CNCDH
COMMISSION NATIONALE CONSULTATIVE DES DROITS DE L'HOMME
RÉPUBLIQUE FRANÇAISE

OPINION

LET US NOT SACRIFICE HUMAN RIGHTS FOR COMMERCIAL INTERESTS

15TH DECEMBER 2016

Opinion on international trade and investment agreements :
« Let us not sacrifice human rights for commercial interests -
The example of the Comprehensive Economic and Trade Agreement
between the European Union and Canada (CETA) »
Adopted with 33 votes « in favour » et 4 abstentions during the plenary session of December 15th 2016.

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Since the 2008 financial crisis, the European Union (EU) has been dealing with an ongoing challenge to boost employment, growth and investment. The EU has proven its desire to rise to this challenge by placing these objectives at the forefront of its political priorities. It has fitted this goal into a broader strategy called «*Trade for All: Towards a more responsible trade and investment policy*», which was presented by Cécilia Malmström, the EU Trade Commissioner, in October 2015[1]. During this presentation, she highlighted that EU trade policy must be more responsible, i.e. more effective, more transparent, and able to promote our interests as well as our values[2].

The CNCDH (National Consultative Commission on Human Rights) is pleased with this new approach, aiming to fully incorporate human rights promotion and protection into EU trade policy and into all of its external policies. It recalls its previous work on the subject, in particular the opinion on EU external action with regard to human rights[3] — adopted on 26 June 2014 — and the opinion on development, the environment and human rights[4] — adopted on 16 April 2015.

By virtue of treaties, the EU has exclusive competence with regard to common commercial policy[5]. Under Article 207 of the Treaty on the Functioning of the European Union (TFEU), the European Commission is responsible, with the Council of the European Union's agreement, and on behalf of the 28 Member States, for the negotiation of international trade and investment agreements.

On this basis, it has initiated a number of bilateral negotiations and concluded certain trade and investment agreements with partners from every continent[6]. However, three of these agreements capture the attention, namely :

- the Comprehensive Economic and Trade Agreement (CETA) with Canada, which was concluded on 26 September 2014 and signed on 30 October 2016;
- the Transatlantic Trade and Investment Partnership (TTIP) with the United States, the negotiations for which started in 2013 and faced increasing obstacles on both sides until reaching an impasse which continues to this day;
- and finally the Trade In Services Agreement (TISA) with 23 members of the World Trade Organisation (WTO), including the EU, the United States, Switzerland and Canada, negotiations for which were launched in 2013[7].

However, in this self-referral, from the perspective of human rights, the CNCDH has chosen to only examine CETA (as it is the only one of these three agreements which has been formally concluded). Nevertheless, the other two agreements will be referred to where appropriate to illustrate certain aspects, and the CNCDH may return to these agreements when this proves timely. Indeed, we already know that these three agreements were developed in a coordinated way and include a number of identical provisions.

CETA is the agreement which best embodies the EU's new approach to trade and investment. It is thus defined as a «next-generation» agreement, i.e. an agreement which seeks to be broader than a simple removal of tariff barriers to trade. While conventional trade and investment agreements were intended to only deal with tariff barriers, in other words custom duties, CETA goes further. By tackling non-tariff

1. European Commission, «Trade for All: Towards a more responsible trade and investment policy», 14 Oct. 2015. Available at [http://europa.eu/rapid/press-release_IP-15-5806_fr.htm].
2. European Commission, Speech, «CETA: An Effective and Progressive Deal for Belgium and Europe», C. Malmström, EU Trade Commissioner, 20 Sept. 2016. Available at [http://trade.ec.europa.eu/doclib/press/index.cfm?id=1543].
3. CNCDH, *Avis sur la politique extérieure de l'Union européenne en matière de droits de l'homme*, Plenary session on 26 June 2014, JORF no.0156 dated 8 July 2014, text no. 90.
4. CNCDH, *Avis sur le développement, l'environnement et les droits de l'homme*, Plenary session on 16 April 2015, JORF no.0119 dated 24 May 2015, text no. 50.
5. Treaty on the Functioning of the European Union, Article 3, Letter e).
6. For an overview of agreements reached or ongoing negotiations, see European Commission, «Overview of FTA and other trade negotiations». Available at [http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf].
7. The CNCDH has decided to use the English acronyms for the agreements in this opinion. It should be noted that, in France, these acronyms are frequently used given the lack of French acronyms.

barriers to trade, it brings within its scope restrictive non-tariff measures put in place by a country aiming to protect its market and which are expressed, for example, by technical, social, environmental and fiscal standards.

In light of the diversity of subjects brought together under CETA, and especially the relevance of some of these to the human rights sphere, this unprecedented situation merits a discussion being started regarding the consistency of the different issues found within the same agreement[8].

Moreover, CETA is likely to have a snowball effect on EU trade and investment policy, and serve as a «model» for international regulation. According to the EU Trade Commissioner, CETA is «*the first step forward towards a global system*"[9]. This view is relayed by some institutions, including the French National Assembly, and representatives of civil society[10], who are aware of the fact that CETA will serve as a role model once it is ratified and comes into force.

Finally, CETA is the most complete agreement, in comparison with TTIP and TISA which are still in the negotiation process, with negotiations for TTIP having been suspended and negotiations for TISA progressing in complete obscurity.

Trade relations between Canada and the EU are long-standing and were primarily founded on the 1976 Framework Agreement for Commercial and Economic Cooperation which was supplemented by sectoral agreements[11]. The two Parties thus made the choice to take advantage of this well-established relationship and combine these different agreements into one single partnership. The negotiations were initiated in 2009 by the European Commission, under a Council of the European Union mandate[12], and came to a close on 26 September 2014 when the agreement was presented, i.e. after a five-year round of negotiations. After a legal verification on both sides by the relevant departments, CETA is currently being translated into the languages used by the agreement's stakeholders[13].

The adoption procedure for CETA is following the conventional procedure for international agreements[14]. At the Commission's suggestion, in July 2016[15], the Council of the EU adopted a decision authorising the latter to sign the agreement on behalf of the EU. After reluctance from Walloon MPs[16], CETA was finally signed on 30 October 2016, after a delay of a few days with respect to the date originally scheduled.

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8. See in this respect: French National Assembly, *Proposition de résolution européenne pour que la France s'oppose à toute application provisoire de l'Accord économique et commercial global avec le Canada et s'assure de sa compatibilité avec les traités de l'UE*, no.4071, 30 Sept. 2016, p.6: «*Considering CETA's scope in many fields including the environment, the social sphere and public procurement, to an unprecedented degree in European trade history*».
9. European Commission, Speech, «CETA: An Effective and Progressive Deal for Belgium and Europe», C. Malmström, EU Trade Commissioner, Civil Society Dialogue meeting, 19 Sept. 2015. Available at [http://trade.ec.europa.eu/doclib/docs/2016/september/tradoc_154955.pdf].
10. See for example: National Assembly, *Résolution européenne sur le projet d'accord économique et commercial entre l'Union européenne et le Canada*, Text adopted no.428, 23 Nov. 2014, p.2: «*Considering the precedent such an agreement could set for the ongoing negotiations for partnership proposal*».
11. These various sectoral agreements are: the 1996 Joint Action Plan; the 1997 Agreement for Scientific and Technological Cooperation; the 1998 Agreement on Mutual Recognition in relation to Conformity; the 1999 Veterinary Agreement and Competition Agreement; the 2004 Agreement on Trade in Wines and Spirit Drinks; the 2009 Agreement on Civil Aviation Safety; and the 2009 global Agreement on Air Transport.
12. Council of the European Union, *Recommendation from the Commission to the Council in order to authorise the Commission to open negotiations for an Economic Integration Agreement with Canada*, 9036/09, 24 Apr. 2009.
13. The French version of CETA is available at [http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/fr/pdf].
14. See TFEU, Article 218.
15. European Commission, *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,* COM(2016)444 final, 2016/0206(NLE), 5 July. 2016.
16. *Le Monde,* «Pourquoi les Wallons bloquent le CETA», 17 Oct. 2016, available at [www.lemonde.fr/economie/article/2016/10/17/pourquoi-les-wallons-bloquent-le-ceta_5015033_3234.html]. The text was due to be adopted during a ministerial meeting bringing together all of the Member States in Luxembourg on 18 October 2016. According to Belgian law though, the different Belgian communities and regions must approve a so-called «mixed» treaty, like CETA, otherwise it cannot be ratified by the federal government.

Indeed, the Walloon opposition somewhat affected the conclusion and content of CETA. In order to sign the agreement, whilst respecting the desiderata of French-speaking Belgian, Austrian and German leaders, the Parties established a "*Joint Interpretative Instrument*"[17], in addition to 37 other interpretative unilateral declarations, which makes their respective legal status unclear[18]. This instrument aims to "*clearly and unambiguously*" clarify some provisions "*that have been the object of public debate and concerns*"[19]. However, the legal nature of this instrument is controversial: while some points just paraphrase CETA, others change the material scope of the Parties' commitment[20]. However, the CETA text is still expected to change, at least with regard to the chapter dealing with investments, at Belgium's request as its regions announced that they could not ratify CETA as its stands.

The signature of CETA does not, however, clear up all the uncertainties surrounding its implementation terms. Indeed, in light of the Union's law, CETA may enter into force from the Council's vote. However, in practice it is customary to wait for the European Parliament's approval, which will have to consent to the treaty by the majority of the votes cast. Another step is provided for in mixed agreement situations[21] — as is the case with CETA — namely ratification by each of the EU Member States. Aware that national ratifications will take time, the Parties decided that some of the agreement's provisions would be applied provisionally, from its ratification by the European Parliament[22]. Therefore, the whole of the agreement will only enter into force after national ratifications but a part of it will begin to have an impact now.

This provisional application raises various issues for the CNCDH. Firstly, the notion "mixed" loses all of its significance if the agreement is provisionally applied. Indeed, the need to obtain national parliaments' consent seems overrated, as they will be at a point of no return where the agreement proposed to them will have already started to have an impact. It is a de facto imposition of the treaty which contravenes the very principle of mixed, placing the vote of national parliaments at the same level of that of EU institutions.
Moreover, there is a more ambiguous and complex issue regarding the consequences if one of the Member State's national parliaments refuses the agreement. To date, there has still been no definitive response forthcoming regarding this thorny issue as it is difficult to know if the refusal by a national parliament would put the whole of the agreement or just a part of it in danger, or even if the refusal would only relate to shared competences or also to exclusive competences. At the German Federal Constitutional Court's request, the Council outlined the procedure in point 20 of the statements to the minutes: "i*f the ratification of CETA fails permanently and definitively because of a ruling of a constitutional court, or following the completion of other constitutional processes and formal notification by the government of the concerned state, provisional application must be and will be terminated. The necessary steps will be taken in accordance with EU procedures*". This statement could mean that the proposal to terminate the provisional application would be left to the Commission after notification by a country and would require a unanimous vote by the Member States within the Council. This uncertainty goes hand in hand with uncertainty regarding how competences will be allocated within CETA, between the provisions which fall under exclusive competence and those which fall under shared competence. CETA has still not been broken down according to this interpretation. The pending ruling by the Court of Justice of the European

17. Council of the European Union, *Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States (hereinafter: the «Interpretative Instrument»)*, 27 Oct. 2016.
18. Interview with Mr. Yannick Jadot, MEP, before the CNCDH on 6 December 2016.
19. Council of the European Union., op. cit., note 17, 1), letter e).
20. For example, the interpretative instrument increases the list of "legitimate objectives" in which the States have a "right to regulate"; gives Canada's formal commitment to ratify Convention no.98 of the ILO (International Labour Organisation); cites the Paris Agreement, the implementation of which is qualified as a "shared responsibility" for the EU, its Member States and Canada; specifies that investors can choose to pursue available appeal procedures in domestic courts; and states that the Parties will draw up a new code of conduct for arbitrators which should be finalised before CETA enters into force.
21. An agreement is "mixed" when it involves both the EU's exclusive competences and competences shared between the EU and Member States.
22. See: CETA, Article 30.7, "*Entry into force and provisional application"; Council of the EU, Proposal for a decision on the provisional application 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,* 2016/0220 (NLE).

Union (CJEU) on the Agreement between the EU and Singapore could provide potential answers in this respect but the ruling will only be made after the ratification of CETA within the EU and its provisional application.

Therefore, in the near future we could find ourselves in a position with the provisional application of CETA without any certainty regarding its term or even its scope, and outside of any national democratic controls.

One solution to remedy these uncertainties would be to bring them before the CJEU for a more general check of CETA's legality. However, this issue seems closed since the European Parliament refused the appeal led by a coalition of MEPs asking for CETA to be submitted before the CJEU[23]. Nevertheless, the Kingdom of Belgium has undertaken, following the "Walloon" episode, to referring to the CJEU itself in order to ask it to check whether EU law and CETA are compatible. Moreover, two constitutional complaints have been lodged, one in Germany on 30 August 2016, and one in Canada, on 21 October 2016. In France, legal practitioners attest to comparable risks of incompatibility between CETA and the French Constitution and recommend that the French Constitutional Council be referred to in order to conduct a check prior to CETA, on the basis of Article 61 of the Constitution.

Taking account of all of the points raised, and because all of the State Parties to CETA, and also to TTIP and TISA, adhere to the universal principles of human rights[24], the CNCDH is initiating discussions on this next generation agreement. The developments are not intended to determine whether free trade should exist or not — the CNCDH is aware that it has boosted development for centuries. But they seek to question the desire, highlighted by the European Commission itself, to show that a robust and ambitious agreement can enable a framework to be created favouring the protection of human rights. According to a United Nations' report, «*that requires the recognition that human rights are not a barrier to trade, but that trade can be a significant obstacle to the realization of human rights*»[25].

The CNCDH's recommendations in this opinion are therefore made with regard to CETA, in order to draw the public authorities' attention to certain points which it considers to be problematic. However, as the CNCDH is aware that CETA is part of a larger whole aiming to revive the EU's trade policy, its recommendations are also part of the perspective of agreements in the process of being negotiated and those to come.

Preliminary recommendation: The CNCDH strongly recommends that negotiations be resumed in order to take into account the following recommendations. The resumption of negotiations could enable the legal status of the interpretative declarations which go alongside CETA to be clarified.

In any case, it is vital that the French government calls on the CJEU in order to check that the agreement, as it exists today, is compatible with the Union's law. In order to dispel doubts regarding the compatibility of CETA with the French Constitution, the CNCDH also recommends referring a priori to the (French) Constitutional Council.

Finally, and as an entirely preliminary remark, the CNCDH would like to thank the European Commission Representation in France, as well as the experts who agreed to be interviewed. The CNCDH nevertheless wonders about the government's silence, and especially the Minister of State for Foreign Trade's silence, who, despite numerous requests from the CNCDH, refused all meetings and interviews. The CNCDH thus regrets not having been able to elicit his view and expertise on this extremely complicated and

23. See: Europe Ecologie in the European Parliament Website, Press release, "Le Parlement européen refuse de vérifier la légalité du CETA", available at [http://europeecologie.eu/Le-Parlement-europeen-refuse-de-verifier-la-legalite-du-CETA].
24. For the European Union and its Member States, this adherence is expressed in Article 6§3 of the Treaty on European Union.
25. General Assembly of the United Nations, Report of the Independent Expert on the promotion of a democratic and equitable international order, A/HRC/33/40, 12 July 2016, p.20.

political subject. Likewise, the CNCDH wonders why the MP of the fifth constituency of Paris refused to respond to its questions, even in writing, given that she wrote a parliamentary report titled « *le règlement des différends Investisseur – État dans les accords internationaux*» (Investor-State dispute resolution in international agreements).

In this opinion, the CNCDH first of all focused on the chapters dealing with sustainable development, from an overall perspective, before dealing with them specifically by analysing the agreement's issues linked to labour law and environmental protection. The CNCDH then concentrated its analysis on the investor-State dispute settlement mechanism provided for by CETA.

First Part
The Sustainable Development Chapter[26] : from stated intentions to the reality of the provisions, a lacklustre consideration for human rights

A.The European Union's stated desire for an agreement which takes on board the stakes of sustainable development

According to the guidelines given to the Commission[27], CETA should have made sustainable development a key objective for the State Parties and «*aim at ensuring and facilitating respect of international environmental and social agreements and standards*»[28]. In order to do this, the negotiation mandate specified that the commitments made by the two Parties regarding the social and environmental aspects of trade and sustainable development had to be included in the agreement. It also provided for a ban stopping the Parties from encouraging trade or foreign direct investment «*by lowering domestic environmental, labour or occupational health and safety legislation and standards or by relaxing core labour standards*»[29].
This commitment had to materialise through a chapter dedicated to these issues, in order to give the agreement a «comprehensive» character, thus incorporating trade into a larger «sustainable development» approach.

This is why the EU and Canada included three chapters in the agreement in order to emphasise their commitment to sustainable development. These chapters are: Chapter 22 «Trade and Sustainable Development»; Chapter 23 «Trade and Labour»; and Chapter 24 «Trade and Environment». By means of these chapters, the two Parties agree to support trade and investments by strengthening the protection of labour and environmental rights, and not designing one without the other, or worse, making the first harmful to the second.

The CNCDH is pleased with the inclusion of social and environmental provisions within the agreement, and more generally with the consideration given to sustainable development. In doing so, CETA appears innovative and opens the door for better combining of economic interests, such as trade and investments, and interests linked to human rights. However, there is no denying the fact that the opportunity to genuinely consider sustainable development issues was not completely, or even correctly, taken up by the Parties during the negotiations.

Recommendation no.1: Given that new trade agreements now go far beyond simple trade issues, the CNCDH asks France to encourage trade negotiators to be supported by a multidisciplinary team, specialised, in particular, in social matters, labour law, the fight against climate change, and more generally, in human rights, in order to offer a comprehensive view of the existing issues.

B. An unambitious agreement in terms of sustainable development

Indeed, hardly any space is given to these issues in CETA. Out of the nearly 1,600 pages making up the agreement, including annexes, only around 40 pages[30] are devoted to the sustainable development

26. In this opinion, the CNCDH understands «Sustainable Development Chapter» as all of Chapters 22, 23 and 24, namely, respectively: the «Trade and Sustainable Development» Chapter, the «Trade and Labour» Chapter and the «Trade and Environment» Chapter.
27. Council of the European Union, op. cit., note 12.
28. *Idem §7.*
29. *Ibidem*
30. Chapters 22, 23 and 24 of CETA span pages 386 to 429 (in the French version of the agreement).

chapters. Since these issues were described by the Council of the EU as a key objective, the faithfulness of the agreement to the negotiation mandate is questionable.

