CETA:
TTIP IN A CANADIAN DISGUISE

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1. Executive Summary

Trade and investment treaties are at the centre of today's social, political and juridical debate. The controversy around the Transatlantic Trade and Investment Treaty (TTIP) has triggered this debate. However, TTIP is only the most visible accord in a wave of new generation treaties all of which require in-depth debate.

This report focuses on the Comprehensive Economic Trade Agreement (CETA), negotiated between the European Union and Canada. The imminence of the ratification process urges us to focus without delay on the contents and consequences of this agreement. CETA, like TTIP and unlike traditional trade agreements, does not focus on tariff reduction, but on non-tariff barriers, which means that it aims to modify rules and legislation. Again, like TTP, it includes an Investor to State Dispute Settlement (ISDS) system, which allows foreign investors to challenge European law.

The analysis of CETA enables us to affirm that it will have negative consequences on a large number of aspects of social rights, the economy and the environment. In addition, the real scope of CETA goes far beyond the influence of Canadian lobbies on European policy making. There are 24,000 American companies operating in Canada, and 81 per cent of Canadian companies are linked as subsidiaries to companies of the United States. Additionally, 75 per cent of the world's mining companies are registered in Canada. Therefore, it is a priority to recognise Canada as a key player in a global context and that the "regulatory chill" or the capability of challenging European regulations is open to a greater number of interests than those we would originally have thought.

On a quantitative basis, this research has found that there are reasons to expect significant losses for European workers - both in terms of jobs and wages - and also for significant sectors of the European economy, including Small and Medium Enterprises (SMEs) and farmers, which will be among the most vulnerable. Indeed, the marginal gains due to increased exports to Canada will be rapidly absorbed by bigger enterprises, since economies of scale will play a key role in doing so, whereas SMEs, whose main market is the European Union, will have to face increased competition.

The qualitative impacts are even more dramatic. The increased freedom of capital movements under CETA will necessarily lead to a "race to the bottom" competition in labour standards. Additionally, CETA reduces the possibilities of introducing social clauses in public procurement. CETA would also have a severe negative effect on European citizens' health, since any sanitary or phytosanitary measures, which are stricter in the European Union than in Canada, will be likely to be challenged. Finally, the agreement represents a risk for European agricultural products with Geographical Indicators, since 87.3 per cent of them will remain unprotected.

CETA has been envisaged as a living agreement, which means that it contains the tools to modify its own scope. This fact entails a great degree of uncertainty in the treaty, since the fact of a piece of legislation not being challenged immediately after the treaty's signature does not mean that it will not be challenged in the future. Regulatory Cooperation is the main tool for this dynamic nature of CETA. A Regulatory Cooperation Forum will be created and the concept of Regulatory Cooperation is also introduced in several chapters (including Chapters 6 and 7 - technical and phytosanitary trade barriers, 23 to 24 (trade, labour and environment) 27, (transparency) and 29 (dispute settlement). The introduction of the Regulatory Cooperation Forum in the legislative procedure leads to a culture in which the participation of third party agents who are outside of legislative bodies (i.e. lobbies) occurs nearly on the same level as the legislator. The logic imposed by CETA requires the legislator to scientifically prove the need to adopt a specific regulation, and the consequence of this logic can only be the end of the precautionary principle that the European Commission has promised to maintain.

Parallel to the impact of Regulatory Cooperation on European legislation, the establishing of an Investor to State Dispute Settlement system (renamed the Investor Court System, ICS) will also have a deep qualitative impact on European law (not to mention the direct economic costs due to litigation, compensation, and the setting up of the system itself). The experience of the North American Free Trade Agreement (NAFTA), signed between the US, Canada and Mexico, proves that the country with the most protective legislation will be the one most sued through ISDS, thereby discouraging the enactment of protective legislation. If CETA was signed, this widely documented phenomenon, known as the "legislative chill", will immediately affect any legislative procedure within the European Union and its member states.

CETA not only raises problems concerning the impact of its content on the rights of people and the environment, it constitutes a breach of the principles of transparency that the European Commission preaches. It also reduces the power of the European Parliament to a bare minimum and creates a breakdown of various aspects of the legal system of the EU and its member states. The secret negotiations, the limited discussion at the EU institutions during its negotiation and the approval proposal with an immediate provisional application are clear evidence of the Commission's intention to force through the treaty without subjecting the text to an open and proper debate. Additionally, as many law experts have stated, there is a clear incompatibility between the system of protection of foreign investors with the EU legal system, the competences of the European Court of Justice (ECJ) and the constitutional traditions of member states.

2. Introduction: CETA, a part of the global shift towards deregulation and privatisation

The Comprehensive Economic and Trade Agreement (CETA) is a macro-agreement negotiated between the European Union and Canada, which has been classified as part of a new generation of trade agreements like the Transatlantic Trade and Investment Partnership (TTIP) between the United States and the European Union for two main reasons. First, because the main objective is not tariff reduction at borders (as it is in conventional free trade agreements), but the development of rules on both sides. Thus, its most important effects are not at the borders, but behind them. Second, because the protection of foreign investments is of central importance to the treaty, which also has, as we shall see, a major impact on the ability to legislate on both sides.

Although the first discussions on the possible creation of a free trade area date back to the Canada-EU summit held in Ottawa in 2002, formal negotiations on CETA did not begin until 2009. After six years of negotiations in the shadows, the end of negotiations was formally announced on September 26, 2014, and the text of an agreement that was kept secret was finally made public with the publication of its final version on February 29, 2016, almost two years after the legal revision of the CETA text ended.

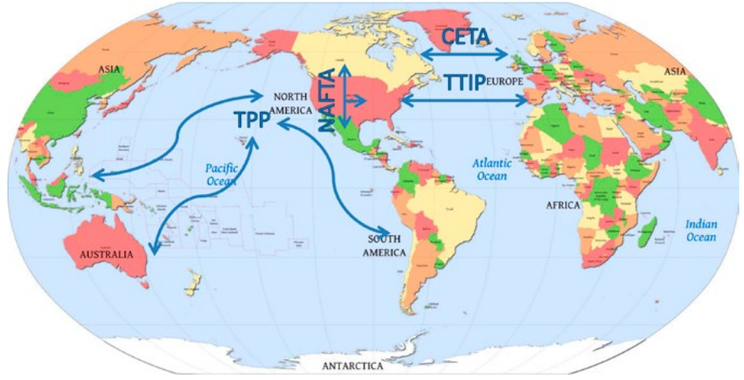
The negotiation of TTIP and the willingness to approve CETA in the most expedient way possible has brought issues of content, scope, compatibility with the legal system of the EU and its implications for the signatory parties and particularly for the wellbeing of their populations, to the centre of legal and political debate.

At the EU level, the main defender of these treaties is obviously the European Commission under the premise that trade policy is the main stabilising force in times of crisis ("trade is one of the few instruments available to boost the economy without imposing a burden on state budgets"[1]). To support this idea, and as a roadmap that will set the trade policy of the EU, in October 2015, the Commission presented a new trade and investment strategy for the Union called 'Trade for all. Towards a more responsible trade and investment policy', where the TTIP and CETA occupy a privileged place. The Commission recognises, regarding CETA, that the agreement is the broadest treaty to date, calling it a "ground-breaking agreement" that allows ambitious liberalisation and, according to its approach, can create significant opportunities for European companies, for consumers and the general public. The Commission also notes that CETA promotes EU standards and obligations which are unprecedented for Canada, thus presenting the deal as a victory for European negotiators.

However, this supposed victory conceals an assault on democracy and the rights of the social majorities on both sides of the Atlantic. A thorough analysis of the CETA shows that the objectives of the agreement go far beyond promoting trade between the parties and obtaining supposed economic benefits, in any case, and according to the impact assessment[2], they are expected to be reduced. As some studies have underlined, "CETA is expected to generate a one-time income effect of around 20 Euros per EU citizen after a 10-year implementation period"[3].

In fact, CETA, like TTIP, focuses primarily on the desire to control and neutralise the government in order to force the maximum deregulation and most ambitious privatisation of what remains of the public sector in the EU and Canada. It is obviously nothing new, on the contrary, CETA must be understood as an integral part of a common strategy developed from both sides of the Atlantic, accepted and promoted by the EU. In this sense, CETA is actually a step in the neoliberal project aimed at limiting the decision-making power of citizens and the regulatory power of governments. It aims to reduce the possibility of adopting policies to improve and protect the rights of people while making the freedom of movement of capital and the opening of new spaces for private economic powers an end in itself.

Moreover, the importance of CETA on the agenda of both parties and their stakeholders should also be understood from a geopolitical point of view. CETA is one of many interconnected free trade treaties. Along with the TTIP, it connects North America and the European Union; while inside the American continent it interacts with NAFTA (North American Free Trade Agreement, signed in 1991, which has been in force for more than two decades), with CUSFTA (Canada-United States Free Trade Agreement, 1987) and finally, with the TPP (Trans-Pacific Partnership) creating a free trade area in the Pacific that includes countries in America, Asia, and Oceania, but excludes China. It is important to understand that two key global players such as China and Russia are excluded from this network of free trade agreements.



In this regard, it is pertinent to see the geopolitical analysis of John Hilary[4]. He said that "TTIP - and we can say without doubt also CETA - is not only an attack on democracy but also on peace. TTIP has been called the economic NATO. It is a way to isolate Russia, and let us look especially at the energy chapter, which aims to ensure oil exports to the EU (Canadian oil sands, gas fracking boom in the US). It is, ultimately, the creation of a new Cold War".

Given the above, it should be noted that the potential of CETA to advance this agenda goes far beyond the contents that are integrated into the text of the agreement and discussed throughout the following pages. Therefore, when analysing the mechanisms of the treaty and its possible consequences, the following principles should be considered:

- It is true that Canada is a relatively small market, but we cannot forget that the degree of economic integration between the United States and Canada is very high, as a result of a long history of economic integration through CUSFTA and NAFTA[5].

- CETA introduces many pathways for the further development of its contents through nine "specialised committees" and a Joint Committee to enable CETA to behave like a "living agreement" with uncontrollable consequences.

- In 2015, the UK was Canada's third-largest export market and the destination for 3.0 per cent ($16.0 billion) of all Canadian merchandise exports. Among the EU member states, the UK was by far Canada's largest export destination. The consequences of BREXIT will, therefore, be substantial for the life of the agreement and should be considered before starting the ratification process.

1 European Commission (2014): "Trade for all. Towards a more responsible trade and investment policy."

2 Assessing the cost and benefits of a closer EU-Canada economic partnership. A joint study by the European Commission and the Government of Canada (2008). http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_141032.pdf; KIRKPATRICK, P. (Dir) (2011): EU-Canada SIA Final Report, June.

3 RAZA et al. (2016): Assess_Ceta: Assessing the claimed benefits of the EU-Canada Trade Agreement (CETA), OFSE, Vienna.

4 Presentation at the GUE/NGL hearing "TTIP, TPP; CETA, TiSA", 2015

5 As a matter of fact, 81 per cent of Canadian companies are subsidiaries of American companies, and today there are 42,000 American companies operating in Canada.

3. The structure, contents and mechanisms of CETA

The treaty consists of 30 chapters spanning a total of 230 pages. The rest of the text, up to page 1,598, is composed of a series of annexes to which are attributed the same binding legal status as the central text of the agreement.

3.1. Access to markets

Given the size of the Canadian market, economic exchanges between Canada and the EU are far from negligible. In 2014, Canada was the EU's 12th most important trading partner, accounting for 1.7 per cent of the total external trade with the EU. The EU is Canada's second-largest trading partner, after the United States. In turn, as Canada's second most important trading partner, the EU accounted for around 9.5 per cent of Canada's total external trade. Additionally, the EU is the second largest investor in Canada, with about 26.3 per cent of Canada's inward foreign direct investment (FDI), whereas Canada is the fourth largest investor in the EU (about 4.3 per cent of the EU's inward FDI).

As noted above, CETA's stated aim is to encourage these exchanges by opening markets (even more) through instruments such as the reduction of tariffs, rules for trade in services and public procurement regulation.

a, Tariff reduction: sacrificing sensitive sectors when commercial interests require it

Trade between the European Union and Canada is currently subject to a remarkable degree of liberalisation. Proof of this is that the average tariffs in major tariff lines are around 3 per cent. However, there are tariff peaks in key sectors such as agriculture that are critical for the survival of the sector.

These sectors will be the first affected by CETA. Some of the products for which tariffs are higher in the EU are processed food products, certain seafood, beef and pork[6]. With the entry into force of CETA, customs duties for all tariff items will be deleted unless the parties specify, thus introducing exceptions[7]. These exceptions can be partial (whereby tariffs are reduced each year until eliminated after four, six or eight years) or permanent.

The list of permanent exemptions from tariff reduction (category E) has been used by both sides, but represents only 2.3 per cent of the EU tariff lines and 1.8 per cent of the Canadian ones. Thus, most of the products, including those whose sensitivity enjoyed the tariff peaks above, may be imported without tariffs if CETA is signed.

Table 1. Most used tariff items in category E and staggering categories

	Total protection (category E)	Products for which tariff quotas are established
Canada	Poultry, eggs and egg products	Cheese, dairy
European Union	Poultry, eggs and egg products	Beef and pork, sweet corn, wheat, processed shrimp, frozen cod

Source: Canonne, A (2006) : Le TAFTA avant l'heure. Tout comprendre au traité UE-CANADA

6 On the Canadian side, the most significant tariff peaks are to be found in processed food stuff, shoes, textiles, and cheese out of the annual import quota.

7 The automatic tariff elimination concerns all the tariff lines from 1 to 97 of the Harmonized System. Chapters 97 and 98 (special classification provisions) are excluded from the automatic tariff elimination.

The immediate effect of the tariff reduction is the difficulty faced by local industries in trying to compete since competition on 'equal footing' between unequal actors is not necessarily fair. It should be noted that the tariff peaks above have been maintained despite pressure from different countries and organisations within the WTO to eliminate all tariffs, demonstrating their importance to the survival of these sectors. The example of the crisis in the Canadian agricultural sector following liberalisation prompted by the signing of NAFTA (the free trade agreement between the US, Canada and Mexico) should be a warning to the European Union, as stated by Sujata Dey, when she explained that under this treaty "not only were the promises of economic growth, employment and better wages not met, but Canada lost around 40 per cent of its agriculture.[8]" The second effect of this tariff reduction, which tends to be ignored in impact studies, is the erosion of state revenue from collecting tariffs[9].

b, The mechanisms to liberalise services: the negative and positive lists

As noted in the previous section, the commercial relationship between Canada and the European Union is important, but nowhere near as significant as the volume of trade between the EU and the United States. In 2013, Canada-EU trade in services totalled $32.1 billion, with service exports to the EU accounting for $14.5 billion and service imports from the EU representing $17.6 billion. Canada was a net importer of travel services, transportation services and government services from the EU in 2013[10]. Furthermore, we must not lose sight of the impact of the triangular relationship between the EU, Canada and the US, since the latter is both the largest trading partner of both Canada and the EU. As the impact report of CETA noted[11], the service sector is the predominant source of economic activity in the EU, Canada and the United States.

In the centre of this triangular relationship, both TTIP and CETA seek to maximise the free movement of services at all costs. The use of international agreements to promote trade in services is not a new technique. The Uruguay Round took place between 1986 and 1993 and focused on creating a set of rules that led to the General Agreement on Trade in Services (GATS), which entered into force in 1995 as a counterpart to the General Agreement on Trade and Tariffs (GATT). Increased service trade, unlike product trade, requires the elimination of restrictions that hinder the flow of suppliers, so GATS focuses on removing non-tariff rate barriers, the elimination of which is not only more complicated but also involves many more risks to society than the elimination of tariffs.

