

## The perspective of social clauses in international trade\*

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## **Introduction.**

In my paper I analyzed in a rather systematic way the linkage between international trade and labour rights, with particular reference to the theme of social clause as a tool capable of connecting different regulatory regimes, namely that of the international labour law and the international economy law. Such regulatory regimes have deep common roots that date back to the inception of international labour law: the first draft of the British delegation in the commission for international labour law, appointed after the first World War by the Peace Conference, declared that one of the main objectives of International labour conventions should be to eliminate unfair competition based on oppressive working conditions and that States signing conventions should reject commodities produced under unfair competition conditions. This is to say that the linkage deals with a recurrent theme in the history of labour law, which has its roots as right of regulation of the competition among States and among enterprises, in an epoch in which the national economies were compared out of a regulatory frame of the international commerce and the United Nation Society had not been founded yet. The links of labour law with this component of the liberal economy - the commerce and the philosophy of the free trade - have marked the history of the 20<sup>th</sup> century, with alternate stories and different perspectives. If with the foundation of the ILO the respect of the social rights on the part of nations was already conceived as a condition for the advancements of the other States desirous to progress in the social regulation, the perspective of an institutional connection between regulation of the commerce and respect of the social rights will find a consecration in the Havana Charter, in which it is foreseen expressly that the States adherent to the new Trade International Organization must respect equitable conditions of labour.

The failure of the negotiations of the Havana Charter and the conclusion of the GATT will mark a decisive setback of social conditionality as a requirement for international trade regulation. Negotiations for the foundation of the WTO will be marked by the resurgence of this issue, but it will nevertheless find the sharp contradiction of developing Countries, the jealous guardians of its elements of competitiveness in a "Ricardian" logic of safeguarding the comparative advantages of nations. However, the failure of the insertion of a social clause in the WTO does not mark the end of the idea and the practice of social conditionality in the treaties of international trade, and this for reasons linked to the philosophy that informs the social reparation of free trade by two great powers of the global economy, the US and the EU. Both these actors have, for different reasons, made the respect for social rights a constant element of external relations, with generalized preference systems (albeit very different) or in the ambit of bilateral treaties. This stage of relaunching the historical link between international trade and social rights has been followed by the progressive realization of the social clause in the field of macro-regional treaties (NAFTA, CETA, MERCOSUR) and finally in the framework of the so-called mega-treaties, such as TTP, TTIP, CETA, EPA, with a progressive enhancement of the Sustainable Development model as a regulatory framework that can stabilize and institutionalize the link between social rights and free trade.

Today, we are experiencing a slowdown, if not a real crisis of these models of regional integration, caused by the resurgence of economic nationalisms. Therefore, new questions are going to arise. What is the future of global trade in the light of US and Brexit neo-protectionism? What tools can be used to convey a new consensus and cohesion phase in the international community where development policies, international business transactions and social and environmental sustainability coexist harmoniously? And what responsibilities, in this confused and fluid scenario, must

take the economic actors, first of all, the multinational companies that move investment and productive locations globally?

Of course, answering these questions is hard matter. However, I think that

social clauses could be relaunched and find space and unexpected revival. The difficulties in negotiating commercial mega-treaties could be resolved in a new impetus for bilateral treaties, which China is practicing with great determination, assuming for the first time commitments, albeit still very temperate, in the field of the protection of social rights and environmental issues. The role of the World Bank and of institutional investors could be result amplified in this context, by developing a financing project and an international cooperation where stabilization clauses prohibiting States from amending the existing regulatory framework at the time of funding will eventually contain derogations for social and environmental rights. And the multinational enterprise, whose social and economic power surpasses that of individual national States, could find a new planetary legitimacy if it adopted and carry out with seriousness and commitment, throughout the production chain, the guidelines contained in the new ILO tripartite declaration. Thus, to a destabilizing de-globalization guided by populisms, it could oppose a new, more socially oriented globalization.

### **1. International trade and social rights: the justifications for the linkage.**

It is commonly known that the current context of globalization has been for several decades characterized by the expansion of both bilateral and multilateral commercial exchanges. The first direction has its evidence in the increase of commercial relations among Countries and it has led to the stipulation of a large number of FTAs; in the second direction there has been an initial (1990's and 2000's) impulse to economic regionalism, that is to say the constitution of free trade areas, customs unions and common markets that imply forms of economic integration, which go beyond the trade sector, since they refer to issues like services and investments, that have been followed (from 2010 to today) by a tendency to the negotiation of mega-treaties that have involved several economic areas, like in the case of TTIP, CTTIP, and so on. This model of free trade has largely dominated the global scenario from the foundation of WTO to today. However, in the last years, we can see an inversion of this trend: multilateral negotiations to bring down barriers to trade have largely stalled and economic and social protectionism, linked to an upswing in initiative of National States in the global arena, is making a comeback<sup>1222</sup>. Even Countries that have traditionally championed an open global economy, like Us and UK, are now looking into ways to put a brake on imports, limit immigration and favour domestic production. These developments have all contributed to the recent marked slowdown in the growth of global trade, to the point that some experts have predicted a future characterized by processes of “de-globalization” and of upswing of national States’ sovereignty on economic processes and on monetary and trade policies.

However, in this evolving complex geo-political scenario, whose balances are hard to predict, several bilateral and multilateral Free Trade Agreements (further on, FTAs) are on the table of negotiations or have been recently stipulated. This confirms the will of national States and of economic powers to go for the liberalization of exchanges and the integration of markets.

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<sup>1222</sup> The WTO, OECD and UN Conference on Trade and Development report showed that since 2008 over 1 500 new trade restrictions have been recorded in G20 economies. Only a quarter of these had been rolled back by May 2016.

In the field of this free trade perspective, we have progressively witnessed a model of regulative “linkage” – or inter-normativity – within the economic dimension of trade exchanges that arises social and environmental concerns. Actually, we are dealing with a regulative logic that dates back to the past: to the failed attempt – with the Havana Charter – to link the ITO to the ILO, with the perspective to obligate States to the compliance with fair labour standards<sup>1223</sup>.

This model of regulation based on the linkage between commercial and social spheres can, matter-of-factly, be distinguished in two sub-models. The first, that has its roots in the unilateral commercial policy of the USA and is then developed in a multilateral perspective – most of all with the NAFTA – is linked to the idea of “fair trade” and sees in the respect of social rights a principle of respect of basic conditions for a trade without any distortion under the profile of competition (level playing field). Such a model, that is characterized by an instrumental perspective directly linked to trade and thus dependent to the regulation of exchanges (in the USA internal legislation, the practises of non compliance with social rights on the part of commercial partners are included in the “unfair” commercial praxis; in the NAALC, the social clause works with sanctionary mechanisms only if the behaviour of States is “affecting trade”). The first model is very ambiguous under the profile of the identification of social rights, generally defined as “internationally recognized” social rights, without any reference to the ILO conventions and therefore without a precise setting of supra-national standards, but actually very often explicitly linked to the compliance with the “internal” standards of each State.

The second sub-model is to be placed within a wider axiological perspective, that is not only and not as much as directly linked to the “fair” regulation of trade exchanges’ system, but it is more characterized by the promotion of fundamental human rights and values: thus intended to the promotion and diffusion on a global scale of certain values of social justice, and such a model has its main feature in being based on mechanisms of dialogue and cooperation. In this model, where the EU’s GSP probably represents the most advanced achievement, the references to the ILO’s standards are much more clear, both with reference to the 1998 ILO Declaration on Fundamental Principles and Rights at Work, and to the fundamental Conventions (core labour standards), with a logic intended to the promotion of a supranational system of social standards. This sub-model has in the latest years been re-defined thanks to the more and more recurring reference in the field of commercial negotiations to the paradigm of sustainable development (see *infra*). One of the main promoters of this strategy is the EU, which wants to keep a trade policy which contributes to the integrated policy-making of the 2030 Agenda for Sustainable Development by focusing not only on economic aspects, but also furthering social and environmental objectives, and contributes to the European Agenda on Migration and the European Agenda on Security<sup>1224</sup>. As a matter of fact, the planetary triumph of capitalistic economy and the insertion of national economies within a global market arises again the issue of the social dimension of liberalization within international trade in the world scenario.

Even though they are inspired by different logics, the two sub-models coexist, complete each other and can contribute, even if with different levels of consistency and efficiency, to the idea

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<sup>1223</sup> The United Nations Conference on Trade and Employment, held in Havana, Cuba, in 1947 adopted the Havana Charter for an International Trade Organization which was meant to establish a multilateral trade organization.

<sup>1224</sup> Brussels, 13.9.2017 COM(2017) 492 final COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A Balanced and Progressive Trade Policy to Harness Globalisation.

of commercial exchanges' governance not only in a perspective of free trade, but also of protection of fundamental social rights, in view of phenomena of social dumping, regulatory competition and law shopping that constitute at the same time the causes and the effects of a globalization without any rule.

On the background, there is the *linkage* between liberalization of exchanges and labour law, which cannot but overwhelmingly come up again in the light of the process of globalization, which entails a growing inter-dependency among economies, favoured by a strong expansion of the movements of capital and trans-national companies within international exchanges.

Moreover, this linkage between the processes of liberalization of exchanges and labour regulation constitutes a foundational element of international labour law, contemporaneously in the construction of the ILO's normative policy and in the relation between the latter and the economic-oriented international organizations. In particular, as far normative policies are concerned, the function of labour law has been clearly evident since its inception: it consisted in contrasting the opportunism of States that would push – or actually were pushing – to postpone the protection of workers' rights with respects to the economic or competitive interest of their enterprises. As we have already pointed out, the recurring dialectic connecting the norms of labour law to international exchanges is presented in the formulation of the Havana Charter, forefather of the forthcoming (however, never constituted) International Trade Organization (ITO), whereby not only was it provided the obligation to comply with equal labour conditions, but, even the necessity of a institutional bridge between the ILO and the ITO, in the direction of a profitable integration between liberalization and social *standards* (see below).

Hence, we face the perspective to insert a social clause in international trade treaties that may institutionalize a formal linkage between openness of the market, economic and social progress, improvement of labour conditions and abolition of the most intolerable forms of exploitation. The social clause is at the centre of the debate on globalization and nowadays constitutes a very controversial matter, because, if on one hand it may be considered one of the most efficient instruments in order to sustain and promote the interactions between international trade and social rights, on the other hand, it shows many criticalities for its structure and concept. Such criticalities may be found even in the most advanced chapters intended to sustainable development: in terms of ability to create effective processes of harmonization of social standards (on the contrary, this is often explicitly excluded), in terms of effectiveness of the assumed commitments, with problems both in terms of monitoring, and, most of all, in terms of procedures of controversies resolution and of sanctionatory system, therefore risking of being a merely exhortative instrument for social justice "on paper". We will deal further on with these profiles (par. 7). Now we must examine the rational "justifications" for the integration of the social clause in International trade Treaties.

In this respect, there are two sets of justifications which can be reconducted to a rational justification as regards scope and value.

#### 1.1. First Justification (Scope).

The first justification (scope) stresses the economic interest of trade, a typically mercantilistic interest, and the instruments of regulation in order to overcome market failures, and the limits of rationality of an unregulated market. This operative and instrumental justification of regulation looks into the harmonious development of the market and is based on the idea of fair trade. The

protection of the fundamental social norms guaranteed in the framework of international trade is justified when the sense of violation of those standards by the exporting States is likely to damage the economy of those Countries which respect the standard of the supranational “level playing field”. Adam Smith himself stated the principle of reciprocity in trade relationship. Although it’s been considered as “unilaterally aggressive”, the USA praxis, codified in the Section 301 of the 1974 Trade and Tariff Act, allows to get to the notion of fair trade, connoting it in a social perspective: as a matter of fact, having in mind that regulation, the trade policies of foreign Countries founded on the systematic violation of workers’ internationally recognized labour rights, represent an unreasonable, unfair and inequitable trade practise. *It is a trade practice that is considered unreasonable, not the violation of social rights per se.* It is well known that also in the European construction, the social harmonization has been conceived since its inception as functional to avoid forms of dumping and competition distortions founded on normative disparities, judged as inconvenient with regards to the functioning of the internal market. This justification is therefore based on a certain idea of a regulated market, an ordo-liberal vision in which the adoption of a minimum of internationally recognized social norms is a pre-requisite for trade, which can facilitate the liberalization of interstate trade by guaranteeing equality of basic legal conditions for any economic operator<sup>1225</sup>.

The reciprocal loyalty in the trade relations therefore implies the respect of fundamental social rights. It is important to observe that this conception of loyalty/equity within international trade exchanges is spreading into areas so far considered as immune to this logic, that, on the contrary, have been representative of a basically opposite pattern: like in the case of China, which has, even though in a limited way, started to insert work-related clauses in some FTAs (see infra).

In this perspective, the introduction of social clauses in international trade Treaties has full validity. Such clauses will be able to internalize the externalities produced by the liberalization of exchanges and to absorb the non-trade issues in the governance of the world trade, on a multilateral and bilateral basis. Thus, the notion of fair trade can be considered as a means to complete the game of free trade, guaranteeing to the State and economic actors that none of the global players will take advantage of the unfair benefits that result from the non application of the national or international social norms. Social standards therefore penetrate in the regulative sphere of trade law as an instrument of implementation of a principle of fair competition at the international level, aimed at limiting the phenomena of social dumping.

### 1.2. Second Justification (Value).

The second type of justification (value) privileges the axiological dimension of fundamental social rights<sup>1226</sup>. In this perspective the demand to link social goals and trade agreements is instrumental in “arming” social rights by making them accessible to the sanctioning system provided for in commercial matters against Countries violating fundamental social rights; from this point of view

<sup>1225</sup> It is important to observe that this conception of loyalty/equity within international trade exchanges is today spreading into areas so far considered as immune to this logic, like in the case of China, which has, even if in a very limited way, started to insert work-related clauses in some FTAs. Since 2008 China has take a new approach in international trade and some FTA such as with New Zeland, Australia include special chapter on movement of person, and in FTA with Peru ans Switzerland there are special provision on labour cooperation.

<sup>1226</sup> See M. J. Trebilcock, *The Fair Trade Debate: Protection of Labour Standards and International Economic Law*, in S. Griller (ed.), *International Economic Governance and Non-Economic Concerns: New Challenges for the International Legal Order*, Springer, New York, 2003, p. 299.

the social clause is a device assisted by sanctions that accompanies the other softer measures based on cooperation and moral suasion.

The demand to link trade agreements with social agenda objectives recalls the use of general trade sanction towards violating Countries, as the suspension or prohibition of market access for those products which violate the fundamental social rights.

An alternative solution, which anyway uses international trade as a lever to guarantee the respect of social rights, could be to consider ILO Conventions as *erga omnes* obligations, that, if violated, can lead to the use of economic sanctions by States that respect and apply them effectively. This opinion has been supported by an authoritative doctrine<sup>1227</sup>, but unfortunately could not be accepted because it was unfounded in terms of general international law: in fact the ILO conventions are not mandatory obligations *erga omnes* and they are not *ius cogens*; according to Hobbes, these are “covenants without sword”, contrary to humanitarian treaties. In fact ILO conventions operate in a reciprocal regime, and subjectively limit their scope to the contracting States. Consequently, the use of commercial sanctions outside the provision of a social clause would result in the violation of international trade law, and would expose the sanctioning State to receive sanctions from the WTO in turn. In conclusion according to the current state of international law, the only way to go beyond the mere logic of “moral suasion” is the social clause, which allows a decisive step forward to the promotion of fundamental social rights.

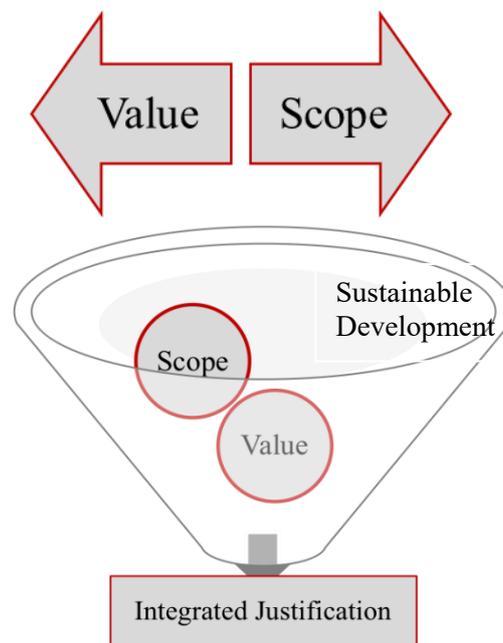
This axiological perspective is strongly re-launched by the paradigm of Sustainable Development. Development is often understood as a synonym for economic development or economic growth. Sustainable development builds and modifies the international approach to development which needs to be understood more broadly. The international community development in the past half-century includes at least four related concepts: peace and security, economic development, social development and national governance that secures peace and development. Each concept is reflected in major multilateral treaties that provide a common framework for relations among nations as well as a shared set of national purposes. In particular, I would stress the idea that Social and economic development are closely related, not only conceptually, but also in the practices of social and economic relationships. Countries that have emphasized education, health and related aspects of social development tend to have the best economic performance. Therefore, the link between economic and social sphere is not an unnatural invention and it's not related to utopia or ideology. It's not for nothing that a fundamental Treaty on human rights, *The International Covenant on Economic, Social and Cultural Rights* contains in itself the idea of integration between economic and social sphere.

Labour law, especially if projected in the international and supra-national dimension, may therefore be considered as a *right of Sustainability*: the respect of fundamental social rights and, more generally, the conditions of effectiveness of labour laws are part of the prerequisites of a globally sustainable competition. Whereby we should face their lack, the economic development without

<sup>1227</sup> Failure to respect fundamental social rights, in particular the ILO Conventions, should give rise to the right of those who respect them to open their markets only to those States that have ratified the same Conventions: see A. Supiot, *Quelle Justice Sociale Internationale Au XXI Siècle?*, Conférence d'ouverture du XXIème Congrès ISLSSL, Le Cap, 15-18 septembre 2015.

integration would lead to the deterioration of the quality of life in the short term and the consumption of capital in the long term<sup>1228</sup>. As Dani Rodrick pointed out, today's challenge is to make the openness of markets sustainable and compatible with wider social aims, and this might be achieved even through a re-visitation of the safeguard measures of WTO, in order to allow the Countries to react to the violation of social rights, especially if those praxis are carried out by non-democratic Countries<sup>1229</sup>.

We may discuss whether this setting should indicate more a cosmopolite vision, centred on the generalization of "universal" principles and values<sup>1230</sup>, that is to say whether this process should most of all preserve the national self-determination against hyper-globalization. In any case, the legitimacy of the World trade's socially conditioned regulation on the basis of double rationality (instrumental and axiologically oriented) on which it is founded finds growing evidence both in case studies, which confirm its economic efficiency (see next chapter), and in the more and more spread and politically meaningful matters on the compliance with global norms of protection of human rights.



### 1.3. An "integrated" Justification.

Today, according to this scenario, the two above mentioned justifications have evolved, and in particular the idea of fair trade results as more interrelated with the axiological dimension of

<sup>1228</sup> Cfr. M. Giaoutzi, P. Nijkamp, *Decision support model for sustainable development*, Aldershot, Avebury, 1993.

<sup>1229</sup> R. Rodrik, *The Globalization Paradox. Democracy and the Future of the World Economy*, New-York – London, W.W. Norton & Company, 2011.

<sup>1230</sup> U. Beck, *Cosmopolitan Vision*, Cambridge, MA Polity Press, 2006

social rights. Both theoretical reflection and the individuation of a much more comprehensive normative paradigm of development have contributed to this evolution.

In this path, an important contribution in the reformulation of Sustainability was given by Amartya Sen. Overcoming the thesis of economists such as Brundtland and Solow, Sen has definitively explained that development must be conceived as a broadening of *capabilities* of human beings and in this perspective the social choice assumes a fundamental role in Development. In this way values influence economic action making it sustainable. A good example of the recognition of the importance of international human rights in the international regulation of trade can be found in the CETA Preamble, that provides for the implementation of the whole agreement in a way consistent with the enforcement of labour and environmental laws (see para 5.2.).

## 2. Economic and social rationalities: the positive effects of respect for social rights.

The positive relationship between economic and social rationalities, in the field of international trade, is confirmed by empirical evidence. The positive effects of social clauses both in terms of economic efficiency and protection of fundamental social rights represent a mostly confirmed result in the scientific literature of economic matrix. Analyzing the data relative to the linkage between social rights and development of trade exchanges in India in the period 2005-2014, we can see that the growth of salaries does not reduce exportations, but it facilitates internal spending and promotes exportations, contradicting the traditional objections on the negative effects induced by social conditionality, as well as proving wrong the competition issue legitimating social dumping<sup>1231</sup>. Even China, which is promoting a strong FTAs policy, has developed a openness in the sectors of cooperation on labour and employment, without anyway recurring to international standards (like in China-Switzerland FTA) or providing for the protection of domestic labour force (like in China-Costa, China-Singapore, China-New Zealand FTAs). The references contained in the trade agreements have stimulated the protections of social rights, as showed by the total cancellation of practises of re-education against ILO Convention n. 105. Effective measures in matter of discrimination assumed by the Chinese Government show its potentialities to implement social clauses relative to condition of labour at a domestic level, with particular reference to principles of equal retribution, equality of treatment between man and woman in retribution matters and non discrimination (think about the efforts made in order to overcome the “Hukou” system, despite the number of migrant farmers that keep on being discriminated in the access to labour)<sup>1232</sup>. Other researches have recently surveyed, on the basis of the Global Preferential Trade Agreements Database (GPTAD), the quantitative effects of social clauses in Countries with medium-low GDP<sup>1233</sup>. The confrontation between systems that have adopted the social clause and those who haven't show a strong and positive impact on conditionality on the ratification of the ILO conventions, especially the fundamental ones, with an average of + 27%. Better Factories Cambodia is as well an excellent example of the benefits derived from a proper implementation of labour standards. Originally known as the ILO Garment Sector Project, it subsequently has changed the

<sup>1231</sup> See H. Chen, *Social Clause in Trade Agreements and China's Experience*, in *Beijing Law Review*, 2015, 6, p. 1 s.

<sup>1232</sup> H. Chen, *op. cit.*, p. 7.

<sup>1233</sup> R. Baziller, A. T. Rana, *Social Clauses in Free-trade Agreements: An efficient tool to improve Labour Standard?*, 4th Conference on the Regulating Decent Work Network, July 9th 2015.

name in Better Factories Cambodia to better reflect the ILO's aim of continuous improvements in working conditions.<sup>1234</sup>

Since its establishment in 2001, the program evolved also with the help of the trade agreement between Cambodia and the United States<sup>1235</sup>, and exports increased over the years, with exception to the biennium 2008-2009 when trade performance decreased due to the financial crisis. This positive impact at a macroeconomic level explains the beneficial outcomes also at a microeconomic level. Brown, Dehejia, and Robertson evidence the relationship between the factory-level compliance and factory survival.<sup>1236</sup> The analysis confirms that factories that increase compliance with labour standards are more likely to survive compared to factories that do not. Indeed, the probability of survival grew as firms conformed with the wage standards. Productivity and profitability increase as well when working conditions are improved.

At this point, the discourse evolves according to the different levels and subjects of such inter-normative regulation. First of all, it is necessary to consider the economic forms of trade organised at global level, which include multiple or multidimensional juridical areas, meeting and overlapping. Each of these areas should be analysed in accordance with the measure to which it can or does guarantee the operative realisation of a link between trade liberalisation and respect of social norms, each in its own way.

In this regards, four pertinent levels or areas can be distinguished:

- i) The global level, governed by the criteria of decision-making centralisation and a multilateral framework (WTO); at this level, the aggregate and regulative processes typical of social rights are generally absent, or else very weak and fragmented.
- ii) Regional level, governed by multilateral and diversified criteria, which depend on the intensity of forms of integration. They follow the model of the EU or of the NAFTA or other forms of regional integration such as MERCOSUR or ASEAN, and vary as to whether there are supranational organs with normative and/or judiciary power having a direct effect on the Member States.
- iii) The level of bilateral agreements between States, in which the social clause is very present.
- iv) Levels unilaterally governed by States or economic aggregations of States; labour issues are often present at this level as the social condition for trade liberalisation.

The following analysis aims to provide a reconstructive synthesis of these levels in which, with some differences deriving from the different geopolitical and institutional profiles of the regulatory framework, the social clause is present in the weaving of international trade relations.

### 3. The multilateral global dimension. The GATT-WTO system: the origins.

On 30<sup>th</sup> October 1947, the General agreement on tariffs and trade (GATT) was signed, with the aim to liberalize the international economic exchanges, progressively abolishing barriers and customs tariffs. The project of constitution of the International Trade Organization, started in those

<sup>1234</sup> Hall, "The ILO's Better Factories Cambodia Program: A Viable Blueprint for Promoting International Labour Rights?", 2010.

