Corporate Social Responsibility in Recent Bilateral and Regional Free Trade Agreements: An Early Assessment

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When looking at international trade and investment, there is a quite remarkable gap between the commercial power companies gain through international bilateral and regional trade agreements (Free Trade Agreements or FTAs) and investment treaties that facilitate their access to foreign markets and the norms of these agreements which address corporate behaviours in order to align them with sustainable development objectives. For instance, there is a strong perception by the public opinion that the recent Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP) negotiations, harshly criticized for lack of transparency, would favour multinational corporations and other business operators at the expenses of the protection of public interests. Recently negotiated FTAs contain dedicated chapters to social, labour and environmental protection issues, including corporate social responsibility (CSR) norms. The opening of FTAs and their investment chapters to sustainable development concerns is – or should be – a way to rebalance the level playing field in these interstate agreements by envisaging public interest standards applicable to business operators. Disagreements between the Parties regarding these provisions may be solved through implementation mechanisms where non-state actors can actively participate. Notwithstanding this shift towards the inclusion of non-trade and non-state actors consideration, the provisions of bilateral and regional FTAs remain of an intergovernmental nature and do not provide for direct obligations for corporations. Despite the lack of vertical effects and the consequent limited implications on enterprises, the presence of CSR clauses testifies the recognition of the crucial role that these actors play as potential promoters, on the one hand, but also of potential infringers, on the other hand, of human and labour rights and of environmental protection.

This contribution first examines the approach and the provisions of selected bilateral and regional FTAs that are relevant for the protection of human and social rights and the environment. It then analyses one of the latest developments in this decade-long normative evolution, which are the CSR clauses included in the more recent FTAs concluded by the European Union. While these clauses, for the time being, are rather programmatic and are coupled with soft implementation mechanisms, some reflections are proposed de lege ferenda *on how they could 'harden' and become more stringent.*

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1 FREE TRADE AGREEMENTS AND CORPORATE SOCIAL RESPONSIBILITY: TWO WORLDS GETTING CLOSER

It is a common perception that international trade and investment agreements disproportionately favour multinational corporations and other business operators at the expenses of the protection of public interests.[1] Companies gain commercial power through these agreements that facilitate their access to foreign markets, but no adequate safeguards and controls on corporate behaviours are provided by their provisions in order to align them with sustainable development objectives. Against this background, recently negotiated FTAs include dedicated chapters to social, labour and environmental protection issues, and more recently they expressly address corporate behaviours relating to these matters. This opening of FTAs and their investment chapters is – or should be – a way to create a level playing field by envisaging sustainability and CSR standards coupled with implementation mechanisms to ensure their effectiveness.

The concept of Corporate Social Responsibility (CSR) refers to the voluntary adoption by corporations of non-binding instruments, for instance codes of conduct, and of processes, such as auditing mechanisms and human rights due diligence assessment, to possibly prevent or manage their negative impacts on society. These initiatives not only comply with the law, but often go beyond the legal commitments to which enterprises are bound according to applicable domestic laws.[2]

Since multinational corporations and enterprises are yet to be recognized as full subjects of international law and holders of human rights obligations, the duty to control corporate behaviours, also under the examined FTAs, is attributed to the States.[3] Hence, States engage in direct responsibilities to comply with their international obligations to establish domestic legal system that envisage appropriate tools to hold corporations responsible for human rights and other violations. States'

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[1] For a doctrinal contribution on this general trend, *see* M. Waibel, A. Kaushal, K.-H. Chung & C. Balchin, *The Backlash Against Investment Arbitration. Perceptions and Reality* (Kluwer Law International 2010). On specific FTAs negotiations, *see* E. U. Petersmann, *When the Sovereign Sleeps: Who Protects Fundamental Rights and other 'Public Goods' in Transatlantic Free Trade Agreements?*, Eur. Soc'y Int'l L. Conf. Paper Series (2016); S. Flynn, *Law Professors Call for Trans-Pacific Partnership (TPP) Transparency*, INFOJUSTICE.ORG (9 May 2012), http://infojustice.org/archives/21137 (10 Oct. 2018).

[2] P. Muchlinski, *Corporate Social Responsibility*, in *The Oxford Handbook of International Investment Law* 637 (P. Muchlinski, F. Ortino & C. Schreuer eds, Oxford University Press 2008).

[3] The international legal personality of corporations is at the centre of decade-long debate, on which *see* J. E. Alvarez, *Are Corporations 'Subjects' of International Law?*, 9 Santa Clara J. Int'l. L. 1–35 (2011); A. Bonfanti, *Imprese multinazionali, diritti umani e ambiente. Profili di diritto internazionale pubblico e privato* 32 (Giuffrè, 2012); P. Muchlinski, *Multinational Enterprises and the Law* (Oxford University Press 2007). Some scholars remark that corporations may be recognized with a limited subjectivity, because investors have the right to trigger international dispute settlement proceedings against States under international investment agreements. *See* B. Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 Int'l. & Comp. L. Q 573–596 (2011).

obligations include the due diligence obligations to make sure that business enterprises operating on their territory and under their jurisdiction do not carry out activities that are harmful to essential public interests.[4]

In the last decades, a great number of organizations have developed international standards for corporate behaviour with regard to human rights and environmental protection. The adoption of these instruments went often through rocky paths, such as the UN Draft Code of conduct for Transnational Corporations[5] and the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regards to Human Rights,[6] which ultimately failed to gain international political support. Other more successful processes are the OECD Guidelines for Multinational Corporations,[7] the International Labour Organization (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,[8] the UN Global Compact,[9] the latest UN-led initiative, known as the 'Protect, Respect and Remedy' framework,[10] and the ISO 26000 Guidance Standard on Social Responsibility.[11]

A preliminary consideration to make relates to the opportunity of having CSR addressed by FTAs: arguments in favour of the inclusion of CSR clauses in FTAs point to these two sectors getting closer and having multiple interfaces. On the one hand, FTAs are becoming more comprehensive and include not only investment chapters, expressly recognizing the linkage between foreign investment flows and trade liberalization, but also chapters on labour, environmental protection, intellectual property rights and sustainable development, which are strictly connected with corporate behaviours. On the other hand, CSR instruments are becoming more specific and are deepening their scope to cover the conducts of subsidiaries,

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4 This approach is endorsed by the *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc. A/HRC/17/31, 21 Mar. 2011. The framework is centred on the three pillars of the State duty to protect from human rights violations carried out by third parties; the corporate duty to respect human rights and the need to ensure effective remedies to the victims, should abuses occur. Pursuant to Principle 1: 'States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.'