The fundamental principles of action for the liberalisation of the movement of services is the principle of national treatment, which involves granting foreign providers treatment no less favourable than for national economic operators[12]; and the principle of most-favoured nation, which ensures that the preferential treatment

8 Presentation at the GUE/NGL hearing "CETA: TTIP in a Canadian disguise", 2016.

9 According to the European Commission, the loss of income will reach EUR 311 million over seven years. The tariffs will be completely eliminated on 97.7 per cent of the tariff lines upon the signature of the Agreement; while an additional 1 per cent of the tariff lines will be tariff-free after 3, 5 or 7 years. This EUR 311 million corresponds to 80 per cent of the estimated tariff revenues that the member states receive from Canadian imports, according to 2015 data. This estimate takes into account the new Decision on own resources, which reduces the collecting costs of the member states from 25 per cent to 20 per cent. Vid. European Commission (2016): Proposal for a Council decision on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its member states, of the other part. Strasbourg, 5.7.2016 COM(2016) 444 final 2016/0206.

10 http://ec.europa.eu/trade/policy/countries-and-regions/countries/canada/

11 Kirkpatrick, P. (Dir) (2011): *EU-Canada SIA Final Report,* June.

12 Article 9.3.1: "National treatment. 1. Each Party shall accord to service suppliers and services of the other Party treatment no less favourable than that it accords, in like situations, to its own service suppliers and services"

accorded to a country or countries will extend equally to all other countries[13]. Through the application of these principles, CETA would allow any provider in the Canadian services market entry to EU markets and, once inside, it should be treated as a domestic provider, unless with respect to this service in particular the state had requested any exception.

Obligations and reserves established by each of the parties and the method for inclusion are fundamental issues for understanding the dynamics of the deregulation. The methodology included in GATS was based on the 'positive list' concept. This involves drawing up a list that includes the sectors and subjects that will be liberalised and leaves out the obligations of liberalisation matters that are not expressly included, i.e. the only trade that is liberalised is that which parties expressly agree upon. Proponents of greater and faster deregulation have been proposing a modification of this mechanism, posing as an alternative use of the 'negative list'. Under the negative list approach, all sectors and modes of supply of services will be liberalised, excluding only those that the parties expressly decide to insert in a list drawn up during the negotiations[14].

Finally, both CETA and TTIP have included a system of lists that hybridises previous proposals, i.e. the positive list is used to determine market access (Annex III) and the negative list for obligations of national treatment and the application of the principle of most-favoured nation (Annexes I and II). Along with these mechanisms, the clause of irreversibility of liberalisation (*ratchet* clause) will be applied. This clause is a provision by which the parties undertake to always maintain at least the highest level of market liberalisation reached. That is, any form of liberalisation stays frozen, there is no going back.

The change of method involves serious consequences because the negative list has a greater capacity for deregulation: any failure plays in favour of liberalisation. Once a service is mentioned in the market access list (Annex III) it automatically grants without restriction 'national treatment' and 'most-favoured nation' clauses unless domestic suppliers explicitly protect themselves by an exception in Annex I or II. This is the reason for the importance of analysing the content and operation of these annexes.

The difference between Annexes I and II is that the first concerns exceptions for existing measures while the second creates exceptions (i.e. the right to regulate) for the future. If a state (or the EU) wants to keep some internal rule that sets specific requirements for foreign companies, it must be expressly included in Annex I. In addition, on these measures the *ratchet* clause applies, so that neither states nor the EU can expand the content of exceptions. Instead, it will be possible to deepen liberalisation, i.e. reduce the number of exceptions and if this occurs, this new situation will freeze. In Annex II any state (or the EU) could reserve the right to take future measures, which do not apply the national treatment and most favoured nation clauses.

The exceptions established in CETA and proposed in TTIP are clearly insufficient. A careful analysis of the exceptions included by each of the states shows that, beyond the complexity of the mechanism and thanks to the deregulatory potential of the negative list, these treaties have opened a huge window so that the member states and their governments eliminate rules to protect state services under the cover of obscurantism and opacity in these treaties, thus limiting the political cost of deregulation decisions.

13 Article 9.5: "Most-favoured-nation treatment 1. Each Party shall accord to service suppliers and services of the other Party treatment no less favourable than that it accords, in like situations, to service suppliers and services of a third country."

14 In support of the negative list, Vid. The statements of the Business Coalition for Transatlantic Trade: http://www.transatlantictrade.org/issues/services/ or the Coalition of Services Industries: https://servicescoalition.org/images/TTIP_Comment_Letter_FINAL.pdf.

c, Government procurement and elimination of the possibilities to introduce social clauses

The term government procurement refers to public procurement of goods and services of various kinds. According to data from the European Commission, in 2014 some 250,000 public authorities in the EU spent 13 per cent of GDP (EUR 1,931.5 billion)[15] on the purchase of services, works and goods in sectors such as energy, transportation, cleaning, social protection and provision of health services and education. In Canada, the amount allocated to public procurement is between CAD 130 billion and CAD 200 billion[16].

Undoubtedly, we are talking about a huge portion of GDP, but the important thing is not only the economic value of public procurement but the possibility that through this public authorities have an impact on social and environmental issues in their particular context. This is an important way to promote the economy, local development and the welfare of certain disadvantaged groups. This use of public procurement to achieve social and environmental objectives has been formally recognised in the rules of the EU and many of the member states[17] which, to a greater or lesser extent, have come to accept that contracts must not set the price as the single criterion, instead they can and should aspire to achieve social, environmental or research objectives.

Many analysts have pointed out that one of the fundamental objectives of CETA is precisely the reduction of these possibilities for introducing social and environmental objectives in public procurement[18]. It intends to force the parties to restrict the possibilities for public authorities to establish social or environmental clauses. To achieve this, it was requested in the negotiating mandate for CETA that the Agreement would affirm mutual market access to public procurement in all sectors of government (national, regional and local) in both traditional sectors, and in the field of public goods, ensuring treatment no less favourable than that accorded to locally established contractors. In addition, market access will be extended to all relevant entities of public law and companies operating in the field of public services.

This mandate is developed in Chapter 19 of CETA including the provisions relating to public procurement. Among its items we highlight item 19.3, where the text establishes security exceptions and other exceptions that can always be applied if they do not involve discriminatory treatment and are "necessary to protect public moral, order or safety; necessary to protect the health and lives of people and animals or to preserve plants; necessary to protect intellectual property; or related to the products or services provided by persons with disabilities, philanthropic institutions or prison labour." As can be seen, the possibility of introducing a social clause aimed at gender equality and the promotion of employment of people experiencing social exclusion is very restricted. Another item that should not be overlooked is item 19.9, which prohibits tender specifications from including a technical specification that has the purpose or effect of creating unnecessary obstacles to international trade, again leaving the question open regarding what constitutes an unnecessary obstacle and whether it can be considered as a social clause.

The IATEC report[19] warns that policies favouring "local content" and local production, which are regarded as discriminatory to foreign companies, will be prohibited if the CETA is approved. The agreement limits the protection of public procurement, to the detriment of local development, and benefits most transnational firms. In addition, because of the principles of non-discrimination and transparency, public officials will be forced to consider the price as an essential criterion for the selection of tenders, relegating to the background the social and environmental benefits gained by modes of production able to sustain ecological transition and local development.

15 European Commission (2016): *Public Procurement Indicators* 2014. DG GROW G4 - Innovative and e-Procurement: http://ec.europa.eu/DocsRoom/documents/15421/attachments/1/translations

16 Sinclair, S., et al. (2014): Making Sense of the CETA. An analysis of the final text of the Canada–European Union Comprehensive Economic and Trade Agreement. https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2014/09/Making_Sense_of_the_CETA.pdf.

17 European Commission (2015): *Study on "Strategic use of public procurement in promoting green, social and innovation policies*. Final Report. DG GROW. http://ec.europa.eu/DocsRoom/documents/17261

18 Sinclair, S., et al. (2014): Making Sense of the CETA..., Op. cit.

19 Ibidem.

In fact, as the report continues to point out, the opening of the Canadian public procurement market should not be perceived as a victory for European negotiators. It is rather the result of an exchange of concessions aimed to satisfy the interests of big business on both sides. They are definitely the real winners, gaining the modifications in the field of public procurement in return for the major concessions in agriculture that have been identified in the preceding paragraphs.

3.2. Regulatory cooperation: advancing towards deregulation

Both the TTIP and CETA have been called 'new generation treaties' because they expand the traditional content of trade agreements. This expansion is mainly oriented towards the elimination of non-tariff barriers (NTBs) by influencing regulatory procedures on both sides.

According to the definition of UNCTAD (2012), NTBs are "different policy measures, of tariffs, which can potentially have an economic effect on international trade in goods, altering the quantities sold or prices or both"[20]. These barriers include, for example, measures to protect health and the environment, and the provisions traditionally used in trade policy such as quotas, price controls and export restrictions; even other internal measures such as competition policy, investment measures related to trade, restrictions on public procurement, etc. may be included in the non-trade measures (NTM). In other words: all environmental, health, social, occupational or protective regulations of one of the two parties. Even though they would be applicable equally to domestic and foreign producers, they can be considered by the other party as an NTB, and the aim of CETA would, therefore, be to eliminate them.

The only way to avoid these barriers is the use of mechanisms such as mutual recognition (mentioned in Chapters 4, 11 and 21 of CETA), harmonisation or the establishment of compatible conformity assessment procedures between different states or economic blocks and the purpose of new generation treaties is precisely to give a legal nature to these 'cooperation' mechanisms.

CETA dedicates its 21st chapter to regulatory cooperation mechanisms. It should be noted that although both CETA and TTIP have a chapter on regulatory cooperation, the scope of each one is different. TTIP determines the participation in these processes as mandatory, however, Article 21.2.6 of CETA establishes that the parties enter into the regulatory cooperation process on a voluntary basis and that they can refuse participation in these mechanisms, though if this happens the party refusing should be prepared to give an explanation of its refusal to the other party. This voluntariness must not lead to the misconception that regulatory issues have less weight in CETA. It is true that, although Chapter 21 does not force a party to participate, throughout the text there are other instruments aimed at the development of this cooperation, establishing it as mandatory.

The 21st chapter (on regulatory cooperation) opens with a reference to the commitments made in GATT and GATS, as well as the Agreement on Technical Barriers to Trade of the WTO (TBT) and the Agreement on the Application of Sanitary and Phytosanitary Measures of the WTO (SPS). Among the activities of cooperation in the regulations set out in Article 21.4, mutual recognition is integrated, minimising the use of regulatory instruments that distort trade and investment, and the use of international standards, including standards and guidelines for conformity assessment.

One of the most significant issues is the creation of the Regulatory Cooperation Forum (RCF), which will have the status of a specialised committee and will consist of officials from both sides, chaired by senior representatives appointed by the European Commission and the Government of Canada. The functions of this RCF are aimed at facilitating discussion and consultation between the parties to perform the activities above, including support for "individual regulators to identify potential partners for cooperation activities which will provide the right tools, such as models for confidentiality agreements". In addition, the parties may, by mutual agreement, invite other interested parties to participate in meetings of the RCF. This latest forecast is connected with Article 21.8 of the text which authorises the parties to hold consultations with private entities, by any means, to understand the non-governmental points of view.

Let us not forget that the mechanisms of regulatory cooperation are not only in the voluntary instruments of Chapter 21 but also in other chapters of CETA, primarily in Chapters 6 and 7 (technical and phytosanitary trade barriers), 23 to 24 (trade, labour and environment) 27 (transparency) and 29 (dispute settlement). The repercussions are not limited therefore to a change in the internal regulatory procedures, which is left

to the will of the parties, they also include the integration of a culture in which the participation of third party agents that are outside of legislative bodies (i.e. lobbies) occurs on the same level as the legislator. The logic imposed by CETA requires the legislature to scientifically prove the need to adopt a specific regulation. A permanent distrust with the legislator is thus installed and, therefore, in the democratic regulation procedures that are specific to systems of representative democracy, as Meuwese (2015) indicates, the sovereignty of the state parliaments is being limited and their relationships with their citizenries are being modified, as long as the representative mandate and decision-making authority are questioned and mediated by the intervention of other actors.

Finally, we should not forget that the idea of reducing regulatory requirements by reviewing the processes and the introduction of corporate actors into these processes is found in other mechanisms that are already in place, as is the REFIT programme. The programme for improvement of legislation (REFIT 'Regulatory Fitness and Performance, COM (2013) 685 final) was driven by the Barroso Commission with the aim of combating "administrative obstacles" (the so-called red tape) and making the law "lighter, simpler and less expensive." The REFIT programme has received a lot of criticism, especially after the publication of the results of 2014. The Commission, following the directions of the programme, rejected the proposal of some initiatives on health and safety at work, soil protection and access to environmental justice, because of its high 'costs'. If a mechanism like the REFIT, in trying to eliminate administrative burdens, reduce 'unnecessary' regulatory barriers to trade and simplify legislation at European level, causes deregulatory consequences, then what would be the impact of a device on a larger scale that binds two systems such as Canada and the EU which have such significant differences in standards and levels of protection?

20 According to the ECJ, "all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions" (Judgment of the Court of 11 July 1974. Dassonville. Case 8-74).

3.3. The protection of foreign investment and the arbitration system for resolving disputes

According to UNCTAD[21] data, there are currently about 3,286 investment treaties in force, and the number is increasing rapidly; in fact, in recent years a treaty of this type is approved each week. Of the total of these treaties, approximately 1,400 have been signed between EU member states or the EU itself[22], and a third country[23], including 8 with Canada[24] and 9 with the United States. In addition, according to data analysed by the Commission for the year 2011, there are 176 bilateral investment treaties (BIT) between EU states. They were negotiated at a time when at least one of the two parties was not a member of the EU.

The European Commission has often justified the introduction of a mechanism for investment protection in new generation trade agreements by the need to replace these BITs by a single agreement that would prevent the fragmentation of capital markets that these treaties are causing today, as well as other legal problems caused by ISDS and the fact that the Commission itself has been criticised for years. Still, the first version of the CETA and the TTIP initial proposal included the traditional version of the investment protection mechanisms. As we shall see, only strong social and political pressure has managed to move the Commission to reform the initial proposal, and the most dangerous features of these mechanisms have been eliminated or even modulated. The truth is that, as shown in the following pages, both the old and the new versions of ISDS pursue the same goal: to exponentially increase the scope of a system whose negative effects are well proven and which aims to neutralise the normative power of the states, the so-called chilling effect.

A BIT is an agreement between two states which aims to offer investors full guarantees for their investments. History shows that the mechanisms of protection of investment and in particular the arbitration tribunals (ISDS) were designed to allow foreign investors to act against a state where they consider that their interests have been violated in a context in which the courts of the host state were perceived as unreliable, either because of their lack of resources or their lack of impartiality, or for other reasons. However, the number of BITs has also multiplied among countries with similar levels of economic development (north-north), whose first and foremost exponent was the NAFTA[25]. The disastrous consequences of mechanisms for the protection of

21 http://investmentpolicyhub.unctad.org/IIA.

22 According to the data that the European Commission has taken into account on the Inception Impact Assessment concerning the Establishment of a Multilateral Investment Court for investment dispute resolution. 01/08/2016.

23 http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchBITResults.