Furthermore, it should be noted that the chapters seem to encourage the States much more than they obligate them. Whereas the States commit, rightly, to «promote», «encourage», and «further» the standards for labour rights and environmental protection, the CNCDH can only lament the detrimental lack of concrete action plans. In addition, the Parties' intentions, as commendable as they may be, are not accompanied by any real verification of their implementation, and there are not any potential sanctions if their behaviour does not conform to these chapters' provisions. Several examples, included in CETA, raise questions over the genuine effectiveness of the provisions it contains.

As an example, CETA establishes a Committee on Trade and Sustainable Development[31], which, according to Article 22.4, is responsible for ensuring that the provisions included in the Trade and Sustainable Development, Trade and Labour and Trade and Environment chapters are respected. The Committee is made up of high level representatives of the two Parties to the treaty, without any clarifications about the competency level required in the above-mentioned fields[32]. The Committee is thus responsible for overseeing «*the implementation [...] [of] cooperative activities and the review of the impact of this Agreement on sustainable development, and address[es] in an integrated manner any matter of common interest to the Parties in relation to the interface between economic development, social development and environmental protection*»[33]. Nevertheless, the Committee has no judicial function and even less power to sanction, which removes from its supervision activities any real effect on the protection of the «Sustainable Development» chapter's provisions. The only power the treaty gives to this Committee is the presentation of an annual report on the issues it was able to raise amongst its members[34].

Recommendation no.2: Although the Committee on Trade and Sustainable Development has no power to sanction, the CNCDH recommends, at the very least, that the high level representatives of each Party who make up the Committee have certain competences in the fields covered and, more generally, in international human rights law. At a minimum this will enable the issues raised to be dealt with by the best expertise possible, in accordance with human rights.

Another example is the procedures for consultations and panels of experts established in chapters 23 and 24[35]. The mandate for these panels of experts, stepping in after the consultation procedures have failed, is to examine, in light of the chapters they stem from, the issue raised by one of the Parties and to produce a report presenting recommendations to resolve the dispute. However, these mechanisms are far from fulfilling their control role and, yet again, have no power of sanction (see below).

Finally, the explicit exclusion[36] of inter-State dispute settlement (provided for by chapter 29 of the agreement) from the «Sustainable Development» chapter demonstrates the lack of desire to sanction violations of international law regarding labour and the environment. This choice made in the agreement is to be lamented as it would have enabled the «Sustainable Development» chapter to have an undeniable effectiveness (see below).

31. The Committee is established in Article 26.2.1, letter g).
32. Article 22.4.1 of CETA states that the high level representatives of the parties who will make up the Committee on Trade and Sustainable Development should be «*responsible for matters covered by this Chapter and Chapters Twenty-Three (Trade and Labour) and Twenty-Four (Trade and Environment)*». However, there is no mention of the competency level required. An example could have been to indicate whether the main activity of these representatives had to be directly linked to the fields mentioned. Another could have been to indicate the competency level required, namely, for example, many years of experience in these fields.
33. CETA, Article 22.4.1.
34. CETA, Article 22.4.4, letter c), «*the Committee on Trade and Sustainable Development shall report annually on any matter that it addresses*».
35. For Chapter 23 «Trade and Labour», see Article 23.9 (Consultations) and Article 23.10 (Panel of Experts); for Chapter 24 «Trade and Environment», see Article 24.14 (Consultations) and Article 24.15 (Panel of Experts).
36. CETA, Article 23.11.1; CETA, Article 24.16.1.

Recommendation no.3: The CNCDH recommends that the implementation and respect of all of the provisions, in particular in terms of social rights and environmental protection in international trade and investment agreements, fall under the general mechanism for dispute settlement between States which applies to all agreements.

The CNCDH feels that the provisions in the «Sustainable Development» chapters are a question of generality and good intentions. This is in complete contradiction of the European Parliament's recommendations[37] made related to TTIP, but partly transferable to CETA, which called for the chapter relating to sustainable development to be binding and enforceable.

Even though some provisions, in particular regarding social rights, are to be applauded, the CNCDH can only regret the fact that the chapters mentioned do not sufficiently fulfil the stated ambitions and, as a result, would not be able to bring about the full and effective implementation of human rights.

C. A living agreement turning a blind eye to the necessary consideration of human rights: regulatory cooperation

CETA is defined as a «living» agreement. This adjective is used as it entails a so-called «regulatory cooperation» mechanism[38] which allows the States to broaden and expand its contents as needed after ratification[39]. In other words, regulatory cooperation involves setting up methods for future negotiation beforehand regarding health, industrial, environmental and other standards, beyond what has been initially agreed within the agreement[40]. Indeed, according to Article 21.1 of the agreement, «*this Chapter applies to the development, review and methodological aspects of regulatory measures of the Parties' regulatory authorities that are covered by [...] Chapters [...] Twenty-Two (Trade and Sustainable Development), Twenty-Three (Trade and Labour) and Twenty-Four (Trade and Environment)*».

In itself, the agreement does not create new joint standards or regulations, but it enables Parties, through the mechanisms established, to work on reconciling existing and future legislation.

For numerous civil society stakeholders, this Chapter 21 brings about standard «haggling»[41], in addition under still obscure conditions, while pursuing the single goal of facilitating trade and investment and not tending towards effective respect for human rights. As such, and in particular in view of the chapters concerned by this mechanism, regulatory cooperation included in the CETA agreement requires the CNCDH's particular attention.

1. Substantive aspect: regulatory cooperation

In each of these speeches and statements[42] made by Cecilia Malmström, Trade Commissioner, the

37. European Parliament, European Parliament Resolution dated 8 July 2015 *containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership* (TTIP)(2014/2228(INI), P8_TA(2015)0252.
38. See CETA, Chapter 21 «Regulatory cooperation».
39. The TTIP project also has a chapter on regulatory cooperation.
40. Collectif national unitaire stop TAFTA (Stop TAFTA national collective unit) - International Association of Technicians, Experts and Researchers (AITEC), «Le TAFTA avant l'heure : tout comprendre au traité UE-Canada», April 2006. Available at [www.collectifstoptafta.org/ressources-materiels/ceta/article/le-tafta-avant-l-heure-tout-comprendre-au-traite-ue-canada].
41. For use of this term, see: Collectif national unitaire stop TAFTA - Association for the taxation of financial transactions and for civic action (ATTAC), «*Petit guide pour contrer la propagande en faveur du CETA/AECG*». Available at [https://france.attac.org/nos-publications/brochures/article/petit-guide-pour-contrer-la-propagande-en-faveur-du-ceta-aecg].
42. European commission, speech by Cecilia Malmström, Trade Commissioner, «CETA – Making an informed decision», 14 Sept. 2016; European commission, speech by Cecilia Malmström, Trade Commissioner, and by Chrystia Freeland, Canada's Minister of International Trade, 18 Sept. 2016; European commission, speech by Cecilia Malmström, Trade Commissioner, «CETA – An Effective, Progressive Deal for Europe», Civil society dialogue meeting, 19 Sept. 2016; European commission, blogspot, «Next stop in the trade debate: Bratislava», 21 Sept. 2016. For all of the European Commission's speeches and remarks, see

Commission has continued to defend the regulatory cooperation mechanism. Chapter 21 is presented as aiming, above all, to improve transparency and to foster closer relations between the two Parties. In order to do this, the Parties are encouraged to discuss and exchange information so as to establish standards for the future, and to do everything possible to avoid trade barriers which are considered unnecessary.

This chapter of the agreement is based on a specific perspective. First of all the fact that the Parties are already linked by multilateral commitments in terms of cooperation, in particular in the WTO framework should be recalled[43]. Thus, as part of CETA, while reiterating the appreciation of the fact that regulatory cooperation is well-founded and useful[44], the Parties commit «*to ensure high levels of protection for human, animal and plant life or health, and the environment*»[45]. Therefore the Parties intend to implement the best possible cooperation based on these commitments in the field of planning, evaluating and revising various norms and standards.

As a preliminary remark, it should be noted that CETA does not fix the aforementioned standards itself, but it nevertheless determines the objectives and the processes through which they will be able to be defined.

Thus, Article 21.3 of the agreement lists the objectives that the regulatory cooperation between the Parties will follow. Whilst keeping in mind the need «*to contribute to the protection of human life, health or safety, animal or plant life or health and the environment*»[46] it is a question of: «*promot[ing] [...] predictability in the development and establishment of regulations*»; «*enhanc[ing] the efficacy of regulations»; «identify[ing] alternative instruments*»; or «*avoid[ing] unnecessary regulatory differences*»[47]. The objectives thus mentioned are designed in such a way as to facilitate trade and «*contribute to the improvement of competitiveness and efficiency of industry*», by aiming to reduce «*duplicative regulatory requirements» and «pursue compatible regulatory approaches*»[48].

Some of the objectives drawn up in this chapter are legitimate and the reference made to protection aspects is to be applauded. However, although the protection of people and the environment are mentioned at the top of the list of these objectives, it appears that the aspects dealing with trade, investment and the business climate take greatest precedence. Indeed, the different subjects are not treated equally — some have more importance than others. This observation casts doubt, over time, over the real balance between these two aspects — human rights and trade — in the terms for implementing regulatory cooperation. Therefore, there is a risk that the aspects linked to human rights rarely, or even never, prevail over economic aspects.

The CNCDH regrets that this Article did not set the obligation to make human rights the guide and foundation of regulatory cooperation as a preliminary principle. It thus might have been possible to ensure they were completely taken into consideration, and the conformity of States' regulatory activity with these fundamental principles.

Recommendation no.4: As soon as a trade and investment treaty provides for a cooperation mechanism, the CNCDH recommends that human rights be an integral part of the treaty, by putting respect of human rights as the main goal of said mechanism.

Article 21.4 of the agreement sets out the methods to follow as part of regulatory cooperation. For

the Directorate General for Trade of the European Commission [http://ec.europa.eu/trade/policy/in-focus/ceta/index_fr.htm]. These remarks were also reiterated by Ms Jegouzo, Head of the European Commission Representation in France, during her interview with the CNCDH on 18 October 2016.

43. CETA, Article 21.2.1.
44. CETA, Article 21.2.3.
45. CETA, Article 21.2.2.
46. CETA, Article 21.3, letter a).
47. For the complete list of goals to reach in order to build trust, increase mutual understanding of regulatory governance and make good use of the respective points of view and expertise, see Article 21.3, letter b).
48. CETA, Articles 21.3, letter c) and 21.3, letter d).

the Parties this primarily means[49] keeping themselves mutually informed about their draft regulations, objectives undertaken, the instruments which will be used and the methods applied, and this should be done as far in advance as possible throughout the internal regulatory process. In this way, the Parties can reciprocally make comments regarding planned regulations, and undertake an examination of potential points of convergence or differences in order to work towards legislation harmonisation and equivalence. CETA also decrees that the relevance and the study of alternatives to these regulations be seriously analysed and monitored.

Thus, upon reading all of the regulatory cooperation methods envisaged in CETA, it becomes clear that the objective aiming to limit regulatory differences in all types of policies with a view to facilitating trade is key.

For the CNCDH, the desire thus stated by the Parties to adopt policy objectives relating to non-tariff barriers to trade in addition to objectives purely easing trade restrictions, gives cause for concern.

Indeed, faced with a mechanism whose effects and consequences remain unclear, there are risks, including: governmental interference defending the interests of their industry; the possibility given to European and Canadian industry to directly interfere in regulation processes; prolonged and more complicated procedures for drawing up laws and regulations; or indeed the disqualification of societal, political or moral considerations from the planning criteria[50].

However, these risks must not supplant the significant advantages that such regulatory cooperation can assume. Indeed, it can be very useful, as much for the European Union as for its Member States, but also for civil society and citizens, to be informed about a Canadian draft law or regulation capable of hindering the effective respect of human rights, in particular social rights and environmental protection. Such information will enable the EU or its Member States to take action in regulation processes in order to emphasise, within these processes, the fundamental rights and the joint values which the European Union upholds, and to hope to have an influence so that human rights are better respected.

However, the CNCDH considers that the concerns alluded to are justified because the ranges of internal policies which will be affected by regulatory cooperation are based on the general interest and are defined by the collective desire. This is why the CNCDH regrets that the agreement does not have more guarantees regarding the effective respect of the States' right to define their human rights policy, or any other policy capable, according to the parties concerned, of hindering trade[51].

The CNCDH therefore agrees with the criticism that Chapter 21 paves the way to break up existing norms and standards, casting significant doubt over legislative and regulatory competences within Member States, with the stated goal of increasing competitiveness and trade.

Recommendation no.5: The CNCDH encourages the Parties to revise the chapter on regulatory cooperation in order to actually guarantee the States' right to regulate, or at the very least, to strongly envisage to do so in the agreements to come, in such as way as to protect the regulations made in the public interest, and to ensure that private interests do not take precedence over the common good. Without a revision, it seems vital that chapters 22, 23 and 24 be excluded from regulatory cooperation. A way of ensuring

49. For a comprehensive picture of the methods provided for by CETA as part of regulatory cooperation, see Article 21.4, letters a) to s).
50. For a development of the various risks which could stem from the implementation of regulatory cooperation see: Collectif national unitaire stop TAFTA - ATTAC, op.cit., note 41; Collectif national unitaire stop TAFTA - AITEC, op.cit., note 40.
51. The lack of guarantees is all the more worrying given that there have already been several examples of abuses. For example, the Fondation Nicolas Hulot mentions several European legislations which have been profoundly amended under pressure from America or Canada outside of negotiations. This is the case with the Directive on the quality of fuel which was dismantled, with importing beef soaked in lactic acid which was finally authorised, and a regulation which provided for the abandonment of 31 potentially carcinogenic pesticides which was suspended.

that the collective will is respected could be to introduce a degree of democratic control, via national parliaments, throughout regulatory cooperation processes.

Finally, it should be noted that the agreement specifies that regulatory cooperation activities will be carried out on a voluntary basis[52]. Thus, Article 21.5 sub-paragraph 2 stipulates that «*A Party is not prevented from adopting different regulatory measures or pursuing different initiatives for reasons including different institutional or legislative approaches, circumstances, values or priorities that are particular to that Party*».
This provision seems to evoke a right to respect the States' individual interests, even if these were to violate trade or a certain search for mutual harmonisation in standards, as can be the case in human rights. However, Article 21.2.6 considerably restricts this possibility by providing that «*if a Party refuses to initiate regulatory cooperation or withdraws from cooperation, it should be prepared to explain the reasons for its decision to the other Party*». Indeed, the requirement to justify the refusal of regulatory cooperation makes the option given in Article 21.5 lose all effectiveness. The State wanting to keep its approach and its regulations will therefore have to justify its political choices, thus encountering potential opposing arguments strong enough to make the State reincorporate the regulatory cooperation process, given its inability to defend itself appropriately as part of an agreement focused on trade.

It should be noted in this regard that the interpretative instrument does not specify whether a State can break with this requirement to justify the refusal to cooperate or not. Indeed, it only recalls, in fairly general terms, the voluntary nature of regulatory cooperation[53].

Recommendation no.6: The CNCDH praises the option to refuse or cease regulatory cooperation when the State's interests are such that they cannot be discussed, however, it hopes that this ability cannot be derogated from and that it is not coupled with any requirement, or incitement, to justify the refusal.

While regulatory cooperation could help to better take human rights into account, and especially labour rights and environmental protection, in existing standards and those to come, it seems however that this process involves a significant risk of challenging existing requirements in the matter, in favour of trade and investment.

2. Institutional aspect: the Regulatory Cooperation Forum

Article 21.6 of the agreement establishes a Regulatory Cooperation Forum (RCF)[54]. According to the European Commission[55], the Forum will function as a voluntary cooperation mechanism enabling useful information and experiences to be shared between regulation authorities and facilitating the identification of fields in which they can cooperate.
Nevertheless, it is stipulated that the Forum will not be able to change existing regulations or draw up new legislative provisions. Therefore the Forum will not be able to act as a stand-alone regulator and instead is limited to helping domestic authorities and making suggestions to them. Thus, the European Union insists that the RCF should not limit the decision-making power of regulators in its Member States or at its own level[56].

52. In this regard, see: CETA, Article 21.2.6 «*The Parties may undertake regulatory cooperation activities on a voluntary basis. For greater certainty, a Party is not required to enter into any particular regulatory cooperation activity, and may refuse to cooperate or may withdraw from cooperation*».
53. Council of the European Union, op. cit., note 17, Point 3, «*This cooperation will be voluntary: regulatory authorities can cooperate on a voluntary basis but do not have an obligation to do so, or to apply the outcome of their cooperation*».
54. The Forum is established under Article 26.2.1, letter h) (Specialised committees).
55. European Commission, *op. cit.*, note 15.
56. European Commission, *Id.*, p.4.

The CNCDH recognises that this point is adequately guaranteed in the agreement and that, according to its provisions, nothing encourages or enables the RCF to exceed its initial functions. However, other points, more concerned with the operational aspects of this Forum seem, to the CNCDH, to be of more concern.

The RCF is «*co-chaired by a senior representative of the Government of Canada [...] and a senior representative of the European Commission*»[57]. In addition, with regard to the way it operates, Article 21.6.4 provides that it will report to the CETA Joint Committee[58] on the implementation of Chapter 21.

Thus, it is a purely intergovernmental process which may result in a certain amount of opacity and operating outside of all democratic control. Indeed, while it is an unavoidable stakeholder in regulation matters, the European Parliament has not at any time provided for the Forum's consultation procedure. In principle the same applies for national parliaments, even though they are the first instigators of existing or future regulations and laws which will be examined within the Forum.

This observation is all the more troubling given that Article 21.6.3 provides that «*The Parties may by mutual consent invite other interested parties to participate in the meetings of the RCF.*» In other words, the representatives of Canada and the European Union will have the freedom to invite so called «interested parties» to issues dealt with at their convenience, without all the representatives being subject to a requirement for fair consultation and impartiality between all the stakeholders concerned[59]. There is therefore a risk that, in an agreement which has sided with trade and investment, the people invited will mainly be from businesses' interest groups or the businesses themselves and promoting human rights will not be their main interest.

As a result, for the CNCDH, one of the major risks lies in the agreement's total lack of clarity and precision when it comes to the Forum's membership, referral and control methods[60]. The executive powers seem to have a certain amount of room for manoeuvre, and this, with regard to a subject as delicate as sustainable development, is without ensuring that the appropriate people in this field would indeed be invited to the Forum.

Recommendation no.7: The CNCDH recommends that regulatory cooperation be subject to democratic control and transparency requirements by introducing a defined role to the European Parliament, and if possible, to national parliaments when their legislation is affected.

Recommendation no.8: The CNCDH requests that the Regulatory Cooperation Forum's membership, referral, decision and control methods be precisely defined.