<sup>1235</sup> ILO, Better Factories Cambodia. [http://www.ilo.org/asia/projects/WCMS\\_099340/lang--en/index.htm](http://www.ilo.org/asia/projects/WCMS_099340/lang--en/index.htm)

<sup>1236</sup> Brown, Dehejia, and Robertson, "Laws, Costs, Norms, and Learning: Improving Working Conditions in Developing Countries," IZA Discussion Paper No. 10025, June 2016

years with the editing of the Havana Charter, was, on the contrary, interrupted due to the opposition of the USA. In that document, the States committed to economic and social cooperation entrusting to what should have been the newly constituted ITO the task to promote economic growth and, at the same time, the elimination of *sub-standard* labour conditions, especially in *export-oriented* enterprises, more induced to apply unfavourable employment conditions for reasons of international competition.

Above all, in the Havana Charter, in the art. 7, we find the first example of social clause: “the Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements; they recognize that all Countries have a common interest in the achievement and maintenance of fair labour standards. The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions. Members which are also members of the International Labour Organisation shall co-operate with that organization, and in all matters related to labour norms that will be presented to the ITO, the latter shall consult and co-operate with the International Labour Organisation”.

The missed ratification of the Havana Charter on the part of the Congress of the USA interrupted the construction of a stable normative and institutional order, where to collocate the issue of the social clause. Therefore, the GATT was founded on the ashes of the Havana Charter and had limited goals and competences, since it did not include any mechanism referring to protection and fundamental social rights issues, nor recognizing any value to the action of the ILO. From that moment on, there was a phase of negotiations in trade matters, outside of a pre-defined institutional framework; this was interrupted in 1944 when, in the occasion of the eighth cycle of multilateral negotiations held within the GATT, the World Trade Organization's institutional agreement was signed among 124 Countries. The agreement incorporated in a single text the totality of negotiations in trade matters according to the GATT system so far occurred, and it included agreements relative also to other sectors previously not provided for (GATS). The agreement did not contain any explicit reference to fundamental social rights even though, on the matter, most of all France and the European Commission, supporting the USA's requests, had proposed to introduce within trade agreements some provisions intended to internationalize the social costs produced by the decisions in matter of international trade. Moreover, the agreement did not deal with the cooperation between the WTO and the ILO, that is to say it did not acknowledge to the ILO neither the possibility of participation to the negotiations, nor the possibility to participate to yearly Rounds, where member States meet.

### 3.1. The debate on the social clause.

With social clause we intend peculiar norms having as an object the internationally recognized rights that States (in their activity of production and application of law) and, consequently enterprises (in their role of employers) must comply with, in order to be able to benefit from determined effects of international trade liberalization, that is to avoid incurring in actual economic sanctions.

The idea, long nurtured both within law studies and inter-governmental praxis, refers to the debate concerning the possibility to insert a social clause in the field of the system GATT-WTO, in order to fulfil the integration of social rights in the space designated to regulate international

exchanges. As it is known, this perspective presents evident criticalities, but just as many potentialities.

First of all, we are facing the difficulty to define what social *standards* should be, that is to say what are the minimum rules to comply with in order for the clause to find its full achievement, in the framework of fair trade's rules. This definition needs an agreement that is way more difficult to obtain, compared to the one relative to the adoption of labour multilateral conventions in the field of the ILO. However, as it has been proved when we examined the "international labour code" elaborated by the ILO, a careful analysis of the sources of international law allows to explain a hard core of "unconditioned" social rights, that is to say they may not be inflected by reason of the different economic and cultural situations. These rights have already been contemplated by the ILO's Conventions, by the Universal Declaration of Human Rights and by the 1966 UN Treaties on political and civil rights and economic and social rights; they have been recognized as "fundamental" by the Declaration of Copenhagen on social development and eventually consecrated by the historical Declaration adopted by the 1998 International Conference of Labour in Geneva. We are dealing with freedom of association and right to collective bargaining; with the prohibition of forced and mandatory labour; with the protection of minor labour; with the prohibition of discrimination. This set of *core labour standards* must therefore be considered of universal application, so much so that the ILO requires the compliance with it to member States merely by reason of their belonging to the Organization. As we have already said, we are dealing with workers' rights that essentially behave like internationally recognized human rights, having most likely an *opinio iuris* on the basis of which the international community results as bound to comply with them. For example, to the usage of minor labour in cases that, by their nature or circumstances where they take place, put at risk the physical and moral health of minors is a praxis to be included in the notion of "cruel, inhuman and degrading treatments" (art. 1 and 56 of UN Charter) whose prohibition is undoubtedly referable to (and sanctionable according to) *jus cogens*. *This is to say that the social clause has a codification function of already operating principles in the field of general international law: the trade treaties that bear it inside should, consequently, be interpreted as a confirmation, broadening and specification of already existing common norms.*

However, the reason of the difficulties encountered by the social clause at global multilateral level is explained most of all according to a political-structural factor, regarding the conception of the international division of labour supported by the WTO, strongly connected to the classical theory – dating back to David Ricardo – of comparative advantages. In the ministry Declaration of Singapore, the parties declare "to refuse the usage of labour norms with protectionist aims and agree that the comparative advantages of Countries, in particular developing Countries with low salaries, must not in any case be put into discussion". The principle of comparative advantages is founded on the idea of integration of national economies in the international division of labour according to competences and according to the richness in natural resources, manpower and capital. The WTO has therefore inherited – and so far jealously conserved – a conception of loyalty within exchanges unable to remedy the trade distortions determined by the diversity of national legislations, especially regarding the management of labour.

At the same time, it is true that the interpretations that recognize in the social clause a risk of aggressive unilateralism intended to impose protectionist conditions to poor Countries' trade appear as less and less convincing. The objections regarding the lack within the WTO of a tripartite

structure allowing the participation of governments and social parties in the definition and in the application of social *standards* are not shareable; moreover, the background theoretical objections on the utility of exploiting market logics in the modernization of international social-economic relations are equally non-satisfying. It is actually hard to understand why the forced convergence is easily imposed when it comes to obligating jurisdictions unwilling to accept non-appreciated trade rules, while coercion is not allowed when it comes to protect the workers' fundamental rights. The ILO itself (see above) has solemnly stated within the "Declaration on social Justice and a fair globalization", adopted in Geneva on 10<sup>th</sup> June 2008, that "*the violation of labour principles and fundamental rights can neither be invoked nor utilized as legitimate comparative advantages*", thus definitively repudiating the lawfulness of the practises of *social dumping* founded on the theory of comparative advantages.

The idea of social clause, as a juridical mechanism that goes with the liberalization of international exchanges subordinating the fruition of the connected tariffs benefits to the compliance with the respect of some social fundamental principles, therefore constitutes a perspective to be pursued in the field of the international community. It should overcome the traditional intrinsic limits of international labour law, thanks to a more elevated level of effectiveness guaranteed by trade sanctions to be inflicted to the Countries non-complying with the most elementary rules of protection of fundamental human rights. The identification of basic social rights (*id est* "fundamental, or "internationally recognized") through the recognition of the norms elaborated by international organizations (ILO and UN, first), has allowed to put forward the reconstructive hypothesis that considers social clauses not as instruments of disguised protectionism (as reported by a lot of developing Countries that oppose to its adoption), but as an operational improvement of universally recognized human rights, already sanctioned in the field of general international law and, perhaps by *ius cogens* itself. The crucial point of this clause does not consist in eliminating the competitive advantages – on a compared basis – of developing and transitional economies, but in creating within the system of free exchange the necessary requisites in order that the minimum conditions of social and Union equality are respected.

### 3.2. The compatibility of social clause in the GATT-WTO system.

Despite the basically unsuccessful outcomes of the debate on the social clause, the pressure of industrialized Countries and the critiques by the Organizations of consumers, of workers' Unions and by other NGOs interested in the "social" failures of *trade liberalization* represent a guarantee for the re-launch of the social clause within the WTO. While waiting for a development in this sense, it is necessary to verify the compatibility of a social clause with the principles in force in the field of GATT-WTO, checking the possible actionability of restrictive trade measures, adopted by single States with an "anti social dumping" function. Regarding this matter, we have a series of extremely interesting provisions, whose analysis leads to problematic, though possibilist, results.

The first problematic aspect regards the fact that the concept of social *dumping* cannot be technically referred to the notion of *dumping* on prices, complying with art. VI of the GATT. In principle, there is no relationship between the technical definition of *dumping* offered by the GATT and social *dumping* (the same is valid for the so-called environmental *dumping*). First of all, the reason of this lies both in the historical and textual interpretation: in the phase of negotiation of the GATT, the parties effectively agreed on the existence of four types of dumping, relative to prices, services, exchanges and to "social" issues (the latter recognized by negotiators as "*very difficult*

to define"). However, they opted for a more restricted definition, that is to say limited to the dumping on prices, considering the forms of *non-price dumping* as additional compared to the parameters posed by *anti-dumping* norms and avoiding to include workers and their Union representatives among the subjects willing to (and for this reason qualified, according to the *standing* rules) propose the action intended to activate the *anti-dumping* procedures. International trade law does not recognize the differential cost among producers as a potential cause of *dumping*: in a market economy system the reduction of the price of a product is, as a matter of fact, included in the classic goals of free competition. On the contrary, international trade law asserts that the producer may sell the same product at different prices in the domestic market (that is to say, the one of the exporting Country) and in the foreign exportation market. Therefore, if the price of the commodity in both markets reflects the costs of production, we do not have *dumping*. We have to reaffirm that *social dumping* is not based on a discrimination between the price of sale on the domestic market of the producer and the price of sale on the importing market, because also in the domestic market the price may be just as much low: we infer that such practise does not constitute *dumping* complying with the General Agreement.

Closer to the praxis of social *dumping* is the notion of public subsidization to exportations, characterized by the fact that the lower price compared to the normal one derives from an help directly or indirectly granted by States to enterprises; in view of such praxis, the GATT, in addition to allow the injured States to react with the imposition of compensative customs duties (art. VI), disciplines the phenomenon by limiting or prohibiting the concession of subsidizations. Therefore, one may wonder whether the State allowing national enterprises to violate social norms does not end up in granting them a subsidisation; we are dealing with a suggestive interpretative hypothesis, provided also in the case of environmental *dumping*, which, however, clashes with textual-oriented obstacles, because in this hypothesis we do not have the requisites of the subsidization outlined by the relative agreement edited during the *Uruguay Round*, that is to say a *financial contribution* of the authority and the specificity of the subsidization.

Further, the mechanism of the social clause can be commensurate to the so-called "safeguard clause", conventional provisions that provide for, in view of particular situations, the faculty to temporarily infringe to the norms of a treaty of inter-State economic cooperation, adopting measures of protection such increase of customs tariffs, quantitative restrictions, that is to say subsidizations to domestic enterprises. For example, all the Countries adhering to GATT-WTO can temporarily limit their importations whereby the national production is likely to be disturbed by low-price importations (art. XIX). A perspective that sees the safeguard clause operating as an instrument to react with protection measures against unfair trade practises due to the non-compliance with social *standards* cannot therefore be excluded.

For this reason, the only norm within the GATT's *corpus* that may be linkable to a social clause is anyway constituted by the art. XX, relative to a regime of dispensations called general exceptions, intended to establish a domestic jurisdiction in favour of single States, which are authorized to give priority to certain interests of national policy, with regards to trade liberalization. In particular, the norm allows the parties to adopt restrictive measures of exchanges that are justified by, in addition to considerations relative to protection of moral, life and health of people, animal and plants, to the defence of environment and of natural resources, to the protection of artistic heritage and of the consumer, by reasons linked to the trading of commodities produced in prisons (art. XX, lett. "e"). On the basis of these provisions, the States may therefore adopt restrictive

measures of international trade in order to protect their markets from the importations of commodities produced with low cost manpower. We are dealing with a norm that has never to date been invoked in order to justify such restrictions; however it is theoretically very much relevant, since it authorizes the States to adopt protectionist measures based on the assessment of the *production processes* of a foreign commodity. The main path should therefore lead to the reformulation of the art. XX, inserting new exceptions relative to the missing compliance with certain fundamental social rights; however indeed, an extensive interpretation of “the measures necessary to the protection of health and life of people” could at least include the prohibition of minor labour and some minimum norms of security within labour, allowing the States that suffer from social *dumping* to adopt restrictive measures of importations.

Eventually, the art. XXIII of the GATT deserves our attention, as explained by the *Dispute Settlement Rules*. The norm, relative to the “protection of concessions and advantages, provides for the case in which a contracting part considers that an advantage deriving from the Agreement is “cancelled or compromised”, or that the realization of one of the aims of the Agreement is compromised, due to other parties’ behaviours contrary to the Agreement, that is to say that “there is another situation” that may cancel or compromise such advantages. Within these hypotheses, one party may ask to start an inquiry, which may lead to the suspension of concessions or other obligations deriving from the general Agreement. An official document of the USA emanated in the 1950’s declared that “*trade problems stemming from unfair labour standards were already actionable under Article XXIII* <sup>1237</sup>”; and the same opinion was supported by the Trade Union Congress (TUC), that invoked the recourse to the art. XXIII in order to impose trade sanctions to Countries violating international standards in matter of labour. This perspective can be appropriately updated. As a matter of fact, in the strictly juridical field, the reference to the existence of “another situation” that may “cancel or compromise” the advantage deriving from the GATT appears so undetermined that it constitutes a sort of “general clause” wherein a social clause may exist; however, there is no evidence that the art. XXIII was ever invoked to fulfil such aim.

### 3.3. The perspectives social clauses in FTAs.

On one hand, we observed the predominance of a market model centred on social *dumping* and on the competition between social systems and juridical orders; however, on the other hand, the most recent developments, within GATT-WTO and more in general in the international dimension, seem to conceal a different idea, grounded on *fair* trade, respectful of rules, principles of equality, solidarity and fairness on exchanges; a trade that is founded on the paradigm of equity and not, on the contrary, on the competitive devaluation of social regimes which could contribute to a sustainable development, as promoted by the recent UN Agenda 2030.

According to a first and more restrictive hypothesis, fair trade alludes to an organization of international trade exchanges that may ensure an equal sharing of flows. The “right” quantity of exportations and importations for each Country would then be the one guaranteeing the equilibrium of the bilateral trade balance with each partner. The issue about equality can also be utilized to claim an equal treatment of economic actors, according to which Governments should grant to their national enterprises the same advantages of their foreign competitors. In this acceptation of equality, we can find the idea of a balanced ground among *players*, achievable both through

<sup>1237</sup> US Commission on Foreign Economic Policy: *Staff Papers*, 1954, p. 437.

the elimination of unfair advantages of foreign enterprises, and through compensational mechanisms. Also in this perspective, the idea of fair trade breaks up one of the cornerstones of social *dumping*, that is to say the principle of comparative advantages as a foundation of international trade policies. As a matter of fact, social dumping, that consists in less strict labour *standards* within exporting fields, is a possible cause of distortion of trade flows, that may be caused by a “failure” of the government in the *enforcement of labour rights*: basically it is definable as an “unfair subsidy” that legitimates the activation of the procedure to impose compensational duties, according to an interpretative line suggested in the cases of environmental dumping, where the tolerance of some Countries with respect to environmental degradation (particularly typical of developing Countries) would result in a sort of subsidization for national industry.

Considering all this, the idea of fair trade re-launches the above-mentioned thesis according to which social dumping may be included within subsidizations granted by the State, as an attribution of an advantage to enterprises that falls on the lower cost of the product. However, in this perspective, the usage of the art. XVI of the GATT in social matters – according to a perspective put forward also by the International Metalworkers Federation and analysed by the ILO’s International Office of Labour – presumes such an extensive interpretation of the concept of subsidization that it would include in itself the inertia of the State that artificially (and with active will) keeps sub-standards labour conditions.

On the basis of these concepts about the notion of fair trade, the notion itself of dumping stipulated by GATT-WTO may appear as obsolete. In the previous paragraph, we said that the concept we are analyzing is offered by the art. VI, par. 1 of the GATT, which states that dumping “allows the introduction of products of a Country on another Country’s market at a lower price than their normal value”, whereby the price lower than the normal value is such if the price of that given product is “lower than the comparable price adopted in the course of normal trade operations for a similar product, destined to the consumption in the exporting Country”; otherwise, in the absence of such price within the internal market of this given Country, if the price of the exported product is “lower than the more elevated comparable price charged for the exportation of a similar product towards a third Country, in the course of normal trade operations”, that is to say, “lower than the cost of production of this commodity in the origin country, plus a reasonable increase for selling costs and the profit” (the so-called normal value, according to the principle of *fair comparison*: art. 2, par. 4 of the 1947 Agreement on Implementation of Article VI of GATT).

Basically, dumping, as a consequence of a private strategy of the producing enterprise, consists in the sale of a commodity in a foreign market at a lesser price compared to its normal value, that is to say a lower price than the one charged in the market of origin or, anyway, a price insufficient to cover production costs. The member States of GATT-WTO, and the following interpretative and implementation codes, consider such forms of *international price discrimination* as detrimental both for domestic industries and for the opportunities of exportation of third Countries that do not practise any type of *dumping*. Therefore, we would be dealing with unfair trade practices carried out by single producers that intend to acquire or maintain foreign market quotas through a strategy of price discrimination, which tend to provoke distortions within international trade and disturbances within the importation market. For this reason, if a commodity launched in the market with dumping by a contracting party causes or menaces to cause an important damage to an industry (in the sense of productive field) of such contracting party, the importing Country will have the possibility to neutralize its effect by imposing anti-dumping duties, resulting

as equivalent or inferior to the dumping margin, that is to say to the difference between the price of the commodity in the importation market and its “normal value” (art. VI, par. 2).

This adopted interpretation does not keep into account of what the ILO's International Office of Labour stated and, in particular, of what the specific “Group of labour on the social dimension of international trade liberalization” stated: the compliance with social norms inserted in the Conventions of the ILO could prove that the products destined to the exportation and manufactured complying with those norms have been introduced with a price non-inferior to their normal value; on the contrary, we should presume the existence of social *dumping*. Therefore, we need to define the “normal” level of social protection in just as much objective terms as of what happens for commodities’ “normal value”: a value coinciding with the assumption of production's costs that internalize the compliance with core labour standards.

In this perspective, it is thoroughly legitimate to introduce social clauses in international multilateral trade treaties: the social clauses are intended to the respect of the fundamental Conventions of the ILO, according to lines of reform of the WTO, able to “internalize the externalities” produced by the liberalization of exchanges and to include non-trade issue in the governance of world trade.

#### 4. The American Multilateral Free Trade Agreements.

The virtuous linkage among progressive social policies and international trade regulation finds by now several empirical evidences starting from the NAALC, North American Agreement on Labour Cooperation, the Agreement parallel to NAFTA, the North American Free Trade Agreement among Mexico, US and Canada.

NAALC as we will see in details, has favoured a substantial increase of the level of knowledge of the reciprocal systems of labour law on the part of Unions, Governments, NGOs, managers, academic environment and public opinion.

This linkage has nurtured the development of *cross-border* collaborations between Unions and NGOs; it has produced a *climate changing* among whose consequences we have, for example, the anti-discriminatory law that explicitly prohibits the praxis (emerged during the phase of investigation within the field of the Agreement) to impose pregnancy tests to women during the phase of recruitment (12<sup>th</sup> June 2003 Act, Federal Official Gazette, 11<sup>th</sup> June 2003). The ILO itself, which recognizes the repercussions of trade and financial policies on employment and social rights, hopes for the realization of an “integrated approach” in the promotion of decent labour, getting in touch with international and regional organizations that have mandates on “connected” issues: “*d'autres organisations internationales et régionales peuvent apporter une contribution importante à la mise en oeuvre de cette approche intégrée. La politique relative aux échanges commerciaux et aux marchés financiers ayant des répercussions sur l'emploi, il incombe à l'Oit d'évaluer ces effets a fin d'atteindre son objectif qui consiste à placer l'emploi au coeur des politiques économiques*”. In the famous Myanmar case that regarded the systematic violation of the ILO Convention n. 29 on the exploitation of forced labour on the part of military people, the ILO has promoted the adoption of economic measures, like restrictions to importations, the sequestration of the regime's pension funds, the interruption of economic subsidizations: these are measures that have been adopted by member States against the non-complying government.

This confirms that if *moral suasion* does not work, globalization can exploit mechanisms of *connecting regimes* in order to reach goals of social justice. An integrated approach on the basis of criteria of conditionality linked to the dimension of global trade is on the other hand more and more credited to the internationalist doctrine in matter of protection of human rights, of which social rights constitute integrating and inseparable part.

#### 4.1. The NAFTA and its labour side agreement (NAALC).

The North American Agreement on Labour Cooperation (NAALC) represents a peculiar case of social clause adopted in the context of the multilateral agreement of free trade among the USA, Canada and Mexico (NAFTA). Signed in 1993, it represents the first instance in which the United States has negotiated an agreement dealing with labour standards to supplement an international trade agreement.

NAALC is the first free-exchange agreement that sets up a specific normative instrumentation intended to encourage the labour protection through a procedural mechanism allowing the adaptation between trade liberalization and the respect of fundamental social rights. By incorporating aims that differ from the ones of trade liberalization, the NAALC therefore acts as a model for the integration of social values in the supra-national processes that regulate economic globalization.

The main objective of the NAALC is to improve working conditions and living standards in the United States, Mexico, and Canada and it promotes more trade and closer economic ties among the three Countries. The preferred approach of the Agreement to reach this objective is through cooperation - exchanges of information, technical assistance, consultations - a concept that is explicitly recognized in the very title of the instrument. The Agreement also provides some oversight mechanisms to ensure that labour laws are being enforced in all three Countries. These oversight mechanisms are aimed at promoting a better understanding by the public of labour laws and at enhancing transparency of enforcement. The Agreement does provide the ability to invoke trade sanctions as a last resort for non-enforcement of labour law by a Party.

With the NAALC, we have the re-affirmation, within a context characterized by a weak perspective of integration, limited to the economic matter, of a functionalist logic that is very close to the one characterizing the primitive European Community experience. However, within the NAALC, the techniques and goals of supra-national social regulation change. The *labour side agreement* has as its object surveillance and cooperation procedures among partner Countries that may lead, whereby the missing compliance with the obligations incurred may entail effective competition damages, and actual economic-financial sanctions. Therefore, this mechanism may be intended as a social clause that, differently from what normally provided for in international trade treaties and in the experience of European integration (as well as in the normative tradition of international labour law) does not contemplate the respect of minimum uniform supra-national standards, but the guarantee of effectiveness of single national social standards.

In the logic of the agreement, the grounds of the social clause are substantially economic: they regard at the same time the regulation of competition and the preservation of comparative advantages. As a matter of fact, the condition for the application of a sanction is the proof of a competitive advantage deriving from the missing compliance with the internal labour legislation of a given Country. The art. 3 of NAALC testifies the intention of the parties, who promote the "respect and the effective application of their own laws in matter of labour through appropriate

actions of government”: therefore, there is no aim of harmonization or, even more, of standardization of the levels of protection in social matters, that is left to the national legislator’s discretionality. It is true that the agreement individuates some *principles*; however – as we can see in the attachment on *Labour Principles*, which is integrating part of the agreement – they do not represent supra-national social standards, but they indicate “guiding values” and “areas of labour law interest” where each Country established its own level of regulation.

A critical profile regards the different protection ensured to the eleven Labour Principles<sup>1238</sup>: the agreement excludes Union rights from the *strongest* level of protection, applying to the violation of the rights of organization, collective bargaining and strike not actual economic sanctions but the mere activation of “Ministerial Consultations”. Only the violation of some *labour standards* regarding matters relative to security on labour and health, minor labour and minimum wage allows the activation of the complex procedure of *Review* that, through the initial experiment of inter-ministerial consultations, reaches the summoning of an *Arbitrary Panel*, which may conclude with the provision of financial sanctions. The field of operativeness of sanctions is therefore strictly circumscribed: they will be active only in the case where the pact violations, in addition to being persistent, will result as being “trade-related” and “covered by mutually recognized labour laws” (NAALC; art. 49, “Definitions”). In other words, not every violation will result as censorable, but only those which, realizing in the missing reaction in the field of the respective orders to the violation committed by the single economic subjects in order to pursue an undue comparative advantage, appear as relevant for the trade-economic integration pursued by the NAFTA; further, the missing application will have to deal with labour law disciplines that have been acknowledged by contractors, regarding the capacity to implement rights and level of protection.

However, paradoxically, all the procedures of violation so far activated have as object the violation of Union Rights, while the procedure of *Review* has provided important outcomes, thanks in particular to the summoning of public forums of public opinion awareness raising and to the consequent “media” sanctions, as well as to the transnational collaboration among Union Organizations, within an area where factors non-facilitating the international solidarity among Trade Unions are prevailing. Such collaboration is stimulated by the necessity that a procedure of *sub-mission* relative to a Country is introduced within the administrative structure of another Country, on the part, therefore, of a foreign organization.