24 Agreement between the Government of the Republic of Croatia and the Government of Canada for the Promotion and Protection of Investments, done at Ottawa on 3 February 1997; Agreement between the Czech Republic and Canada for the Promotion and Protection of Investments, made in Prague on 6 May 2009; Agreement between the Government of the Republic of Hungary and the Government of Canada for the Promotion and Reciprocal Protection of Investments, done at Ottawa on 3 October 1991; Agreement between the Government of the Republic of Latvia and the Government of Canada for the Promotion and Protection of Investments, made in Riga on 5 May 2009; Exchange of Notes between the Government of Canada and the Government of the Republic of Malta Constituting an Agreement Relating to Foreign Investment Insurance, made in Valletta on 24 May 1982; Agreement between the Government of the Republic of Poland and the Government of Canada for the Promotion and Reciprocal Protection of Investments, made in Warsaw on 6 April 2009; Agreement between the Government of Romania and the Government of Canada for the Promotion and Reciprocal Protection of Investments, made in Bucharest on 8 May 2009; Agreement between the Slovak Republic and the Government of Canada for the Promotion and Protection of Investments, made in Bratislava on 20 July 2010.

25 Vicente, D.J., (2003): "El conflicto histórico por el régimen de la inversión extranjera directa", en Vicente, D.J. (ed), *La libertad del dinero*, Germanía, Valencia, pp. 41-85 y Vicente, D.J. (2016): "ISDS (ICS) el asalto a la justicia" in Guamán, A., Jimenez, P. (coords.) *Los acuerdos comerciales como estrategia de dominación del capital. Las amenazas del CETA y del TTIP*. Pol·len edicions. Barcelona

investments in this treaty and the numerous BITs that followed on issues such as the rights to health, work or on the environment have not deterred states or the EU from including these mechanisms in the new treaties nor has their content really been softened.

The protection of foreign investment in CETA occupies Article 8 of the treaty. It should be noted that this chapter was modified in extremis in February 2016, when the agreement was already in the process of legal scrubbing, when the negotiations on the text had already been closed for two years. The changes aimed to silence social protest and facilitate the future approval of CETA by integrating two key issues: first, the formal recognition of the right to regulate, and second, replacing the old ISDS with the new Investment Court System (ICS), an issue that we will discuss in the following sections.

a, The protection of foreign investment

To understand the broad scope of CETA it is important to highlight some of the most important provisions included in the investment chapter, before entering into the question of the dispute-settlement mechanism.

In order to define the scope, Section A of the investment chapter begins by defining what it means by 'investment'. It specifies that the term covers any kind of asset owned by an investor, or under the investor's direct or indirect control, that has the characteristics of an investment, including certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or risk-taking. From this definition we highlight three key elements that contribute to maximising the reach of the Agreement: on the one hand, the text does not refer to having invested capital, but to having committed it; on the other hand, it mentions the "expectation of profit" which is a term of apparent amplitude. Finally, nine categories are listed for different types of investments, but the list is preceded by the words "inter alia" leaving the possibility that any activity can be considered as an investment.

Within the broad scope of the concept of investment that Article 8.2 defines, the measures that are exempted from the application of the provisions of the chapter relate to the establishment of investments and non-discriminatory treatment. Among them a number of exceptions by sector are established, with an additional two exceptions by territory (for the EU on audio-visual services and for Canada with respect to cultural industries) are established, as well as the general exception that covers activities in the exercise of governmental authority (defined as those that are "carried out neither on a commercial basis nor in competition with one or more economic operators").

The key is that, while the concept of 'investment' is defined broadly, exceptions are defined in a restrictive form and in a closed list. In particular, the last exception is extremely narrow since currently there are very few activities that are not performed in competition with other economic operators. Even what the European Union means by public service is provided (as discussed in the following sections) often in competition with other economic operators so that the basic exception for the protection of the right of states to regulate effectively has a very limited scope.

Then, Section B starts with Article 8.4 delimiting access to markets that, in principle, can have foreign investors. It specifies that no level of government can impose limits on the number of participants in an economic area (this includes the inability to set limits on the number of players in a sector, to put in place economic needs tests prior to authorisation, to set numerical quotas, etc.). This limits the ability to prevent, for example, an excessive concentration of these businesses in a certain area, which may have detrimental effects on the economy, society and the environment.

Section C of the agreement includes items relating to non-discriminatory treatment. We highlight among them Article 8.6 on national treatment and Article 8.7 that integrates the clause of the most favoured nation, as defined in previous sections. Today there are already numerous experiences of investors who have invoked this clause to denounce laws which apply equally to domestic and foreign investors. The most representative case is SD Myers vs. Canada. SD Myers is a company dedicated to waste management and that invested in Canada to export waste of polychlorinated biphenyls (PCB) at its headquarters in the United States. Canada banned the export of hazardous waste (as dictated by the Basel Convention signed by 170

countries in 1989 and in force since 1992). The company sued Canada, citing the national treatment clause of NAFTA. Although the arbitration panel found no liability on the part of the charges filed by the company, Canada had to pay six million dollars (plus interest) in addition to the costs associated with the process.

Sections D and E of the chapter are equally essential and are dedicated to establishing rules for the protection of investments and reserves and exceptions. One of the most striking items is 8.9 in section D about regulatory measures which, as noted, was one of the last-minute inclusions. One of the major criticisms of CETA has been the involvement of the right of states and governments at various levels to regulate. For this reason, to facilitate support of the member states and the European Parliament to CETA, the negotiating parties have proceeded to include the following paragraph: "for the purposes of this chapter, the Parties reaffirm their right to regulate in their territories to achieve legitimate policy objectives such as the protection of public health, safety, environment, public morals, social or consumer protection, or the promotion and protection of cultural diversity." The Article went on as follows "For security, the mere fact that a party regulates, even by amending its own legislation so that it affects negatively investments or does not meet the expectations of an investor, including expectations of benefits, does not constitute a breach of any of its obligations under this section". In addition, and probably to avoid situations such as the Micula case [26], one last point has been integrated which states that "no provision of this section shall be construed as preventing a Party to suspend the concession of a subvention or request its return when such measure is necessary to meet international obligations between the parties or has been ordered by a court or administrative court or other competent authority, or that warns that Party to compensate the investor for it".

The problems raised by this apparently widespread recognition are several. On the one hand, the concept of 'regulation' is problematic because its definition, unlike in the TTIP agreement, is not included in CETA. If we adopt a similar treaty with the United States, the strict concept is only valid for the central level regulations (EU) or as much for the state level, but in any case, for regional regulatory activities or decisions taken on a local level. On the other hand, the justification of the right to regulate lies with the pursuance by the government of 'legitimate' political objectives. This is an indeterminate legal concept that can lead to an endless number of different interpretations. The list of issues does not solve the problem because it is in any case a matter of degrees of protection and intervention in these areas. In addition, as noted by the AITEC report[27], it is a court of arbitration (by whatever name) that must determine whether the objective is legitimate or not, which is even more worrying.

In addition, other 'hard' contents of the article (definition of expropriation, for example) have not been changed.

Article 8.10 is also important because it includes one of the fundamental principles of the Treaty; that of fair and equitable treatment. The problem with this principle is that its content is not limited. Article 8.10 establishes a list of obligations of the parties, but also notes that "the Parties shall review periodically, at the request of one of them, the content of the obligations to provide fair and equitable treatment". Further, the Committee on Services and Investment may make recommendations thereon and submit them to the CETA Joint Committee for a decision. It is, therefore, a 'carte blanche', an opening of uncertain boundaries for future expansion of the obligations under this principle. It should also be remembered that the exceptions mentioned in Article 8.2 (among which are the activities performed in the exercise of governmental authority) are only set for sections B and C and therefore do not apply to the rest of the chapter, and in particular, do not protect these activities from the application of the principle of fair and equitable treatment.

Finally, Section E includes exceptions, referring to Annexes I, II and III of CETA. It has already been said that through these lists existing or future legislation can be protected and access to the market can be limited. These exceptions are included by the EU or by a particular member state. Thus, it can happen that one state may not impose, for example, economic necessity tests prior to the authorisation of certain investments, while another may do this. The reality is that the use of exceptions is very uneven, there are states like France and Germany that have made considerable use of this tool, while others, like Spain, have not[28].

b, From the ISDS to the ICS: same problems, different mechanism

The section F of Chapter 8 (Articles 8.18 to 8.45) establishes the dispute-settlement mechanism regarding investments between investors and states. This was originally called the Investor-to-State Dispute Settlement (ISDS) but has now been renamed the Investment Court System (ICS).

In general terms, as expressed by Eberhardt[29], the ISDS is a system that allows foreign investors to sue a state in a private arbitration tribunal and to avoid the state court system. The investor may use this system to protect his property rights or actual or planned benefits against a threat from the approval of a European, a state or a regional standard - concerning, for example, health, environment or labour rights - or the execution of a social policy that can lessen the benefits of the foreign investment.

It is a mechanism that has been developing since the sixties and is now contained in more than 3,000 agreements. In the use of ISDS, and in the conclusion of investment agreements that contain it, the North-South

26 In case T-646/14 *Micula v Commission* the General Court was asked to rule on whether an arbitral award against Romania can be considered as illegal state aid. By award of 11 December 2013 the Arbitration Tribunal established under the auspices of the International Center for Settlement of Investment Disputes ('ICSID') decided in favour of the claimants and ordered Romania to pay RON 367 433 229 (ca. EUR 82 million) as damages for failing to ensure a fair and equitable treatment of the claimants' investments and thus violating Article 2(3) of the Romania – Sweden Bilateral Investment Treaty. The Commission considered that the execution of the award constituted unlawful state aid and ordered Romania to suspend any action which may lead to the execution or implementation of the award. The Micula brothers challenged the Commission's decision (Action brought on 2 September 2014 — Micula a.o. v Commission (Case T-646/14)). In support of the action, the applicants rely on two pleas in law: "first plea in law, alleging a lack of competence: EU law is not applicable to the case and the Commission lacks the competence to issue a decision under Article 11 of Regulation no 659/1999. The Commission's decision fails to acknowledge that Romania is obligated by international law to execute the ICSID award without delay and that Romania's international law obligations take primacy over EU law. The Commission's decision infringes Article 351 TFEU and Article 4(3) TEU, which recognise and protect Romania's obligations under the ICSID Convention and under the Sweden-Romania Bilateral Investment Treaty; second plea in law, alleging a manifest error of law and assessment: the Commission erred in law by wrongly categorising the execution of the ICSID award as a new state aid measure and violated the applicants' legitimate expectations. The Commission's entire decision is based on the incorrect assumption that the execution of the ICSID award constitutes state aid under EU law. The ICSID award neither gives an economic advantage to the applicants, nor does it constitute a selective measure, nor a voluntary measure that is imputable to Romania, nor does it distort or threaten to distort competition". However, on 2 December 2015, the applicants informed the Court that they wished to discontinue proceedings. On 29 February 2016, the President of the Fourth Chamber ordered that the case be removed from the register.

27 AITEC (2016): *Le TAFTA avant l'heure. Tout comprendre au Traité UE-Canada.* https://www.collectifstoptafta.org/IMG/pdf/rapport_ceta_web.pdf.

28 Although there is no comprehensive comparative research on the use of exceptions by each of the member states, a critical analysis of the use of these exceptions by Spain in TTIP and CETA can be found in Guamán, A., Conesa, J., (2016): "Los efectos del TTIP sobre los servicios y las reservas que España decidió no introducir: cómo privatizar un país por la vía indirecta" in Guamán, A., Jimenez, P. (coords.): *Los acuerdos comerciales como estrategia de dominación del capital. Las amenazas del CETA y del TTIP*. Pol·len edicions. Barcelona.

29 Eberhardt, P. (2014): *Investment Protection at a Crossroads. The TTIP and the Future of International Investment Law.* Friedrich Eber Stiftung [online], http://library.fes.de/pdf-files/iez/global/10875.pdf.

trend has been dominant: three-quarters of the resolved or pending demands under mechanisms for investor-state dispute resolution have been presented against developing countries and emerging economies. However, with time, the use of ISDS is evolving towards the North. Specifically, 117 of the known cases have been caused by claims against a member state of the EU.

The adoption of NAFTA meant the inclusion of the first ISDS type conflict resolution mechanism, the first to be adopted by countries with similar levels of economic development (Canada/USA). Even when negotiators argued that the mechanism was needed to prevent Canadian investors from being abused in Mexico, in practice most of the cases have been against Canada. In fact, according to Jean-Pierre Soucy[30], Canada has become the industrialised country most pursued through ISDS mechanisms and has been forced to disburse 135 million Euro. The explanation for the extraordinary number of complaints against Canada in the context of NAFTA is that its environmental legislation is more protective than that of the other two parties.

In addition, the extension of the mechanism has also led to so-called forum shopping which allows companies to choose the most permissive BIT under which to sue a state. This has occurred, for example, in the case of Philip Morris vs. Australia, in which Philip Morris, despite the fact that it is an American company, used the BIT between Hong Kong and Australia to pursue its claim.

Currently, the legal framework of the investor-state conflict resolution systems is composed of a set of rules akin to the World Bank's Washington Convention of 1965 that created the institutional arbitration system ICSID, the UNCITRAL Model Law on International Commercial Arbitration of 1985 and other international arbitral institutions. As we have noted on other occasions, the Lisbon Treaty included investment in its trade policy, as the exclusive competence of the EU. Various communications of the Commission that have been published since that time, including in 2010 and 2015[31] have reiterated the willingness of the EU to introduce ISDS-type mechanisms into trade agreements, although on numerous occasions, as seen below, the Commission itself noted that the investor-state dispute settlement mechanism constitutes a breach of the legal order of the EU[32]. In fact, both the CETA and the EU-Vietnam trade agreement include a mechanism of this type, which is also present in the current negotiations of trade agreements with the United States, China, Myanmar, Tunisia, Morocco, Japan, the Philippines, Mexico and planned trade agreements with Indonesia, Australia, New Zealand, Chile, etc.

The consequences of ISDS on the regulatory power of states and environmental and social rights have been denounced for years. Still, despite having severely criticised the ISDS in its traditional version with respect to other treaties as incompatible with the legal system of the EU, the Commission had no problem with proposing and maintaining this system in the proposed TTIP and the closed text of CETA. Only in September 2015, when it was clear that the inclusion of an ISDS mechanism had become one of the pillars of criticism against the Treaties, the Commission decided to propose a new system of dispute resolution, the Investment Court System (ICS), in an attempt to ensure the support of the European Parliament and placate the mobilisations against TTIP and CETA. To do this, and contrary to what was announced, the Commission was forced to request the reopening of the text of CETA and proceed to the modification of its content.

30 Presentation at the GUE/NGL hearing "CETA: TTIP in a Canadian disguise", 2016.

31 European Commission Communication COM(2010)343 "Towards a comprehensive European international investment policy"; European Commission Communication "Trade for all - Towards a more responsible trade and investment policy". COM(2015) 497 final of 14.10.2015.

32 Vid. Infra, footnote. 98

This is a change that many experts have described as 'cosmetic'. To demonstrate this lack of real will to control the harmful consequences of the mechanism, we will confront it with three fundamental questions:

- Is it compatible with EU law and in particular with the Statute of the Court?
- Does it really it represent a change from the previous ISDS which is able to avoid the ISDS' negative consequences?
- Is a specific system for resolving investor-state disputes really necessary?

