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Helsinki August 7 2018

Mr Henrik Kristensen
Deputy Executive Secretary
European Committee of Social Rights

Complaint No. 163/2018
ATTAC Finland, Global Social Work Finland (GSW) and Friends of the Earth v. Finland

Response to the Observations of the Finnish Government on the admissibility of the complaint and on the request for immidiate measures

Sir,

With reference to your letter of 26 June 2018 , the complainant organisations appreciate the opportunity to submit a respons to the Observations of the the Government of Finland on the aforementioned complaint as follows:

Numbers in brackets refer to comments on the corresponding points in the Government's Observations, except in the cases of text with smaller fonts, which are quotations from our complaint or from its annexes and in which there appear the original references of the texts as they were written in the complaint or its annexes.

1. The Government's Observations on the Complaint confirm that the the issues raised in the Complaint are central in respect to Finland's obligations under the Social Charter:

- The Government's interpretation in the Observations of its duties as an EU Member State to ensure that new trade-agreements like CETA do not conflict with Finland's obligations under the Social Charter, does not respect international law. (84)

- The Government has not identified that CETA's investment protection, and especially the articles 8.10, 8.12 and Annex 8-A, undermine the state's ability to secure the fundamental rights Finland has committed itself to secure under the Social Charter. This is confirmed by the Governments points in its Observations (55, 63**)**

2. References in the text of the Complaint to social rights guaranteed in the Social Charter (48-49)

The government says that where the complaint must indicate in what respect the state "has not ensured the satisfactory application of this provision", "the complainant organisations invoke nearly all Articles of the Charter" but that it assumes that they "have not at all specified their allegations under the specific provisions of the Charter". (48-49)

In the complaint we gave examples on referred provisions of the Charter as follows, noting that in such investor-state disputes "in most of the cases state laws or acts have been judged as 'breach' due to frustrated profit 'expectation' that investors have got from a state" and that "also CETA mandates its 'investment court' to issue awards thus for the following kinds of causes":

a) "Rights concerning work conditions, social security, work safety and health as protected by laws and acts which implement the European Social Charter could become judged as "indirect expropriation" which "interferes with distinct, reasonable investment-backed expectations" and restricts the profits expected by investors in a manner which "appears manifestly excessive" - even if those laws and acts were obliged by the European Social Charter". :

"CETA, article 8.12 (1) and Annex 8-A [...] would thus impair the protection and realisation of the rights provided by the European Social Charter articles 2, 3 (1), 4(2), 4 (5) and 12" like our complaint detailed in its references.

b) Social and medical assistance or protection of workers' rights could be judged as 'inequitable' for an investor if a state has made an investment-inducing "specific representation to an investor [...] that created a legitimate expectation, and upon which the investor relied" (on commercialisation of social and health services or on work conditions) but which the state for its human rights protecting acts has "subsequently frustrated".:

"CETA, article 8.10 (4) would in this way weaken the state's capacity of implementing the rights provided by the European Social Charter articles 1, 6, 13, 21, 22 and 28 - also in relation to the Finnish government's new proposals on labour conditions and social and health services - on which see the attached Annex on the SOTE-proposal of the Finnish government" like our complaint detailed in references.

c) Laws and acts, which secure people's rights to equal, dignified treatment in work without gender-based or other discrimination or disturbance - or rights against termination of job, poverty or marginalisation -, could be judged to become compensated as harassment of investors or "abusive treatment of investors ".

"CETA, article 8.10 (2) (e) would weaken the state's capacity of implementing the rights provided by the European Social Charter articles 4 (3), 20, 24, 26 and 29" like our complaint detailed the

Charter articles in references.

3. The Government's general critique from the perpective of the approach and purpose of the Complaint (70, 72, 77, 73, 74)

In the summary (70 - 72) of its observations concerning the 9 conclusions drawn by the organisations, the corresponding explanatory notes consisting of 9 chapters and the Annex ”How the combined impact of the Act on the freedom of choice and CETA endanger fundamental rights in health and social services”, the foreign ministy characterises our arguments as ”very vague, general, unsubstantiated and speculative, and not supported by any relevant arguments nor evidence in that respect.” The Ministry for Foreign Affairs of Finland is also of the opinion, that ”some of the allegations are also based of misleading and/or only partial presentation of the facts.”

The starting point in the assessment of the Complaint should be how it corresponds to the role and purpose of the System for Collective Complaints: ”the system of complaints is to be seen as a complement to the examination of governmental reports, which naturally constitutes the basic mechanism for the supervision of application of the Charter”. (77)

In the complainant's view the government has therefore the burden of proof considering impact assessments of CETA:s implications for the state's ability to fulfil its international human rights obligations. The role of NGOs is complementary and confined to a state's violations or inaction to fulfil the obligations under the Charter.

