SÉRGIO PEDRO

EU FOREIGN DIRECT INVESTMENT POLICY AND HUMAN RIGHTS

Is European Union Promoting Human Rights abroad through its Foreign Direct Investment Policy? An analysis on the Normative Power Europe thesis.

Dissertação com vista à obtenção do grau de Mestre em Direito em Direito Público

Orientador:
Francisco Pereira Coutinho,
Professor da Faculdade de Direito da Universidade Nova de Lisboa

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RESUMO

A aquisição, por meio do Tratado de Lisboa, da competência exclusiva na negociação de tratados de comércio e investimento, comprometendo todos os Estados membros da União Europeia, representa uma mudança relevante no papel da União Europeia enquanto ator global.

A relação entre os direitos humanos e o investimento directo estrangeiro representa uma busca para a densificação do ideal cosmopolita da dignidade humana na realidade do século XXI.

Sendo considerado como uma referência para a defesa e promoção dos direitos humanos em todo o mundo, o projecto da União Europeia apresenta o objectivo de ser uma referência chave num campo onde as críticas surgem entre as evidências da existência de um modelo internacional que, ativa e passivamente, contribui para a perpetração de violações dos direitos humanos e em violação da soberania nacional dos Estados envolvidos.

Constitui intuito principal da presente dissertação a avaliação da evolução do mecanismo jurídico dos tratados internacionais de investimento na União Europeia, atribuindo um foco particular sobre as ferramentas recém-adquiridas, tomando em consideração a sua concatenação com os direitos humanos, as obrigações internacionais da União Europeia e seus Estados Membros neste domínio e o debate académico e político sobre a fragmentação do direito Internacional. Propomos confrontar os compromissos internacionais da União Europeia com o respeito e efectividade dos direitos humanos na sua política externa à luz da tese do "Poder Normativo Europeu" em todas as suas configurações, analisando o padrão de respeito dos Direitos Humanos promovido dentro e fora da União Europeia. Para cumprir tal objetivo iremos analisar o novo modelo de Acordo de Investimento Internacional da União Europeia e respectivas ferramentas de avaliação de impacto e responsabilização sobre os direitos humanos através da lente das obrigações

internacionais e Europeias de respeito dos direitos humanos, evidenciando as possíveis etapas futuras da política comercial comum.

ABSTRACT

The acquisition, through the Treaty of Lisbon, of the exclusive competence in the negotiation of trade and investment agreements , binding all European Union member states, represents a significant change in the role of the European Union as a global actor.

The relationship between human rights and foreign direct investment is a search for the densification of the cosmopolitan ideal of human dignity in the reality of twenty-first century.

Being regarded as an iconic figure for the defense and promotion of human rights around the world, the EU project has the objective to be a key reference in a field where critics arise between the evidences of the existence of an international model that active and passively contributes to the perpetration of human rights violations and the violation of the national sovereignty of the states involved.

It is the main purpose of this thesis to assess the evolution of the legal mechanism of international investment treaties in the European Union.

A particular focus will be given on newly acquired tools taking into account the concatenation to human rights, international obligations of the European Union and its Member States and the academic and political debate of the fragmentation of international law.

We propose a comparison of the international commitments of the European Union with the respect of human rights in the latter´s foreign policy, and the thesis of the "Normative Power Europe" in all its settings by analyzing the pattern of human rights promoted within and outside the Union European.

To accomplish this goal we will analyze the new International Investment Agreement model of the European Union and its impact assessment and accountability tools on human rights through the lens of international premises and

European respect for human rights, highlighting possible future steps for the EU´s common commercial policy.

List of abbreviations

ACP The African, Caribbean and Pacific Group of States
Art. Article/Articles
BIT Bilateral Investment Treaty
CAFTA Central America Free Trade Agreement
CCP Common Commercial Policy
CESCR Committee on Economic, Social and Cultural Rights
CETA Comprehensive Economic and Trade Agreement
CFSP Common Foreign and Security Policy
CSO Civil Society Organization
DG Relex Directorate General External Relations of the European EC
DG Trade Directorate General Trade of the European Commission
EC European Commission
ECJ European Court of Justice
ECT Energy Charter Treaty
ECHR European Convention of Human Rights
ECtHR European Court of Human Rights
EP European Parliament
EU European Union
EUCFR European Charter of Fundamental Rights
EUMS European Union Member States
FDI Foreign Direct Investment
FF. Following pages
FRA Fundamental Rights Agency
FTA Free Trade Agreement
HR Human Rights
HRIA Human Rights Impact Assessment

HRFASP High Representative of the European Union for Foreign Affairs and Security Policy

ICC International Chamber of Commerce

ICJ International Court of Justice

ICS Investment Court System

ICSID International Centre for the Settlement of Investment Disputes

IIA International Investment Agreement

IL International Law

INTA European Parliament Committee on International Trade

ISDS Investor-state Dispute Settlement

MAI Multilateral Agreement on Investment

MEP Member of European Parliament

MERCOSUR Common Market of the South

NAFTA North American Free Trade Agreement

NATO North Atlantic Treaty Organization

NPE Normative Power Europe

NYC New York Convention

OECD Organisation for Economic Co-operation and Development

OLP Ordinary Legislative Procedure

P. Page

Para. Paragraph

PP. Pages

QMV Qualified Majority Voting

SCC Stockholm Chamber of Commerce

SIA Sustainable Impact Assessment

TEC Treaty establishing the European Community

TEU Treaty on European Union

TFEU Treaty on the Functioning of the European Union

TISA Trade in Services Agreement ToL Treaty of Lisbon TPC Trade Policy Committee TTIP Transatlantic Trade and Investment Partnership UN United Nations UNCITRAL United Nations Commission on International Trade Law VCLT Vienna Convention on the Law of Treaties WTO World Trade Organization	

Introduction

I . The legal figure of Bilateral Investment Treaty (BIT) and Foreign Trade Agreements (FTA) acquired international legal relevance in the sixties of the twentieth century with the advent of the creation of international economic relations with countries that emerged from independence movements in colonized territories. Representing a legal mechanism which has as a primary goal the establishment of a legal framework to assure the certainty to potential economic actors to both sides of the investment relationship, investment agreements can, be a prominent legal mechanism for the promotion of a human right strategy worldwide.