In order to answer these questions, it is necessary to make first a cursory analysis of the mechanism integrated into Section F of Chapter 8 of CETA. The system maintains the key features of the above, i.e., it remains a mechanism to allow foreign investors, not domestic, to denounce the failure to meet the obligations under Sections C and D of Article 8 of CETA by the parties. The most significant features of this new system are:

- It integrates specific provisions regarding the previous steps of the claim:
    - A process of consultation and mediation is established and when this does not work, then the specific party targeted by the claim (EU or member state) must be determined.
    - The investor should withdraw or suspend any existing proceedings in a court or tribunal under the domestic or international law and waive its right to introduce any claim on the same case in a court or tribunal under the domestic or international law in future.
    - The investor may propose that a single member of the court considers the claim. The defendant will consider such a request favourably, especially if the investor is a small or medium enterprise, or if compensation or damages claimed are relatively low.
- It integrates specific provisions concerning the composition of the court:
    - Article 8.27.2 gives the CETA Joint Committee the power to appoint the arbitrators. The Committee shall appoint the fifteen members of the tribunal, for five years, renewable once. This shall include five from a member state of the European Union, five from Canada and five from other countries. The court will consider the issues in divisions composed of three members. In addition, an appellate court is created to reconsider the awards (obviously not sentences) of the first court.
    - The members of the court will receive a monthly fee in advance, to be determined by the Board which could also decide to convert these fees into a regularly determined wage amount.
    - The Joint Committee is credited with a key role that can determine the content of the resolutions of the ICS. Article 8.31.3 states that in the case of serious problems on questions of interpretation that may affect investment, the Services and Investment Committee may recommend to the Joint Committee of CETA to adopt interpretations of the meaning of the provisions of CETA. Any interpretation of this committee shall be binding on the ICS from a certain date, again fixed by the Committee. This means de facto that the Committee is the 'owner' of the ICS. In addition, the Committee will be responsible for accepting and outlining a future transition between ICS and a multilateral investment tribunal whose creation is proposed in Article 8.29 of the CETA as detailed below.

It cannot be denied that the new investment chapter contains certain improvements compared to its previous versions, such as the introduction of an article on the right to regulate, more transparency provisions or the appointment of judges. However, as denounced by numerous experts and organisations, these changes do not solve the two major problems of the dispute settlement mechanism between investors and states and these are basically divided into a double typology:

- The incompatibility of such foreign investor protection with the EU legal system and constitutional traditions of the member states (vid. Infra, p. X).

- The negative effects on the right to regulate social, labour and environmental standards on both sides. The freezing effect, the step from the right to regulate to the 'fear of regulating' and the prohibition on reversing privatisation or to improve the protection standards of the rights of citizens are still present. Therefore, the threats to the rights of the social majorities continue.

Moreover, numerous reports have shown that slight changes in the ICS regarding the ISDS do not solve most of the inherent risks of private arbitration. Indeed, the essential problem of ISDS is the fact that a foreign investor has, by definition, more rights than a national investor and the fact that states can be reported because they adopt democratically legitimate rules and that these reports will not be dealt with in ordinary courts, remain unchanged[33].

It is also important not to lose sight of the fact that the justification for the creation of the ICS is to prevent cases of abuse such as the cases documented under ISDS and to prevent these cases from occurring again. However, if the abuse cases that led to the majority of the European Parliament, and ultimately the European Commission, proposing a 'reformed' system can be repeated under the new system, how can it have any legitimacy?

Cigotti and others[34] have documented widely that cases like Philip Morris vs Uruguay, TransCanada vs the US, Lone Pine vs Canada, Vattenfall vs Germany and Bilcon vs Canada would have occurred under the new system just as they had with the previous one. For example, the attempt to limit the scope of the concept of "fair and equitable treatment" (Article 8.10) has left significant gaps, namely the 'manifest arbitrariness' as a form of violation of this clause. Therefore the arguments that led Philip Morris to sue Uruguay would remain valid in a similar circumstance under the ICS.

On the other hand, the possibility that arbitration mechanisms can be applied with respect to labour standards has been demonstrated in the well-known case of Veolia vs. Egypt over the minimum wage[35]. This case demonstrates the impact that these mechanisms may have on collective agreements when they have recognised the 'erga omnes' effect through state intervention[36]. In this regard, a question was presented to the European Parliament over the compatibility of the ISDS with Article 151 of the TFEU and Article 4.2 of the TEU (regarding the diversity of the states on labour issues and regarding national identity) and asking the Commission for security clauses to prevent the possibility that the collective agreements could be the subject of an ISDS claim. The response of the Commission was laconic and disappointing: ISDS cannot threaten the 'European Social Model' (whatever that is, given it is a vague legal concept). The investment protection raised by the EU cannot, according to the Commission, enable an investor to obtain compensation for the adoption of a public policy, as a collective agreement *while it is not discriminatory*. It also notes that to avoid these issues in the negotiating texts, notions of 'fair and equitable treatment' or 'indirect expropriation' have been limited and they have included the reference to the 'right to regulate' in the preamble of the treaty. The

33 See, among others, CEO (2016): The zombie ISDS. http://corporateeurope.org/sites/default/files/attachments/the_zombie_isds_0.pdf; BEUC (2015): From ISDS to ICS: Still a long way to go. http://www.beuc.eu/blog/from-isds-to-ics-still-a-long-way-to-go/

34 Cigotti, N., et alt. (2016): *Investment Court System put to the test*. Published by the Canadian Centre for Policy Alternatives, Corporate Europe Observatory, Friends of the Earth Europe, Forum Umwelt und Entwicklung (German Forum on Environment & Development) and the Transnational Institute.

35 Veolia Propreté v. Arab Republic of Egypt (ICSID Case No. ARB/12/15)
Krajewski, M., Modalities for investment protection and Investor-State Dispute Settlement (ISDS) in TTIP from a trade union perspective, Friedrich-Alexander-Universität Erlangen-Nürnberg. http://library.fes.de/pdf-files/bueros/bruessel/11044.pdf

"The Investment Court System is a botoxed version of ISDS: both ISDS and ICS are only for foreign investors (class-based justice); require compliance with trade agreements only, not with national law or European treaties; offer no possibility of appeal with national or European courts; are used to pressure governments ('regulatory chill'); and create a parallel justice system — can the EU do that??"

Anne-Marie Mineur, MEP, GUE/NGL

reality is that none of these provisions would be sufficient to ensure that cases such as Veolia could not be repeated, even aiming at a collective agreement. To ensure the effectiveness of the safeguard, a broad exception would be needed to cover any action by the public authorities based on the protection of the public interest or in the defense of the rights of the workers, specifically including collective agreements, which would probably be unacceptable for negotiators.

As if that were not enough, the ICS will have a permanent economic cost, as admitted by the Commission: "An amount of EUR 0.5 million of additional annual costs is expected from 2017 (pending ratification) to finance the permanent structure formed by a first instance and an appeal court."[37]

In conclusion, and in view of all these problems and costs we should ask what the possible benefits of the introduction of protection mechanisms for foreign investment are. The fact is that no one seems to be able to offer a convincing answer. There is no consensus on this issue among academics who have conducted comparative analyses of bilateral investment treaties and foreign direct investment. On the contrary, the results of their studies show disparate results and it is impossible to affirm any correlation[38]. Given the inconsistency of these studies, methods for using secondary indicators to measure the effect of the BITs on foreign investment have been utilised. Yackee[39] comes to the conclusion that this correlation is very weak. He measures this using the following indicators: the influence of BIT in the political risk ranking of consulting firms; the influence of whether or not BITs exist on the conditions offered by investment risk insurance companies; and finally, the importance of whether there is a BIT or not in the investment decisions of investors. Through each of the indicators, the author comes to the following conclusion: "The results suggest that developing countries that wish to attract investment, or to continue to attract investment, need not sign on to the rigors and disciplines of BITs. Countries that refuse to sign BITs, or who allow their BITs to lapse, will probably not see a meaningful reduction in investment flows. Nor will they fall ever more behind in the so-called competition for capital."[40]

37 European Commission (2016): Proposal for a Council decision on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part. Strasbourg, 5.7.2016 COM(2016) 444 final 2016/0206.

38 Yackee, J.W. (2010): "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from an Alternative Evidence". University of Wisconsin Law School, Legal Research Paper Series. No. 1114; Salacuse, W., Sullivan, N. (2005): "Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain", 46 Harv. Int'l L. J. 67; Yackee, J.W. (2008): "Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?" 42 Law & Soc'y Rev. 815 (2008); Hallward-Driemeier, M., (2003) "Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only A Bit…And They Could Bite", World Bank Policy Research Working Paper No. WPS 312).

39 Yackee, J.W. (2010): "Do Bilateral Investment Treaties Promote Foreign Direct Investment?" Op. Cit.

40 Ibidem.

3.4. And it doesn't end here: CETA as a living agreement

One of the most disturbing issues surrounding CETA is its status as a 'living agreement' because, through nine 'specialised committees'[41] and a Joint Committee, CETA includes multiple pathways for its content to be developed after its approval.

Each committee has specific and more or less decisive functions. For example, under Article 5.14.2.d) the Joint Management Committee on Sanitary and Phytosanitary Measures may decide to amend the annexes of the relevant chapter; while the Committee on Sustainable Trade and Development has, as expected, much less important functions. The functions of the Committee on Services and Investment are of particular concern (Article 8.44), as this committee has to adopt the code of conduct for members of the dispute settlement court for investors and states, which "may replace or supplement the applicable rules" in matters such as confidentiality. It can also adopt and amend rules to complement the applicable dispute settlement standards, and modify the applicable rules on transparency. All these modifications have to be adopted by the Committee "after an agreement between the Parties and after completing their respective internal requirements and procedures", but it is not yet possible to know what those internal procedures are, nor in which decision-making area of the EU they are going to be adopted, or with what implications for the parties to the agreement.

Above all of these committees lies the so-called CETA Joint Committee, to which Chapter 26 is dedicated. It is composed of representatives of the European Union and Canada and has extensive functions in monitoring the implementation and development of the agreement and coordinating the rest of the committees. In its proposal for the signing and provisional application of the CETA, the Commission has endeavoured to emphasise that this Committee is not an independent body, nor will it decide unilaterally or restrict the right of the Parties to regulate. However, in view of its very broad functions, the Commission's statement seems more than questionable for several reasons. Firstly because, as we have already noted, although reiterating that for some decisions the Committee requires the prior approval of the Parties, it is unclear how and by whom such approval will be granted. Secondly, this Committee has been given an enormous set of powers. while prior approval of the Parties is required, the Committee can modify most of the annexes. However, as it is the Committee that proposes and that finally approves the changes, by de facto it has sweeping powers over the treaty since the annexes are the true heart of CETA. It is evident, therefore, that this body is far from being a 'controlled' committee. Instead it is the perfect instrument to keep CETA alive and growing independently, free from democratic control by all the institutions of the EU and its member states.

"Unelected bodies would be deciding on citizens' rights and surpassing the national parliaments of the European Union's member states. We will not accept this procedure or CETA's content itself. We stand by the European people for a decent, fair and democratic life."

Dimitris Papadimoulis, MEP, GUE/NGL

41 These specialised committees are established under the auspices of the CETA Joint Committee: the Committee on Trade in Goods; the Committee on Agriculture, the Committee on Wines and Spirits, and the Joint Sectoral Group on Pharmaceuticals; the Committee on Services and Investment; the Joint Customs Cooperation Committee; the Joint Management Committee on Sanitary and Phytosanitary Measures; the Committee on Government Procurement; the Financial Services Committee; the Committee on Trade and Sustainable Development; the Regulatory Cooperation Forum; the CETA Committee on Geographical Indications.

4. The consequences of CETA

The instruments for deregulation that are provided by CETA and described in the preceding paragraphs may provoke, in addition to the negative consequences already mentioned, a series of specific impacts on public services, SMEs and employment, labour rights, health and the environment. This, as we shall see, is not only contrary to the interests of the social majorities of the EU and Canada, but violates rights enshrined in international commitments previously adopted by the member states (such as conventions of the International Labour Organization) and belies the statements that the Commission itself has maintained regarding the harmlessness of the CETA.

4.1. Public services in danger

EU law recognises the existence of services of general economic interest, which must be preserved because they are part of the constitutional traditions of the member states and are part of the shared values of the Union. In addition, Protocol no. 26 on services of general interest recognises the wide discretion of the authorities of the member states to provide, mandate and organise these services. According to this Protocol, the states can establish exceptions to the liberalisation of services of general economic interest.

Despite this recognition, the European Union has lobbied to promote privatisation. Since the nineties, the European institutions have promoted neoliberal policies in the field of public services, but it is certain that the advent of the financial crisis of 2008 accelerated this trend. The implementation of the mechanisms of the EU's economic governance framework (and in particular, the European Semester) has led to the imposition of permanent austerity as an action principle, directly oriented towards stifling public services[42]. However, it seems that privatisation is not fast enough to satisfy the demands of finance capital, which has launched an alternative channel for acceleration: the new generation of trade agreements.

"Public transport must be under democratic control. Multinational companies want to take over the most profitable routes and leave the costs to taxpayers."

Merja Kyllönen, MEP, GUE/NGL

Both regulatory cooperation mechanisms and instruments of foreign investment protection will damage public services. At the beginning, they involve the freezing of the current level of privatisation, but their ultimate goal is to lead to the gradual opening of all public services to private actors.

Denying the evidence, negotiators have argued that neither CETA nor TTIP are a threat to public services. They state that member states can maintain the organisation of their public services (at any level) so that they may be provided by a single supplier; deny market access to foreign companies in sectors such as health, education or social services; provide grants to any sector and exclude companies outside the EU; and regulate all services "in the way they prefer"[43]. In this regard, the negotiating mandate of CETA recognised that the high quality of public services in the EU should be retained in accordance with its internal rules and the provisions of GATS, also stating that the services provided in the exercise of public authority, as defined in GATS, should be excluded from the negotiations.

42 Guamán, A., Noguera, A. (2015): Derechos sociales, integración económica y medidas de austeridad, la UE contra el constitucionalismo social, Albacete: Bomarzo.

43 http://trade.ec.europa.eu/doclib/press/index.cfm?id=1141&serie=793&langId=es

However, despite these premises, the CETA text does not contain an explicit exception of sufficient amplitude. In addition, as already noted, the effects on public services, particularly health and education, do not solely derive from the content of the services chapter but from all the provisions of the treaty. We will first see the exceptions, then we will move on to all of the articles.

a, The 'safeguard clauses' and their insufficiencies

Throughout the CETA text, we found several references to public politics and services[44] that can be divided into three types of safeguard clause: the clause that excludes the services provided on the basis of government authority, the recognition of the right to regulate and the clauses that directly mention "public services".

Despite the apparent scope of all these exceptions, their weakness have been criticised both for their narrow range and for the uncertainty of their fundamental concepts. The exception of public services included in CETA refers to the definition of GATS and this puts the liberalisation obligations only to "supplied services in the exercise of governmental powers that are not supplied on a commercial basis nor in competition with one or more service providers or operators." The weakness of this exception is apparent because currently, the only public services within the framework of a comprehensive public monopoly are those relating to the execution of the functions of police, justice or defence. All other public services (water, social services, energy, transport, mail, education, health or culture) are generally provided in competition with private providers; that is, they are not covered by the exception and are, therefore, in danger. In addition, as Fritz[45] noted, the exception in the investment chapter does not apply to its Section D, i.e. the obligations of Fair and Equitable Treatment and investor protection against indirect expropriations and its Section F where the ICS mechanism is included. The consequence is that an investor could sue a state for actions in the field of public health systems or social protection if they violate the principles of protection of foreign investment.

b, The various threats to public services derived from the CETA text

The CETA text is riddled with provisions that pose a danger to public services beyond those directly included in the services chapter. Following the analysis of Fritz[46] and the report prepared by the AITEC[47], we can identify the following: measures on market access to foreign investment; provisions on public procurement; state aid measures; a chapter on the temporary residence of professionals; provisions on recognition of qualifications; the chapter on internal regulations; and articles on competition.

