

# Corporate Social Responsibility (CSR) in International Trade and Investment Agreements: implications for states, businesses and workers

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## ABSTRACT

Businesses increasingly engage in the promotion of labour standards through initiatives of Corporate Social Responsibility (CSR). Even if the effectiveness of such CSR initiatives is not undisputed, it is increasingly regarded as one decisive element of global labour governance. Once conceptualized as purely private and voluntary, it is increasingly considered as a responsibility of enterprises to address the broader implications for society of its activities worldwide, and becoming part of governmental policies. The increasing incorporation of CSR language in trade and investment agreements is such an example, where various policy instruments on the soft-hard law continuum are combined. This article therefore assesses the reference to labour-related CSR commitments in trade and investment agreements and examines its implications for states, businesses and workers. It finds that CSR language is relatively weak in terms of obligation, precision and delegation, however, it also stresses the potential to use the mechanisms that are provided in these agreements to activate and follow-up CSR commitments. The paper concludes by addressing the role of the ILO. Although some experiences exist where the ILO directly targets private businesses' compliance with labour standards, for instance through monitoring, capacity building or social dialogue, the research points towards the potential role of the ILO in enhancing multi-stakeholder involvement.

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## INTRODUCTION

The global economy is becoming more deeply integrated and interdependent. International trade and investment increasingly takes place through new patterns and structures of production that operate beyond national boundaries. New forms of production that are shaped through Multinational Enterprises (MNEs) and Global Supply Chains (GSCs) are increasingly prominent and set the architecture of international trade and investment and accordingly decent work impacts. Some studies stress the opportunities of these newer forms of production to create more and better jobs, i.e. through spill-overs of innovation, skills and best management practices. Other studies highlight the pressure of intensive competitiveness and increased demands for flexibility on decent work.<sup>1</sup> The increased influence, complexity and mobility of these newer forms of production on the one hand (see, e.g., Chandler & Mazlish, 2005; Muchlinski, 2007), and mixed results in terms of labour impacts on the other, pose a particular challenge to sustainable development, particularly in economies where the regulatory and institutional capacity of national governments to deal with global business activities is limited (see, e.g., Strange, 2000).

### ... emerging global labour governance

As a response to this limited capacity at the state level to develop appropriate regulations and ensure compliance with these, a plethora of actors such as international organizations, civil society, including trade unions and businesses are increasingly involved in setting, implementing and monitoring the policy and institutional frameworks that shape the conditions under which global trade and investment operate.

A recent illustration is the Rana Plaza disaster in the Bangladeshi Garment sector (24 April 2013) and the various policy initiatives in response to that, such as the Bangladesh Accord on

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<sup>1</sup> See Chapters 4 and 5 in ILO (2015).

Fire and Building Safety and the Alliance for Bangladesh Worker Safety amongst others, that address the differentiated responsibilities of states, private businesses along the GSC, international organizations, such as the International Labour Organization (ILO), and other stakeholders.<sup>2</sup> This emerging global labour governance framework is increasingly transnational, multi-layered and complex, involving a range of policy instruments and institutional mechanisms.

### **... businesses contribution to the promotion of labour standards**

Also businesses increasingly contribute to the promotion of labour standards, both in home and host countries, through their Corporate Social Responsibility (CSR) activities. Companies are increasingly concerned to behave responsibly everywhere they operate. CSR is a container concept that entails various dimensions, amongst others, the development of codes of conduct and the establishment of monitoring mechanisms to review compliance with these, due diligence with regard to sustainable development impacts of supply chain activities, revision of purchasing and pricing practices (e.g. through buyer responsibility agreements) or cooperation activities to improve the capacity of suppliers to deal with increased competitiveness and fluctuations in demand (Anner et al., 2013).

Even if the effectiveness of such CSR activities is not undisputed, CSR is increasingly regarded as one decisive element of global governance (see, e.g., Scherer & Palazzo, 2011). Once conceptualized as purely private voluntary mechanisms, it is increasingly becoming part of governmental policies, as such creating a “policy hybrid” combining various policy instruments on the soft-hard law continuum (see Steurer, 2010; Aaronson and Zimmerman, 2008). The proliferation of trade and investment agreements that increasingly make referral to CSR is important in this regard.

This article first examines the reference to labour-related CSR commitments in trade and investment agreements. In this context,

*CSR is defined as a way in which enterprises give consideration to the impact of their operations on society and affirm their principles and values both in their own internal methods and processes and in their interaction with other actors. CSR is a voluntary,*

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<sup>2</sup> <http://bangladeshaccord.org/>; <http://www.bangladeshworkersafety.org/> (consulted 8 June 2015).

*enterprise-driven initiative and refers to activities that are considered to exceed compliance with the law.*<sup>3</sup>

### **Box 1. CSR clauses vis-à-vis labour or sustainable development provisions**

The article distinguishes CSR clauses from labour or sustainable development provisions. In previous work of the ILO, labour provisions are defined as: “(i) any labour standard which establishes minimum working conditions, terms of employment or workers’ rights, (ii) any norm on the protection provided to workers under national labour law and its enforcement, as well as (ii) any framework for cooperation in and or monitoring of these issues” (IILS, 2009).<sup>4</sup> This is essentially a state-centered definition, as it identifies a commitment of the signing parties - states.<sup>5</sup> CSR clauses on the contrary deal with voluntary, private sector commitments on labour issues.<sup>6</sup>

### **Structure and main findings**

- *Section 1* describes that CSR, despite being widely regarded as a set of voluntary business activities, is increasingly perceived as a responsibility and accordingly regulated by nation states in order to advance responsible business conduct;
- *Section 2* provides an analysis of the increasing integration of CSR clauses in international trade and investment agreements. Overall, the reference to CSR is limited to declaratory language towards general principles, with limited reference to existing frameworks, such as the ILO MNE Declaration, the Organisation for Economic Co-operation and Development (OECD) Guidelines or the United Nations (UN) Guiding Principles on Business and Human Rights. However, most of the agreements that make reference to CSR principles provide some institutional mechanisms that *inter alia* have the potential to deal with CSR issues.
- *Section 3* analyzes the potential role of the ILO in increasing the effectiveness of such CSR clauses. The research finds that its main contribution might be situated at mainly two levels: (i) the state level through the traditional ILO instruments and supervisory mechanisms, and (ii) the level of private businesses and investors. In particular, the

<sup>3</sup> GB.295/MNE/2/1.