In the EU realm, having acquired, through the Treaty of Lisbon (ToL), the exclusive competence to negotiate international trade and investment treaties compromising all European Union Member States (EUMS), the European Union (EU), the biggest trade and investment actor in the world (DG Trade,2014), has added to its role of competences a crucial tool for the promotion of the coherence and common path in the economic external relations of all its EUMS.

This newly acquired responsibility of the EU is bound to the respect of the normative framework of the ToL, moreover, art. 21 of the Treaty of the European Union (TEU) that refers that the Union's action on the international scene shall be guided by the principles which have inspired its own creation.

II. However, trade in goods or commodities is only one of the vectors of the contemporary global economy, which has been losing successive importance over time, compared to other internationalization areas, specially trade in services and flows of investment.

According to the United Nations Commission on Trade and Development (UNCTAD), the 1990s began with circa 900 investment agreements around the World and currently we have above 3000[1].

III. In the same path, the relationship between HR and Foreign Direct Investment (FDI) represents a quest of the international community for the densification of the cosmopolitan ideal of human dignity in the XXI century reality. The relationship between the international trade phenomenon, in its relative character of international competition for the downgrade of HR patterns (Petersmann, 2012), and HR protection and promotion, depends not only on an international concerted political strategy, but, moreover, on a solid and coherent local commitment for the construction of an alternative policy for trade and FDI. Thus, it is an example for the dethrone of the neoliberal tide on international relations legitimized by the current international economic law (Blalock, 2015; Picciotto, 2010).

IV. The academic attention for FDI has increased in the last five years, a phenomenon explained by the changes of the international economy since 2008 and to the stagnation of the World Trade Organization (WTO) negotiations in the Doha Round (2001), resulting in the fragility of the multilateralism model.

More than the movement of financial resources, such attention is justified by the securing of competitive advantages over local entrepreneurs both within the market as well from state authorities. This situation results in the inevitable involvement in the internal economic and political affairs of the host state, and implies changes in its political, social and economic dynamics.

The trans-nationalization of the European public sphere has allowed, beyond the affirmation of a post-national model, the emergence of a growing number of

[1] http://investmentpolicyhub.unctad.org/IIA

movements and organizations which articulate their identity and consequent action strategy in a supranational spectrum.

V. We can consider that the relevance of the EU as a political forum comes from the hybrid nature of its identitary basis. Through a EUMS joint identity, often ambivalent, the EU has established itself as a "window of opportunity for the forces that seek to challenge the national forms of organization of the political" (Costa, 2009. p. 20).

Being a flagship figure for the defence and promotion of HR worldwide, the EU holds the aim to be a key reference (Manners, 2001) in a field where critiques emerge among the evidences of an existent international model which actively and passively contributes to the perpetration of violations of HR and undermines the sovereignty of the peoples. More than, like Atlas, supporting the weight of a non-consensual figure, the EU publicly (EC, 2007) aims to co-create, through its policy, a HR-based framework of FDI that can represent a worldwide model.

Although the stakes are high when faced with a widely contested paradigm entrenched in decades of practice, whose origin can be traced to the North American Free Trade Agreement (NAFTA) signed in 1994 by Canada, Mexico, and the United States and its promotion of an economic model that violates HR, exemplified by the Mexico´s Maquiladoras[2] industry (FIDH, 2006).

Since 1961, the EU has been developing its potential as an actor of trade policies in ways that largely are conditioned by the influence of the global trade regime (EC, 2014).

[2] A manufacturing operation, where factories import certain material and equipment on a duty-free and tariff-free basis for assembly, processing, or manufacturing and then export the assembled, processed and/or manufactured products, sometimes back to the raw materials' country of origin.
This model has been object of critics due to the low working conditions and environmental standards of operations.

VI. In this thesis we will resort to critical legal and material analysis of the international commitments of the EU vis-à-vis the respect and fulfilment of HR in its foreign investment policy in the light of the thesis of the "Normative Power Europe" in all its consequences. Moreover, relating to the participation in the political decisions, the primacy of HR before business interests and the EU´s conditionality policy.

For the obtainment of the framework we will resort to a historical analysis of law by evidencing the HR pattern promoted within and outside the EU frontiers, with the general practice of the international economic law as a background.

To accomplish this goal, we will analyse the new International Investment Agreement Model of the EU and its tools of Impact Assessment (IA) on HR through the lens of international and European foundational premises, highlighting possible future steps for the EU´s Common Commercial Policy (CCP).

This thesis results from our work developed as Business and Human Rights intern in 2014 and 2015 at the EU delegation in Brussels of the International Federation for Human Rights[3] (FIDH) and as founding activist of the Portuguese Platform NO to the Transatlantic Treaty[4] in relation to the negotiation of new Foreign and trade agreements with Canada, United States, South Korea and China.

The present work will not analyse the Investor to State Dispute Settlement (ISDS) mechanisms due to the characters limitations of a Master thesis and considering that ISDS has been profusely studied in the last twenty years (Sornarajah, 2010, pp. 276 and ff.; Van Harten and Malysheuski, 2016).

It is therefore, out of the purpose of this dissertation to investigate the impact of the classic ISDS and the newly proposed investment court system (ICS) by the EU (Titi, 2016) in respect to HR obligations and the State´s right to regulate.