In this context it should be recalled, that the subject of the Complaint is not the ratification of CETA as such (which had not yet been completed at the time the complaint was filed) or CETA:s investment protection as such (which is not implemented yet), but ”the measures and proceedings by which the Finnish government has negotiated and contributed to formulate the Comprehensive Economic and Trade Agreement (CETA) and has proposed and processed it to be approved within the EU and by Finland in a manner which neglects Finland's obligations under the European Social Charter and thus violates or exposes to violations the rights recognised in the articles 1,2, 3(1), 4 (2,3 and 5), 5,6,7 (1 and 3), 11-13, 20-24, 26-31 and article E of the part V of the Charter.” The ratification process is well documentated in the Complaint and annexes.

The relevance and scope of the content in the Complaint should be assessed on the basis of the purpose and character of a complaint: It should focus on such aspects, which the government has not properly taken into consideration and which might undermine the government's declared aims. In this respect the fundamental, conquested issue relates to the government's interpretations of CETA's articles 8.9, 8.10 and 8.12. The second relates to Finland's obligations to assess the consequences of conflicts arising from its international human rights obligations and the new generation of trade-agreements agreements like CETA.

As CETA's Investment Court System is not approved nor implemented yet, there is no concrete, ascertained knowledge available on its impacts. Neither are there any thorough and impartial research projects or assessments of the costs entailed by the cumulative effects of CETA and the reform of health and social services, on which we could have based the Complaint. The government itself has not considered appropriate or possible to commission any study, research, or expert report about the potential risks, even if the Government has the the burden to prove that negative effects not are likely.

The only way to avoid speculation when assessing the potential human rights impacts of the Investment Court System is thus to rely on experiences from impacts of investment-agreements on the realisation of human rights so far, and examine the published text of the CETA Agreement in the light of these experiences.

As the impacts of investment-agreements have been followed closely within the UN for quite some

time, we have made use of statements of UN organs to place the issue of CETA's implications into a broader context. (73, 74) It should, however, be noted that CETA consitutes a qualitatively different threat to the realisation of fundamental rights, compared with trade-agreements so far. It has been our starting point when filing the Complaint, and we will return to this issue in the end of our comments on the Government's point 104.

Primarily we have, however, focused on the text of the agreement from the perspective of what kind of protection the agreement provides for the realisation of human and fundamental rights and, second, what rights to file claims for compensation based on such measures of the state, which secure fundamental rights, does the agreement provide for the investor, if these measures affect the investor's profit-expectations adversely.

4. Huge compensations for protecting fundamental rights (51-55, 57-58, 60-65)

In the Complaint we stress that article 8.10 (fair and equitable treatment) and article 8.12 (expropriation), as clarified in annex 8-A, allow for even billion-scale compensations, because in CETA the awards are not capped. We also underline, that a threat like this would weaken the state's ability to fulfil its human rights obligations, either directly because of awards affecting the state's budget or indirectly by causing a regulatory chill.

In its point 51 the Ministry for Foreign Affairs of Finland says:
”The complainant organisations base this allegation essentially on the assumption that the Agreement and especially its provisions on the protection of investment would generate for the Government of Finland so high liabilities for compensation that after paying them the Government could no longer afford to fund sufficient social and health services, social security or protection of employees.”

This is true when speaking of deprivations hitting different sectors unevenly. If the compensations awarded would be some hundred millions, the consequences would be budget cuts. The government's proposal on a budgetary framework, by which the government wants to slow down the projected rise in expenditure in the area of health and social services by 3 billion euros during the next 10 years, would serve as a proper benchmark. The saving target would then be 300 million euros per year. The Constitutional Law Committee has stated, that a strict implementation of the proposal could endanger fundamental rights.

In its points 52 and 53 the Ministry for Foreign Affairs of Finland says:

”The organisations justify their allegation about the billion euro scale compensations in more detail by referring to the health and social services reform (SOTE) and the related freedom to choose the service provider.
In practice, however, they fail to justify how the provisions of the CETA Agreement could lead to so high compensation liabilities that they would endanger the realisation of the rights protected by the Charter.”

Here we want to remind that the government has the burden to prove the opposite, namely that the recources needed to provide all necessary services are secured also in the case of awards.

The first observation of the Ministry for Foreign Affairs of Finland

The Ministry for Foreign Affairs of Finland presents its first observation concerning our assumed assumptions about billion euro scale awards in point 54:

”The complainant organisations base their allegations on the assumption that Finland would already become liable for compensation if a possible Canadian investor expected profits and the expectations did not materialise because of, for instance, national regulatory measures taken by Finland.”

