ILO Research Paper No. 13

International Labour Office

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Implications for states, business, and workers

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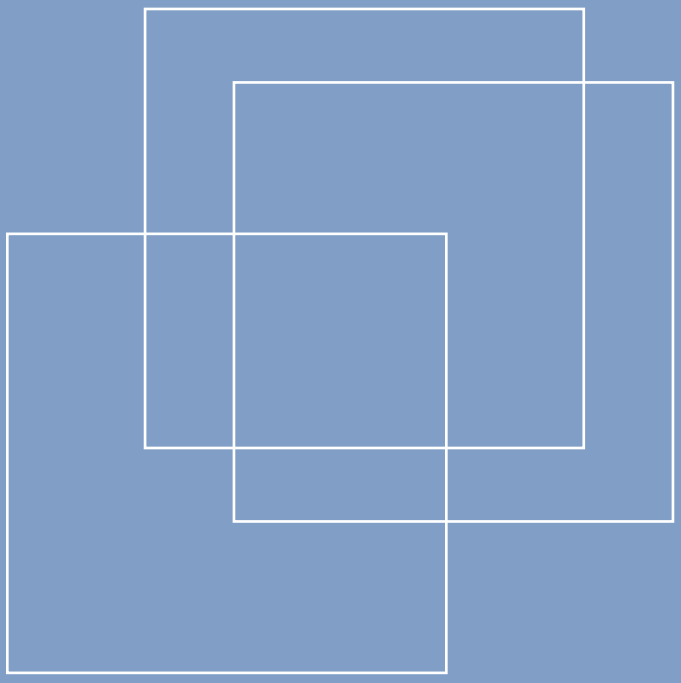

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ISSN 2306-0875 (web pdf)

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Acknowledgements

The authors would like to thank Sean Cooney, Marva Corley, Franz Ebert, Marialaura Fino, Damian Raess, Githa Roelans, Dora Sari, Emily Sims and two anonymous reviewers for their useful comments and suggestions. The authors would also like to thank Uma Rani and Raymond Torres for providing us the opportunity to publish this paper in the ILO Research Paper Series. Any views expressed or conclusions drawn represent the views of the authors and not of the ILO. This paper has only been possible thanks to the support of the ILO Research Department and the ILO Multinational Enterprises Unit. An earlier version of the article was published in the Bulletin of Comparative Labour Relations, 89 (2015).

Abstract

Businesses increasingly engage in the promotion of labour standards through initiatives of corporate social responsibility (CSR). CSR was traditionally regarded as voluntary and private, however it has become increasingly "legalized" where CSR is shaped by governmental policies and integrates non-voluntary elements. Even though the effectiveness of such CSR initiatives is not undisputed, it is increasingly regarded as an important element of global labour governance. This paper assesses the reference to CSR commitments in trade and investment agreements and finds that CSR language is relatively weak in terms of obligation, precision and delegation. We then discuss and emphasise the potential to use the mechanisms that are provided in these agreements to activate and follow-up CSR commitments, and what the implications could be for states, business and workers. The paper concludes by addressing the potential role of the ILO in the interplay between soft and hard labour regulations, and its experience in the follow up of CSR.

Keywords: corporate social responsibility; governmental policies; investment treaties; legalization; private governance; trade agreements; trade and labour; tripartism

JEL classification: F13; F16; K20; K31; K33; M14; G34; G38; J81; J83

1 Introduction

Despite the positive impacts on development that have been related to globalization, to which trade and investment agreements are fundamental means, concerns have also been raised with regard to the potential negative labour markets outcomes through downward pressure on employment, labour standards and working conditions (UNHRC, 2015; UNCTAD, 2007). This is particularly true for economies concerned with attracting investment, but that are also challenged with limitations in institutional and regulatory capacities to secure compliance with legal obligations, and to ensure that investments generate a positive impact on society (see, Mooney, 2015; Strange, 2000). Furthermore, from a labour rights perspective, the establishment of new forms of production beyond borders, such as Global Supply Chains (GSC), and the influence of Multinational Enterprises (MNEs) in the world economy, constantly challenge labour governance and its impacts, as labour rights constitute an intersecting point in human rights, trade, labour law and public policy (Addo, 2015). One way to address these concerns and to assure that trade and investment go hand-in-hand with decent work is through the promotion of Corporate Social Responsibility (CSR).

Since the 1990's, civil society has become instrumental in exerting pressure and drawing public attention to gaps in legislation and enforcement to address questionable corporate conduct, in particular when it is associated to labour rights abuses, environmental deterioration and other human rights impacts (Mooney, 2015; Nolan, 2014). As a response, private business have increasingly adopted CSR schemes to ensure the respect for labour rights, among others, in their activities worldwide. CSR commitments may take various forms, ranging from codes of conduct, the establishment of auditing mechanisms and processes for human rights due diligence, to the revision of purchasing and pricing practices, among others.

The increasing number of trade and investment agreements with CSR references is quite important and in this paper we analyse the "legalization" of CSR by looking at the inclusion of CSR language in trade and investment agreements. We then focus on labour-related CSR clauses in these agreements, that is, explicit CSR language, including both principles and instruments ("corporate responsibility", "OECD Guidelines for Multinational Enterprises" (OECD Guidelines), etc.) that are related to labour rights. These CSR provisions can be distinguished from traditional labour provisions, which are essentially a state-centred definition, and therefore establishes direct obligations for the states.

However, an unavoidable overlap remains as often CSR provisions are part of the same trade and sustainable development or labour chapters. Furthermore, the majority of these CSR instruments often include references to the same labour instruments that are referred to in the labour provisions, for example the ILO 1998 Declaration on Fundamental Principles and Rights at Work, the ILO Fundamental Conventions, and other instruments.

The remainder of the paper is structured as follows. Section 2 reviews the literature focusing on the concept of CSR as a regulatory mode, briefly discussing the potential and challenges of private governance, which – while regarded as purely voluntary – is increasingly regulated by nation states in order to advance responsible business conduct. Section 3 addresses the method followed for the purpose of enumerating instances of labour-related references to CSR in trade and investment agreements. In addition, it develops an analytical framework for CSR provisions, based on the concept of "legalization" and the soft-hard law continuum as developed by Abbott et al. (2000). Section 4 provides an analysis

of the increasing integration and evolution of CSR clauses in international trade and investment agreements and finds that CSR language is relatively weak in terms of *obligation*, *precision* and *delegation*. The reference to CSR is found to be limited to declaratory language towards general principles, with limited reference to existing frameworks, such as the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO MNE Declaration), the OECD Guidelines or the UN Guiding Principles on Business and Human Rights (UN Guiding Principles). The section then discusses and emphasizes the potential to use the mechanisms that are provided in these agreements to activate and follow-up CSR commitments, and what the implications could be for states, business and workers. Section 5 analyses the potential role of the ILO in the interplay between soft and hard labour regulations, and its experience in the follow up of CSR. Section 6 concludes with a summary and provides some suggestions for future research.

2 Literature review

The proliferation of various CSR schemes, has contributed to a global labour governance framework that is increasingly diverse, involving a wide array of policy instruments and institutional mechanisms (see, Scherer and Palazzo, 2011; Steurer, 2010; Aaronson and Zimmerman, 2008). However, the complexities of this heterogeneity and proliferation of standards create challenges for the different market actors (including corporations, their suppliers and consumers) to effectively implement CSR initiatives. While CSR was initially conceptualized as purely private and voluntary it has evolved towards an increasing "legalization" (conceptualized by Abbott et al, 2000), and has become part of governmental policies shifting away from purely voluntary instruments (Lux et al., 2011).

The linkage between CSR and government policies has permeated into trade and investment policy.[1] While the integration of social issues in trade agreements was strongly debated at the multilateral level in the context of the World Trade Organization (WTO), since the Singapore Ministerial Declaration (1996) it has been excluded from the WTO agenda.[2] Despite this, some governments have made efforts to link CSR with trade at the multilateral level, but there exists a lot of uncertainty with regard to the application of CSR schemes in trade and the extent to which this is consistent with WTO regulation, for instance whether it can be considered as a trade-distorting measure (Vidal-León, 2013; Aaronson and Zimmerman, 2008; Aaronson, 2007).

Initially, one could argue that CSR would be better placed addressing only investors' behaviour in Bilateral Investment Treaties (BITs) as a means to rebalance the investors' rights conferred in these treaties (for example, access to investor-state dispute settlement) with the rights of states to regulate in the public interest (Footer, 2009), and to ensure the promotion of responsible investments (UNCTAD, 2015).[3] This is undisputable in the view of the authors. However, BITs are not the only way to regulate investments. The past decades have observed a trend to link trade with investment liberalization (Footer,

[1] Ideally, CSR and other types of provisions (labour, investment, environmental, among others) could be included in the multilateral trade agenda at the World Trade Organization. However, none of these are part of the WTO's mandate.

[2] See https://www.wto.org/english/twto_e/minist_e/min96_e/wtodec_e.htm

[3] The trade and investment agreements that are covered in this article are: (i) bilateral trade agreements, also known by the WTO as regional trade agreements (RTAs); (ii) and bilateral investment treaties (BIT), which are agreements between two countries regarding the promotion and protection of investments made by investors from respective countries in each other's territory. Brief reference is made to unilateral trade schemes, such as the Generalized System of Preferences (GSP).