57. CETA, Article 21.6.3.
58. In Article 26.1 of the Chapter «Administrative and Institutional Provisions», the creation of a CETA Joint Committee is provided for; this Committee is responsible for continually supervising the implementation, application and impact of the agreement. The Joint Committee is made up of representatives of the European Union and of Canada who will meet once per year or at the request of one of the Parties and will supervise the work of all specialised committees and other bodies established under the agreement. The CETA Joint Committee is not an independent body and its decisions and recommendations can only be adopted if the European Union and Canada agree to them.
59. AITEC and ATTAC, «CETA, marche-pieds pour l'Accord transatlantique – première analyse du texte de l'accord UE-Canada obtenu en août 2014». Available at [https://france.attac.org/nos-publications/notes-et-rapports/article/structure-generale-de-l-accord].
60. Although the Regulatory Cooperation Forum will be answerable to the CETA Joint Committee, it will be free to adopt its own procedures and work-plan, according to Article 21.6.4, letter a).

Second Part
The impacts of the agreement on the protection of social rights

For the European Commission, CETA «contains strict rules concerning the protection of social rights»[61]. Even though this Free Trade Agreement (FTA) does indeed seem to be innovative on several points, an analysis of CETA calls for this remark to be qualified.

With regard to the issue of employment, a strong argument for the Commission[62], the CNCDH wonders what made the Commission sign such an agreement. Indeed, the only impact assessment dates from 2008 and predicts a 0.08% increase in GDP. Other impact assessments foresee a net loss of 200,000 jobs in the European Union[63]. Without getting into the economists' debates on the way in which these assessments are carried out, it would seem expedient for the Commission to publish an up-to-date impact assessment, before trade agreements are signed, including data broken down by country and by sector, so that political decision-makers and citizens can make an informed decision about whether it is worth signing such an agreement.

More generally, the CNCDH has noted that, to date, there are not any comprehensive assessments to enable the determination of whether easing trade and investment restrictions leads to mutual improvement in social protection standards (race-to-the-top) or whether the opposite is true and this phenomenon leads to these standards being mutually lowered (race-to-the-bottom). The studies focusing on this subject[64]are limited to certain social protection standards (for example, the freedom of association and the right to collective bargaining), to certain specific cases, and are largely dependent on the availability of reliable data. The methodology used also leads to inconsistencies between the different studies. Thus, to date, «*Disentangling the links between labour standards, trade openness, and trade flows remains a challenge*»[65].

Recommendation no.9: Noting a detrimental gap in terms of impact assessments for free trade agreements on social rights, the CNCDH strongly recommends that such assessments be systematically and comprehensively carried out, based on reliable and verified data. Given the negotiation time needed to conclude these types of agreement, the CNCDH recommends that the impact assessments carried out in this way be updated when said agreement is signed, and demonstrate that stakeholders have truly been consulted.

Nevertheless, trade liberalisation can be analysed as a form of risk-taking by the negotiators: in the short term FTAs make «winners» and «losers» out of the partner States[66].

For the CNCDH, the main threat that trade liberalisation poses to social rights is the search for competitiveness. Indeed, the States, in order to appear «more advantageous» for companies when compared with other States, can lower social protection standards in order to be more competitive. This is commonly known as social dumping. This phenomenon is nothing new. During the 19th century, when the idea of limiting working hours first appeared, it was clear that this could only be done on an international scale, otherwise «*any reduction [in working hours] effected in only one country would be to*

61. European Commission, op.cit., note 15.
62. European Commission, DG for Trade, Comprehensive Economic and Trade Agreement. Available at: [http://ec.europa.eu/trade/policy/in-focus/ceta/index_fr.htm].
63. P. Kohler and S. Storm «CETA Without Blinders: How Cutting 'Trade Costs and More' Will Cause Unemployment, Inequality and Welfare Losses », *Tufts University,* 2016.
64. A summary of which is presented in the European Parliament, Directorate-General Internal Policies of the Union, Policy Department, Economic and Scientific Policy, TTIP and Labour Standard – Study for the EMPL Group, 2016, p. 14.
65. S. SALEM and F. ROZENTHAL, Labor Standards and Trade: A Review of Recent Empirical Evidence, *Journal of International Commerce and Economics*, 4(2), 2012, pp. 63-98.
66. C. DAVIDSON, S. J. MATUSZ, "Trade liberalization and compensation", *International Economic Review*, 47(3), pp. 723-747.

the advantage of the others»[67]. The International Labour Organisation (ILO) Constitution summarises this phenomenon as follows: «*the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries*»[68]. In the post-financial crisis context which characterises western economic systems seeking growth, this assertion is all the more relevant.

There are two conventional methods to ensure that partner States to an agreement are linked by the same protection standards in order that increasing competitiveness is not detrimental to protection standards:
▪ either the most advanced negotiators in terms of the ratification of protection instruments say they will ratify the FTA if the other Party ratifies the same protection instruments[69];
▪ or the less advanced Party in terms of the ratification of protection instruments commits to ratify them after the FTA comes into force.

A third, more ambitious, approach involves including a «social clause» alongside an anti-reduction clause for labour protection standards and procedural guarantees in the implementation of domestic law, as is the case for CETA. However, the inclusion of these clauses is not sufficient on its own. In order to effectively protect workers, the treaty needs to establish monitoring and implementation mechanisms for itself, and provide for the sanction of violations of international labour standards.
The CNCDH also notes with interest the Scandinavian trade unions' proposal aiming to include a «most-favoured-nation clause» for labour rights and social and environmental guarantees which would contribute to social progress.

A. CETA's social clause: international social standards moderately taken into account

The aim of the social clause is make trade conditional upon the respect of international labour protection standards. In other words, the execution of a FTA could be suspended if it turns out that one of the Parties is not be respecting the worker protection standards included in the social clause.

The idea of incorporating minimum social standards into FTAs was controversial from the beginning: while opponents to the social clause argue that «*the game of comparative advantages would be skewed in favour of developed countries*»[70] and that the social clause would be tantamount to «*disguised protectionism*»[71], supporters of the social clause claim that «*the internal working conditions would improve and invoke the fundamental human rights at work*»[72]. The first approach is still defended by the WTO, which considers «social clause» to be synonymous with «protectionism»[73]. Inversely, the EU and the United States have progressively incorporated internationally recognised standards into their bilateral agreements[74].

67. V. FERRANTE, «Social Concerns in Free Trade Agreements», *E-Journal of International and Comparative Labour Studies,* vol. 5, May-June 2016, p. 320.
68. ILO Constitution, preamble, fourth recital.
69. With regard to TTIP, it seems that the European Commission is putting pressure on the United States so that it will ratify certain fundamental ILO Conventions. See T. BODE, *Le mensonge du libre-échange : Pourquoi il faut s'opposer au TAFTA et au CETA, DVA.*
70. G. BESSE, «Mondialisation des échanges et droits fondamentaux de l'homme au travail : quel progrès possible aujourd'hui ? «, *Droit social,* 1994, no. 12, pp. 841-849.
71. *Ibid.*
72. *Ibid.*
73. WTO, Ministerial Declaration, Singapore, 18 December 1996, §4. At multilateral negotiation level in general and at WTO level especially, making economic and social rights protection coincide with free trade agreement seems impossible. See European Parliament, op. cit. note 57, p. 19. Interview with Ms Jegouzo, Head of the European Commission Representation in France, with the CNCDH on 18 Oct. 2016.
74. G. BESSE, «Mondialisation des échanges et droits fondamentaux de l'homme au travail : quel progrès possible aujourd'hui ? «, *Droit social,* 1994, no. 12, pp. 841-849.

1. The international labour standards included in CETA

International labour standards are included in Article 23.3 §§ 1 and 2 of CETA. According to these provisions, each State «shall ensure that» its labour law and practices «embody and provide protection» for the eight fundamental principles of the ILO, which provide protection for four rights referred to as being a necessary condition for the effective enjoyment of all the others. They are: the freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination with respect to employment and occupation.

In addition, each State «shall ensure that» its labour law and practices «promote» certain objectives included in the ILO Decent Work Agenda, namely: health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness; establishment of acceptable minimum employment standards for wage earners, including those not covered by a collective agreement; and non-discrimination in respect of working conditions, including for migrant workers.

Firstly, the reference to non-discrimination in terms of working conditions in respect of migrant workers is a positive feature. Indeed, it enables the non-discrimination principle, included in Article 7 of the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, to be incorporated even though neither Canada nor the EU's Member States have ratified it. However, the CNCDH feels that it would have been worth referring to other aspects of the Convention as it outlines a catalogue of rights, including economic and social rights, beyond the non-discrimination principle.

Recommendation no.10: The CNCDH supports the inclusion of all of the relevant provisions laid out in the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in future free trade agreements. In that regard, the CNCDH reiterates its recommendation that France ratifies this Convention.

In addition, Article 23.3.3 specifies, whilst remaining fairly vague, the rules which each Party must «ensure» are incorporated with regard to the health and safety of workers. This provision establishes a precaution principle, according to which the Parties commit to not use «the lack of full scientific certainty as a reason to postpone [...] protective measures». Thus, when there are «*existing or potential hazards or conditions that could reasonably be expected to cause injury or illness to a natural person*», the States should not justify their inaction with the lack of scientific certainty regarding the medical consequences of a new phenomenon. The CNCDH considers the inclusion of this clause as a positive step, since it goes beyond the eight fundamental principles of the ILO.

The reference to the Decent Work Agenda is also a positive step — it demonstrates the continuity of EU policy to include this Agenda in FTAs, which dates back to 1995. The objectives it references have continued to get broader[75]. However, the CNCDH feels that the EU and Canada could have gone much further than Article 23.3. Indeed, only a few of the Agenda's objectives were taken up by this Article.

Recommendation no.11: The CNCDH praises the, albeit partial, reference made in CETA to the ILO Decent Work Agenda, however, it recommends that France advocate that this Agenda be more extensively, even exhaustively, taken into account in future agreements of this type.

Recommendation no.12: In light of the risks created by trade and investment liberalisation (restructuring plans, relocations, etc.), the CNCDH recommends that CETA and future agreements contain provisions protecting employees which are not limited by national borders. The inclusion of provisions regarding investment must go hand in hand with strengthening workers' rights vis-à-vis multinational companies.

75. See European Parliament, op. cit. note 64, pp. 22-23.

In order to reach this goal, the CNCDH considers that workers' rights to information and consultation, as well as the opportunity to organise cooperation and coordination meetings, should be guaranteed across the scope of a company and not be limited to national or European scope.

2. Uncertainty regarding the scope of States' commitment

From the outset, the terms used in Article 23.3 raise questions. For the CNCDH, one must ask whether the States are obliged to respect these international standards and conventions or whether they must simply take them into account, or, according to the expression used, «shall ensure that» they respect them. In other words, whether the States have to follow the international standards included in CETA or not.

In this respect, the standards which the States are already bound by must be differentiated from the other standards. While the 28 Member States of the EU ratified the eight fundamental principles of the ILO, Canada only ratified seven of them[76]. Under the *pacta sund servanda* rule[77], these States must respect the treaties that they have ratified, similarly they must perform them in good faith[78]. Thus, independent of CETA and its provisions, the States are bound by these conventions, as well as any other convention that they may have lawfully ratified, such as, for example, the International Covenant on Economic, Social and Cultural Rights.

The key question here is what is CETA's impact on the standards referenced by Article 23.3? Indeed, for the CNCDH, one must ask whether CETA shores up their binding nature, or, if, on the contrary, it weakens the States' commitments. The terms used in Article 23.3 argue in favour of a regressive interpretation of the binding nature of the treaties cited. Indeed, paragraphs 1 to 3 state that each State «shall ensure that its labour law and practices»: «*embody and provide protection for the fundamental principles and rights at work» (§1); «promote the following objectives included in the ILO Decent Work Agenda» (§2); «embody and provide protection for [...] the health and safety of workers» (§3).*

These terms are in clear contrast with those used for example, in Article 2.4 dealing with the reduction and elimination of customs duties, a key provision of any FTA: «*Each Party shall reduce or eliminate customs duties on goods originating in either Party*», and not «*shall ensure that customs duties on goods originating in either Party are reduced or eliminated*».

It therefore seems that the States are committed through obligations of means rather than performance obligations, even though the ILO Conventions clearly outline a performance obligation[79]. For the CNCDH, the greatest danger is that the States will no longer feel bound by these conventions even though they have ratified them, or that they use Article 23.3 of CETA as justification for not carrying out a performance obligation which they are bound to given their ratification of the ILO Conventions.

Recommendation no.13: The CNCDH recommends that the respect of international standards in terms of social rights be a sine qua none condition of implementing international trade and investment agreements. It would be advisable to have the implementation and respect of international conventions and other texts which the States have previously signed with regard to human rights as a performance obligation.

Article 23.11 adds to the confusion. According to this provision, the States «*understand that the*

76. Canada did not ratify Convention no.98 on the right to organise and collective bargaining.
77. «Treaties must be respected».
78. Vienna Convention on the law of treaties, Art. 31.
79. For example, Article 1 of Convention no.105 on the abolition of forced labour states that «*Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour (...)*».

obligations included under this Chapter are binding» (in French «*comprennent que les obligations énoncées dans le présent chapitre sont contraignantes*»). As a preliminary remark, let us look at the use of the word «*contraignantes*» (i.e. from «*contrainte*», «*constraint*» in English) in the French translation which is unsuitable: the English version of CETA (the language used during the negotiations) uses the term «*binding*» which should have been translated as «*obligatoire*» (i.e. from «*obligation*» which is the same word in English). Saying that «*obligations*» are «obligatoire» is tautological and does not provide any substantial data regarding the scope of the States' commitment. This vague terminology is all the more troublesome given that CETA does not provide for any «contraignant» mechanism for Chapter 23 (see below). Even though there are some typical «contraignant» mechanisms which the EU and Canada can appeal to if fundamental social rights are not respected, such as counter-measures[80], the «*contrainte*» comes precisely from this mechanism rather than from the obligation which was originally violated.

It goes without saying that statements of intent, such as those stated in the first paragraph of Article 23.1[81], are not «obligations» in that sense, given that they do not present any legal commitment on the part of the States. However, the provision under which a State «*shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour law and standards, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory*»[82] is formulated in such a way that it would be reasonable to think that the States intended to legally commit to not practise social dumping.

Finally, the CNCDH notes that Canada, which has not ratified Convention no.98 of the ILO on the right to organise and collective bargaining, is only obliged to «*make continued and sustained efforts to ratify the fundamental ILO Conventions*»[83]. In other words, the EU has not required Canada to ratify all the fundamental ILO Conventions as a prerequisite to the CETA negotiation, even though it does so within the framework of the «Generalised System of Preferences plus» («GSP+»)[84]. Canada is therefore still not bound by Convention no.98 of the ILO. However, according to the «interpretative instrument», Canada formally commits to ratify Convention no.98 of the ILO and to implement it[85]. This document states that the ratification process has been started by the Canadian authorities.

Recommendation no.14: The CNCDH advises that, with next generation agreements such as CETA, the Parties have the ratification of all of the fundamental ILO conventions as a prerequisite to the agreement coming into force.

B. The non-lowering clause and the procedural guarantees in the implementation of domestic law

Under the terms of Article 23.4, entitled «Upholding levels of protection», the States commit to not weaken or reduce the levels of protection afforded by their domestic social law with the aim of stimulating trade or investment. This clause, which demonstrates that next generation FTAs do not only deal with international labour law, aims to prohibit social dumping. This positive addition is in keeping with a trade

80. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the General Assembly on 12 December 2001, (A/56/10), articles 49 to 54.
81. The relevant passage reads as follows: «*The Parties recognise the value of international cooperation and agreements on labour affairs as a response of the international community to economic, employment and social challenges and opportunities resulting from globalisation (...)*».
82. CETA, Article 23.4.2.
83. CETA, Article 23.3.4
84. See European Council, *Regulation (EC) No.732/2008 dated 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007,* Article 9, §1, letter b).
85. Council of the European Union, op. cit., note 17, 8), b).

policy initiated in 2008 by the EU in the CARIFORUM agreement[86]. To date, there are nine FTAs concluded by the EU which include this obligation[87].

However, to date there have been no instances of the States applying the non-lowering clause[88]. This phenomenon may be explained by the fact that the implementation of this clause requires two elements of proof to be gathered, which is difficult. First of all, the impact on trade and investment, in other words the fact that the measure taken by the State «stimulates» trade or investment must be proven. Then, the intentionality of the measure: the fact that the State is lowering its social standards «with the aim of» stimulating trade or investment must be proven, and therefore the will of the legislative or regulatory power.

However, the «interpretative instrument» adds that if the non-lowering clause is violated «*governments can remedy such violations regardless of whether these negatively affect an investment or investor's expectations of profit*»[89]. This point is a step forward compared with the CETA text. This shall not be enough for the CNCDH, as this possibility is not mentioned in CETA directly, raising doubts over its application.

Recommendation no.15: For the CNCDH, it is vital that the non-lowering clauses be effective and applicable in international trade and investment agreements. In order to do this, it recommends that the option given to the States to take advantage of this clause to report lowered standards be made easier, and that the burden of proof be reversed, placing it upon the State suspected of lowering its social standards to stimulate trade or investment.

Nevertheless, the CNCDH would like to praise Article 23.5 which, with the aim of ensuring effective respect of this clause, sets a number of minimum procedural guarantees, generally in the employee's favour, that the State must respect in procedures in which a Party cites a violation of labour law domestically. It even seems that a number of this Article's provisions take up the procedural guarantees expressed in international instruments related to civil and political rights and by case law of bodies related to it.

Even if the worker or anyone with a legitimate interest alleges a breach of a right conferred by national legislation — therefore, potentially, a right conferred by the instruments stated in Article 23.3 implemented in domestic law — the State must ensure that these plaintiffs have access to an «effective» procedure, whether administrative or legal, enabling damages suffered to be compensated for where necessary[90]. The procedures must not have a «prohibitive cost»[91] for the plaintiff and must not take «unreasonable» periods of time. These procedures must provide for injunctions. Finally, these procedures must be «fair and equitable».

In the same vein, Article 23.6 declares that States must «*promote public awareness of its labour law*» and the «*enforcement and compliance procedures*».

86. See European Parliament, op. cit. note 64, p. 23.
87. *Ibid.*
88. *Ibid.*
89. Council of the European Union, op. cit. note 17.
90. A parallel can be drawn with Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: these two provisions require States to implement effective procedures enabling compensation for right violations.
91. This expression comes from case law of the European Court of Human Rights. See Guide on Article 6, CoE, §45, p. 15.

C. Monitoring, implementing and sanctioning violations of international labour standards

1. The choice of intergovernmental cooperation rather than a mechanism for dispute settlement

Under Article 23.11, Chapter 23 is not included in the State-State dispute settlement mechanism. In its place, States can either have recourse to «*good offices, conciliation, or mediation*»[92] to resolve their dispute, or refer to a Panel of Experts specially established for disputes linked to labour law.