[3] https://www.fidh.org/

[4] https://www.nao-ao-ttip.pt

VII. The first chapter will be dedicated to the introductory explanation of the phenomenon of FDI and its relationship with other epistemological fields. The next chapter we will assess the changes of the EU´s FDI policy performed by the ToL in concatenation with the relevant EU institutions and democratic audition processes, namely, the EP, civil society and the Consultative Committees and civil society dialogue processes.

Encompassing an international relations perspective, Chapter III will embrace an analysis of the new legal framework of the EU FDI policy impacts within the neoliberal domination of International Economic Law and established corporatocracy. This analysis will consider the concept of Corporate Responsibility, confronting the proposed model with the theoretical debate around the concept of Normative Power Europe.

The fourth chapter is dedicated to the conditionality policy proposals of the EU, namely, a critical analysis about the way in which the advanced guidelines are an alternative to the discretionary westphalian model of enforcement of HR clauses.

Chapter V analyses the EU´s impact assessment policy and possible measures to obviate the violation of HR, the enclosure of the commons and violation of the sovereignty of the peoples.

Finally, Chapter VI is reserved to an exploratory discussion of possible alternatives to the current neoliberal FDI model. Considerable attention will be given to the communitarian construction and accountability of investment projects.

Due to the number of bibliography and the characters limitations, we will use the American Psychological Association (APA) mode of citation.

CHAPTER I –Human Rights and International Economic Law

1.1 Definition of Investment and Investor

The definition of FDI in the text of a treaty is of an extreme relevance for the determination of economic acts. Usually, the definition is not objective, but is part of an agreement´s normative content made on a case-by-case basis. A situation until this moment justified by the professional interests of investment lawyers and academics (CEO and TNI, 2014).

Moreover, the Vienna Convention on the Law of Treaties (VCLT) requires that tribunals consider first the ordinary meaning of the terms of the treaty as the best manifestation of negotiators intent, and that, as a rule, the specific substantive provisions of a treaty are given priority over generalized principles such as those contained in preambles.

Following SORNARAJAH´s definition (2010, p. 8), FDI involves the transfer of tangible or intangible assets from one country to another with the purpose of benefiting with their use in one country to generate wealth under the total or partial control of the owner of the assets.

The Encyclopaedia of Public IL (vol. 8, p. 246), defines FDI as "a transfer of funds or materials from one country to another in return for a direct or indirect participation in the earnings of that enterprise". However, this definition is broad enough to include a wide portfolio of investments, including those which comprises speculative assets.

The distinguishing element is that, in portfolio investments, on the one hand, there is a separation between management and control of the company and, on the other, the share of its ownership.

One criteria for clarifying the definition of FDI has been to identify it as having distinct elements such as commitment of assets into a project with the object of

profit, positive social impact and permanence and considering the risks arising from legal, political and economic changes in the host country[5].

The tendency of many investment treaties, particularly the models drafted by the United States and other capital-exporting states, has been to broaden the scope of the definition of FDI.

In early arbitrations in the field, a distinction was made between, on the one hand, foreign investments in developed countries which were subject to the host State´s domestic law and, on the other, investments in developing countries - which were subject to a supranational or international legal system. These arbitrations assumed that the agreements in the developing countries involved high risk but were being made to promote economic development. Indeed, the contracts made in developing countries were designated "economic development agreements" so as to reflect this distinction (Hyde, 1962, p. 271). In more recent years, the use of a tightly defined "closed list" of protected assets has also become the practice of some International Investment Agreement (IIA).

An additional requirement used is that only investments made in accordance with the host country law could have legal protection. Investments that fail to abide by the law of the host country will lose the protection of the IIA (Sornarajah, 2010, p. 14).

As for the definition of investor, the agreements commonly state that an "investor" is a natural or legal person of one contracting party that has made an "investment" in the territory of the other. Some agreements broaden that definition

[5] However, in the case *Petrobart Limited v. Kyrgyz Republic* decided under the Energy Charter Treaty (ECT) by the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the tribunal was called to decide whether a contract for the sale of gas condensate, which did not involve any transfer of money or property as capital, qualified as an investment under the ECT. According to the Tribunal's view:
"There is no uniform definition of the term investment, but the meaning of this term varies. While in ordinary language investment is often understood as being capital or property used as a financial basis for a company or a business activity with the aim to produce revenue or income, wider definitions are frequently found in treaties on the protection of investments, whether bilateral (BITs) or multilateral (MITs)." (*Petrobart Limited v. The Kyrgyz Republic,* SCC, 2003, p. 69)

further by stating that a covered investor may include those that have not yet established an actual investment in the host country, but are seeking to do so (International Institute for Sustainable Development, 2012, p. 9).

What is understood by the EU as FDI is presented in its EUROSTAT definition as "the category of international investment in which an enterprise resident in one country (the direct investor) acquires an interest of at least 10 % in an enterprise resident in another country (the direct investment enterprise). Subsequent transactions between affiliated enterprises are also direct investment transactions" (2007, p. 145).

A legal relation that is based on permanence through time, considering that "it gives the investor an effective voice in the management of the enterprise and a substantial interest in its business, FDI implies a long-term relationship between the direct investor and the direct investment enterprise" (EUROSTAT, 2007 , p. 145) that can "take place through the establishment of an entirely new firm, so-called «greenfield» investment, or through the complete or partial purchase of an existing firm via a merge or acquisition" (idem).

1.2 Foreign Direct Investment in face of the International Law

Considering the actual rate of creation, development and specialization of concepts and definitions of the legal field of FDI, and facing the consequences that derive from it, one question emerges: what is the relationship between the International FDI regime and the general International Law (IL)? In answering this question, we identified three threads in the doctrine.

Following the CALVO´s doctrine (Calvo, 1868), which defends that IL has no relevance to foreign investment and only national laws have competence in this field, the first thread argues that each one of the around three thousand FDI treaties that exist in the World are *Lex specialis*, thus derogating the general IL. The analysis

of this legal field is limited to the definition of the IIAs rules, underconsidering general IL [6].