<sup>4</sup> The inclusion of labour provisions in trade and investment agreements is discussed elsewhere (e.g. IILS, 2013; Prislán and Zandviet, 2013).

<sup>5</sup> In IILS (2009), explicit reference is made towards the exclusion of private-sector initiatives, such as codes of labour practice of multinational companies, in the study.

<sup>6</sup> To a certain extent, this is an artificial distinction and an unavoidable overlap will remain as often CSR provisions are part of the same trade and sustainable development or labour chapters. Furthermore, the majority of these CSR instruments do include reference to the same labour instruments that are referred to in the labour provisions, i.e. the ILO Fundamental Conventions or ILO 1998 Declaration on Fundamental Principles and Rights at Work. And these provisions are subject to the same institutional mechanisms, such as monitoring and technical cooperation activities that are provided in these agreements.

article emphasizes that the ILO has a role to play in rethinking the boundaries of CSR, mainly by stressing the involvement of multiple stakeholders and by experimenting with different approaches located on the soft-hard law continuum. Furthermore, the ILO has a particular contribution to make by enhancing institutional coherence on the issue;

- *Section 4* concludes with a summary and reflection on the way forward.

### **CSR AS A REGULATORY MODE**

This section will focus on four dimensions to better grasp the concept of CSR:

- the article starts with briefly discussing the *potential and challenges of private governance*;
- secondly, it gives an overview of the *evolution and current understanding of CSR*;
- the *soft-hard law continuum* as developed by Abbot et al. (2000) is discussed in the light of CSR clauses in trade and investment agreements. The soft-hard law continuum blurs the boundaries between traditional state-centered, sanction-based hard law and the ideal type of purely voluntary private regulation;
- the fourth dimension builds further on the soft-hard law continuum and assesses the *role of states* in the follow-up CSR provisions. Although, CSR is mainly developed as a response to weak normative frameworks and implementation capacity of states, i.e. in developing countries, the limits of voluntary private regulation spurred renewed attention to the role of states in this regard (e.g., see, Mayer and Gereffi, 2010). Indeed, it is found by some authors that the soft-law continuum is better suited to assess the regulatory dimension of CSR in the emerging architecture of global labour governance (see, e.g., Scherer & Palazzo, 2011).

### **Potential and challenges of private regulation**

Different opinions exist with regard to the potential, and threats, of businesses in the design and implementation of policy making. Proponents argue that:

- CSR initiatives may fill in the regulatory vacuum in particular policy areas and may contribute to enhanced monitoring and compliance of labour standards (O'Rourke, 2006; Graham and Woods, 2006; Gao, 2008; Gond et al., 2011);
- private business may bring economic leverage, additional expertise and other resources for making and enforcing norms and standards (Boisson de Chazournes, 2014);
- 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, 2014; La Hovary, forthcoming).

Nonetheless, private regulation comes with its own challenges:

- CSR initiatives may lack the legitimacy, 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).

### **The concept of CSR**

CSR is defined as a way in which enterprises give consideration to the impact of their operations on society. It is a voluntary, enterprise-driven initiative and refers to activities that are considered to exceed compliance with the law.

#### **Box 2: From voluntary to an enhanced sense of responsibility**

Reality is less straightforward, though. The evolution of the European Commission's CSR definition is important in this respect as it shows a clear evolution away from a purely voluntary approach – “*a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis*” (EC Green Paper, 2001) towards an approach that emphasizes the “*responsibility of enterprises for their impacts on society*” (EC, 2011). This evolution is incorporated in Morguera's (2009) conception stressing that the “*concept of corporate responsibility is based on the expectation that private companies should no longer base their actions on the needs of their shareholders alone, but rather have obligations towards the society in which the company operates*” (see also Carroll, 2008; Melé, 2008). Hence, corporate responsibility entails a social norm or moral obligation to act correctly, not because it is a legal obligation, but because it is “the right thing to do” (see e.g. Ruggie Report, 2009; McCorquodale, 2009; Nolan, 2014).

#### **... the hard-soft law continuum**

The soft-hard law continuum (Abbott et al., 2000) proves useful to better grasp this shift away from conceptualizing CSR as purely voluntary (see Box 2). The soft-hard law continuum characterizes a continuum of regulatory approaches that range from the traditional state-centered, sanction-based hard law to purely voluntary, private regulation. Abbott et al. (2000) argue that the continuum between these two ideal types can be characterized based on

three dimensions: *obligation, precision, and delegation*. Accordingly, different CSR instruments should be characterized by their degree of softness-hardness instead of a clear dichotomy between both. Whereas Abbott et al. developed this scheme to understand international organizations, such as UN agencies or the WTO; this paper uses the scheme to better understand commitments of businesses in state-to-state trade agreements.

- The dimension of (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. In this regard, Duplessis (2008) clarifies the distinction between formal and substantive soft law. When using language such as, ‘*if the parties consider it reasonable*’ or ‘*if appropriate*’, the limited obligatory character lies in the substance of the norm (soft language use), whereas the instrument in itself may be hard law, i.e. being part of a binding agreement or treaty between the parties. Formal soft law instead refers to the legal medium, i.e. resolutions, declarations, recommendations and codes of conduct that do not generate binding legal obligations.

Non-binding instruments may have legal implications, though: the European Court of Justice for instance has held that national courts are bound to take recommendations (which have no binding force according to Article 288 of the Treaty on the Functioning of the European Union) into consideration in order to decide disputes submitted to them (Thürer, 2009; Snyder, 1993).<sup>7</sup> Another way is to explicitly integrate the soft-law commitment in a binding agreement: e.g. provisions towards promoting CSR in trade/investment agreements are legally binding for the signing parties. Language used is soft, however, which limits the obligatory character of the provision and has important implications for its enforcement (see *delegation* below).