According to the European Commission, the exemption of State-State dispute settlement from Chapter 23 is explained by the fact that it is too difficult to prove the impact that social legislation can have on trade and investment[93]. Subsequently, submitting labour disputes to State-State dispute settlement jurisdiction would be inappropriate and ineffective. There is no doubt that quantifying the impact of the amendment of labour legislation which would violate international trade and investment standards can prove complicated. However, it may also be obvious that the amendment of a domestic legislation which would violate international law would be likely to stimulate trade and investment and, consequently, to increase the competitiveness of the State concerned.

Recommendation no.16: The CNCDH hopes that France initiates a discussion in order to facilitate the inclusion of social aspects of international trade and investment agreements which will be negotiated by the EU in State-State dispute settlement. The CNCDH suggests including the ILO as an expert in monitoring the implementation of social law provisions, by allowing it to be consulted during dispute settlements and to make this opinion binding.

2. The Panel of Experts, subsidiary mechanism without power to sanction

If the States are unable to resolve their dispute via governmental consultation, they can submit it to the Panel of Experts[94]. This body's intervention is therefore subsidiary.

The members of the Panel of Experts must have expertise in the issue raised. They serve in their individual capacities and are independent[95]. This Panel of Experts determines «*as to whether the responding Party has conformed with its obligations*» under Chapter 23 and makes the reports, along with their recommendations, public.

However, the findings on the violation of an international obligation by the State do not possess the force of res judicata: the Parties only «*take into account the final report*»[96] during their discussions following the findings regarding the violation. The experts' opinion can therefore be ignored.

The weakness of this mechanism is accentuated by the fact that the violation of an international labour obligation does not bring about any sanction. The leaked rough draft of CETA revealed that the EU and not Canada opposed the labour law sanctions[97]. The EU reportedly insisted on the fact that the decisions of the Panel of Experts «shall not trigger the imposition of any economic penalties by the other Party», while Canada asked specifically for the possibility to apply and enforce economic sanctions[98]. Indeed, the European institutions consider that economic sanctions are neither desirable nor effective

92. CETA, Art. 23.11.2.
93. Interview with Mr Bourcieu, Trade Advisor for the European Commission Representation in France, with the CNCDH on 28 Oct. 2016.
94. CETA, Article 23.10.1.
95. *Id.*, §7
96. CETA, Art. 23.10.12.
97. See European Parliament, op. cit. note 64, p. 27.
98. *Ibid.*

and that workers' rights should be promoted in a different way[99]. According to the European Commission, the fact that experts pronounce a State's violation of a labour law obligation has a dissuasive effect, and would suffice to force a State to conform to its obligations, lest its reputation on the international scene be tarnished[100].

It seems to the CNCDH that the cooperative approach, advocated by the EU, and the option to sanction international law violations are not contradictory: cooperation could be used initially to settle disputes, then, in the absence of compliance with international law, the States could use sanctions (e.g. economic) to enforce the execution of international labour law. However, CETA is not regressive on this point: it is rather seen as a missed opportunity to go further in the effective implementation of international law. It turns out that the States, in possession of the standard-setting production process, have little interest in the effective implementation of international labour law.

Recommendation no.17: The CNCDH encourages France to ensure, during negotiations for international trade and investment agreements, that sanction mechanisms be incorporated if a State Party is found to be violating an international labour law obligation.

3. The implementation of social rights via the human rights clause: a merely theoretical possibility

The «human rights clauses» enable the execution of the FTA to be suspended if one of the Parties infringes an «essential element» of the agreement, of which human rights form an integral part. Since the Treaty on European Union (1993) came into force, all the FTAs negotiated by the EU have included a human rights clause[101]. With regard to CETA, negotiators preferred to include this clause in the Strategic Partnership Agreement, an agreement negotiated in parallel to CETA.

For the CNCDH, this clause is extremely weak in relation to what the EU usually imposed on developing countries: only a «*coup d'État or grave crimes that threaten the peace, security and well-being of the international community*»[102] can constitute a «*particularly serious and substantial*» violation and consequently be the basis for the suspension of CETA. Admittedly, the issues with Canada are not the same as those with certain other third States, but this set a negative precedent for the effective implementation of human rights, in particular given the part of role model that CETA is set to play.

In any case, the human rights clause seems to only be able to be implemented when civil and political rights are violated and not economic, social or cultural rights[103]. The European Parliament had requested, in vain, that the European Commission ensure that any trade agreement concluded by the EU with a third country provides for a «legally binding and suspensive» human rights clause[104].

Recommendation no.18: The CNCDH recommends the inclusion, in all international trade and investment agreements negotiated by the EU, of a strong and mandatory human rights clause in line with the values the EU promotes, and that this be accompanied by a monitoring and sanction mechanism.

4. Civil society and monitoring the implementation of international labour law: an inadequate role

The CNCDH would like to acknowledge one of CETA's positive aspects. Indeed, this treaty involves many stakeholders at different levels and institutionalises civil society meetings. Nevertheless, Article

99. *Ibid.*
100. Interview with Mr Bourcieu, Trade Advisor for the European Commission Representation in France, with the CNCDH on 28 Oct. 2016.
101. M. GARCIA, «From Idealism to Realism? EU Preferential Trade Agreement policy», *Journal of Contemporary European Research,* 9(4), 2013, p. 526.
102. Strategic Partnership Agreement, Article 28, §3.
103. See European Parliament, *op. cit.* note 64, p. 28.
104. See European Parliament, *op. cit.*, note 37.

22.5, which deals with the Civil Society Forum, is succinct to say the least. The Forum is made up of the following civil society organisations: employers; trade unions; labour organisations; business organisations; environmental groups «who are representative and independent» *(sic)* and other relevant civil society organisations.

However, with regard to the Forum's composition, the CNCDH feels that the addition of the condition for «environmental groups» to be representative and independent is highly questionable. Nothing is specified when it comes to criteria enabling a definition of what «representative» and «independent» cover to be established. In addition, this is the only part of civil society to be subject to such conditions. Although these criteria can be understood as enabling industrial lobbies to be excluded from the Forum, they can also be seen as retaliations for the long-standing criticisms these «environmental groups» levelled against CETA.

The frequency of the Forum meetings is also cause for criticism. Indeed, paragraph 2 of Article 22.5 sets the frequency of meetings at once per year, but with the condition of the States' approval[105]. Consequently the Parties could convene meetings much less frequently than the — already inadequate — standard of once per year.

Article 22.5 is quite vague when it comes to the purpose of the meetings and the relationships between the Civil Society Forum and the partner States. Even if the Forum's purpose — otherwise laudable — is to «*conduct a dialogue on the sustainable development aspects of CETA*», Article 22.5 does not mention whether this dialogue is only conducted between the organisations making up the Forum, or whether the States are also involved in this dialogue given that they alone can amend the existing law. In addition, the States only commit to «*facilitate [organisation of] a [...] Forum*» and can also «*facilitate participation by virtual means*». The expression «*virtual means*» seems in opposition to «*material means*», and seems to insinuate that the States will not finance this Forum. Yet it seems clear that the lack of financing for meetings and associated costs (travel, accommodation, etc.) is an obstacle to them actually being held, and *in fine*, to the effectiveness of the system for implementing international social standards.

Recommendation no.19: The CNCDH recommends that the institutionalisation of trade union and civil society meetings be supported by the availability of the necessary human and financial resources, such as a Secretariat dedicated to the Civil Society Forum and its own resources, in order that this body can successfully carry out its monitoring role in the application of free trade agreements.

105. By adding the following phrase: «unless otherwise agreed by the Parties».

Third Part
The agreement's climate and environmental issues

In accordance with the negotiation mandate[106], the agreement includes an environmental dimension to trade in Chapter 24 «Trade and Environment», which is, more broadly, a prerequisite to sustainable development.

According to the European Commission[107], CETA will be part of an approach which is respectful of the recognised international agreements and standards in the environmental field, and will ensure their proper implementation, and thus will not have any consequences on environmental regulations in the EU. In this respect, the Commission insists on the fact that the Parties should not weaken or break their environmental laws in order to achieve the agreement's objective, namely to develop their trade and attract investments.

The French government, through the Directorate General of the Treasury[108], broadly takes up these lines of argument, clarifying that the EU's level of environmental protection will be in no way diminished by the agreement. Indeed, it is argued that the EU, its Member States and Canada will be able to exercise their right to freely legislate in areas concerning public interest, such as the environment, in accordance with their international commitments in the matter, while seeking to provide a high level of protection.

However, for the CNCDH, there is no denying the fact that the guarantees put forward in this way do not meet the level of effectiveness expected in the content of the agreement on some points.

A. Question of the conformity of CETA with the Paris Agreement on the Climate

Regarding the negotiation mandate, the agreement should «*promote sustainable development by providing the right conditions to increase trade in environmental goods and services, including those that encourage the transition to a low carbon resource efficient global economy. Trade in environmental goods and services, as well as the elimination of those barriers which inhibit such trade, should be on the basis that the goods or services provide for a substantial overall benefit for the environment*»[109].

Although these statements are ambitious and conform to current environmental requirements, there is reasonable doubt as to whether the agreement conforms to them[110]. Firstly, as outlined above, the «Sustainable Development» Chapter, which Chapter 24 belongs to, has no associated possible sanction if the Parties do not conform, which raises questions over the implementation of the latter. In addition, and above all, no mention is made of the Paris Agreement on the Climate[111]. Worse, for many stakeholders, there is a risk that the implementation of CETA does not allow for compliance with the objectives of the Paris Agreement, and even leads to aggravating global warming.

106. Council of the European Union, op. cit., note 12, point 39.
107. European Commission, op.cit., note 62.
108. Ministry of the Economy and Finance, Directorate General of the Treasury, Accord économique et commercial global entre l'Union européenne et le Canada – Questions et Réponses (*Comprehensive Economic and Trade Agreement between the European Union and Canada – Questions and Responses)*, available at: [www.tresor.economie.gouv.fr/10864_AECG-CETA-questions-reponses].
109. Council of the European Union, *op. cit.,* note 12, §39.
110. An internal document from the European Commission made public by the Corporate Europe Observatory (CEO) NGO, on 4 December 2015, revealed the instructions Brussels gave to its negotiators to not allow the future climate agreement to be able to impose limits on trade. It is a memo presented by the Commission's Directorate-General for «Climate Action» addressed to the Council's Trade Policy Committee, on 20 November 2015, in other words before COP21. The position of the European Union (EU) appears clear: «No mention of trade should appear in any climate change agreement. And the EU is against «any explicit mention of trade», any mention of intellectual property rights and promises to minimise «discussion on trade-related issues»», CEO indicated. Available at [www.politis.fr/COP-21-La-Commission-europeenne-a,33378.html].
111. The Paris Agreement is a universally-binding agreement on the climate, negotiated during the Paris Climate Conference (COP21) for the United Nations Framework Convention on Climate Change. It came into force on 4 November 2016, see: UN, Framework Convention on Climate Change, Adoption of the Paris Agreement, FCCC/CP/2015/L.9/Rev.1, 12 December 2015.

1. Freudian slip: no mention of the Paris Agreement and its objectives

After the signature of the Paris Agreement, CETA gave an unprecedented opportunity to conclude the first climate-compatible international trade and investment agreement. Although the negotiations for CETA took place before the 2015 Paris Climate Conference, no one could reasonably ignore the climate ambitions which animated the international community and which lead to the conclusion of a fair, sustainable, dynamic, balanced and legally binding agreement[112], i.e. the Paris Agreement.

Accordingly, and while CETA is defined as a «next generation» agreement, it is particularly regrettable to note that it does not provide any concrete measures capable of reducing greenhouse gas emissions, and in addition that no mention is made of the objective aiming to limit the rise in global warming, whether to 2°C or to 1.5°C.

Furthermore, the agreement does not include a specific chapter related to energy, unlike the TTIP draft, making the latter a good like any other[113]. Such a chapter would have, however, enabled a preference to be imposed in terms of the trade of goods and services using clean or renewable energies, and thus to conform, indirectly, without stating it, to the Paris Agreement. Yet energy trading is highly liberalised, like any other good. This therefore covers the liberalisation of fossil fuels, even though they are strongly objected to, since no exception to their use is stated. Although the custom duties in force before CETA are already very low and do not represent an obstacle to trade, with CETA, the way is wide open, with no exceptions, and without the option to turn back.

Nevertheless, the CNCDH would like to applaud the provision in Article 24.9 paragraph 2 which stipulates that «*parties shall, consistent with their international obligations, pay special attention to facilitating the removal of obstacles to trade or investment in goods and services of particular relevance for climate change mitigation and in particular trade or investment in renewable energy goods and related services*».
However, there is reason to doubt that a single provision in such a substantial agreement, can, on its own, compensate for the lack of a specific chapter dealing with energy. Even though facilitating trade and investments in green technologies is a good thing, the positive effects of such a decision cancel each other out if the same advantages are given to fossil fuels.

This observation is especially detrimental and regrettable given that the negotiation mandate expressly targeted the transition towards a low-carbon global economy using resources efficiently.

There is a risk that businesses will refer to Investor-State dispute settlement in order to attack environmental regulations or laws regarding climate issues on the grounds that they hinder trade even though they would respond to the requirements of the Paris Agreement (see below). However, these situations could have been prevented. Indeed, if the Paris Agreement had been mentioned in the body of the treaty, it would have enabled the contested measure to be interpreted as part of Investor-State dispute settlement in light of the international environmental and climate obligations resulting from it, thus serving as a basis for arbitrators.

Likewise, regulatory cooperation, previously dealt with by this opinion, could call into question these very laws fighting against climate change, as a result, tone down their content in advance of the political

112. Remark made by Laurent Fabius, Minister of Foreign Affairs and International Development, during the presentation of the final version of the agreement, see: *Le Monde,* Une dernière journée marathon avant l'adoption d'un « accord décisif pour la planète, 12 Dec. 2015. Available at [www.lemonde.fr/cop21/article/2015/12/12/cop21-laurent-fabius-presente-un-texte-d-accord-mondial-sur-le-climat_4830539_4527432.html].
113. A specific chapter enables specific regulations for market access, for discipline in national regulations and for performance requirements, etc. to be defined which should enable elements of local content to be included for certain investments, certain activities to be banned or limited and subsidies in fossil fuels to be forbidden and instead subsidies for other activities conducive to the transition to be favoured, etc.

process.

Recommendation no.20: The CNCDH recommends that the energy field be the subject of a specific chapter, thus enabling commitments to reduce greenhouse gas emissions to be included in the agreement, and explicitly authorising the Parties to promote investments in clean energy sectors, and also to gradually ban those oriented towards fossil fuels.

Recommendation no.21: The CNCDH encourages France, who chaired COP21, to encourage the inclusion, in each agreement, of an explicit and express mention of the Paris Agreement on the Climate, or at least its objective to limit the increase in global warming.

2. The fear of an agreement with harmful effects for the climate

The CNCDH, while concerned over the fact that the agreement does not have any measures to reduce greenhouse gas emissions linked to air and maritime transport, has chosen to focus on the oil sands situation[114] in order to illustrate the potential harmful effects CETA could have on the climate and the consequences of not mentioning the Paris Agreement. Indeed, the 2011 sustainable development assessment[115] is unequivocal with regard to the agreement's effects on the development of the exploitation of these lands.

The aspects of the agreement relating to energy are most likely one of the main environmental and climate concerns given the partner chosen by the EU. Indeed, within the oil sands, mainly coming from the Province of Alberta, Canada may harbour the second largest oil reserve in the world[116]. Yet it is the most polluting oil industry in the world with more chemical waste and greenhouse gas emissions than conventional oils[117]. As the EU does not have a significant oil reserve, it is highly dependent on external sources and therefore on imports, which can partly explain why the EU sought a free trade agreement with Canada.

However, the sustainable development assessment[118] is quite clear on the fact that it is unlikely that the tariff liberalisation provided for by CETA will bring about a considerable increase in Canadian oil exports from oil sands to Europe. Indeed, Europe is currently only a minor market for Canadian oil, and, according to experts, this will hardly change with CETA.

Yet the assessment[119] is also unequivocal on another point, namely that CETA is likely to increase production in the Canadian oil industry by means of the liberalisation of investments. This conclusion is justified[120] in that the oil sands are already, to date, a significant beneficiary of global investments, and

114. Oil sand is a mixture of crude bitumen, sand, water and clay. These oil sands are exploited from open-pit mines or from underground deposits. In the former case, their extraction requires excavators and giant trucks. In the latter case, drilling is required and the bitumen must be heated by injecting vapour and solvents extensively, then the sand extracted must be mixed with hot water to remove its viscous nature. Finally, it must be decanted to extract the oil from it. Thus it is a complex, expensive and extremely polluting process.
Oil sand deposits are a significant source of synthetic crude oil referred to as «unconventional». The two regions in the world which have the majority of the oil sand are: Canada and Venezuela.
115. A Trade Sustainable Development Assessment relating to the negotiation of a Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, Trade 10/B3/B06, Final Report, June 2011. This report was commissioned and financed by the European Commission. However, the points of view expressed were those of the contractors and do not represent the Commission's official opinion.
116. According to the sustainable development assessment, out of the 175 billion barrels of oil reserves in Canada, 97% are found in the oil sands located in three deposits in Alberta and Saskatchewan. This availability would make Canada the second largest global oil reserve.
117. Unconventional oil is oil produced or extracted using techniques other than the traditional, and therefore conventional, method of oil wells, like, for example, hydraulic fracturing. Unconventional oil emits 49% more greenhouse gas on average than conventional oil extraction.
118. A Trade Sustainable Development Assessment relating to the negotiation of a Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, op. cit., note 116, p.150.
119. *Ibid*
120. Collectif unitaire national Stop-TAFTA, «Le CETA ; un « bon accord ? « - Crash test en 9 mots clés». Available at [www.

this also applies to direct European investments[121]. There is therefore a reasonable risk that European investments in this sector will considerably increase after the implementation of CETA taking into account the significant profits which the oil industry can generate as well.

This forecast is especially concerning with regard to climate and environmental requirements within the international community. Indeed, in order to aim to reach the objective to limit the temperature increase to 1.5°C, and therefore to conform to the Paris Agreement, the majority of fossil fuels — oil, gas, coal — will have to remain in the ground, unexploited[122]. Additionally, the governments who wish to honour this commitment will have to adopt ambitious and major policies[123] in order to initiate a durable transition to renewable and clean energies, and thus progressively limit fossil fuel trade and extraction. Yet CETA, by officially liberalising investment in the oil exploitation sector, now restricts the possibility of the EU and its Member States to resort to these policies as soon as the Canadian government and its businesses are concerned.