5 UN Doc. E/1990/94 (12 June 1990).

6 UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 Aug. 2003).

7 OECD, *Guidelines for Multinational Corporations*, DAFFE/IME/WPG (2000)15/FINAL (31 Oct. 2001).

8 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, Nov. 1977) as amended at its 279th (Nov. 2000) and 295th Session (Mar. 2006).

9 The UN Global Compact received the endorsement of the UN General Assembly: UN General Assembly Resolution 62/211, *Toward Global Partnership*, para. 9 (2007); and Resolution 64/223, *Toward Global Partnership*, para. 13 (2009).

10 *Guiding Principles on Business and Human Rights, supra* n. 4.

11 *See* the International Standardization Organization (ISO) website, https://www.iso.org/iso-26000-social-responsibility.html.

subcontractors and other suppliers, thereby setting standards and norms on the production processes and on the supply chains which are highly interconnected with international trade. Furthermore, as the above list shows, CSR has been promoted through the adoption of soft law instruments, signalling a rather strong resistance from States to agree to legally binding instruments endorsing significant provisions on corporate behaviour. In such a context, it is noteworthy that when embedded in trade agreements CSR provisions could establish a legal commitment for the Parties.

This article aims at assessing whether CSR clauses may contribute to advance social and environmental standards in international trade by being included in FTAs. It starts by examining in a selection of trade agreements the human rights, labour and environmental provisions, and the Sustainable Development chapters that directly apply to States Parties, but that indirectly concern business operators, which are the ultimate implementers of these obligations when they are transposed into domestic law. The second part looks at CSR clauses and shows that although FTAs recognize the important role that corporations play in achieving a sustainable trade policy, they still fall short of tackling directly corporate behaviours. The third part examines the main models of implementation mechanisms with specific regard to non-trade related obligations and CSR clauses.

2 HUMAN RIGHTS, LABOR AND ENVIRONMENTAL PROTECTION IN FTAS: FROM EXCEPTIONS AND NON-DEROGATION CLAUSES TO POSITIVE COMMITMENTS

The opening of trade negotiations to non-trade related values started with the recognition of the importance that States parties respect human rights and democratic principles. Since the 1990s EU trade agreements have included a 'human rights clause' requiring the Parties to respect human rights and democratic principles. As it constitutes an essential element of the Agreement, the breach of this clause would permit the partial or full suspension of the agreement.[12]

The evolution of how human rights, the environment and social matters are considered under FTAs shows that these issues are initially considered as exceptions and over time they gained autonomous recognition and gave rise to positive obligations.[13] The endorsement of non-trade values by FTAs has taken different

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[12] *See* the European Commission, *Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries*, COM (1995)216 (1995); L. Bartels, *Human Rights and Sustainable Development Obligations in EU Free Trade Agreements*, Legal Stud. Res. Paper Series no. 24 1–19, at 1 (University of Cambridge, Faculty of Law 2012).

[13] For a comprehensive overview of this process in different trade agreements, *see* L. Bartels, *Social Issues: Labour, Environment and Human Rights*, in *Bilateral and Regional Trade Agreements. Commentary and*

paths, for instance, through the adoption of regulatory approaches used in other trade agreements, such as the WTO, and being influenced by parallel international legal and policy developments in the areas of environmental protection, climate change,[14] labour rights and the recognition of the rights of indigenous communities.[15]

A first way in which FTAs recognize non-trade values is by referring to the list of general exceptions of GATT article XX. The use of exceptions mainly seeks to ensure that FTAs do not weaken or reduce the protection afforded by domestic environmental and labour laws.[16]

In a similar way non-derogation provisions expressly require States not to lower their human rights, social and environmental standards in order to facilitate trade flows and attract foreign investments. Non-derogation clauses are a recurrent pattern in FTAs. They are drafted either in synthetic formulations, such as in the Canada–Colombia FTA:

> Neither Party shall encourage trade or investment by weakening or reducing the levels of protection afforded in their respective environmental laws[17]

or resorting to more extensive language, like in the Canada–Panama FTA:

> The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures to encourage the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request discussions with the other Party and the two Parties shall enter discussions with a view to avoiding any such encouragement.[18]

FTAs become more proactive towards sustainable development values when States recognize that their overall objective is not merely to blindly increase trade flows

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Analysis 364–384, at 368 (S. Lester, B. Mercurio & L. Bartels eds, 2d ed., Cambridge University Press 2015).

[14] The EU-Japan FTA, Trade and Sustainable Development Chapter, Art. 4.4 endorses the threats deriving from climate change and states the correspondent commitment of the Parties to 'promote the positive contribution of trade to the transition to low greenhouse gas emissions and climate-resilient development'.

[15] *See* for instance, with regard to the sustainable management of natural resources, the EU-Japan FTA, Trade and Sustainable Development Chapter, Art. 6.2 (d) and the EU-Georgia FTA, Ch. 13 on Trade and Sustainable Development, Arts 232 and 233.

[16] *See* for instance, Chile-Korea FTA, Art. 20.01. For more details *see* Bartels, *supra* n. 13, at 369 and references therein.

[17] Canada–Colombia FTA, Art. 1702. Similar language is founds in the FTA between the Republic of Albania and the EFTA STATES (Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Swiss Confederation) (2009), Art. 24.2: 'The Parties … recognise that it is inappropriate to encourage investment by relaxing health, safety or environmental standards.', http://www.efta.int/free-trade/free-trade-agreements/albania.