### **Box 3: The ILO 1998 Declaration in the hard-soft law continuum**

The ILO 1998 Declaration is a good example of a soft law instrument (*formally*, see Duplessis (2008) above) that makes reference to hard obligations (Constitutional and Conventional) (e.g., see, La Hovary, forthcoming). The ILO 1998 Declaration and its Follow-Up is non-binding (dimension of *obligation*) and does not impose or create new legal obligations to ILO Members. The 1998 Declaration, however, does entail a hard dimension, based on the referral to the Constitution and Conventions.

<sup>7</sup> See Case C-322/88 Grimaldi v Fonds des Maladies Professionnelles ECR 4407.

This hard-soft dimensions of the ILO 1998 Declaration have the following consequences: (i) it reaffirms the significance and meaning of the “contract” between States and the ILO (ILC, 1998); (ii) the referral to the Conventions provides a uniform standard of reference towards the principles concerning fundamental rights, which the Members have committed themselves to “*respect, to promote and to realize, in good faith*” by their adherence to the Constitution (ILC, 1998; Ebert and Posthuma, 2011). At the same time it excludes any obligation to comply with non-ratified Conventions (dimension of *precision*). This was reaffirmed by the ILO’s Legal Adviser in 1998 (ILC, 1998), concluding that it was “*legally impossible in the framework of the Declaration to impose any new obligation whatsoever on Members with regard to Conventions that they have not ratified*” and assuring the lack of intention of the parties to impose new legal obligations on Members through this document; and (iii) in spite of its non-binding nature, it does create a promotional follow-up mechanism that encompasses, amongst others, annual reporting based on the Constitutionally mandated follow-up concerning non-ratified fundamental Conventions, and technical cooperation (dimension of *delegation*).<sup>8</sup> Although, it is not its main objective, it also seeks to encourage States to ratify the fundamental conventions as a “*logical outcome*” of this follow-up mechanism.<sup>9</sup> Uncertainty exists, however, with respect to the added value or implications of introducing a reference to the 1998 Declaration in a context outside of the ILO, for example in trade and investment agreements or CSR instruments (see e.g. Augustí-Panareda, et al., 2015; Alston and Heenan, 2004).

Businesses are legally obliged to comply with domestic regulation in the countries where they operate (both home and host countries). Hence, every business decision to go beyond the law, is per definition voluntary, at least from a legal perspective (see Box 3). However, some elements come into play that blur the boundary between the binding and non-binding nature of CSR commitments:

- a company may voluntarily commit to, and require of its suppliers in the global south, to go beyond compliance with domestic labour law. When integrated in a contractual arrangement, this becomes “hard law” (that exceeds domestic legislation). In this regard, van der Heijden and Zandvliet (2014) speak of a third generation of CSR initiatives - contractual CSR commitments or governance by contract (see also Cradden and Graz, 2015);

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<sup>8</sup> ILO Constitution Article 19.5 (e) mentions the obligation of Member States to report to the Director General the reasons or difficulties preventing or delaying the ratification of a Convention.

<sup>9</sup> See GB.273/3 for a discussion on the implications of the Follow-Up on the ILO 1998 Declaration and Maupain (2005).

- furthermore, examples exist where purely voluntary CSR initiatives have been turned into legally binding obligations, for instance by interpreting non-compliance with CSR commitments as misleading commercial practice (Gond et al., 2011);<sup>10</sup>
- home states increasingly develop soft and hard obligations for businesses with regard to their international activities, i.e. voluntary/obligatory reporting on social impacts in the global south. This reflects the incorporation of previously pure soft commitments into domestic regulation; and
- instead of legal obligation, soft law may imply strong social or moral obligation, i.e. increasing expectations of enterprises' behaviour.

- The dimension of *precision* is concerned with a clear definition of commitments, i.e. through the reference towards existing CSR instruments such as the ILO MNE Declaration, the OECD Guidelines or the UN Guiding Principles on Business and Human Rights, instead of reference towards general CSR principles.

- 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 judicial interpretation and application (e.g. enforcement through the domestic judicial system). Voluntariness on the other hand implies limited third-party delegation. However, a whole spectrum of compliance mechanisms, other than legal enforcement, does exist. These range from non-binding arbitration, conciliation/mediation, monitoring to public reporting (Abbott et al., 2000). All of these involve to a certain extent third-party authorization. In the case of trade and investment agreements, these encompass the establishment of mixed (between the administrations/ministries of both parties) trade and sustainable development committees that have the mandate to follow-up the implementation of the labour provisions, civil society advisory committees that monitor the making and implementation of these agreements, to expert committees or independent arbitration that can be established in case of labour disputes.

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<sup>10</sup> 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).

#### Box 4: Illustrations of the soft-hard law continuum in trade and investment agreements

- The trade and sustainable development chapter of the EU-South Korea TA (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* (“facilitate and promote”). Furthermore, it are the signing parties -states- that make certain commitments, not businesses. *Precision is limited* as no reference is made to internationally recognized CSR instruments. As the EU doesn’t include binding arbitration in its labour provisions, it is characterized by a more limited level of delegation.<sup>11</sup> However, the establishment of a civil society advisory body -the Domestic Advisory Group (DAG)- that has the mandate to monitor the implementation of the trade and sustainable development chapter, can be understood as a *degree of delegation*.

- 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. In terms of legal obligation, this commitment is part of a *legally binding treaty*, however, using *soft language* (“promotion”). Both Parties’ commitment is *more precise* as reference is made to the OECD Guidelines. The provision of a dispute settlement mechanism (consisting of consultations, the establishment of an arbitral panel, access to domestic courts or ICSID) to deal with *“any matter concerning the interpretation or application of the agreement”* (Art. 12), can be understood as a higher level of *delegation*.