As an example, we can mention here some of those consequences. First, measures of market access for foreign investors (Chapter 8) that include instruments such as the prohibition on setting quotas on the number of companies that can perform a certain activity, or the total number of persons who may be employed in a particular industry (Article 8.4.1). The inability to adopt this set of rules can affect the state's ability to organise and plan their supply of public services and to restrict or control the entry of private players in certain areas. Some states such as France and Germany have introduced exceptions designed to give priority to certain types of companies for the provision of activities in the health sector, but this has not been a widespread practice, it has been punctual.

44 For example, the preamble states that: **"**Recognising that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity".

45 Fritz, T. (2016): CETA and TTIP. Potential impacts on health and social services. Working Paper Commissioned by the European Federation of Public Service Unions (EPSU). http://www.epsu.org/article/new-epsu-working-paper-ceta-and-ttip-potential-impacts-health-and-social-services.

46 Ibídem.

47 AITEC (2016): *Le TAFTA avant l'heure. Tout comprendre au Traité UE-Canada.* https://www.collectifstoptafta.org/IMG/pdf/rapport_ceta_web.pdf

In the field of social security, the chapter on financial services provides (Article 13.3) an exception stating that its provisions do not apply to measures that a party adopts or maintains with respect to activities or services forming part of a public retirement plan or statutory system of social security, unless the measures of the chapter are applied when a party allows that such activities are applied by its financial institutions or a financial institution in competition with a public institution. Thus, when one of the parties allows the entry of private insurance companies in the field of public social security systems (something common in some member states of the EU) the market should be open to private insurance companies of the other party. Although the EU has introduced specific aspects in Annex II, Fritz[48] points out again that this exception does not cover Canadian companies established in the EU but only those that provide services without establishment. Beyond this exception Germany is the only country that has included a point on protection, also in Annex II, according to which it reserves the right to adopt or maintain any measure with respect to the services of the social security system that can be provided by different companies or entities under competitive conditions and therefore are not "services rendered solely in the exercise of governmental authority."

4.2. The effects of CETA on SMEs

The negotiating parties have defended the need for CETA and TTIP - arguing their supposed beneficial effects for the economy in general and especially for small and medium enterprises (SMEs)[49]. These benefits would accrue from both the reduction of tariffs and the reduction of NTBs (non-tariff barriers) - especially the opening of the public procurement market and from a greater circulation and publication of useful information for these companies. Specifically on CETA, the Commission has published a document that reiterates that the treaty will generate "great opportunities" for European businesses - especially for small and medium enterprises.

Beyond this statement, there is no documented assessment of the impact that the treaty may have on these companies. Unlike what happened with TTIP - which has at least included specific reports[50] - neither the study of cost-benefit mandated at the EU-Canada Summit in 2007 nor the impact report of CETA from 2011[51] has explicit mention of the impact on SMEs be found or what supporting measures might be considered necessary.

The reality is that CETA - "the most ambitious agreement ever signed by the EU" [sic] - does not include a single chapter on specific measures to support SMEs.

With this basic oversight, the analysis of the potential impact of CETA on SMEs is based on three premises: the disparate realities of the SMEs on both sides of the Atlantic; the importance of intra-EU trade for SMEs inside the EU; and the often-discussed degree of market integration and the existing circulation of companies between Canada and the US.

First, it is essential to note that there is no internationally shared concept: in the EU, it is considered that an SME has fewer than 250 employees while for Canada (and the United States) the limit is 499.

Secondly, and we're already chartering onto the empirical level, we note from 2014 data that in the European Union the number of SMEs in non-financial sectors amounted to 22.3 million - that's - 99.8 per cent of all companies. Amongst them, 93 per cent are micro-enterprises, i.e. they have fewer than 10 employees. Together,

48 Fritz, T. (2016): CETA and TTIP. Potential impacts on health and social services... Op. cit.

49 Vid. http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/benefits-avantages/sme-pme.aspx?lang=eng and http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154775.pdf

50 Ibidem.

51 Assessing the cost and benefits of a closer EU-Canada economic partnership. A joint study by the European Commission and the Government of Canada (2008). http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_141032.pdf; KIRKPATRICK, P. (Dir) (2011): EU-Canada SIA Final Report, June.

these companies generated 90 million jobs (67 per cent of total employment). However, of the approximately 20.9 million SMEs that currently exist in the EU, only 619,000 export to countries outside the EU. We can therefore conclude that micro and small enterprises base their main market on the local economy and that most of the exports of all SMEs are done in the intra-EU area.

In Canada, as in the EU, 99.7 per cent of the companies are SMEs. However, they have a more pronounced export pattern (11.8 per cent of them export) although it should be noted that it is mainly the medium enterprises and not the small ones that export. The main destination of these exports is the United States which receives around 96.2 percent of them; in fact, 81 per cent of Canadian companies are linked as subsidiaries of companies of the United States and 42,000 companies from the United States[52] operate in its market.

We are thus faced with two contrasting realities and the ECORYS report itself made specifically for the TTIP has recognised that beyond the existing barriers, the export capacity of a company is bigger the greater its size[53]. Therefore, larger companies - European and mainly North American (US and Canadian) - would be ideally placed for more favourable growth as a result of TTIP and CETA. That means CETA and TTIP can be presented as the opportunity for the EU's SMEs to export to the US and it outweighs the risk that hangs over SMEs with a treaty of this nature. It transforms TTIP and CETA into an instrument at the service of large enterprises of both business areas to expand and will largely come at the expense of SMEs[54].

Having proved that there is no basis for the alleged beneficial effects of CETA for SMEs, it behoves us to observe some of its adverse effects. Following the study by the MORE project (Movement for Responsibility in Trade Agreements),[55] negative effects for SMEs are mainly derived from four CETA integrated fundamental mechanisms: the negative list, the regulatory cooperation forum, the regulation of designations of origin and the ICS (Investment Court System).

52 *Key small business statistics*, June 2016, www.ic.gc.ca/sbstatistics

53 ECORYS (2009): Non-Tariff Measures in EU-US Trade and Investment – An Economic Analysis, Nederland BV: ECORYS

54 Capaldo, J. (2014): "The Trans-Atlantic Trade and Investment Partnership: European disintegration, unemployment and instability". Global Development and Environment Institute, Tufts University. Working Paper núm. 14-03. Medford; Lorente, R., Guamán, A. (2016): "Los efectos del TTIP sobre las Pymes" in Guamán, A., Jimenez, P. (coords.) *Los acuerdos comerciales como estrategia de dominación del capital. Las amenazas del CETA y del TTIP*. Pol·len edicions. Barcelona.

55 http://projekt-more.eu/wp-content/uploads/2016/07/2016-07-20-CETA-and-SMEs.pdf

In all cases the impact on SMEs is clear: limiting the regulatory capacity of public authorities at various government levels; the ability to promote or protect SMEs with specific policy measures is also limited which is negative for their possibilities for expansion and growth. In the case of the regulatory cooperation mechanisms, the involvement of lobbyists in the legislative process can only lead to a regulatory framework that favours big business rather than SMEs. Finally, as discussed in the next section, CETA will mean a decrease in the recognition of appellations of origin. Since SMEs are the main protagonists in this area, they will be the first to be affected.

4.3. The problem of geographical indicators: what is protected and what is left to the free market

The TRIPS Agreement[56] signed in 1994 within the framework of the WTO is the multilateral treaty that establishes the foundation for international standards of intellectual property legislation. However, TRIPS supposes a minimum level of protection. From that base, each state or region develops laws and very different protection levels.

TRIPS itself generates enough gaps to enable very different interpretations. First, its 22nd Article defines broadly what a geographical indicator is but does not clearly specify what level of protection it deserves. This broad definition has been used by countries like the United States and Canada to argue that there is only one violation if the manufacturer intends voluntarily to induce error regarding the true origin of the product. That signifies, to the extent that this is not so and that the geographical indicator (GI) is only used to describe the type of product, that there is no violation. Only in the case of wines and spirits (Article 23 of TRIPS), is it stated that the use of geographical indicators will not be allowed, even if they are accompanied by expressions as 'kind', 'type', 'style', etc.

Finally, paragraph 6 of Article 24 of TRIPS[57] sets the framework for any state to make exceptions for any product so that each state can say that a given GI will not be used on its territory to actually designate products of that region, but a type of product, a generic, regardless of where this occurs. This was the argument used conventionally by countries like the United States and Canada in order to not provide protection for European Geographical Indicators. In the Doha Round of the WTO negotiations, the European Union proposed that the same level of protection that Article 23 of TRIPS provides for wines and spirits should be granted to other food products - but abandoned the proposal because of the opposition of the US[58].

Canadian law, like the United States, does not grant protection to designations of origin as such but equates to trademarks. The Canadian *Trademarks Act* follows the most restrictive interpretation of TRIPS so that the registration of a GI is only possible in the field of wine and spirits; to other products the trademark approach applies exclusively. The problem is that while certain products such as Roquefort or Cognac enjoy a similar level of protection on both sides of the Atlantic, this is not true for many others.

Taking into account all of the above, there is doubt as to what changes would involve CETA given the current situation. Currently, the protection of Appellations of the European Designation of Origin in Canada is covered by three treaties. Broader, but also less concrete, is TRIPS, as already discussed. In the field of wines and

56 Agreement on Trade-Related aspects of Intellectual Property Rights, in: https://www.wto.org/english/docs_e/legal_e/27-trips.pdf

57 Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 24, para. 6: "Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to goods or services for which the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member. (...)."

58 Matthews, A (2014): "Geographical indications (GIs) in the US-EU TTIP negotiations". En: http://capreform.eu/geographical-indications-gis-in-the-us-eu-ttip-negotiations/

spirits, the terms of TRIPS favour greater protection, therefore two specific agreements between the EU and Canada have been signed: the 1989 Agreement on alcoholic beverages and the 2003 Agreement on wines and spirits.

Before we analyse the content of the agreements we must draw attention to the fact that the concept of 'geographical indicator', as defined in Article 20.16 of CETA differs with respect to that offered in TRIPS. While the Article 22.1 of TRIPS refers to "a product", Article 20.16 copied almost literally the rest of the definition of TRIPS, but replaces the word "product" by "agricultural product or foodstuff". That is, the signing of CETA would definitely close the door to the development of non-agricultural designations of origin to which the European Union has recognised to channel an advance[59].

"Only 166 European Geographical Indicators are listed while the European Union recognises almost 1,500. It is regrettable that the European Union sacrifices Geographical Indicators in this agreement."

Stelios Kouloglou, MEP, GUE/NGL

In the field of wines and spirits, the 1989 Agreement on alcoholic beverages and the 2003 Agreement on wines and spirits are integrated into CETA. The vast majority of the 2,090 recognised GI in the European Union are covered by the agreement[60], i.e. they would be protected in Canada. However, in the area addressed by CETA - which was not covered by previous treaties - for Geographical Indicators of agricultural products, the balance is much less positive. From the 1,349 GI protected agricultural products, CETA only provides protection to the 166 listed in Annex 20-A[61]. In addition, for the 1,178 GI that remain outside this list - 87.3 per cent of which are European - the signing of CETA would mean accepting that they will never be protected in Canada, since Article 20.22 prohibits any in the EU registered DO at the time of signature of the Agreement will be incorporated in the future Annex 20-A, which will list the protected GI.

For O'Connor[62], the problem of having negotiated such limited protection is that the EU is undermining the

59 Non-agrarian GI are recognised in the European Union, but there is not a unitary register at the European level, which means that the protection is only granted at state or regional level. Since 2011, the European Commission has moved toward an increased protection of non-agrarian GI. In 2014 the "Green Paper — Making the most out of Europe's traditional know-how: a possible extension of geographical indication protection of the European Union to non-agricultural products" was published, and the same year a public consultation on the topic was launched. On October 6, 2015, the European Parliament adopted a non-legislative Resolution on the possible extension of GI protection of the EU to non-agricultural products (2015/2053(INI).

60 The Agreement includes only 1,960 GI out of the total 2,090 existing GI. The difference might correspond to GI that have been created since the signature of the Agreement.

61 Although according to the European Commission the number of protected GI is 177, there are actually 6 of them (Feta, Munster, Asiago, Fontina and Gorgonzola) which are included under the exception of Article 20.21 which means that the use of these terms is allowed if followed by words such as "class" or "style".

62 O'Connor, B. (2015): "Geographical Indications in CETA, the Comprehensive Economic and Trade Agreement between Canada and the EU." In: http://www.origin-gi.com/images/stories/PDFs/English/14.11.24_GIs_in_the_CETA_English_copy.pdf

concept that the geographical indicators are separate from intellectual property, independent from the rest and equivalent to trademarks. Some successes in protecting specific products cannot hide the failure to address the underlying need to obtain the recognition of the GI as a legitimate form of intellectual property that can coexist with the trademark law.

4.4. The impact of the contents of CETA on labour rights

The relationship between free trade agreements and work is a long-debated issue and both TTIP and CETA have relocated the issue to the centre of political and economic debate. Based on the qualitative prism, those who forecast that the mechanisms for trade liberalisation and investment promotion cause, as a general rule, a decrease in labour regulatory standards, and those who say that this 'race to the bottom' does not have to happen or that, even if it does happen, it is a necessary element to promote competitiveness and that its consequences would be offset by an eventual increase in employment.

In order to address an impact analysis of CETA on labour, we need to start from the general framework concerning the relationship between trade agreements and labour rights, developed by the European Commission in various communications adopted between 2001 and 2015[63]. Its position can be realised in three ideas: first, as a starting point, it is assumed that the EU integration in the global economy through increased trade will generate an increase in jobs and wages; second and notwithstanding the first statement, it is accepted that the cost of adjustment in different areas or sectors can sometimes be high; third, the Commission is committed to promoting a 'chapter of ambitious and innovative development' in each of the negotiated treaties in order to avoid the negative impact on labour standards.

The analyses of CETA are scarcer than the abundant literature on TTIP. The report on the cost-benefits most often cited, commissioned jointly by Canada and the EU in 2008, used a similar methodology to the studies solicited by the Commission to assess the impact of TTIP[64] criticised for sharing a single econometric "General Equilibrium" model with three insurmountable gaps: i) assume perfect information, ii) parting from perfect mobility and perfect interchangeability of the factors (including labour), iii) state the full use of production factors[65]. In fact, according to the study of Raza et al.[66] "all of these studies used models that are based on supply-side, neoclassical assumptions and cannot speak for important macroeconomic variables such as employment".

CETA's costs and benefits official report forecast a remarkable economic growth for both parties but did not make quantitative predictions about jobs. Despite this, the Canadian Trade Minister said the agreement with

63 European Commission: *Promoting core Labour Standards and Improving Social governance in the context of globalisation*, COM (2001) 416; *Global Europe: Competing in the World, A Contribution to the EU's Growth and Jobs Strategy*, COM(2006) 567 final; *Trade, Growth and World Affairs Trade Policy as a core component of the EU's 2020 strategy*, COM (2010) 612; *Trade, growth and development Tailoring trade and investment policy for those countries most in need*, COM (2012) 22; *Trade for all. Towards a more responsible trade and investment policy*, COM (2015)

64 Vid: CEPR (2013): *Reducing Transatlantic Barriers to Trade and Investment*, London: Centre for Economic Policy Research. 2014; ECORYS (2009): Non-Tariff Measures in EU-US Trade and Investment – An Economic Analysis, Nederland BV: ECORYS; Bertelsmann, S. (2013): "Transatlantic Trade and Investment Partnership (TTIP)" http://www.bfna.org/sites/default/files/TTIP-GED%20study%2017June%202013.pdf.