The second thread argues that IIAs are a "network" (Juillard, 1988; Kaushal, 2009), a complex collection of more than 3.000 BIT´s that, due to the existence of similitudes between IIAs (particularly, on their legal concepts, mechanisms and the fact that it is a generalized international practice, ratified by a large number of countries), FDI law is a branch of customary IL (Lowenfeld, 2003, p. 123; Schwebel, 2011, pp. 146-151).

A literature review leads us to the conclusion that the defence of FDI law as customary IL is not new and that, since *the AAPL v. Sri Lanka* case, this thread is pushing even more for its acceptance (Mann, 1989; Salacuse, 2010; Wouters, Duquet and Hachez, 2012).

One of arguments refers that, by ratifying IIAs, the States establish, accept and, thus, enlarge the force of traditional conceptions of the law of state responsibility for FDI (Mann, 1989, p. 249). However, one must not forget that, despite their prevalence, IIAs produce effects only between the contracting parties because they are not sufficiently uniform to establish a custom accepted by the international community.

According to SALACUSE (2010, p. 430), the academics who use the term "network" usually do so without analysing in depth the full meaning and significance of this concept in the investment domain. In the view of this author, the problem with the term "network" is that it suggests the existence of a structural connection between the constituent parts of the network.

[6] See International Centre for the Settlement of Investment Disputes (ICSID) case *Asian Agricultural Products V. Sri Lanka*, were both the award and the dissent make express and frequent references to the investment treaty between the United Kingdom and Sri Lanka as being *Lex specialis*. (*Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID ,1987)

Considering the previous critique to the definition of the operative concept of network[7], it is obvious that, due to the fragmentation by regions, differences of legal frameworks between IIAs and their independence, and mostly due to the genesis of the legal evolution of IIAs and the conflicts of interests between capital importing and exporting nations (Wouters, Duquet , Hachez, 2012, p. 4), the application of the concept network to the existing IIAs is erroneous[8].

Finally, the third thread, based on the Prebisch–Singer hypothesis or Dependency Theory (1959; 1948), argues that resources flow from a "periphery" of poor and underdeveloped states to a "core" of wealthy states, enriching the latter at the expense of the former. Thus the existing body of IIAs, although separate and distinct, are a regime[9].

An international regime is essentially a system of governance in a particular area of international relations (Salacuse, 2010, p. 430). This is a reality in IIAs due to the fact that, despite their independence and specificities, their wording similitudes and same field of application allow the common practice of cross references of IIAs in awards[10].

It proposes that a regime only exists due to the existence of a hegemonic figure (Keohane, 2005, pp. 32–39) that asserts power in order to advance its own interests and, thereby, to attain and preserve relative gains over other countries (Crawford, 1996).

[7] The Webster's Third New International Dictionary defines the concept "network" as "an interconnected or interrelated chain, group, or system." (Webster's Third New International Dictionary, 1981, p. 1520)

[8] It is true that in applying the Most-Favoured-Nation clauses (MFN) in a particular investment treaty, tribunals examine whether investors from other countries are given more favourable treatment under other treaties. However, that act of referring to another treaty does not create a structural or network connection between the two treaties concerned. *See* (*Maffezini v. Spain*, ICSID,1997).

[9] Webster's Third New International Dictionary defines the word "Regime" as "a method of ruling or management" and "a form of government." (Webster's Third New International Dictionary, 1981, p. 1911)

[10] *See, MTD v. Chile*, ICSID, 2004, pp.110–11)

Countries those that sign such treaties in the faith of international cooperation, establishing a common ground in an otherwise anarchic world of independent sovereign states (Keohane, 1989, p. 132).

Of the theories exposed we express my consideration to the regime thesis due to the consideration attributed of the international trade history. However, we recognize that this position is not immune to critics.

First of all, its political implications, there is the inherent difficulty of justifying the identification of the figure of the hegemon that constructed and maintains the current IIA regime. KEOHANE and NYE (2011, p. 44) argue that the USA are the hegemon, due to a consistent and explicit will to use the power to defend its political economic view of foreign trade and investment, understood by DUGAN et al. (2008) as the main proponent of the Calvo doctrine. Despite the fact that authors like SALACUSE (2010, pp. 432-433) argue that the history of international investment reveals that many capital-exporting countries, through their individual and largely uncoordinated actions, have been active in its creation and that no particular country has acted as a hegemon in its development and maintenance in order to advance its own particular interests and gain an advantage over other countries, one can take a closer look at the major users of the IIAs and its remedy mechanisms like the ISDS (Harten and Malysheuski, 2016) .

Albeit, it is beyond the reach of our thesis to perform a thorough analysis on who constitutes this hegemonic political figure that constructs the IIAs regime.

However, we agree with SORNARAJAH (2010, p. 35) who argues that the EUMS applied the pre-existent US model of FDI law to their former colonies. SALACUSE (2010, p. 434) also recognizes that a reference to a collective hegemony, composed of various capital-exporting countries that created and maintain the international investment regime, would distort the usual meaning of that term, which traditionally has referred to a single state.

A second point states that the present IIA regime is built upon the aim of preserving the dominance of the Global North countries in the international economy before Global South Countries (Ha-Joon ,2002; Sornarajah, 2010, p. 173).

Through the development of the IIA legal framework, the hegemon created a regime that fits its strategy of reducing the costs of economic operations, *vis-à-vis* political and economic, thus, conferring stability to the desired objective.

Therefore, by one side, capital-importing states have been led to sign investment treaties in the belief that the treaty commitments they make to protect foreign investment will reduce the perceived risks associated with investing in their territories, and thereby lower their costs of obtaining foreign capital and technology (Guzman, 1998, p. 639). Or, in a more critical perspective, they were forced to sign such treaties as a condition for the granting of loans and rescue packages by financial institutions (Sornarajah, 2010, p. 187).