This has already been noted in regulatory matters, in particular in the revision of the European Directive on the quality of fuels[124]. Indeed, for many stakeholders[125], the Canadian government, at the same time as promoting its mining sector's interests, used CETA negotiations as a way of toning down European legislation. Thus, the weakening of this directive which aimed to force fuel suppliers to decrease the carbon intensity of fuels, is attributable to the Canadian government, acting in the interest of oil and gas companies operating in their territory. This directive was, thus, initially supposed to take into account the ecological footprint of oil products made from oil sands, the extraction and production of which requires more energy. In its final version, the directive recognises that the carbon footprint of this oil is more significant, without however forcing European companies to declare the share of unconventional oil in their imports. Thus, the directive lost any ambition it had to penalise or discourage companies from investing or importing products made from oil sands.

Here again was a missed opportunity, even though the European Parliament highlighted, with regard to TTIP, that it was an opportunity for the «*development of ambitious and binding common sustainability standards for energy production and energy efficiency, always taking into account and adhering to existing standards on both sides such as the EU energy labelling and eco-design directives and to explore ways to enhance cooperation on energy research, development and innovation and promotion of low-carbon and environmentally friendly technologies*»[126].

Thus, when all attention and efforts should be concentrated on avoiding aggravating the climate situation, the CNCDH finds it very difficult to note that agreements, such as CETA, make no reference to the obligations and commitments arising from the Paris Agreement, and what is more, contribute to increasing the level of greenhouse gas emissions.

B. Protection standards threatened: weakening the European precautionary principle

collectifstoptafta.org/ressources-materiels/ceta/article/le-ceta-un-bon-accord-crash-test-en-9-mots-cles]; AITEC, op. cit., note 40.

121. According to the 2011 sustainable development assessment, for the EU, investment in oil and natural gas is one of the largest forms of investment in Canada. For example, in 2007, these fields represented 18.4% of total direct foreign investments from the EU in Canada. In addition, the three main oil companies in the EU already have some form of investment in Canadian oil sands. Finally, the assessment predicts that investment in oil sands is set to drastically increase and, in the long-term, that investments would even reach 192 billion dollars during the next 25 years.

122. The community is unanimous, in order to limit global warming, 80% of fossil fuel reserves must remain in the ground.

123. For example: import restrictions, moratoriums on the extraction of fossil fuels and polluting infrastructures, etc.

124. European Parliament and Council of the European Union, *Directive amending directive 98/70/EC relating to the quality of petrol and diesel fuels and amending directive 2009/28/EC on the promotion of the use of energy from renewable sources, 2015/1513,* 9 Sept. 2015

125. See for example: *Corporate Europe Observatory, Trading away democracy – how CETA's investor protection rules could result in a boom of investor claims against Canada and the EU,* Sept. 2016.

126. European Parliament, op.cit., note 37, letter x).

The precautionary principle is contained in Article 191, paragraph 2 of the TFEU[127]. It thus provides that EU policy on the environment is partly based on the precautionary principle, and in this way aims for a high level of protection. This Article is supplemented by a Communication from the Commission[128] which establishes the guidelines on the application of this principle. The precautionary principle therefore enables competent authorities to adopt preventative measures even when all the scientific proof[129] related to the risk has still not been gathered together[130]. Thus, the burden of proo is distributed differently: the product subject to the authorisation restriction is presumed to pose a risk until the opposite has been proven. When this principle is applied, it can result in the prevention of the importation of certain products coming from third States into the EU.

The precautionary principle is therefore the keystone of European policy in terms of health, the environment and consumer protection. The European Union therefore makes extensive use of it, for example, the CJEU does not hesitate to resort to it in cases related to environmental protection and has also made it a general principle of European law[131].

In addition, it should be noted that this principle is also enshrined in international law, in the 1992 Rio Declaration, adopted as part of the United Nations Conference on Environment and Development[132]. Moreover, the precautionary principle appears in the United Nations Framework on Climate Change[133] (Article 3, paragraph 3) and in the Convention on Biological Diversity (Preamble). Without being exhaustive, it was also proclaimed in other international texts, such as the Cartagena Protocol[134].

International trade law, in the framework of the World Trade Organisation (WTO), determines the leeway States have to defend their demands regarding goods, services and intellectual property[135]. Indeed, each of the WTO's agreements, including GATT[136] for goods, states the principles for liberalisations and the authorised exceptions.
As a result, Article XX of GATT, which sets out general exceptions, offers some flexibility regarding the use of the precautionary principle as capable of justifying taking a measure even though it contradicts the general principle of liberalisation of trade. According to Article XX b), the «*measures necessary to protect human, animal or plant life or health*» are, for example, accepted as an exception to trade. In addition, according to Article XX g), measures «*relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption*»

127. Article 191 paragraph 2 TFEU: «*Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.*
In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union».
128. Commission of the European Communities, *Communication from the Commission on the precautionary principle, COM(2000) 1 final*, 2 Feb. 2000.
129. Article 191 paragraph 3 of the TFEU specifies that the EU takes account, amongst other things, of available scientific and technical data in preparing its policy on the environment.
130. Foodwatch, «CETA, TAFTA et le principe de précaution de l'Union européenne». Available at [www.foodwatch.org/uploads/tx_abdownloads/files/foodwatch_rapport_Principe_precaution_2016_WEB.pdf].
131. See in this regard: CJEU, case. C-180/96, Rec. 1998, I-2265 – Great Britain / Commission, n°98 ss.
132. Principle 15 of this declaration provides that «I*n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*». Note that Canada and the United States were involved in the adoption of this declaration
133. UN, *United Nations Framework on Climate Change*, FCCC/INFORMAL/84, GE.05-62221, 1992.
134. Cartagena Protocol on Biosafety to the Convention on Biological Diversity.
135. The WTO's general principles are incorporated into three sectoral agreements: GATT for goods, the General Agreement on Trade in Services (GATS) and the Trade-Related Aspects of Intellectual Property Rights (TRIPS). To know more about how the WTO works, see the World Trade Organisation website, Understanding the WTO Available at [www.wto.org/french/thewto_f/whatis_f/tif_f/tif_f.htm].
136. The General Agreement on Tariffs and Trade (GATT), signed in 1947, regulates international goods trading and aims to develop free trade. One of the last rounds of negotiations for this agreement, in 1994, led to the creation of the WTO

are also allowed. For the CNCDH, the inclusion of these provisions in GATT is to be praised as they are considered to be good safeguard clauses[137].

However, the WTO provides, in parallel to GATT, two additional agreements[138] which set out in more detail but also restrict the aforementioned Article.
Firstly, the WTO agreement related to Technical Barriers to Trade (WTO/TBT agreement) which mainly aims to ensure that technical standards cannot be used in a way which limits trade nor with the purpose of establishing some form of discrimination[139].
Secondly, and mainly, the WTO agreement related to Sanitary and Phytosanitary Measures (WTO/SPS agreement) which provides for the application of regulations concerning the safety of food products, the protection of animal health and the preservation of plant life. This agreement takes into account a scientific assessment of the risk in order to justify the measures taken at national level[140]. In addition, Article 5.7 of this agreement specifies that «in cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information». The CNCDH finds that this formulation of the principle could largely be improved upon, as uncertainty does not appear as a justification for taking a provisional measure, and that the members of the WTO are required to obtain said scientific proof within a reasonable time period. In other words, when this deadline has elapsed, the provisional measure must be lifted and a product whose risks remain uncertain must be considered to be safe and non-harmful.

This approach, the polar opposite of that advocated by the European Union, is part of the WTO's dispute settlement framework. Indeed, the precautionary principle is more and more criticised and questioned within this framework, in particular by Canada and the United States[141]. For these countries, a regulation hindering trade should only be proposed if a product's harmfulness is proven with certainty, thus completely ruling out the consideration of scientific uncertainty, even though this is the very basis of the precautionary principle. This controversy can explain the choice to reference, in CETA, not the precautionary principle directly, but the way in which it is understood and applied, in both the WTO/TBT agreement and the WTO/SPS agreement.

Indeed, the aspects of WTO law mentioned, namely the WTO/TBT and WTO/SPS agreements, are an integral part of CETA[142]. Yet besides these agreements, no explicit mention is made in CETA of the precautionary principle. Therefore, the EU did not manage to defend its interpretation of the precautionary principle during the negotiations, and even went as far as accepting reference to the way it is expressed in the WTO agreements, thus allowing the Canadian and American approach to take precedence.

As a result, the CNCDH feels there is reasonable grounds to doubt that the EU can hope to force the latter to be taken into account in regulatory cooperation work, or even that it can validly present it if there is a dispute with a foreign investor, given the fact that it can only operate within the limits provided for by the agreement. Indeed, it can be expected that the interpretation of this principle, as being able to justify a measure hindering trade, will be identical within the WTO's Dispute Settling Body and within dispute

137. Interview with Mr. Fontan, head of the negotiation team for COP21, Assistant Deputy Director for Climate/Environment, within the Ministry of Foreign Affairs and International Development, with the CNCDH 22 November 2016.
138. Within the WTO, the agreements outlining the general principles are associated with additional agreements and appendices containing special instructions regarding specific issues or sectors.
139. See in this regard: WTO/TBT Agreement, Article 2, *Preparation, Adoption and Application of Technical Regulations by Central Government Bodies.*
140. See: Accord OMC/SPS, Article 5.1.
141. See Foodwatch, op. cit. note 131: In two momentous cases, the WTO's Dispute Settling Body (DSB) has, at the request of Canada and the United States, and in application of the WTO's rules, declared the EU regulation illegal and rejected the precautionary principle invoked. By invoking the precautionary principle in the way the EU does, it has, up to now, failed in dispute settlement procedures with regard to the OMC/SPS agreement.
142. CETA Agreement, Article 21.2.1 «T*he Parties reaffirm their rights and obligations with respect to regulatory measures under the TBT Agreement, the SPS Agreement, the GATT 1994 and the GATS»; CETA Agreement, Article 21.2.2 «The Parties are committed to ensure high levels of protection for human, animal and plant life or health, and the environment in accordance with the TBT Agreement, the SPS Agreement, the GATT 1994, the GATS, and this Agreement*».

settlement between States and foreign investors within CETA, as this interpretation will be made on the same legal grounds.

However, and according to the CNCDH, the guarantee of the application of the precautionary principle as it exists in EU policy is vital and particularly necessary in CETA given the regulatory cooperation mechanism contained in this agreement. Such a reference would enable the standards and regulations arising from this mechanism to conform fully with European Union import requirements. In addition, it would enable the consumer and environmental protection standards already adopted within the EU, based, in their entirety, on the precautionary principle, to not be subject to downward harmonisation and in this way be contested as presenting an unnecessary regulatory difference with Canada.

Nonetheless, this can only be obtained with explicit recognition of the precautionary principle within the body of the text, and with the European Union's proactive commitment — it must advocate this principle at international level. From this point of view, the reference to «precaution» in the joint interpretative instrument does not enable the States to go any further than what was already in CETA[143].

Recommendation no.22: The CNCDH advises the explicit recognition of the precautionary principle in the texts or at the very least that the scope and invocation of the precautionary principle enshrined in Article 191 of TFEU should not be able to be questioned by the provisions of the agreement.

C. The possible consequences of the ISDS on environmental and climate policies

It is therefore clear that the liberalisation of trade takes precedence over ecological requirements and that investors' rights are not limited; in fact they are even being continually extended. Faced with this observation, there is concern that trade and investment liberalisation policies considerably weaken the prospect of seeing policies come about with a focus on limiting mining activities and enabling genuine ecological transition[144].

This is all the more true given that international trade and investment agreements allow investors, when they feel their interests are being attacked, to take governments to court. This can be the case if a measure taken in favour of environmental protection risks harming their profits[145].

A growing number of proceedings have been observed which have been initiated by investors against Member States of the European Union regarding initiatives taken in the energy sector[146]. For example, the European Energy Charter[147] became the most frequently invoked legal instrument as a basis for complaint proceedings brought about by companies[148].

143. Council of the European Union, op. cit., note 17, preamble.
144. ATTAC – AITEC, «Climat ou TAFTA : il faut choisir ! «. Available at [https://france.attac.org/nos-publications/notes-et-rapports/article/climat-ou-tafta-il-faut-choisir].
145. This can concern, for example, initiatives related to abandoning nuclear power, or moratoriums on the use of shale gas
146. See: Friends of the Earth Europe, «Les coûts cachés des accords commerciaux de l'UE – Règlement des différends Investisseurs-Etats, plaintes engagées contre des Etats membres de l'UE». Available at [www.amisdelaterre.org/Les-couts-caches-des-traites.html]. 75 out of 127 cases recorded concern the environment, relating to the following sectors: oil, gas, coal, nuclear power stations, energy production and distribution, mines, food products, renewable energies, forestry, agriculture, construction and waste management.
147. The European Energy Charter of December 1991 reflects a political will for energy cooperation between the East and the West, however it is not in any way binding. This issue was solved by the Energy Charter Treaty, a multilateral treaty signed after the Cold War aiming to incorporate Soviet and Eastern European energy sectors into the western markets
148. See AITEC – Corporate European Observatory – Power Shift – Transnational institute, «Le Paradis des pollueurs : Comment les droits conférés aux entreprises par les accords de libre-échange de l'UE sabotent la transition énergétique «. Available at [www.collectifstoptafta.org/ressources-materiels/tafta-ceta-climat/article/le-paradis-des-pollueurs]; UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*, 2015, Chapter III, p.114.

For a number of stakeholders, it seems that companies in the energy sector use these proceedings to block environmental restrictions, or as a threat to put pressure on governments during the planning of controversial energy initiatives within the trade community[149].

A few examples of cases will be used to illustrate potential abuses, admittedly unproven but nevertheless plausible within the framework of CETA, of the predominance of the energy sector over environmental issues through foreign investor attacks on the States and their policies. Indeed, each time a company feels discriminated against and sees its profits affected by a State or government measure, it is in a position to lean on international or bilateral trade and investment agreements in order to attack said measure.

One example is a company like Lone Pine Resources, which felt wronged by the moratoriums on hydraulic fracturing. In 2011, the government of the Canadian province of Quebec opted for a moratorium on the use of hydraulic fracturing as part of oil and gas prospecting. This decision was based on serious concerns regarding the water pollution this technique causes. However, in 2012, the energy company, Lone Pine Resources, lodged an «Investor-State» complaint based on the North American Free Trade Agreement (NAFTA) in order to challenge and dispute said moratorium[150]. It should be noted that, in order to lodge this complaint, the company used one of its subsidiaries in the United States, more precisely in Delaware, a notorious tax haven. Using the provisions of NAFTA regarding minimum standards of treatment[151] and expropriation[152], the company is demanding 109.8 million dollars in compensation[153].

Another example may be that of a company like TransCanada, who objected to measures taken in order to fight against climate change. Indeed, very recently, President Obama decided to abandon the highly controversial «Keystone XL» pipeline, the purpose of which was to connect Canadian oil sands exploitation sites to American refineries. The decision was made, because, according to environmental experts, this pipeline would lead to up to 110 million tonnes of additional CO2 emissions per year. The energy company just filed a complaint[154] against the decision based on NAFTA and is demanding record damages amounting to 15 billion dollars[155].

Finally, this may also be the case with a company like Vattenfall, which is contesting environmental restrictions on coal. In 2009, the Swedish company Vattenfall lodged a complaint against Germany for environmental restrictions which the country had imposed on one of Vattenfall's coal-fired power stations. The company argued that with this regulation, its power station, which was directly affected by the measure, would not be able to function at full capacity. In order to do this, it cited the European Energy Charter. Even though the company claimed 1.4 billion euros in damages, the case was closed after Germany agreed to reduce its environmental requirements[156]. In 2012, following the Fukushima nuclear disaster, Germany decided to phase out nuclear energy. Vattenfall therefore contested this again, still based on the same charter, thus claiming 4.7 billion euros for profit loses linked to two of its nuclear power stations[157].

By prioritising the purely commercial aspects over ecological requirements, and by continuing to extend the rights of investors with regard to the States further, the liberalisation policies for trade and

149. Again see the example of the Directive on Fuel Quality.
150. Lone Pine Resources Inc. vs. The Government of Canada, ICSID Case No. UNCT/15/2.
151. NAFTA, Article 1105
152. NAFTA, Article 1110.
153. The case is still under consideration, to follow the proceedings see the ICSID website. Available at [https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=UNCT/15/2&tab=DOC].
154. TransCanada Corporation and TransCanada PipeLines Limited vs. United States of America (ICSID Case No. ARB/16/21).
155. The case has just been investigated, for more information, see the ICSID website. Available at [https://icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?CaseNo=ARB/16/21].
156. See: Vattenfall Europe AG, Vattenfall Europe Generation AG c. Germany, case. ICSID n° ARB/09/6.
157. See: Vattenfall AB and others vs. Federal Republic of Germany (ICSID Case No. ARB/12/12). The case has still not been closed, for more information, see the ICSID website: [https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/12/12].

investment are considerably weakening the prospect of seeing policies come about which will force us to head towards a genuine energy transition and a right to an effective healthy environment.

Recommendation no.23: In order to enable the States to pursue effective laws and policies to sustainably stem climate disturbances, the CNCDH recommends that a certain hierarchy of emergencies and legitimacies be recognised and that trade and investors' rights be submitted to international human rights and environmental law.

By appearing as a simple social and environmental justification within the CETA agreement, the «Sustainable Development» Chapter denotes a lack of coherence between the stated will of the European Union to base this agreement fully on its own values, outlined in Article 2 of the Treaty on European Union[158] (TEU), and the final outcome. Indeed, a sound and ambitious trade agreement is an opportunity to create a framework strengthening regulation so that it responds to the strictest standards, conforming to our common values. The objective shared by the EU and Canada to guarantee free, open and equal competition is not an obstacle to this.

However, different methods would have made it possible to meet the demand from citizens to implement a trade and investment agreement which does not operate indifferently from human rights, or perhaps worse, to their detriment.

Indeed, many stakeholders agree on the fact that it is possible to reach a reasonable compromise enabling foreign investments whilst guaranteeing human rights protection, modelled on the United Nations Guiding Principles on Business and Human Rights[159]. Yet, one cannot help but note that this instrument is absent from the CETA agreement, and that mention is only made of the OECD's Guiding Principles[160].

Considering that this framework is conducive to harmony between human rights and business, United Nations reports[161] recommend that the States collaborate with the intergovernmental working group in order to draw up a binding instrument on corporate social responsibility, which would provide for sanctions if human rights are not respected and monitoring and application mechanisms.
Indeed, the working group highlighted that in accordance with the Principles, « *states should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts*» (Principle 9).
In the same vein, these same reports recommend that «*all international investment agreements under negotiation should include a clear provision stipulating that in case of conflict between the human rights obligations of a State and those under other treaties, human rights conventions prevail*».