In brief, a more blurred understanding of the distinction between hard and soft law seems more helpful to understand the reference to CSR in economic governance arrangements. CSR should not be understood as simply voluntary, but rather as a degree of voluntariness, depending on the level of obligation, precision and delegation. This has also implications for the private character of CSR, considering, as it will be further analyzed, the increased tendency of states to include CSR principles in its regulations

#### ... bringing the state back in

CSR is increasingly discussed as an element of state policies (see, e.g., Steurer, 2010).

According to Ward (2004): *‘the CSR agenda as a whole may now have reached a turning*

<sup>11</sup> The most advanced level of dispute resolution that applies to the trade and sustainable development chapter is the establishment of a committee of experts. The outcome of this committee, however, is not binding, as the parties (only) commit to *“make their best efforts to accommodate advice or recommendations of the Panel of Experts on the implementation of this Chapter”* (Art. 13.15, 2). Furthermore, the trade and sustainable development chapter is excluded from dispute settlement (Art. 13.16).

point in which the public sector is repositioned as a centrally important actor'. This is also reflected in the EU's position on CSR, stating that although:

*“the development of CSR should be led by enterprises themselves, public authorities should play a supporting role through a smart mix of voluntary policy measures and where necessary, complementary regulation, for example to promote transparency, create market incentives for responsible business conduct, and ensure corporate accountability”* (EC, 2011).

This is an important evolution as it essentially shifts the attention away from a CSR approach purely situated at the level of private business, towards bringing states back in, in a variety of ways. For instance, CSR has become an element of the policies of several countries with the aim to foster responsible business practices domestically as well as on an international level (Midtun et al., 2012):

- In 2000, the UK government included CSR as an official policy strategy by appointing a Minister for CSR within the Department of Trade and Industry (Lux et al., 2011).
- In France and Denmark, among other countries, large companies are legally obliged to publish social and environmental information on their activities, in addition to their financial results (see, e.g., Clavet, 2008).
- Similarly, the Australian Corporate Code of Conduct Bill was intended to subject overseas subsidiaries of Australian companies to a general obligation to observe human rights and the principle of non-discrimination (the Bill did not pass, though) (e.g., see, Muchlinkski, 2008).
- India's Companies Act (2013) obliges large companies to establish a CSR committee, develop a policy in this regard, monitor and report, and spend a yearly percentage of profits in pursuance of its CSR policy.
- In April 2014, the European Parliament adopted a directive on the disclosure of non-financial and diversity information by certain large companies and groups.<sup>12</sup>
- This has also been manifested more explicitly in the field of trade and investment, where the European Parliament called for the integration of CSR clauses in all future international trade and investment agreements (European Parliament, 2010; European Parliament, 2011).

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<sup>12</sup> [http://ec.europa.eu/internal\\_market/accounting/non-financial\\_reporting/index\\_en.htm](http://ec.europa.eu/internal_market/accounting/non-financial_reporting/index_en.htm) (consulted on 14 Jul. 2014).

This results in different types of interactions between both public and private governance and challenges for domestic labour regulation and institutions in the follow-up of CSR.

**Box 5: Four types of interactions between private and public governance**

- A first role is *requiring* through laws, regulations or sanctions to guide business behaviour (Ward, 2004; Trubek and Trubek, 2007; Gond et al., 2011). The state is still the primary actor to provide for regulation, policies and adjudication to ensure adequate labour rights and working conditions, both in home and host countries. Utting (2005) observes a “hardening” or integration of broader business responsibilities, that previously may be addressed through purely voluntary CSR initiatives, in domestic regulation. From the moment that regulations become mandatory, however, CSR policies are turned into conventional hard law regulations (Steurer, 2010). Public administrations may require private businesses to conduct due diligence for human or labour rights, i.e. through a direct legal obligation (Green, 2003; De Schutter et al., 2012). For example, various governments of European member states require public pension funds to consider CSR in making investment decisions. India’s Companies Act (2013) obliges large companies to establish a CSR committee, develop a policy in this regard, monitor and report, and spend a yearly percentage of profits in pursuance of its CSR policy. In 2012, the US Dodd-Frank Act requires companies that trade in the US and use conflict minerals, that is, minerals originating in the Democratic Republic of Congo or an adjoining country, to publicly disclose the measures that are taken to exercise due diligence on the source and chain of custody of these minerals;<sup>13</sup>

- A second role is enhancing *transparency and disclosure mechanisms*, to promote or oblige corporations’ reporting on sustainability impacts of their business and investment activities (e.g., see, De Schutter et al., 2012). In France, Netherlands, Denmark, Spain and Sweden, large companies are legally obliged to include social and environmental information in their annual reports or to publish CSR reports, in addition to their financial results (Clavet, 2008; ILO, 2013). In April 2014, the European Parliament adopted a directive on the disclosure of non-financial and diversity information by certain large companies and groups. Since 2012, larger retail sellers and manufacturers doing business in the US state of California must comply with website disclosure requirements on measures taken to prevent human trafficking within the enterprise’s supply chain. In the case of Sweden, a proactive transparency approach has been applied: the Ministry of Foreign Affairs acts as focal point for CSR, which aims to turn Swedish companies into “ambassadors” of human rights, decent labour conditions, environmental protection, and anti-corruption around the world (Steurer, 2010);

<sup>13</sup> This first category has to be understood as traditional hard law, however, that may deal with one of the categories that is discussed under the other categories, such as transparency and disclosure.