The NAALC model, with all its limits, has been therefore appreciated by the doctrine most of all for having stimulated the creation of trans-national links and bonds between Unions and NGOs,

<sup>1238</sup> The Annex 1 defines “labour principles” as “guiding values” that the parties commit to respect and it individuates them in the following thematic fields: 1) freedom of association and right to collective bargaining; 2) right to collective bargaining; 3) right to strike; 4) prohibition of forced labour; 5) protection of child and minor labour; 6) protection of minimum standards of employment (for example: minimum wages and benefits for extra-hour labour); 7) elimination of discrimination on labour; 8) right to equal salary among men and women working in the same enterprise and having the same task; 9) prevention of professional illnesses and injuries on labour; 10) right to compensation in case of illnesses and injuries on labour; 11) protection of migrant workers. We are dealing with an all-inclusive list, which refers to an editing technique used in other treaties and international agreements (see, for example, the twelve principles enounced in the 1989 Community Charter of workers’ fundamental social rights), even though, in this case, it results as extremely cautious in the individuation of the aspects characterizing the specific cases individuated in order to interpret and to apply the regulating norm; in particular, there is no mention of the relative Conventions of the ILO, that the Principles therefore respect, but do not refer to. As regards this, it is important to point out that such Principles do not set common minimum standards at all, but only “wide areas of interest” on which the parties have developed (each its own way) “laws, regulations, procedures and practises” intended to the “protection of the interests of the respective labour forces”. (*Annex 1*).

within a very problematic context, non favourable to the accomplishment of forms of international solidarities for workers (see also Bellace relation on the matter).

#### 4.2. The CAFTA-DR.

The CAFTA-DR agreement<sup>1239</sup> is the first free trade agreement between the United States and a group of smaller developing economies: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, as well as the Dominican Republic. This FTA, signed on 2005, is on the list of free trade agreements where we can find, next to the primary goal of exchanges' liberalization, the issue of workers' rights and of the conditions applied to relations. From the Preamble of the Agreement, we can infer that the parties commit not only to the promotion of integration intended in a purely economic sense, but also to create new opportunities for the social and economic development of the respective territories, in order to protect and to strengthen workers' rights and the cooperation in matter of labour among the different institutions involved, in order to create new opportunities of employment and to improve the conditions of life and labour.

Examining in particular the chapter dedicated to labour, it may be useful to point out that the CAFTA-DR Agreement largely lies on the model proposed by the NAALC and by the recent Free Trade Agreements stipulated with Australia, Morocco, Chile and Singapore. In this perspective, it is therefore in line of continuity with the previous experiences, even though we have important signs of the gradual acknowledgement of social rights going with economic rationality.

The agreement may ideally be divided into two parts: while the first deals with the references to the structure of protections acknowledged to workers and to the instruments that are functional to guarantee their effectiveness, the second is intended to add value and promote a participative and collaborative model among the different actors that intervene in the agreement.

After the reference to the ILO's principles stated in the 1998 Declaration, pointing out that the parties commit both to respect the mentioned principles and to apply the internal legislation in order to comply with the international norms on labour, the text goes on by acknowledging to the participant States the duty not to encourage trade practises through the weakening of the structure of protections provided by the internal legislation. Further, the States are prohibited, in the attempt to promote trade exchanges or to encourage investments in their territory, to apply labour conditions that are inferior to those guaranteed by the principles of international law. Specifically, as stated in the 16.8, when the Agreement refers to "labour laws", it refers to the norms introduced by the participant Countries and directly co-related to internationally recognized principles such as the right of association, the right of organization and of collective bargaining, the prohibition of utilization of every form of forced labour, the minimum age of access to labour, the prohibition and the elimination of forms of exploitation of minor labour, the right to acceptable conditions of labour and in particular with regards to minimum wage, working hour and health and security in workplaces.

The art. 16.2 introduces an actual obligation for the stipulating parties and, in case of non-compliance, the agreement provides for the activation of a procedure that inflicts the non-complying party adequate trade sanctions.

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<sup>1239</sup> Originally, the agreement encompassed the United States and the Central American countries of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua, and was called CAFTA. In 2004, the Dominican Republic joined the negotiations, and the agreement was renamed CAFTA-DR.

With regards to the instruments introduced in order to implement the provisions on the compliance with the ILO's principles and on the need to strengthen the internal legislation in order to guarantee the improvement of the workers' social and professional status, the agreement provides for a procedure of guarantee and the State's responsibility in order to ensure those who are interested in, the possibility to address in an impartial way to the judicial authority in order to claim their rights. The procedure must be equal, free and transparent. The subscribers of the agreement must therefore commit themselves so that the holder of a legally acknowledged interest in the Country of belonging may address to the judicial authority to lay claim to his/her reasons.

As regards the second part of the agreement, it reflects the intention to improve the cooperation and the exchange among the participating Countries as much as possible, so that to monitor the implementation of the Agreement and the possible problematic aspects that may arise in the applicative phase. In this perspective, we can understand both the constitution of a Labour affaire Council (LAC), with tasks of periodic verification of the state of implementation of the agreement, of coordination among the parties stipulating the agreement, and the provision of a system (Capacity Building Mechanism) intended to promote and to strengthen the cooperation, to improve labour standards, to favour consultations and moments of meeting among the parties.

Should we have to draw some considerations on the extent of the agreement, we could not avoid saying that the part dedicated to labour is by all means included in the agreement for free exchange; basically, we are not dealing with a simple attachment, but a list of principles that are integrating part of the agreement. The attention towards the issues of labour has for this reason great autonomous importance, even though it must be put into relation with the needs of the market.

Second, the agreement intends to focus every effort on the instruments to guarantee the effectiveness of protections: this is the first time that such an issue emerges within a free exchange agreement, compared to the totality of the agreements so far stipulated. As it results, in fact, from the June 2005 ILO report, in the Countries of Central America and in the Dominican Republic, we cannot say that the provisions that acknowledge and promote the respect of *core labour standards* are absent. The problem arises, instead, concerning the actual application of the norms of protection of workers.

As a matter of fact, the first labour dispute under any free trade agreement (since 1993, no Country that has signed an FTA with the US has never been fined or had its trade privileges revoked, even when severe infringements of social rights have occurred) regards the CAFTA-DR.

#### 4.3. The MERCOSUR and the Social-laboural Declaration.

The Mercosur (Common Southern Market) has been instituted on 26<sup>th</sup> March 1991 with an act subscribed by Argentina, Brazil, Paraguay, Uruguay and later (2014) by Venezuela.

Venezuela's new membership was short-lived, however, since by the end of 2016 it had already been suspended by the four founding members of MERCOSUR. The official reason was Venezuela's failure to adjust its domestic legislation to existing MERCOSUR law. However, deep ideological differences and doubts about Venezuela's commitment to democracy and the protection of human rights seem to have been the real driving factors for the suspension. The other South American States have obtained the status of Associate Member (Chile in 1996, Bolivia in 1997,

Colombia, Ecuador and Venezuela in 2005, and Peru in 2006) and have concluded free trade agreements with MERCOSUR (Free Trade Areas). Bolivia's accession as a full member was signed in 2015 but still requires ratification at the time of writing (August 2018).

In the intentions of its founders, the Mercosur, as an instrument of economic cooperation among participating States, aspired to realize a system of free trade through the elimination of duties and restrictions to trade exchanges within the involved Countries; however, during the course of time, the original project has been widened to encompass also goals of coordination of macro-economic policies, the definition of a common trade policy and, most of all, a progressive juridical integration of the national orders of member States.

What interests us most is most of all the "Social-labour Declaration" elaborated in 1998 after a long and tormented process intended to the affirmation of a social and economic identity of the Mercosur and amended in 2015, by its own supervisory tripartite body – the Social and Labour Commission of the Mercosour – and, as a result, it was approved, as amended, in Brasilia, in June, 2015

The Declaration is a political act, so it lacks direct efficiency but, at the same time, it is to be considered a starting point for the development of a common and shared social policy within the Mercosur's member States. It undoubtedly represents the outcome of big compromises among the opposed interests that lied within the Mercosur, but we should not underestimate its extent and effects on national labour markets. In the Declaration, there is specific reference to the workers' fundamental rights stated in the 1998 ILO's Declaration and in the most important international Agreement on the matter<sup>1240</sup>. Therefore, within the Declaration, we find specific reference to the protection of the principle of non-discrimination (art.1), the protection of migrant and trans-border workers (art.4), the prohibition of minor labour (art. 6), the prohibition of forced labour, the protection of health and security in the workplace, the freedom of association and of collective bargaining, the prohibition of discrimination by reason of Union membership and the right to strike. Again, the Declaration states the commitment of the States towards the issues of employment, of professional training, of services of sustain to employment. The 2015 amendment also ratifies the provisions regarding the elimination of forced labour and includes regulation on protection against dismissal, on the prevention and elimination of child labour and the protection of young workers, as well as any individual rights which had not been previously considered, such as provision governing the length of a working day, leave and holidays, and the right to a minimum wage according to the national laws, which wage must be sufficient to meet the worker's needs and those of his/her family<sup>1241</sup>.

With reference to the instruments of implementation of the Declaration and of its principles, the parties have provided for the constitution of a specific *Comision Socio Laboral*, with mainly advisory functions, and therefore non-sanctionatory, composed of the representatives of governments, of Union organizations and of employers. Even though facing difficulties, the Commission has carried out an important role in order to implement the Declaration, by supporting the action of governments in the direction of an economic as well as social integration.

<sup>1240</sup> 1948 Universal Declaration of Human Rights, 1966 International Covenant on Political and Civil Rights, 1966 International Covenant on economic, social and cultural rights, 1988 American Convention on human rights and on economic, social, cultural rights.

<sup>1241</sup> Goldin A., *The MERCOSUR (Southern Common Market): Argentina, Brazil, Paraguay, Uruguay and Venezuela*, in Perulli A., Treu T. (eds), *Sustainable Development, Global Trade and Social Rights*, Kluwer International, 2018, pp. 41 ss.

#### 4.3.1. EU- Mercosur FTA.

The EU is negotiating a trade deal with the four founding Mercosur States - Argentina, Brazil Paraguay and Uruguay, as part of a broader Association Agreement between the two regions.

Negotiations started on 1999, but they stopped due to the Argentina's crisis on 2001 and were suspended until 2010, to restart after the protectionist policies started by Mr. President Trump and the apparently stop to the TTIP negotiations: the EU would like to find new ways to expand its market: The current negotiations cover issues that include tariffs, rules of origin, technical barriers to trade, sanitary and phytosanitary measures, services, government procurement, intellectual property, sustainable development and small- and medium-sized enterprises. The final text of the agreement is expected by the end of 2018, even if the last round of negotiations (the EU and Mercosur negotiating teams met in Montevideo, Uruguay, from 4<sup>th</sup> to 8<sup>th</sup> June 2018 for a round of negotiations) was not so fruitful.

The 34<sup>th</sup> negotiation round of the Trade Part of the EU-Mercosur Association Agreement took place from 9<sup>th</sup> to 17<sup>th</sup> July 2018 in Brussels.

The draft of the agreement text is still not available but we are able to find serious commitment by the EU in terms of the promotion of sustainable development and social rights. As a matter of fact, it is possible to observe from the EU's textual proposals, in line with the EU 2015 *Trade for All Strategy*, when the EU reasserted its ambition to “promote an ambitious and innovative sustainable development chapter in all trade and investment agreements”, vowing to achieve “far-reaching commitments on all core labour rights” and to ensure “high levels of occupational health and safety and decent working conditions in accordance with the ILO Decent Work Agenda”, even in the context of the Mercosur negotiations as the EU proposed to include a Sustainable Development Chapter<sup>1242</sup>.

In particular, the EU want to enhance the integration of sustainable development in the Parties' trade and investment relationship, notably by establishing principles and actions concerning labour and environmental aspects of sustainable development of specific relevance in a trade and investment context, recognizing the right of each Party to determine its sustainable development policies and priorities, to establish the levels of domestic environmental and labour protection. Moreover, Parties should not weaken the levels of protection afforded in domestic environmental or labour law in order to encourage trade or investment or derogate from them or, again, fail to enforce labour laws in order to encourage trade or investment.

Then, according to the proposed article dedicated to “Multilateral Labour Standards and Agreements”, “The Parties reaffirm their commitment to promote the development of international trade in a way that is conducive to decent work for all, including for women and young people” and each Party shall respect, promote and effectively implement the internationally recognised core labour standards, “in accordance with the ILO Constitution and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up”.

As for the ILO Core Conventions for example, all Countries have already ratified the ILO Core Conventions, a part from Brazil, which has yet to ratify the the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

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<sup>1242</sup> [http://trade.ec.europa.eu/doclib/docs/2017/april/tradoc\\_155481.pdf](http://trade.ec.europa.eu/doclib/docs/2017/april/tradoc_155481.pdf).

#### 4.4. The US Bilateral Free Trade Agreements.

If we examine the agreements stipulated by the USA following the experience of the NAFTA and of the NAALC, we can highlight significant progresses in the usage and in the formulation of social clauses. Our reference goes, among the others<sup>1243</sup>, to the following agreements: 2004 US-Chile, 2010 US-Jordan, 2009 United States-Peru Free Trade Agreement (PTPA), 2012 US-Korea, that, although being very specific, may be considered as virtuous examples of adaptation among economic and social goals, confirming the actual will of the participating Countries to seriously face the issue of the *linkage* between social rights and international trade.

We need to point out the positive innovations of these agreements: they integrate the norms on *fair labour practices* in the Treaty's *corpus* itself, without recurring to "parallel" agreements like in the case of the NAALC; the social *standards* of reference are specifically those of the ILO, where there is no longer a generic and ambiguous reference to the internationally recognized rights of workers; labour law therefore becomes the *domestic benchmark* in order to evaluate the efficiency of the internal labour regulation; the violation of social norms is compared to the violation of *fair trade practices* by utilizing the same procedural and sanctionatory mechanisms. The emblematic cases, like the one represented by the bilateral agreement *USA-Cambodia* in the textile sector (this agreement expired in 2004), prove the positive effect of the *linkage* in the development of *labour standards* (that is to say in the tendency to avoid the *labour standards'* deterioration) in the sectors covered by the Agreement. The project *Better Factories Cambodia* originally negotiated between the US and Cambodia, provides for a strict connection between the expansion of the Cambodian products in the American market and the improvement of social *standards*, with the presence of the ILO as an actor in monitoring through inspections and strict reports, as well as in the technical assistance to the Cambodian Government. The implementation of this model of hybridization between *hard* techniques (social clause) and *soft* techniques (technical assistance, cooperation) has matter-of-factly achieved a promotion of competitiveness founded on the increase of working conditions, that have determined an increase of productivity able in its turn to compensate the higher costs of manpower, with further benefits in macro-economic and political stability terms. After the expiration of the trade agreement in 2004, the Cambodian Government, together with unions and employers, requested that the ILO set up a sustainability strategy to turn *Better Factories Cambodia* into a self-financing local institution. The ILO teamed up with the IFC (International Finance Corporation (IFC), a member of the World Bank Group) to design and implement this strategy<sup>1244</sup>.

#### 5. The EU's approach to labour rights and social standards in the latest bilateral FTAs: TTIP, CETA and EPA.

In the last two decades, in line with the US FTAs we saw, labour provisions in EU bilateral and multilateral trade agreements have widened and deepened. Over 80 per cent of agreements that

<sup>1243</sup> The US has 20 Bilateral Trade Agreements in force today: Israel 1985 (The United States-Israel Free Trade Agreement was the first FTA entered into by the United States), Canada 1989, Singapore 2003, Australia 2004, Morocco 2004, Chile 2004, Bahrain 2006, Oman 2009, Peru 2009, Jordan 2010, Colombia 2012, Korea 2012, Panama 2012.

<sup>1244</sup> <https://betterwork.org/where-we-work/cambodia/>.

came into force since 2013 contain such provisions<sup>1245</sup>, in order to commit the parties to not lower their labour standards or derogate from labour law with a view to boosting competitiveness.

Social clauses have not only grown in number as to become a common trait of these trade agreements but have acquired great substantive and procedural complexity<sup>1246</sup>.

This instrument intends to correct abusive practice and offer the dual advantage of improving the lot of workers in the exporting Countries and protecting the industries of the importing Countries against unfair competition. The insertion of a social clause in a trade agreement is actually commonly justified for three different grounds: a) the necessity of protection of labour right; b) the prevention of the negative effects of the so well known race to the bottom of social rights competition in the international market; c) the long-term stimulation of economy profits: trade agreements boost trade between members of the agreement, irrespective of the existence of labour provisions<sup>1247</sup>. As regards this last point, as demonstrated by the ILO, a trade agreement which includes labour provisions actually increases the value of trade by 28 per cent on average, similar to 26 per cent for an agreement without labour provisions<sup>1248</sup>. This confirms the essentially economic nature of the social clause, which deals with the regulation of competition and the preservation of the comparative advantages at the same time<sup>1249</sup>, as it has been demonstrated that States with better social protection and higher wages would not be affected by the unfair competitions from States with low wages in the long term.

So said, the social clause deserves new attention, considering firstly, the European trend to conclude more and more multilateral free trade agreements, which clashes with the new protectionist policies from the US (and the UK); and secondly, as we will see, the tendency to include social clauses in FTAs as part of the Chapters generally dedicated to the Sustainable Development, with a progressive enhancement of the Sustainable Development model as a regulatory framework that can stabilize and institutionalize the link between social rights and free trade<sup>1250</sup>, as in the case of TTIP (Transatlantic Trade and Investment Partnership negotiated with the US), CETA (Comprehensive Economic and Trade Agreement) and EPA (EU-Japan Economic Partnership Agreement). While TTIP negotiations are stopped for the moment (see below), CETA and EPA are the two last most important FTAs recently negotiated by the European Union with, respectively Canada and Japan, both on the top 10 of the list of Countries of trade with Europe<sup>1251</sup>.

This new US protectionism could be considered as a paradox compared to the recent European

<sup>1245</sup> ILO, *Studies on Growth with Equity, Assessment of Labour Provisions in Trade and Investment Arrangements*, Report July 2016.

<sup>1246</sup> T. Treu, *Globalization and Human Rights: Social Clauses in Trade Agreements and in International Exchanges among Companies*, in A. Perulli, T. Treu (eds), *Sustainable Development, Global Trade and Social Rights*, Wolters Kluwer, 2018, p. 99.

<sup>1247</sup> Chen H., *Social Clause in Trade Agreements and China's Experience*, *Beijing Law Review*, 2015, 6, 1-8, p. 7.

<sup>1248</sup> ILO, *Studies on Growth with Equity, Assessment of labour provisions in trade and investment arrangements*, Report July 2016.

<sup>1249</sup> Perulli A., *Sustainable Development, Global Trade and Social Rights: an Evolutionary Perspective*, in A. Perulli, T. Treu (eds), *Sustainable Development, Global Trade and Social Rights*, Wolters Kluwer, 2018, p. 2.

<sup>1250</sup> See Perulli A., *Introduction*, in A. Perulli, T. Treu (eds), *Sustainable Development, Global Trade and Social Rights*, Wolters Kluwer, 2018, p. 2.

<sup>1251</sup> With regards to trade, Canada is the 10<sup>th</sup> country in the chart of total trade with EU, 11<sup>th</sup> for imports and 12<sup>th</sup> for exports, while Japan is the 6<sup>th</sup> country in the chart of total trade, 7<sup>th</sup> for imports and 6<sup>th</sup> for exports (Source: European Commission, *Client and Supplier Countries of the EU28 in Merchandise Trade (value %), 2017, excluding intra-EU Trade*).

boost to the FTAs negotiations<sup>1252</sup>.

Firstly, with Canada (CETA has provisionally entered into force on September 2017, but it will enter into force definitely and fully when all EU Member States parliaments have ratified the Agreement) and Japan (EPA, the EU-Japan Economic Partnership Agreement was finalized on December 2017). Europe is then negotiating trade agreements with other Countries and regions around the world: if we consider Asia, there are FTAs on the table of negotiations with some ASEAN Member States: Singapore and Malaysia (negotiations were launched in 2010) Vietnam (June 2012), Thailand (March 2013), Indonesia and Philippines (2016) and Myanmar/Burma (last negotiations were in April 2017). Then, as regards Oceania, the EU is negotiating by 2017 with Australia and New Zealand, while for Latin America with MERCOSUR (last round on March 2018), Mexico (the FTA's text will be finalized by the end of 2018) and Chile (last round of negotiations was on January 2018)<sup>1253</sup>.

Despite the opposite policies from the EU and from the US side, the EU is, together with the US, the biggest proponent of linking trade and labour provisions<sup>1254</sup>: the two giants of the opposite side of the Atlantic Ocean, even if with different tools and manners, have continued to include labour provisions in trade agreements, to reach a sort of social trade.

As a matter of fact, protectionism does not underlie the stronger social clause in trade agreements. If historically, social clause was considered an instrument put forward by industrialized Countries to raise tariff barriers blocking imports with competitive price advantages from developing Countries, thereby guaranteeing the market of the domestic companies<sup>1255</sup>, is it possible to observe an increasing relevance of labour standards on the States free trade agenda, since the mid-2000s. All agreements, negotiated by both protectionist and by liberalist Countries, contains a provision stating explicitly that labour standards shall not be used for protectionist trade purposes, and that the parties should not waive or derogate from their domestic labour law to attract trade or investment.

This is justified also by a new scope and use of FTAs and consequently, of the social clause: FTA, signed to reduce or eliminate trade tariff or other trade blocks to international trades, are now seen as a solution to the crisis and then negotiated and concluded, not only with developing Countries, but, on the contrary, between (or among) peer economies, as EU, Canada, US and Japan<sup>1256</sup>. The exam of the recent trade policy demonstrated that the inclusion of labour provisions in FTA's is more and more legitimized in terms of human rights and in terms of sustainable

<sup>1252</sup> European Commission, Overview of FTA and other Trade Negotiations, Updated May 2018.

<sup>1253</sup> In addition, there are some candidate countries for Free Trade Agreements with the EU (Turkey, Bosnia and Herzegovina, Serbia, Morocco and Tunisia) and other Trade Negotiations with Armenia, Azerbaijan, Belarus, Kyrgyzstan, Uzbekistan, China (investment), Services (TISA), Green Goods, Trade in Agri-Food and Fisheries Products with EEA/ EFTA countries, Association Agreements with Andorra, Monaco and San Marino.

<sup>1254</sup> Van Den Putte L., Orbie J., EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions, in *International Journal of Comparative Labour Law*, 31, n. 3 (2015), p. 263.

<sup>1255</sup> Servais, J. (1989), The Social Clause in Trade Agreements: Wishful Thinking or an Instrument of Social Progress, in *International Labour Review*, 128, 423.

<sup>1256</sup> Protectionism would disrupt production and increase costs and prices for consumers. European exports would become less competitive, putting even more jobs at risk 12. An increase in trade restrictions by 10 % is estimated to lead to a 4 % loss of national income 13. We would lose access to new products, services, technologies and ideas. By hitting the poorest hardest with price increases, protectionism would have the opposite of its desired effect. According to a recent study of 27 European and 13 other large

development, not to protect Countries from social dumping (not only) but to contribute, together, to a fair trade, promoting the integration of social provisions and trade liberalization<sup>1257</sup>, planning an axiological oriented global order<sup>1258</sup>.

EU's approach to labour rights and social standards in FTAs is relatively recent: in 1995 it adopted an approach involving both a withdrawal mechanism and an incentive mechanism for additional preferences, linking trade preferences and labour standards thanks to the Generalised Scheme of Preferences (GPS<sup>1259</sup>), which allows vulnerable developing Countries to pay fewer or no duties on exports to the EU, giving them vital access to the EU market and contributing to their growth. Over time, the approach has evolved and the levels of commitments have deepened and widened, although there remain important differences across agreements.

The content of the social provisions relates to social policy and labour rights or engage Countries in agreeing not to use social policies as protectionist trade measures. There are generally no enforcement mechanisms since most clauses are best endeavored in nature but nevertheless provide for an 'implementation' mechanism done through cooperation with its partner Countries and generally (but contrary to the GSP+<sup>1260</sup>) EU FTAs do not require the partner Countries to ratify ILO Conventions, although specific reference is made to the implementation of core labour standards. Besides an obligation to enforce labour laws, these provisions also require Countries not to reduce their levels of protection and encourage Countries to even raise their levels of protection, subject to a provision that this is not done for protectionist purposes. Labour issues are covered under the rubrics of 'social aspects', 'social matters', or, more recently, to that of 'sustainable development', as for the agreement with Japan.

In terms of implementation, contrary to the US approach, the EU adopts a more nuanced approach, with a preference for dialogue and capacity instead of the provisions of sanctions.

Let's then consider three of the most recent and important bilateral FTA's negotiated by the European Union: the TTIP, the CETA and the EPA and the EU social approach to those treaties.

### 5.1. The social clause in the US-EU Trans-Atlantic Trade and Investment Partnership (TTIP).

The negotiations between the United States and the European Union, in order to stipulate a Transatlantic trade partnership (TTIP) of total liberalization of trade and investments between the

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countries, the real income loss from closing off trade would be 63 % for the poorest households and 28 % for the richest, because the poor spend a higher share of their income on consumption (Fajgelbaum, P. D. and Khandelwal, A. K., 'Measuring the unequal gains from trade', *Quarterly Journal of Economics*, 2016).