The actual text in the Complaint reveals that the government's accusations in this regard are unfounded.

Let's take as an example the following sentence in the beginning of chaper 1 in the explanatory notes: ”By accepting CETA, Finland would give the transnational investors the possibility to sue human rights protecting laws, measures and the use of public funds to become judged in the CETA 'investment court' as a 'breach' of investment protection, which could force the government to pay billion euro scale compensations to the investors by assuming that acts of human rights protection would have restricted the realisation of investors' profit expectations.”

This sentence only means that also all those provisions in CETA, which for different reasons allow for compensation of expected profits which did not materialize due to regulation, would apply to human rights protecting laws, measures and the use of public funds, and thus ”*could* force the government to pay billion euro scale compensations to the investors”. (italics ours)

As the foreign ministery correctly assumes in its points 55 - 60, we are here referring to CETA:s provisions on the investor's protection against indirect expropriation and right to fair and equitable treatment.

The preconditions for a potentially successful claim based on these provisions are described in more detail in the end of chaper 2 of the complaint:

* Rights concerning work conditions, social security, work safety and health as protected by laws and acts which implement the European Social Charter could become judged as "indirect expropriation" which "interferes with distinct, reasonable investment-backed expectations" and restricts the profits expected by investors in a manner which "appears manifestly excessive" (24) - even if those laws and acts were obliged by the European Social Charter

* Social and medical assistance or protection of workers' rights could be judged as 'inequitable' for an investor if a state has made an investment-inducing "specific representation to an investor [...] that created a legitimate expectation, and upon which the investor relied" (on commercialisation of social and health services or on work conditions) but which the state for its human rights protecting acts has "subsequently frustrated". (25)

* Laws and acts, which secure people's rights to equal, dignified treatment in work without gender-based or other discrimination or disturbance - or rights against termination of job, poverty or marginalisation -, could be judged to become compensated as harrassment of investors or "abusive treatment of investors ". (26)”

In all its presententions of CETA:s investment provisions the *Ministry for Foreign Affairs of Finland* has repeatedly denied that non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, could consitute indirect expropriation. The following sentence is no exception in this respect:

”55. Chapter 8, Article 8.9 of the CETA Agreement provides that, for the purpose of the Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity. In addition, in Annex 8-A regarding expropriation, it is confirmed that non-discriminathatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not consitute indirect expropriations.”

The critical point, however, is that an important and decisive exception is missing here: ”For greater certainty, *except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive*, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.” Annex 8 A, article 3, (italics ours.)

In its point 60 the Ministry for Foreign Affairs of Finland draws the same conclusion as in point 54, this time in the context of our supposed interpretation of the provisions on fair and equitable treatment. The foreign ministery points out that the Tribunal must consider whether the Party has acted inconsistently with the obligation of fair and equitable treatment and thus expectations of profit would not alone suffice as grounds for claiming compensation.

Referreing to article 8.10.4, the Ministry for Foreign Affairs of Finland states: ”When assessing compliance with the obligation of fair and equitable treatment, the Investment Tribunal established under the Agreement may take into account measures taken by a Party to induce investment and creating legitimate expectations upon which the investor relied in deciding to make or maintain the investment.”

Again someting is missing compared to the official text of CETA:

4. When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, *but that the Party subsequently frustrated.*(Italics ours)

The starting point for the observations of the Ministry for Foreign Affairs of Finland has been the assumption that the claimant organisations have neglected such provisions in CETA, which supports the Parties' right to regulate.

We have, however, brought forward in the Complaint that the article 8.9 confirms that the mere fact that a regulatory measure has a negative impact on the investor's profit expectation does not alone constitue a breach of the agreement.

The Complaint has however demonstrated how the overall conditions which CETA demands to be fulfilled for judging a public human rights protecting measure to be a breach to be compensated do neither respect nor protect human rights but allow them to be violated as a result of the investment court judgement and compensation award it orders.

The same applies to the Joint Interpretative Instrument on the CETA Agreement, to which *the* Ministry for Foreign Affairs of Finland refers in its points 57 – 58, as it does not provide any additional protection to the states' rights to regulate or change their laws.

The missing points in the Government's presentation of article 8.10 and article 8.12, especially concerning the provisions of annex 8 A, confirms that the government refuses to consider certain aspects of CETA:s investment protection and our critique in the annex about the incorrect information which the government has given the Parliament is well founded.