- A third role is *providing incentives and benefits*, such as export credits, public subsidies or labelling schemes to companies that comply with CSR practices (Aaronson, 2002; Utting, 2005; De Schutter et al., 2012). An example of linking compliance with CSR commitments to economic incentives is the Dutch case: “*in order to receive export credit guarantees, Dutch companies have to state that they comply with the (OECD) Guidelines*” (Evans, 2003). Governments may also have a role to play in fostering an enabling environment for market-incentives, i.e. by enhancing transparency that enables consumers and investors to take consumption and investment decisions based on criteria of social conduct (Graham and Woods, 2006); and

- A fourth role is *partnering*, which is understood as the creation of leverage through the pooling of skills and resources of multiple stakeholders (Ward, 2004; Braithwaite, 2006; Mayer and Gereffi, 2010; ILO, 2013; Mayer, 2014). For instance, in the case of the Dominican Republic, in those sectors where private regulation has been more present, an increase has been observed in the number of requests that workers make for labour inspection (Amengual, 2009). This is a positive spill-over of private to public regulation (Vogel, 2005; Aaronson, 2007). This is also true, however, in the other direction. In the Spanish *Programa Voluntario de Reducción de Accidentes*, public authorities collaborate with enterprises in undertaking capacity-building to address the root causes of previous work accidents. Participation is voluntary, the social partners are involved in developing and implementing the programme and the company is exempted from labour inspection on the issues that are worked on during the period of the programme. The Dutch government established the “*Knowledge and Information Centre on CSR*”, to coordinate CSR activities in the Netherlands, to disseminate information on CSR, and to promote dialogue and partnerships (Steurer, 2010). Another illustration is the Voluntary Protection Programme (VPP) of the US Occupational Safety and Health Authority (OSHA) that recognizes employers and workers that participate in a self-assessment on OHS. To participate, employers must submit an application to OSHA, undergo a rigorous onsite evaluation and three to five year re-evaluation. VPP participants are exempt from OSHA-programmed inspections while they maintain their VPP status (ILO, 2013).<sup>14</sup>

## CSR IN TRADE AND INVESTMENT AGREEMENTS

In the following paragraphs, the article will examine the particular reference towards CSR in trade and investment agreements. After a brief introduction to the state-of-the-art on the issue, CSR clauses will be further assessed in terms of the soft-hard law continuum.<sup>15</sup>

<sup>14</sup> In this regard, Trubek and Trubek (2007) address public regulation as setting minimum standards, but allowing actors to opt-out on condition that they use private schemes, such as self-assessment to exceed the minimal standards.

<sup>15</sup> For the purpose of uncovering instances of labour-related references to Corporate Social Responsibility (CSR) in trade and investment agreements, the following method was used. CSR references - understood as a mixture

## State-of-the-Art

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. Recently an increasing number of countries have started to include such language, though. Language use differs, however, depending on approach, partner country or type of agreement.

### Box 6: Emergence of CSR clauses in trade and investment agreements

Although reference to CSR in trade and investment agreements extends back to 2003/2004, the European Parliament called in 2010 and 2011 for the systematic integration of CSR clauses in future international trade and investment agreements (European Parliament, 2010; European Parliament, 2011). Already in 2001, Canada inserted CSR language in the preparatory documents of the Free Trade Agreement of the Americas (which was never concluded, though). Since 2009, Canada includes, particularly in the investment chapter, labour-related CSR clauses in its trade agreements as a part of a more comprehensive approach toward promoting CSR.<sup>16</sup>

Reference to CSR is most prominent among the traditional proponents on the issue of labour provisions in trade agreements: the EU, Canada, occasionally the US and more recently EFTA. Among the first arrangements 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.<sup>17</sup> Since 2010, also in the agreements of the European Free Trade Association (EFTA), direct reference is made to CSR.

of terms, 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' - were scanned for in both trade and investment agreements (including side agreements). All countries with trade agreements registered at the WTO (Regional Trade Agreements Database - [http://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm)) were examined. In the cases of Canada, the EU and the US -the three economies with the longest tradition of including labour provisions- all bilateral trade agreements were examined. For other countries, only the most recent agreements have been examined, arguing that if a mentioning of CSR could not be found in the most recent agreements, the country was assumed to not make reference to CSR in earlier agreements either. Considering that the number of investment treaties by far exceeds the number of trade agreements, a more narrow selection of treaties was made. As the literature observes that the inclusion of CSR-provisions in investment treaties is a recent development (UNEP, 2011), also here a focus was placed on examining the most recent agreements (2009 onwards). Moreover, as this chapter focuses on CSR in relation to labour, again an emphasis was placed on those countries that are known for including labour provisions in their trade (and investment agreements) (for a list of these countries, see ILO, forthcoming). Similarly, whereas agreements may refer to the promotion of CSR in various fields, such as e-commerce or environmental protection - these are excluded, as the emphasis here is on labour.

<sup>16</sup> <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng> (consulted on 31 Jul. 2014).

<sup>17</sup> In the US case, CSR is mainly referred to under the chapter of environment. However, more recent agreements, such as US-Peru (2009) and US-Colombia (2012) also refer to CSR when dealing with labour.

Finally, reference to CSR is much more present in bilateral trade agreements, compared to other types of arrangements, such as unilateral schemes or Bilateral Investment Treaties (BITs). With regard to unilateral schemes, neither the US nor the EU GSPs incorporate a reference towards CSR.<sup>18</sup>

In the field of investment, reference to CSR is mostly absent. A very limited number of recent BITs do include references to CSR, though:

- The Austria-Nigeria BIT (signed in 2013, not in force yet) expresses in the preamble the belief that responsible corporate behaviour can contribute to mutual confidence between enterprises and host countries;
- The Canada-Benin BIT (signed in 2013, but not in force yet) mentions, in the core text, CSR as guiding principle and commits *'each Contracting Party [to] encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards'* (Article 4, Article 16);
- In some cases, explicit reference is made to existing CSR instruments. The Netherlands-United Arab Emirates BIT (signed in 2013) refers to the promotion of the OECD Guidelines;
- Also the 2009 Norway model BIT (which has not been adopted) explicitly encourages investors to comply with the OECD Guidelines and the UN Global Compact; and
- CSR may also be referred to under the investment chapter of comprehensive trade agreements, which is the case for Canada.<sup>19</sup>

This limited reference is not really surprising, taking into consideration the limited experience with incorporating broader social concerns in BITs, at least compared to its trade counterparts. Additionally there is limited attention given to the issue by the broader public and accordingly advocacy. 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.<sup>20</sup>

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<sup>18</sup> Only the US and EU GSP's have been looked at, as these are the only ones that include a labour provision.