[18] Canada–Panama FTA, Art. 9.16. An early example using similar language is NAFTA, Art. 1114.

but rather to ensure that the liberalization of international trade goes hand in hand with sustainable development goals. Embracing this approach based on positive obligations, recent FTAs include substantive provisions that require States to promote human and labour rights and environmental protection within their trade policies and practices, at the domestic and international level. The content of these chapters clearly varies depending on the Parties involved, but some common characters may be identified.[19]

2.1 The European and transatlantic approaches to corporate social responsibility

Aware of the profound changes that globalization is bringing along and of their impact on international trade and investment, the European Union, on the one hand, has inaugurated a modern long-term and comprehensive trade policy that considers other matters, like human and labour rights, climate change, security of raw materials and energy supply, and the protection of intellectual property rights.

On the other hand, the inclusion of CSR provisions in FTAs is part of the broader European CSR strategy, which started in 2001[20] and has been endorsed by the European Parliament.[21]

In the more recent instruments of the European CSR strategy[22] and the 'Trade for All' strategy[23] adopted in the aftermath of the UN 2030 Agenda, the EU commits to a responsible trade and investment policy as an instrument of implementation of the Sustainable Development Goals in Europe and overseas. Sustainability is therefore one of the key objectives of EU trade policy, which is

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19 For a thorough and comparative analysis of the approach and specific provisions of various FTAs, *see* Bartels, *supra* n. 13, at 369 and ff.

20 European Commission, *Green Paper: Promoting a European framework for Corporate Social Responsibility*, COM(2001)366 final (18 July 2001). The Commission activity continued with the 2002 *Communication concerning Corporate Social Responsibility: A business contribution to Sustainable Development* (COM(2002)347 final) and the 2006 *Communication on Implementing the Partnership for Growth and Jobs: Making Europe a pole of excellence on CSR* (COM(2006)136 final).

21 Among many, *see* the European Parliament Resolution *New trade policy for Europe under the Europe 2020 Strategy*, 2010/2152(INI) (27 Sept. 2011) stating that: 'Free Trade Agreements (FTAs) are important instruments for market access: Members reiterate that all new FTAs concluded by the EU should be WTO-compatible, comprehensive, ambitious including with regard to sustainable development, balanced and lead to real reciprocal market access.'

22 European Commission, *A Renewed EU strategy 2011-14 for Corporate Social Responsibility* (Brussels 25 Oct. 2011). For a comment on the EU strategy and its relationship with the EU trade and investment policy, *see* J. Waleson, *Corporate Social Responsibility in EU Comprehensive Free Trade Agreements: Towards Sustainable Trade and Investment*, 42 L. Issues Econ. Integration 143–174, at 154 (2015).

23 European Commission Communication, *Trade for All: Towards a More Responsible Trade and Investment Policy*, COM(2015)497 (14 Oct. 2015), http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf.

testified by the inclusion of Trade and Sustainable Development chapters in all recently negotiated FTAs.

EU FTAs include provisions on sustainable development and a reference to key international labour and environmental standards, to the promotion of sustainable production processes and to CSR.[24] The EU-Korea FTA was the first time a Sustainable Development chapter was included and is now in its sixth year of implementation.[25] The Sustainable Development chapters in the EU agreements with Central-America,[26] Colombia[27] and Peru[28] have each had three years of implementation, those with Georgia[29] and Moldova[30] have been operating for over a year and the one with Ukraine for one year.[31] According to the 2016 EU Commission Report to the EU Parliament on the implementation of FTAs, the implementation of the Sustainable Development Chapters of several of these FTAs shows a gradual progress and relies on regular and focused dialogues between the trade partners. A prominent example, are the projects undertaken in El Salvador and Guatemala to strengthen the implementation of the ILO conventions, providing special attention to freedom of association, collective bargaining and non-discrimination and child labour.[32]

Over the last two years, discussions concerning labour and environment provisions in trade agreements are intensifying within the European Parliament, the Council, and between Member States, third countries and stakeholders including NGOs and civil society. The outcome of these processes will be important for ongoing negotiations with MERCOSUR countries (Argentina, Brazil, Paraguay, Uruguay), Mexico, Chile, Australia and New Zealand and has driven the conclusion of the recently adopted EU-Japan FTA, which will be examined in the next sections.

FTAs may serve as tools to achieve State consent on progressive and cutting-edge CSR and similar non-trade related matters, serving as front-runners and exercising a pull with regard to multilateral trade negotiations.

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[24] The EU Commission's recent *Reflection Paper on Harnessing Globalisation* (COM(2017) 240 of 10 May 2017) underlined the EU's commitment to a fair, international, rules-based order based on high standards through cooperation and strengthening of multilateral institutions, https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation_en.pdf.

[25] Official Journal of the European Union, L 127 (14 May 2011).

[26] Official Journal of the European Union, L 346 (15 Dec. 2012).

[27] Official Journal of the European Union, L 354 (21 Dec. 2012).

[28] Official Journal of the European Union, L 354 (21 Dec. 2012).

[29] Official Journal of the European Union, L 261 (30 Aug. 2014).

[30] Official Journal of the European Union, L 260 (30 Aug. 2014).

[31] Official Journal of the European Union, L 161 (29 May 2014).

[32] European Commission, *Report From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation of Free Trade Agreements 1 January 2016 - 31 December 2016*, COM(2017) 654 final, 27 (9 Nov. 2017).

A further issue that needs to be considered is whether the inclusion of sustainable development and more specifically of CSR clauses would alter the trade nature of FTAs to the point that they would become mixed agreements under EU law. This matter has gained much attention and generated a heightened debate after the European Court of Justice issued an Opinion on the 16 May 2017 concerning the competences to conclude the EU-Singapore FTA.[33] The Court found that provisions relating to non-direct foreign investment and dispute settlement between investors and States do not fall under the EU's exclusive competence and hence determined that in this case the FTA is a mixed agreement and therefore requires, in addition to EU signature, the ratification by individual Member States in order to enter into force. With regard to the Sustainable Development Chapter, the one where the only – relatively weak – CSR provision is found, the Court devotes a thorough exam of its content and clarifies the relationship between sustainable development and EU commercial policy, including its external dimension. The provisions of the Sustainable Development Chapter constitute an 'integral' part of the latter[34] and have direct and immediate effects on trade.[35] It is the Court's view that the essential nature of the sustainable development provisions is such that their breach would amount to a substantive breach of the agreement, according to Article 60(1) of the Vienna Convention on the law of treaties and would entitle the other Party to terminate or 'suspend the liberalization, provided for in the other provisions of the envisaged agreement, of that trade'.[36]

The Court hence concludes that provisions included in the Sustainable Development Chapter fall under EU exclusive competence.