The second observation of the Ministry for Foreign Affairs

The second observation of the Ministry for Foreign Affairs concerning our assumptions about billion euro scale awards is presented in point 61:

”61. The Government observes that the second reason assumed by the complainant organisations for Finland's liability for billion euro scale

compensations seems to be that, in the case of a dispute, the Investment Tribunal would accept Canadian businesses' possible claims for compensation as such."

In reality, however,our perception is based on UNCTAD's empirical statistics : 1,4 billion dollar average per claim and 0,55 billion average per award demonstrating the empirical average scale of difference between the amounts of claims and resulting awards. These numbers are presented in chapter 2 in the explanatory notes:

"Transnational investors win about 60 % of those investor-state disputes which result in a award. Of these the state is judged to pay on average 0,55 billion dollars per award to the transnational investors, whose claims have been on average 1,4 milliard per case. (23) Even though all awards do not lead to compensations paid in billions, states must still remain prepared for the risks of being judged to pay, and amounts reaching billions cannot be excluded."

The organisations also pointed out in the Compaint that crucial in this respect is that "Even though all awards do not lead to compensations paid in billions, states must still remain prepared for the risks of being judged to pay, and amounts reaching billions cannot be excluded." Further, it should also be noted that the amounts of the average awards have been continuously raising through the years.

The Government states in the end of point 63, that "article 8.31 together with the right to regulate (Article 8.9) and the definition of expropriation as confirmed in Annex 8-A, provide for the integrity of national laws."

The organisations have never argued, that CETA would prevent governments from enacting laws or applying them as they wish but, rather if they are prepared to pay for the consecquences.

The article 8.31 is designed to facilitate the coordination of two mutually exclusive aspects, the integrity of national and EU law and, secondly the power of CETA's Investment Tribunals to consider the law of the Member States as a breach of investors' rights on the base of CETA's own rules. In the explanatory notes, chapter 6, we have brought forward what kind of new logical contradictions the national legislators would be faced with.

The second ground for the governments perception that the organisations believe, that CETA's Investment Tribunals would accept compensation claims as such, is that the organisations not have taken into account for example the improvements of CETA's dispute settlement mechanism, which the government lists in its points 62, 64 and 65.

The Government states, that the improvements probably would reduce the number of claims manifestly without legal merit, manifestly excessive awards and improve the transparency of the process and the predictability of the desicions.

The organisations have not addressed these issues in the Complaint, because the revision of CETA's 'investment court system' does not change the content of the investment rules in any way or obligate the Tribunals to interpret those rules in a way that would strenghten the rights of the states. Nor have the attempts to specify the content of the umbrella articles improved the protection of the states.The inclusion of investors' legitime expected profits in FET-provisions in more recent investment agreements has expanded the investors' rights considerably. The inclusion of these provisions also in CETA would be likely to further justify and consolidate this practice in other investment agreements.

The improvements in the predictability in the decisions of the Tribunals would not, however, help the governments to avoid claims by adapting the legislation to the rules of the investment protection, because the Tribunals do not judge laws as such but, rather consider laws from the perspective of the impacts of a concrete measure on the investor's rights. The same law or measure may thus affect the materialization of profit-expectations of different undertakings in very different ways and thus put them in an unequal position.

5. The impact assessments of the Act on the freedom of choice and CETA (68)

In its comments 66 - 69 on the Annex ”How the combined impact of the Act on the freedom of choice and CETA endanger fundamental rights in health and social services” the foreign ministy does not at all address the central question raised in the Annex as well as in the Complaint itself: Why did the government not consider it necessary to include any assessment of CETA's investment provisions in the impact assessments of the proposed regulatory framework for the Act on the freedom of choice?

Instead the Ministry for Foreign Affairs of Finland concentrates on the same ”ill-founded conclusion” it found in its earlier observations:

”68. Moreover, the annex, like the complaint itself, makes the ill-founded conclusion that the proposed Act on the freedom of choice, as such, would expose Finland to claims for billions of euros in compensation based on the CETA Agreement because the *Agreement* creates expectations of profits for transnational investors.” (Italics ours)

Perhaps the Government has meant Act instead of Agreement above, (even if such an interpretation of CETA also rather easily could be justified), because the sencence in the end of the Annex, to which the ministy probably refers, reads:

”The government has proposed reforms affecting Finland's health and social services, unemployment benefits and working life, but the potential effects of these reforms are still rather obscure in spite of a large number of analysies about the issues. The proposed reforms easily create many encouraging ”profit expectations” and ”representations”, on which CETA's ”Investment Court” could base billion scale awards. (98)”

The crucial point is, that if both the Act on the Freedom of Choise and CETA are implemented, the combination would create such profit- expectations which would not be possible, if either the Act or CETA would not exist.