<sup>19</sup> Canada-Peru (2009, Art. 810); Canada-Colombia (2011, Art. 816) or Canada-Panama (2013, Art. 917).

<sup>20</sup> An additional evolution in this area has been the more tenable link between human rights and IIA, mostly as a result of the work of John Ruggie as Special Representative of the UN Secretary General on Human Rights and Transnational Corporations and Other Business Enterprises (e.g., see, Footer, 2009).

Notwithstanding the recent nature of the phenomenon, CSR clauses tend to become *more comprehensive*:

- some agreements refer increasingly to CSR in the preamble, core of the agreement or parallel agreements (whereas before this was only mentioned in the preamble for instance), which is the case for EFTA or Canada;<sup>21</sup> or
- to refer to existing CSR instruments such as the ILO MNE Declaration, the OECD Guidelines, or the UN Global Compact, which is the case for the EU and EFTA; and
- regarding the US, while CSR has traditionally been referred to under the chapter of environment, this has been extended to the labour chapter in some of the more recent agreements.

Initial indications of *spill-over effects* between types of agreements can be observed:

- some countries have a longer tradition to include CSR language in its trade agreements and started to do this in their investment agreements, e.g., Canada;
- others already include labour provisions in some of their investment agreements and started to add a reference to CSR, which is the case for Austria or the Netherlands; and
- although one could expect countries that have included a referral to CSR in one trade agreement to repeat this in trade agreements with other countries, this is not observed in the data.

### **... obligation and precision**

When having a closer look at these CSR clauses, the signing parties - states - typically commit to cooperation activities on CSR, to encourage enterprises to voluntarily incorporate CSR mechanisms or to facilitate and promote trade in goods that are subject to CSR schemes. These are mainly '*double soft*' references (e.g., see, Prislán and Zandvliet, 2013), understood as (i) soft language in terms of states' commitment with regard to the support to (ii) purely voluntary CSR engagement of the private sector. Nevertheless, these clauses also offer potential: states do commit to take policy initiatives in the area of CSR, be it the encouragement of investors to adopt voluntary standards.

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<sup>21</sup> The placement of the CSR reference gives some indication of the level of commitment expected of the parties to the agreement. Some agreements refer to the principle of CSR only in the preamble or annex of the agreement rather than in the core and therefore has only having limited legal power or is not subject to existing institutional mechanisms.

#### Box 7: Illustrations of CSR commitments in TAs

- *cooperation activities*, which may include amongst others CSR activities. The labour chapter of the US-Peru FTA (2009) for instance states that *‘[...] regional cooperation activities on labor issues, may include, but need not be limited to ... dissemination of information and promotion of best labor practices, including corporate social responsibility, that enhance competitiveness and worker welfare’* (Annex 17.6, Article 2(o));

- *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 recognised guidelines and principles in this respect, such as the OECD Guidelines for Multinational Enterprises, the OECD Principles of Corporate Governance and the UN Global Compact’*; and

- *facilitate and promote trade in goods that are the subject of CSR schemes*. The EU-South 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)).

Whereas the former illustrations deal with CSR reference, more as exception than as rule, certain agreements *address direct investors’ obligations*.<sup>22</sup>

- Art. 72 states that *‘the EC Party and the Signatory CARIFORUM States shall cooperate and take, within their own respective territories, such measures as may be necessary, inter alia, through domestic legislation, to ensure that: investors act in accordance with core labour standards as required by the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work, 1998, to which the EC Party and the Signatory CARIFORUM States are parties’*;
- similarly, the Economic Community of West African States’ (ECOWAS) Community Rules on Investment (2008) states that: *‘investors and investments shall act in accordance with fundamental labour standards as stipulated in the ILO Declaration on Fundamental Principles and Rights of Work, 1998’*;<sup>23</sup> and

<sup>22</sup> Although no explicit reference is made to the voluntary character of private business regulation, it is included in this analysis as it directly addresses investors responsibilities in the field of labour.

<sup>23</sup> Taken from Ruben Zandvliet, ETUC presentation, April 2014.

- along the same line (See Box 8), the Model BIT of the Southern Development Community (SADC, 2012) establishes rights but also direct obligations for investors and their investments.

#### **Box 8: Analysis of the SADC Model BIT in the hard-soft law continuum**

- *obligation*: the Model itself is not a legally binding document. However, when executed in the shape of a BIT with other parties, its content will become legally binding. This implies that investors and their investments would have a binding obligation that directly emerges from the BIT, to respect human rights in the workplace and in the community and State in which they are located (Article 15.1).

- *precision*: the Model clarifies 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.

- *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). A particular interesting element, are the extraterritorial implications, where the host state may initiate a complaint against the investor in the domestic courts of the home state (when the action is related to the conduct of the investor and claim damages arising from breaching the obligations of the agreement).<sup>24</sup>

Although differences exist among agreements, CSR clauses are generally soft, both in terms of obligation and precision. With regard to *obligation* reference to private business' responsibility is voluntary and accordingly the legal obligations these clauses entail are limited.

#### **Box 9: Implications for business**

Commonly, direct commitments for businesses are not existent as the agreements' subjects are the signing states. Indirectly, there may be implications for businesses as the Parties underline the

<sup>24</sup> Article 19.4 SADC. Accordingly, Article 17 on Investor Liability, requires home states to be more accessible towards receiving complaints (of civil nature) of persons affected by the conduct of investors violating the agreement in the host state. This means that the home state are required to reduce the application of jurisdictional rules as the so called *forum non conveniens*, for example, that would allow them to reject a case because another tribunal in another jurisdiction (in this case the home state one) would be more convenient to hear it. See SADC Model BIT Treaty Template with commentary (2012). Available at: <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>

importance of CSR behaviour, i.e. through encouraging businesses' compliance with CSR instruments and principles when they are operating in their territory.