In alignment with this Opinion, the recently concluded EU-Japan EPA excludes provisions on non-direct foreign investment and investment dispute mechanisms, which would fall under the mixed competence of the EU, leaving their negotiation to a separate mixed investment agreement.

On the American and Canadian side, the North American Free Trade Agreement (NAFTA) with its two side-agreements requiring the Parties to adopt domestic laws and policies in order to ensure labour and environmental standards is the leading model.[37] States generally follow with variations this precedent in

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33 CJEU, Opinion of 16 May 2017, *Opinion 2/15* (Free Trade Agreement between the European Union and the Republic of Singapore).

34 *Ibid.*, para. 147: 'It follows that the objective of sustainable development henceforth forms an integral part of the common commercial policy.'

35 *Ibid.*, para. 151.

36 *Ibid.*, para. 161.

37 The North American Agreement on Environmental Cooperation Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America (NAEEC) and the North American Agreement on Labor Cooperation Between the

subsequently negotiated trade agreements. The Canada–Colombia FTA, article 1703 provides for an illustrative provision:

> the Parties have set out their mutual obligations … that addresses, inter alia: (a) conservation, protection and improvement of the environment in the territory of each Party for the well-being of present and future generations; (b) a commitment not to derogate from domestic environmental laws in order to encourage trade or investment; (c) conservation and sustainable use of biological diversity and protection and preservation of traditional knowledge; (d) development of, compliance with and enforcement of environmental laws; (e) transparency and public participation on environmental matters; and (f) cooperation between the Parties on the advancement of environmental issues of common interest.

Another common feature across FTAs is the reference to international standards and the reaffirmation of the commitment to effectively implement international labour conventions and multilateral environmental agreements to which the States are Parties. These provisions are drafted with a different degree of specificity: while the FTAs in which the EU participates tend to be exhaustive in listing the multilateral standards and agreements to take into account and to anchor the obligations under the FTA to specific instruments,[38] the US and Canadian practice shows a more general reference to international standards without specific reference to the treaties and organizations.[39]

In all these different formulations States adopt a 'mutually supportive' approach that promotes the complementarity and the integration of economic rules with other provisions focused on human rights and environmental protection.[40] In this perspective, FTAs recognize explicitly the principle of mutual

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Government of Canada, the Government of the United Mexican States and the Government of the United States of America (NAALC). *See* in particular, NAALC, Art. 2 and NAAEC, Art. 3.

38 For instance, *see* EU-Japan FTA, Trade and Sustainable Development Chapter, Art. 6.2(b) on Biodiversity, which recalls CITES, Art. 8.2 which recalls UNCLOS and other treaties and soft law instruments on the conservation and sustainable use of fisheries.

39 Canada–Korea FTA, Ch. 17, Environment, Art. 17.3: Multilateral Environmental Agreements: '1. The Parties recognise the value of international environmental governance and agreements as a response of the international community to global or regional environmental problems and commit to consulting and cooperating as appropriate with respect to trade-related environmental issues of mutual interest.2. The Parties affirm their commitments to the effective implementation in their respective laws and practices of the multilateral environmental agreements to which both Parties are party.'

40 The principle of mutual supportiveness aims at combining the norms and objectives pursued by economic agreements, such as trade and investment agreements, with other regimes focused on human and social rights, or on environmental protection. The reciprocal influence across regimes is to be welcomed as a factor that fosters integration. On the principle of mutual support between trade and human rights and environmental regimes, *see* L. Boisson de Chazournes & M. Mbengue, *A propos du principe du soutien mutuel – Les relations entre le protocole de Cartagena et les accords de l'OMC*, Revue Générale de Droit Int'l Pub. 829 (2007); R. Pavoni, *Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?*, 21(3) Eur. J. Int'l L. 649 (2010).

supportiveness also with regard to sustainable development norms of other agreements:

> 1.The Parties recognize that each Party has sovereign rights and responsibilities to conserve and protect its environment and affirm their environmental obligations under their domestic law, as well as their international obligations under multilateral environmental agreements to which they are party. 2. The Parties recognize the mutual supportiveness between trade and environment policies and the need of implementing this Agreement in a manner consistent with environmental protection and conservation and sustainable use of their resources.[41]

The principle of mutual supportiveness is reaffirmed with regard to the link between FTAs and their side-agreement covering non-trade aspects, such as environmental protection and labour rights, as envisaged by Article 1704 of the Canada–Colombia FTA 'Relationship between this Agreement and the Agreement on the Environment':

> 1.The Parties recognize the importance of balancing trade obligations and environmental obligations, and affirm that the Agreement on the Environment complements this Agreement, and that the two are mutually supportive.[42]

3 STATE OBLIGATIONS ADDRESSING CSR IN FTAS

CSR clauses are one of the latest developments in the evolution of trade and investment agreements towards a more sustainable economic globalization.[43] Notwithstanding this shift towards the inclusion of non-trade and non-state actors consideration, the provisions of bilateral and regional trade agreements remain of an intergovernmental nature and do not provide for direct obligations for business operators. Despite the lack of vertical effects and the consequent limited implications on enterprises, the explicit presence of CSR clauses testifies the recognition of the crucial role that these actors play as potential promoters, on the one hand, but also of potential infringers, on the other hand, of human and labour rights and of environmental protection.

The first agreements to include references to CSR are the US-Chile Trade Agreement (2003), the EU-CARIFORUM Economic Partnership Agreement (2008), followed by the US-Peru and the Canada–Peru FTAs, which entered into force in 2009.