2013). [4] Mann (2013) points out that, developing countries in order to access trade markets are increasingly pressured to liberalize their investment market. Furthermore, the recent agreements have become more "comprehensive" in their content (Waleson, 2015) by including issues not only related to trade and investment, but also expanding to intellectual property rights, labour standards, environmental protection, health and safety, and public procurement, among others. Hence, one could argue that it would be only logical that CSR provisions are included in such agreements (Footer, 2009; Hepburn and Kuuya, 2011).

The re-evaluation or re-orientation of investment regimes in several economies over the past years with regard to trade and investment policies also show that "if they are to have a meaningful future" (Mann, 2013, p. 536) then there is a need to shift towards a "sustainable development" approach. As part of the reforms to the international investment governance framework, UNCTAD (2015) proposes the inclusion of corporate social responsibility as a principle for investment policymaking for sustainable development. This view is shared by the main proponents of labour, environment and sustainable development provisions in trade agreements, namely Canada, the European Union (EU), the European Free Trade Association (EFTA) and the United States (US), which also are increasingly including CSR in their agreements.

Agreements have also been criticized by the broader civil society to offer significant rights for private businesses and investors (access to markets, to dispute settlement, etc.), with only limited responsibilities in return. Hence, incorporating CSR language is a way to counterbalance rights and responsibilities for businesses. Further, whereas trade and investment agreements are state-to-state agreements, incorporating CSR language is a way to recognize the role of private business in promoting and furthering labour rights, and this is complementary to the role of states. Finally, the prospect of entering into a trade agreement and the potential economic benefits associated with this, also holds an important economic leverage to further CSR behaviour.[5]

However, there are different opinions with regard to the potential, and downsides, of business involvement in policy design and implementation. On the one hand, proponents of CSR argue that this may fill in the regulatory vacuum in particular policy areas and may contribute to enhanced monitoring and compliance of labour standards (Gond et al., 2011; Gao, 2008). The CSR policies of private business may also assist corporations to avoid reputational and legal risks when operating in countries with limited capacities for legal enforcement (Hepburn and Kuuya, 2011; Rudolph, 2011). Private business may bring economic leverage, additional expertise and other resources for making and enforcing norms and standards (Boisson de Chazournes, 2015). Furthermore, voluntary private regulation is often viewed as more flexible and responsive (Braithwaite, 2006); and CSR schemes may also disseminate shared values in a particular policy area that may contribute to increased coherence and legislative development in the longer run (Kirton and Trebilcock, 2004; Boisson de Chazournes, 2015).

[4] "[…] foreign investment is drawn to international trade like a moth to the flame and […] this mutual attractiveness has become stronger with the passage of time" (Footer, 2013).

[5] In this regard a recent information report for the European Economic and Social Committee (EESC, 2015), highlights that CSR applied to international trade is an important "lever" for moving towards sustainable development, comprising all the countries involved in trade, investment and cooperation/development. (EESC, 2015, p. 2).

On the other hand, arguments against private regulation must also be considered: CSR initiatives may lack the legitimacy (Scherer and Palazzo, 2011; Diller, 2013), and may lack the surveillance and enforcement mechanisms offered by domestic labour legislation and institutions. In addition, with the involvement of a broad array of stakeholders, the proliferation of CSR initiatives may lead to increased heterogeneity among standards, their interpretation and monitoring (O'Rourke, 2003; Trebilcock, 2004; Fransen, 2012).

In terms of effectiveness of CSR initiatives, results have been mixed. Whereas CSR has contributed to enhanced worker rights, certain limitations have also been identified (Vogel, 2006; Egels-Zandén and Lindholm, 2014). Positive impacts have often been concentrated in visible and less-contentious areas. Indeed, compliance with working conditions, such as Occupational Health and Safety (OHS) and working hours are more likely to improve as a result of codes of conduct, compared to freedom of association and collective bargaining, non-discrimination or child labour (Smith and Barrientos, 2007; Anner, 2012; Newitt, 2013). However, these results have been criticized for being difficult to sustain over time (van Opijnen and Oldenziel, 2011).

In light of these arguments, this paper examines the role of states and the concept of "legalization" to underpin the benefits of CSR and addresses some of the main challenges of self-regulation. In this regard, Kauffman (2007) suggests that "[…] the legal gap left open by the voluntary instruments could be best filled by the state. By incorporating voluntary standards such as the OECD Guidelines and the ILO Tripartite Declaration into domestic law, states could play an important role in the building of an international law of business responsibility." (p. 169) It is from this context that the existing literature on CSR in trade and investment agreement is discussed. For instance, Footer (2009) proposes the incorporation of CSR instruments in BITs so that they "could be made to bite" (p. 61). So, according to Footer, these soft instruments would become "harder" to the extent that the investment treaty or trade agreement is binding upon the parties to it and they are obliged to comply with its content in good faith (Cf. Wawryk, 2003, p. 56).

Van der Zee (2013) in her study on Dutch companies with respect to how certain MNEs' commitments to human rights are implemented, particularly those referred to in the OECD Guidelines, finds that while most companies may have a CSR policy, its implementation is generally inconsistent with the OECD Guidelines. She proposes that in order to enhance effectiveness and enforceability of this instrument a valid option might be to include a reference, binding or not, to the OECD Guidelines or the standards contained therein in trade and investment agreements.[6] Among the different arguments against a binding reference, is that sometimes developing countries are unable to meet the standards called for in the OECD Guidelines and technical assistance must be provided in this regard. Another argument is that host countries might see as a threat to their sovereignty that home countries are obligating its MNEs to undertake human rights due diligence wherever they have operations.

UNEP (2011) explores to some extent how CSR has been included in certain trade and investment agreements (in specific, US-Peru and Canada-Peru (2009)). Though the study is limited in the assessment of the content of CSR provisions, but it adds to the existing debate by stressing the opportunity that trade and investment agreements pose to enhance greater coherence in the use of CSR initiatives, as they can assist in "providing signals to companies about which guidelines, standards and labels to adopt" (p. 28). Waleson (2015) addresses CSR principles included in "comprehensive trade

[6] The author in this regard mention as an example the agreements of Canada, to be further assessed in this paper, which normally only make reference to "internationally recognized standards" of CSR.

agreements" of the European Union (EU) as a means to balance trade liberalization and investment protection with social aspects. The author questions the effectiveness of trade agreements to enforce voluntary standards, considering that generally the obligations are directed to states parties to the trade agreements and not the corporations themselves. Nevertheless, he also recognizes that the inclusion of implementation mechanisms and the participation of non-state actors in the agreements might be useful to improve the effectiveness of the CSR commitments adopted.

Hepburn and Kuuya (2011), recognize that the "added-value" of CSR provisions is that they complement the commitments adopted by states in trade and investment agreements. CSR provisions, are useful because the obligation of the state parties to the agreement to encourage CSR initiatives provides corporations with an opportunity to show to their stakeholders and civil society their true commitment to go "beyond the law" voluntarily, and to respond to the encouragement made by states to behave responsibly. They also suggest the potential of these commitments to "crystalize" into hard law over time.

Whereas various authors have addressed the potential of CSR language in trade and investment agreements, this paper adds to this existing literature by conducting a systematic assessment of CSR language by using the concept of "legalization", in both trade and investment agreements, covering mainly Canada, EFTA, the EU, the US, and also others; and what the implications of CSR references in trade and investment agreements could mean for states, business and workers.

3 Methodology

For the purpose of enumerating instances of labour-related references to CSR in trade and investment agreements, CSR references were scanned for in both trade and investment agreements (including side agreements).[7] For reasons of feasibility (such as availability of texts and resources), not all trade and investment agreements that are notified to the WTO or UNCTAD have been scanned.[8] The desk review has focused on those countries or regions that traditionally have incorporated broader social or sustainable development commitments in their agreements, that is, typically, Canada, the EU, and the US but also EFTA, Chile, New Zealand, Turkey and Japan.[9]

While for these countries, all bilateral trade agreements have been examined; in the case of BITs, only the more recent agreements (2009 onwards) have been assessed, assuming that if a mention of CSR could not be found in the most recent agreements, CSR would probably not be referred to in earlier agreements either. Due to the limitations of the non-exhaustive scope it would be difficult to make any generalization. It is therefore plausible that the research provides a comprehensive overview of CSR clauses in the overall field of trade and investment agreements. Moreover, as this paper focuses on CSR in relation to labour, references to the promotion of CSR limited to particular fields, such as e-commerce or environmental protection, are excluded from the analysis.

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[7] CSR references are understood as a mixture of terms, including principles and instruments, that are associated with CSR - 'CSR', 'corporate', 'voluntary', 'self-regulation', 'OECD', 'global compact', 'responsibility', 'OECD Guidelines for Multinational Corporations', 'Global Reporting Initiative', 'Guiding Principles on Business and Human Rights', 'ILO MNE Declaration' and 'ISO 26000'.

[8] The WTO Regional Trade Agreements Database is available at: http://www.wto.org/english/tratop_e/region_e/region_e.htm; The UNCTAD's Investment Policy Hub is available at: http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu

[9] EU and EFTA also include the agreements its individual member states have entered into.