The exception is, however, when direct reference is made to investors' behaviour. By integrating a states' commitment to ensure that investors act in line the 1998 Declaration in the trade agreement, it makes it subject to the various institutional mechanisms (i.e. dialogue, technical cooperation, and perhaps even dispute settlement, etc.) that are provided for under the agreement.

Also in terms of *precision*, the examined agreements refer in general terms towards the idea of CSR, without defining it 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.

#### **Box 10: Illustrations of (limited) precision**

The US-Colombia FTA (2012) for instance includes in the list of priority areas for technical cooperation and capacity building the dissemination of information and promotion of best labour practices, including on corporate social responsibility (Annex 17.6, Article 2(o)).

There are some exceptions, however, where explicit reference is made to existing CSR instruments. The preamble of the EFTA–Montenegro Agreement (2012) not only acknowledges the importance of good corporate governance and corporate social responsibility for sustainable development, but also affirms the parties' aim '*to encourage enterprises to observe internationally recognised guidelines and principles in this respect, such as the OECD Guidelines for Multinational Enterprises, the OECD Principles of Corporate Governance and the UN Global Compact*'.<sup>25</sup>

Also in the field of investment, some exceptions do refer explicitly to existing CSR instruments. The Netherlands-United Arab Emirates BIT (2013) makes reference to the OECD Guidelines by stressing the Parties' obligations to promote the application of these. Also the Norway Model BIT (2009, never adopted) makes explicit reference to the OECD Guidelines and the UN Global Compact, stating that the Parties agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises and to participate in the United Nations Global Compact.

<sup>25</sup> Although the EFTA-Hong Kong, China FTA dates from the same year (2012) as the EFTA-Montenegro FTA and incorporates a similar reference towards CSR in the preamble, different language is used: 'acknowledging the importance of good corporate governance and corporate social responsibility for sustainable development, and affirming their aim to encourage enterprises to take into account internationally recognised guidelines and principles where appropriate'. No reference is made to existing CSR instruments.

### ... delegation

Nevertheless, states do commit to cooperation, encouragement, facilitation or promotion of CSR. And these are binding commitments, which means that states can be held accountable with regard to whether measures have been taken to comply. As a general principle, parties are obliged to give effect to any commitment through good faith in the implementation and enforcement (e.g., see, Footer, 2009). Building further on this, Duplessis (2008) argues that despite the soft character of these provisions, a third-party could, if necessary, in practice determine what is reasonable behaviour in this regard (i.e. 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 provide different levels of third-party authorization, i.e. the establishment of mixed (between the administrations/ministries of both parties) trade and sustainable development committees that have the mandate to follow-up the implementation of the labour provisions, and civil society advisory committees that monitor the making and implementation of these agreements. The EU-South Korea agreement for instance provides for the establishment of a Domestic Advisory Group (DAG) in the respective countries and a joint Civil Society Forum. These 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, as higher levels of delegation almost never coincide with lower levels of obligation (Abbott et al., 2000), it is very unlikely that a CSR clause would be brought to dispute settlement (if not excluded to begin with) in the framework of a trade agreement.

Although CSR provisions have only limitedly been activated, in those cases where it has, labour advocates have played an important role. This is in line with the finding that stakeholders are key actors to activate the various implementation mechanisms of trade agreements (IILS, 2013; ILO forthcoming) and resonates with Abbott et al. (2000) who stress the importance of private access to activate the various implementation mechanisms, i.e. to initiate a process of conflict resolution.

The EU-South Korea DAG raised the issue of 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 and the UN Guiding

Principles on Business and Human Rights. At the CSF (9 December 2014), both DAGs 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 NCPs.<sup>26</sup>

#### **Box 11: Institutional coherence**

These mechanisms are established in the particular context of bilateral trade or investment agreements. However, they co-exist with existing mechanisms that are established under CSR instruments, 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. Typically, the latter hold a mediation and conciliation function, without autonomous investigatory power or the mandate to enforce the outcome of the dispute. Hence, this can be understood as a limited level of delegation.

Similarly, the ILO provides for various mechanisms to monitor the compliance with international labour standards, i.e. through its traditional supervisory mechanisms, but also through periodic surveys to assess practices in areas identified in the MNE Declaration (fundamental rights; employment promotion; skills development; conditions of work and life; and industrial relations) or through the ILO Helpdesk for Business on ILS.

#### **THE 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 (e.g., see, Duplessis, 2008). 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 (e.g., see, Doumbia-Henry and Gravel, 2006; ILS, 2013; Gravel and Delpech, 2013). However, less is known about the role of the ILO with regard to CSR-clauses in these agreements. Based on existing experiences of ILO involvement in the broader trade and labour debate, the potential role of the ILO with regard to CSR in trade and investment agreements, is explored. Challenges are situated mainly in three areas that correspond with the ILO tripartite mandate and structure:

- *Action at the level of states:* states are still the main actors in shaping the necessary conditions to guide corporate responsible behavior. States may promote adequate business behavior through various regulatory tools, ranging from laws and regulations that require transparency and disclosure in business' operations, voluntary

<sup>26</sup> See more in the Conclusions issued by the two Co-Chairs, Mr Thomas Jenkins and Mr Youngki Choi at the Civil Society Forum under the EU-Korea Free Trade Agreement, 3<sup>rd</sup> meeting (Brussels, 9 December 2014).

recommendations and guidelines, to sanctions and incentives, i.e. by conditioning access to public procurement. The promotion of CSR initiatives may also take the form of providing access to information, the dissemination of best practices, or stimulating the pooling of resources;

- *Action at the level of private businesses:* the traditional ILO instruments and supervisory mechanisms mainly address the state level, aiming at strengthening national regulatory frameworks in home and host countries. Increasingly, 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 Programme) (Van der Heijden and Zandvliet, 2014);<sup>27</sup> and
- *Action at the level of workers:* various authors stress the importance of workers and workers' organizations, i.e. through industrial relations and bottom-up monitoring, to enhance the effectiveness of CSR initiatives (e.g., see Sabel et al., 2000; Blackett, 2004; Thompson, 2008; Anner, 2012; Young and Marais, 2013; Marx and Wouters, 2013). Stakeholder involvement is a transversal issue: it is not only a level of increased delegation in itself, labour advocates have also been found essential to activate the various implementation mechanisms provided in economic governance arrangements. Furthermore, stakeholders may improve the informational basis, trust and pressure to engage in enhanced levels of social, moral and legal obligation of CSR policies. Accordingly, information, technical expertise and monitoring of stakeholders may contribute to more detailed, better elaborated and therefore precise CSR commitments.