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41 Canada–Colombia FTA, Ch. 17 – Environment, Art. 1701.

42 Canada–Colombia FTA, Art. 1704.

43 J. Hepburn & V. Kuuya, *Corporate Social Responsibility and Investment Treaties*, in *Sustainable Development in World Investment Law* 589–613 (M.-C. Cordonier Segger, M. W. Gehring & A. Newcombe eds, Kluwer Law International 2011).

States obligations addressing CSR fall in three broad categories that are highly interconnected although they operate at different levels: first, the obligations to cooperate at the international level bilaterally and within the competent institutions and their regulatory processes; second, at the domestic level, the commitments to adopt domestic measures addressing corporate behaviour and to encourage enterprises operating on their territory or under their jurisdiction to adopt CSR instruments and, third, States obligations to promote trade in goods that are the subject of CSR schemes. These provisions will be examined in turn in the following paragraphs.

3.1 Obligations to cooperate at the international level

Recent FTAs are increasingly adopting a comprehensive approach and covering other sectors of cooperation between the Parties that are connected with trade and investments. In this context, the Parties commit to strengthen their cooperation to promote CSR at the international level. The relevant provisions also indicate the preferred means the Parties may use in this regard.

An example is the EU-Georgia FTA, where the Parties in the context of their commitment to enhance the contribution provided by trade to sustainable development:

> agree to promote corporate social responsibility, including through exchange of information and best practices. In this regard, the Parties refer to the relevant internationally recognised principles and guidelines, especially the OECD Guidelines for Multinational Enterprises.[44]

Using a similar programmatic language, in the EU-CARIFORUM agreement the Parties specify their commitment to promote CSR 'through public information and reporting',[45] and the EU-Japan FTA refers to 'exchange of information and best practices, including on adherence, implementation, follow-up, and dissemination of internationally agreed guidelines and principles'.[46]

3.2 Obligations to promote CSR instruments at the domestic level

The recognition of the importance of promoting CSR initiatives on behalf of companies of the States' nationality is found in the preambles and in operative parts of the treaties, in both cases framed in a rather generic language. Examples are

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[44] EU – Trade Agreement with Georgia, OJ L 261/89 (30 Aug. 2014), Ch. 13, Art. 231, let.(e).
[45] EU – CARIFORUM, Art. 196 'Cooperation'.
[46] EU-Japan FTA, Trade and Sustainable Development Chapter, Art. 12(g).

found in the Canada–European Union Comprehensive Economic and Trade Agreement (CETA) preamble where the Parties:

> Encourage enterprises operating within their territory or subject to their jurisdiction to respect internationally recognized standards and principles of corporate social responsibility, notably the OECD Guidelines for multinational enterprises and to pursue best practices of responsible business conduct.[47]

Two aspects are worth of examination with regard to these clauses: the first is where or with regard to which companies this obligation should be carried out; and the second relates to the nature and content of the reference to CSR instruments, namely whether these clauses refer in a stringent and precise way to CSR instruments or whether they refer in general to international standards.

As for the first issue, FTAs do not always clarify where States should or shall encourage the adoption of CSR instruments.[48] There are provisions referring to enterprises operating 'on their territory and under their jurisdiction' and provisions which limit the scope of the commitment to enterprises operating on the territory of the State. This constructive ambiguity could be interpreted as requiring States to encourage the adoption of CSR instruments also from enterprises, notably multinational corporations, which operate through their subsidiaries overseas, and thus leaving margin for the extraterritorial application of CSR instruments. This wording echoes the language used by Principle 2 of the UN Guiding Principles, according to which:

> States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.[49]

The Commentary to this Principle explains that there are 'strong policy reasons for home States to set out clearly the expectation that businesses respect human rights

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[47] *See also* the EFTA-Montenegro FTA, preamble, para. 11: 'ACKNOWLEDGING the importance of good corporate governance and corporate social responsibility for sustainable development, and affirming their aim to encourage enterprises to observe internationally recognised guidelines and principles in this respect, such as the OECD Guidelines for Multinational Enterprises, the OECD Principles of Corporate Governance and the UN Global Compact'.

[48] E.g. Canada–Panama FTA, Art. 9.17: CSR: 'Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as those statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.' Almost identical provisions are found in the Canada–Colombia FTA, Art. 816; Canada–Benin Agreement for the Promotion and Reciprocal Protection of Investments, Art. 16.

[49] The extraterritorial application of CSR standards should be taken with caution. If it has the positive effect of exporting CSR standards to weakly governed States, it entails the corresponding risk for host states to apply standards which their national companies may face difficulties in complying with. On this point, *see* N. Boschiero, *Corporate Responsibility in Transnational Human Rights Cases. The U.S. Supreme Court Decision in Kiobel v. Royal Dutch Petroleum*, Rivista di diritto internazionale private e processuale 2, 249–292, at 253 (2013).

abroad, especially where the State itself is involved in or supports those businesses'. This is exactly the case of FTAs promoting trade and investment abroad.

It may not be a case that more stringent obligations, framed with 'shall', are found in the Investment Chapter of certain FTAs and expressly limit their application to companies operating on the territory of the State. An example is Article 72 'Behaviour of investors' of the EU-CARIFORUM Agreement, which states that:

> The EC Party and the Signatory CARIFORUM States shall cooperate and take, within their own respective territories, such measures as may be necessary, inter alia, through domestic legislation, to ensure that: … (b) Investors act in accordance with core labour standards as required by the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work, 1998, to which the EC Party and the Signatory CARIFORUM States are parties.

This provision shows that States Parties are willing to undertake ('shall cooperate and take') more stringent measures ('necessary') to ensure that investors operating on their territories respect the CSR rules, compared to the ones that may have an extraterritorial reach.

With regard to the second aspect relating to how the reference to international standards is drafted, certain FTAs contain a general reference to internationally recognized standards and guidelines in the field of CSR,[50] while others make reference to specific instruments, such as the OECD Guidelines for Multinational Enterprises, the OECD Principles of Corporate Governance, the UN Global Compact, the UN Guiding Principles on Business and Human Rights, the ISO 26000 guidelines or the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.[51]

In rare cases, such as for instance in the Agreement between EFTA countries and Central America (2014) and in the Canada–Cote d'Ivoire Agreement (2015), the Parties 'shall encourage' their companies to adopt CSR instruments.