65 Capaldo, J., *TTIP: European Disintegration, Unemployment and Instability*. GDAE Working Paper14-03; De Ville, F., G. Siles-Brügge (2013): The false promise of EU-US trade talks. http://blog.policy.manchester.ac.uk/featured/2013/12/the-false-promise-of-eu-us-trade-talks/; Venhaus, M. (2015): «An Unequal Treaty. TTIP and Inequality in Europe», BFoGP Working Paper WP/2015/01; Raza et al. (2016): *Assess_Ceta: Assessing the claimed benefits of the EU-Canada Trade Agreement (CETA)*, OFSE, Vienna.

66 Raza et al. (2016): *Assess_Ceta: Assessing the claimed benefits of the EU-Canada Trade Agreement (CETA)*, OFSE, Vienna.

the EU would allow the creation of 80,000 new jobs in Canada - a statement that given its lack of justification was widely criticised[67]. The SIA 2011[68] restates generically that CETA will generate benefits in all areas. But in terms of employment generation, an even approximate general quantification of the jobs that could be created or destroyed is not performed. Following the analysis by sector, it is possible to detect how the report itself acknowledges that the effects on employment and its quality are not clear. This is seen clearly in the agriculture sector, on which the report states: "While high degrees of liberalisation would produce the greatest overall economic gains, it could negatively impact dairy in Canada and beef/pork in the EU. Workers in these sectors would, subsequently, be expected to be negatively impacted by this and a number of workers likely forced to shift into alternative sectors over the long-term[69]"

"These treaties could lead to a drop in labour income, converting decent working conditions into trade barriers (to eliminate) and promoting an aggressive competition between European and Canadian companies."

Tania González, MEP, GUE/NGL

The OFSE report (based on the OFSE Global Trade Model) explicitly reports employment effects and changes to macro-economic variables. It shows that, in the best scenario, "EU employment increases slightly by +0.018 per cent. However, real wages shrink slightly for lower skilled workers (-0.011 per cent), whereas small gains for high skilled workers are possible (+0,014 per cent)". It also states that "adjustment costs caused by temporary unemployment during the implementation period of CETA are possible"[70].

In trade agreements, the parties are not directly obliged to reduce their labour standards. From the moment when capital gains the necessary freedom of movement, it tends to locate to places with lower costs - for both financial and regulatory reasons. In this way, the areas where they maintain or raise labour standards tend to lose investments compared to those where the costs are reduced. This phenomenon inevitably leads to a race to the bottom to attract foreign investment. A detailed analysis of CETA points to four points of friction between the content of this agreement and labour rights: the maximisation of the liberalisation of services and the applicable standards to the labour force displaced in the transnational services (the so-called Mode 4); the reduction of the possibilities of introducing social clauses in public procurement derived from regulations by CETA; the possible consequences of regulatory cooperation mechanisms on labour

67 Vid. http://canadians.org/blog/cetas-promise-80000-jobs-doesnt-add

68 Kirkpatrick, P. (Dir) (2011): *EU-Canada SIA Final Report,* June.

69 "Given that many provinces exempt a number of workers involved in agriculture and certain types of processing from minimum employment standards, greater shifts into the sector could lower the overall level of standards that the workforce is exposed to. This would also create greater levels of temporary employment, given the nature of the work, which could disproportionately be filled by foreign labour under Canada's Seasonal Agricultural Worker Program. Further, as agriculture and food processing tend to have some of the highest rates of work related injuries and fatalities, expansion of employment in Canada and the EU's agriculture and food processing sectors could expose a greater number of workers to working conditions that are more unsafe than average. This could, in turn, produce negative consequences for the level of work-related stress of employees in both Canada and the EU". Ibídem.

70 RAZA et alt. (2016): *Assess_Ceta: Assessing the claimed benefits of the EU-Canada Trade Agreement (CETA)*, OFSE, Vienna.

regulatory standards and collective agreements; the impact of the resolution systems for investor-state disputes on labour rights and in particular on its heteronomous and autonomous regulation (collective agreements)[71].

Faced with these potential threats, the negotiator's discourse has focused on the inclusion of a chapter (Trade and Labour) in CETA. It is the 23rd chapter, with a very broad content that seeks to certainly legitimise the treaty by giving it a social appearance. It formally recognises aspects as the value of international cooperation on labour matters; the need for greater coherence in the policy about decent work; the importance of social dialogue and ILO standards - including the Declaration of 1998. Despite this scope, the 23rd chapter has many inconsistencies and presents deep problems.

First, the negotiating parties refer to the ILO regulations as a common basis but the use of the ILO standards raises doubts given the unequal number of ratifications between signatory parties and the lack of the EU competences to carry out these ratifications. In this regard, it should be noted that Canada has not ratified two of the eight core conventions and neither two of the priority ones[72]. In addition, although the EU has the capacity to sign international treaties (Article 216 et seq TFEU), it cannot, however, ratify the ILO Conventions as the Constitution of the latter prevents it (Article 15.5 (d) so that their commitment to "push forward" remains actually unheeded.

Secondly, the chapter covers cooperation in areas such as labour inspection, which are clearly outside of trade and investment policy. What is also clear is that the issues related to the labour process and their guarantees do not fall under the exclusive competence attributed to the EU but, in any case, linking them, it is a matter on which there is shared competence, sufficient reason to consider the CETA as a mixed agreement.

Thirdly, the 23rd chapter integrates a number of institutional mechanisms for the implementation of the chapter and the methods of dispute resolution are exclusive and different from those for the rest of the subjects of the treaty. Article 23.11 clearly states that the commitments made in the chapter are mandatory and enforceable, but only through consultation procedures, access to the expert panel or by mutual agreement, and the recourse to conciliation or mediation mechanisms. That is, without the possibility of penalties for breach of the obligations of the parties regarding labour rights is actually established. Thus, it can be said that the recommendation of SIA which indicated that in the chapter on labour issues an "effective monitoring body" should be integrated is clearly violated.

4.5. The impact on the health of humans, animals and vegetation

It has been often stated that one of the priorities of the CETA negotiators was to limit the public debate about the agreement. They have avoided having to deal with the most controversial issues and occasionally they have "made-up" the most controversial issues (as happened with the substitution of the ISDS for the ICS). In the case of the regulations that affect sanitary and phytosanitary measures, they have avoided making direct modifications to the regulations to instead establish mechanisms to help change them in the future. In that sense, the negotiators have sought to dampen criticism that the decrease of protective measures would have generated but have instead set the conditions to achieve the same objective in the medium term.

Despite this strategy, one of the issues most widely used by critics of the treaty has been the question of chlorinated chicken. The standard practice in the US and Canada to treat chicken and derived products with chlorine is banned in the European Union. The rules of the European Union are more demanding on hygienic standards throughout the production chain. The practice is prohibited as it leads to less sanitary safety

71 Guamán, A. (2016): "La política comercial de la UE y su impacto en los derechos laborales: una aproximación a los posibles efectos de la firma del TTIP y del CETA". Lex Social: Revista de Derechos Sociales, [S.l.], v. 6, n. 2. https://www.upo.es/revistas/index.php/lex_social/article/view/1978

72 Canada is one of only 24 countries in the world that have not ratified Convention No. 98 – Right to Organize and Collective Bargaining (1949) and is one of only 22 countries in the world that have not ratified Convention No. 138 – Minimum Age (1973). Canada has not ratified neither Convention 81 and 129 (Labor Inspection Convention).

and trust that this last wash removes bacteria. The risk that the EU starts to import chlorinated chicken from Canada, or even starts to use this technique in the European Union has been one of the arguments that has attracted more criticism of CETA. This has contributed to the fact that the poultry sector has been relegated to very discreet commitments about access to the markets.

"CETA opens the door to indiscriminate imports of Canadian oil and gas, threatening the energy sovereignty of the EU and its COP21 goals. Through ICS, it will also destroy the EU's environmental regulation in energy and mining, from fracking to gold cyanidation. For a sustainable economy: no to CETA."

Paloma López, MEP, GUE/NGL

However, when studying the agreement's SPS article we note that chlorinated chicken is just the tip of the iceberg. As noted by Sujata Dey (The Council of Canadians) "The Canadian sanitary and phytosanitary standards are frequently close to the US standards. In Canada, ractopamine and other hormones are used; neonicotinoids are banned in the EU. We are the third largest producer of GMOs in the world - for which there is no labelling. Through CETA, Canada has pushed the EU to accelerate the approval of GMOs and has obtained the promise that it will be so."

One of the primary interests of Canada was to ensure market access to meat, particularly beef and veal. We have already seen in the tariff chapter that the EU has agreed to the requests from Canada and has accepted that Canada exports duty-free 50,000 additional tons of beef and veal. The Food Inspection Agency of Canada (CIFA) replicates in the chapter on beef the requirements of poultry, i.e. it allows the chlorinated wash. We note that the practice of disinfecting the final product, instead of paying attention to sanitary conditions along the entire production chain, not only refers to chlorinated chicken but also to other sectors.

Another area in which CETA would represent a clear threat is that of environmental regulations. In this sense, the field of mining exemplifies better than any other because CETA would involve a reduction in the level of protection in the European Union. Chapter 24 of the Agreement contains the environmental clause which should enable and even encourage the adoption of measures to protect the environment on both sides. However, in Chapter 5.9, the clause only provides a partial protection that depends of an analysis of "cost-effectiveness". In addition, the experience of previous bilateral treaties with ISDS mechanisms shows that environmental standards generated in all cases the biggest complaints.

75 per cent of the mining companies in the world are registered in Canada and 60 per cent of the listed companies are in Toronto[73]. The mining companies registered in Canada are not only based in the country to exploit the notable local reserves but also because of the legal and tax advantages available to them. In fact around 2,061 of them are active abroad[74]. Dominique Bernier, Member of the Quebec Coalition Against Mining, reminds us that, "in Canada, the regulatory framework that governs mining is above almost any other standard. There were attempts to reform this law, but each time the government has not moved forward to avoid complaints through NAFTA". Indeed, most of Canada's current mining regime[75] is based on the principle of *free mining*, dating back to 1858. This principle implies the right to free access of land whose resources are public property, the right to acquire these resources through a mining title without the central government having to intervene and, finally, the right to exploit these resources[76].

The free mining principle has been a burden for the development of Canadian environmental mining regulations. In fact, it remains one of the developed countries that does not meet international standards in terms of social and environmental protection[77]. Indeed, sometimes Canadian regulations on mining are not obliged to respect the principles of public participation, environmental protection and the "polluter pays" principle which can be found in the laws of sustainable development in different provinces[78].

It is evident that the pressure of the huge mining lobby based in Canada (constituted both by Canadian and foreign companies) is the main cause of this anomaly in Canadian law. Among the many international organisations that have denounced the abuses of Canadian mining companies and the helplessness before the law of those trying investigate civilly alleged offences committed by them are the Oxford Pro Bono Publico (OPBP) or the OCDA and the UN[79]. The scope of the Canadian mining lobby is not limited to national legislation but also has a crucial weight in negotiating bilateral treaties to which Canada is a party and has influences in the agencies and diplomacy. This explains, for example, that it finances the reform of the mining code in Peru and Colombia[80].

Since CETA is no exception, and its environmental clause and the formulation of the ICS does not provide guarantees to European legislation, it is expected that CETA constitutes an obstacle to the achievement of the objectives of the EU in the framework of the COP21 and for the overall European environmental legislation.

4.6. The end of the precautionary principle and the inadequacy of the environmental clause

The precautionary principle is formulated in Article 191 of the Treaty on the Functioning of the European Union (TFEU) and its scope extends to the policy of environmental protection, consumers, and legislation concerning food, human, animal and vegetable health. The precautionary principle enables a quick reaction to a possible danger to human, animal or vegetable health, or to protect the environment. In the case that the scientific data does not permit a complete risk assessment, the use of this principle allows, for example, to prevent the distribution of products that may pose a health hazard or to withdraw them from the market. It is up to the manufacturer, producer or importer to demonstrate that the product in question is not harmful and only then, and if the evidence is convincing, will the legislator allow the distribution.

Canada, however, does not recognise the precautionary principle. In an uncertain situation over the possible effects of a substance or a product, i.e., in the presence of a potential risk, Canada chooses neither to intervene nor to veto until science is not able to give certain answers; eventually only then can the public

73 DENEAULT, A. y SACHER, W. (2012): "Toronto, corazón del imperio minero", Le Monde Diplomatique. Edition number 171.

74 Minister of Foreign Relations and International Trade (2009) "Renforcer l'avantage canadien: stratégie de responsabilité sociale des entreprises (RSE) pour les sociétés extractives canadiennes présentes à l'étranger" *apud* DENEAULT, A y SACHER, W (2012), *op cit.*

75 Particularly in the provinces of British Columbia, Ontario, Québec, Yukon and Territoires du Nord-Ouest

76 Lapointe, U. (2010) : "L'héritage du príncipe de free mining au Quebec et au Canada". Recherches amérindiennes au Quebec, vol. 40, nº3, In : https://www.erudit.org/revue/raq/2010/v40/n3/1009353ar.pdf

77 Ibídem. The author provides as a clarifying example the fact that the Canadian laws do not comply with the volunteer standards provided by the Rio Declaration of 1992, the Convention 192 of the ILO, the 2000 OECD Guidelines and the UN Declaration on Autonomous People's rights of 2007.

78 Ibidem.

79 Deneault, A. & Sacher, W. (2012): "Toronto, corazón del imperio minero", Le Monde Diplomatique. Edition number 171.

80 Ibidem.

take countermeasures[81]. Contrary to what happens in the European Union, the burden of proof rests with the legislator who must prove conclusively that the product is harmful. In practice, this leads to a situation of paralysis because the government's limited resources are insufficient to meet the costs of scientific studies.

The underlying issue in the debate about the possible negative impact of CETA on the protection level of European legislation is whether the precautionary principle, thanks to which sanitary and phytosanitary measures of the European Union are more protective than Canadian measures, is threatened. If regulatory cooperation establishes mechanisms to call into question normative judgment based on the principle of protection - and we have seen that this is the case - then the European sanitary and phytosanitary standards are at risk.

The Commission has been quick to announce that the precautionary principle will not be negotiated. But on what basis is this affirmation made by studying the articles of the treaty? Jurjen de Waal, a member of Foodwatch, warns that the precautionary principle is not explicitly mentioned in any article of CETA[82]. The closest thing to a recognition of the precautionary principle is mentioned in the Articles 23 (trade and labour) and 24 (trade and environment) that specify that "the lack of full scientific certainty (cannot be used) as a reason for postponing security measures with a good cost-effectiveness ratio" (Art 23.3.3 and Art 28.8.2). Clearly, the omission of the term "precautionary principle" is not accidental. Indeed, the way the exception arises here is restrictive by introducing the requirement that the measures have a "good ratio between cost and effectiveness".

The text explicitly mentions that consideration should be given to the Committee on Sanitary and Phytosanitary Measures of the WTO (Article 5.14.3), which returns to endanger any sanitary or phytosanitary measure that resulting from the application of the precautionary principle is more protective than that required by the WTO. The WTO does not recognise the precautionary principle as such since according to the chapter on SPS measures of the WTO, measures to prevent potentially dangerous products must be "temporary" and the legislator has to prove their harmful effects "within a reasonable period of time[83]". That is, the burden of the proof to maintain the measure lies with the legislator and not on the person who wishes to commercialise the product.