3.1 Analytical framework

CSR has traditionally been understood as a purely voluntary, enterprise-driven initiative that refers to activities that are considered not only to comply but to exceed compliance with the law (Carroll, 1979). In contrast to a completely voluntary and private view, CSR is characterized by an increasing "legalization" and is becoming an element of the regulatory toolbox of governments. In this paper, the partial "legalization" concept of CSR is assessed through the lens of the hard-soft law continuum, which characterizes a continuum of regulatory approaches that range from the traditional state-centered and sanction-based "hard" law to purely voluntary (or "soft") and private regulation. Abbott et al. (2000) argue that the concept of "legalization" entails a continuum between these two ideal types, which can be characterized based on three dimensions: *obligation*, *precision*, and *delegation*.[10] Accordingly, different CSR instruments can be characterized by their degree of softness-hardness, based on these three dimensions, instead of a clear dichotomy between both.

The first dimension - (legal) *obligation* - is concerned with "bindingness". Conventions for instance are binding on states which ratify them, which is not the case for recommendations, declarations or guidelines. The soft character of CSR legislation may refer to the substance of the norm (e.g. soft language use) or the instrument, that is, resolutions, declarations, recommendations, codes of conduct, or in our case, trade and investment agreements.

The dimension of *obligation* can also be related to the location of the commitment in a given instrument. For instance, it is generally argued that the preamble of treaties is not binding for the parties, but it provides for the purpose of the agreement (Bourgeois, et al., 2007).[11] However, generally preambles can be used as guidelines for interpretation of the agreements (Article 31 of the 1969 Vienna Convention on the Law of the Treaties (VCLT)), for example in dispute settlement. When a provision (in this case a CSR clause) is located in the *operative* provisions of the agreement, meaning the body or core text of the agreement, this would also have implications for the dimension of *delegation* providing for the possibility to apply to the CSR clauses the implementation mechanisms of the agreements or those of the chapter of the agreements where the clauses are inserted.

But, what does the dimension of *obligation* mean from a business perspective? Businesses are legally obliged to comply with domestic regulation in the countries where they operate, being home or host countries. Hence, every business decision to go beyond the law is per definition voluntary, at least from a legal perspective.[12] However, in reality, the boundary between the binding and non-binding nature of CSR commitments is often blurred: a company may voluntarily commit to, and require of its suppliers in the global south, to go beyond compliance with domestic labour law (i.e. by integrating this in a contractual arrangement) (e.g. van der Heijden and Zandvliet, 2014). Furthermore, examples exist

[10] Whereas Abbott et al. (2000) developed this scheme to understand international organisations, such as UN agencies or the WTO; this paper uses the scheme to better understand commitments of businesses in state-to-state trade and investment agreements. Some authors have used this concept in the context of trade agreements. Van den Putte et al. (2013) and Van den Putte (2015) build on Abbott et al. (2000) concept for an overall understanding of labour provisions in EU trade agreements, and more in particular to examine the involvement of civil society in the implementation of trade agreements between the US and the EU, and the Republic of Korea.

[11] This is the general approach. However, other approaches have been held with regards to the binding nature of preambles (see e.g. ILO, 2011).

[12] One could argue that the expectations from society or civil society organisations with respect to responsible business behaviour increase the (moral or public) obligation of companies to conduct CSR behaviour.

where purely voluntary CSR initiatives have been turned into legally binding obligations, for instance by interpreting non-compliance with CSR commitments, particularly codes of conduct, as misleading, deceptive or unfair commercial practices, as the codes of conduct adopted would not match the corporation's actual practices (see Nolan, 2014; Creutz, 2013; Gond et al., 2011).[13]

The dimension of *precision* is concerned with a clear definition of "commitments" for instance through the reference towards existing CSR instruments such as the ILO MNE Declaration, the OECD Guidelines or the UN Guiding Principles, instead of reference towards general CSR principles or unilaterally established CSR initiatives. A higher level of *precision* means that commitments are clearly embedded in the existing international legal framework of CSR instruments and mechanisms. By making reference to international instruments, it also has an important role in enhancing the coherence and legitimacy of CSR language. Furthermore, these instruments are often not only supported by governments but also by other stakeholders. The ILO MNE Declaration could be cited as an illustration, as it is addressed equally to governments, MNEs, employers, and workers and provides guidelines to all of them regarding the labour aspects of CSR.

Finally, the dimension of *delegation* is concerned with the question of third-party authorization to implement, interpret and apply rules, to resolve disputes or to make additional rules. In the case of hard law, this can be understood as a rule or commitment being subject to administrative and/or judicial interpretation and application (e.g. enforcement through the domestic judicial system, or dispute settlement in the case of trade agreements). Soft law on the other hand, implies limited third-party delegation. However, a whole spectrum of compliance mechanisms, other than legal enforcement, exists. These range from non-binding arbitration, conciliation/mediation, monitoring (through stakeholder involvement, for example) to public reporting (Abbott et al., 2000). All of these involve to a certain extent third-party authorization.

3.2 Corporate Social Responsibility as a component of State policies

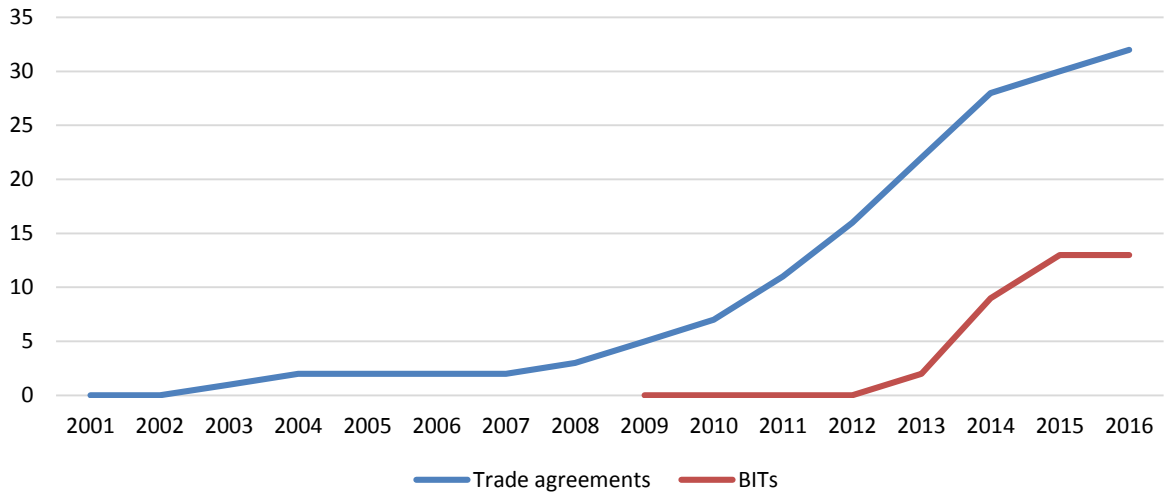
The concept of "legalization" and its three dimensions is helpful considering that CSR is increasingly discussed as an element of state policies leading to an emergence of a "policy hybrid" (see, e.g., Steurer, 2010; Aaronson, 2007). According to Ward (2004, p. 7): "the CSR agenda as a whole may now have reached a turning point in which the public sector is repositioned as a centrally important actor". This is also true in the field of trade and investment, where governments increasingly commit to CSR issues through their trade and investment policies.

By means of illustration, the European Parliament called for the systematic integration of CSR clauses in all future international trade and investment agreements (European Parliament, 2011; European Parliament, 2010). Also, the new EU Trade Policy clearly establishes that "EU's trade and investment policy must respond to consumers' concerns by reinforcing corporate social responsibility initiatives and due diligence across the production chains" (European Commission, 2015).

[13] An example of this is the "Unfair Commercial Practices Directive" (Directive 2005/29/EC of the EP and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council).

In a similar vein, Canada developed a strategy to strengthen in particular the extractive sector abroad and calls for "the inclusion of voluntary provisions for CSR in all Foreign and Investment Promotion and Protection Agreements and Free Trade Agreements signed since 2010", where the parties to the agreement encourage corporations with operations in their territories to "voluntarily incorporate internationally recognized CSR standards into their practices and internal policies" and is applicable to different areas including labour (Government of Canada, 2014).

Figure 1: CSR clauses in trade and investment agreements



Note: Since 2014 the BITs trend has been mainly driven by Canada with five BITs signed or in force in 2014 and four in 2015.
Source: UNCTAD Investment Policy Hub and WTO RTA Database.

4 CSR clauses in trade and investment agreements

This section examines the particular reference towards labour-related CSR clauses in trade and investment agreements. Recent trade agreements and BITs, such as the Trans-Pacific Partnership (TPP),[14] the Comprehensive Economic and Trade Agreement (CETA) negotiated between the EU and Canada, the EU-Vietnam Free Trade Agreement, or the Canada-Burkina Faso Foreign Investment Promotion and Protection Agreement (FIPA), to name but a few, make explicit reference to CSR.[15] However, the inclusion of CSR clauses in trade and investment agreements is in an embryonic state. This means that the large majority of agreements do not refer to CSR. However, recently an increasing number of countries and regions have started to include CSR language in their trade and investment agreements. Typically, these actors are the traditional proponents of social and sustainable development provisions in trade agreements, that is, the EU, Canada, occasionally the US, and more recently EFTA (see Figure 1). Although practices differ across trade partners and agreements, the inclusion of CSR

[14] The trade Parties to TPP are: Australia, Canada, Japan, Malaysia, Mexico, Peru, United States, Vietnam, Chile, Brunei, Singapore and New Zealand.