<sup>1257</sup> A. Perulli, *Fundamental Social Rights, Market Regulation and EU External Action*, *International Journal of Comparative Labour Law and Industrial Relation*, 27, 41, 2014.

<sup>1258</sup> T. Novitz, *Core Labour Standards Conditionality: A Means by which to Achieve Sustainable Development?* In J. Faundez, C. Tan (eds), *International Economic Law, Globalization and Developing Countries*, Edward Elgar, 2010, pp. 234 et seq.

<sup>1259</sup> The Community GSP scheme was actually introduced on 1 July 1971, applying the principles laid down in the UNCTAD generalized system of preferences, which differ from the standard GATT rules and the most-favoured-nation clause, and were authorized by GATT by means of a formal derogation decision, commonly known as the "enabling clause", which was first adopted on 25 June 1971 and renewed on 28 November 1979. The Community GSP scheme has, since its introduction, been regularly renewed, with a comprehensive review taking place every 10 years. The first such revision was implemented on 1 January 1981, and was followed by a more limited mid-term exercise on 1 January 1986. The 10-year revision scheduled for 1 January 1991 was postponed each year until 1 January 1995, when a new scheme, with a link between social provisions and trade, entered into force.

<sup>1260</sup> See further.

USA and the EU, are currently stopped, due to the change of international trade policies<sup>1261</sup>.

The US is the main partner of EU trade, the second Country for imports (after China<sup>1262</sup>) and the first for exports<sup>1263</sup>. For this reason, those Countries started, on 2013, negotiations for a TTIP, a *Transatlantic Trade and Investment Partnership*, in order to revise standards, to evaluate compliance and to promote regulatory cooperation in order to maintain high international standards and enhance normative compatibility in the various economic and productive sectors<sup>1264</sup>.

Despite the success of the various rounds of negotiation, the change of US Presidency, on the starting of 2017, marks definitely a change of course on American trade policies.

First, with the stop to negotiations of the TTIP<sup>1265</sup> (and, more generally, of all the FTAs decided by Obama) and more recently, with the war on duties started by the US against EU: at the starting of June 2018, the Trump administration is putting steel and aluminum tariffs on U.S. allies European Union<sup>1266</sup> (as Canada and Mexico), and the EU has imposed countermeasures in response to the US actions, endorsing the decision to impose additional duties on the full list of US products notified to the World Trade Organisation (WTO).

Despite the stop to the TTIP, the analysis of the treaty deserves our attention as the TTIP represent a historic step towards the creation of a global market ruled by free trade principles. The FTA, once (and if) signed, will give way to a “normalization” of the regulative standards and promote commercial interchange and investments between the two most important economic areas in the world.

Even if its conclusion is uncertain at the moment, this treaty deserves a reflection as regards the approach and the method used by the two Parties during the negotiations, and in particular by the EU, as it represents a recent and concrete example of the building of a social right chapter in the ambit of a trade and investment treaty.

Under a strictly normative profile, TTIP aims to the revision of the standards and evaluations of compliance, enhancing the regulatory cooperation, in order to reach high international standards and to increase the normative compatibility within the various economic and productive sectors. The impact of this agreement in social and work-related terms might be remarkable for both continents. Under the influence of the liberalization of exchanges, it is believed that the TTIP may create hundreds thousand of new jobs, increase salaries and stimulate workers' mobility towards expanding productive sectors. In view of these optimistic economic growth perspectives, the TTIP raises a series of social concerns linked to the possible (de)regulative competition on fundamental

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<sup>1261</sup> TTIP's future is uncertain because the last round of negotiations dates back to October 2016 and are currently on hold following the change of US Administration.

<sup>1262</sup> Negotiations of a comprehensive EU-China investment agreement were formally launched at the EU-China Summit of 21 November 2013 in Beijing. The aim of this agreement is to remove market access barriers to investment and provide a high level of protection to investors and investments in EU and China markets. It will replace the 26 existing Bilateral Investment Treaties between 27 individual EU Member States and China by one single comprehensive investment Agreement.

In 2016 the EU and China negotiators reached clear conclusions on an ambitious and comprehensive scope for the EU-China investment agreement and established a joint negotiating text. The 17th round of negotiations took place in Beijing in May 2018.

<sup>1263</sup> European Commission, Client and Supplier Countries of the EU28 in Merchandise Trade (value %), 2017, excluding intra-EU Trade.

<sup>1264</sup> Perulli A., Sustainability, Social Rights and International Trade: The TTIP, in *The International Journal of Comparative Labour Law and Industrial Relations* 31, no. 4 (2015), p. 473.

<sup>1265</sup> Negotiations are suspended with no chance to continue for the time being.

<sup>1266</sup> Those entities had been exempted from the 25 percent tariffs on steel imports and 10 percent tariffs on aluminum imports.

labour norms, that such a liberalization may be able to enact. The increasingly global processes of liberalization of exchanges and investments have produced alarming phenomena of social dumping, so far. They are closely linked to a pronounced increase of social inequalities, as a vast empirical literature shows, estimating the incidence of commercial exchanging, of capital transfer and migratory pressure on the increase of inequalities on salaries and on the emersion of new poverty areas in advanced Countries.

Those worries were augmented due to the initial provision of the ISDS (*Investor-To-State Dispute Settlement*) in the Treaty.

Scholars are debating on the effects of the TTIP, asking whether the TTIP, if concluded, will be the liberalistic instrument using commerce as a Troy Horse in order to dismantle the social protection, and to extend the deregulation, or if it will represent an occasion to re-launch the linkage between liberalization of exchanges and social rights, within a value line having its cultural and historical roots in the ILO Constitution<sup>1267</sup>.

Regarding this matter, some crucial questions for labour law are arising at all levels of normative production (national, supra-national, international), as for each FTA signed: what will be the repercussions of such agreement on the system of national industrial relations of member States? What will be the impact on European workers' social rights? What will be the measures to be previously adopted to protect European (and national) social standards, in view of the entrepreneurial competition and the manpower of the USA? In order to answer these regulatory challenges, the TTIP negotiators will have to overcome the ambivalences that, most of all on the part of the USA, are traditionally connected to the relation between "free trade" and "labour"<sup>1268</sup>, in order to conjugate the trade agenda with the new issues of value deriving from the de-nationalization of labour law, in the perspective – promoted by the European counterpart – of sustainable development.

We are dealing with needs that include different but convergent *ratios*, that refer both to the planning and the institution of an axiologically-oriented international order, able to correct the globalization's undesired social consequences, and to regulate the phenomena of the distortion of competition that obstructs the optimal allocation of resources.

This is why the TTIP should conceive a new model of "social clause" to be inserted within the TTIP's *corpus*, developing a confrontation among the experiences of commercial integration already present in the global market, not only in the field of similar processes of exchanges liberalization (NAFTA, *Free Trade Agreement*), but also in the field of unilateral Trade policies linked to the promotion of social rights, (see below about the Generalized System of Preferences (GSP) adopted by the USA and the EU).

#### 5.1.1. The TTIP and Sustainable Development.

The TTIP negotiators decided to dedicate a chapter on *Sustainable Development and Trade (TSD Chapter)*, conceived not as an external or accidental element of the agreement, but, on the con-

<sup>1267</sup> Cfr. Perulli A., *Sustainability, Social Rights and International Trade: The TTIP*, in *IJCLLIR*, 2015, vol. 32, pp. 473-49.

<sup>1268</sup> For historical reference, see ETHAN B. KAPSTEIN, *Sharing the Wealth. Workers and the World Economy*, trad. it. *Governare la ricchezza. Il lavoro nell'economia globale*, Carocci editore, 2000.

trary, to “involve all the areas of the negotiated agreement”. The aims of sustainable development was declared from the beginning of negotiations, starting from the *Directive of negotiation on transatlantic Partnership for exchanges and investments between EU and USA* (17<sup>th</sup> June 2013). These Directives stated that the TTIP’s preamble must take into account that “the partnership with USA is based on principles and common values that must be coherent with the principles and the aims of the external action of the Union”, and contain also: 1. shared values as human rights, fundamental freedom, democracy and state of law; 2. the responsibility of the parties in favour of sustainable development and the contribution to international trade to sustainable development as regarding its social, environmental and economic aspects, economic development, full, productive and decorous employment, as well as the protection and conservation of environment and natural resources; 3. The right of the parties to undertake the measures intended to realize legitimate objectives of public policy on the basis of the level of health, safety, workers, consumers and environment protection, as well as the promotion of diversity of cultural expressions.

There are some precedents in the adoption of external relationships in the EU, having as an aim sustainable development, as it has been for the CETA (Canada and European Union FTA) and are certainly useful to formulate the TDS chapter within the TTIP. As a matter of fact, the EU has long since adopted a regulation model intended to combine trade liberalization and respect of social rights through the Generalized System of Preferences (GSP)<sup>1269</sup>, the preferential and non-mutual treatment granted to developing Countries in the field of trade exchanges, notwithstanding the GATT normative<sup>1270</sup> (see further).

The TTIP analysis is useful for our reflections on the protection of social rights in the ambit of free trade as the main points of the Chapter on Sustainability (which will probably called “Trade and Sustainable Development Chapter”) should be the following:

a) *Provision for a mechanisms of Sustainability Impact Assessment (SIA) of TTIP in social matters.*

The Sustainability Impact Assessment (SIA) is a DG Trade-specific tool for supporting major trade negotiations which provide the Commission with an in-depth analysis of the potential economic, social, human rights, and environmental impacts of ongoing trade negotiations. In the field of the 2020 strategy, the EU has provided for all trade initiatives, the activation of economic, social and environmental impact assessments, with “specific attention to wide consultations and the involvement of the society in the sustainability impact assessment that will be implemented in the course of the trade negotiations”<sup>1271</sup>. This impact assessments can therefore legitimately be included within the social aims of TTIP, largely contributing to re-balance the confrontation between social rights and economic freedoms. The *Counsel Negotiation Directives* are then laid in this perspective, providing for a SIA, aimed to verify the TTIP’s impact on a social, economic and

<sup>1269</sup> F. PANTANO, R. SALOMONE, *Trade and Labour within the European Union Generalized System of Preferences*, Jean Monnet WPS, New York University School of Law, 2008.

<sup>1270</sup> See T.M. FRANCK, *Fairness in International Law and Institution*, Oxford, 1995, p. 58.; L. BARTELS, C. HABERLI, *Binding Tariff Preferences For Developing Countries Under Article II GATT*, in *Journal of International Economic Law*.

<sup>1271</sup> Communication of the Commission to the European Parliament, to the Counsel, to the Social and Economic European Committee and to the Region Committee, “Trade, Growth and World business. Trade Policy as an essential component of 2020 EU Strategy”. COM (2010) 612 def.

environmental basis, during the course of the negotiation to which the society and all the components specified in the agreement will participate (point 33).

The assessment of the TTIP's social consequences should disregard the terms of drawing up of the agreement, and represent a permanent mechanism able to supply *ex ante* and *ex post* indications on the effects of the Chapter on Sustainable development, providing *follow up* sessions able to indicate the measures to be adopted in order to guarantee the expected results<sup>1272</sup>. Besides, this monitoring impact assessment activity should combine with additional *review* and *follow up* mechanisms, to be considered in the agreement. They should include mutual learning and circulation of good procedures, to be adopted on the basis of shared guidelines, in the field of an open coordination mechanism, on the basis of the EU (MAC) directives to coordinate the labour policies of member States<sup>1273</sup>.

In March 2017, the European Commission published its position paper on the Sustainability Impact Assessment in support of negotiations of the TTIP<sup>1274</sup>, where it is stated that from the perspective of potential impact on social human rights if the projected economic and social results can be obtained with full respect for social and economic human rights TTIP is not expected to have a negative effect on social and economic human rights in the long run – as long as labour and social rights and levels of social protection are upheld or increased. In the short-run labour displacement could put pressure on the human right to an adequate living as workers move from one sector to the other. However, the wage data suggest that most mobility will be a consequence of workers being drawn into growing sectors that offer higher wages, as opposed to being made redundant against their will.

With regards to the ratification of the ILO Core Labour Conventions (the EU has ratified all eight ILO Fundamental Labour Conventions, while the US ratified only two), the SIA clarifies that there will clearly be little impact on the EU, but for the US there are major roadblocks in terms of US law and practice that will impede ratification of these ILO conventions within the context of the TTIP negotiation. TTIP is unlikely to lead to the signing of any other ILO Fundamental Conventions (other than Convention 111, which has already been presented to Congress) as ratification by the Senate, requiring a two-thirds majority, is improbable. The EU proposal for the Sustainable Development chapter includes sustainable commitments on labour standards that are comparable to the ILO's core conventions, as well as very high standards in other areas. These will become legally binding when TTIP enters into force.

b) *Provision for a mechanism of permanent monitoring on the social effects of the agreement.*

Further, the TTIP should contemplate an adequate implementation mechanism of the agreement, aimed to monitor its effectiveness and the fulfillment of the duties deriving from it, with particular reference to provisions of *compliance* with international obligations (ILO's Declaration

<sup>1272</sup> Also according to K. LUKAS e A. STEINKELLNER, *Social Standards in Sustainability Chapters of Bilateral Free Trade Agreements*, p. 11, "A continuous repeated review of the impact of the agreements is also required".

<sup>1273</sup> In this perspective see also T. TREU, *Labour and Industrial Relations in the transatlantic Free Trade Agriments guidelines*, Speech at 21<sup>st</sup> Nov 2013 meeting at Italian Cultural Institute in New York.

<sup>1274</sup> European Commission, European Commission services' position paper on the sustainability impact assessment in support of negotiations of the Transatlantic Trade & Investment Partnership between the European Union and the United States of America 31 March 2017. <http://www.trade-sia.com/ttip/wp-content/uploads/sites/6/2017/03/TSIA-TTIP-Final-Report-03-17.pdf>.

on fundamental social rights). In this perspective, the agreement should contemplate the constitution of an independent *committee of experts*, with an ILO member with consultative function and having the following roles: a) editing of periodic reports on the state of effectiveness of social standards, to be compiled taking into consideration the information transmitted by governments and other institutions; b) gathering and assessing any *complaint*, editing recommendations, promoting consultative forums to exchange information among governments, social parties and other *stakeholders* (on NAALC model); c) with reference to the latter, the transatlantic communication should be duly institutionalized through the creation of a *Forum for Trade Investment and Sustainable Development*, which should regularly represent the location where the social matters linked to the TTIP should be publicly discussed. We need to observe, on the USA side, that an interest in monitoring related to promoting effectiveness profiles of the commitments undertaken in the trade field, is at the basis of USA's foreign policies in *trade and investments*.

### c) *Social Clause*

Although the agreement in matter of labour may be conceived in wider and more ambitious terms than a mere “social clause”, and it may by all means provide for *soft* mechanisms of spreading of good praxis among the parties, my opinion is that the TTIP should contain also an actual *social conditionality clause*, to be implemented in the field of the mechanisms of enforcement of the agreement and, in particular, to be appealed before a *dispute settlement body*, on the model of WTO<sup>1275</sup> and of what provided by the FTAs. An authoritative indication about the above mentioned topic, relative to the adoption of a real social clause, with the contemplation of any possible trade sanctions, can be found on the *Counsel Negotiation Directives*, where it is indicated that “*the agreement must include a clause on general exceptions, inspired by art. 20 and 21 of the GATT*” (art. 12).

As we have already mentioned, thanks to art. XX of the GATT, which deals with a dispensation regime named “general exceptions”, a reserve of domestic jurisdiction in favour of the single Countries is adopted. They are authorized to prepose some national politic interests to the obligations deriving from trade liberalization agreements. In particular, the norm allows the parties to adopt restrictive measures concerning exchanges that are justified by considerations relative to the protection of *public moral, of life and health* of people, animal and plants, to the respect of laws and internal regulations, to the defence of environment and natural resources, to the protection of the artistic heritage, and of the consumer, for reasons connected to the trading of *commodities produced in jail*. Therefore, thanks to the art. XX of the GATT, States are authorized to adopt restrictive measures of international trade (restrictions to exportations: embargo, or to importations: boycott) in order to protect their markets from the introduction in the internal market of products realized with low-cost workforce<sup>1276</sup>. Indeed, the reference contained in the *negotiation Directives* to the necessity of contemplating in the TTIP a clause on “general exceptions” inspired to art. XX of the GATT can represent an important occasion of reflection for negotiators, in the editing of a series of general exceptions linked to the respect of the commitments undertaken in the chapter dedicated to labour and sustainability: they should recognize to the

<sup>1275</sup> See E.-U. PETERSMANN, *The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization*, in *European Journal of International Law*, Vol. 6, No. 2, 1995, p. 207 The literature on this issue is extremely huge.

<sup>1276</sup> Cfr. *Wto Appellate Body «Japan-Taxes on Alcoholic Beverages»*, report 4<sup>th</sup> October 1996, Dor. *WI/OS8/ABIR*, e «*Canada-Certain Measures Concerning periodicals*», Doc. *WI/OS31/ABIR*.

parties the faculty of taking the appropriate trade measures against the violation of fundamental social rights and social *dumping*.

## 5.2. Labour Provisions on CETA: the “Trade and Labour” Chapter.

The importance of the CETA is linked both to the central position of transatlantic trade and to the historic relations also in social traditions between the two areas<sup>1277</sup>.

In the CETA, as all the other recent FTAs, the Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their labour law and standards and they shall waive or derogate from its labour law and standards, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory, or, again, shall not fail to effectively enforce its labour law and standards to encourage trade or investment<sup>1278</sup>.

As we can see, the Parties use, as it is for most of the FTAs recently concluded, an aspirational language, and, despite the commitment to keep the levels of protections for workers, it remains the problem to find the proof to show a link between the lowering of domestic labour standards and the intention to encourage trade or investment.

What is new, is the position of these provisions in the text, which suggests, as we will see, a new function of this tool in the context of free trade.

As a matter of fact, those social clauses are inserted in Chapter 23, dedicated to “Trade and Labour”. We should observe that the previous Chapter (22), is entitled “Trade and Sustainable Development”, while the Chapter 24 “Trade and Environment”.

Since 2008, the EU’s FTAs have included ‘sustainable development’ chapters: the first agreement was the EU-CARIFORUM Economic Partnership Agreement with the Caribbean Forum<sup>1279</sup>, which contains numerous provisions relating to aspects of sustainability and human rights.

Partly inspired by US and Canadian FTAs, these three chapters contain obligations requiring signatory Parties to comply with labour and environmental standards (including ILO core labour standards), and, conversely, not to use labour and environmental regulation as a means of economic protection. It is worth to note that while the EU tends to combine these issues under one single sustainable chapter, the US and Canada deal with labour and environment issues in two separate chapters in their FTAs. As a result, the EU-Canada FTA contains three chapters to cover these issues: one on labour, one on the environment, and one on sustainability.

The intention of EU and Canada is to recognize that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development and reaffirm their commitment to promoting the development of international trade in such a way as to contribute to the objective of sustainable development, for the welfare of present and future generations<sup>1280</sup>.

<sup>1277</sup> T. Treu, Globalization and Human Rights: Social Clauses in Trade Agreements and in International Exchanges among Companies, in A. Perulli, T. Treu (eds), *Sustainable Development, Global Trade and Social Rights*, Wolters Kluwer, 2018, p. 109.

<sup>1278</sup> Article 23.4 CETA, Upholding levels of protection.

<sup>1279</sup> Schmiege E., Human Rights and Sustainability in Free Trade Agreements. Can the Carifourm-EU Economic Partnership Agreement Serve as a Model? In German Institute for International and Security Affairs, SWP Comments n. 24, May 2014.

<sup>1280</sup> Art. 22.1, par. 1, CETA.

Consequently, the implementation of Chapters Twenty-Three (Trade and Labour) and Twenty-Four (Trade and Environment), the Parties aim to: (a) promote sustainable development through the enhanced coordination and integration of their respective labour, environmental and trade policies and measures; (b) promote dialogue and cooperation between the Parties with a view to developing their trade and economic relations in a manner that supports their respective labour and environmental protection measures and standards, and to upholding their environmental and labour protection objectives in a context of trade relations that are free, open and transparent; (c) enhance enforcement of their respective labour and environmental law and respect for labour and environmental international agreements; (d) promote the full use of instruments, such as impact assessment and stakeholder consultations, in the regulation of trade, labour and environmental issues and encourage businesses, civil society organisations and citizens to develop and implement practices that contribute to the achievement of sustainable development goals; and e) promote public consultation and participation in the discussion of sustainable development issues that arise under this Agreement and in the development of relevant law and policies (art. 22.1, par. 3, CETA).

It is easy to observe that Labour and Environment are treated and considered of the same value, as it is suggested by the same concept of Sustainable Development the three dimensions (also called “pillars”) of Sustainable Development, (social, environmental and economic one) are of the same importance and mutually reinforcing<sup>1281</sup>, and it is assumed that Sustainable development is only possible if all these pillars are taken account of.

#### 5.2.1. CETA and ILO provisions.

The CETA labour chapter “Trade and Labour”, contain also some obligations dealing with the ILO but, differently from the past FTAs, they do not refer directly to the ILO’s Fundamental Conventions. Rather, reference is made to the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998), to the ILO Declaration on Social Justice for a Fair Globalisation (2008) and to the ILO Decent Work Agenda.

The commitment is to respect (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation but also (a) health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness; (b) establishment of acceptable minimum employment standards for wage earners, including those not covered by a collective agreement; and, (c) non-discrimination in respect of working conditions, including for migrant workers (art. 23.3, par. 4) but there is no special and direct reference to the ILO Conventions.

Despite the lack of reference or mention to the ILO Core Convention, each party reaffirms its commitment to effectively implement in its law and practices in its whole territory the fundamental ILO Conventions that Canada and the Member States of the European Union have ratified respectively and the Parties “shall make continued and sustained efforts to ratify the fundamental ILO Conventions if they have not yet done so”.

<sup>1281</sup> Treu T., *Labour Law and Sustainable Development*, WP CSDLE “Massimo D’Antona”.INT-130/2016; Cagnin V., *Diritto del Lavoro e Sviluppo Sostenibile*, Cedam Wolters Kluwer, Milano, 2018.

### 5.2.2. CETA and Monitoring of Implementation.

In line with the soft European approach in terms of sanctions, the EU and Canada did not insert in the agreement a special mechanism for sanctions in case that labour commitments are not respected. The Parties decided to foresee a special Committee, the *Committee on Trade and Sustainable Development*, which shall oversee the implementation of those Chapters and can also carry out its duties through dedicated sessions comprising participants responsible for any matter covered by the Chapter on Trade and Labour (as well as for that on Trade and Environment). Any decision or report of this Committee shall be made public and the Committee shall present updates on the implementation of the Chapter to the Civil Society Forum.

This Forum is composed of representatives of civil society organizations established in their territories and shall be convened once a year unless otherwise agreed by the Parties. The Parties shall promote a balanced representation of relevant interests, including independent representative employers, unions, labour and business organisations and environmental groups (art. 22.5 CETA).

In particular, with the involvement of trade unions, through the Civil Society Forum, social clauses can become in this way a mean to spread practices of transnational collective bargaining at a regional level, promoting the social dialogue between European and Canadian social partners. At the same time, this Forum could be the way to overcome the aspirational language used (i.e. parties “shall not derogate...”) and would facilitate the court or the inspectorate’s intervention in labour disputes, reinforcing thus the effectiveness of these social provisions, which lack, of a specific sanctions mechanism.

As a matter of fact, social dialogue is recognized as an important issue: they also recognise the importance of social dialogue on labour matters among workers and employers, and their respective organisations, and governments, and commit to the promotion of such dialogue (Art. 23.1 CETA). In this perspective, the Social Clause could be considered as a tool to improve international social dialogue, as the parties of a FTA recognise the importance of social dialogue on labour matters among workers and employers, and their respective organisations, and governments, and commit to the promotion of such dialogue.

### 5.3. Labour Provision on EPA: the “Trade and Sustainable Development” Chapter.

EU-Japan Economic Partnership Agreement (EPA)<sup>1282</sup> is the biggest bilateral trade agreement ever negotiated by the European Union: EU firms already export over €58bn in goods and €28bn in services to Japan every year.

The EU-Japan economic partnership agreement comes at a time of US President Donald Trump’s erratic trade policy. This trade agreement with a strategic ally can send a strong message in favour of an open and rules-based trade order. In addition, it gives the EU trade agenda a strong opportunity to take the lead in the Asia-Pacific region. The Economic Partnership Agreement will open huge market opportunities for both sides, strengthen cooperation between Europe and Japan in

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<sup>1282</sup> The EU-Japan Economic Partnership Agreement was submitted for the approval of EU Member States on 18 april 2018. Once approved by the Council, the agreement will be sent to the European Parliament. The text of the Agreement is available here: [http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc\\_156423.pdf](http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156423.pdf).

a range of areas, reaffirm their shared commitment to sustainable development, and include for the first time a specific commitment to the Paris climate agreement.