#### **Box 12: Illustrations of ILO experience**

The ILO Better Factories Cambodia Programme is a good example where the ILO engages with states, businesses and social partners. First of all, 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- and the International Organisation of Employers -IOE). It also

<sup>27</sup> See GB.320/POL/10 for the renewed follow-up mechanisms of the MNE Declaration.

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, it addresses private businesses: companies voluntarily commit to a precise, binding 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, to the Programme. The Programme also incorporates innovative government and international trade instruments: various economic incentives have been tied to participation in the Programme. Although participation is voluntary, it is a condition to receive an export licence and compliance with labour law and standards is also tied to additional market access under the Bilateral Textile Agreement between Cambodia and the United States (CUSBTA, 1999).<sup>28</sup>

Similarly the Accord on Fire and Building Safety in Bangladesh is an illustration of multi-stakeholder involvement, addressing states, businesses and workers. The Accord is a binding commitment between international brands, global trade unions and Bangladeshi trade unions. It is governed by a steering committee consisting of the signatory companies and trade unions, international NGOs and the ILO as chair.<sup>29</sup> Buyers voluntarily enter a binding commitment to disclosure, independent inspection, support factory upgrade and remediation, financial contribution, worker participation and grievance mechanisms. The increased public attention and consumer awareness after the Rana Plaza disaster (2013) on the issue of working conditions in the Bangladesh garment sector has contributed to companies entering the Accord. This means that factories enter on a voluntary basis a contractual commitment (legal obligation) to certain aspects of responsible business behavior. 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; van der Heijden and Zandvliet, 2014).<sup>30</sup> 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 (WESO, 2015).

<sup>28</sup> Cambodia Bilateral Textile Agreement (1999). Available at: [http://khmer.cambodia.usembassy.gov/media2/pdf/uskh\\_texttile.pdf](http://khmer.cambodia.usembassy.gov/media2/pdf/uskh_texttile.pdf) (consulted 17 June 2015).

<sup>29</sup> See <http://bangladeshaccord.org/> (consulted 11 June 2015).

<sup>30</sup> A separate group of buyers established an agreement to inspect their factories called the Alliance for Bangladesh Worker Safety (2013).<sup>30</sup> Although both schemes (Accord and Alliance) share the overall goal to promote working conditions in the Bangladeshi garment sector, approaches tend to differ mainly with regard to monitoring, enforcement and stakeholder involvement (ILO, 2015).

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, consisting of a general survey, a mechanism for the examination of the interpretation of the Declaration and the ILO Helpdesk.

### **THE WAY FORWARD**

Although references to CSR are still relatively limited in trade and investment agreements, they have become more common place in the last decade. CSR language is relatively weak in terms of obligation, precision and delegation. However, more potential exists than generally recognized and experimentation with CSR clauses could deliver interesting insights into its effectiveness. Although one could question the implications for private businesses, state actors do commit to take certain initiatives, mainly the promotion of voluntary CSR activities among companies. As these clauses are typically subject to the same institutional mechanisms as the other sustainable development or labour provisions, reporting, monitoring, technical cooperation and in limited cases even conflict resolution, these hold the potential to improve the effectiveness of CSR provisions.

This article finds that CSR language in trade and investment agreements has implications for states, business and workers to a varying extent:

- *States*: are increasingly active in shaping the conditions for responsible business behaviour worldwide, amongst others, through the support of CSR initiatives in trade and investment agreements. Typically, states commit to promote, encourage or 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. Whereas, often rather general CSR principles are referred to, increasing reference is made to existing international CSR instruments. Also delegation is rather

limited. The participation of labour advocates, however, is promising with regard to the activation of these clauses;

- *Businesses*: as the paper discusses CSR language in the particular context of state-to-states agreements, direct implications are situated at the level of states. However, at an indirect level, these agreements do offer additional implementation mechanisms to follow-up CSR (e.g. technical cooperation, or monitoring of business' operations worldwide through civil society advisory bodies). Those agreements where direct investors' obligations are mentioned do imply more far reaching possible consequences, such as being held accountable in the home country for investments in host countries; and
- *Workers*: trade agreements, typically, provide for various ways of stakeholder involvement, i.e. through the establishment of cross-border civil society committees. These have been used to advocate for increased cooperation activities or close monitoring of CSR behaviour of MNEs, and to cooperate with businesses in this matter.

Current ILO involvement in the follow-up of CSR clauses in trade and investment agreements is limited, but some embryonic experiences exist. The ILO is foremost involved by directly addressing states and their obligation to implement the international labour standards at the domestic level. This is the core of the ILO. However, interesting experiences exist where the ILO directly targets private businesses, through monitoring, capacity building or social dialogue at the sector or company levels. The research points towards the potential role of the ILO in enhancing multi-stakeholder involvement.

Very limited attention has been paid to the issue so far, and numerous elements deserve to be further examined in the future:

- whereas past research examined the experience with, including the effectiveness of, the various implementation mechanisms provided in 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;

- since trade and investment agreements shape the regulatory framework through which GSCs operate, the opportunities (and boundaries) of CSR language throughout the supply chain can be further examined;
- furthermore, the consistency of CSR measures with global trade rules, as established under the World Trade Organization (WTO) deserves more attention;
- also the role of workers' and employers' organisations in the follow-up of these CSR schemes should be further examined;
- finally, an assessment of how existing ILO supervisory mechanisms have been dealing with CSR, and trade and investment agreements should give additional insights into the potential role of the ILO in this regard.

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