[15] All of these agreements are concluded but not yet in force. Only TPP (February, 2016) and Canada-Burkina Faso FIPA (April, 2015) have been signed. Seen the political and economic importance of both countries/regions involved (EU and US), the Transatlantic Trade and Investment Partnership (TTIP) is an important agreement to look at. However, as it is still under negotiation, it is excluded from this study.

clauses points to an increasing "legalization". Appendix 1 presents more detailed assessment of CSR language in the agreements of Canada, EFTA, the EU and the US.

4.1 Evolution of CSR clauses in trade and investment agreements

Among the first agreements that include CSR are the Joint Declaration concerning Guidelines to Investors, developed parallel to the EU-Chile Association Agreement (2003), the US-Chile Trade Agreement (TA) (2004), the EU-Cariforum Economic Partnership Agreement (2008), and the Canada-Peru (2009) TA. Over time, CSR clauses have become more elaborated in terms of *obligation, precision* and *delegation*.[16] In EFTA agreements, CSR references were traditionally found mainly in preambles of agreements.[17] Moreover, an increased level of *precision* over time can be observed: increasing references are made to CSR instruments such as the OECD Guidelines for Multinational Enterprises, the OECD Principles of Corporate Governance and the UN Global Compact.[18] In the 2014 agreement with Central America, EFTA expanded this approach to the inclusion of CSR language in the core text of the agreement, that is, the Chapter on Trade and Sustainable Development. It also contains stronger commitments in terms of *obligation* and *delegation*. According to the agreement, the parties *shall encourage* CSR, and the same implementation mechanisms that are provided in the Chapter on Trade and Sustainable Development apply to the CSR clause, i.e. cooperation activities, monitoring through a Joint Committee and government consultations in case of disputes.

A similar evolution is observed in Canadian agreements. Canada, already in 2001, inserted CSR language in the preparatory documents of the Free Trade Agreement of the Americas (which was never concluded, though). Since 2009, this country includes, particularly in the investment chapter, labour-related CSR clauses in its trade agreements as a part of a more comprehensive approach towards promoting CSR. Canadian agreements do not explicitly refer to specific CSR instruments, but rather make general references towards *internationally recognized corporate social responsibility standards and principles* and/or *statements of principle that have been endorsed or are supported by the Parties*.[19] More recent agreements, particularly TPP, incorporate CSR references into the chapters of investment and labour, while providing for higher levels of *obligation* (however the obligations are still of a soft character), that is, an evolution from "*should encourage"* to "*shall endeavour to encourage"* enterprises operating within the territory of the parties or subject their jurisdiction to *voluntarily* incorporate CSR on labour issues. This also has implications in terms of *delegation* as the specific implementation mechanisms of the agreement apply to the CSR clause.

Turning to EU agreements, increased levels of "legalization" are observed since the Joint Declaration in the agreement with Chile (2004). This first agreement with CSR references did not include obligations for states but a weak reminder directed to MNEs towards the adoption of the OECD Guidelines for Multinational Enterprises. Over time, CSR language has been integrated in the Trade and Sustainable Development chapters, and other chapters such as Cooperation on Employment, Social

[16] See Annex 1 for a detailed overview of the different country approaches and evolution over time.
[17] For example EFTA agreements with Albania (2010), Serbia (2010), Ukraine (2012), and Hong-Kong (2012).
[18] For example, EFTA TAs with Colombia (2011), Peru (2011), and Montenegro (2012).
[19] For example, Canada-Peru (2009), Canada-Colombia (2011) and Canada-Panama (2013). Generally, Canadian agreements expressly exclude CSR provisions from investor-state dispute settlement, but do not make any reference towards the exclusion of this topic from state-state dispute settlement. Therefore, state-state dispute settlement could be applied, but this is only a theoretical affirmation because in terms of practice the application of dispute settlement to enforce CSR provisions in Canadian or in any other trade agreement is less realistic.

Policy and Equal Opportunities, or those related to corporate governance. The latest agreement with Viet Nam (not in force) promotes an increased level of *obligation* for states. It establishes that the parties *shall encourage* the development and participation in CSR schemes but also *agree* to promote CSR. The level of *precision* evolved from general references towards internationally agreed guidelines, fair and ethical trade, private and public certification and labelling schemes,[20] to explicit reference to CSR instruments, such as the OECD Guidelines for Multinational Enterprises, the United Nations Global Compact, and the ILO MNE Declaration.[21] In terms of *delegation*, the mechanisms that are provided in the Trade and Sustainable Development Chapter (e.g. monitoring, cooperation, among others) also apply to the CSR clause.

The US approach has also observed important changes over time. An evolution can be observed in the location of the CSR provisions, from environmental chapters or annexes of labour cooperation observed in the trade agreements with Chile (2004), Peru (2009), and Colombia (2012) towards the previously mentioned approach of TPP that integrates CSR language into the labour chapter, while providing for higher levels of *obligation* and *delegation*.[22]

4.2 Other types of trade arrangements: BITs and GSP

The reference to CSR is more present in bilateral trade agreements compared to other types of arrangements, such as unilateral schemes or BITs. Although increasing, a limited number of more recent BITs include references to CSR. For instance, the Austria-Nigeria BIT (signed in 2013, not in force) expresses in the preamble the belief that responsible corporate behaviour can contribute to mutual confidence between enterprises and host countries. The Canada-Benin FIPA (2014) mentions in the body of the treaty CSR as a guiding principle, and establishes that "each Contracting Party *should encourage* enterprises operating *within its territory or subject to its jurisdiction* to voluntarily incorporate internationally recognized standards in their practices and internal policies*"* that address issues such as labour and others (Art. 4, Art. 16).

This provision is repeated in other Canadian FIPAs such as those with Cameroon, Nigeria, Senegal, Mali (2014, not in force) and Serbia (2015). In the treaty with Côte d'Ivoire (2015) the dimension of *obligation* evolves, mandating that the parties "*shall encourage*" the adoption of CSR policies. Clearly, the language is still soft, but higher level of commitment is observed transitioning from an action that the parties to the treaty *should* perform, to an obligation and commitment to encourage enterprises towards the adoption of CSR. Also, the Colombia-France BIT (signed in 2014, not in force) establishes an obligation of the parties to encourage the enterprises in their territories to promote CSR standards, and particularly, in the dimension of *precision*, refers to the OECD Guidelines for Multinational Enterprises (Article 11).

Some possible explanations of the limited CSR language in BITs are, first the relatively limited and much more recent public attention towards the sustainable development potential/challenges of BITs, compared to trade agreements.[23] More recently, these criticisms are being looked into, for instance the

[20] For example, in the agreements with Republic of Korea (2013), Colombia/Peru (2013), and EU-Central America (2013) no explicit instruments of CSR are referred.
[21] The EU, in its recent agreements with Georgia, Ukraine and Moldova (2014).
[22] Non-labour CSR language is also included in the investment chapter.
[23] This has been changing more recently, owing mainly to the numerous claims under the investor-state dispute settlement (ISDS) mechanisms with regard to states' regulation in the areas of labour, environment, health, etc.

international investment policies are currently under revision and countries are revising their BIT models with the intent to make these more sustainable. UNCTAD (2015) proposes that to achieve this the inclusion of CSR is important as a "core principle for sustainable investment". With regard to unilateral schemes, neither the US nor the EU GSPs incorporate a reference towards CSR.[24] This may be explained by CSR being traditionally a concept designed for companies of developed economies being active in developing economies. As GSPs deal with unilateral market access to developed economies, it can be perceived as being less of an issue.[25]

An interesting evolution that one can observe is the spill-over between different types of agreements. Some countries have a longer tradition to include CSR language in their trade agreements and have started to do this in their BITs, e.g. Canada. Other countries already included labour provisions in some of their investment agreements and started to add a reference to CSR, such as Austria or the Netherlands. Finally, one could expect countries that have included a referral to CSR in one trade agreement to repeat this in trade agreements with other countries.[26] This is the case for instance for the Colombia-Costa Rica trade agreement (signed in 2013, but not in force) that includes an article (Article 12.6) in the investment chapter towards CSR which is basically the same as found in the Canada-Colombia trade agreement (2011) (Art. 816).[27] Also the South Korea-Turkey framework agreement (2013) includes a CSR provision that is identical to the EU- Republic of Korea TA (2011).

4.3 "Double soft" references in CSR clauses

When having a closer look at these CSR clauses, the signing parties - states - typically commit to cooperation activities on CSR (*cooperation*), to encourage enterprises to voluntarily incorporate CSR mechanisms (*enterprises' adoption of CSR instruments*), or to facilitate and promote trade in goods that are subject to CSR schemes (*CSR trade* including labelling schemes and ethical trade). These are mainly 'double soft' references (see, Prislan and Zandvliet, 2013), understood as (i) soft language in terms of states' commitment with regard to the support to CSR initiatives; and (ii) purely voluntary CSR engagement of the private sector.