Upon meeting strict requirements, which at present are not yet complied with, the reference to CSR standards may have the effect of incorporating these rules in the FTA and 'transform' these originally non-legally binding instruments into treaty law. The 'upgrade' or 'hardening' of CSR instrument should meet the following requirements: first, the language used in the incorporation clause needs to be sufficiently stringent (for instance, using 'shall') and not of a programmatic nature (like 'should' or 'encourage'). Second, the *renvoi* should

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[50] Art. 20.10 of the TPP contains a general reference and requires that the CSR practices shall be 'consistent with intentionally recognised standards and guidelines that have been endorsed or are supported by the party'.

[51] Recent EU agreements, such as the one negotiated with Ukraine (Art. 422) and Moldova in 2014, as well as the proposal for the Trade and Sustainable Development chapter (Art. 20) in the TTIP contain a list of references to specific internationally recognized instruments.

be precise with regard to the instruments that are incorporated, because a general reference to 'internationally recognized standards' would not allow the identification of the norms that are incorporated; and third, the CSR norm which is incorporated should be sufficiently precise and detailed too, in order to be self-executing. While waiting for this progressive development of having CSR norms incorporated into FTAs and becoming applicable law between the Parties, these norms and standards can already be used as interpretative tools of other FTAs provisions according to the customary rules of treaty interpretation, as set by Article 31.3 (c) of the Vienna Convention on the Law of Treaties.

An analogous reasoning has been suggested with regard to the incorporation of CSR instruments in bilateral investment treaties.[52] A similar regulatory technique called 'legislation by reference' or 'incorporation by reference' is commonly used by the United Nations Convention on the Law of the Sea (UNCLOS) which is open to legal and technical regulatory developments occurring outside its legal framework.[53]

Likewise, in private international law 'legislation by reference' occurs when soft law and provisions which are not part of a domestic legal order, notably *lex mercatoria*, are incorporated by explicit and stringent clauses and thereby become applicable law.

Arguably incorporated rules and standards would acquire the legal nature of the incorporating treaty provision and hence become binding upon the FTA Parties. Another consequence of this incorporation is that CSR norms would fall under the competence of the implementation mechanisms established under FTAs, which will be examined in the following paragraphs.[54] Even if for the time being they are not directly justiciable before international judiciary bodies, they complete and strengthen the sustainable development legal context in which all the provisions of the FTA are included and might be interpreted. They may hence have an influence in the judicial and arbitral reasoning when primary norms are considered.[55] It could be argued that, notwithstanding their uncertain legally

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52 *See* M. E. Footer, *BITs and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment*, 18(1) J. Int'l. L. & Prac. 33–64 (2010).

53 *See* for instance, UNCLOS, Art. 211.5: 'Coastal States … may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organization […]'. On this aspect, A. Bonfanti & F. Romanin Jacur, *Energy from the Sea and the Protection of the Marine Environment: Treaty-Based Regimes and Ocean Corporate Social Responsibility*, 29 Int'l. J. Marine & Coastal L. 622–644, at 631 (2014).

54 *See* para. 4, *infra*.

55 A similar reasoning has been advanced with regard to the legal nature of the principle-approach of sustainable development by V. Lowe, *Sustainable Development and Unsustainable Arguments*, in *International Law and Sustainable Development* 19–37 (A. E. Boyle & D. Freestone eds, Oxford University Press 1999).

binding nature,[56] these clauses establish the threshold of the CSR minimum standards to be respected by the business operators. As a consequence, Viñuales notes that 'investors could not reasonably expect thaty they will be able to operate under lower standards, which, in turn, limits the range of what they can reasonably claim (and obtain) in investment proceedings.'[57]

A different approach that is at odds with the incorporation of CSR norms into FTAs is found in the EU textual proposal of the abandoned TTIP negotiations. Here the Parties promote CSR norms and processes but clearly intend to do so within their original institutional fora and maintaining their soft legal nature.[58]

3.3 Obligations to promote trade in goods that are the subject to CSR schemes

In recently negotiated FTAs States commit themselves to the sustainable management of natural resources, including forestry, fisheries and biodiversity and, in this context too, they endorse and reaffirm commitments made under other agreements[59] but also envisage a sort of preferential treatment for goods produced through sustainable supply chains which take into account CSR schemes. An example of this approach is found in the EU-Georgia FTA:

> Parties agree to promote trade in goods that contribute to enhanced social conditions and environmentally sound practices, including goods that are the subject of voluntary sustainability assurance schemes such as fair and ethical trade schemes and eco-labels[60]

and in the EU-Republic of Korea FTA (2011) which refers to goods that are 'subjects of schemes as fair and ethical trade and those involving corporate social responsibility and accountability.'[61]

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[56] J. E. Viñuales, *Investor Diligence in Investment Arbitration: Sources and Arguments*, 32(2) ICSID Rev. 346–370 (2017), at 354 refers to CSR clauses as 'midway anchor provisions.'

[57] *Ibid.*, at 355.

[58] EU Textual Proposal tabled for discussions with the US, made public on 6 Nov. 2015, Art. 20.3: ' … the Parties shall refer to and support internationally recognized guidelines and principles on CSR and responsible business conduct, including by endorsing, adhering to, or participating in, according to the nature of the instrument, the OECD Guidelines for Multinational Enterprises, the UN Global Compact, the UN Guiding Principles on Business and Human Rights, ISO 26000, and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. The Parties equally agree to facilitate progress in responsible business conduct by supporting actions which can allow for greater uptake of these internationally recognized instruments among companies established in their respective territories.'

[59] For instance, *see* EU-Japan FTA, Trade and Sustainable Development Chapter, Art. 6.2(b) on Biodiversity, which recalls CITES, Art. 8.2 which recalls UNCLOS and other treaties and soft law instruments on the conservation and sustainable use of fisheries.