The CNCDH entirely embraces these observations, and can only regret that the «Sustainable Development» Chapter and the Chapter on regulatory cooperation give no guarantees regarding the primacy of human rights. On the contrary, there is a risk that the latter are barely taken into account, and that absolute priority is given to the rights and interests of trade and investment

Recommendation no.24: In the context of CETA and other agreements, the CNCDH encourages the States

158. Treaty on European Union, Article 2: «*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*».
159. For the CNCDH's position on the implementation of Guiding Principles, see: CNCDH Entreprises et droits de l'homme : a*vis sur les enjeux de l'application par la France des Principes directeurs des Nations unies,* Plenary session of 24 October 2013, JORF n°0266 of 16 November 2013, Text no. 56.
160. CETA agreement, Article 22.3.2, letter b).
161. General Assembly of the United Nations, op. cit., note 25; General Assembly of the United Nations, *Independent Expert on the promotion of a democratic and equitable international order*, Alfred-Maurice de Zayas, A/HRC/30/44, 14 July 2015.

to monitor whether the United Nations Guiding Principles are being complied with by all multinational corporations with a headquarters in their territories by making these principles binding in their domestic legal order.

Fouth Part
Investment and dispute settlement between investors and States

Under Article 207 of TFEU, the EU has exclusive jurisdiction in investment policy. Thus the 2009 negotiation mandate was supplemented in 2011 by a specific mandate on investments[162]. This enabled the negotiation of a chapter within CETA relative to investment protection[163].

This chapter aims to guarantee a stable and predictable environment for investors[164]. From the Commission's viewpoint, CETA enables obstacles for foreign investors hoping to invest in Canada to be removed and also guarantees that all European investors are treated fairly and equally in Canada[165]. It also aims to establish an Investor-State Dispute Settlement (ISDS) system.

Although bilateral investment treaties are all different, they nevertheless are based on a common architecture, including CETA. Indeed, in addition to a definition of investor and investment[166], they include four protections offered to investors: the most-favoured-nation clause[167] and the national treatment clause[168], which protect against discrimination; protection against expropriation, whether it is direct or indirect, without compensation[169]; the guarantee of fair and equitable treatment[170]; and the guarantee of the opportunity to transfer funds abroad.

The guarantees given to investors targeted by CETA (foreign investors) are available for no consideration even though national investors are subject to obligations defined by national or community law. CETA does not extend these obligations to foreign investors which constitutes unequal treatment between national and foreign investors.

Recommendation no.25: Any provision offering foreign investors guarantees must go hand in hand with balanced obligations (obligation to apply the rights of workers to information-consultation, standards relating to corporate social responsibility, UN and OECD directives for multinational firms, etc.). These obligations must duly take into account the social consequences of establishing an international investment scheme in particular in terms of individual and collective labour laws.

The guarantees given to foreign investors automatically transfer the risk of undertaking such investments to the host State, which contradicts French established case law applied to national investors. In current trade practices, this type of risk would be covered by the investor's insurance. Nothing justifies offering the investor this protection for free.

These agreements therefore have all the same clauses, but they do not all have the same content. Indeed, each agreement has its own definitions and concepts. That is why there are now thousands of agreements, and therefore a multitude of scattered texts with no overall consistency. The only point of concordance between the States, which is found in each agreement, and covers the same form, was, at

162. Council of the European Union, *Recommendation from the Commission to the Council on the modification of the negotiating directives for an Economic Integration Agreement with Canada in order to authorise the Commission to negotiate, on behalf of the Union, on investment*, 12838/11, 15 Dec. 2015.
163. CETA, Chapter 8 «Investment».
164. Minister of the Economy and Finance, Treasury Directorate-General, op.cit., note 109.
165.,European Commission, DG Trade, *op.cit.* note 62.
166. CETA, Article 8.1.
167. CETA, Article 8.7. This clause covers equal treatment for all the States' trade partners. Under the terms of the WTO's agreements, the countries cannot, in principle, discriminate between their trade partners. This means that an investor of one Party to the agreement or their investment will receive treatment from the other Party which is «no less favourable than the treatment it accords in like situations, to investors of a third country and to their investments.»
168. CETA, Article 8.6. The objective of a national treatment clause is to ensure that imported products, in other words foreign products, are treated in the same way as national products, with regard to the laws, taxes, etc. This principle only applies once a product, service or element of intellectual property has been admitted to the market.
169. CETA, Article 8.12.
170. CETA, Article 8.10.

a very early stage, ISDS[171].

ISDS is a legal mechanism, provided for in a bilateral or multilateral treaty, which enables a foreign investor, when there is a dispute regarding whether a State Party is respecting said treaty, to have this settled by an international body, preferably in the courts of the State Party concerned[172]. The fact that ISDS is only a mechanism for settling disputes must be underlined, and even if it mostly takes the form of a private arbitration, purely because it is in line with the States' wishes. In this way, it is quite possible to denounce the arbitration courts as they exist today, but potentially to defend ISDS in another form.

For the European Commission[173], the justification to include an ISDS in CETA is irrevocable. For the Commission, although it is proven that the EU and its Member States, in the same way as Canada, have sound legal systems, they do not all however enable the provision of perfect and satisfactory protection for foreign investors[174]. In addition, since the Member States have already signed thousands of trade and investment agreements involving an ISDS, this system is perceived to be a constant, and it is therefore entirely natural to find it in CETA, and also in other agreements negotiated or being negotiated by the EU[175]. However, these arguments need to be qualified, and cannot amount to an irrefutable reason to establish an ISDS in CETA[176].

However, amongst the issues disputed within CETA, ISDS is the one that most tensions and debates focus on. This doubtlessly explains why the European Commission paid particular attention to it and made the decision to reform it.

A. The reform of the ISDS system: moving from a standard ISDS to a quasi-legal system on investment

1. The reasons for this reform

There has been widespread criticism, most of which has[177] focused on a specific chapter of the TTIP and CETA agreements, namely the one dedicated to dispute settlement between investors and States.

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171. National Assembly, Information report no. 3467, *Le règlement des différends Investisseur-Etat dans les accords internationaux,* submitted by the Commission of European Affairs, presented by Ms Seybah Dagoma, MP, filed at the Presidency of the National Assembly on 2 Feb 2016, p.25: «*In the absence of agreement on the content of international investment law, the choice has been made, since the 1960s, to define a procedure considered to be safe, predictable and neutral to settle disputes between States and investors*».

172. *Ibid.*, 94, p.25.

173. European Commission, DG Trade, op.cit., note 62; interview with Ms Isabelle Jegouzo, Head of the Commission Representation in France, 18 Oct. 2016.

174. For example, the European Commission says that it is possible for foreign investors to see their goods seized, so expropriated, without appropriate compensation, or even be limited in their courses of legal action in the country.

175. Friends of the Earth Europe, op. cit., note 147. Since 1960, the Member States of the EU have been signatory parties to some 1,400 treaties involving a dispute settlement mechanism.

176. Introduced within a context of North-South foreign investments, ISDS originally aimed to protect investors from developed countries investing in developing countries who were not offering sufficient guarantees in terms of legal effectiveness and independence. Recourse to private justice, considered free from all State influence, therefore appeared to be the appropriate solution. Yet between Canada and the Member States of the EU this argument no longer holds water as they both have sufficient legal guarantees, see: National Assembly, op. cit., note 172, p. 10.
Why were the States eager to sign investment treaties curbing their sovereignty? Firstly, capital-exporting countries were likely to have an interest in supporting «their» businesses abroad. Secondly, developing countries hoped that these treaties would attract more foreign investment, even though there was never any clear proof justifying this belief and in practice, the majority of the other expectations were not met. Finally, in many governments worldwide, there was, and, without a doubt, there still is, a certain amount of ignorance when it comes to the economic and political risks of such treaties, see: Corporate Europe Observatory et al., «The zombie ISDS, rebranded as ICS, rights for corporations to sue states refuse to die», March 2016. Available at [https://corporateeurope.org/fr/international-trade/2016/09/lisds-mort-vivant].

177. For example, in the context of CETA, the National Assembly, in a European resolution opposed any mechanism for the arbitration of Investor-State disputes, and consequently requested a substantial revision of these provisions, see: National Assembly, op. cit., note 7. For example, in the context of TAFTA, see: Le Monde «Qu'est-ce-que le TAFTA, dont la France demande l'arrêt des négociations ?»13 Oct. 2015. Available at [www.lemonde.fr/les-decodeurs/article/2015/10/13/si-vous-n-avez-rien-suivi-au-tafta-le-grand-traite-qui-effraie_4788413_4355770.html].

Indeed, while it was generally accepted, and mostly unfamiliar to the general public, ISDS was the focus of attention on the political, media and citizen stage for several reasons. Firstly, this increased attention can be explained by the visibility of highly symbolic disputes, such as the case of Philip Morris versus Australia[178] or Vattenfall versus Germany[179]. These two cases emphasised deviations from ISDS, which has drawn considerable public attention, in view of the colossal figures at stake, and also in view of the very nature of the cases which directly concerned the States' right to regulate in areas as sensitive as health and the environment. Secondly, it is evident that challenges by civil society with regard to TTIP, and especially on this point, have had a repercussion on CETA.

Thus, according to an information report by the National Assembly, «*while the main advantage of ISDS is to depoliticise dispute settlement, it finds itself at the centre of a vast political controversy*"[180].

Left no choice by the wave of protests regarding ISDS, and driven by Franco-German impetus, the European Commission decided to launch a broad public consultation on the ISDS system within the framework of TTIP.

The extent of the opposition to ISDS was expressed clearly through the results of the consultation, published by the European Commission at the beginning of 2015[181]. Indeed, out of the 150,000 people who participated in the consultation (a record number for this type of exercise within the EU), 97% of them rejected ISDS outright. This consultation was preceded by a petition against TTIP and CETA which brought together over 3.3 million Europeans.
It is interesting to note that this opposition came from all backgrounds: businesses, elected representatives within governments, universities, unions, NGOs, etc.[182]. Such was the scale of the objection that, despite diverse interests, the whole of society agreed to reject this system.

Nevertheless, the way in which the consultation was designed was criticised. The majority of the participants regretted that it was only limited to TTIP and that the questions asked were skewed and biased. Indeed, the questions regarding ISDS were only related to the form it would take in TTIP, and therefore did not enable the relevance of such a mechanism to be questioned. Moreover, other criticisms were made about the technical nature of the questions asked and the fact that the extracts from legal texts accompanying the questions were only available in English.

Thus, the CNCDH regrets than no discussion was held on the basis of this feedback, and that the criticisms made were in no way taken up in the Commission's report on the consultation.

Recommendation no.26: The CNCDH would like to applaud the European Commission's initiative to launch a public consultation on such a subject. Nevertheless, it recommends that these public consultations be more open and easy to access and understand for all citizens whether they are informed or not. In addition, the CNCDH is keen that the questions asked in this context be as neutral as possible and that they do not reflect a biased approach to the subject.

It was therefore after this particularly enlightening survey process that the Commission presented, in autumn 2015, the conclusion of its work, namely the model for the "Investments" Chapter which it hopes to incorporate into TTIP and which it also incorporated into CETA. In this way it decided to establish a new

178. In this case, Philip Morris took Australia to court for its policy in favour of so-called «plain» cigarette packs, see: Philip Morris Asia Limited vs. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12
179. National Assembly, op. cit., note 172
180. *Id.*, p.76.
181. European Commission, Press release, 13 Jan. 2015. Available at [http://europa.eu/rapid/press-release_IP-15-3201_fr.htm].
182. To get a more detailed overview of the profiles of the people who participated in the consultation, see: Corporate Europe Observatory, "TTIP investor rights: the many voices ignored by the Commission", Available at [https://corporateeurope.org/fr/international-trade/2015/02/droits-des-investisseurs-dans-le-ttiptafta-les-nombreuses-voix-ignor-es].

provision for Investor-State Dispute Settlement, the Investment Court System (ICS).

2. The EU's new approach

For the European Commission[183], CETA now includes all the innovations which characterise the EU's new approach regarding investment protection and the mechanism for settling disputes between investors and States. While responding to society's high expectations, the Commission introduced significant changes, by guaranteeing a high level of protection for investors and the right for States to regulate[184]. According to the EU, CETA thus brings the old system, which was prone to abuse, to a close, and creates an independent,"judicial" system for investments[185]. Thus, the EU and Canada chose to shift towards a tribunal for settling disputes which is "*permanent, transparent, and institutionalised*" and to set out "*more detailed commitments on ethics for all tribunal members*"[186].

The new approach defended by the EU includes, first of all, according to the latter, «*clear and distinct*» language protecting the States' right to legislate in order to achieve legitimate objectives such as the protection of health, workers and the environment. Article 8.9 of CETA therefore aims to provide the tribunal with an element of interpretation — based on the States' right to legislate — in the event of a dispute regarding a measure taken by the State which is capable of interfering in an investor's activities[187].

Moreover, according to the EU, CETA defines investors' protections more precisely (see above). For example, the notion of just and equitable treatment is defined here in a «*precise*» way, in a «*clear, closed text*» «*without leaving unwelcome discretion to the Members of the Tribunal*»[188]. Article 8.10.2 provides that there can only be a violation of the obligation for fair and equitable treatment in the following cases: «denial of justice in criminal, civil or administrative proceedings (a); «*fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings*» (b); «*manifest arbitrariness*» (c); « *targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief*» *(d); and «abusive treatment of investors, such as coercion, duress and harassment*» (e); The notion of legitimate expectations, which is highly controversial, is also defined in Article 8.10.4[189] which limits its use to situations in which the State made a promise or a specific declaration.
Finally, a developed definition has been given of the notion of indirect expropriation. For the Commission, it is the first time that the EU has given explicit wording «*to clarify what constitutes indirect expropriation in order to avoid claims against legitimate public policy measures*»[190]. This definition is found in Article 8.12 as well as in Annex 8-A. Thus, indirect expropriation should not be invoked against a measure, with an effect equivalent to expropriation, taken «*for a public purpose*» (a); «*under due process of law*» (b); «*in a non-discriminatory manner*» (c); and «*on payment of prompt, adequate and effective compensation*» (d). In application of this approach to characterise the protection given to investors, CETA provides for a procedure to object to unfounded claims or those judged to be futile[191].

183. European Commission, DG Trade, op.cit., note 62; *European Commission, CETA – Summary of the final negotiating results,* Feb. 2016.
184. European Commission, op. cit., note 15.
185. *Ibid.*
186. Joint statement by the European Commissioner for Trade and the Minister of International Trade of Canada on the trade agreement between Canada and the European Union, 29 Feb. 2016. Available at [http://europa.eu/rapid/press-release_STATEMENT-16-446_fr.htm].
187. CETA, Article 8.9 «*the Parties reaffirm their right to regulate [...] For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section*».
188. European Commission, *Investment provisions in the EU-Canada free trade agreement (CETA*), Feb. 2016, p.2.
189. CETA, Article 8.10.4 «*When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated*».
190. European Commission, op.cit., note 189, p.3.
191. CETA, Article 8.32.

Over and above the importance given to the clarification of terms related to investment, the key change carried out by the Commission is the implementation of a permanent investment Tribunal. The Tribunal will be made up of 15 members appointed, in advance, by the EU and Canada[192], for a five-year term, renewable once[193]. Thus, unlike with arbitration tribunals, investors will not have the opportunity to appoint a party of arbitrators themselves. Three Members of the Tribunal will hear each case[194] and they will be appointed using a randomised procedure. Finally, the Commission specified that the Members of the Tribunal «will have the same qualifications as for the International Court of Justice»[195].

One of the main innovations accompanying the creation of a permanent investment Tribunal is the implementation of an appeal system, with the establishment of the Appellate Tribunal. Article 8.28.2 sets out the grounds which could lead to a review of the Tribunal's decisions. These grounds are: «*errors in the application or interpretation of applicable law*» (a); «*manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law*» (b); and «*the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention*[196]« (c). The requirements imposed on Members of the Appellate Tribunal are the same as those imposed on Members of the Tribunal.

Moreover, the Commission insisted on giving these Tribunals sound guarantees in terms of ethics, an aspect which was often lacking from standard arbitration tribunals. That is why the Members of the Tribunals are subject to a code of conduct[197] which, according to the Commission, guarantees their «full independence and impartiality»[198]. Ethical regulations are also set out in Article 8.30 of CETA. These regulations mainly aim to prevent conflicts of interest which are the bane of arbitration. For example, it is set out that «upon appointment, [the arbitrators] shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement»[199].

Moreover, and still with a view to reassuring public opinion, the Commission also provided for the possibility for the EU and Canada to adopt binding interpretations[200] and to make observations when they are not defendants[201]. For the Commission, «the ability to adopt binding interpretations is a safety valve in the event of errors by the tribunals»[202].

Finally, one of the key points of the change in the EU's approach is the transparency desired in ISDS procedures. Indeed, Article 8.36 provides that all the documents related to the case will be made public apart from protected and confidential information. In the same way, the hearings will be public[203].

Faced with the European Union's desire to make significant improvements to the current ISDS system, the CNCDH can only praise the reform adopted and some of the advances that this has led to. However,

192. CETA, Article 8.27.2 «*The CETA Joint Committee shall, upon the entry into force of this Agreement, appoint fifteen Members of the Tribunal. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada11 and five shall be nationals of third countrie*s».
193. CETA, Article 8.27.5.
194 CETA, Article 8.27.6 «T*he Tribunal shall hear cases in divisions consisting of three Members of the Tribunal, of whom one shall be a national of a Member State of the European Union, one a national of Canada and one a national of a third country. The division shall be chaired by the Member of the Tribunal who is a national of a third country*».
195. European Commission, op.cit., note 189, p. 4
196. ICSID Convention, Article 52(1) « E*ither party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; (e) that the award has failed to state the reasons on which it is based»*
197. CETA, Annex 29-B, «Code of conduct for arbitrators and mediators».
198. European Commission, op.cit., note 189, p.5
199. CETA, Article 8.30.1.
200. CETA, Article 8.31.3.
201. CETA, Article 8.38.
202. European Commission, *op.cit.* note 189, p.8
203. CETA, Article 8.36.5.

more details need to be provided regarding these different elements, whereas others would gain from being questioned.