Nevertheless, these clauses also have potential since, the states parties to the agreements do commit to take policy initiatives in the area of CSR, even though these are relatively soft commitments, which may have implications in the territory of the parties or overseas in some cases:

First, various trade agreements refer to the inclusion of joint cooperation activities, which may include, amongst others, CSR activities. The annex to the labour chapter of the US-Peru trade agreement (2009), which establishes a Labor Cooperation and Capacity Building Mechanism, for instance states that *"[…] regional cooperation activities on labor issues, may include, but need not be limited to … dissemination*

[24] Only the US and EU GSP's have been looked at, as these are the only ones that include a labour provision.
[25] However, unilateral schemes from the US and the EU do make reference to labour provisions in general without including CSR aspects.
[26] As commitments made in one agreement diminishes the threshold to commit to similar engagements in agreements with other countries. This spill-over has been observed at least in the case of labour provisions. For example Colombia in its agreements with the US, EU and Canada has labour provisions and a "lighter" version of such provisions has been repeated in Colombia's recent BITs with Turkey (Article 11) and France (Article 12) (2014, signed but not yet in force).
[27] It only does not include a reminder to the parties to encourage the companies to adopt certain CSR principles in their internal policies.

of information and promotion of best labor practices, including corporate social responsibility, that enhance competitiveness and worker welfare" (Annex 17.6, Article 2(o)).

Secondly, the parties may encourage enterprises to voluntarily incorporate/observe CSR mechanisms. For instance, the EFTA-Montenegro agreement (2012) acknowledges in the preamble the *"importance of good corporate governance and corporate social responsibility for sustainable development, and affirming their aim to encourage enterprises to observe internationally recognized 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"*.

Third, CSR clauses may facilitate and promote trade in goods that are the subject of CSR schemes. The EU-Republic of Korea (2011) trade agreement for instance deals with CSR under the chapter of trade and sustainable development, as following: *"the Parties shall strive to facilitate and promote trade in goods that contribute to sustainable development, including goods that are the subject of schemes such as fair and ethical trade and those involving corporate social responsibility and accountability"* (Article 13.6(2)).

Fourth, the provisions generally do not clarify where states *should* or *shall* encourage (or even a softer commitment to "make an effort" to encourage) businesses to adopt these policy initiatives. Therefore, it could be assumed that this encouragement might also be directed to businesses with operations overseas to apply their adopted CSR policies wherever they operate (i.e. in home and host countries). In this regard, it should be noted that Canadian agreements often establish the commitments of the parties towards the encouragement of enterprises to adopt CSR when they operate within their territories (understanding that enterprises can be national or foreign) or under their jurisdiction (even if this is outside of their territories).[28]

4.4 Assessing "Obligation and Precision" in CSR clauses

When we assess CSR clauses in terms of the soft-hard law continuum as referred to in the concept of "legalization", although differences exist among agreements, an important finding is that CSR clauses are generally soft, both in terms of *obligation* and *precision*. With regard to the dimension of *obligation*, the adoption of CSR initiatives for enterprises is voluntary and accordingly the legal obligations these clauses entail are limited for corporations.[29] Also in terms of *precision*, the examined agreements typically refer towards the overall idea of CSR, without defining it, referring to "internationally recognized CSR guidelines and standards", or further specifying existing CSR instruments, such as the ILO MNE Declaration, the UN Guiding Principles on Business and Human Rights or the OECD Guidelines.

[28] These "extraterritorial" implications should be examined with caution as different issues regarding the legal personality of corporations, nationality and jurisdiction, difficulties to effectively supervise abroad, among others, arise (see in this regard, e.g., Simmons, 2015; McCorquodale, 2014; Kendal – Human Rights Consulting, 2014; McCorquodale, 2009). This analysis, however, is not within the scope of this paper.

[29] Direct obligations for investors are rare in BITs or trade agreements, which is logical as these agreements are between states. One particular example of direct obligations for investors is found in the SADC Model BIT, which defines the content of investors' obligations, binding them to act in accordance with core labour standards as required in the ILO 1998 Declaration, and to operate consistently with international environmental, labour, and human rights obligations in the hosts or the home States, whichever the obligations are higher. In terms of *delegation*, the Model provides for a means to enforce investors obligations, providing the host state with the right to initiate a claim against the investor/investment in domestic courts based on the breach of the agreement (Article 19.3).

For example, the trade and sustainable development chapter of the EU-Republic of Korea trade agreement (2011) mentions that *"the Parties shall strive to facilitate and promote trade in goods that contribute to sustainable development, including goods that are the subject of schemes such as fair and ethical trade and those involving corporate social responsibility and accountability"* (Article 13.6(2)). In terms of legal obligation, this commitment is part of a legally binding trade agreement, however, using soft language is an obligation of effort (*"shall strive to facilitate and promote"*). Furthermore, it is the signing parties - states - that make certain commitments, not businesses. Parties in this agreement, do not establish where they are meant to promote these initiatives, in consequence, the obligation might comprise their territories and abroad. Also *precision* is limited as no reference is made to specific internationally recognized CSR instruments.

However, other trade agreements or investment treaties do have an increased level of *precision*, like the Netherlands-United Arab Emirates BIT (signed in 2013) explicitly refers to the OECD Guidelines by stressing the Parties' obligations to promote the application of these. Also the 2015 draft Norway model BIT explicitly refers to an agreement between the parties to encourage investors to comply with the OECD Guidelines, the UN Guiding Principles on Business and Human Rights and to participate in the UN Global Compact.

This is also true for the EFTA-Montenegro Agreement (2012), where the preamble affirms the parties' aim "to encourage enterprises to observe internationally recognized 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". From an ILO perspective, recent EU agreements (e.g. EU-Ukraine, 2014; EU-Moldova, 2014) are important in this regard as the ILO MNE Declaration is explicitly referred to. For instance, EU-Ukraine (2014) establishes that "the parties shall promote corporate social responsibility and accountability and encourage responsible business practices, such as those promoted by the UN Global Compact of 2000, the International Labour Organization (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of 1977 as amended in 2006, and the OECD Guidelines for Multinational Enterprises of 1976 as amended in 2000" (Article 422).

4.5 Assessing "Delegation" in CSR clauses

States commit to cooperation, encouragement, facilitation or promotion of CSR, and these are either non-binding or binding commitments, even though they are generally soft. Despite the limited levels of *obligation*, these commitments are included in a binding treaty and the parties must perform it in good faith (Article 26 VCLT).[30] This means that states can be held "accountable" with regard to whether measures have been taken to comply. Based on this, Duplessis (2008) argues that despite the soft character of these provisions, a third-party could, if necessary, in practice determine what is a reasonable behaviour in this regard (for instance, to clarify a commitment of effort).

The majority of these agreements provide for various implementation mechanisms that *inter alia* have the mandate to deal with CSR provisions. All of these include different levels of third-party authorization such as the establishment of mixed committees (between the administrations/ministries

[30] This is the principle of *pacta sunt servanda*, fundamental principle of treaty law and arguably the oldest principle in international law (Shaw, 2014).

of both parties)[31] that have the mandate to monitor and cooperate in the implementation of the provisions in the agreements, and civil society advisory committees that monitor the making and implementation of these agreements.[32] Some agreements also include various levels of conflict resolution, including government consultations and the establishment of a panel of experts to examine a particular issue, and in some cases arbitration through formal dispute settlement, including the possibility of economic sanctions. However, even if this is feasible with CSR clauses, higher levels of *delegation* almost never coincide with lower levels of *obligation* (Abbott et al., 2000). Consequently it is very unlikely that a CSR clause would be brought to dispute settlement (if not expressly excluded from it) in the framework of a trade agreement.

Examples of the application of the dimension of *delegation* are still scarce, which might be owed mainly to the fact that trade agreements with CSR clauses are still recent. However, there has been the case of the Canada-Colombia agreement (2009), where the parties agreed on conducting a self-assessment and producing Annual Reports on Human Rights and Trade. For the production of the assessment, civil society members may submit information. The report for 2014 informed with respect to CSR that Canadian companies (particularly from the petroleum and coffee industry) claim to respect internationally recognized standards (although the report does not present evidence) in their operations in Colombia, and representatives from the Colombian government expressed the willingness to introduce measures (for example obtaining social licenses) to ensure that projects by companies are social and environmentally responsible (Government of Canada, 2015). However, civil society has criticized the effectiveness and meaning of these reports (Rochlin, 2014).

A more developed example is found in the EU-Republic of Korea agreement, which provides for the establishment of a Committee on Trade and Sustainable Development (CTSD), a Domestic Advisory Group (DAG) in the respective countries and a joint Civil Society Forum (CSF). In practice, discussions in all these fora, have included CSR as potential area for technical cooperation and the joint surveillance of multinational enterprises operating in the EU and the Republic of Korea on their compliance with the principles of the OECD Guidelines, the UN Guiding Principles on Business and Human Rights, the UN Global Compact, and ISO 26000 (CSF, 2014).

At the CSF (10 September 2015), the DAG of both countries emphasized the need to promote and implement international CSR instruments, i.e. through the exchange of best practices and by getting familiarized with the operations of the OECD National Contact Points (NCPs). Also the CSF called for a future discussion on the development of National Action Plans to implement the UN Guiding Principles, the organisation of workshops parallel to the next CSF in 2016, and encouraged European and Korean enterprises to increasingly apply the OECD Guidelines (including reporting on social and governance aspects, traceability in supply chains, labour standards, human rights, among others) (CSF, 2014, 2015). Furthermore, the CSF not only stressed the importance of promoting CSR in the EU and the Republic of Korea by European companies operating in Korea and vice-versa, but while discussing EU initiatives in the Ready-Made-Garment sector in Bangladesh, also encouraged the Korean

[31] These committees or sub-committees are created for the implementation of the agreement in general, or of specific chapters in the agreements, which is the general approach. For example, the trade and sustainable development committees (for the trade and sustainable development chapter) in some EU agreements, the committee on investment (for the investment chapter) in some Canadian agreements, or the Labour Affairs Council (for the labour chapter and the labour cooperation mechanism established) in some US agreements.