[60] EU-Georgia FTA, OJ L 261/89 of (30 Aug. 2014), Ch. 13, Art. 231, let.(d).

[61] EU-Republic of Korea FTA (2011), Art. 13.6(2).

4 IMPLEMENTATION MECHANISMS OF NON-TRADE RELATED PROVISIONS

The alleged breach of sustainable development provisions and CSR clauses, both when they are envisaged within the investment chapters or by the Sustainable Development chapters of FTAs, cannot be brought before legally-binding dispute settlement procedures.[62] There is hence a certain imbalance, considering that while the investor can sue the State for alleged breaches of the trade-related guarantees provided by the treaty, this couldn't happen to challenge an alleged violation of an environmental, social or CSR obligation. These non-trade related provisions that envisage programmatic sustainability obligations on behalf of State Parties are not protected on an equal footing like the trade and investment obligations, which remain the core commitments under FTAs. Labour, environmental and sustainability-related obligations, including CSR obligations, when included in the operative part of the treaty, are coupled with alternative implementation mechanisms. In practice, however, the soft and programmatic language used to draft these clauses makes it highly improbable and difficult to implement them in practice.

Depending on the FTA under consideration, the specific remedies may vary, but the music is overall the same: the alleged breach of non-trade related obligations cannot be settled through legally binding procedures, be they State-to-State dispute settlement or investor-State arbitration and in case of their violation no sanctions can be issued, unless the breach has an impact on trade.

4.1 State to state consultations and dispute settlement mechanisms

FTAs to which the US and Canada (prior to CETA) are Parties generally resort to an enforcement mechanism which is of a preponderant intergovernmental nature. In the Canada–Colombia FTA, for instance, the Parties:

> establish a Committee on Investment, comprising representatives of each Party. 2. The Committee shall provide a forum for the Parties to consult on issues related to this Chapter

[62] An example of the first model (CSR provision contained in an investment chapter) is the Canada–Panama FTA, Ch. 9 'Investment'. Its Art. 9.17 'Corporate social responsibility' provides that: 'Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as those statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.' Immediately after, Section C – Settlement of disputes between an investor and the host party, Art. 9.20 excludes that CSR as well as other sustainable development provisions can be brought before arbitration by an investor, by envisaging that: Claim by an investor of a party on its own behalf: 'An investor of a Party may submit to arbitration under this Section a claim that the other Party has breached (1) an obligation under Section B, other than an obligation under Article … 9.17 [Corporate social responsibility].'

> that are referred to it by a Party. 3. The Committee … should work to promote cooperation and facilitate joint initiatives, which may address issues such as: … (b) promoting corporate social responsibility.[63]

Another model is the enforcement mechanism of the NAFTA side agreements. Here an arbitral panel may determine whether a State is adequately enforcing its labour and environmental law and in case of non-compliance, the panel can decide that the State pay a monetary sanction, but only if the breached labour or environmental provisions affect trade between the Parties.[64] The sustainability dimension of this dispute settlement mechanism is strengthened by the provision that the revenues deriving from the monetary sanctions shall be invested in measures that improve environmental law enforcement in the respondent Party, following instructions from the Council.[65]

Some FTAs, following the model set by NAFTA, establish implementation mechanisms characterized by the issuance of sanctions as a last resort. The procedure under these mechanisms starts with consultation between the parties; if this first stage does not end successfully, a panel is established, which issues a report that is made public. The panel could require the State to withdraw or modify the challenged measure within a certain period of time. Should this time pass without the State returning to compliance, the complaining party could bring the dispute back to the panel, which could decide to issue proportionate sanctions, such as the withdrawal of trade concessions or fines.[66]

While the sanction-oriented model may have more convincing arguments to ensure higher rates of compliance with the treaty, it faces a strong limit with regard to CSR clauses enforcement: as it is designed in current FTAs it is not applicable to breaches of environmental, human and social rights, or CSR clauses *per se*, because it requires that the violation is trade- or investment-related, i.e. that it has an harmful impact on bilateral trade or investment which should be quantifiable in economic terms. Practice so far confirms that it is very hard to see cases relating to the alleged violation of environmental or human rights obligations that end with the issuance of sanctions.[67]

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63 Canada–Colombia FTA, Art. 817.

64 NAEEC, Annex 34, para. 2. The agreements provide objective and subjective criteria that should orient the panel discretion in determining the amount of the sanction. These include the pervasiveness and duration of the Party's non-compliance, but also the level of enforcement that could reasonably be expected of a certain State taking into consideration its resource constraints, and the behaviour of the State under scrutiny, including the reasons advanced to justify the lack of enforcement and the efforts made to try and remedy the situation.

65 NAEEC, *supra* n. 64, para. 3.

66 Similar procedures are found in the Canada–Peru FTA, Canada–Korea FTA, Canada–Honduras FTA, Canada–Panama FTA.

67 Criticisms of the model issuing sanctions for breach of trade-related obligations are expressed by the Non-paper of the EU Commission, *Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs)* (11 July 2017), at 8: 'Proving the economic injury necessary for sanctions may be a challenge and the question is whether this may not lead to narrowing the scope of the EU's TSD work.'

4.2 Consultation mechanism with civil society involvement

Recently adopted FTAs introduced innovative implementation mechanisms that are applicable to provisions of Sustainable Development chapters and CSR clauses. These mechanisms rely for their functioning on the active participation of civil society, at the national level, and of other international organizations, such as the ILO and the OECD, which are experts in CSR matters.