An incontestable proof of the risk that the precautionary principle is not explicitly stated in the agreement with Canada, while the legitimacy of the Committee on SPS measures of the WTO is recognised, is the result of the US and Canada controversy vs EU about the import of hormone-treated meat. In this case, the WTO's Committee on SPS measures ruled in favour of the plaintiff as it considered that the European measure "restricted unnecessarily trade[84]." It is, therefore, a case that proves that the WTO does not recognise the precautionary principle as a principle of general international law[85].

81 GERMANÒ, A (2003): "La responsabilità del produttore agricolo e principio di precauzione", *Trattato Breve di Diritto Agrario Italiano e Comunitario,* Luigi Costato, Padova, 3 ed.

82 Presentation at the GUE/NGL hearing "TTIP, TPP; CETA, TiSA", 2015.

83 On the European Commission's Communication on the precautionary principle of February 2000, the Commission announced that the precautionary principle "has been recognised by various international agreements, notably in the Sanitary and Phytosanitary Agreement (SPS) concluded in the framework of the World Trade Organisation (WTO)". However, when reading this agreement we observe that a) the WTO never mentions explicitly the "precautionary principle" itself" b) the understanding of damage prevention by the WTO is weaker than the EU's since all the measures must be provisional and it is unclear that the burden of proof lies with the producer, importer or distributor.

84 This decision does not force the EU to lift the ban on American and Canadian meat, nor does it imply the payment of compensation. However, Canada and the US were authorised to introduce equivalent sanctions through import quotas or tariffs. In 2012 the sanctions were substituted by an extension of the tariff free meat quota which these two countries can export to the EU.

85 DE SADELEER, N. (2001): "Le statut juridique du principe de précaution en droit communautaire: du slogan à la règle", Cahiers de Droit Européen, nº1-2.

Finally, Article 25.2 (dialogue on biotechnology) is explicit in that the approval procedures for biotech products must be "efficient and scientifically based", i.e., they return to terms used that, in practice, represent the annulment of the precautionary principle.

We can therefore conclude that while the European Commission has insisted that the precautionary principle is not affected by any of the new generation trade agreements, the text of the CETA presents evidence to the contrary: it not only evades explicitly mentioning this principle but rather focuses on risk or "based on science".

5. CETA versus law: inconsistencies, gaps, and legal problems

CETA not only raises problems about the impact of its content on the rights of people and the environment, it also constitutes a breach of the principles of transparency that the European Commission preaches, as well as a reducing the power of the European Parliament to a bare minimum and a breakdown of various aspects of the legal system of the EU and its member states. The secret negotiations, the limited discussion at the EU institutions during its negotiation and the approval of the proposal with an immediate provisional application are clear evidence of the Commission's intention to force through the treaty without subjecting the text to an open and proper debate. Such discussions are not only essential for the health of the system but because democratic Community law itself requires it.

5.1. An opaque negotiation

In the EU-Canada summit in 2002 - the starting point for CETA, though negotiations were frozen until 2009 - the importance of consultation mechanisms that would ensure the direct participation of NGO representatives among other interest groups was stated. However, in view of what happened, we can say that in practice the public debate has been virtually non-existent until TTIP came along. This opacity has been clearly pursued by the negotiators. Thus, it is no coincidence that, according to the terms originally envisaged by the negotiators, CETA had to be signed before they started TTIP negotiations since it was expected that this other treaty would attract considerable attention. In a meeting between interest groups and the Canadian and European negotiators, Steve Verheul, Canada's chief negotiator, lamented that "the negotiations of CETA have been extended and are expected to be completed at the same time as TTIP. Otherwise, we could have signed CETA without a fuss[86]".

The limited content of the European Parliament resolution of 8 June 2011, on EU-Canada trade relations[87] should be taken into account. That resolution defines the opinion and the Parliament's guidelines on the agreement. A first quantitative analysis shows a clear lack of depth: the resolution in question contains only 19 recommendations against the 69 of the Resolution on TTIP or the 79 of the Resolution on TiSA. From a qualitative point of view, it is noteworthy that all the recommendations are of general nature and allusions to the content of the negotiation documents are almost non-existent.

Beyond the content of this resolution, it is relevant to analyse if the text of CETA respects the red lines that the European Parliament marked in its more comprehensive resolution on TTIP. Logically, one would expect that there is a consistency in the Parliament's demands to both treaties but the reality is that there is none. As detailed by De Ville,[88] there are many paragraphs of the resolution that the CETA text does not respect and these inconsistencies are troubling for two reasons. First, CETA is the first ambitious trade agreement with another industrialised country to be signed by the EU - which means it will set the precedence for future

86 Presentation in the seminar Canadá – Unión Europea: Acuerdo Económico Comercial Global, which took place on 23rd April in La Casa de América, Madrid.

87 Full resolution: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2011-0257%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN

88 DE VILLE, F (2016): "In pursuit of a consistent European Parliament position on two transatlantic trade agreements".

agreements. In this regard, it should be noted that in the eighteenth round of the TiSA negotiations, the US delegation circulated among participants a comparison between the trade liberalisation of the EU in CETA and its offer in TiSA to show that the latter is less ambitious. If the EU has already been attacked because it has not been exposed enough to liberalisation in TiSA, how can we expect the same will not happen in other negotiations? And if this happens, will the Commission sacrifice the defensive conditions required by the European Parliament? A second troubling element of this inconsistency is that given the deep integration between the US and the Canadian economies, US companies can choose which of the two treaties is more favourable and brandish the one through its subsidiaries in Canada or the other from its parent company in the USA.

5.2. The problems of Provisional Application

One of the most contentious issues has been the CETA approval procedure and the possibility that the agreement is applied provisionally before completing the ratification process. Both issues are linked and are conditioned by the existence of certain elements within the treaty that have been regarded as contrary to the legal system of the EU.

Regarding the approval procedure, the Commission has consistently said that the Union has exclusive competence to conclude CETA individually because, in its opinion, it would be within the common trade policy. In addition, the Commission has stated that if any part of the agreement remained outside of this policy, it would fall – in any case –within one of the exclusive competences of the EU. This same position had been held by the Commission on the EU-Singapore agreement in its application presented before the Court of Justice[89] for its Opinion. Pending the outcome of this Opinion and despite having declared that it is an agreement that only concerns EU competence, the Commission decided to propose the signing of the agreement as a mixed treaty[90] in order not to delay its signing in view of the possibility that many voices within the Council and within the scope of state parliaments and governments[91] might demand that the EU member states could present their point of views on CETA.

89 The Opinion was requested following Art. 218. 11 of the TFEU (Opinion 2/15, (2015/C 363/22). The questions were the following: Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically: Which provisions of the agreement fall within the Union's exclusive competence?; Which provisions of the agreement fall within the Union's shared competence?; Is there any provision of the agreement that falls within the exclusive competence of the member states?

90 It must be taken into account that with the Lisbon Treaty (Art. 207 of the TFEU) the common trade policy's reach was extended to include the trade agreements referring to services, intellectual and industrial property, and foreign direct investment. The objective was to avoid the existence of "Mixed Agreements", however since CETA and TTIP came into public debate the majority of experts have noted that these treaties can't be considered EU-only because of the wide scope of their contents.

91 Some of the most significant pronouncements in favour of CETA being considered a mixed agreement are: The letter sent on the 25th June 2014 by the Presidents of the Commissions of EU affairs of the 20 different Chambers to the Trade Commissioner asking for the text to be voted in the 28 member states; on the 27th April 2016, the Walloon Parliament approved a resolution demanding the regional government not to grant the power of voting CETA to the Belgian Government; on the 7th June Luxembourg's Parliament approved a motion urging the Government to defend CETA's mixed nature; on the 14th June 2016 the Dutch Parliament approved a number of motions asking the Government to urge the Commission to allow the National Parliaments to express their position concerning the inclusion of ISDS in CETA: on the same date, Hungary's National Assembly urged the Government to maintain the position of considering CETA as a mixed agreement and rejecting its provisional application.

The recognition as a mixed treaty involves the opening multiple ratification processes that involve the 40 parliamentary chambers in the area of the 28 member states and it would be legally possible to conduct 14 national referenda. This was probably the scenario that the Commission wanted to avoid because its expectations from the beginning were to complete CETA in 2016. By avoiding any undue delay and to encourage its adoption, the Commission proposed that the agreement can be applied provisionally.

Provisional application is a technique used with respect to international treaties to provide its substantive provisions an immediate effect, even before the parties have to comply with the required procedure for approval and entry into force. This provisional approval was the method used, for example, in the treaty between the EU and South Korea, allowing the trade agreement to come into force in 2011 although the procedure for approval as a mixed treaty was completed in 2015[92].

The legal basis for the provisional application of CETA is Article 218.5 (the Council, on a proposal by the negotiator, will take a decision to authorise the signing of the agreement and, if necessary, its provisional application before entry into force). This allows the Council to take such a decision but does not set the time, although it will obviously be before the final deadline of the agreement. CETA itself contains a number of provisions that regulate possible provisional application. In particular, Article 37.3 includes the possibility to apply the treaty provisionally from the date on which the parties agree. Once the provisional application is accepted and a concrete date is determined, it will be considered for all purposes as the moment of "entry into force of the agreement", leading to the overall functionality of its internal mechanisms regarding all provisions that are understood within the advanced application. On the other hand, the fourth paragraph of Article 30.8 provides that should the treaty not be ratified (e.g. when a member state objects), the provisional application

92 See the list of Agreements with specific clauses concerning their entrance into force (including provisional application) in: **http://ec.europa.eu/world/agreements/viewCollection.do?fileID=76210 .**

of CETA would end, although when exactly is not made clear. However, the article warns that investors may present a claim based on Section F of Chapter 8 (Investment) within a period not exceeding three years from the date of termination of the provisional application with respect to any matter arising during the provisional application of CETA. In other words, the ICS would behave like a zombie mechanism.

"The Commission still wants to force the agreement upon the people of Europe by enabling the agreement to be applied provisionally, before the member states' national parliaments have made their decisions."

Helmut Scholz, MEP, GUE/NGL

In addition, there are many questions concerning the provisional application, such as the possible scope thereof, the role of parliament or even the legal possibility of it arising. Here are some details:

- The provisional application decided by the Council before ratification by the member states can only occur with respect to the parts of the agreement that deal with matters falling within the exclusive competence of the EU. With this in mind, the Commission, in its proposal for a Council decision, described the entire CETA as an exclusive competence of the EU although it is not commercial policy. That is, it considered CETA as a mixed treaty, but only because of its political sensitivity. In terms of content, the Commission reaffirmed that as CETA is the exclusive competence of the EU then it can be provisionally applied in its totality.

- The provisional approval can be approved by the Council even before the approval of the agreement by the European Parliament which has caused a political storm between the two institutions. To avoid further conflict, former Commissioner De Gucht coordinated the effective date of the provisional entry into force of the agreement with South Korea with the pronouncement of the EP. The current commissioner said in response to a parliamentary question[93] regarding CETA that such a solution would be addressed but none of this is covered in the proposal from the Commission to the Council about the adoption of CETA. The only clarity about the role of Parliament is found in Article 109 of the Operating Regulation of the European Parliament whereby, when the Commission reports to the Parliament and the Council its intention to propose the provisional application or the suspension of an international agreement, a statement followed by a debate in plenary will be formulated.

- One of the issues to be addressed is the possibility of the provisional application in the light of the constitutional provisions of some states. For example, the Irish Constitution lays out in Article 29.5.2 that the state cannot be bound by an international treaty that involves changing its public expenditure unless the agreement has been approved by the Parliament. As we have seen, on the one hand CETA involves public expenditure (although only for the budget to create the ICS) and it can certainly implicate expenditure for the duration of this application and even in three subsequent years that Ireland can be the subject of a lawsuit by a Canadian investor. On the other hand, the treaty itself states that the date of the provisional application should be understood for all purposes as the date of entry into force, so de facto the provisional application for Ireland itself would require a favourable statement from the parliament.

Once again the investment chapter and in particular the dispute-settlement mechanism for investor-state disputes is placed at the centre of the debate.

93 http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2015-002491&language=EN

5.3. The ICS incompatibility with the EU legal system and the constitutional traditions of the member states

The question of compatibility between the system of protection of foreign investors and the EU system has two fundamental aspects. On the one hand the general part, i.e., the rupture that certain provisions of the investment chapter assume in respect of constitutional principles and legal traditions of the member states. In this sense, it has been argued that the planned mechanism (whether ISDS or ICS) provides special rights, privileges and a special jurisdiction for foreign investors that are incompatible with the principle of equality before the law and law enforcement, in order to ensure the rule of law and ensure the correct, impartial, fair, equitable and effective application of the law, (Article 1 of the European Magna Carta of Judges)[94]. In addition, some provisions of Section E on investor protection are not compatible with the constitutional traditions of many member states, such as the uncertainty of the principles of Fair and Equitable Treatment or Indirect Expropriation[95].

The second line of questioning regarding the mechanisms of protection of foreign investment refers to its compatibility with the EU system itself. The main criticisms can be categorised into two: the ICS violates the autonomy of EU law; the ICS involves discrimination prohibited by the Charter of Fundamental Rights of the EU and is unsustainable in the field of the internal market[96].

Before we treat this double issue it is interesting to note that the European Commission has developed a set of matching critical points - both in official texts and their participation as Amicus Curiae in various arbitration proceedings. One of the most important critical positions is included in the Commission text of 2013 called ''Commission Staff Working Document on the free movement of the capital in the EU[97]", which drew the following conclusions:

- When both parties are EU member states, there is no need, in principle, for these agreements since both national law and EU law provide for appropriate investment protection standards and remedies.
- Such agreements clearly lead to discrimination between EU investors and are incompatible with EU law.
- The arbitration mechanisms of a binding character are not subject to review by the ECJ on issues of interpretation of EU law. This form of international arbitration is incompatible with the exclusive competence of EU courts to rule on the rights and obligations of member states under EU law.
- In contrast to national courts, arbitral tribunals are not bound to respect the primacy of EU law and, in case of doubt, are neither required nor in a position to refer questions to the ECJ for a preliminary ruling.
- In any case, such investor-to-state arbitration is very costly and thus not easily accessible to SMEs.

Beyond this document, the Commission has been involved in various arbitration proceedings in which member states have been implicated and noted that bilateral investment agreements between EU member states are contrary to EU law. According to EU jurisprudence (including that of the member states), they

94 Fisahn, A., "ISDS and CETA", Presentation at the GUE/NGL hearing "CETA: TTIP in a Canadian disguise", http://www.guengl.eu/news/article/events/ceta-ttip-in-a-canadian-disguise-31-05-2016.

95 Ibidem.

96 Ankersmit, L., "Compatibility of ICS in CETA with EU law", Presentation at the GUE/NGL hearing "CETA: TTIP in a Canadian disguise", Op. cit.

97 Staff Working Document on the free movement of capital in the EU, SWD (2013)146 final, 15 April 2013, p. 11.

can still be used only insofar as they are compatible with the obligations of member states under EU law[98]. In addition, the European Commission is engaged in legal action against five member states requiring that they terminate their intra-EU BITs because ISDS contravenes the principles of the single market, and they argue thus: "[...] all member states are subject to the same EU rules in the single market, including those on cross-border investments (in particular, the freedom of establishment and the free movement of capital). All EU investors benefit from the same also thanks to EU protection rules (e.g. non-discrimination on grounds of nationality). By contrast, intra-EU BITs confer rights on a bilateral basis to investors from some member states only: in accordance with consistent case law from the European Court of Justice, discrimination based on nationality as such is incompatible with EU law[99].