[32] See ILO (forthcoming) for an in-depth analysis of mechanisms in trade agreements with civil society participation.

companies with operations in Bangladesh to evaluate a possible participation in CSR initiatives related to improving workers' rights, health and safety at work, among others.

Along the lines of this discussion, at the fourth meeting of the Committee on Trade and Sustainable Development (CTSD of 9 September 2015) the parties expressed their intention to launch a project related to CSR in their next meeting (CTSD, 2015).[33] Similar discussions are commencing in the framework of the agreements with Central America and Colombia-Peru in the joint meetings of civil society advisory groups and the trade and sustainable development board or sub-committee.[34] Although, these mechanisms are established in the particular context of bilateral trade or investment agreements, they co-exist with existing mechanisms, such as the OECD guidelines that imply an obligation for governments to set up a NCP with the task to promote the guidelines and implement the complaint mechanism.

4.6 Implications of CSR clauses for states, business and workers

As trade and investment agreements are state-to-state agreements, the most important implications of CSR language are for states. The analysis of the content of CSR provisions shows that implications for business are relatively limited. However, incorporating CSR language is a way to recognize the role of private businesses in promoting and furthering labour rights, complementary to the role of states. Given the recent nature of the inclusion of CSR language in trade and investment agreements, it still has to be seen what the implications for labour rights and working conditions are on the ground. We briefly summarize the implications that CSR clauses in trade and investment agreements could have for states, business and workers, which are the main interested parties to labour-related CSR provisions and moreover the tripartite constituents of the ILO. As mentioned earlier, the negotiation and more importantly the implementation of these provisions is just starting.

Implications for states: Through the support of CSR initiatives in trade and investment agreements, states could play an important role in shaping the conditions for responsible business behaviour worldwide and enhance coherence. As examined before, states commit themselves in different ways, for example, through an obligation of effort to promote CSR (*e.g. shall strive to, should promote)* or a direct obligation to promote these initiatives (*shall promote)* with the enterprises that are in their territories or are subject to their jurisdiction (as mandated in the case of Canadian agreements). Notwithstanding the relatively soft character of these commitments, these commitments are included in binding agreements and states can in principle be held "accountable" through the implementation mechanisms provided in the agreements. However, the levels of compliance are left to the states, and difficulties may arise to determine "how much the state is promoting or trying to promote these initiatives". The establishment of monitoring mechanisms and involvement of stakeholders through the institutional mechanisms provided in these agreements (see delegation) should be assessed on their potential for holding states accountable on their CSR commitments.

[33] This project would be under the EU Partnership Instrument, which is contained in Regulation (EU) No 234/2014 of the European Parliament and of the Council (11 March 2017) establishing a Partnership Instrument for cooperation with third countries.

[34] See for example: the Joint Statement of the Sub-Committee on Trade and Sustainable Development under the EU-Peru and Colombia Trade Agreement (6 February 2014), and the Summary of the discussion held during the joint meeting of the European and Central American civil society advisory groups (28 May 2015).

Implications for business: As the paper discusses CSR language in the particular context of state-to-states agreements, the direct implications are situated at the level of states. And, with the encouragement of governments towards the adoption of certain CSR frameworks, businesses would be responsible for the implementation of the policies adopted in their operations, and perhaps will select those CSR instruments particularly promoted by governments. Indirectly, however, it is a strong recognition that the role of private business is to promote labour standards and improved working conditions. Consequently, corporations might be scrutinized by stakeholders and the wider public through the implementation mechanisms provided in the agreements (see delegation). Through the promotion of international instruments, CSR clauses may contribute to increased harmonization and indirectly impact businesses' CSR commitments. The adoption of CSR commitments may also permeate into Global Supply Chains (GSCs) through the practices of lead firms and subsidiaries and various agreements provide for cooperation on awareness raising and capacity building on CSR.

Implications for workers: As discussed earlier the negotiation and more importantly the implementation of these provisions is at a nascent stage. Therefore, the potential of these provisions and its actual impacts are largely unknown. However, there is a potential in the activation of these clauses, in conjunction with other provisions in trade and investment agreements (such as labour provisions), to have a positive impact in workers' and broader human rights. Workers' organisations have been involved in the institutional mechanisms provided in the agreements. For example, in the cross-border civil society meetings, these have been used to advocate for increased cooperation activities or close monitoring of CSR behaviour of MNEs, and to cooperate with governments and businesses in this matter.

5 Potential role of the ILO

The debate with respect to whether the ILO has a role to play in the interplay between soft and hard labour regulation, involving public as well as private actors is not new (see, Duplessis, 2008). A recent report of the Director-General mentions that CSR has been required to become more rigorous, and highlights the need of governmental and the international community's guidance to define what is expected from corporations. It also makes implicit reference to the concept of legalization by stating that: "The distinction between the strictly legal and the purely voluntary seems to be getting blurred, not least as accountability and reporting mechanisms are tightened" (ILO, 2015a, p. 16). The same is true for the discussion with regard to the role of the ILO in the governance of labour concerns in trade and investment agreements (see, Agustí-Panareda et al., 2015; Peels and Fino, 2015; Gravel and Delpech, 2013; IILS, 2013; Doumbia-Henry and Gravel, 2006).

However, less is known about the role of the ILO with regard to CSR-clauses in these agreements. To shed some light in this area, the parties to the trade agreements could make more explicit the role that ILO should play in the implementation of these clauses. For instance, in the case of the EU, the European Economic and Social Committee on CSR calls for the inclusion in trade agreements of internationally-recognized CSR instruments including a reference to the ILO. It also emphasizes on the promotion of health and safety at work and relevant Conventions in the context of trade agreements, in addition to the eight fundamental Conventions and the Guidelines on occupational safety and health management systems (ILO-OSH 2001); and it encourages particularly developing countries and businesses therein to use the ILO Helpdesk (EESC, 2015). Therefore, the direct or indirect reference to ILO instruments in CSR clauses calls for a reflection on the potential role for the ILO in this field.

There is only limited evidence directly related to CSR, based on existing experiences of ILO involvement in the broader trade and labour debate and also the potential role of the ILO with regard to CSR in trade and investment agreements. However, there are challenges at different levels that correspond with the ILO tripartite mandate and structure: the level of states, the level of workers and employers, and their organisations. The traditional ILO instruments, its activities in providing technical cooperation and assistance, and the supervisory mechanisms mainly address the state level, aiming at strengthening national regulatory frameworks in home and host countries.

Increasingly however, the ILO has been involved directly at the level of private business, i.e. through the provision of guidelines (e.g. the MNE Declaration), by supporting businesses in the promotion of international labour standards (e.g., the ILO Helpdesk for Business on ILS), and by monitoring or developing capacity at the company levels (e.g., the ILO Better Work and Sustaining Competitive and Responsible Enterprises (SCORE) programmes) (Van der Heijden and Zandvliet, 2014).35 Furthermore, the ILO experience entails various levels of legalization, which have been developed in an international trade and investment context. The important role of monitoring by civil society organisations in determining the effectiveness of CSR initiatives, which is emphasized in the literature (e.g., see Sabel et al., 2000; Blackett, 2004; Thompson, 2008; Anner, 2012; Young and Marais, 2013; Marx and Wouters, 2013) is also evident in the ILO experience, wherein the role of multiple stakeholders in the follow-up of various CSR commitments is observed either through industrial relations and bottom-up monitoring.

Although, current ILO involvement in the follow-up of CSR clauses in trade and investment agreements is limited, various experiences exist that deliver interesting insights on the potential role of the ILO in the follow-up of CSR clauses. The ILO Better Work Programme, the Accord on Fire and Building Safety in Bangladesh and the ILO MNE Declaration are examined in this regard. In each of these, the following dimensions are addressed: (i) development of the initiative in a trade and investment context; (ii) focus on ILO involvement at the company level; (iii) inclusion of different levels of legalization; and (iv) emphasis on multi-stakeholder involvement.

The ILO Better Factories Cambodia Programme is a good example where the ILO engages with states, businesses and social partners. Better Work brings together various national and international stakeholders, ranging from international buyers, national governments, workers and employers and their organisations (including the Global Union Federation dealing with the manufacturing sector (IndustriALL Global Union) and the International Organization of Employers (IOE). It also promotes the establishment of joint worker-management committees. It is a clear commitment towards the principle of social dialogue and the involvement of workers and their organisations in the design and follow-up of responsible business behaviour. Furthermore, Better Work directly addresses private businesses, while entailing different levels of legalization: companies voluntarily commit to a binding and precise agreement with the Better Work Programme, including various obligations with respect to the auditing of suppliers, the number of participating suppliers, or the support of the Advisory process. It also involves the delegation of certain functions, i.e. monitoring the Programme, which has been designed in the context of an international trade agreement. Although participation is voluntary, there are conditions attached to it. For example, to receive an export license, entails that there is compliance with labour law and standards, which then allowed for additional market access under the Bilateral Textile Agreement between Cambodia and the United States (1999).

[35] See ILO (2016) for the proposed modalities to review the MNE Declaration.