Indeed, if a government would like to avoid investors' claims, it should refrain from proposing acts like the Act on the freedom of choice. However, the preconditions for a claim are mentioned in the end of page 1 and beginning of page 2 in the original Finnish version:

- CETA's Investment Court may decide to order the state to pay compensations to the foreign investor for laws and measures by which the state provide health and sosial services as fundamental rights – if the state by its proposals on commercialisation of the health and social services ”has made a specific representation to an investor that created a legitimate expectation”, ”but that the Party subsequently frustrated”. (11)

- The state may also be ordered to pay compensation to a transnational investor for human rights securing measures ”the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations” and has affected the materialization of the investor's expected profits adversely in a way that ”appears manifestly excessive” (12) – taken into account that the Investment Court is primarily obliged to strenghten the rights of transnational investors by its decisions.

- Laws and measures, which secure people's equal rights to healthcare and social services, may also otherwise be considered a breach of any further elements of the fair and equitable treatment obligation (13), for which the state may be ordered to pay billion scale compensations to transnational investors.

6. Is Finland obliged to assess CETA's provisions from the perspective of realising the rights protected by the European Social Charter? (79 - 84)

In the Complaint the organisations asked the European Committee of Social Rights ”to review in which respects Finland may have neglected its responsibilities to assess CETA's and its

investment rights provisions' impacts on the fulfilment of the rights enacted by the European Social Charter, on Finland's jurisdiction and on its qualifications and resources of securing these rights and their effective and equal use."

The issue concerning the obligations of EU Member States to respect their international human rights commitments is discussed in more detail in chapter 9 in the explanatory notes. The relevant core conclusion reads as follows: "EU-membership does not mandate EU Member States to approve CETA independently from their human rights obligations, because their "rights and obligations arising from agreements concluded [...] before the date of their accession" to the EU - set by the UN Charter, UN human rights covenants or European Social Charter between the EU Member States and other states - "shall not be affected by the provisions of the Treaties" of the EU. (124)"

The Ministry for Foreign Affairs presents the government's position on Finland's obligations related to this issue in the points 79-84. In its summary of the argumentation in points 79-82, which is based on the division of competence between the Member States and EU in trade policy, the *the* Ministry for Foreign Affairs of Finland on behalf of the government actually denies Finland's obligations twice in points 80 and 83.

The first time the Government denies Finland's obligations in respect to the CETA Agreement as a whole in point 80:

"80. Because the European Union has not acceded to the Revised European Social Charter, the Charter is not legally binding on it. *Thus, the relevance of the Charter is confined to the very limited parts of the CETA Agreement under which the Member States have competence."* (Italics ours)

The Government makes a profound mistake when approaching the issue only from the viewpoint of the aspect referred to above concerning division of competences between EU and the Member States. The proper starting point would have been the Vienna Convention on the Law of Treaties and the corresponding article 351 in the Treaty on the Functioning of the European Union.

In principle the Member States are thus obliged to ensure that <u>all</u> provisions in new EU trade agreements are compatible with such international human rights treaties, including the Social Charter, which the Member States have signed before they acceded to EU. The Member States' right to fulfil their obligations in this respect is confirmed in article 351 TFEU.

When giving the Commission a mandate to negotiate the CETA Agreement, the Member States should thus have set out as a precondition that CETA should be compatible with their own international human rights obligations. The next step should have been to ensure that CETA is compatible also with EU law.

CETA almost passed through without any legal checks in this respect. Due only to Wallonia's vigilance, the Belgian Government had to ask the CJEU to provide an opinion with regard to the compatibility of the ICS with the CJEU's exclusive competence to provide a final interpretation of EU law, the rights of access to courts and to an independent and impartial judiciary as well as the principles of equality and practical effect of EU law.

The second time the Government denies Finland's obligations in point 83 concerning the parts of CETA which are left and relevant from the perspective the Member States' competences under EU-law:

"83. Moreover, in 2017 a request for an opinion (Opinion 1/17) was submitted to the Court of Justice of the European Union concerning the CETA provisions on dispute settlement and their compatibility with Union law and fundamental rights. The matter is still pending before the Court. *The requested opinion will define the official position for the whole Union.*

The Union has exclusive competence over all parts of the CETA Agreement except for those concerning investment other than direct foreign investment (so-called portfolio or indirect investment) and those concerning the procedure for settling disputes between investors and States." (Italics ours)

As the Government itself above confirms, the Member States still have the right to decide themselves wether to approve or reject CETA's investment provisions and Investment Court System. The fact that "the requested opinion will define the official position for the whole Union" in this context only defines EU's position as a party to the CETA Agreement, not the position of the Member States.