All the labour clauses (or provisions) are inserted in Chapter 15 “Trade and Sustainable Development”, thus following the EU’s approach.

This chapter is in line with the level of ambition of the chapters concluded in others recent EU FTAs. Notably, at the starting of the Chapter, EU and Japan recognise that its purpose is to strengthen the trade relations and cooperation between the Parties in ways that promote sustainable development and they clarify, first of all, that the agreement “is not to harmonise the environment or labour standards of the Parties” (Art. 16.1, par. 2, EPA).

Then, the Chapter provides for commitments like the prohibition of relaxing domestic labour laws to attract trade and investment (“The Parties shall not encourage trade or investment by relaxing or lowering the level of protection provided by their respective environmental or labour laws and regulations. To that effect, the Parties shall not waive or otherwise derogate from those laws and regulations or fail to effectively enforce them through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties”, art.16.2, par. 2), nor for discrimination or restrictions to trade’s purpose: (“The Parties shall not use their respective environmental or labour laws and regulations in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Party, or a disguised restriction on international trade”, art. 16.2, par. 3).

### 5.3.1 EPA and ILO provisions

EPA refers to the commitment to the key international instruments on labour, such as the effective implementation of the 4 groups of ILO core labour standards as covered by the 1998 ILO Declaration on Fundamental principles and Rights at Work, a continued and sustained progress towards ratification of non-ratified fundamental ILO Conventions (art. 16.3, International labour standards and conventions).

Thus, in this case, the ratification of the ILO Convention has not been a condition, a prerequisite for the negotiations of a bilateral trade agreement with the EU.

### 5.3.2. EPA and Monitoring of Implementation.

The Agreement, as CETA did, constitutes a Committee on Trade and Sustainable Development (art. 16.13), which shall be responsible for the effective implementation and operation of this Chapter, (a) reviewing and monitoring the implementation and operation of the Chapter and, when necessary, making appropriate recommendations to the Joint Committee (representatives of both Parties) for its consideration, (c) interacting with civil society (independent economic, social and environmental stakeholders, including employers’ and workers’ organisations and environmental groups) on its implementation and (e) seeking solutions to resolve differences between the Parties as to the interpretation or application of this Chapter.

The EPA provides to include mechanisms for the involvement of civil society in the implementation of the chapter, both domestically (consultation of “domestic advisory groups<sup>1283</sup>”) and jointly (“joint dialogue with civil society”, which means independent economic, social and environmental

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<sup>1283</sup> Also foreseen on CETA, art. 24.13.

stakeholders, including employers' and workers' organisations and environmental groups); and a tailored mechanism for the resolution of disputes, including governmental consultations and recourse to an independent panel of experts<sup>1284</sup>.

## 6. The Generalized Preferences System: the EU experience as an exemplar model of positive linkage between international trade and social rights.

After this reconstruction of the framework of social provisions in the latest FTAs, we can observe that it is difficult to see a real enforcement mechanism in order to oblige parties to respect all the important commitments taken in terms of social rights. If it is true that, both for CETA and EPA (as for the TTIP), labour provisions have widened and deepened compared to the past, but we need to observe that they are mostly cooperative and non-binding provisions.

FTAs use an aspirational language, and for this reason labour provisions risk to lack of an effective remedy to labour violations or of a valid deterrent. This is, unfortunately, in line with the EU traditional policies.

As a matter of fact, the only agreement where economic and clear sanctions are imposed, is the EU Generalised System of Preferences (GSP), an exemplar model of positive linkage between international trade and social rights in the European external action<sup>1285</sup>: in this context, any of the GSP Industrialized Countries, on request by the UN, have granted a preferential and non-reciprocal treatment to developing Countries in matter of trade exchanges. Such scheme, (GSP), by granting a facilitated access in the European Market to commodities coming from weak territories, represents a mechanism of distributive justice in the system of international trade with a general extent. The EEC has matter-of-factly granted since 1971, notwithstanding the GATT-WTO normative that provided for a unique system of preferences, some generalized tariff preference for industrial finished and semi-finished commodities coming from developing Countries, authorizing a more advantageous customs treatment compared to the one normally practiced, and consisting in the total or partial elimination of import duties.

Twenty years after the concession of the above-mentioned measure, the Council, being aware of the positive results achieved in the course of time, has adopted the Reg. 3281/1994. In the new regulation, the need to co-relate international trade with the respect of fundamental social rights overwhelmingly emerges and, in this sense, the tariff-related instrument shows great potentialities. On the same line are the following regulations<sup>1286</sup>.

Initially, there were two types of measures provided by the 1994 Regulation.

First of all, the advantages are to be temporarily, totally or partially cancelled in case the Country involved resorts to forced labour, in accordance with the ILO's Conventions on the matter<sup>1287</sup>, as well as in case of exportation of commodities produced in jail. The temporary cancellation is not automatic, but it will be active after a procedure that may be activated through a report of the violation to the Commission.

<sup>1284</sup> European Commission, EU-Japan EPA – The Agreement in Principle, 6 July 2017 - report submitted to Member States and to the European Parliament, available at: [http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc\\_155693.doc.pdf](http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155693.doc.pdf)

<sup>1285</sup> Perulli A., *Clausola Sociale*, Enciclopedia del Diritto, Giuffr , 2014, vol. VII, pp. 187-211.

<sup>1286</sup> Reg. n. 1154/1998, Reg. n. 2810/1998, Reg. n. 2501/2001, Reg. n. 980/2005, Reg. n. 732/2008, Reg. n. 1063/2010, Reg. n. 978/2012.

<sup>1287</sup> 1930 Convention n. 29 on forced and mandatory labour; 1957 Convention n.105 on the abolition of forced labour.

If, in this case, we are dealing with a negative sanction, the second measure provided by the Regulation is, on the contrary, a promotional sanction, which consists in the concession of a special “regime of stimulation”, whose aim is to promote the addressee Countries in the adoption of more advanced social policies.

Starting from 1<sup>st</sup> January 1998, following the Reg. n. 1154/98, some additional preferences was granted (equal to an *extra* 20%) to those Countries already admitted to the GSP, which prove to have adopted – and actually implemented – the eight fundamental Conventions of the ILO

Even though the GSP is unilaterally adopted by the EU, it is important to underline that the Council grants the potential extra-measures on the basis of criteria that must be acknowledged and shared at international level, as well as by reason of a report of the Commission that keeps into account the results of the surveys carried out by the ILO, the WTO and the OECD.

In this way, we have the promotion of an unprecedented mechanism of control based on the cooperation among several international organizations, which could be considered as the potential backbone of a system of promotion of any hypothesis of future insertion of social clauses in trade treaties. Given the specific reference to the ILO’s Conventions, the European System results as particularly virtuous and inclined towards an international trade policy complying with fundamental social rights.

The following Regulation (EC) n. 732/2008 of the Council<sup>1288</sup> has then simplified the special regime of subsidization, by substituting the three previous regimes with the current two: the special regime in favour of developing Countries and the special subsidization regime of “sustainable development and good governance”, acknowledged only to the Countries that have “ratified and effectively applied” the Conventions referring to the attachment III (among which we have the 8 ILO’s fundamental Conventions) and that commit themselves to “maintain the ratification of the Conventions and of the relative laws/measures of implementation and to accept periodical assessments and re-examinations of the application, complying with the provisions of implementation of the ratified Conventions”.

Actually, Regulation n. 978/2012<sup>1289</sup> provides for a general regime, and two special regimes, that is to say the special regime of subsidization for sustainable development and *good governance* and the one in favour of less developed Countries.

The first special regime (GSP+) is an agreement of particular subsidizations for sustainable development and good governance that recognizes total exemption from customs tariffs for commodities entering the EU’s market for Countries that have ratified and implemented a series of Conventions of the ILO and the UN in matter of labour and human rights, and in matter of environment and of *good governance*, and that accept a constant monitoring.

The second special regime, which provides for the cancellation of customs tariffs, is called EBA,

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<sup>1288</sup> Regulation (EC) n. 732/2008 of the 22<sup>nd</sup> July 2008 Council, relative to the application

<sup>1289</sup> EU Regulation n. 978/2012 of European Parliament and of 25<sup>th</sup> October 2012 Council, relative to the application of a system of generalized tariff preferences and that abrogates the EC Regulation 732/2008 of Council. The Regulation 732/2008 provided for a scheme of generalized tariff preferences for the period from 1<sup>st</sup> January 2009 to 31<sup>st</sup> December 2011, extended to 31<sup>st</sup> December 2013 by the GSP *Roll-over Regulation*, Regulation n. 512/2011. The new Regulation is active from 1<sup>st</sup> January 2014.

which stands for *Everything But Arms*: such program, reserved to less developed Countries, guarantees the total cancellation of customs tariffs for all products coming from such Countries, except for weapons.

With this new Regulation we see the concentration of tariff preferences “on the support to developing Countries more in need in the field of development, trade and finance”<sup>1290</sup>. The goal is to strengthen the subsidizations for the respect of fundamental human and labour rights, the environment and good governance norms through the GSP system, increasing its predictability, transparency and stability: in this sense, the length of the programme is increased from 3 to 10 years, with the exception of the EBA, which has no deadline.

## 7. The US Preference Programs.

The USA adopt different agreements in order to support third Countries, especially developing Countries, allowing a preferential access to the USA's market.

One of the most relevant preferential programmes is the GSP (Generalized System of Preferences) instituted by the 1974 *Trade Act* to promote economic growth in the developing Countries and was implemented on January 1, 1976<sup>1291</sup>, and recently extended<sup>1292</sup>.

The USA system of generalized preferences is a programme intended to promote economic development and growth in the developing World: it supplies a preferential exemption from customs tariffs for more that 3000 commodities coming from 120 beneficiary Countries (including many least-developed beneficiary developing Countries (44))<sup>1293</sup>.

In the original 1974 text of the *Trade Act* were already indicated the reasons that could justify the exemption from the tariff benefit (in particular for Countries with dictatorial regimes, that is to say they did not cooperate within the international war to drug trade, or they were still considered as supporters of international terrorism). With the 1984 amendment, other causes of exclusion were added: the most relevant was the social clause stating that the Countries aspiring to the preferential regime must prove to being complying with internationally recognized labour standards. Actually, a GSP beneficiary must have taken or is taking steps to afford internationally recognized worker rights, including 1) the right of association, 2) the right to organize and bargain collectively, 3) a prohibition on the use of any form of forced or compulsory labour, 4) a minimum age for the employment of children, and a prohibition on the worst forms of child labour, and 5) acceptable conditions of work with respect to minimum wages, hours of work and occupational

<sup>1290</sup> Recital n. 7 of Reg. 978/2012. The new Regulation intends to reduce, starting from 1<sup>st</sup> January 2014, the benefitting Countries of the preferential system, from 176 to 89. The Countries that already have a different preferential access to the EU's market will be excluded, that is to say the Countries that the World Bank ranked as “high-income or medium-high income” Countries, in the course of the three consecutive years immediately prior to the up-date of the list of benefitting Countries.

<sup>1291</sup> U.S. Generalized System of Preferences Guidebook, Office of the United States Trade Representative Executive Office of the President Washington, D.C., March 2017, <https://ustr.gov/sites/default/files/gsp/GSP%20Guidebook%20March%202017.pdf>.

<sup>1292</sup> On March 23, 2018, the President signed into law H.R. 1625 (Public Law 115-141), the “Consolidated Appropriations Act, 2018,” which in addition to providing full-year federal appropriations through September 30, 2018, extended GSP with retroactivity, for goods entered or withdrawn from warehouse for consumption from January 1, 2018 through December 31, 2020. The new Act also provided for the retroactive refund of all duties (without interest) to the importer of record (IOR) on GSP-eligible goods entered during the January 1, 2018 through April 21, 2018 lapse period.

<sup>1293</sup> See General Note 4 of the U.S. Harmonized Tariff Schedule for the most up-to-date number of GSP beneficiaries: <https://hts.usitc.gov/current>

safety and health. A GSP beneficiary must implement any commitments it makes to eliminate the worst forms of child labour.

In 1985, the USA elaborated an additional programme of tariff preferences, contained in the 1985 *Overseas Private Investment Corporation Amendment Act*. There was the constitution of a Governmental Agency, controlled by the State Secretariat, in charge of supplying services of financing and insurance of capitals coming from North-American companies and employed in projects of foreign investments (most of all in developing Countries). Also in this system we have a social clause stating that “the company may ensure, re-assure, guarantee or finance a project only if the Country involved proves its compliance with internationally recognized labour rights”.

We need to highlight the interventions of the USA’s Government in order to favour the economic development of the Countries facing the Caribbean Basin. On the basis of the *Caribbean Basin Initiative (CBI)*, the missing compliance with internationally recognized social rights is impedimental to the conservation or the *ex novo* attribution of the relative tariff concessions.

In the same perspective is to be read the *African Growth and Opportunity Act*, promoted in 2000 in order to guarantee a *duty free* treatment to the commodities coming from 40 States of sub-Saharan Africa, in view of the respect of a series of standards also in matter of labour.

#### 8. Fundamental social rights in the external action of EU.

*As we have seen in the previous paragraphs, if the operational justification on which the social clause is founded results as difficultly practicable by the State at a multilateral global level, on the contrary, it appears as functional to the development of the regional and/or bilateral integration. As a matter of fact, we find again important examples of social conditionality both in the field of the European construction, and in the framework of the North-American Trade Integration (and, in particular, centre-south-American), and in the bilateral Free Trade Agreements, which confirm the will of States to affirm the linkage between social rights and international trade, overcoming the several ambiguities within the previous trade treaties*<sup>1294</sup>.

In the European construction, the social harmonization has been conceived since its inception as functional to avoid forms of dumping and competition distortions founded on normative disparities, judged as inconvenient with regards to the project intended to ensure a harmonious development of the internal market. For this reason, the European social law has followed a functionalist rationality, instrumental to the service of the common market. Within a functionalistic vision of integration, the aim established by the common market’s founders was to avoid a competition to the bottom in the application of social standards, contrasting the ongoing deregulation due to structural deficits and to the lack of common references to a minimum threshold of fundamental social rights.

Currently, the functionalistic vision of integration is being overcome thanks to the redefinition of the basic normative references of treaties – particularly after Amsterdam – and to the constitutionalisation of fundamental social rights. The field of social rights has progressively broadened and the

<sup>1294</sup> See. M.A. CABIN, *Labour Rights in the Peru Agreement: Can Vague Principles Yield Concrete Change?*, in *Columbia Law Review*, 2009, p. 1047 s.; for a synthetic analysis see K. LUKAS, A. STEINKELLNER, *Social Standards in Sustainability Chapters of Bilateral Free Trade Agreements*, Ludwig Boltzmann Institute, Wien, June 2010.

consideration of such rights – from being subordinate, to take part in the process of economic construction of Europe – has considerably increased to get to an equal level with the basic principles of economic integration. Forced to penetrate the communitarian juridical order thanks to the activity of the Court of Justice, social rights have then established themselves in the Charter of fundamental social right of the EU, becoming, with the Lisbon Treaty, common constitutional references in social matters. In this way, they were able to lay the normative basis to overcome that sort of schizophrenia consisting in the promotion of the respect of fundamental social rights in the framework of external relations, as well, as for example, with the Generalized Preference System, observing structural deficiencies in the internal field. The cyclical sequences of events of the so-called European Social model outline a scenario where the issues of labour and employment never came before the scenario of the market integration, related to strictly economic values and for these reasons at the basis of a growing mistrust and scepticism of European citizens towards Europe and its institutions<sup>1295</sup>. Nevertheless, with the development of a “holistic” conception of European integration<sup>1296</sup>, culminating in the Lisbon Treaty, the goals of full employment, social progress and social cohesion are definitely re-launched in the perspective of a new “strongly competitive social market economy”, characterized by the fight against social discrimination and exclusion, and in favour of the equality between men and women, of inter-generational solidarity and of the protection of minors’ rights.

#### 8.1. Social rights in the construction of the EU: the perspective of the horizontal social clause.

In pursuing these non-trade goals, the Treaty on the Functioning of the European Union (TFEU) contemplates, for the first time in the history of the European integration, a provision, defined by commentators as a “horizontal social clause” (art. 9), that is the expression of a new *Social Mainstreaming* in the field of a strengthening of the above mentioned axiological orientations, expressed by the art. 2 and 3 of the TFEU. It is evident that with such provision, to which the Commission attributes a fundamental value<sup>1297</sup>, we are facing goals that include social and personalistic values that become part of the economic fabric and that do not result as dismissible in the intention to promote a balanced and sustainable development of the market. The clause introduces a sort of social conditionality in the “actions” and in the “policies” of the EU, consisting in respecting obligations deriving from the compliance with social values: it establishes, in fact, that “in the definition and the implementation of its policies and actions, the EU keeps into account the needs linked to the promotion of an elevated level of employment, the guarantee of an adequate social protection, the fight against social exclusion and an elevated level of education, training and protection of human health”. This principle of social conditionality is reconnected with other horizontal clauses in the Treaty, relative to the equality between men and women, the protection of environment and the protection of consumers and the fight against discrimination (art. 8, 10, 11, 12 TFEU). Although the expression “keeps into account” is less intense with regards to other provisions contained in these final horizontal clauses (in particular the one referring to

<sup>1295</sup> For a general overview see S. SCIARRA, *L'Europa e il lavoro. Solidarietà e conflitto in tempi di crisi*, Laterza, Roma-Bari, 2013.

<sup>1296</sup> See P. CRAIG and G. DE BURCA, *EU Law: Text, Cases and Materials*, Oxford, OUP, 2008.

<sup>1297</sup> Communication of the Commission to the European Parliament, to the Council, to the Social and Economic Committee and to the Committee of COM Regions (2010) 608 def.

the art. 11, according to which the needs linked to the protection of environment “must be integrated” in the definition and in the implementation of the policies and actions of the EU), the perceptive value of the social clause is obtained both from its collocation in the title II (Provisions having General Applications)<sup>1298</sup>, and from the essentiality with regards to the action of realization of the paradigm of market social economy, otherwise destined to lacking in meaning or to being merely programmatic. Commentators should move in this perspective within the discussion whether the horizontal social clause has prevalingly political and/or interpretative orientation value for Courts and address value for the EU’s organisms, or whether we may hypothesise a precise justiciability pertaining to the horizontal social clause. In fact, only if the this option prevails, the art. 9 of the TFEU may correctly be included among social clauses in a strict sense, characterized by a sanctionatory *lato sensu* component, which overcomes the perspective of the mere *moral suasion* in giving shape to the economic activity. In this sense, it is important to point out that the clause imposes to the institutions of the EU, and in particular to the Commission, to report on their initiatives in the framework of the obligation of providing grounds *ex art.* 296, par. 2 of TFEU; as if to say that an act contrary to the content of the social clause – because, for example, detrimental for employment or for social protection – may be cancelled because not complying with the Treaties, pursuant the art. 263 of the TFEU.

As being horizontal, such clause must be employed in order to introduce social goals in all relevant sectors, economic and trade policies included, as well as in order to monitor the impact of policies in a logic of integration and coordination in economic, social, employment and environmental fields. In such perspective, the social clause provides to the Institutions of the Union a wide mandate to include a series of social goals in all policies, the initiatives and the activities pertaining the EU, transforming the social development of Europe in a cross-wise task, able to overcome the historical asymmetry between development of the market’s economic integration and social sphere<sup>1299</sup>. The European Commission, to whom the Lisbon Treaty has entrusted the task to promote the general interest of the EU (art. 17 of the TFEU), must guarantee that the social clause is efficiently applied and that all documents, as well as the pertinent judiciary texts, actually refer to it and keep it into account, making sure that it effectively contributes to the pursuing of the new goals of the Treaty, both on the part of the EU and of the member States. In particular, according to the statements of the European social and economic Committee, this clause must be applied to the general fields and to the global architecture of the new social-economic governance of the EU, provided by the 2020 Europe Strategy, and approved by the European Council in 2010. The art. 9 of the TFEU therefore provides a new juridical basis to the already existing Social Impact Assessment, an *ex ante* assessment procedure of the policies inaugurated at the 2002 Laeken European Council and later confirmed with the 2005 Lisbon strategy for development and employment. With the 2009 guidelines, the Commission has adopted an ambitious mechanism of social impact assessment in the areas of labour market, standards and rights linked to the quality of labour, social inclusion, equality of treatment and non-discrimination, access to social protection, education and health system, health and public security. Particular attention is

<sup>1298</sup> In this sense, see F. Lecomte, *Embedded Employment Rights in Europe*, in *Columbia Journal of European Law*, vol. 17, p. 1 ss.

<sup>1299</sup> According to the Opinion of the European social and economic Committee on the matter “*Strengthening the cohesion and the coordination of the EU in the social field thanks to the new horizontal social clause, referring to the art. 9 of the TFEU* (initiative opinion), 24<sup>th</sup> June 2012/C, lecturer Lechner, the implementation of the social clause may “therefore contribute to reduce the sense of dissatisfaction that has long been persisting and to overcome the deeper and deeper scepticism of some member States with regards to the added value offered by the EU, in particular in terms of economic, employment and social progress”.

addressed to the re-distributive impact on poverty and social inclusion, both within member States and with regards to member States, especially developing Countries, concurring to the goal of guaranteeing the respect of the provisions of social policy contained in the Treaty of Lisbon (in particular the articles from 145 to 166 and the art. 168 of the TFEU) and in the EU's Charter of fundamental rights (in particular the chapter IV on *Solidarity*), to which the art. 6 of the European Single Act has recognized the same juridical value of the Treaties. The innovation may therefore crucially contribute to re-balance the confrontation between social rights and economic freedom that are object of a jurisprudence of the Court of Justice that tends to favour a trade-related perspective.

Recently, this tool has found another base of legitimation with the European Pillar of Social Rights, which has been proclaimed by the European Parliament, the Council and the European Commission on 17 November 2017. As a matter of fact, art. 9 TFEU is recalled on the Preamble (p. 2) of the Solemn Declaration of the Social Pillar. The Pillar, in this sense, demonstrates a new sensibility to the horizontal social clause, and this approach is in line with the recent European Court of Justice jurisprudence, which for the first time, in 2016, expressly named the horizontal social clause in a case where there was a need of balancing enterprise freedoms and social rights (C-201/15, *Aget Irarklis*, p. 78-79).

The general comments of the doctrine have regarded the consequences that the examined horizontal social clause can and must have with reference to the internal market. However, the examined clause, as being horizontal, pertains to *all the policies of the EU* and for this reason also to the ones relative to the Union's external relations. The EU, as regional entity with a "*global vocation*" in the promotion of human rights<sup>1300</sup>, now has a new normative basis to be employed in order to mobilize all the *governance* instruments available in the social field. A field being particularly fertile – and by all means coherent with the horizontal social clause – regards the promotion of the values contained in the *UN Guiding Principles on business and human rights* that include the *OECD Guidelines on multinational enterprises*, the *ISO 26000 Social Responsibility Standard*, the *UN Global Compact*, and other instruments of internationally recognized *Corporate Social Responsibility (CSR)*, such as the recently updated ILO Tripartite Declaration of Principles concerning Multinational Enterprises on Social Policy<sup>1301</sup> but also the UN Agenda 2030<sup>1302</sup>.

The involvement of the EU in the development of the project *UN Protect, Respect, Remedy* (that represents the most important point of global reference for CSR policies)<sup>1303</sup> constitutes an important example of this process that involves the European Parliament and the EU delegations within international organizations. The horizontal social clause should be able to provide a greater

<sup>1300</sup> See M. CREMONA, *Rhetoric or Reticence: EU External Commercial Policy in a Multilateral Context*, in *Comm.mar.law rev.*, 2001, p. 359; T. NOVITZ, *In search of a coherent social policy: EU import and export of ILO labour standards?*, in J. Orbie & L. Tortell (eds), *The European Union and the Social Dimension of Globalization*, Routledge, 2009.

<sup>1301</sup> The MNE Declaration is the only ILO instrument that provides direct guidance to enterprises on social policy and inclusive, responsible and sustainable workplace practices. It is the only global instrument in this area that was elaborated and adopted by governments, employers and workers from around the world. It was adopted close to 40 years ago (amended in 2000 and 2006) and revised in 2017. Its principles are addressed to MNEs, governments, and employers' and workers' organizations and cover areas such as employment, training, conditions of work and life, and industrial relations as well as general policies. All principles are based on international labour standards (ILO conventions and recommendations).

<sup>1302</sup> Communication from the Commission A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development (Commission's proposal to the Gothenburg European Council); COM/2001/0264 final.