On the other side, capital-exporting countries have joined the regime hoping to reduce the foreign investment transaction costs associated with adverse actions by host country governments, such as expropriation without compensation[11] and negative governmental interference with enterprises owned by their nationals (Vandevelde,2009, p. 13).

In the light of this arguments, one can consider that the IIA regime, while lowering the costs of transactions that are considered legitimate, raises the costs of those that are deemed illegitimate under the regime. This is a position adopted by Olivier De Schutter, former UN Special Rapporteur on the Right to food (Schutter, 2006) and Alfred de Zayas, UN Independent Expert on the promotion of a democratic and equitable international order, that referred that "Rights must not be abandoned in trade negotiations" (Zayas ,2015).

[11] The average number of nationalizations of foreign investor property per year rose steadily from 1960, the year when many former colonies became independent, when such measures averaged slightly more than fifteen, until 1975, when they reached over fifty, resulting in significant losses to foreign investors. It is not a coincidence that the movement to negotiate BITs was initiated during this period as a means to avoid such costs in the future. (UNCTAD, 2004, p. 7).

1.3 Foreign Direct Investment and Corporate Responsibility

Considering the scope of the IL, in the relationship between host state and investor, the responsibility of the former for the violation of HR is self-evident[12] since, while exercising its territorial jurisdiction, it is expected to regulate and control investment activities in a way that will effectively ensure respect for HR.

However, the international responsibility of the investor is underdeveloped (Tzevelekos, 2010, pg. 159), resulting in an immunization of investors that perpetrate HR violations abroad with the complicity of corrupt governments of the host states[13]. A fact mentioned by authors that have advanced legal options for the international responsabilization of home states for the acts of an investor violating HR abroad.

Only few scholars have so far written in support of this argument. FRANCIONI (1991, p. 275; 2011, p. 245) argues that the home state may be held responsible for the activities of the investor for polluting the environment. With other opinion, MCCORQUODALE (2006, p. 95) and TZEVELEKOS (2010, pg. 159) argue that the home state may be held responsible for the activities of the investor for violations of HR.

Very few authors address the role of the international investor in the IL theory. This under consideration of the investor as subject of law is manifested at the

[12] See *Banković v. Belgium*, ECtHR case stating that "from the standpoint of public IL, the jurisdictional competence of a State is primarily territorial" and "as a general rule, defined and limited by the sovereign territorial rights of the other relevant States". (*Banković v. Belgium*, ECtHR,2001, p. 351–52).

[13] *See* the analysis of NWOBIKE and WOKOCHA (2006) that detailing the contracts of establishment signed between Chad and Cameroon on one side, and a consortium of oil companies concluded that such contracts contained burdensome clauses that were voluntarily endorsed by local governments and might in fact undermine those governments ability to guarantee the respect of human rights.
See also the analysis of VERMA and PRAYAS (2011) that details the failure of the judiciary of India to provide effective judicial protection in the case of the thousands of victims of the Bhopal accident.
For the impact of the privatization of water in Latin American Countries and the relation with FDI see (WOODHOUSE, 2003, p. 295).

international level in the transition from *jus gentium* to the Vattelian model of *jus inter gentes*. After the Second World War was developed the legal concept of individual as a passive subject who holds rights and obligations that stem directly from the international legal order in the international HR law (Rosenne, 2004, pp. 15–16). However, this concept was mostly dependant on the sovereign state´s westphalian will.

This voluntarist approach to IL, directly contrasts with the objectivist perspective of a multi-layered society that has been growing in support in the last years namely in the International Court of Justice (ICJ) case law.

According to the supporters of this approach, IL has always been a product of customary law, reflecting practical social necessity that was often validated by a judge. IL thus responded to an international social necessity rather than sovereign consent.

The legal void materialized in the fact that corporations are accredited with more prerogatives than duties. Moreover, the absence of a complete general normative corpus of obligations cannot be attributable to the lack of will of the international community. The efforts to prevent corporations from violating HR date back to the 1970s and the New International Economic Order, which were a set of proposals put forward during the 1970s by some developing countries through the UNCTAD to promote their interests by improving their terms of trade. It proposed increasing development assistance, developed-country tariff reductions, and other means, meant to be a revision of the international economic system in favour of Third World countries, replacing the Bretton Woods system, which had benefited the leading states that had created it (Clapham ,2006, p. 201; Schutter, 2006, pp. 2–22).

According to the ICJ, IL is a system of "variable geometry", since "the subjects of law in any legal system are not necessarily identical in their nature as in the extent of their rights" (Reparation for Injuries Suffered in the Service of the United Nations, ICJ, 1949, pp. 174-178).

Therefore, the nature of international legal personality depends upon the collective needs of the international community.

Following on TZEVELEKOS (2010, p. 162) thought, it is difficult to understand how an investor can be a "giant" international actor, being the legal obligations and responsibilities attributed of a "pygmy", limited only to the negative dimension of HR[14].

Such legal lag is evident in the absence of a direct international legal enforcement mechanism for the HR obligations of the investor. A legal void filled by the substitute concept of corporate social responsibility.

Corporate Social Responsibility is a set of discretionary corporate policies aimed at responding to social expectations. However, they lack legal enforceability. (Parker,2009)

A trend that, due the inherent and exposed flaws during the last three decades as received public attention and State concern.

In the last years, some proposals have been advanced for the effective accountability of corporations abroad. One of the proposals has been the criminalization of corporations HR violations under the International Criminal Court. However, such alternative faces the immunity of the US, which was obtained through the apposition of a clause in the agreements for loans to Southern countries (Human Rights Watch,2003).

Since 2015, the public outcry resulted in the constitution of a UN Working Group for the creation of a binding Instrument of International responsibility on Transnational Corporations and other Business Enterprises.