B. Persistent criticisms despite the reform

1. The permanent investment Tribunal and the appellate mechanism

Although the implementation of a Tribunal addresses the many challenges made with regard to the ad hoc arbitration tribunals normally used in ISDS systems, its fully innovative nature needs to be qualified. Indeed, by directly referencing the systems of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[204], and the United Nations Commission for developing international trade[205] (UNCITRAL), the Tribunal and the Appellate Tribunal will continue to apply procedural rules currently in force in existing arbitration tribunals[206]. Thus, although the form is changing, from ad hoc tribunals to a permanent tribunal, the procedural rules remain the same. This observation allows for a certain distancing from the European Commission's communication which claims the implementation of a permanent Tribunal is a radical change in the treatment of disputes between investors and States.

Moreover, the Commission uses the term «judges» to signify the Members of the Tribunal. Yet the CNCDH feels particular attention should be paid to the terminology. Indeed, the Members of the Tribunal remain private individuals, who do not fall under an independent judicial authority and who will not be appointed by an independent legal body[207]. The EU's proposal only aspires to implement short-lists of arbitrators, called «Members of the Tribunal» by the State Parties, who will be called to sit on the Tribunal in rotation of three in the event of a dispute. In no way is this a «court» in the technical meaning of the word[208]. Beyond a fixed base wage granted by the Parties to the agreement, arbitrators' pay will always be on a case by case basis and will be ensured by the parties to the dispute (the investor and State).
In addition, the selection criteria indicate that the pre-chosen arbitrators will come from the exclusive background of international investment law, without mentioning a potential opening to other fields of law, such as labour law and environmental law, even though they are the very basis of the measures which will be contested in front of the Tribunal.

Recommendation no.27: The CNCDH recommends extending the competence criteria for arbitrators to international human rights law in international trade and investment agreements involving a permanent arbitration Tribunal.

In another measure, the CNCDH noted that the Appellate Tribunal provided for in CETA was not readily operational, unlike the one provided for in the TTIP draft[209]. Indeed, according to Article 8.28.7 «*The CETA Joint Committee shall promptly adopt a decision setting out the following administrative and organisational matters regarding the functioning of the Appellate Tribunal*»[210]. The CNCDH can only wonder about this

204. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States was signed on 18 March 1965. It created the International Centre for Settlement of Investment Disputes (ICSID). The ICSID is not a court, it proposes arbitration regulations and makes its logistics available to Parties. It is then up to the Parties to establish an ad hoc tribunal to resolve their dispute according the ICSID's rules.
205. The UNCITRAL is the main legal body in the United Nations system in the field of international trade law. The UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationships. The rules cover all aspects of the arbitral process. See: [www.uncitral.org/uncitral/fr].
206. CETA, Article 8.23.
207. Interview with Ms Catherine Kessedijan, with the CNCDH on 18 Oct. 2016.
208. Collectif national unitaire stop-TAFTA, «TAFTA et CETA : NON, les lignes rouges du gouvernement ne sont pas respectés – Décryptage des mythes sur les traités transatlantiques». Available at [https://france.attac.org/nos-publications/notes-et-rapports/article/tafta-et-ceta-non-les-lignes-rouges-du-gouvernement-ne-sont-pas-respectees]. Indeed, creating a Tribunal would call for the creation of an independent judiciary, functioning with judges, forbidden, by statute, to act as legal counsellors in other cases and appointed and supervised by an independent legal administration
209. National Assembly, op. cit., note 172, p.129
210. i.e.: administrative support; procedures for the initiation and the conduct of appeals, and procedures for referring issues back to the Tribunal for adjustment of the award, as appropriate; procedures for filling a vacancy on the Appellate Tribunal and

point. While the European Commission considers the creation of an Appellate Tribunal as a revolution enabling an end to be brought to criticisms made about arbitration, this point of view must be questioned. The Appellate Tribunal has still not been created and will not be created when the agreement comes into force, but only as a result of a decision by the CETA Joint Committee. Worse, this decision will focus on key elements of the Appellate Tribunal such as its administration and the procedures for the introduction and management of appeals, which means that, at the moment, nothing sure and definitive is known yet about this mechanism.

The CNCDH would also like to highlight a potential conflict between the appeal mechanism provided for in CETA and TTIP and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, even though these agreements reference the latter. According to Article 54 of this Convention, a sentence is definitive, which, in fact, means that there is no opportunity to make an appeal. Yet CETA, whilst creating an appeal mechanism and referring to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, is incompatible. Thus, «*the moment the Convention on the Settlement of Investment Disputes between States and Nationals of Other States aims to establish a fast and effective procedure for dispute settlement and, for this purpose, forbids appealing sentences, the compatibility with an appeal body prolonging and complicating the procedure with this goal strikes as difficult*»[211]. This aspect doubtlessly explains why the appeal mechanism is not automatically operational and will require decisions after the signature of CETA.

Recommendation no.28: The CNCDH recommends that, before any ratification, the application methods for the appeal mechanism be clarified and its compatibility with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, included in CETA provisions, and with European treaties be verified, by means of the French government referring to the CJEU.

Finally, the CNCDH would like to highlight that recourse to an appeal procedure should not be presented as a miracle solution to arbitration abuses. The Members of the Appellate Tribunal will be as likely to make mistakes as the members of the permanent investment Tribunal. In addition, the public's reaction should be examined if a situation arises where a State prevails in the first court but is condemned after an appeal.

2. The code of conduct

One of the main criticisms of ISDS regarding the form of the ad hoc arbitral tribunal is the risks that arbitrators will have conflict of interests. In the standard system, those responsible for settling the dispute between a foreign investor and State were successively arbitrators, lawyers, experts, councils, etc., which can imply a certain bias. In addition, it has been suggested that the arbitrators would tend to side with the investors when pronouncing sentences in order to be favoured during arbitrator selection for other cases. Indeed, only the investors are able to trigger litigation proceedings, and they will therefore try to choose an arbitrator who often sides with the investors and not with the States in ISDS cases.

It is therefore only right that the Parties introduced a code of conduct for arbitrators into CETA. According to this code, arbitrators are encouraged to «*avoid impropriety and the appearance of impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interests and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved*»[212].

on a division of the Appellate Tribunal constituted to hear a case; remuneration of the Members of the Appellate Tribunal; provisions related to the costs of appeals; the number of Members of the Appellate Tribunal; and any other elements it determines to be necessary for the effective functioning of the Appellate Tribunal.
211. National Assembly, op. cit., note 172, p.131.
212. CETA, Annex 29-B §2

Recommendation no.29: The CNCDH recommends waiting until this code of conduct is drafted before submitting the text to national representation.

However, for the CNCDH, there is no denying the fact that the criteria used to define conflicts of interest remain quite vague and that they give the Members of the Tribunal a lot of leeway. Indeed, in view of the terms used, one can think that the assurance of the arbitrators' ethical behaviour in reality falls under self-regulation alone[213]. For example, «*a candidate shall make all reasonable efforts to become aware of such interests, relationships and matters*»[214] or «*an arbitrator shall avoid creating an appearance of bias*»[215]. For many stakeholders, given the general wording and the lack of supervision from an independent public body, CETA does not seem to put an end to the problem of conflicts of interest[216].

In addition, upon completion of their term the arbitrator Members of the CETA Tribunal have no waiting period enforced upon them. In other words, when their functions as part of CETA come to an end, the arbitrators can accumulate their operations and activities once more, which is indisputably conducive to creating conflicts of interests during their term at the Tribunal. Indeed, it is altogether possible that the Members of the Tribunal, when they are called upon to judge, are not just concerned with their past interests, but their future prospects as well, and may therefore be inclined to help one Party in the dispute over another. When they return to their «private» lives, nothing will stop them from taking advantage of the sentences pronounced as part of CETA for their own profit and that of their future clients. In this context, a number of European legal scholars have agreed on the fact that the term provided for in CETA, namely six years, cannot prevent conflicts of interests and thus guarantee the Members of the Tribunal are independent and impartial[217].

Finally, there are relatively few arbitrators who are likely to become members of the CETA permanent investment Tribunal given the microcosm of the field of international arbitration. This point raises different issues: firstly, with regard to the problem of conflicts of interests. Indeed, it is entirely possible that the arbitrators once disparaged in highly symbolic cases will become Members of the CETA Tribunal; then, if the EU decides to set up a similar tribunal as part of each of the international trade and investment agreements it concludes, mathematically, the number of arbitrators available to make up these tribunals is going to decrease, and the choice will be restricted, which in no way ensures the quality, impartiality and independence of those who will be left.

Recommendation no.30: Recognising that the arbitrators provided for in the ICS system will not be judges in the strictest sense of the term, and therefore that their independence and impartiality will not be ensured in any way, the CNCDH recommends, at the very least, that the code of conduct be made binding by establishing a monitoring and filtering mechanism before each nomination to the Tribunal, and that this monitoring be repeated before each nomination for a case.

3. Procedural imbalance, a unique feature of ISDS

One of the objections made against ISDS is that it does not involve two private trade contracting parties, but the public authority and a private individual as parties in a dispute. Indeed, as part of

213. PowerShift et al., «*Protection des investissements dans le TTIP/TAFTA : la nouvelle proposition de la Commission européenne reste dangereuse pour nos démocraties, Analyse de la proposition de réforme de la Commission européenne en date du 16 septembre 2015 – Des réformes frileuses pour justifier une vaste extension de la protection des investissements à l'échelle mondiale*». Available at [www.foodwatch.org/uploads/tx_abdownloads/files/Analyse_arbitrage_TAFTA_CETA_foodwatch_Powershift.pdf].
214. CETA, Annex 29-B §3.
215. CETA, Annex 29-B §11.
216. Sherpa et al., «Mécanisme de règlement des différends entre investisseurs et Etats (RDIE) : La proposition de la Commission Européenne pour le TAFTA/TTIP ne comble pas les failles du dispositif». Available at [www.asso-sherpa.org/wp-content/uploads/2016/01/ISDS-ICS-Doc-de-position-VF-210116.pdf].
217. European Association of Judges, Regional Group of the International Association of Judges, «Statement from the European Association of Judges on the proposal from the European Commission on a new investment court system», 9 Nov. 2015.

ISDS, foreign investors are led to question States' policy choices which are normally motivated by public interest.

However, one of the most contentious points is that ISDS functions only at the request of international or foreign investors. Conversely, if a State feels that a foreign investor is contravening his obligations as part of an international trade and investment agreement, the State can only refer to national courts. For the the CNCDH, this situation is grossly unbalanced and the European Commission's reform was not able to correct this imbalance. This observation is all the more worrying given it is difficult to understand why, in an agreement signed between States, an investor can unilaterally attack one of the Parties when the Party represents the general interest both by respecting its signed contracts with private service providers and through its legislative function[218].

In addition, the third parties have no recourse under the agreement if investors fail in their social and environmental obligations, for example.

Even though businesses have the right to expect protection against corrupt governments, arbitrary expropriations, or even relative partiality in front of public justice, the governments also need to defend themselves. Thus, since there are mechanisms for investors, the CNCDH feels that similar but more equitable mechanisms should be created. One of the avenues considered could be to impose obligations on businesses and investors related to environmental and social responsibility, enabling appropriate recourse to be set up for the victims, whether they are the State or third parties. The advances promised by the Guiding Principles on Business and Human Rights did not materialise, however, these principles enable a privileged framework to be implemented to serve as a basis for States' and third persons' complaints[219].

Recommendation no.31: The CNCDH advises implementing a discussion on the opportunity to expand the ISDS mechanism to allow referral of both parties involved in the dispute, i.e. both the investor and the State concerned, or on opening a parallel path which would enable the failures ascribable to the investors in terms of human rights to be highlighted.

4. Questioning the legitimacy of ICS: why not refer to national courts?

One of the recurring issues surrounding ISDS is related to the relevance of the system. Indeed, many people question the need to refer to a system for dispute settlement outside of national courts. The 2011 impact assessment on sustainable development even went so far as to recommend the exclusion of this mechanism from CETA, and more generally in agreements negotiated by the EU, in favour of dispute settlement between States[220]. The European Association of Judges had another approach — to recommend that the European Commission promote national systems to register investors' complaints rather than imposing a court on Member States which is not linked to CJEU decisions and States' courts[221]. The French National Assembly is also opposed to this system[222]. These oppositions were expressed during the public consultation on ISDS mentioned above.

This movement questioning ISDS also extends outside European borders. For example, South Africa very recently presented a draft law enabling an end to be brought to some of the most dangerous fundamental clauses in terms of international investment law[223]. Therefore, South Africa denounced some

218. AITEC; «Six raisons pour lesquelles l'arbitrage d'investissement n'est pas réformable». Available at [http://aitec.reseau-ipam.org/spip.php?article1438].
219. General Assembly of the United Nations, op. cit., note 25.
220. A Trade SIA relating to the Negotiation of a Comprehensive Economic and Trade agreement (CETA) between the EU and Canada, op. cit., note 116, p.22.
221. European Association of Judges, op.cit., note 218.
222. National Assembly, Text adopted no.428, op. cit., note 10, p.4.
223. Droit international des investissements et de l'arbitrage transnational, under Charles Leben, Editions A. Pedone, 2015,

of its bilateral investment protection treaties, following India's example which, last December, presented a reform of its investment model in which foreign investors must have exhausted all internal recourse methods before they are allowed to refer to an international arbitration mechanism[224]. Within Europe, it should be noted that, after Italy was threatened with prosecution on this basis as part of its renewable energy policy, it withdrew from the European Energy Charter[225].

Although the CNCDH understands the argument related to the need to protect investments and therefore investors in countries where the legal system could be inefficient, it nevertheless doubts that this argument can be used against the EU Member States or Canada.

Thus, calls recommending abandoning this *ad hoc* system and preferring public judicial systems are getting more and more numerous.

There are three different approaches with CETA's implementation architecture:
▪ The general situation, where a State/State dispute settlement mechanism is provided for which can lead to economic sanctions;
▪ This mechanism does not apply to the investment chapter where the investor/State mechanism is established, and can lead to the State giving the investor compensation;
▪ No binding mechanism for referral [footnote: The Canadian suggestion to introduce a binding mechanism within CETA would have been rejected by the European Union] is provided for in the three Sustainable Development Chapters (ch. 22 to 24). Only a non-prescriptive form of mediation between the Parties is established.

Recommendation no.32: the CNCDH recommends harmonising the means of referral provided for in trade agreements, including CETA, and to provide for one mechanism for settling disputes between States, applicable to all the provisions in the agreement.

However, this alternative, as appealing as it may be, brings up a delicate legal issue, namely regarding the direct applicability of treaties' provisions in domestic order[226]. In countries with a monist tradition, in order to be validly invoked before public, national or European courts, a treaty, or some of its provisions, must have been declared «direct effect». If the treaty itself specifies that it is direct effect, the issue is settled. However, CETA is clear on this point, and states in Article 30.6 that the agreement cannot be directly invoked before domestic courts[227]. In that case, it is down to the CJEU, if it is referred to by an investor regarding a measure taken by the EU, to decide whether the treaty can be invoked or not[228]. If the measure contested is national, for example French, it will, on the other hand, be up to the supreme courts to rule as to whether the measure is invokable or not. This power to decide, incumbent on the courts, is not without a risk concerning differences of opinion. Even if in such a case, the national courts have the opportunity to submit a question for preliminary ruling to the CJEU, nothing stops, in the absence of such a procedure, the same clause from being interpreted differently within the EU. This situation involves a certain amount of legal unpredictability which could be as harmful to businesses as to States and private individuals. In other words, investors could find themselves without a legal basis to file an appeal before the national courts if their rights have been violated in the name of an international trade and investment agreement. Thus, the abandonment of ad hoc tribunals for national courts cannot be done without the

p.1027.
224. Sherpa et al., op. cit., note 217.
225. Corporate Europe Observatory et al., op. cit., note 177.
226. National Assembly, op. cit., note 172, p.78.
227. CETA, Article 30.6 «*Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties*».
228. CJEU case law in the matter is quite close to that of the French Conseil d'Etat. The ability to invoke the treaty is only possible under two conditions: the overall economy, contents and terms of the treaty must not formally oppose being invoked and the provision invoked must fulfil the conditions of a direct effect, namely that it involves a clear obligation and specifies who is not subordinate in its execution or its effects on the adoption of a normative intermediary action.

certainty that the agreement will be directly applicable.

Recommendation no.33: In order to respond to the constant criticisms of ISDS, the CNCDH recommends that a discussion be started, on France's initiative, to establish exclusive recourse to national courts as part of international trade and investment agreements. This changeover will not be able to happen without the agreement itself providing for direct applicability in domestic laws and European law.

Another compromise would be to only allow the CETA Tribunal to be referred to after all other means of recourse have been exhausted. However, CETA also very clearly excluded this possibility by obliging the Parties in a dispute to make a definitive choice between national courts and the CETA Tribunal[229]. However, this solution seems the most coherent for the CNCDH, although it considerably increases the length of the proceedings. Indeed, this alternative offers States the opportunity to have their cases tried before uncontested courts, and offers investors the opportunity to take their cases to the CETA Tribunal if they feel that the national courts have shown bias in their regard.

Recommendation no.34: The CNCDH advises forcing investors, before they appeal to an arbitration court, to exhaust all other domestic means of recourse, as France has already asked.

5. Right to regulate: a genuine barrier to arbitration or an illusion?

The main guarantee presented by the European Commission against arbitrary sentences is the «*right to regulate*», introduced in Article 8.9 of CETA. Yet the CNCDH can only doubt its real effectiveness as the legal content of this right in agreements like CETA is practically non-existent, unlike the substantial provisions defining the protection of investments, and which have an extensive basis behind them given the hundreds of arbitrary sentences delivered[230]. Acting as a vague guideline, there is a risk that the «*right to regulate*» will not fulfil its promises and will only end up playing a minimal role in decision-making.

Thus, Article 8.9.1 justifies the «*right to regulate*» by pursuing «*legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity*». However, there is no denying the fact that this idea suffers partly from subjectivity, and that without a clear definition, it will vary inevitably both spatially and temporally[231]. Thus, while this «right to regulate» had been put in place to stop public policy measures from being directly threatened because they hinder trade, it seems that arbitrators were left significant room for manoeuvre.

It therefore does not seem that Article 8.9 explicitly limits the investment protection standards provided for by Articles 8.4, 8.5, 8.6 and 8.7. This would however be a vital prerequisite if this Article really aimed to ensure the States' right to regulate without systematically fearing that a complaint would be filed by an investor.

The possibility remains that an investor, knowing that his rights are largely protected, uses the threat of a complaint to dissuade a State from continuing with measures which serve the general interest but restrict investments. Although the sentences taken as part of ISDS can only award financial compensations and none of them lead to the withdrawal of a measure[232], there is a risk that this obligation to pay compensation will be enough to intimidate the regulators[233].