<sup>1303</sup> UN Special Representative on business and human rights, UN "Protect, Respect, Remedy" Framework, <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework>.

impulse to the EU's external action, required by the NGOs that invoke the commitment of the Union within the re-launching the responsibility of multinational enterprises operating in the European territory for the violations of human rights carried out by their homologous outside the EU. In particular, these social *guidelines* should connect to the common trade policies providing, for example, a normative basis in order to realize principles of CSR in the field of initiatives (lacking preceptive value) already developed in other contexts such the "*Communication on the promotion of labour fundamental norms and on the improvement of the social governance in the context of globalization*" and the Communication "*the partnership for employment and growth: make Europe a centre of excellence in matter of CSR*". Hence, we have the Union's commitment to promote CSR at a global level, by working in order to include within the Union's bilateral agreements norms of sustainable development and to support specific initiatives like *Global Compact* and the so-called Kimberley process. Further, the art. 9 of the TFEU may provide a decisive incentive in order to implement the Resolution of the European Parliament adopted on 25<sup>th</sup> November 2010, in the field of the promotion of social values within multilateral Courts of international trade, concerning the implementation of a principle of extraterritoriality stating that a Country of origin may require the compliance with its social legislation also to the enterprises operating outside their territorial field<sup>1304</sup>. Other fields where to adopt initiatives under the sphere of the art. 9 are linked to action of coordination in areas of interest, such as the common policies on investments, which must be guided by the principles and goals of the EU's external action<sup>1305</sup>, the specific policies on minor labour<sup>1306</sup>, on forced labour, on human beings trade, and on the *due diligence* in the mining sector. With reference to the external action, social rights start being considered as relevant issues in the field of the dialogue with third Countries, for example with Cambodia, Laos and China<sup>1307</sup>; further, in the field of initiatives intended to guarantee the respect of the ILO's agenda on Decent Work and in the field of the relationships of international cooperation, like in the case of Bangladesh<sup>1308</sup>. Therefore, we may expect an incentive to the promotion of fundamental social rights towards the exterior of the EU, thanks to the insertion of "CSR clauses" in all trade agreements stipulated by the Union on the wake of the usage of another horizontal clause, already present in the normative fabric of the prior-to-Lisbon Treaties, relative to the promotion of sustainable development (current art. 10 of the TFEU), which has contributed to insert the issue of sustainability in the field of the EU's external trade relations. According to the European Parliament, such CSR clauses, to be inserted in the trade agreements to come, should force enterprises to assume obligations of due diligence intended to the adoption of precautionary measures of compliance with human rights in their outsourced branches, with the obligation to periodically publish the balance sheets in matter of CSR.

### 9. Social clauses in Trade Agreements: a disaggregate analysis.

At this point of the paper, I would like to propose a disaggregate analysis of some Treaties and of

<sup>1304</sup> See D. AUGENSTEIN *et al.*, *Study of the Legal Framework on Human Rights and the Environment applicable to European Enterprises operating outside the European Union*, Study for the European Commission, ENTR/09/045 (2010).

<sup>1305</sup> Communication of the Commission "Towards a Comprehensive European International Investment Policy, COM (2010) 343 final.

<sup>1306</sup> EU Council, Council conclusion on child labour, [http://www.concilium.europa.eu/eudocs/cms\\_Data\\_docs/pressdata/EN/foraff/115180.pdf](http://www.concilium.europa.eu/eudocs/cms_Data_docs/pressdata/EN/foraff/115180.pdf).

<sup>1307</sup> See G. Gorska, *Mutual Influence: The Case of the EU and the UN Guiding Principles on Business and Human Rights*, in *European Yearbook on Human Rights*, 2012, p. 109 ss.

<sup>1308</sup> D. AUGENSTEIN and C. BEHRMANN, *Partnering with Civil Society: The EU's Approach to Promoting Human Rights and Decent Work in Bangladesh*, in *European Yearbook on Human Rights*, 2012, p. 97 ss.

their social clauses, focusing in a transversal way around two essential points of the comprehension of the matter: 1) Commitments; 2) enforcement and effectiveness.

This way to proceed leads to more fruitful outcomes, compared to the single analysis of the treaties, as it permits to compare the different social clauses, in order to verify differences and similarities and to create some “models” of social clause; it will be useful, again, to identify pros and cons of each model and thus identify the more advanced model, or, at least on paper, the more effective social clause. In the analysis I will consider some bilateral treaties (like CETA, EPA, EU-Korea, US-Jordan) and some multilateral treaties (GATT-WTO, Mercosur, NAALC, CPTTP and CAFTA-DR) and also the unilateral system of trade tariff preferences (EU-GSP and US-GSP), as they can be considered “a milder approach to the social clause”<sup>1309</sup>.

This work is useful to identify the different “logic for action” which guided the Parties during the negotiations of social clauses and thus permits to answer, for each “model” to a list of questions:

- i) Will the economic-mercantilist logics prevail, or the axiological ones, or a mix of those? What is the degree of social conditionality?
- ii) Is there a difference on the logics between social clauses in the agreements with developing Countries and those among peer economies?
- iii) Is there any difference between the US and the EU’s approach on negotiations?
- iv) Has the insertion of the social clause in the paradigm of sustainable development, which represent the last evolution of the social clause, really entailed some advantages in terms of social rights (or not?)

### 9.1. Commitments.

The first step concerning the disaggregate analysis is about the commitments. First of all, we must verify i) the allocation of the commitments in social matter in the general economy of the Treaty, ii) the literal formulas employed, iii) the content of the commitments.

#### 9.1.1. Allocation of Commitments.

Since the signing of the North American Agreement on Labour Cooperation (NAALC), the first example of social clause adopted in the context of the multilateral agreement of free trade among the USA, Canada and Mexico (NAFTA), numerous regional or bilateral trade treaties have included provisions relative to labour, but the introduction of such provisions takes various forms and covers different aspects of social practice and labour laws.

Before starting with the analysis of the content of such provisions, we need to reflect on the possibly different “allocation” of those provisions, as, in addition to simply being mentioned in the preamble, they may be covered in a *separate section*, that is to say in an agreement annexed to the treaty (as it is the case of NAALC, which is commonly called “Labour side agreement”), or those provisions can be *part of a specific chapter* of the agreement.

<sup>1309</sup> See A. Perulli, *Fundamental social rights. Market regulation and EU external action*, in *Int. Journal of comparative Labour Law*, 2014, p. 27 ss.; F. Pantano, R. Salomone, *Trade and Labour within the European Union. Generalized system of preference*, J. Monnet work, papers (New York Univ.School of Law), 2008; L. Compa, J. Vogt, *Labour rights in the generalized system of preferences: a 20 Year Review*, 22, *Lab and Policy Journal* 199, (2000-2001), p. 206.

In this regard, the US-Jordan (2001) was the first US agreement which introduced a special section on labour, becoming a benchmark for all subsequent agreements (Singapore, Chile, Australia, Morocco, CAFTA, Bahrain, Oman and Peru, etc.). The provision for a whole chapter of the agreement devoted to labour, integrating a clause on social issues in the body of the text, rather than in an annexed agreement, is the first step forward for the recognition of workers' social rights, in order to realize a true integration of labour concerns into the trade agreement: it is not thus a simple attachment to the treaty but a list of principles which is full part of the treaty, like any commercial provisions.

After this milestone, all the agreements have a specific chapter which regards Labour (CAFTA-DR Chapter 16 "Labour"; CPTTP Chapter 19 "Labour") or, as it is more common from the EU side, are inserted all labour provisions in a chapter entitled "Trade and Labour" (CETA) or, more broadly, "Trade and Sustainable Development" (as for Korea-EU FTA and EPA).

#### 9.1.2. Literal meaning of commitments.

Looking at the several agreements, is it possible to observe a lot of differences concerning the language used for social clauses, which determines a great variation of the juridical and social effects of the commitments undertaken.

Often, the parties express their central obligations not in a binding way, but using an aspirational language, using verbs in their conditional form, or referring, in a "soft" way, to the promotion of compliance: ex. NAALC, art. 1: *The objectives of this Agreement are to: (f) promote compliance with, and effective enforcement by each Party of its labour law*; Us-Jordan, art. 6: "The Parties shall strive to ensure that such labour principles and the internationally recognized labour rights are recognized and protected by domestic law"; CAFTA-DR, art. 16.1.1. "Each Parties shall strive to ensure that such labour principle and the internationally recognized labour rights are recognized and protected by the law" or art. 16.2 "A party shall not fail to effectively enforce its labour law..."; Art. 19.4 CPTTP: "No party shall waive or derogate from its statutes and regulations"; Art. 13.3 Korea-EU "(...) each Party shall seek to ensure that those law and policies provide for and encourage high levels of labour protection (...).

In this sense, we are not able to see a step forward in the last mega-treaties because the formula used (Art. 23.3.4 CETA "The Parties shall make continued and sustained effort to ratify the fundamental ILO Conventions if they have not yet done so") is not more binding (even if enforced in a more binding way, as we will see). We can find an approach that is still exhortative, but with a greater level of commitment, at least on paper, in the second generation USA FTAs, like for instance in the US-PERU FTA, where (Art. 17.1: Statement of Shared Commitments), after stating that The Parties reaffirm their obligations as members of the International Labour Organization (ILO), it is provided that "Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the ILO Declaration".

Those literal formulas lead to consider the social clause as a promotional tool where the commitments are often built with a regulative technique using aspirational formulas that are little binding, if not mere declarations of intentions; this weakness in the formulation of obligations does not certainly tend to a social conditionality in a strong sense.

#### 9.1.3. Content of commitments.

In the last two decades, labour provisions in bilateral and multilateral trade agreements have

been widened and deepened. Over 80 per cent of agreements that have come into force since 2013 contain such provisions<sup>1310</sup>, in order to commit the parties not to lower their labour standards or derogate from labour law with a view to boosting competitiveness.

Social clauses have not only grown in number as to become a common trait of these trade agreements but have acquired great substantive and procedural complexity<sup>1311</sup>, as they are included in different ways in FTAs.

Even if no standard model can be identified when we review these agreements, we must point out which are the most commonly included provisions, starting from the main distinction between those agreements which, as NAALC, state the commitment for each party to enforce its domestic labour law (a), on the other agreements which include also some reference to the international dimension of social rights (b) (in different ways, as we will see).

#### 9.1.3.1 No harmonization.

In most free trade agreement the Parties declare that they do not intend to harmonise the labour standards.

This is explicitly declared in NAALC, ANNEX 1 LABOUR PRINCIPLES: “The following are guiding principles that the Parties are committed to promote, subject to each Party's domestic law, but do not establish common minimum standards for their domestic law.”, but also in the most recent FTA: “the agreement is not to harmonise the environment or labour standards of the Parties (EPA, Art. 16.1, par. 2) or “The Parties recognise that it is not their intention in this Chapter to harmonise the labour or environment standards of the Parties” (EU-Korea, Article 13.1 3). This type of social clause, differently to what happened within the experience of European integration (as well as in the normative tradition of international labour law), does not provide for the compliance with uniform supra-national minimum standards, but rather the guarantee of effectiveness of the single national standards.

Differently from this explicit negation of harmonization, MERCOSUR, through the 1998 Social Labour Declaration, states in the Preamble the objective to set a minimum floor of workers right. We could call this commitment as a “soft” or “small” harmonization, at least referring to the core, minimum, social standards: “Whereas the Ministers of Labour of MERCOSUR have stated in their meetings that regional integration cannot be confined to the commercial and economic spheres, and must also incorporate social issues, as regards the adaptation of the regulatory frameworks for labour to the new circumstances resulting from integration and the process of economic globalization, as well as the recognition of a minimum floor of workers' rights within MERCOSUR, in line with the fundamental ILO Conventions” (Preamble, MERCOSUR).

Even if the Preamble also states that “Whereas the States parties, as well as being Members of the International Labour Organization (ILO), have ratified the principal Conventions guaranteeing the fundamental rights of workers” at the time of writing Argentina, Paraguay and Uruguay had already ratified all the ILO Conventions, while Brazil was missing a core convention (C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). In this

<sup>1310</sup> ILO, Studies on Growth with Equity, Assessment of Labour Provisions in Trade and Investment Arrangements, Report July 2016.

<sup>1311</sup> T. Treu, Globalization and Human Rights: Social Clauses in Trade Agreements and in International Exchanges among Companies, in A. Perulli, T. Treu (eds), *Sustainable Development, Global Trade and Social Rights*, Wolters Kluwer, 2018, p. 99.

sense, the construction of a minimum floor of rights could not be referred only to the ILO core labour standards, but, more generally to some common labour standards, “in line with” ILO Conventions and in this case the Mercosur could be considered as a pioneer in promoting the social rights in the economic relationship.

#### 9.1.3.2. Commitments to respect its own labour law.

When we are thinking about a treaty which aims to commit Parties to respect their own labour law, it is logic to refer to the NAALC Model, as it was the first example of FTA to adopt such measure.

The art. 3 of NAALC testifies the intention of the parties, who promote the “*compliance with and effectively enforce its labour law through appropriate government action (...)*”. Therefore, there is no aim of harmonization or, even more, of standardization of the levels of protection in social matters, that is left to the national legislator’s discretion.

This provision to respect its own domestic labour law guarantees the maximum valorization of the sovereignty of the nation-State about the levels of national protections on social matters and this model seems to be expanded, nowadays.

As a matter of fact, the formula has been adopted in the recent CPTTP: “Article 19.5: Enforcement of Labour Laws 1. No Party shall fail to effectively enforce its labour laws”, but also in the CETA Article 23.2 (Right to regulate and levels of protection), states that “*Recognising the right of each Party to set its labour priorities, to establish its levels of labour protection and to adopt or modify its laws and policies accordingly in a manner consistent with its international labour commitments, including those in this Chapter, each Party shall seek to ensure those laws and policies provide for and encourage high levels of labour protection and shall strive to continue to improve such laws and policies with the goal of providing high levels of labour protection*”. Similarly, in EPA, Article 16.2, using more or less the same words, (Right to regulate and levels of protection), indicates that “*1. Recognising the right of each Party to determine its sustainable development policies and priorities, to establish its own levels of domestic environmental and labour protection, and to adopt or modify accordingly its relevant laws and regulations, consistently with its commitments to the internationally recognised standards and international agreements to which the Party is party, each Party shall strive to ensure that its laws, regulations and related policies provide high levels of environmental and labour protection and shall strive to continue to improve those laws and regulations and their underlying levels of protection*”.

This provision, as stated in NAALC, EPA and CETA, leads to some interpretation problems: how will it be possible to deal with the commitment to enforce its national labour laws, with the ideal objective of the social clause to create uniform standards, in a way to guarantee a level playing field, and, from a point of view of values and labour, the respect of international recognized labour standards?

Will we face the risk that, in such way, the logic of comparative advantages of the different domestic levels of regulations, on which the Singapore Declaration (“*We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of Countries, particularly low-wage developing Countries, must in no way be put into question*”) was focused? This concern could be by-passed considering that parties “shall strive to continue to improve those laws and regulations and their underlying levels of protection” (as it was foreseen in the

NAALC, as in EPA and CETA there is a double commitment: that of enforcement of the domestic law and that of continuing to improve those laws).

A further profile of critic analysis regarding the respect of the internal legislation in matter of labour concerns the prohibition of encouraging trade or investments through the souplesse of the respective domestic regulations. This leads to the following question:

if parties should undertake to respect their labour law without any exception, is this obligation “absolute”, or is it limited to the behaviours that are capable to conditionate the trade relationships?

Just to mention an example, the EPA provides for commitments like the prohibition of relaxing domestic labour laws to attract trade and investment (“The Parties shall not encourage trade or investment by relaxing or lowering the level of protection provided by their respective environmental or labour laws and regulations. To that effect, the Parties shall not waive or otherwise derogate from those laws and regulations or fail to effectively enforce them through a sustained or recurring course of action or inaction *in a manner affecting trade or investment between the Parties*”, art.16.2, par. 2), and of discrimination or restrictions to trade’s purpose: (“The Parties shall not use their respective environmental or labour laws and regulations in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Party, or a disguised restriction on international trade”, art. 16.2, par. 3). This clause is present also in CAFTA (art. 16.2), and in some FTAs, with reference to the internal legislation and to the related compliance with the rights as stated in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998): for example, the US-Peru FTA states that “Neither Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations implementing paragraph 1 *in a manner affecting trade or investment* between the Parties, where the waiver or derogation would be inconsistent with a fundamental right set out in that paragraph”.

How should we interpret this clause?

Two explanations could be possible.

1) According to the first interpretation, the clause confirms the existence of a minimum floor of rights which cannot be modified to attract investors or in order to facilitate trade: therefore, a floor of rights that is inconditioned and non negotiable for trade/financial purposes. This interpretation would be coherent with the 2008 ILO Declaration on Social Justice for a Fair Globalization, according to which “the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for protectionist trade purposes”. This interpretation is closer to the axiological logic rather than the trade one, from which, on the contrary, it seems to free itself, in order to go towards an ideal of a trade that is fair and unconditionally respectful of fundamental social rights.

2) The second interpretation is more problematic, because it seems to establish a linkage between the reduction of levels of protection and the encouragement of trade or investments. This interpretation is more coherent with the trade logic of social clause, in the sense that, in order to contrast the possible violation, the Country must demonstrate that the commercial partner has adopted those behaviours (that is the reduction of the levels of protections) to encourage trade

or investments and thus it must give the proof. This should be a very serious concern because it is not easy at all to demonstrate a direct relation between the deregulation of labour standards and the objective to encourage trade and investments<sup>1312</sup>. This is why, in my opinion, this is a very dangerous statement, and it should be overcome enshrining the absolute obligation to respect the domestic law, and not to derogate from it, but, on the contrary, to raise the level of social rights protection, as provided in the NAALC, according to which “each Party (...) shall continue to strive to improve those standards”.

Another concern related to the commitment of the domestic labour law regards the variety of normative references to the internal legislation. Reading the CTPPT, the parties decide to give a definition of labour law, which could be intended to limit the field of labour law which has to be promoted and respected. According to art. 19.1, “labour law means statutes and regulations, or provisions of statutes and regulations, of a Party that are directly related to the following internationally recognised labour rights: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour, a prohibition on the worst forms of child labour and other labour protections for children and minors; (d) the elimination of discrimination in respect of employment and occupation; and (e) acceptable conditions of work with respect to minimum wage, hours of work, and occupational safety and health”. Certainly wider is the reference to the internal legislation supplied by the NAALC with its 11 Labour principles that the parties commit to comply with; an omni-comprehensive list that includes also the right to strike, while no reference is made in the field of dismissal.

The matter raised by these Treaties is therefore *the field of social conditionality*, that varies in an extremely sensitive way by reason of the field of application of internal legislations recalled by each single Treaty. We may not say that the global scenario is intended to a rational identification of the object of the clauses, while it should be hoped that a research for a more homogeneous finalization of the assumed commitments, in order to build an organic network of rules about labour on a global scale were done.

#### 9.1.3.3. Commitments to respect international labour law.

With reference to the commitments to respect international labour standards, which, of course, are usually added to the (possible) previous commitment to respect its own domestic labour law, we need to distinguish different types of standards mentioned, and a different degree of commitment for the signatories Parties.

##### i) “Internationally recognized labour rights”

Some agreements generally refer to “internationally recognized labour rights” without referring to the ILO Core Labour Standards, but sometimes spreading the content of the commitments undertaken, compared to those promoted by the ILO Core Conventions.

The first example of this model is the NAALC.

This agreement, which precedes the 1998 Declaration on fundamental principles and rights, makes no explicit reference to the ILO's conventions but, as prof. Bellace observed, the NAALC

<sup>1312</sup> See F. Ebert, The Comprehensive Economic and Trade Agreement (CETA): Are Existing Arrangements Sufficient to Prevent Adverse Effects on Labour Standard?

labour principles include the four principles in the Declaration, and more. NAALC refers to eleven principles (Article 49) which go further than the eight fundamental conventions that the nations must strive to achieve. According to the NAALC Annex 1 defines “labour principles” as “guiding values” that the parties commit to respect and it individuates them in the following thematic fields: 1) freedom of association and right to collective bargaining; 2) right to collective bargaining; 3) right to strike; 4) prohibition of forced labour; 5) protection of child and minor labour; 6) protection of minimum standards of employment (for example: minimum wages and benefits for extra-hour labour); 7) elimination of discrimination on labour; 8) right to equal salary among men and women working in the same enterprise and having the same task; 9) prevention of professional illnesses and injuries on labour; 10) right to compensation in case of illnesses and injuries on labour; 11) protection of migrant workers.

Despite the content of the commitment is broader than that of the ILO Conventions, it is important to point out that such Principles, expressed in a quite vague and succinct formula, do not set common minimum standards at all, but only wide areas of interest (“broad areas of concern”) on which the parties have developed (each its own way) “laws, regulations, procedures and practices” intended to the “protection of the interests of the respective labour forces” and, furtherly, there is no mention of the relative Conventions of the ILO.

In the case of US-Jordan, despite the commitment to respect the ILO 1998 Declaration, the parties talk about some internationally recognized labour rights but the list does not strictly correspond to the list of the core labour rights: the list is wider, mentioning among the “internationally recognized labour rights, that of “(e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health”. (Us-Jordan, Article 6, *Labour* 1. The Parties reaffirm their obligations as members of the International Labour Organization (“ILO”) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Parties shall strive to ensure that such labour principles and the following internationally recognized labour rights (a) the right of association; (b) the right to organize and bargain collectively; (c) a prohibition on the use of any form of forced or compulsory labour; (d) a minimum age for the employment of children; and (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health) are recognized and protected by domestic law).

A similar commitment can be found in the recent CTPPT (2018): if the article 19.4 states that “it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in each Party’s labour laws”, art. 19.1, as already said, gives a definition of labour law, which recalls, in an identical formula to that of the US-Jordan agreement, which is included also in the CAFTA-DR (art. 16.8), demonstrating the success of this model.

Despite the broader commitment compared to the ILO Declaration, this is a critical point of the agreement, mainly for CTPPT, because (as prof. Bellace observed in her relation) it is impossible to identify definitions of these rights on which the 11 signatory nations agreed (while it could be simpler for 2 Countries as in the case of the US-Jordan agreement). This is a limit which regards all multilateral negotiations as the Countries involved could be very distant in terms of social policy and labour provisions, and thus, the more the Country are involved, the less the predictability of each Party is real commitment.

ii) reference to the ILO 1998 Declaration

Other agreements generally refer to the ILO 1998 Declaration but do not mention the ILO Core Conventions (as CPTTP, where the members Parties have not ratified all the Core Conventions yet, or the Us-Jordan for example).

CAFTA-DR for example, in the art. 16.1 states that “the Parties reaffirm their obligations as members of the ILO and their commitments under the ILO Declaration”.

The 1998 Declaration commits Member States, in accordance with the obligations deriving from membership of the ILO, to respect and promote principles and rights in four categories, whether or not they have ratified the relevant Conventions. These categories are: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation.

The problem is that ILO Core Conventions' content is very detailed compared to the principles of the ILO Declarations, and because the ILO's organs of control guarantee interpretative uniformities of the rights sanctioned in the Conventions, differently to what happens with the 1998 Declaration, which is not submitted to any technical supervision.

iii) reference to the ILO Core Conventions

Other Treaties, again, refer specifically to the ILO Core Conventions, as it is usual for FTAs signed by EU. This is the case of EPA EU-Japan, at art. 16.3, with a formula that is, however, little binding: “Each Party shall make continued and sustained efforts on its own initiative to pursue ratification of the *fundamental ILO Conventions* and other ILO Conventions which each Party considers appropriate to ratify”. The formula is a little vague, because as far as the commitment is concerned, the usual aspirational approach (“shall make efforts”) prevails, both with reference to core Conventions and with reference to other Conventions, leaving the parties free to identify those they believe it should be “appropriate” to ratify. This approach to fundamental Conventions, even though it is vague, does not even recur in the Treaties signed by the US (as NAALC and US-Jordan which does not contain any reference to the ILO's Conventions). It is evident that the reference to the ILO Core Conventions should, on the other hand, be considered as a real commitment, given that the ILO requires their compliance by reason of the mere bond of affiliation. Besides, the ILO regularly examines the application of standards, thanks both to the examination of periodic reports submitted by Member States on the measures they have taken to implement the provisions of the ratified Conventions and to a representations procedure and a complaints procedure of general application, together with a special procedure for freedom of association. So the reference to the ILO Conventions is at the moment the only way to assure a control on the respect of the commitments undertaken.

In most cases, Parties commit themselves to respect the ILO Conventions ratified, and to ratify those that at the moment of the signature of the treaty are not yet ratified. An example is the Korea-EU FTA: *Article 13.4 Multilateral labour standards and agreements (...) 3. The Parties reaffirm the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the European Union have ratified respectively. The Parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions*

that are classified as 'up-to-date' by the ILO." (at the time of writing Korea has ratified 4/8 ILO Core Conventions)<sup>1313</sup>.

This obligation, to ratify the Core Conventions not yet ratified at the moment of the signature of the agreement, is also present in the EU-Vietnam agreement (art. 3), and, as we have pointed out, in the EPA (art. 16.3.3: "Each Party shall make continued and sustained efforts on its own initiative to pursue ratification of the fundamental ILO Conventions and other ILO Conventions which each Party considers appropriate to ratify").

This commitment towards a ratification of non-ratified fundamental ILO Conventions (even if the ratification should be on Japan's initiative), demonstrates the pressure given by the EU for a social conditionality, even if we are not in the case of pre-ratification conditionality, as it is the case, for example, of the EU-SPG.