[14] It has been suggested that corporations have a positive duty to protect human rights in cases of certain categories or groups of individuals, such as their own workers or people residing on land owned by the corporation. (Danish Institute for Human Rights ,2000, pp. 8-9).
The Institute of IL suggested that "certain obligations bind all subjects of international law for the purposes of maintaining the fundamental values of the international community." (Institut De Droit International,2005). Also, Art. 1 of the UDHR states that "All human beings [. . .] should act towards one another in a spirit of brotherhood." and art. 30 "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.".

The mere fact that private economic actors are referred to as "non-state" illustrates the extreme extent to which the international legal system is state centric[15], therefore using in an abusive way the concept of international community (Dupuy,2001).

1.4 The Normative Relationship between Human Rights and Investment Disciplines

The legal lag and prominence of the discourse defending the fragmentation of IL is strongly evidenced in the relationship between HR and FDI law.

From a substantive viewpoint, the shared origins of HR and investment disciplines are reflected by the similarity of their contents (Dupuy and Viñuales, 2012, p. 8).

HR and IIA law are fields of law applied with extensive similarity in the international fora.

This similarity can create, and often does, conflicts between regimes.

Conflicts that can be resolved through the application of the principles of the interpretation of the law such as Lex superior, Lex specialis, Lex posterior or systemic integration (Dupuy and Viñuales, 2012, p. 8).

It is fundamental to mention that, referring to the ECHR, the European Commission of HR recalled in 1958 a general rule of intertemporal IL that according to which:

"It is clear that, if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty, it will be answerable for any resulting breach of its obligations under the earlier treaty" (European Commission of HR,1958).

[15] ALSTON (2013) criticizes the use of negatively defined terms, such as "non-state actors" as well as the state-centric reading of IL by the means of comparison with the linguistic skills of children.

Therefore, at the moment of negotiation of an IIA, the involved State must respect its HR obligations, either derived from treaties in which the State ratified or regarding international human rights customary rules.

Moreover, the difficulty of disentangling legislative priorities in order to avoid normative conflicts may level up before prior commitments of the State that were broadly or even vaguely formulated.

This fact is particularly evident in the case of the "dormant environment clauses" (Viñuales, 2012) arising from multilateral environmental agreements.

It is also the case of some economic, social and cultural rights when the interpretation of which may be subject to considerable uncertainty, especially when they have not yet been further elaborated by treaty bodies (Kriebaum, 2007).

In this field, the indeterminacy may be considerably reduced through the direct reference to legal standards, namely those established by international organizations like the case of the protection of the right to water, defined by the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment N° 15 of 26 November 2002(CESCR ,2003), in direct conjunction with the right to an adequate living standard protected by art. 11(1) of the ICESCR that states that everyone is entitled to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use.

The Committee argued that the concerned State must prevent private companies[16] based on its territory from interfering in any way with the enjoyment of the right to water (CESCR ,2003, para. 24).

The history is unfortunately common and well known. Facing the HR violations caused by the foreign investor acting under the protection of an IIA, and before the outcry of the population and the urgency of the decreeing of political measures to stop and remedy the violations, the host state introduces new legislation that in a way or another is less beneficial to the foreign investor. Affecting the fair and

[16] For the purpose of the present thesis, private companies that invest in a foreign state.

equitable treatment expected, thus resulting in corporate lobby and divestment threats, and lastly, ISDS cases.

One may argue, however, that in such situations, for their expectations to be considered as "legitimate", investors must also have taken due notice of the State´s obligations deriving from its HR obligations (Dupuy and Viñuales, 2012, pp. 14-15).

Since all EUMS have ratified the International Bill of Rights, they are under the international obligation to identify and resolve any potential inconsistency between pre-existing HR treaties and subsequent trade or investment agreements[17]. These obligations can potentially inhibit the ability of countries to comply with their HR obligations[18].

[17] A statement reinforced by the DE SCHUTTER(2011, p. 7) that mentions that States "must ensure that they will not be precluded from the possibility of controlling private actors whose conduct may lead to violating the HR of others, for example as a result of an excessively high level of protection of foreign investors established on their territory or because of a broad understanding of the prohibition of imposing performance requirements on such investors", and therefore States must "refrain from concluding agreements that would affect their public budgets or balance of payments in a way that would impede the full realisation of HR, making the fulfilment of HR impossible or delayed".

[18] Recognized, *inter alia*, in Principle 9 of the RUGGIE Principles (UN, 2011, p. 11), that also mentions that "intellectual property obligations can raise the prices of certain products and services, making it difficult for a country to ensure rights to health and food, and trade obligations can encourage the production of cash crops in the form of "land grabbing" at the expense of local people and indigenous groups."

CHAPTER II – European Union's Foreign Direct Investment policy after the Treaty of Lisbon

2.1 The international commitment of the European Union to HR

Following on the growing relevance of HR in the EU external policy and building upon the experience of the cooperation agreements and partnerships possessing a HR development concern, the enactment of the ToL represents a significant mark in the relevance of HR in the primary law of the EU.

One of the important contributions of the ToL for the EU's international legal order is exactly the reinforcement of its identity, visibility and external relevance through, among others, the express conferral of legal personality to the EU, the agglutination under the external action of the name of the EU, the provisions relating to a number of material areas covered in the Union's tasks and also on instruments for pursuing and re-systematization of the ToL provisions on international action by the EU.

Also the organic changes in the external action of the EU, particularly the establishment of the European Council President with competence in the EU's external representation (Mesquita, 2011, p. 22) and the creation of the figure of the HRFASP and the establishment of the EEAS.

The legal wording of the ToL, namelyart. 3(5) TEU expresses the aim of the EU to "uphold and promote its values and interests" in its relations with the wider World, contributing to "peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of HR, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the UN Charter".

For such proposed aim, art. 6 TEU attributes to the EU Charter of Fundamental Rights the same legal value as the Treaties and expresses the commitment of the EU to accede to the European Convention for the Protection of HR and Fundamental Freedoms.