229. CETA, Article 8.22.1 «*An investor may only submit a claim pursuant to Article 8.23 if the investor [...] withdraws or discontinues any existing proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim*».
230. AITEC, op. cit., note 40.
231. PowerShift et al., *op. cit.,* note 214.
232. CETA, Article 8.39.1.
233. Those who oppose ISDS highlight the fact that when there is a proven violation of an investment treaty, the States can be forced by the arbitration tribunals to pay damages which can reach several billion dollars paid by the national taxpayer, to the

Nevertheless, this «regulatory chill» remains very difficult to prove, as the pressures are unofficial and the draft regulations are withdrawn before they are even made public. The link could however be made for Canada[234] and New Zealand[235] who postponed their anti-smoking policy as they were worried about complaints from foreign investors.

However, States have means at their disposal to counter this phenomenon. By clearly defining the notions of investor and investment and by specifying the scope of the protection which they want to investors to have, they are in a position to reduce the scope of their consent to ISDS. That is why they must pay special attention to it. Indeed, since the arbitrators merely interpret the agreement, a good sentence will only be pronounced if it obeys precise definitions and clear rules. In this way, the CNCDH feels it is regrettable that France has not expressed any reservation about CETA.

Another way may be to refer to the set of exemptions and exceptions in order to protect some matters deemed too sensitive by the States[236]. The most radical use of this alternative involves excluding foreign investments from certain sensitive sectors, at the discretion of the State concerned. A more moderate use would involve authorising investments in these sectors, but removing the investor's ability to avail himself of the protection given by the treaty and to refer to ISDS. In such case, the foreign investor will be on equal footing with the national investor, thus benefiting from the same protection, and able, like the national investor, to refer to national courts if there is a dispute.

The CNCDH feels that the need to strengthen the «right to regulate» is therefore essential and primordial, especially with a so-called «next generation» agreement which is supposedly comprehensive by including within its scope domains as sensitive as the environment and social rights. As attested to by Joseph Stiglitz, Nobel laureate in economics, «Corporations everywhere may well agree that getting rid of regulations would be good for corporate profits. Trade negotiators might be persuaded that these trade agreements would be good for trade and corporate profits. But there would be some big losers — namely, the rest of us»[237].

Recommendation no.35: To ensure the «right to regulate» does not lose any of its meaning and retains its power, the CNCDH recommends introducing a preliminary article to the provisions related to the protection of investments, setting the right for the States' to regulate as the basis for interpretation for the whole of the treaty so that this principle binds the arbitrators in their forthcoming decisions.

Recommendation no.36: In order to avoid the «regulatory chill» phenomenon in the so-called sensitive fields such as social rights or environmental protection, the CNCDH advises excluding sensitive sectors from the scope of ISDS as these sectors are where the States will be called upon to commit to ambitious policies which are likely to disrupt investments for compelling reasons related to the public interest.

Recommendation no.37: Should CETA be terminated, the agreement provides that the whole of Chapter 8 on investments and arbitration will remain in force for 20 years afterwards. The CNCDH suggests that this deadline be shortened to one year.

Recommendation no.38: The CNCDH suggests that the following be incorporated into Chapter I, §5 of CETA: «*The investors concerned must carry out their investment operations with respect for the laws*

extent that they could hesitate to adopt regulations, in particular environmental or health regulations, likely to lead to a foreign investor complaint. ISDS therefore would directly threaten their sovereign right to regulate. See: French National Assembly, op.cit., note 172, p.66.

234. See: Physicians for Smoke-Free Canada, The Plot Against Plain Packaging. Available at [www.smoke-free.ca/pdf_1/plotagainstplainpackaging-apr1%27.pdf].

235. See: [www.australasianlawyer.com.au/country-editor/new-zealand/plain-packaging-and international-law-thoughts-from-across-the-ditch-187272.aspx].

236. National Assembly, op. cit., note 172, p.97.

237. Joseph Stiglitz, «On the wrong side of globalization», New York Times, 15 March 2014.

and regulations of the Party of the territory they invest in and must conform, with due diligence, to these laws and regulations when establishing, acquiring, expanding, conducting, managing, maintaining, using, profiting and selling or arranging their investments in the territory».

As a conclusive remark, the CNCDH would hope to attract the public authorities' attention to two specific points, namely: the issue of the transparency of the negotiations carried out by the EU with its partners for trade and investment agreements as well as the technique used for negotiations, in other words the use of negative lists.

Recommendation no.39: The CNCDH recommends that the Commission be more transparent during trade negotiations. Even though it praises the efforts currently being made as part of the TTIP negotiations, in particular by publishing the European Union's position papers, it regrets that this arrangement has not been applied to other agreements currently being negotiated. Moreover, the CNCDH asks the European Commission to go further by publishing consolidated texts for all on-going negotiations and by authorising representatives of civil society to participate in negotiations as an observer, based on the model of the climate negotiations which are carried out as part of the United Nations Framework Convention on Climate Change (UNFCCC).

For the first time, the European Commission decided to use the technique of negative lists to negotiate trade and investment agreements. This negotiation technique effectively reverses the way in which agreements are negotiated since, until now, trade agreements have only applied to services explicitly named in the text but the new agreements now apply to all services except those excluded from the agreement. In CETA, the services which do not appear will thus be open to Canadian competition and providers will be able to benefit from a treatment equal to that of national providers. Services which do not yet exist thus would be able to open by default: as indicated by a BNP Paribas memo[238], «this approach presents risks since the governments are actually committing to sectors which do not yet exist»[239].

Recommendation no.40: In CETA, as in future agreements still being negotiated, the CNCDH recommends a return to the positive list approach to negotiation.

238. Available at [http://economic-research.bnpparibas.com/Views/DisplayPublication.aspx?type=document&IdPdf=27289].
239. C. Stephan «Traité transatlantique: beaucoup d'ambition, peu de concrétisation…» December 2015.

Appendix I: the CNCDH's recommendations

Preliminary recommendation: The CNCDH strongly recommends that negotiations be resumed in order to take into account the following recommendations. The resumption of negotiations could enable the legal status of the interpretative declarations which go alongside CETA to be clarified.
In any case, it is vital that the French government calls on the CJEU in order to check that the agreement, as it exists today, is compatible with the Union's law. In order to dispel doubts regarding the compatibility of CETA with the French Constitution, the CNCDH also recommends referring a priori to the (French) Constitutional Council.

Recommendation no.1: Given that new trade agreements now go far beyond simple trade issues, the CNCDH asks France to encourage trade negotiators to be supported by a multidisciplinary team, specialised, in particular, in social matters, labour law, the fight against climate change, and more generally, in human rights, in order to offer a comprehensive view of the existing issues.

Recommendation no.2: Although the Committee on Trade and Sustainable Development has no power to sanction, the CNCDH recommends, at the very least, that the high level representatives of each Party who make up the Committee have certain competences in the fields covered and, more generally, in international human rights law. At a minimum this will enable the issues raised to be dealt with by the best expertise possible, in accordance with human rights.

Recommendation no.3: The CNCDH recommends that the implementation and respect of all of the provisions, in particular in terms of social rights and environmental protection in international trade and investment agreements, fall under the general mechanism for dispute settlement between States which applies to all agreements.

Recommendation no.4: As soon as a trade and investment treaty provides for a cooperation mechanism, the CNCDH recommends that human rights be an integral part of the treaty, by putting respect of human rights as the main goal of said mechanism.

Recommendation no.5: The CNCDH encourages the Parties to revise the chapter on regulatory cooperation in order to actually guarantee the States' right to regulate, or at the very least, to strongly envisage to do so in the agreements to come, in such as way as to protect the regulations made in the public interest, and to ensure that private interests do not take precedence over the common good. Without a revision, it seems vital that chapters 22, 23 and 24 be excluded from regulatory cooperation. A way of ensuring that the collective will is respected could be to introduce a degree of democratic control, via national parliaments, throughout regulatory cooperation processes.

Recommendation no.6: The CNCDH praises the option to refuse or cease regulatory cooperation when the State's interests are such that they cannot be discussed, however, it hopes that this ability cannot be derogated from and that it is not coupled with any requirement, or incitement, to justify the refusal.

Recommendation no.7: The CNCDH recommends that regulatory cooperation be subject to democratic control and transparency requirements by introducing a defined role to the European Parliament, and if possible, to national parliaments when their legislation is affected.

Recommendation no.8: The CNCDH requests that the Regulatory Cooperation Forum's membership, referral, decision and control methods be precisely defined.

Recommendation no.9: Noting a detrimental gap in terms of impact assessments for free trade agreements on social rights, the CNCDH strongly recommends that such assessments be systematically and comprehensively carried out, based on reliable and verified data. Given the negotiation time needed to conclude these types of agreement, the CNCDH recommends that the impact assessments carried out in this way be updated when said agreement is signed, and demonstrate that stakeholders have truly been consulted.

Recommendation no.10: The CNCDH supports the inclusion of all of the relevant provisions laid out in the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in future free trade agreements. In that regard, the CNCDH reiterates its recommendation that France ratifies this Convention.

Recommendation no.11: The CNCDH praises the, albeit partial, reference made in CETA to the ILO Decent Work Agenda, however, it recommends that France advocate that this Agenda be more extensively, even exhaustively, taken into account in future agreements of this type.

Recommendation no.12: In light of the risks created by trade and investment liberalisation (restructuring plans, relocations, etc.), the CNCDH recommends that CETA and future agreements contain provisions protecting employees which are not limited by national borders. The inclusion of provisions regarding investment must go hand in hand with strengthening workers' rights vis-à-vis multinational companies. In order to reach this goal, the CNCDH considers that workers' rights to information and consultation, as well as the opportunity to organise cooperation and coordination meetings, should be guaranteed across the scope of a company and not be limited to national or European scope.

Recommendation no.13: The CNCDH recommends that the respect of international standards in terms of social rights be a sine qua none condition of implementing international trade and investment agreements. It would be advisable to have the implementation and respect of international conventions and other texts which the States have previously signed with regard to human rights as a performance obligation.

Recommendation no.14: The CNCDH advises that, with next generation agreements such as CETA, the Parties have the ratification of all of the fundamental ILO conventions as a prerequisite to the agreement coming into force.

Recommendation no.15: For the CNCDH, it is vital that the non-lowering clauses be effective and applicable in international trade and investment agreements. In order to do this, it recommends that the option given to the States to take advantage of this clause to report lowered standards be made easier, and that the burden of proof be reversed, placing it upon the State suspected of lowering its social standards to stimulate trade or investment.

Recommendation no.16: The CNCDH hopes that France initiates a discussion in order to facilitate the inclusion of social aspects of international trade and investment agreements which will be negotiated by the EU in State-State dispute settlement. The CNCDH suggests including the ILO as an expert in monitoring the implementation of social law provisions, by allowing it to be consulted during dispute settlements and to make this opinion binding.

Recommendation no.17: The CNCDH encourages France to ensure, during negotiations for international trade and investment agreements, that sanction mechanisms be incorporated if a State Party is found to be violating an international labour law obligation.

Recommendation no.18: The CNCDH recommends the inclusion, in all international trade and investment agreements negotiated by the EU, of a strong and mandatory human rights clause in line with the values

the EU promotes, and that this be accompanied by a monitoring and sanction mechanism.
Recommendation no.19: The CNCDH recommends that the institutionalisation of trade union and civil society meetings be supported by the availability of the necessary human and financial resources, such as a Secretariat dedicated to the Civil Society Forum and its own resources, in order that this body can successfully carry out its monitoring role in the application of free trade agreements.

Recommendation no.20: The CNCDH recommends that the energy field be the subject of a specific chapter, thus enabling commitments to reduce greenhouse gas emissions to be included in the agreement, and explicitly authorising the Parties to promote investments in clean energy sectors, and also to gradually ban those oriented towards fossil fuels.

Recommendation no.21: The CNCDH encourages France, who chaired COP21, to encourage the inclusion, in each agreement, of an explicit and express mention of the Paris Agreement on the Climate, or at least its objective to limit the increase in global warming.

Recommendation no.22: The CNCDH advises the explicit recognition of the precautionary principle in the texts or at the very least that the scope and invocation of the precautionary principle enshrined in Article 191 of TFEU should not be able to be questioned by the provisions of the agreement.

Recommendation no.23: In order to enable the States to pursue effective laws and policies to sustainably stem climate disturbances, the CNCDH recommends that a certain hierarchy of emergencies and legitimacies be recognised and that trade and investors' rights be submitted to international human rights and environmental law.

Recommendation no.24: In the context of CETA and other agreements, the CNCDH encourages the States to monitor whether the United Nations Guiding Principles are being complied with by all multinational corporations with a headquarters in their territories by making these principles binding in their domestic legal order.

Recommendation no.25: Any provision offering foreign investors guarantees must go hand in hand with balanced obligations (obligation to apply the rights of workers to information-consultation, standards relating to corporate social responsibility, UN and OECD directives for multinational firms, etc.). These obligations must duly take into account the social consequences of establishing an international investment scheme in particular in terms of individual and collective labour laws.

Recommendation no.26: The CNCDH would like to applaud the European Commission's initiative to launch a public consultation on such a subject. Nevertheless, it recommends that these public consultations be more open and easy to access and understand for all citizens whether they are informed or not. In addition, the CNCDH is keen that the questions asked in this context be as neutral as possible and that they do not reflect a biased approach to the subject.

Recommendation no.27: The CNCDH recommends extending the competence criteria for arbitrators to international human rights law in international trade and investment agreements involving a permanent arbitration Tribunal.

Recommendation no.28: The CNCDH recommends that, before any ratification, the application methods for the appeal mechanism be clarified and its compatibility with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, included in CETA provisions, and with European treaties be verified, by means of the French government referring to the CJEU.

Recommendation no.29: The CNCDH recommends waiting until this code of conduct is drafted before submitting the text to national representation.

Recommendation no.30: Recognising that the arbitrators provided for in the ICS system will not be judges in the strictest sense of the term, and therefore that their independence and impartiality will not be ensured in any way, the CNCDH recommends, at the very least, that the code of conduct be made binding by establishing a monitoring and filtering mechanism before each nomination to the Tribunal, and that this monitoring be repeated before each nomination for a case.

Recommendation no.31: The CNCDH advises implementing a discussion on the opportunity to expand the ISDS mechanism to allow referral of both parties involved in the dispute, i.e. both the investor and the State concerned, or on opening a parallel path which would enable the failures ascribable to the investors in terms of human rights to be highlighted.

Recommendation no.32: the CNCDH recommends harmonising the means of referral provided for in trade agreements, including CETA, and to provide for one mechanism for settling disputes between States, applicable to all the provisions in the agreement.

Recommendation no.33: In order to respond to the constant criticisms of ISDS, the CNCDH recommends that a discussion be started, on France's initiative, to establish exclusive recourse to national courts as part of international trade and investment agreements. This changeover will not be able to happen without the agreement itself providing for direct applicability in domestic laws and European law.

Recommendation no.34: The CNCDH advises forcing investors, before they appeal to an arbitration court, to exhaust all other domestic means of recourse, as France has already asked.

Recommendation no.35: To ensure the «right to regulate» does not lose any of its meaning and retains its power, the CNCDH recommends introducing a preliminary article to the provisions related to the protection of investments, setting the right for the States' to regulate as the basis for interpretation for the whole of the treaty so that this principle binds the arbitrators in their forthcoming decisions.

Recommendation no.36: In order to avoid the «regulatory chill» phenomenon in the so-called sensitive fields such as social rights or environmental protection, the CNCDH advises excluding sensitive sectors from the scope of ISDS as these sectors are where the States will be called upon to commit to ambitious policies which are likely to disrupt investments for compelling reasons related to the public interest.

Recommendation no.37: Should CETA be terminated, the agreement provides that the whole of Chapter 8 on investments and arbitration will remain in force for 20 years afterwards. The CNCDH suggests that this deadline be shortened to one year.

Recommendation no.38: The CNCDH suggests that the following be incorporated into Chapter I, §5 of CETA: «The investors concerned must carry out their investment operations with respect for the laws and regulations of the Party of the territory they invest in and must conform, with due diligence, to these laws and regulations when establishing, acquiring, expanding, conducting, managing, maintaining, using, profiting and selling or arranging their investments in the territory».

Recommendation no.39: The CNCDH recommends that the Commission be more transparent during trade negotiations. Even though it praises the efforts currently being made as part of the TTIP negotiations, in particular by publishing the European Union's position papers, it regrets that this arrangement has not been applied to other agreements currently being negotiated. Moreover, the CNCDH asks the European Commission to go further by publishing consolidated texts for all on-going negotiations and by authorising

representatives of civil society to participate in negotiations as an observer, based on the model of the climate negotiations which are carried out as part of the United Nations Framework Convention on Climate Change (UNFCCC).

Recommendation no.40: In CETA, as in future agreements still being negotiated, the CNCDH recommends a return to the positive list approach to negotiation.

Appendix II : List of people interviewed

Laurence Boisson-de-Chazournes, Member of the United Nations Human Rights Council Advisory Committee and Professor of International Law at the University of Geneva (28 June 2016) (specifically on the Paris Agreement)

Edouard Bourcieu, Trade Advisor with the European Commission Representation in France (28 October 2016)

Mathilde Dupré, Veblen Institute for Economic Reforms (13 September 2016)

Olivier Fontan, Head of the COP21 negotiation team, Assistant Deputy Director for Climate/Environment, within the Ministry of Foreign Affairs and International Development (22 November 2016)

Yannick Jadot, MEP (6 December 2016)

Isabelle Jegouzo, Head of the European Commission Representation in France (18 October 2016)

Catherine Kessedjian, Professor of Law at the University of Paris 2 Panthéon-Assas, specialist in International Trade and International Arbitration Law (18 October 2016)

Samuel Leré, Head of Climate-Energy Projects at Fondation Nicolas Hulot (28 June 2016)

Tancrède Voituriez, Programme Director Governance at the Institute for Sustainable Development and International Relations (IDDRI) (25 October 2016)

Appendix III: Structure of CETA

Created in 1947 at the instigation of René Cassin, the National Consultative Commission on Human Rights (CNCDH) is the French national institution responsible for promoting and protecting human rights with level 'A' accreditation from the United Nations.

The CNCDH performs a three-pronged role that involves the following:
▪ enlightening the public decision-making process with regards to human rights;
▪ monitoring the effectiveness in France of rights protected by international human rights conventions;
▪ overseeing France's implementation of recommendations made by international committees.

The CNCDH is independent and operates based on the principle of the pluralism of ideas. This being the case, as the only institution that maintains continuous dialogue between civil society and French experts in the field of human rights, the Committee comprises 64 qualified individuals and reprsentatives of non-governmental organisations with their roots in civil society.

The CNCDH has been an independent National Rapporteur on the fight against all forms of racism since 1990 and on the fight against the trafficking and exploitation of human beings since 2014.

70 ANS AU SERVICE DES DROITS DE L'HOMME

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