Thus, when the Government in point 84 concludes that "Therefore, an individual Member State has a very limited opportunity and obligation to assess the CETA provisions from the perspective of realising the rights protected by the European Social Charter", it is a political decision reflecting the government's own policy and is not justified by EU law.

7. Are CETA's human rights impacts considered adequately in the government's proposal?(101)

In the Complaint the organisations pointed out, that "when the Finnish government has been negotiating and considering CETA and its investment provisions, and proposed their approval, it has not identified, recognised or treated compliant to its human rights obligations the ways how CETA restricts the state's ability to ensure the fulfilment of the rights recognised by the European Social Charter."

In its point 104 the government points out, that it has considered CETA's human rights impacts from the viewpoint of of Finland's sovereignty, which has been addressed in the government's proposal on the CETA agreement.

The Ministry for Foreign Affairs of Finland goes on in point 101 by noting that as the transfer of powers from domestic courts to CETA:s Investment Court Tribunals is not considered to affect Finland's sovereignity significantly, the matter of CETA's human rights impacts are considered from the perspective of impacts on the activities of public authorities, environmental impacts and societal impacts as per practice regarding government proposals.

When the matter is reduced to this level, it is practically lost as the government did neither consider it necessary to assess the impacts of CETA's investment protection to the human rights nor the implications for the reform of health and social services. This is further confirmed by a summary included in the proposal of the findings relating to CETA's social impacts in the assessment, to which the government referred above: In the summary is found that the Parties undertake to promote human and labor rights, but the agreement has not any direct social implications in Finland.

As the organisations pointed out in chaper 2 in the explanatory notes, CETA outsources the reponsibility for human and labor rights to the Member States while it at the same time preserves the right of CETA's Investment Tribunals to consider the securing of these rights as breaches of investors' rights. From this perspective the government's finding is meaningless.

As a matter of fact, CETA's human rights impacts are not considered seriously anywhere in the government's proposal, neither in respect to Finland's international human rights obligations nor in the routine assessment of the government's proposal.

8. Is the transfer of competence to CETA's Investment Court System significant from the point of view of the sovereignty of Finland? (104)

The Government underlines in its proposal, that the central issue from the viewpoint of sovereignity is the transfer of authority to CETA's Investment Court as proposed in CETA's chapter 8 section F and the securing of the right to regulate.

As we already discussed the government's main arguments for its position that CETA not will endanger Finland's right to regulate, which the Ministry for Foreign Affairs summed up in its point 63, we will next take a look at how the government considers the question of sovereignity from the perspective of the Constitution and the transfer of significant competence to an international organ.

In its point 104 the foreign ministy points out:

”Moreover, the Constitutional Committee of the Parliament, after hearing and consulting several independent experts and professors of international, constitutional and EU law, of the highest quality, concluded in its statement (PeVL 61/2017 vp- HE 149/2017 vp) that the provisions of the CETA Agreement establishing the Investment Court System (CETA Tribunal and the Appelate Tribunal) does not constitute a significant transfer of competence to an international organ from the point of view of the sovereignty of Finland. Therefore, nothing in the CETA Agreement would require deviation from a regular process to pass an Act.”

The Government's argument when defending the ratification process of CETA in point 104 is not quite as strong as it seems, as the matter was not handled adequately by the Constitutional Law Committee of the Parliament.

9. *The Constitutional Law Committee neglected its constitutional duty*

The Constitutional Law Committee of the Parliament neglected its constitutional duty as laid down in the Constitution to ”issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, *as well as on their relation to international human rights treaties*.” (Italics ours) No references to CETA's relation to international human rights treaties are, however, found in the statement of the Constitutional Law Committee.

The cross-references between the government and the Constitutional Law Committee may have caused the blunder of the Committee: As there was no reference in the government's proposal to Finland's international human rights commitments, the Constitutional Law Committee did not either make any statement about the matter.

Thus the Constitutional Law Committee concentrated its attention on the matter brought forward by the government: Should the transfer of powers from domestic jurisdiction to CETA:s Investment Court tribunals be considered significant from the viewpoint of sovereignity or a normal consequence of contemporary international cooperation in developing society, in this case in the field of international trade and investment law, as the government suggested.

The Constitutional Law Committee came to the conclusion that the transfer of powers to CETA's Investment Court would not affect Finland's sovereignity significantly. It justified its conclusion by referring to on an earlier statement about the Energy Charter Treaty from 1997, according to which aspects relevant for the reasoning are that the agreement's provisions on dispute settlement should follow common practice and that the dispute settlement should relate to the individual, isolated cases at hand. It also referred to the fact that in the case of CETA the Investment Court System would replace older dispute settlement mechanisms found in Finland's earlier trade-agreements, and thus it would not bring about any fundamental change in comparision to earlier accepted practice.