Entering into a little more detail on the critical points identified by experts and various associations of judges and magistrates[100] we can say that:

- ICS violates the autonomy of EU law. The EU can sign international treaties; Article 216 TFEU empowers it to do so. According to the jurisprudence of the ECJ, once an international treaty is signed it enjoys primacy over secondary or derivative law but not over the primary law, which must be respected[101]. In this regard, primary law, as the ECJ interprets Article 91 TEU, states that the guardians of the legal system and the judicial system in the EU are both the ECJ and the courts of the member states which are competent to judge and to execute judgments[102], following the constitutional traditions of the member states[103]. The ECJ has also stated on several occasions that "an international agreement concluded by the Community may confer new powers on the Court, such as the power to interpret the provisions of such agreement, provided that in so doing it does not change the nature of the function of the Court as conceived in the EEC Treaty, namely that of a court whose decisions are binding"[104]. The key question is: given that the ICS does not establish an appeal mechanism before the TJEU, would the ICS interfere with the TJEU's exclusive right to provide the final interpretation of European law?

98 Vid. Achmea B.V. v. Eslovaquia (UNCITRAL, Caso No. 2008-13); AES Summit Generation v. Hungría (ICSID Caso No. ARB/07/22); Electrabel v. Hungría (ICSID Caso No. ARB/07/19).

99 Commission, 2015. 'Commission asks member states to terminate their intra-EU bilateral investment treaties'. European Commission - Press release, Brussels, 18th June. Available at: http://europa.eu/rapid/press-release_IP-15-5198_en.htm (03-06-16).]

100 European Association of Judges. Regional Group of the International Association of Judges. "Statement from the European Association of Judges (EAJ) on the proposal from the European Commission on a new Investment Court System". November, 2015

101 Case C-61/94. Commission of the European Communities v Federal Republic of Germany: "the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements".

102 "To confer that jurisdiction on that court is incompatible with Community law, since it is likely adversely to affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order, respect for which must be assured exclusively by the Court of Justice". Opinion 1/91. Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area. Paragraph 35.

103 Case C-50/00, Unión de pequeños agricultores v. Council. Paragraph 40.

104 Opinion 1/92. Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area; Opinion 2/13. Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties; Opinion 1/09. Draft agreement - Creation of a unified patent litigation system - European and Community Patents Court - Compatibility of the draft agreement with the Treaties.

- For its part, Article 340 indicates that regarding non-contractual responsibility, the union must repair any damage caused by its institutions or its servants in the performance of their duties, in accordance with the common general principles of the law of the member states[105]. This means that it is possible to sue the EU for damages by a foreign investor at the ECJ. It is true that CETA does not allow an application addressed to vary a standard but it is naive to say that a demand for compensation for damages is, in a certain way, not a way to question the correctness of a standard for a text as we have seen. Once approved, it becomes EU law. Moreover, also taking into account the jurisprudence of the ECJ, we must remember that it 'does not find the EU liable easily because it is concerned about a 'regulatory chill'[106]. It could also be argued that the Article 8.31 of the CETA prevents that ICS awards have the effect of a binding precedent for the tribunals of the parties, but this is again an ineffective measure: foreign investors - the main beneficiaries of the system - will not choose the internal way but the arbitral route. Furthermore, as we have seen in previous sections, with CETA once a blank cheque for the Joint Committee is signed then it can extend the obligations of the parties and subject them to an even more extensive interpretation of the obligations derived from 'fair and equal treatment'.

- The ICS violates the prohibition of discrimination on the basis of nationality. This prohibition is strongly rooted both in Article 2 of TEU and Article18 et seq. of TFEU and Article 20 of the Charter of Fundamental Rights of the EU. Obviously, the investment chapter of CETA integrates a difference in treatment between foreign and domestic investors, the first have privileges included derived from ICS. This difference in treatment could be sustained, according to the defenders of the Treaty, by the "reciprocity" that is agreed in CETA but this argument lacks a minimum of legal rigour. Although equal protection for foreign investors is recognised in Canada, it is obvious that not all investors (especially SMEs) of EU member states have the possibility to use the free movement established in CETA and thus benefit from this 'reciprocity' but, instead, they will lose out 'at home' because of the unjustified difference in treatment. For this reason, it should be regarded as discrimination contrary to EU law and the constitutional traditions of the member states.

To all this we must add that, as noted by the European Association of Judges collecting the reasons of the ECJ in the Opinion 1/09 of 8 March 2011, the creation of a tribunal as envisaged under the banner of ICS does not enter within the competence of the EU[107]. As pointed out by the Association of Judges "the competence for the European Union to establish a court system outside its existing one is therefore very limited. Besides, it has to be questioned very carefully if the national legal systems and the transfer of competences by them to the European Union include the transfer of the competence to establish an International Court System with exclusive competence. Thus, if the investor submits a claim to the ICS, it would be Article 6 par.1 against a member state with no recourse to a supreme national court, a constitutional court of a member state or the ECJ".

In conclusion and based on the strictly legal terms, it is necessary to agree with this association that the introduction of a specific system of protection of foreign investors is not only incompatible with the regulatory system of the EU and with the constitutional principles of the member states it is also unnecessary,

105 Case C-377/09 Hanssens_Ensch v. European Community.

106 Joined cases C-46/93 and C-48/93 Brasserie du Pêcheur.

107 Opinion 1/09, Creation of a unified patent litigation system and European and Community Patents Court and the compatibility of the draft agreement with the Treaties: "the envisaged agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field, would deprive courts of member states of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the member states and which are indispensable to the preservation of the very nature of European Union law" (sect 89)."

given the obvious development of normative legal systems of both parties and the protection established with respect to investments.[108]

"This ratification process also mirrors somewhat the deal's content - namely shifting power and decision making away from democratic institutions in favour of big corporations."

Fabio de Masi, MEP, GUE/NGL

Finally, it is important to note that with respect to the change in nomenclature (from the arbitrator to judge), the European Association of Judges has indicated that the appointment of the arbitrators does not meet the criteria required by the European Magna Carta of Judges[109]. This text provides that the judges' independence should be statutory, functional and objective so that their appointment should be based on objective criteria and by a body of guaranteed independence (nothing further than the CETA Joint Committee). However, neither the selection nor appointment of 'judges', nor their period of tenure, nor its financial considerations are in line with the provisions of international standards on judicial independence. In addition, the required professional experience does not seem to be sufficient given the complexity of the cases and the clear implication of EU law.

Given the entity and the solvency of the critics, it seems necessary to have the opinion of the Court on the matter prior to the approval of CETA

5.4. The creation of a multilateral investment Court

During the negotiation of these 'new generation' treaties, the idea of creating a Multilateral Investment Court is taking shape in an accelerated manner. In fact, the CETA (like the EU-Vietnam treaty) already includes provisions that anticipated this possibility. In fact, it is not something new; we must remember the Multilateral Investment Agreement was negotiated in secret in the framework of the OECD until it withdrew its signature in 1998 because of growing social and political pressure. Again, now within the EU, they are attempting to create a Multilateral Court of Investments to ensure the super-protection of foreign investors against national ones, and to find a way to neutralise the power of the state in establishing standards. According to the European Commission, this court is necessary because of the existence of numerous ISDS that are operating in parallel and this increases the possible inconsistencies in the implementation of the investment protection policy (which is true) and it causes a decrease in the efficiency of arbitration systems and increases the risks for the EU. Will an International Investment Court, probably dominated by the UniteDStates, solve these problems? Obviously not, on the contrary, it will most likely be the way to ensure that companies in certain countries have preferential access and use, protected by the arbitration mechanisms.

108 European Association of Judges: "The judicial system of the European Union and its member states is well established and able to cope with claims of an investor in an effective, independent and fair way. The European Commission should promote the national systems for investor's claims instead of trying to impose on the Union and the member states a jurisdiction not bound outside the decisions both of the ECJ and the supreme courts of the member states. (European Association of Judges. Regional Group of the International Association of Judges. "Statement from the European Association of Judges (EAJ) on the proposal from the European Commission on a new Investment Court System". November, 2015)

109 Strasbourg, 17 November 2010 CCJE (2010)3 Final

6. Alternatives to trade liberalisation in favour of transnational corporations: for a fair trade that benefits the social majorities

One of the most repeated arguments to delegitimise the campaigns, movements and organisations that are critical of the CETA has been the absence of an alternative approach to regulate trade relations and protection of investments between the EU and Canada. It is a double-edged argument which must be answered clearly: the rejection of CETA does not require an alternative proposition of its very nature. That is, there is a no good version of a trade and investment agreement between the European Union and Canada but this does not mean that there is not an alternative trade model. In this sense, the rejection of the CETA is a privileged opportunity to address the debate on a trade model that does not favour transnational corporations, but the social majorities.

"It is clear that CETA is the first of a number of treaties aiming to install a dictatorship of multinational corporations. All our current struggles to stop activities due to their enormous social and environmental impact, such as fracking or open-air mining, would be useless if CETA is passed, since it will put no limits to the activities of private companies whatever their cost may be."

Marina Albiol, MEP, GUE/NGL

Because of this it is essential to refer to the *new lex mercatoria* concept coined in the current debate by Juan Hernandez and Pedro Ramiro[110]. This law of the current market is actually a new global economic and legal order that "reinterprets and formalises the power of multinational corporations using international practices and customs rules of national states and the set of contracts, agreements, treaties and trade and investment rules on multilateral, regional and bilateral basis; the decisions of the arbitration courts and the Settlement System (ISDS) of the World Trade Organisation[111]" . This legal armour has allowed companies to violate rights with impunity, mainly in countries of the Global South. CETA, as TTIP or TiSA go one step further: they open environmental legislation and labour and public health standards of the northern countries to the logic of the supremacy of the transnational corporations' standards. In this way, since this set of treaties aimed at favouring the interests of the same transnational corporations that have used their political influence to establish this new *lex mercatoria*, the reflection on alternatives to CETA should be expanded to become a reflection on how to limit the impunity of transnational corporations globally.

The first precedent of the debate on the regulation of transnational corporations is the creation in 1974 of the Commission on Transnational Corporations of the United Nations Economic and Social Council. However, both the proposed development of a code of conduct by the Council, as well as several subsequent projects never saw the light of day. Thus, according to The Economist Intelligence Unit, until the late 90s there was no notion that companies had liability in the field of human rights. The first step is not given until 1999 when, within the framework of the UN Global Compact, a body of principles aimed at transnational corporations was created. In 2011, the Guiding Principles on Business and Human Rights were published. It is, like Global Compact, a set of principles without any coercive power and, as recognised by Mr. Ruggie (Special Representative for Business and Human Rights, which proposed the Guiding Principles) which, 'by themselves.... will not end all the challenges. They mark the end of the beginning. Now that we have a common foundationof minimum standards and processes, they will need to be developed in a more granular way.'[112]

110 Hernández Zubizarreta, J., Ramiro, P. (2015): *Contra la Lex Mercatoria*, Icaria, Barcelona.

111 Hernández Zubizarreta, J., (2012) "Lex mercatoria"; OMAL 2012, http://omal.info/IMG/article_PDF/Lex-mercatoria_a4803.pdf

112 https://www.eiuperspectives.economist.com/sites/default/files/EIU-URG%20-%20Challenges%20for%20business%20in%20respecting%20human%20rights%20WEB_corrected%20logos%20and%20UNWG%20thx.pdf. The Guiding Principles suggest each state should establish its own National Action Plan to monitor the application of these guidelines. So far there are 10 countries which have developed a Nation-

In this context, in 2012, the Global Campaign was created to dismantle corporate power during the Peoples' Summit organised during Rio+20, which crystallises the momentum of hundreds of campaigns, networks and social movements. Through the contributions of more than fifty organisations a first draft of the International Treaty of the Peoples' Control of Transnational Corporations was presented in December 2014. In its introduction, the Treaty announces that "the current international situation requires choosing one of the two roadmaps or possible ways: find a radically different context in which people and communities pressured into a binding framework of control by transnational corporations, or maintain a condescending way of volunteering with transnational corporations and taking a punt on instruments such as corporate social responsibility, the Global Compact (or Global Compact) and the Ruggie framework, among others[113]." The Treaty bets on this second way and thus constitutes the first proposal under which the paradigm of volunteering is abandoned to opt for the binding obligations.

"We do not know who gave the mandate that allowed the EU representative to prevent the binding treaty from succeeding. Obviously it was not the European Parliament, since Parliament has not been asked at any time, or the parliaments of the member states, and certainly not civil society."

Lola Sánchez Caldentey, MEP, GUE/NGL

The Treaty imposes obligations not only to transnational corporations but also to the countries of origin of foreign investment, the host countries and the international financial institutions. It is pertinent to dwell on the importance of control of the latter and to take into account their responsibility for human rights violations. According to Erika Gonzalez, a researcher at the Observatory of Multinational Corporations in Latin America, agents such as the WTO (through the negotiation rounds) or the IMF (with adjustment policies) have boosted the legal and economic order of the impunity of transnational corporations. They not only finance these companies and their projects without an efficient monitoring of the projects, they come to hold shares in them[114]. Finally, the Treaty envisages the creation of bodies to enforce these obligations which is the cornerstone of the shifting paradigm that has been mentioned.

In its resolution of 26 June 2014, the Human Rights Council of the United Nations adopted the Resolution 26/9 by which it created 'an intergovernmental open-ended working group on transnational corporations and other business enterprises with regard to human rights, whose mandate is to develop a legally binding instrument to regulate the activities of transnational corporations and other enterprises in the International Law Human Rights'.[115]

The draft of the Resolution was written by Ecuador and South Africa and saw 20 votes in favour, 13 abstentions and 14 against. It is significant that all countries in the European Union and Japan and the United States were on the against side. Equally significant was that the vote against by many of the northern countries is the declaration of the International Organisation of Employers that "deeply regrets that the adoption of the

al Action Plan, out of which only one is a developing country: Colombia. However, according to Elisabeth Périz, member of Tierra Digna Colombia, this Plan does not offer any real guarantees. As a matter of fact, human rights violations have not fallen since its implementation.

113 http://www.stopcorporateimpunity.org/wp-content/uploads/2015/02/PeoplesTreaty-ES-dec2014-1.pdf

114 Presentation at the GUE/NGL hearing "How to Hold Transnational Corporations Responsible for Human Rights Violations", 2016

115 UN Resolution 26/9 in: https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/064/48/PDF/G1406448.pdf?OpenElement

initiative of Ecuador has broken the consensus (...) achieved three years ago with the approval of the Guiding Principles of the UN on Business and Human Rights".

The first session of the working group was held in Geneva from 6 to 10 July 2015[116] With regard to this report, the first fact to note is that the representative of the European Union, who spoke on behalf of the 28 member states, was only present on the first day and always trying to block the start of this working group[117]. Lola Sánchez Caldentey, who attended the meeting, pointed to the influence of lobbyists on the attitude of the EU representative: "We do not know who gave the mandate that allowed the EU representative to prevent the binding treaty from succeeding. Obviously, it was not the European Parliament since it had not been asked at any time, or the parliaments of the member states and certainly not civil society."

The ambassador of Ecuador to the United Nations, Maria Fernanda Espinosa, president of the working group, highlights the importance of former experiences for the work of this group. Perhaps the most important reference is the International Treaty of the People's Control of Transnational Corporations, "but we must not forget that there are more than 50 years of struggle of organised peoples, social movements and victims (...)"[118].

116 Full report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument, in: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/018/22/PDF/G1601822.pdf?OpenElement

117 The member states were also entitled to participate in the working group on their own right. France was the only member state who attended the meetings.

118 Presentation at the GUE/NGL hearing "Hold Transnational Corporations Responsible for Human Rights Violations", 2016.

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