One of latest examples is the EU-Japan FTA. Here, each Party may request in writing to consult with the other Party concerning the interpretation or application of a provision, setting out the reasons, the facts and the legal basis of the request as well as the relevant provisions. During the consultation phase, the Parties shall seek a mutually satisfactory resolution of the matter and may seek advice from the competent international organizations, such as the ILO. The outcome of the consultations should be made public, unless otherwise agreed by the Parties. If no solution is agreed, each Party may request that the Specialized Committee convenes to consider the matter.[68] In the event that also this step of the procedure results unsuccessful in solving the disagreement, a Party may request that a Panel of Experts examines the matter. This Panel, composed by three independent experts, shall interpret the relevant provisions according to the customary rules of interpretation of public international law. The Panel shall issue an interim report within ninety days from its establishment, on which the Parties may submit written comments. After considering the Parties' comments, the Panel has ninety days to issue its final report which shall be made publicly available. Within three months from the report's issuance, each Party should inform the other Party on the follow-up measures it intends to adopt in furtherance of the recommendations made.[69] The Specialized Committee shall monitor this implementation phase. In addition to this intergovernmental Committee, each Party shall convene meetings of its domestic advisory group on economic, social and environmental issues[70] and of a Joint Dialogue with civil society organizations who may submit their observations.[71]

The CETA envisages a similar implementation mechanism with the participation of representatives of civil society.[72] These inclusive mechanisms by opening

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68 EU-Japan FTA, Art. 16.
69 *Ibid.*, Art. 17.
70 *Ibid.*, Art. 14.
71 *Ibid.*, Art. 15.
72 CETA, Sustainable Development Chapter, Arts 4 and 5. In the Statement of implementation for the CETA, Canada committed to continue to seek to encourage sustainable development practices by Canadians and Canadian businesses enterprises in areas such as CSR. On the innovations and regressions found in CETA with regard to sustainable development obligations, *see* L. Bartels, *Human rights, Labour Standards and Environmental Standards in CETA*, Legal Stud. Res. Paper Series 13 1–19 (University of Cambridge, Faculty of Law 2017).

channels of dialogue with competent international organizations, such as ILO and the OECD, reflect the spirit of mutual supportiveness and may have the benefit of creating synergies across different institutions and their regulatory instruments, thereby preventing and avoiding the risks of fragmentation and of conflicts between parallel processes.

Furthermore, these models aptly implement a procedural dimension of sustainable development by envisaging multi-stakeholder processes that should consider and find a balance between the different values and interests at stake in complex scenarios that need to combine trade, environmental and social matters.

At present, it is too early to assess the operation of these new approaches to implementation, since they have been in place only for a few years and their functioning requires the EU and partner countries time to establish them correctly, have them up and running and become familiar with their challenges.

4.3 Self-assessment procedures

Another model worth examining is the self-assessment procedure of the Canada–Colombia FTA. According to this procedure the Parties shall produce an Annual Report on Human Rights and Trade highlighting, on the one hand, the CSR initiatives undertaken by their enterprises in the host country (for instance, the Canadian companies operating in Colombia) and, on the other hand, the governmental measures introduced to promote responsible business practices. Civil society may provide information relevant for the drafting of the Report.

In the drafting of the 2016 Report CSR issues emerged as one of the priority issues. Submissions received through the public consultations process urged the Government of Canada:

> to take proactive steps to ensure that Canadian-based companies investing in Colombia are well-informed of their duties under international laws particularly with regard to obtaining free, prior and informed consent to operate on land belonging to indigenous groups and the expectations of the Government of Canada under its CSR Strategy.[73]

Other submissions required Canada to pass a law recognizing a right of access to Canadian courts in cases alleging human rights and other violations connected with overseas operations of Canadian companies and to adopt a National Action Plan for the implementation of the UN Guiding Principles on Business and Human Rights.[74]

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[73] *Sixth Report on Human Rights and Free Trade in the context of the Canada-Colombia FTA* (period 1 Jan. 2016 to 31 Dec. 2016), para. 8.2(b). A similar wording immediately calls to mind the obligations envisaged by the Convention on Biological Diversity.

[74] *Ibid*.

5 CONCLUDING REMARKS

The current international legal system remains centred on inter-state obligations endorsed by treaty law and provides for limited answers to the growing requests coming from various voices within the international community to apply international minimum standards to private companies in their transnational activities. Enhancing accountability of these players is a way to counterbalance the favourite position and CSR clauses of FTAs could be used to restore a certain balance in this context.

Notwithstanding the soft language of these commitments, the fact that they are envisaged in legally binding agreements and increasingly not only in the preamble but also in operative parts of the treaty allows their potential use as interpretative tools in case of disputes. Even if for the time being they are not directly justiciable before international judiciary bodies, they complete and strengthen the sustainable development legal context in which all the provisions of the FTA are included and should influence the interpretation and the judicial and arbitral reasoning when primary norms are considered.

As corporate responsibility standards have circulated across different instruments, for instance from soft CSR instruments to treaties, and in so doing they have become legally binding upon the parties to these agreements, similarly, if incorporated with an adequately specific and stringent clause by FTAs, these standards may turn into legally binding obligations for the States Parties to the FTA.

Should this development occur, it would go in the direction suggested by the European Parliament, which:

> Calls on the Commission to systematically include a chapter on sustainable development, containing a legally binding CSR clause, in the free trade and investment agreements it negotiates with third countries;[75]

Furthermore, the presence of implementation mechanisms that can be triggered to monitor the effectiveness of these provisions may endow these clauses with accountability pressure towards the States and even towards corporations which might be scrutinized by stakeholders and the public through the implementation mechanisms of recent FTAs.[76] It is still too early to assess whether in practice these mechanisms, with the participation of civil society and the publicity that characterize them will be able to make States Parties accountable with regard to compliance with their CSR commitments. Should these mechanisms work, the

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[75] European Parliament, *Resolution of 8 June 2011 on the external dimension of social policy, promoting labour and social standards and European corporate social responsibility* (2010/2205(INI)).

[76] ILO, *Corporate social responsibility in international trade and investment agreements. Implications for states, business, and workers*, Research Paper 13 16 (Apr. 2016).

inclusion of CSR clauses in FTAs could contribute to fill the accountability gap by giving 'teethes' to such clauses and may provide a complementary tool that strengthens the effectiveness of existing CSR enforcement systems. A positive experience occurred in the framework of the Canada–Colombia FTA, where Canada supported Colombia in setting up its National Contact Point, which is the governmental non-judicial mechanism providing access to redress to victims negatively affected by the activity of foreign corporations.[77]

[77] *Sixth Report*, *supra* n. 73, para. 9.5.