The reasoning above is logical as such, but if the Constitutional Law Committee had used its discretion to consider CETA in relation to the Constitution as a whole and the purposes of Finlands international cooperation, it would perhaps had realised, that the context in which CETA is negotiated today, as well as CETA itself, is fundamentally different in some respects from Finland's earlier bilateral trade-agreements and the WTO-agreements:

- The WTO-agreements do not provide for investor-state dispute settlement at all
- Bilateral agreements can be terminated, but it is practically impossible for an individual Member State to withdraw from CETA
- Almost all countries in the world have signed UN-treaties and EU Member States also the Social Charter, and thus the fundamental rights guaranteed in these treaties must be respected in investor-state dispute-settlement concerning the Member States' bilateral trade-agreements. This does not, however, apply to CETA.
- The presumption of CETA's arbitration awards as isolated, rare cases does not fit in at all with the picture of the proposed Multilateral Investment Court and the steadily rising numbers of investor claims worldwide.
- The scope of governmental and municipal activities covered by CETA's investment protection has expanded in the two last decades, and if the proposed Act on the freedom of choise is passed, it will expand further.

10. The Government's references to rights and obligations set out in the Constitution (102 -103)

The Ministry for Foreign Affairs of Finland recalls in point 102 that ”the agreement has been analysed in the government proposal from the viewpoint of the Finnish Constitution” and in point 103 that ”the government proposal does take into account that the provisions of the Agreement have links with the Constitution of Finland, namely its section 1 (sovereignty), section 6 (equality and prohibition of discrimination), section 15 (expropriation, protection of property), section 18 (freedom to engage in commercial activity), section 19 (guaranteed public social and health services), section 21 (protection under the law), section 81, paragraph 1, and section 121, paragraph 3 (tax liability), as well as section 94, paragraph 2, and section 95, paragraph 2 (transfer of authority of significance to sovereignty).”

In addition to section 19 (guaranteed public social and health services), which was addressed before under the title The impact assessments of the Act on the freedom of choice and CETA, the most important sections from the perspective of Finland's human rights treaties are section 6 (equality and prohibition of discrimination), section 21 (protection under the law) and section 15 (expropriation, protection of property)

Section 6 (equality and prohibition of discrimination) and section 21 (protection under the law):

As the Ministry for Foreign Affairs of Finland points out, a section ”Equality and prohibition of discrimination” in which CETA's provisions are discussed from the viewpoint of section 6 in the Constitution is included into the proposal.

The government states that several provisions, which are meant to secure nondiscriminatory national treatment of the investors of the other Party, implement the obligations relating to equality and prohibition of discrimination as set out in section 6 in the Constitution. When examined in combination with the provisions relating to access to CETA's Investment Court in section F, which are not mentioned at all, it becomes obvious that the government's approach neglects the principles of equality and prohibition of discrimination as set out in human rights law.

According to the UN Committee on Economic, Social and Cultural Rights ”property status, as a prohibited ground of discrimination, is a broad concept and includes real property (e.g. land ownership or tenure) and personal property (e.g. intellectual property, goods and chattels, and income), or the lack of it.”

Access to CETA's Investment Court is based on the status of an investor as owner of an investment representing the other Party. As domestic investors are not allowed to file claims in the Investment Court, CETA's provisions on nondiscriminatory national treatment in combination with a priviledged access to CETA's Investment Court creates a condition, where foreign investors are treated more favorably than domestic ones.

The first sentence in section 6 in the Constitution reads, however, as follows: ”Everyone is equal before the law.”

Moreover, ordinary people, whose lives would be affected by the awards rendered by CETA's investment tribunals, are also denied their rights to have the awards reviewed by a court of law or other independent organ for the administration of justice, as laid out in section 21 in the Constitution. This does not, however, apply to the authority of CETA's Investment Court, because according to CETA's article 30.6 domestic courts are not allowed to assess the legality of CETA's investment provisions or interfere with the Investment Court's decisions.

The Government's reasoning is examined in more detail in the annex about the incorrect information which the government has given the Parliament, sections a and h.

Section 15 (expropriation, protection of property):

The organisations pointed out in their sixth conclusion in the Complaint, that ”Finland has not clarified what judicial consequences for the state's laws, its property and for the use of these follows from the 'investment court's' power to judge the laws or legal use of public property as "breaches" of investors' rights.”

We hope that the Government has not got the impression from the conclusion above that the organisations actually are stating that the government not has presented any clarifications at all on CETA's judical implications, when it in point 103 underlines that government proposal does take into account inter alia section 15 (expropriation, protection of property) in the Constitution.