Despite this lack of pre-ratification conditionality, we can observe that this commitment has led to a progress ratification of ILO Conventions by some Countries.

I am referring, in particular, to Canada: at the time of CETA's signature, Canada had not ratified all the ILO Core Conventions: C-138 has been ratified in June 2016, and C-98 in June 2017. But we need to observe that Canada ratified 9 ILO Conventions in the last 12 months, so we can easily state that this Treaty has been for Canada a great incentive to ratify the ILO Core Conventions, while all Eu Member States<sup>1314</sup> had already ratified all the Core Conventions<sup>1315</sup>.

This could be a path also for Japan, in the context of EPA: we may observe that the time of writing Japan did not ratify two Core Conventions: C105 - Abolition of Forced Labour Convention, 1957 (No. 105) and C-111 - Discrimination (Employment and Occupation) Convention, 1958. If, with regards to the latest Convention (C111), the lack of ratification is probably due to a cultural tradition,

<sup>1313</sup> Conventions ratified by Korea: 1) C100 - Equal Remuneration Convention, 1951 (No. 100); C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111); C138 - Minimum Age Convention, 1973 (No. 138); Minimum age specified: 15 years; C182 - Worst Forms of Child Labour Convention, 1999 (No. 182). Conventions not ratified: C029 - Forced Labour Convention, 1930 (No. 29); C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98) and C105 - Abolition of Forced Labour Convention, 1957 (No. 105).

<sup>1314</sup> Eu28: Austria, Italy, Belgium, Latvia, Bulgaria, Lithuania, Croatia, Luxembourg, Cyprus, Malta, Czech Republic, Netherlands, Denmark, Poland, Estonia, Portugal, Finland, Romania, France, Slovakia, Germany, Slovenia, Greece, Spain, Hungary, Sweden, Ireland, United Kingdom.

<sup>1315</sup> This is the list of Countries which did not ratify at the time of writing the ILO Core Labour Conventions: C029 - *Forced Labour Convention, 1930*: Afghanistan, Brunei Darussalam, China, Korea, Republic of, Marshall Islands, Palau, Tonga, Tuvalu, United States; C087 - *Freedom of Association and Protection of the Right to Organise Convention, 1948*: Afghanistan, Bahrain, Brazil, Brunei Darussalam, China, Cook Islands, Guinea – Bissau, India, Iran, Islamic Republic of, Jordan, Kenya, Korea, Republic of Lao People's Democratic Republic, Lebanon, Malaysia, Marshall Islands, Morocco, Nepal, New Zealand, Oman, Palau, Qatar, Saudi Arabia, Singapore, South Sudan, Sudan, Thailand, Tonga, Tuvalu, United Arab Emirates, United States, Viet Nam; C098 - *Right to Organise and Collective Bargaining Convention, 1949*: Afghanistan, Bahrain, Brunei Darussalam, China, Cook Islands, India, Iran, Islamic Republic of, Korea, Republic of, Lao People's Democratic Republic, Marshall Islands, Mexico, Myanmar, Oman, Palau, Qatar, Saudi Arabia, Thailand, Tonga, Tuvalu, United Arab Emirates, United States, Viet Nam; C100 - *Equal Remuneration Convention, 1951*: Bahrain, Brunei Darussalam, Cook Islands, Kuwait, Liberia, Marshall Islands, Myanmar, Oman, Palau, Qatar, Somalia, Tonga, Tuvalu, United States; C105 - *Abolition of Forced Labour Convention, 1957*: Brunei Darussalam, China, Japan, Korea, Republic of, Lao People's Democratic Republic, Marshall Islands, Myanmar, Palau, Timor-Leste, Tonga, Tuvalu, Viet Nam; C-111 - *Discrimination (Employment and Occupation) Convention, 1958*: Brunei Darussalam, Cook Islands, Japan, Malaysia, Marshall Islands, Myanmar, Oman, Palau, Singapore, Tonga, Tuvalu, United States; C-138 *Minimum Age Convention, 1973*: Australia, Bangladesh, Cook Islands, Iran, Islamic Republic of Liberia, Marshall Islands, Myanmar, New Zealand, Palau, Saint Lucia, Somalia, Timor-Leste, Tonga, Tuvalu, United States, Vanuatu; C182 - *Worst Forms of Child Labour Convention, 1999*: Cook Islands, Eritrea, Marshall Islands, Palau, Tonga, Tuvalu.

the Core Convention of Forced Labour has not probably been ratified yet, because Japan is currently under observation by the CEARC, the ILO Committee of experts about the other Conventions concerning Forced or Compulsory Labour (ratified by Japan in 1939): C029 - Forced Labour Convention, 1930 (No. 29). The matter regards the compensation to some victims of wartime sexual slavery or industrial forced labour during the Second World War<sup>1316</sup>. The Committee refers in particular to a decision of the Korean Supreme Court of Justice passed on 24<sup>th</sup> May 2012 which reversed the decisions of lower courts rejecting the demands for compensation by forced labour victims against two leading Japanese industries. Moreover, about the same ILO Conventions, there is a CEACR Request (on the same ILC session of 2016), related to the trafficking in humans, in particular about the low number of prison sentences imposed on perpetrators, to the fact that no perpetrators of forced labour have been brought to justice, to the decline in victim identification and to the insufficient support granted to victims<sup>1317</sup>.

We therefore expect clear progress from Japan towards ratifying the two remaining ILO core conventions (on discrimination and on the abolition of forced labour), considering that, above all, Japan is the second largest contributor to the ILO's regular budget<sup>1318</sup>.

A peculiar case is that of CAFTA-DR, which, in addition to a mention to the ILO 1998 Declaration, refers explicitly only to one single core ILO Convention: ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) (ILO Convention 182). Art. 16.5, focused on "Labour Cooperation and Capacity Building Mechanism" states that: 1. 1. Recognizing that cooperation on labour issues can play an important role in advancing development in the territory of the Parties and in providing opportunities to improve labour standards, and to further advance common commitments regarding labour matters, including the principles embodied in the ILO Declaration and ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) (ILO Convention 182), the Parties hereby establish a Labour Cooperation and Capacity Building Mechanism, as set out in Annex 16.5.

This commitment undertaken by the signatory parties could be suggested as a model to follow because in this way, choosing one or more conventions to be respected, the binding of the commitments is assured.

Finally, we need to observe that the agreements do not contain any reference to the interpretation given by the ILO about the content of the Core Conventions, so the question whether the right to strike follows from or not the Convention n. 87 on freedom of association and right to organize is not clear, as prof. Bellace underlined in her paper.

#### 9.1.3.4. Pre-ratification conditionality.

In some cases, the social conditionality is more rigorous and it subordinates the signature of the

<sup>1316</sup> Observation (CEACR) - adopted 2015, published 105th ILC session (2016) - *Forced Labour Convention, 1930 (No. 29), Victims of wartime sexual slavery or industrial forced labour*.

<sup>1317</sup> Direct Request (CEACR) - adopted 2015, published 105th ILC session (2016), *Forced Labour Convention, 1930 (No. 29)* - ([http://www.ilo.org/dyn/normlex/en/f?p=1000:13201::NO:13201:P13201\\_COUNTRY\\_ID:102729](http://www.ilo.org/dyn/normlex/en/f?p=1000:13201::NO:13201:P13201_COUNTRY_ID:102729)).

<sup>1318</sup> [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/publication/wcms\\_357443.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/publication/wcms_357443.pdf).

trade agreement to the ratification of the Conventions (the so-called “pre-ratification conditionality”). This is the model adopted by the EU Generalized System of Preferences<sup>1319</sup>, a regulation model which intended to combine trade liberalization and respect of social rights through the preferential and non-mutual treatment granted to developing Countries in the field of trade exchanges, notwithstanding the GATT normative<sup>1320</sup>.

According to the special incentive arrangement for sustainable development and good governance (as stated by Art. 9 of the Reg. 978/2012) a GSP beneficiary Country may benefit from the tariff preferences provided under the special incentive arrangement for sustainable development and good governance if “it has ratified all “relevant conventions” and the most recent available conclusions of the monitoring bodies under those conventions do not identify a serious failure to effectively implement any of those conventions.

The relevant conventions are the core international conventions on human and labour rights, environmental protection and good governance. In terms of social rights, Parties are committed to ratify and implement a list of Core human and labour rights UN / ILO Conventions, and thus, indeed, all the ILO Core Conventions<sup>1321</sup>.

In this sense the EU GSP could be considered as an exemplar model of positive linkage between international trade and social rights in the European external action<sup>1322</sup>: any of the GSP arrangements may be temporarily withdrawn for serious and systematic violations of core principles laid down in core human and labour rights conventions and on a number of other grounds such as unfair trading practices and serious shortcomings in customs controls.

#### 9.1.3.5. The reference to the Decent Work and to Sustainable Development

The last FTA signed by EU (CETA and EU-Korea) extends their commitment to the decent work and sustainable development.

In the EU-Korea for example all labour provisions are inserted in Chapter 13, “Trade and Sustainable Development”, where art. 13.1 states the intentions of the Parties “to strengthen their trade relations and cooperation in ways that promote sustainable development” and (art. 13.6), the Parties recognise “the beneficial role that core labour standards and decent work can have on economic efficiency, innovation and productivity, and they highlight the value of greater policy

<sup>1319</sup> F. PANTANO, R. SALOMONE, *Trade and Labour within the European Union Generalized System of Preferences*, Jean Monnet WPS, New York University School of Law, 2008.

<sup>1320</sup> See T.M. FRANCK, *Fairness in International Law and Institution*, Oxford, 1995, p. 58.; L. BARTELS, C. HABERLI, *Binding Tariff Preferences For Developing Countries Under Article II GATT*, in *Journal of International Economic Law*.

<sup>1321</sup> Annex VIII of Regulation (EU) No 978/2012 of 31 October 2012, The relevant GSP+ conventions, Core human and labour rights UN/ILO Conventions: 1. Convention on the Prevention and Punishment of the Crime of Genocide (1948) 2. International Convention on the Elimination of All Forms of Racial Discrimination (1965) 3. International Covenant on Civil and Political Rights (1966) 4. International Covenant on Economic Social and Cultural Rights (1966) 5. Convention on the Elimination of All Forms of Discrimination Against Women (1979) 6. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) 7. Convention on the Rights of the Child (1989) 8. Convention concerning Forced or Compulsory Labour, No 29 (1930) 9. Convention concerning Freedom of Association and Protection of the Right to Organise, No 87 (1948) 10. Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, No 98 (1949) 11. Convention concerning Equal Remuneration of Men and Women Workers for Work of Equal Value, No 100 (1951) 12. Convention concerning the Abolition of Forced Labour, No 105 (1957) 13. Convention concerning Discrimination in Respect of Employment and Occupation, No 111 (1958) 14. Convention concerning Minimum Age for Admission to Employment, No 138 (1973) 15. Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, No 182 (1999).

<sup>1322</sup> Perulli A., *Clausola Sociale*, Enciclopedia del Diritto, Giuffrè, 2014, vol. VII, pp. 187-211.

coherence between trade policies, on the one hand, and employment and labour policies on the other”.

In CETA, Article 22.3, par. 2 entitled “Cooperation and promotion of trade supporting sustainable development” – the Parties “affirm that trade should promote sustainable development. Accordingly, each Party shall strive to promote trade and economic flows and practices that contribute to enhancing decent work (...)”. In the following article (CETA 23.3.2), we observe the commitment to “ensure that its labour law and practices promote the following objectives included in the *ILO Decent Work Agenda*, and in accordance with the ILO Declaration on Social Justice for a Fair Globalization of 2008 adopted by the International Labour Conference at its 97th Session, and other international commitments: (a) health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness; (b) establishment of acceptable minimum employment standards for wage earners, including those not covered by a collective agreement; and, (c) non-discrimination in respect of working conditions, including for migrant workers”.

As we will point out, (see *infra*), the reference to Decent Work and to the paradigm of sustainable development can represent a wider and new horizon for social clauses. Reluctant trade partners might also be more willing to accept a sustainable development chapter than a separate chapter on social rights, as Sustainable Development is a principle universally accepted<sup>1323</sup> and proclaimed by the UN, through the Sustainable Development Goals, and by the European Commission in all the latest Communications related to the European external action to harness globalisation<sup>1324</sup>.

Moreover, the framing of core labour rights as part of a broader “sustainable development” agenda has contributed to their unobjectable status<sup>1325</sup>.

The questions of sustainability in those FTAs serves the goals of protection and promotion of human rights and certainly possesses model character for other, future, free trade agreements and of course can be considered as a new basis of legitimation for a new era of social and enforceable clauses.

Indeed, the majority of agreements that include such provisions are too recent to be able to stand back and assess them adequately.

## 9.2. Carrot and stick: sanctions and incentives.

Whichever model of social clause may be taken into consideration, we may reaffirm that a merely vountaristic, or founded on moral suasion choice, would not be in line with the standards of the procedures of social conditionality within both European and North-American traditions. After a reasonable period of time of useless activation of the soft implementation mechanisms above mentioned (ministerial consultations, recommendations of the experts committee, realization of consultative public forums, and so on), the *non-compliance* with *labour standards* should

<sup>1323</sup> Van Den Putte L., Orbie J., *EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions*, in *International Journal of Comparative Labour Law*, 31, n. 3 (2015), p. 282.

<sup>1324</sup> WHITE PAPER ON THE FUTURE OF EUROPE; Reflections and scenarios for the EU27 by 2025; European Commission COM(2017)2025 of 1 March 2017; Brussels, 13.9.2017 COM(2017) 492 final COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A Balanced and Progressive Trade Policy to Harness Globalisation.

<sup>1325</sup> Van Den Putte L., Orbie J., *EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions*, in *International Journal of Comparative Labour Law*, 31, n. 3 (2015), p. 264.

lead to financial or commercial sanctions, following the procedure of *dispute resolution*. For example, interruption of benefits (on the NAALC model), and/or Monetary Enforcement Assessment (on the model of some FTAs and of generalized preference systems). At the same time, this kind of *penalties* should particularly regard those sectors in which the problems about compliance with the obligations specified on the chapter on Sustainability appear repeatedly, in spite of the technical/administrative support of the experts committee and international organizations like ILO, with whom we hope for a strict collaboration.

The contemplation of sanctionary mechanisms as a last resort does not exclude, and actually presupposes the coexistence of other compliance instruments: the cooperation and the technical support with multilateral agencies, notably the ILO. However, the TTIP should contemplate also some mechanisms founded on a promotional philosophy, under the shape of positive sanctions and “incentives”, like those who characterize in particular the GSP European Model.

#### 9.2.1. A verification of the enforcement. The NAALC, CAFTA, EU-GSP cases.

In terms of implementation, contrary to the US approach, the EU adopts a more nuanced approach, with a preference for dialogue and capacity instead of the provisions of sanctions: if it is true that, both for CETA and EPA (as for the TTIP), labour provisions have been widened and deepened compared to the past, we need to observe that they are mostly cooperative and non-binding provisions. As we saw, most EU FTAs use an aspirational language, and for this reason labour provisions risk to lack an effective remedy to labour violations or a valid deterrent. This is, unfortunately, in line with the EU traditional policies.

As a matter of fact, the only agreement where economic and clear sanctions are imposed, is the EU Generalised System of Preferences (GSP) as any of the GSP arrangements may be temporarily withdrawn for serious and systematic violations of core principles laid down in core human and labour rights conventions and on a number of other grounds such as unfair trading practices and serious shortcomings in customs controls.

This “stick and carrot” conditionality of the EU’s GSP constitutes the “flagship” of trade initiatives aimed at supporting sustainable development and human right.

In particular, if we consider the special incentive arrangement for Sustainable Development and Good Governance GSP+ granting full removal of tariffs for vulnerable low and lower-middle income Countries, its benefits may be temporarily withdrawn if the national legislation of a GSP+ beneficiary Country no longer incorporates the relevant conventions or if that legislation is not effectively implemented - in other words if the underlying balance in GSP+ between additional trade preferences in the EU market and beneficiaries' acceptance and implementation of international sustainable development and good governance rules and standards is no longer properly respected. In this regard, the Commission monitors the situation in beneficiary Countries on an on-going basis primarily by drawing on material available from the relevant inter-national monitoring bodies.

The problem is double: this regulation is only for developing Countries and, as other scholars observed, the temporary withdrawal more or less has remained “to be law in the books”.

Even in the case where sanctions for violations of the commitments in the field of labour law are clear and stated, the EU appears reluctant to apply trade sanctions for violation of labour rights: since 1995 the EU GSP has provided that “serious and systematic violations” of labour standards

could lead to a withdrawal of trade preferences but over the past two decades to date, that has only happened three times : in 1997 for Myanmar/Burma, on the grounds of serious and systematic violations of labour rights, in 2007 for Belarus, on the same grounds and in 2010 for Sri Lanka. Sri Lanka's benefits were temporarily withdrawn in 2010 due to non effective implementation of certain human rights conventions. Thus, imports from Sri Lanka benefit only from the standard GSP preferential treatment.

This lack of sanctions demonstrates that the GSP has rarely been used for protectionism reasons, to restrict imports from developing Countries, because numerous calls for sanctions have not been taken into consideration.

For example, the only sanction to be adopted against China in 1989 (at that time China was a GSP beneficiary) for its violent repression of the Tiananmen Square protests was an arms embargo; in 2008, no new sanctions were added after another wave of violence in Tibet. In the same year, Russia's attack on Georgia went unpunished.

Before continuing the reflection, I would like to point out that this problem is not an only European problem.

Moreover, if we consider the US, the field of application of NAALC's sanctions is rigorously limited: they apply only if the violation of the agreement proves to be "trade related" and "covered by mutually recognized labour law" (NAALC, Art. 49).

The NAALC requires that the NAOs (National Administrative Office in each of the three NAFTA Parties) provides for the receipt and review of submissions on labour law matters in the other two Countries. The NAALC further delineates the types of issues that may be considered at the various resolution stages of the Agreement. The framers of the Agreement intended that disputes be addressed and settled through dialogue and cooperative consultations, initially at the NAO level and later at the ministerial level. At the NAO and ministerial level, there is a broad range of issues that may be considered for review.

At the time of writing (August 2018), there are 39 submissions received under the NAALC: 3 are currently under review, 4 have been withdrawn by submitter, 9 are declined after review, 23 have been reported<sup>1326</sup>.

Considering those reported, 11 submissions were filed by the US (especially against Mexican industries, the majority for violations under the NAALC concerns freedom of association and the right to organize, collective bargaining, but there were also cases concerning violations of occupational safety and health, minimum wage and overtime pay, access to fair and transparent labour tribunal proceedings and gender discrimination), 10 submission were filed by Mexico (most of the submissions concern migrant workers in the State of Washington employed in the apple industry and raises issues of freedom of association, safety and health, employment discrimination, minimum employment standards, protection of migrant workers, and compensation in cases of occupational injuries and illnesses) and 2 submission were filed by Canada (one was also filed with the U.S. NAO and includes the same allegations of worker rights violations at two different garment factories located in Mexico, and the other raises concerns about the enforcement

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<sup>1326</sup> <https://www.dol.gov/ilab/trade/agreements/naalc.htm> (here the list of cases with the reports).

of labour legislation covering occupational safety and health and freedom of association of workers at the Itapsa export processing plant in the State of Mexico).

As for the results of this submissions, with regards to the last case submission reported (June 2016)<sup>1327</sup>, the U.S. Department of Labour has issued a public report (June 2016) in response to a submission filed under the NAALC by the United Food & Commercial Workers Local 770, the Frente Auténtico del Trabajo, the Los Angeles Alliance for a New Economy, and the Project on Organizing, Development, Education, and Research, with research assistance from Change to Win. The report determines that there is insufficient evidence, at this time, to support specific conclusions related to the Mexican government's application of labour laws at Chedraui retail stores, in light of information in the submission and additional information obtained during the review. Nonetheless, the report discusses in detail the Department of Labour's longstanding, serious concerns regarding issues raised in the submission, in particular so-called "protection contracts" and the primary factors that facilitate them, such as structural bias in the Conciliation and Arbitration Boards that administer labour justice in Mexico.

The previous submission had the same result (August 2007), due to the lack of evidence of proof. The submission (U.S. NAO Submission No. 2005-03, Hidalgo) was filed on October 14 by The Progressive Union of Workers of the Textile Industry, the Manufacturing, Cutting and Confection of Fabric and Garments in General and Related and Similar Industries in the Mexican Republic, a member of the "Vanguardia Obrera" Workers Federation of the Revolutionary Confederation of Workers and Peasants, with the support of the U.S. Labour Education in the Americas Project, and the Washington Office on Latin America under the NAALC concerning the enforcement of labour laws by the Government of Mexico. The submission focuses on events at a textile plant operated by Rubie's de Mexico. In particular, the submitters allege that the Government of Mexico has failed to fulfill its obligations under the NAALC to effectively enforce its labour law under Article 3 in connection with freedom of association and protection of the right to organize, the right to bargain collectively, the right to strike, prohibition of forced labour, labour protections for children and young persons, minimum employment standards, elimination of employment discrimination, prevention of occupational injuries and illnesses, and compensation in cases of occupational injuries and illnesses, and under Article 5 with respect to fair, equitable and transparent labour tribunal proceedings.

According to Public Report of Review of Office of Trade and Labour Affairs (OTLA), "the submitters failed to provide sufficient evidence to corroborate many of their claims and failed to pursue domestic procedures to remedy many of the alleged violations". That is why the report included only some recommendation: the OTLA recommends NAO consultations pursuant to Article 21 of the NAALC to discuss the following: i) Compliance with procedural requirements in Mexico's labour law, and measures taken to prevent unwarranted delays and to improve coordination between federal and State authorities in the administration of labour justice procedures; ii) Transparency in the union representation process, including the establishment of a publicly available registry of unions and collective bargaining agreements; iii) Resources devoted to the periodic inspection of workplaces so that labour laws, such as those related to the protection of young people, minimum employment standards, and occupational safety and health, may be enforced effectively and consistently; iv) Clarification of discriminatory practices in Mexico and the current

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<sup>1327</sup> U.S. NAO Submission No. 2015-04 (UFCW).

status of initiatives undertaken on this issue pursuant to the Ministerial Consultations Implementation Agreement relating to U.S. Submission 9701; and v) Access to Mexican authorities responsible for relevant labour law enforcement. Despite the strict limits of operativeness which have been demonstrated by these two submissions' results, the predisposition of a social clause supported by an actual sanctionary apparatus (which goes well beyond "the moral pressure" and the *mobilisation of shame*, in which basically the activity of the ILO can be summarized) inside a multilateral agreement of free exchange constitutes an unprecedented fact.

On one hand, this marks a clear fracture with the past experiences of international regulation of the economy and of trade exchanges, in particular with the GATT, and on the other hand, it modifies the unilateral approach so far dominating the USA's trade policies, making it more suitable to international law principles and to the multilateral discipline of trade relations.

With regards to the difficulty to apply the sanctions, we may underline that in all the commitments according to the commitment of the parties not to relax their labour law "in a manner affecting trade", the affection to trade is very hard to be demonstrated.

We must observe that this formula is very frequent: in EPA (art. 16.2.2. "the Parties shall not waive or otherwise derogate from those laws and regulations or fail to effectively enforce them through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties") but also in CAFTA-DR (art. 16.2, Enforcement of Labour Laws 1. (a) A Party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement), in US Jordan (art. 6.4.a A Party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties) and in CPTTP (Article 19.4: Non Derogation. The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in each Party's labour laws. Accordingly, no Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations: (a) implementing Article 19.3.1 (Labour Rights), if the waiver or derogation would be inconsistent with a right set out in that paragraph; or (b) implementing Article 19.3.1 (Labour Rights) or Article 19.3.2, if the waiver or derogation would weaken or reduce adherence to a right set out in Article 19.3.1, or to a condition of work referred to in Article 19.3.2, in a special trade or customs area, such as an export processing zone or foreign trade zone, in the Party's territory, in a manner affecting trade or investment between the Parties").

The difficulties to demonstrate the Party's intention to affect trade, that is to attract investors and enterprises, is clearly demonstrated by Trade Dispute issues ruling in US-Guatemala Labour Law Case, under the CAFTA -DR, finding that Guatemala's alleged failure to enforce domestic labour legislation was not done "in a manner affecting trade".

The Guatemala Submission under CAFTA-DR (*Arbitral Panel Decision Reached in June 2017*) was the first time a labour rights dispute had ever been filed under an FTA's dispute settlement mechanism. The US formally launched the case in 2010, following complaints made by domestic and Guatemalan labour unions two years prior. Washington officials raised concerns that the alleged treatment of Guatemalan workers (8 employers were cited for their dismissal of nearly 80 workers who had attempted to engage in union activities) was in violation of their labour rights, while also putting American workers at an unfair competitive disadvantage. The international ruling

(June 2017) prevents the United States from seeking penalties on Guatemala for failing to effectively enforce its labour laws, simply because such abuses are not “in a manner affecting trade.” Under CAFTA-DR, the panel decision is final; there is no appeal process. Any press inquiry about the case should be directed to the Office of the U.S. Trade Representative.