Similarly the Accord on Fire and Building Safety in Bangladesh is an illustration of multi-stakeholder involvement, addressing states, businesses and workers. The increased public attention and consumer awareness after the Rana Plaza disaster in 2013 on the issue of working conditions in the Bangladesh garment sector has contributed to companies entering the Accord. The Accord is a binding commitment between international brands, global trade unions and Bangladesh trade unions. It is governed by a steering committee consisting of the signatory companies and trade unions, international NGOs and the ILO as chair. Buyers voluntarily enter a binding commitment to disclosure, independent inspection, factory upgradation and remediation, financial contribution, worker participation and grievance mechanisms. This means that factories enter on a voluntary basis a contractual commitment (legal obligation) to certain aspects of responsible business behaviour. The Accord is very precise and includes a third-party authorization, i.e. independent inspection, worker involvement and mandatory compliance with remediation measures (Bangladesh Accord, 2013; Zandvliet and van der Heijden, 2015). The Government of Bangladesh and national employers and trade unions also signed a National Tripartite Plan of Action on Fire Safety and Structural Integrity in the Ready-Made Garment Sector of Bangladesh, which is a framework document for improving working conditions in the garment industry. Activities include strengthening of labour inspection and capacity building on occupational safety and health (OHS) and workers' rights. The ILO assists in the implementation of the Action Plan (ILO, 2015b).

By stressing the differentiated roles of, and interplay among, states, workers and employers' organisations and MNEs, the ILO MNE Declaration uses a multi-stakeholder approach. The declaration stresses the potential contribution of MNEs to economic and social development, complementary to states' obligation to develop and enforce appropriate laws and policies to create an enabling environment for responsible business. The role of employers' and workers' organisations is addressed through the emphasis on collective bargaining, regular consultation, access to information, and the establishment of grievance mechanisms. Although the Declaration is a voluntary guideline, it has authority, and accordingly implies social and moral obligation on the issue. In terms of precision, important reference is made to the ILO standards and supervisory mechanisms. Specific third-party authorization takes place through a separate follow-up procedure (which is currently under review), consisting of a general survey, a mechanism for the examination of the interpretation of the Declaration and the ILO Helpdesk.

6 Conclusions

CSR was understood initially as merely voluntary and private, but today governments are increasingly including CSR issues in their policies, together with trade and investment policies. In recent agreements, governments have gradually expanded the traditional issues covered to include disciplines such as environment, labour, intellectual property and, more recently, CSR. Although references to CSR are still relatively limited in trade and investment agreements, they have become more common in the past decade. The inclusion of CSR language in trade and investment agreements has the potential to reinforce the benefits of CSR and deal with some of the challenges of these initiatives, particularly in the areas of coherence, legitimacy and implementation. The inclusion of CSR clauses in these agreements is a way to counterbalance rights and responsibilities for businesses; a manner to respond to civil society concerns towards questionable business conduct; and a way to recognize the role of private businesses in promoting and furthering labour rights, complementary to the role of the states.

This paper uses as analytical framework, the concept of "legalization" as developed by Abbott, et al. (2001), and its three dimensions of obligation, precision and delegation, and assesses the content, scope and means for implementation of the CSR clauses in trade and investment agreements. The paper finds that CSR language is relatively weak in terms of obligation, precision and delegation. However, CSR provisions have become more elaborated over time, and one can observe the evolution in the agreements of the main proponents of these clauses, namely Canada, EFTA, the EU and more recently the US. In respect to obligation, the paper finds that CSR clauses establish direct obligations for the states parties to trade agreements, which normally commit to make an effort to promote or oblige themselves to promote general CSR practices or specific CSR schemes. However, generally no direct obligations for businesses are established. Regarding the dimension of precision, usually CSR commitments refer towards the overall idea of CSR, without defining it or explicitly mentioning particular internationally recognized CSR instruments. But increasingly, some actors, for example EFTA or the EU, refer to particular initiatives such as the OECD guidelines or the ILO MNE Declaration. This is relevant for enhancing coherence. Finally, with respect to the dimension of delegation, the different mechanisms applicable to labour, trade and sustainable development, or other chapters where the CSR clauses are embedded in the agreements, might as well serve as implementation mechanisms for CSR provisions.

The CSR language in trade and investment agreements could have different implications for states, business and workers, the main interested parties to labour-related CSR clauses and the tripartite constituents of the ILO. States typically commit to promote fair trade, to encourage adherence to CSR schemes, or to cooperate on the issue of CSR. Notwithstanding the relatively soft character of these commitments, states do make certain commitments in this regard and can in principle be held accountable through the implementation mechanisms provided in the agreements. However, at an indirect level, state commitments have implications for businesses as the ultimate implementers of the CSR provisions adopted, and agreements may offer additional implementation mechanisms to follow-up business behaviour. Finally, trade and investment agreements, generally, provide mechanisms, including for workers' representatives to participate in the follow-up of CSR commitments.

Currently, ILO involvement in the follow-up of CSR clauses in trade and investment agreements is limited, though there could be potential for its involvement. To date, the ILO is foremost involved by directly addressing states and their obligation to implement international labour standards at the domestic level, as part of its core activities. However, some experiences also exist where the ILO has worked in a trade and investment context, by targeting private businesses, by exploring different levels of "legalization" and by involving multiple stakeholders through monitoring, capacity building or social dialogue. So far, very limited attention has been paid to the involvement of the ILO in these issues, and deserves to be further examined in the future.

Whereas past research examined the experience with, including the effectiveness of, the various implementation mechanisms provided in the labour provisions of trade and investment agreements to improve labour rights and working conditions, no research has been done with regard to the (potential) follow-up of CSR commitments through these mechanisms and its effectiveness.36 This points towards the need to examine the effectiveness of CSR clauses in trade and investment agreements in improving labour rights and working conditions, and its practical use for the social partners. However, one needs to also acknowledge that it is difficult to examine effectiveness, as the many of the CSR clauses that have been introduced are very recent, and also the availability of data is limited. Another issue that

[36] See Aissi, et al. (2016) on how to measure the effectiveness of labour provisions in trade agreements.

requires further examination relates to the application of the variety of available institutional and implementation mechanisms in the agreements to assess their potential, and to improve the effectiveness of CSR provisions. In this regard, the role of workers' and employers' organisations in the follow-up of these CSR schemes should be further assessed.

Finally, the issue of coherence deserves more attention. This refers not only to consistency of CSR measures with global trade rules under the WTO, but also with the diverse commitments under a plethora of trade and investment agreements, instruments and mechanisms. With this regard, an assessment of how existing ILO supervisory mechanisms have been dealing with CSR, and trade and investment agreements, should provide additional insights into the potential role of the ILO.

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Appendix 1: Synthesis of country approaches and evolution of CSR clauses in selected trade agreements

Selected trade agreements	Location of labour-CSR reference (preamble or chapter)	Normative content (*Obligation*) towards CSR	Specific instruments (*Precision*)	Implementation mechanisms (*Delegation*)
Canada				
Peru (2009) **Jordan (2012)** **Panama (2013)**	Preamble of the agreement and preamble of the agreements on labour cooperation (ALCs)	-Parties *resolve to* encourage enterprises operating within their territory or subject to their jurisdiction - Parties *recognize* the importance of CSR **to ensure coherence between labour and economic objectives (ALCs only)**	-Internationally recognized CSR standards and principles	N/A
Peru (2009) **Colombia (2011)** **Panama (2013)** **Republic of Korea (2015)**	Investment	-States *should* encourage enterprises operating within their territory or subject to their jurisdiction -*Reminder* to enterprises of the importance of incorporating CSR in their policies	-Internationally recognized CSR standards, such as statements of principle endorsed or supported by the Parties (including labour)	- Monitoring committee (except Panama (2013))
TPP (signed 2016, not in force) –Also applicable to the US and other members of agreement	Labour	-Parties *shall endeavour to encourage enterprises* towards the voluntary adoption of CSR (no particular territory or jurisdiction is mentioned)	-Initiatives on labour issues *that have been endorsed or supported* (by that Party)	- Cooperative activities - Public submissions - Cooperative labour dialogue (with the possibility to include different paths of actions, i.e. action plans, independent evaluation programmes, capacity building, etc.) - Monitoring through national contact points, labour council and civil society participation - Labour consultations - Possibility of dispute settlement (however unlikely and other mechanisms must be exhausted)
European Free Trade Association (EFTA)				
Albania (2010) **Serbia (2010)** **Ukraine (2012)**	Preamble of agreement	- Parties *acknowledge* the importance of responsible business conduct and its contribution to sustainable economic development, and support CSR initiatives	-Relevant international standards	N/A
Colombia (2011) **Peru (2011)**	Preamble of agreement	- Parties acknowledge the relationship between good corporate and public sector	- Principles of corporate governance in the UN Global Compact	N/A