Finland's formal right to preserve its property legislation is secured in CETA, but the conclusion above refers to the fact that the contradictionary requirements imposed by two different legal regimes on the Finnish legal system weaken its internal coherence.

In chapter 6 in the explanatory notes some of these contradictions are brought forward:

A meaning according to which the money collected from taxpayers would be 'indirect expropriation' from a transnational investor to whom it should be 'compensated' does not follow the prevailing interpretation given to the domestic law but comes from outside of it, ordering taxpayers' money to be transnational investors' property.

As awards redered by CETA's investment tribunals are binding, the states are forced to act against the prevailing interpretation given to the domestic law when paying the awards, even if ”any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party”.

If the meanings which the Investment Tribunal gives to laws from outside are approved to bind the state's authorities and courts by orders of ownership transfer, this endangers the competences and obligations set by the EU treaties. The CJEU shall ensure that in the interpretation and application

of the Treaties the law is observed so that it shall have jurisdiction to give preliminary rulings concerning the interpretation of the Treaties. CETA does not respect this and thus those disputes could be resolved in a manner that prevents the full effectiveness of EU law.

11. Untrue and inadequate information (105 -109)

Regarding the facts we have presented on the government's untrue and inadequate informing of the Parliament and the public in regard to CETA's provisions, the organisations note, that the government in its points 105 – 109 puts forward arguments in its defence relating to the extensive processing of the proposal in the Parliament. The government also underlines, that it has informed the Parliament frequently about the negatiations throughout the process.

The description of the process is adequate as such. The government cannot, however, escape its responsibility to provide fact-based and objective information about conquested issues relating to CETA's investment provisions and its Investment Court. In its point 108 the Ministry for Foreign Affairs of Finland also refers to the Parliament 's requests for further clarifications and information. Especially in situations where the statements of experts have differed significantly from the government's position and thus created confusion in the Committees, the government's further clarifications and information may have been decisive for the position of some members of Parliament.

12. Request for immediate measures (85-100)

Like the Government informs in its response, Finland has now already ratified CETA. But the following second part of our request on "immediate measure" continues to be still relevant:

- "Finland will assess and review CETA's human rights impacts in a way which is acceptable to the European Committee of Social Rights as a competent human rights impacts assessment – including also CETA's cumulative impacts when combined with other changes of legislation which the government proposes, such as new laws on social and health care services and new provisions on EU-Canada strategic partnership".

13. The government's conclusions about the admissibility of the Complaint (85 – 100)

110. In the Government's view, in the specific circumstances of the present complaint, it is of importance to decide upon the admissibility of the complaint separately.

As the issues referred to in the Complaint in this case also define the competence needed to address them, the organisations wish, that the Committee would consider the admissibility of the Complaint as a whole.

In the Government's view, (111) the complainant organisations are not representative in the meaning of Article 2 of the Additional Protocol nor do they have particular competence within the meaning of Article 3 of the Protocol. Accordingly, the complaint should be declared inadmissible.

As the Ministry for Foreign Affairs of Finland listing of the activities of the complainant organisations is not complete, we ask the Committee to take into account the additional information about the representativeness and particular competence of the organisations provided in annex 1

In point 112 the Ministry for Foreign Affairs stresses, that the complainant organisations have failed to substantiate how the complaint relates to the provisions of the Charter, as well as to indicate in what respect Finland has not ensured the satisfactory application of the Charter's provisions. In the government's view, the complainant organisations have thus failed to meet the admissibility criteria laid down in Article 4 of the Additional Protocol. Accordingly, the complaint should be declared inadmissible.

As a matter of fact, references to the provisions of the Charter are found in the Complaint as we point out in section 2 in the beginning of this response. Secondly the Complaint refers to the fact that the government has neglected its duty to ensure that the ratification of CETA would not endanger the realisation of the fundamental rights set out in the European Social Charter. The ratification process of CETA is well documentated in the Complaint itself and in the annexes. In our view the government has not thus been able to justify its request to declare the Complaint inadmissible.

In point 113 the Ministry for Foreign Affairs states, that " At any rate, the Government is of the view that there has been no violation of any of the articles of the Charter in the present case".

The Ministry for Foreign Affairs does not seem to understand, that it by its own statements in the Observations we are responding to now, acually neglects Finland's obligations under the Social Charter, as we point out in the introduction to our response.

Signatures, Helsinki, 7 August 2018:

Attac ry Omar El-Begawy

Globaali sosiaalityö ry Miina Kaartinen

Maan ystävät ry Liisa Uimonen

Maan ystävät ry Jarrah Kollei