A statement in line with art. 21(1) TEU that sets the EU´s HR-based foreign policy, providing that the EU's action on the international scene shall be guided by a number of principles which it seeks to advance in the wider world, and in particular democracy, rule of law, the universality and indivisibility of HR (EGAN and PECH, 2015, p. 3).

At the same level, the commitment is extended to "the development and implementation of the different areas of the EU's external action covered by Title V of the Treaty on European Union (TEU) and by Part Five of the Treaty on the Functioning of the European Union (TFEU), and of the external aspects of its other policies," ensuring "consistency between the different areas of its external action and between these and its other policies" (Art. 21 (3) TEU).

A relevant question with the attribution of exclusive competence to the EU to negotiate IIAs is the current legal status of the EUMS BITs signed before the ToL, considering that even before the adoption of the ToL some EUMS BITs provisions were found to be in conflict with EU law (EC,2015).

Considering its framework, the *circa* 1,320 extra-EUMS BITs, albeit presenting differences, are, in their great majority based on the Organisation for Economic Co-operation and Development (OECD) Draft Convention on the Protection of Foreign Property of 1967 with the patchwork of the ISDS mechanism (Ripinsky and Rosert ,2013, p. 162).

Under the EU Regulation 1219/2012 that establishes transitional arrangements for BITs between EUMS and third countries, EUMS retain the competence to negotiate new BITs or amendments to existing BITs after an EC´s authorisation. Such authorization, under the scope of art. 2 (1) TFEU, should be granted if the

proposed talks and the negotiated text of the treaty satisfies the conditions set out in Art. 9 of the Regulation, which is: consistency with EU law, the principles and objectives of the EU external action and the EU's investment policy.

In what concerns the EU´s CCP competence, the ToL overcomes the implicit competence setup of a case-by-case EUMS approval to the EU to negotiate IIAs to an exclusive competence, in particular the competence to the negotiation of IIAs with third countries in name of the EUMS (Art.s 47 TEU and 207 (1), 216 and 217 TFEU).

Until the ToL the lack of EU exclusive competence for FDI was an operational blockage of the EU's external trade policy, a fact expressed before by the European Commission (EC) , although, with the resistance of EUMS[19].

A competence that, notwithstanding being committed to the "harmonious development of world trade, the progressive abolition of restrictions on international trade and on FDI, and the lowering of customs and other barriers" (Art. 206 TFEU) is bounded to HR concerns and EU values, under art. 21 (2) TEU (Art. 205 TFEU) without establishing any priority between these objectives.

Under the legislative procedure (Art. 207 TFEU), the EC can propose to negotiate a new international trade and investment agreement. The Council has the final decision to adopt the agreement. At this stage, the European Parliament (EP) is only informed about the mandate[20]. Once authorised, the EC negotiates with the partner country on behalf of the EUMS, with the cooperation of the TPC[21] and

[19] During the negotiations on the Constitutional Treaty, the inclusion of a FDI competence by the EC was opposed by Germany, France, Britain, Spain and Netherlands (the main users of BITs). However, FDI competence was included in the draft of the same treaty and transposed into the TFEU. The probable factors behind this change were the growing acceptance that having EU exclusive competence for trade but not investment was indeed an anomaly given the growing relevance of FDI in EU external economic relations. The EP and integrationist EUMS lobbied in favour of a more active and coherent external policy for the EU.

[20] The inter-institutional agreement between the EP and the EC of 2010 stipulates that the "Parliament shall be immediately and fully informed at all stages of the negotiation and conclusion of international agreements, including the definition of negotiating directives". See (EU ,2010, point 23).

[21] Previously known as the "Art. 133 Committee". The TPC is an advisory working group of the Council with a relevant role in the negotiation process, acting as a survey pole for the EUMS positions in the mandatory EC consultations and as EUMS watchdog of the EC. See Art. 207 (3) TFEU.

regularly informs the international trade committee of the EP of the flow of the negotiations (INTA).

After the conclusion of the negotiations, and after the vote of the final text on the Council with Qualified Majority Voting (QMV)[22] , the EP should vote with a single majority, albeit, without the possibility to make amendments to the final text.

In what concerns the substantive relation with the acquired competence in the ToL, the agreement negotiated by the EC must be in accordance with the provisions of primary law, being such compliance assured by an ECJ *a priori* check (France v. Commission, ECJ, 1991; Germany v. Council, ECJ, 1995).

Or *a posteriori* check via an action for annulment.

EU institutions and EUMS are bound by international commitments through the EU legal order. Such agreements and unilateral acts have a superior position in the EU hierarchy vis-à-vis secondary law (Schroeder KG v. the Federal Republic of Germany, ECJ,1972; Michelina Santopietro v. Commission, ECJ, 1974; IATA and ELFAA, ECJ, 2004).

The same applies for unilateral acts of institutions created by EU international agreements. The case law clearly establishes that:

"The provisions adopted for the implementation of an association agreement concluded by the Council and a non-member country by the Association Council created by that agreement form an integral part of the Community legal system, in the same way as the agreement itself, as from their entry into force, so that the Court, which has jurisdiction, on the basis of Article 177 of the Treaty, to give rulings on the agreement, which was adopted as an act of the institutions, also has jurisdiction to give rulings on their interpretation, this being conducive to the uniform application of Community law " (Sevince v. Staatssecretaris van Justiti.ECJ, 1989).

[22] Unanimity is only needed for association agreements and for trade agreements that include provisions for which unanimity is required for the adoption of internal rules and under certain conditions for specified services.

2.2 European Parliament

The EU´s Trade policy has long been a duopoly of the EC and the Council. However, the "Luns procedure" for association agreements, established in 1964 by the Council, allowed the EP to have a debate before the start and before the conclusion of the negotiations. It was only through the "Westerterp Procedure" in 1973 that the EP started to be informed about trade agreements and was provided with the t of an agreement before its signature.