		governance and support principles of corporate governance		
Hong-Kong (2012)	Preamble of agreement (not mentioned in labour agreement)	- Parties acknowledge good corporate governance and corporate social responsibility for sustainable development - Parties affirm their aim to encourage enterprises to adopt CSR initiatives	- Internationally recognized guidelines and principles (where appropriate)	N/A
Montenegro (2012)	Preamble of agreement	Parties acknowledge good corporate governance and corporate social responsibility for sustainable development - Parties affirm their aim to encourage enterprises to adopt CSR initiatives	-OECD Guidelines for Multinational Enterprises - OECD Principles of Corporate Governance -UN Global Compact	N/A
Central America (2014,Costa Rica and Panama- entry into force for Guatemala is pending)	Preamble of agreement	- Parties acknowledge good corporate governance and corporate social responsibility for sustainable development - Parties affirm their aim to encourage enterprises to adopt CSR initiatives	- Internationally recognized guidelines - Principles on CSR for sustainable development established by organisations such as the Organisation for Economic Cooperation and Development (OECD) and the United Nations (UN)	N/A
	Trade and Sustainable Development	- The Parties shall encourage CSR and cooperation between enterprises (in different aspects towards sustainable development)	- General CSR initiatives	- Monitoring/review of the implementation of the chapter through contact points and Joint Committee - Cooperation between the parties (including the exchange of information on CSR and practices) - Consultations (no recourse to the dispute settlement mechanism of the agreement)
European Union				
Chile (2003)	Joint Declaration concerning Guidelines to Investors (parallel to agreement)	- Parties *remind* to multinational enterprises to observe CSR wherever they operate	- OECD Guidelines for Multinational Enterprises	N/A
Cariforum (2008)	Social Aspects	- Parties *agree* to cooperate, including by facilitating support in enforcement of adherence to national legislation and work regulation including promoting CSR through public information and reporting	- General CSR initiatives	- Development cooperation and technical assistance - Monitoring through Trade and Development Committee - Civil society participation
Republic of Korea (2013)	Trade and Sustainable Development	- Parties *shall strive to* facilitate and promote trade and foreign direct	- Schemes: fair and ethical trade, private and public certification	- Monitoring through the Committee on Trade and Sustainable Development

		investment in goods that contribute to sustainable development, including those subject to certain schemes including CSR - Parties *commit* to initiating cooperative activities on the effective implementation and follow-up of CSR and accountability	- General CSR initiatives and accountability - Internationally agreed guidelines - Private and public certification and labelling schemes	- Domestic Advisory groups and Civil Society Forum - Government consultations, in the case of a matter arising under the chapter - Panel of experts, only if parties did not resolve issues through government consultations
Central America (2013)	Social Development and Social Cohesion	- Parties *agree* to cooperate: to promote decent work conditions, especially through the promotion of legal and sustainable trade through CSR and accountability	- Schemes: fair and ethical trade - General CSR initiatives and accountability - Labelling and marketing initiatives	- Development cooperation and technical assistance
	Trade and Sustainable Development	- Parties *shall endeavour to* facilitate and promote trade in products that respond to sustainability considerations related to CSR	- Schemes: fair and ethical trade - General CSR initiatives and accountability	- Establishment of Contact Points (office under the administration of each party) to implement trade-related aspects of sustainable development - Board on Trade and Sustainable Development (high level authorities) - Advisory group and civil society dialogue forum - Government consultations, in the case of a matter arising under the chapter - Panel of Experts, only if parties did not resolve issues through government consultations - Development cooperation and technical assistance
Colombia and Peru (2013)	Trade and Sustainable Development	- Parties *agree* to promote best business practices related to CSR	- General CSR initiatives	- Establishment of Contact Points to implement trade-related aspects of sustainable development and transmitting informa-tion between the parties - Sub-committee on Trade and Sustainable Development - Domestic mechanism for consultation with a balanced representation of labour, environment or sustainable development groups - Dialogue with civil society - Government consultations, in the case of a matter arising under the chapter - Group of Experts, only if parties did not resolve issues through government consultations

		- Parties *recognize* the importance of cooperation activities for the implementation an better use of policies and practise covering labour and environmental protection which should cover good CSR practices	-General CSR initiatives	- Exchange of information and experiences - Technical assistance and capacity building
Georgia (2014)	Trade and Sustainable Development	- Parties *agree* to promote*:* trade in goods that contribute to enhanced social conditions including goods subject of certain schemes and CSR -Parties *may* cooperate in promoting CSR	- Voluntary sustainability assurance schemes such as fair and ethical trade - Relevant internationally recognized principles and guidelines: OECD Guidelines for Multinational Enterprises - General reference to private and public certification, traceability and labelling schemes	- Cooperation (e.g. exchange of information, awareness rising, dissemination of CSR practices) - Contact points (as referred above) - Monitoring through Trade and Sustainable Develop-ment Sub-Committee - Monitoring through Domestic advisory group and Joint Civil Society Dialogue Forum (DAGs and the public) - Government consultations (applicable as above) - Panel of experts (applicable as above)
	Employment, Social Policy and Equal Opportunities	- Parties *shall* strengthen dialogue and cooperation: in various labour related topics and CSR - Parties *agree* to cooperate - Parties *shall* promote CSR and accountability and encourage responsible business practices	- General reference towards international CSR guidelines - Reference to OECD Guidelines for Multinational Enterprises	- Cooperation (including exchange of information, best practices and awareness and dialogue) - Monitoring by subcommittee, association committee - Monitoring by civil society platform - Consultations and adoption of appropriate measures (good faith shall prevail and measures shall be the least disturbing of the agreement)
Ukraine (2014)	Trade and Sustainable Development	- *Parties shall strive to* facilitate trade in products that contribute to sustainable development, including products under certain schemes and CSR principles	- Schemes: fair and ethical trade - General reference to CSR and accountability principles	- Monitoring by Advisory group on sustainable development and Civil society forum - Monitoring by Trade and Sustainable Development Sub-committee - Consultations in case of conflict and (if necessary) intervention of Trade and Sustainable Development Sub-committee

	Company Law, Corporate Governance, Accounting and Auditing	- Parties *recognize* the importance of an effective set of rules and practices in corporate governance. -Parties *agree* to cooperate to develop corporate governance policy aligned with certain standards and gradual approximation to the EU rules and recommendations in this area	- General reference to international standards - OECD Principles on Corporate Governance (referred in Annex)	- Cooperation (through information sharing, exchange between the national register of Ukraine and business registers of EU Member States) - Regular dialogue - Monitoring by Sub-committees of the Association Committee -Monitoring by Civil society platform - Consultations and adoption of appropriate measures (good faith shall prevail and measures shall be the least disturbing of the agreement)
	Cooperation on Employment, Social Policy and Equal Opportunities	-Parties *shall* promote CSR and accountability and encourage responsible business practices	-UN Global Compact of 2000 - International Labour Organization (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of 1977 as amended in 2006 -OECD Guidelines for Multinational Enterprises of 1976 as amended in 2000	
Moldova (2014)	Company law, Accounting and Auditing and Corporate Governance	- Parties *recognize* the importance of an effective set of rules and practices in corporate governance. - Moldova *shall carry out* approximation of its legislation to the EU's acts and international corporate governance instruments	- Corporate Governance OECD Principles on Corporate Governance	- Monitoring by Sub-committees of the Association Committee -Monitoring by Civil society platform - Consultations and adoption of appropriate measures (good faith shall prevail and measures shall be the least disturbing of the agreement)
	Employment, Social Policy and Equal Opportunities	- Parties *shall* promote CSR and accountability and encourage responsible business practices	-UN Global Compact -ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy	
	Trade and Sustainable Development	-Parties *agree* to promote*:* trade in goods that contribute to enhanced social conditions including goods subject of certain schemes and CSR - Parties *may* cooperate in promoting CSR	- Schemes: fair and ethical trade schemes - Private and public certification, traceability and labelling schemes - General mention to relevant internationally recognized principles and guidelines - OECD Guidelines for Multinational Enterprises - United Nations Global Compact - ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy	- Cooperation (through the exchange of exchange of information and best practices) - Actions concerning awareness raising, adherence, implementation and follow-up - Monitoring by Advisory group on sustainable development and Civil society forum - Monitoring by Trade and sustainable development sub-committee (reporting to the association committee) - Consultations - Panel of experts

Vietnam (2016, not in force)	Trade and Sustainable development	- Parties *recognize* that voluntary initiatives can contribute to the achievement and maintenance of high levels of environmental and labour protection and complement domestic regulatory measures - Parties (according to own laws and policies) *shall* encourage the development of and participation in certain schemes - Parties *agree* to promote CSR (in a non-discriminatory manner) - Parties take into account relevant CSR instruments - Parties *may cooperate* in CSR and accountability	- Schemes: voluntary sustainable assurance schemes (e.g. fair and ethical trade) - General reference to internationally accepted and agreed instruments (endorsed or supported by parties) - OECD Guidelines for Multinational Enterprises - UN Global Compact - ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy	- Cooperation, technical assistance (including promotional activities: exchange of information, and experience of application of CSR/labelling/schemes, best practices, training activities, and education) - Monitoring by Advisory group on sustainable development and Civil society forum - Monitoring by Trade and Sustainable Development Sub-committee - Government consultations (as referred above) - Panel of experts (as referred above)
United States				
Chile (2004)	Annex- Labour Cooperation Mechanism	- Parties labour ministries *shall* comply with the "Labor Cooperation Mechanism" developing and implementing cooperative activities including practices adopted by MNEs	- General references to best labour practices adopted by MNEs and small and medium enterprises and other enterprises	- Cooperative activities
Peru (2009) **Colombia (2012)**	Labour Chapter and Annex on Labor Cooperation and Capacity Building Mechanism	- Parties contact points *shall* comply with the "Labor Cooperation Mechanism" developing and implementing cooperative activities including CSR	- General references to best labour practices, dissemination of information and promotion of these practices including CSR	- Establishment of contact points Monitoring through Labor Affairs Council, contact points - Monitoring through national labour advisory or consultative committee (civil society involvement) -Cooperative labour consultations between parties (not really feasible) -Cooperative activities