This decision demonstrates that it is very difficult for workers’ complaints to be upheld, despite the social provisions included in the FTA. This is why we need to think to a new legitimization of the social clause.

### 9.3. Enforcement and ISDS.

A profile of particular and current interest concerns the relationship between the enforcement of social clauses and arbitral clauses on the investments (ISDS), or ICS, and their compatibility with the principles of EU’s right on the external action of the Union (art. 206 and 207 TFEU, but also art. 9 on horizontal social clause).

Such clauses could be undermined by the ISDS (*Investor-To-State Dispute Settlement*), a mechanism included in many trade and investment agreements to settle disputes.

This clause could be invoked by transnational corporations in order to protect investments and to contrast all social policies considered against financial and economic interests<sup>1328</sup>: under a free trade agreement which include ISDS mechanisms, a company from one signatory State investing in another signatory state can argue that new laws or regulations, for example the raising of some labour standards, could negatively affect its expected profits or investment potential, and seek compensation in a binding arbitration tribunal, rather than public courts. In this way, all the commitment taken by a Country in terms of social rights could be frustrated.

In reply to the criticisms to this tool, in particular due to the lack of the right to appeal, the lack of transparency or the lack of independence of arbitrators, the EU has decided to reform the traditional arbitration-based system and replace it with the ICS, the Investment Court System.

The ICS incorporates many innovative features and addresses to some of the core criticism, solving many problems like the lack of the right to appeal, the lack of transparency or the lack of independence of arbitrators, demonstrating a certain progress in developing a balanced and forward-looking approach in the international investment policy<sup>1329</sup>.

The first important element is the establishment of an Investment Tribunal of First Instance, composed of 15 judges jointly chosen at random for each case, and subjected to strict ethical requirements, including a prohibition from acting as legal counsel in any investment dispute. The second important element is the creation of a permanent Appeal Tribunal, which will ensure the respect of rights and more importantly, the coherence of decisions in individual cases.

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<sup>1328</sup> Cfr. LANCE COMPA, *Labour Rights and Labour Standard in Transatlantic Trade and Investment Negotiations: An American Perspective*, John Hopkins University, Working Paper Series, July 2014.

<sup>1329</sup> Cagnin V., *New generations treaties and the attempts for a renewal of the Investor State Dispute Settlement (ISDS)*, in Perulli A., Treu T., *Sustainable Development, Global Trade and Social Rights*, Kluwer, 2018, pp. 155-168.

Following the EU Commission proposal to replace the ISDS with the ICS in the context of the TTIP negotiations (at the moment stopped), the ICS has been included in the CETA<sup>1330</sup>, and in the trade agreements concluded with Singapore, Vietnam and Mexico.

The EU has discussed during the negotiations its reformed proposal on the ICS also within the Economic Partnership Agreement (EPA) between the EU and Japan, which is a well-known supporter of the ISDS<sup>1331</sup>: the agreement is now awaiting ratification by the European Parliament and the Japanese Diet following which it could enter into force in 2019 but negotiations with Japan continue on investment protection standards and investment protection dispute resolution in order to reach convergence in the investment protection negotiations as soon as possible, in light of their shared commitment to a stable and secure investment environment in Europe and Japan.

For the EU, ISDS in EU trade and investment agreements is a thing of the past: in its recent judgment of 6 March 2018 in the *Achmea* case, the ECJ confirmed the Commission's view that investor-to-State arbitration in an agreement concluded between Member States is not compatible with EU law. The ECJ ruled that these clauses do not have legal effect.

Thus, the replacing of the ISDS with ICS is considered as a guarantee not to undermine EU's and member States' right to adopt and apply, accordingly to their respective competences, the measures geared to non-discriminatorily fulfill legitimate interests of public policy, in social, environmental, national security, financial system stability, public health and security fields, as well as in social policies such as the raising of the minimum wage.

The skepticism about ISDS is growing in various parts of the world, also in the US.

This is why the renegotiations of NAFTA, including the chapter on investment, began. Canada, Mexico and the United States held several rounds of renegotiations of the treaty. Although a handful of chapters have been finalized (e.g. competitiveness, and customs and border facilitation), the investment chapter remained in flux at the time of writing. A number of proposals have been reported in the early part of 2018, including regarding the status of ISDS, since the failure by the party complained against to effectively enforce its occupational safety and health, child labour or minimum wage technical labour standards is trade-related and covered by mutually recognized labour laws.

<sup>1330</sup> CETA moves decisively away from the traditional approach of investment dispute resolution and establishes independent, impartial and permanent investment Tribunals. Accordingly, the members of these Tribunals will be individuals qualified for judicial office in their respective countries, and these will be appointed by the European Union and Canada, and not arbitrators nominated by the investor and the defending State (as foreseen in the ISDS). Contrary to the traditional investment dispute settlement approach, cases will be heard by three randomly selected members. Strict ethical rules for these individuals have been set to ensure their independence and impartiality, the absence of conflict of interest, bias or appearance of bias. The Tribunal will be composed of fifteen members nominated by the Union and Canada and not by arbitrators nominated by the investor and the defending State. The tribunal will hear cases in divisions of three members appointed via a randomised procedure. CETA is then the first agreement to include an Appeal mechanism (art. 8.28) which will allow the correction of errors and ensure the consistency of the decisions of the Tribunal of first instance<sup>1330</sup>. Furtherly (art. 8.36), CETA introduces full transparency in investment dispute settlement proceedings: all documents (submissions by the parties, decisions of the tribunal) will be publicly available on a United Nations website which the EU will finance and all hearings will be open to the public. Interested parties (NGO's, trade unions) will be able to make submissions. This will be binding and cannot be waived by the tribunal or the parties to a dispute.

<sup>1331</sup> In December 2017, the EU announced that the negotiations between the EU and Japan on the EPA had been finalized. However, for the investment chapter, some aspects remain subject to further negotiation.

On September 6, 2017, Belgium (strong opponent to the signature of CETA) submitted to the Court of Justice of the European Union (CJEU) a request for an opinion on the compatibility of the ICS with the European Treaties<sup>1332</sup>.

Specifically, Belgium is requesting an opinion on the compatibility of the ICS with (1) the exclusive competence of the CJEU to provide the definitive interpretation of EU law, (2) the general principle of equality and the “practical effect” requirement of EU law, (3) the right of access to the courts and (4) the right to an independent and impartial judiciary.

The doubt of the compatibility could be overcome also with regards to the EU external action, in the ambit of which, following the Lisbon Treaty, the linkage between global trade and social rights<sup>1333</sup> moves on, keeping the promotion of human dignity and the respect of equality and solidarity, which cannot be sacrificed by the free trade.

Another limit to the fairness of this clause is due to the presence of the Horizontal social clause<sup>1334</sup> (Art. 9 TFEU), which reads: “In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, (and a high level of education, training and protection of human health)”.

The CJEU’s response will affect future international agreements negotiated by the European Union: if, according to the CJEU, the ICS is not compatible with the EU law, in the future EU’s FTAs a more social logic (and less commercial) will be adopted.

In the meantime, the best solution to avoid any negative potential effect of ISDS / ICS on social rights, can be found in the possibility of restricting treaty provisions that are subject to this arbitral resolution of conflict, excluding certain policy areas, such as labour law, so that those clauses cannot be invoked in social matters. Otherwise, all social clauses, and in general, all the commitments to labour, social rights and the right to regulation, would not have reason to be inserted into Treaties.

## 10. Some concluding remarks: from free trade to fair trade, through a new sustainable legitimization of social clauses.

The most recent European architecture marks an important stage in the passage from *free-trade* to *fair-trade*, in a perspective of strong re-launch of the *linkage* between international trade and promotion of *core labour standards*<sup>1335</sup>. Among the innovations introduced by the Lisbon Treaty is, in fact, relevant the totally unprecedented reference to the inspirational principles of the EU’s external action that mark a crucial leap forward in the logic of inter-normativity between trade policies and protection of social rights. The new article 205 of the TFEU establishes that the action of the Union on the international scene lies on the principles, pursues the goals and is conducted complying with the general provisions of the Chapter I of the Title V of the EU Treaty. The reference is in particular to the art. 21 of the Chapter I, which states that the inspiring principles of the

<sup>1332</sup> [https://diplomatie.belgium.be/sites/default/files/downloads/ceta\\_summary.pdf](https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf)

<sup>1333</sup> A. PERULLI, *Sostenibilità, diritti sociali e commercio globale: la prospettiva del Trans-Atlantic Trade and Investment Partnership (TTIP)*, in WP CSDLE “Massimo D’Antona”.INT - 115/2015, 10.

<sup>1334</sup> On horizontal social clause, cfr. A. PERULLI, *Fundamental Social Rights, Market Regulation and EU External Action*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2014, 30,1, 33-39.

<sup>1335</sup> A. LYON-CAEN, *A proposito di dumping sociale*, in *Lav. dir.*, 2011.

EU's action are "democracy, the State subject to the rule of law, the universality and indivisibility of human rights and fundamental freedoms, the respect of human dignity, the principles of equality and of solidarity and the respect of the principles of the Charter of UN and of international law".

The introduction of these general provisions applicable to the totality of the EU's external actions, international trade included, represents one of the main systematic innovations of the Lisbon Treaty, which opens unprecedented perspectives in the regulation of the global market, not only according to principles of profit, but of democracy and respect of human rights.

Another significant innovation of the Lisbon Treaty is to be read in this perspective: it is relative to the goals of the relations "with the rest of the world" and it states that the EU affirms and promotes its values and "contributes" to the "sustainable development of the Earth", to "solidarity" and to "fair and equal trade", as well as "to the elimination of poverty and to the protection of human rights" (art. 3 TUE). The Lisbon Treaty represents in this sense a peculiar stage towards a renewed commitment on the part of the EU in the promotion of *core labour standards*, by easing the ILO's normative action and promoting its respect in the field of its external relations, with particular (but not exclusive) reference to the trade and common investment policies. Therefore, we need to deeply ponder on the main sense of this innovation and on the operational possibilities that it opens, with particular emphasis on the notion of *free and fair* trade.

We may groundedly argue, in this sense, that behind this formula (and behind "sustainable development") we have an idea of market and trade that is by all means opposed to the one of neo-liberalistic free market, founded on the legitimating of *social dumping*, on the Darwinian competition between social systems and juridical orders. We have a different vision of trade: a fair trade complying with the rules, the principles of equality, solidarity and correctness within exchanges; a trade (and an economic development) that is not to be founded on competitive devaluation of social regimes, but, on the contrary to become an occasion to promote the EU's values and principles, such as that of sustainable development

As a matter of fact, it is not easy to explain the meaning of the concept of fair trade. According to a more restrictive merely economic hypothesis, fair trade alludes to an organization of international trade exchanges that may ensure an equal sharing of trade flows. The right quantity of exportations and importations for each Country would then be the one guaranteeing the equilibrium of the bilateral trade balance with each partner. The issue related to equality may be utilized also to claim an equal treatment of economic actors, by reason of which Governments should grant their national enterprises the same advantages of their foreign competitors. We find in this meaning of equality the idea of a level playing field among *players* that is achievable both through the elimination of unfair advantages of foreign enterprises, and through compensational mechanisms. Also in this perspective, the idea of fair trade breaks up one of the cornerstones of social *dumping*, that is to say the principle of comparative advantages as a foundation of international trade policies. As a matter of fact, social dumping, that consists in less strict labour *standards* within exporting fields, is a possible cause of distortion of trade flows, that may be caused by a "failure" of the government in the *enforcement of labour rights*: basically it is definable as an "unfair subsidy" that legitimates the activation of the procedure to impose compensational duties, according to an interpretative line suggested in the cases of environmental dumping, where the tolerance of some Countries with respect to environmental degradation (particularly typical of developing Countries) would result in a sort of subsidization for national industry.

We may formulate a more extensive interpretation of the notion of fair trade in a social perspective by increasing the value of the formulation of the Havana Charter, forefather of forthcoming (however, as reminded never constituted) International Trade Organization (ITO), whereby not only was it provided the obligation to comply with “equal labour conditions”, but, even the necessity of a institutional bridge between the ILO and the ITO, in the direction of a profitable integration between liberalization and social *standards*.

Considering all this, the idea of fair trade re-launches the above-mentioned thesis according to which social dumping may be included within subsidizations granted by the State, as an attribution of an advantage to enterprises that falls on the lower cost of the product. However, in this perspective, the usage of the art. XVI of the GATT in social matters – according to a perspective put forward also by the International Metalworkers Federation and analysed by the ILO’s International Office of Labour – presumes such an extensive interpretation of the concept of subsidization that it would include in itself the inertia of the State that artificially (and with active will) keeps sub-standards labour conditions.

The will to promote an external action that may be coherent with the promotion and the protection of fundamental social rights is obtained from the analysis of the trade agreements with third Countries.

The same methodology used in the TTIP, CETA and EPA, was followed in the ambit of *free trade agreement* with Korea and the *EU-Cariforum Economic Partnership Agreement*, which could be considered as another exemplification of the EU’s approach in this matter, by referring to the respect, the promotion and the effective application of *core labour rights*, the application of the ILO’s Conventions and the commitment in order that the policies of *foreign direct investment* are not encouraged by compromise-oriented reductions within the internal legislation in matter of health and security in the workplace or in the de-regulation of *core labour standards*<sup>1336</sup>.

In the same way, in the Cariforum Agreement, that is operating within the relationships among the EU and all the Countries of the Caribbean Community (CARICOM), the Preamble refers to the commitment to the respect of “*basic labour rights*”, with specific reference to “rights” and not merely *standards* or principles; further, the priorities of cooperation provide for a precise commitment in order to “facilitate the development and the respect of internationally recognized environmental and social standards” (art. 8).

In this perspective, the *compliance* with international labour law results as incorporated in the goals of growth and of development, to the extent that – and this is the most innovative part of the Agreement – “the behaviour of investors is directly interested. Investors must comply with the ILO’s *core labour standards*” (art. 72). The art. 74, relative to the maintenance in activity of social *standards*, states with even greater energy that the parties shall ensure that the “*foreign direct investments are not encouraged by relaxing the labour standards in matter of labour and health in the workplace*”. Despite the *enforcement* of this provision is entrusted to single Countries, however under the control of the ILO, this clause sends a clear message to potential foreign investors, in order for them to seriously adopt praxis of “social responsibility”, instead of recurring to rhetorical as much as inoffensive calls of ethic-social principles.

<sup>1336</sup> See art. 72 of the *EU-Cariforum Agreement*.

Finally, we would like to point out a new tendency regarding the promotion of the compliance of social rights: the inclusion of labour provisions is more often legitimized in terms of human rights, and also increasingly in terms of sustainable development. As a matter of fact, labour standards are included in so-called chapters on “Trade and Sustainable Development”, devoted to social and environmental goals, as we saw for TTIP, CETA and EPA.

The concept of sustainable development has allowed for a large political consensus within Europe, to support the inclusion of labour standards in trade agreements. Probably social clauses have finally found an ideal and conceptual paradigm capable of providing new legitimacy and a new impetus for their incorporation into international trade treaties. This new legitimation also benefited from the legislative action of the ILO, which has become the qualified “reference point” for the social pillar of sustainable development; and this happened also thanks to the choice made by the ILO, and that in the end proved to be right<sup>1337</sup>, to define the core labour standards with the 1998 Declaration. This choice has in fact allowed to identify in a more specific and clear way the contents of the social clause (I mean the minimum contents that should exist in any social clause), without evidently setting aside the other conventions and therefore the variety and richness of international labour law.

Sustainable Development is, indeed, an economic theory as well as juridical and ethical. Development is often understood as a synonym for economic development or economic growth. Sustainable development builds and modifies the international approach to development which needs to be understood more broadly. In the international community development in the past half-century includes at least four related concepts: peace and security, economic development, social development and national governance that secures peace and development. Each concept is reflected in major multilateral treaties that provide a common framework for relations among nations as well as a shared set of national purposes. In particular, I would like to point out the idea that Social and economic development are closely related, not only conceptually, but also in the practices of social and economic relationships. Countries that have emphasized education, health and related aspects of social development tend to have the best economic performance. Therefore, the link between economic and social sphere is not an unnatural invention and it's not related to utopia or ideology. It's not for nothing that a fundamental Treaty on human rights, The International Covenant on Economic, Social and Cultural rights contains in itself the idea of integration between economic and social sphere.

Nowadays, the UN, with its 2030 Agenda for sustainable development pursues an integrated vision with economic, social, environmental aspects; and a specific point (number 8) is related to employment and decent work, and they provide to push on the promotion of sustained, inclusive and sustainable economic growth and full, productive employment and decent work for all. In particular point 8.8 of the agenda concerns the protection of labour rights and the promotion of safe and secure working environments for all workers, including migrant workers and those in precarious employment. So, labour standards are fully presents in the conceptual framework and in the political agenda of Sustainable Development, and can constitute a new important element

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<sup>1337</sup> See B. Langille, *Core Labour Rights - The True Story (Reply to Alston)*, in EJIL, Vol. 16 no.3, 2005, p. 409.

of theoretical and practical justification for the law systems at national<sup>1338</sup>, international and supranational level<sup>1339</sup>. At the same time, labour law is undoubtedly an element of that paradigm, capable of providing a response to coordination failures and imperfections which are inherent in the labour market and contribute to economic development and growth<sup>1340</sup>.

It is evident that, inside the Sustainable Development paradigm, the economic matter matches with the political-institutional, juridical and ethical matter. Basically, through the paradigm of Sustainable Development, some values coming from afar are reconsidered and are today re-discovered by a non-standard economic thought. Moral concepts such as prudence, social justice, equity are thus revitalized, and a particular emphasis is placed on the use of fundamental social rights in achieving Sustainable Development<sup>1341</sup>.

The most accomplished example of this trend is offered by the European Model of Sustainable Development, from the Amsterdam Treaty of the EU that declared that one of the objectives of the European Union is to promote economic and social progress and to achieve balanced and sustainable development, to the Lisbon Declaration in 2000, where the European Council set for the Union the strategic ambitious goal of becoming the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion<sup>1342</sup>. Another important innovation introduced by the Treaty that can be interpreted in this context, regarding the goals of relations “*with the wider world*”, according to which the EU upholds and promotes its values and among other things “*contributes [...] to the sustainable development of the Earth, solidarity and [...] free and fair trade*” as well as to the “*eradication of poverty and the protection of human rights*” (Art. 3 TUE). In order to comply with a strategy of Sustainable economic growth, when the EU re-planned the regulations on GPS (the generalized preference systems which allows favourable conditions to PVS in trade matters) in the field of its external relations, it has titled this chapter “Sustainable and Good Governance”. In the same perspective, within the TTIP negotiations between EU and USA, they are

<sup>1338</sup> This is why Sustainable Development can be considered as a new paradigm for Italian Labour Law, to exit from the current crisis and to stop the de-regulation process. See A. Perulli, Il contratto a tutele crescenti e la Naspi: un mutamento di “paradigma” per il diritto del Lavoro? in A. Perulli, L. Fiorillo, Contratto a tutele crescenti e Naspi, Decreti legislativi 4 marzo 2015, n. 22 e n. 23, Giappichelli, Torino, 2015; A. Perulli, L’idea di diritto del lavoro, oggi, in A. Perulli (a cura di), L’idea di diritto del lavoro, oggi. In ricordo di Giorgio Ghezzi, Cedam, Padova, 2016, p. XLI; H. Arthurs, Labour Law After Labour, in G. Davidov, B. Langille (eds), The Idea of Labour Law, Oxford University Press, Oxford, 2011; B. Langille, Labour Law’s Theory of Justice, ibidem, p. 101; V. Speziale, La mutazione genetica del diritto del lavoro, in Dir. lav. mer., 2016, 2.

<sup>1339</sup> See T. Novitz, *The Paradigm of Sustainability in a European Social Context: Collective Participation in Protection of Future Interests?*, IJCLLIR, 2015, 243; T. Treu, *Labour Law and Sustainable Development*, WP CSDLE “Massimo D’Antona”.INT-130/2016

<sup>1340</sup> See S. Deakin, *The Contribution of Labour Law to Economic Development and Growth*, Centre for Business Research, University of Cambridge, Working Paper No. 478, March 2016

<sup>1341</sup> See R. Zahn & D. Mangan, *Labour Standards and Sustainable Development: Unpicking the EU’s Approach*, IJCLLIR, 2015, 233.

<sup>1342</sup> The European Commission works to ensure that EU trade policy evolves to meet the Union’s overarching economic and political aims, including by enhancing coherence between trade policy and other EU external and internal policies. For example, trade policy contributes to the integrated policy-making of the 2030 Agenda for Sustainable Development by focusing not only on economic aspects, but also furthering social and environmental objectives, and contributes to the European Agenda on Migration and the European Agenda on Security (Brussels, 13.9.2017 COM (2017) 492 final COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A Balanced and Progressive Trade Policy to Harness Globalisation; WHITE PAPER ON THE FUTURE OF EUROPE, Reflections and scenarios for the EU27 by 2025, European Commission COM (2017) 2025 of 1 March 2017).

discussing the social clause within a chapter of the Treaty dealing with Sustainable Development<sup>1343</sup>. More generally it can be surely stated that, thanks to this paradigm, the promotion of the international labour rights has become part of a wider frame on *Trade and Sustainable Development* assuming the status of “unobjectionable norm” in EU trade agreement<sup>1344</sup>.

Inside this complex framework, there is an important evolutionary perspective to be attentively considered. As far as now, it was the social dimension to push on the trade dimension to find acknowledgement. Today, the situation is far more balanced and it is the current trade sphere to be interested in internalizing the social concerns coming from the society, as there would be a failure in achieving any sort of growth, without taking social issues into consideration. As a matter of fact, as a Nobel prize winner has recently written, the failures of globalization must be attributed to the fact that the international economic institutions have been mainly driven by commercial and financial interests and eventually, a very much peculiar vision of the role of governments and markets has prevailed; consequently, the trade agreements have been unfair, because they have favoured the advanced nations to the detriment of workers, both in advanced Countries and developing Countries<sup>1345</sup>. This is demonstrated by the substantial failure of the policies – dating back to the 80’s – of IMF, WB and WTO. As a matter of fact, the Countries which actually followed their prescriptions did not achieve any economic development nor democracy<sup>1346</sup>. In almost all Countries involved into such policies, the effect has been a massive increase of debts versus foreign creditors, and heavy cuts of public funds to the welfare, education, health system, infrastructures.

As a consequence, if up until a recent past the matter of social clause merely involved the field of a perspective of “resistance” to the most negative effects of the liberalization of markets, with all the possible reserves on a strategy of Western economic systems accused of “masked protectionism”, the evolution of globalization, with its failures and contradictions, allows to position the matter in a wider and ambitious perspective today: as an aspect of the dynamic inter-relation between the sphere of the international market’s regulation and the development of non-trade, social and environmental policies; more generally, in the field of possible international or even global economic policies<sup>1347</sup>, within the range of a Sustainable Development paradigm.

<sup>1343</sup> See A. Perulli, *Sustainability, Social Rights and International Trade: The TTIP*, IJCLLIR, 2015, 473

<sup>1344</sup> See L. Van Den Putte & J. Orbie, *EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions*, IJCLLIR, 2015, 263. The approach of the EU to social issues in the sphere of external action consists of two main perspectives. On the one hand, it has a highly developed practice in including human rights clauses in its international agreements (including regional trade agreements) which allow for the suspension of the agreement in the event that one of the parties violates human rights or democratic principles. On the other, it deals with social matters, including labour standards, by way of co-operation, entailing where necessary financial and technical assistance. For instance, concerning the Agreement which contains a type of human/social rights clause on the model of EU agreements, we can make reference to the EU-Algeria Association Agreement, the EU-Jordan Agreement, the EU Chile Agreement, and the EU-Syria Agreement, in which the term “fundamental social rights” is used for the purpose of “giving priority to such rights” or to “recognize the responsibility to guarantee basic social rights”. In the Cotonou Agreement the parties have incorporated legally binding standards “reaffirming their commitment to the internationally recognized core labour standards, as defined by the relevant International Labour Organisation (ILO) Conventions”; see A. Perulli, *Fundamental Social Rights, market Regulation and EU External Action*, IJCLLIR, 2014, 41.

<sup>1345</sup> J. E. Stiglitz, *Globalization and Its Discontent Revisited. Anti-Globalization in the Era of Trump*, 2002, 2018.

<sup>1346</sup> See S. Sassen, *Expulsion: Brutality and Complexity in the Global Economy*, Cambridge, Mass., Harvard University Pres, 2014.

<sup>1347</sup> Cfr. H. W. Arthurs, *Extraterritoriality by Other Means: How labour Law Sneaks Across Borders, Conquers Minds, and Controls Workplaces Abroad*, Comparative Research in Law & Political Economy. Research Paper No. 25/2010.

Considering this, the current challenge is neither to liberalize the trade regime, nor to go back to anti-historic nationalisms, but to make the existing trade openness sustainable and compatible with the idea of social justice.

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