This "Luns-Westerterp Procedure" was updated in 1982 in order to provide the consultation of the EP at the stage of conclusion of almost any international agreement (EU,2001).

With the ToL the role of the EP as a CCP maker was enhanced by stipulating that it should be involved in the negotiations of trade agreements, in order to assure HR coherence of EU´s IIA during negotiations, and by applying the ordinary legislative procedure to the CCP (art. 218 (10) TFEU).

However, this treaty change for a greater participation of the EP is not perceived unanimously.

Those that oppose a greater participation of the EP in negotiating and concluding trade agreements argue that the active participation of the EP would make the decision-making process too cumbersome and hinder efficient negotiations since some agreements are too technical to involve non-experts and international negotiations should be secret and an open parliamentary process is not fitted for that aim (Woolcock,2010, p. 7; Meunier, 2003).

Furthermore, trade policy has often been seen as "outcome-legitimate" in the sense that its technocratic nature enabled the pursuit of free trade without being "hijacked" by protectionist interests, since population at large would benefit from

less political interference in the trade policy-making process (Woolcock,2010, p. 7; Meunier, 2003).

While some understand the adoption of the Ordinary Legislative Procedure (OLP) as a key change in the EU framework (Devuyst,2013, p.263; Eeckhout, 2012, pp. 57-58), others argue that the ToL only codifies a pre-existent practice (Young, 2011, p. 719).

We consider that the attribution of competence to the EP results in a more transparent negotiation, enabling the broad participation and inputs of MEPs and civil society.

The case of the disclosure of information is a paradigmatic since the "consolidated texts", e.g., negotiation proposals, guidelines and mandates are confidential.

Even in the EP the opinions are divided, being broadly understood by S&D, and EPP members of the EP that the EC fully complies with Treaty provisions, while GREENS and ALDE MEPs understand that the information shared to the EP Committee on International Trade (INTA) committee by the EC is vague and selective (Richardson,2012, p.10).

The existence of reading rooms in the EP premises in Brussels for the consultation of trade and investment negotiating texts that only few INTA MEPs have access is self-evident.

The consultation is conditioned to specific scheduled dates, no more than two hours, in a confined room, being the MEP while watched by two guards, prohibited to obtain copies, carry personal cell phone or any digital device (Giegold,2015), is a self-evident example.

Not to speak of the absurdity of the existence of national reading rooms only in the European US embassies were - like in the case of Portugal, France and Germany - (PLATAFORMA NÃO AO TRATADO TRANSATLÂNTICO, 2015; WAR ON

WANT ,2016) only there the national deputies can consult the TTIP negotiating texts, evidences a reality that is very far from a transparent policy.

An argument reinforced by the wording of art. 218 (3) TFEU that does not foresee a real supervision of the negotiator´s conduct during the negotiations.

Notwithstanding its limited formal power to influence the negotiations, the EP is still using various means to get its voice heard.

These include non-binding parliamentary resolutions, opinions, hearings, questions to the Commission and others, all of which set out the boundaries for final ratification (Passos,2011, p.54).

If we link the ToL changes in relation of the EP competence in FTAs to the broad picture of the political realm, it is possible to conclude that such change of the list of the EP competences derives from the previous EU trade and investment negotiations and the public outcry for more democratic accountability of the negotiations.

Since the WTO's Uruguay Round that dealt with a broad range of economic and social issues, the interest of civil society groups and parliaments rose (Dür and De Bièvre, 2007). A fact evidenced by the intense public attention and protests against leaked EU negotiation documents on the liberalization of water and public services in the WTO negotiations (Sinclair,2006), through the debates on the OECD´s Multilateral Agreement on Investment(Tieleman,2010) , the Economic Partnership Agreements between the EU and the ACP group (MUTUME , 2007, p. 10) and finally Anti-Counterfeiting Trade Agreement (Papademetriou,2012).

A position repeated in the EP resolution of 6 April 2011, were the EU parliamentary institution expresses its defence for sustainable investment, particularly in the area of extractive industries, recognising that FDI in least developed countries is extremely limited and tends to be concentrated in natural resources" (EP, 2011, pt. 38).

Also the promotion of good quality working conditions in the enterprises targeted by the investment, inciting the EC to include in the future agreements a reference to the updated OECD Guidelines for Multinational Enterprises, calls for a corporate social responsibility clause and effective social and environmental clauses to be included in every FTA the EU that takes into consideration of the acquired knowledge of the enforcement of such clauses in EUMS BITs (EP, 2011, pts. 27-29).

Finally, a parliamentary recommendation that addresses the "race to the bottom" tendency of states to attract foreign investment, advising the EC to include anti – downgrade of social and environmental legislation (EP, 2011, pt. 30).

Moreover, it is generally accepted in the political economy of international trade (Milner,1999, pp.91-114) that agents such as the EC are more isolated from domestic pressures for protection and consequently more liberal-oriented than democratically elected political figures, such as the EP.

Considering the previous point, the attribution of competences is also explained by the usual position of the EP and Council against the EC (Lehmann, 2009, p. 64).

We understand that the allocation of competence to the institutional figure of the EP is rooted the assumption of the EP as being a normative flagship of the EU, defender of social, environmental, HR and democracy concerns (Krajewski, 2013, p. 83; Richardson, 2012, p.5; Meunier and Nicolaïdis, 2011, p. 282).

This is a plausible opinion considering the key role of the EP in the negotiation of previous agreements such as, for example, the power exercised in the 90s to delay the ratification of agreements with Algeria, Croatia, Morocco, Pakistan, Russia, Syria and Turkey on the basis of their lack of respect for HR.

Also the political pressure of the EU-Mexico agreement negotiations, were the EP voted for the inclusion of a democratic clause, the push for the inclusion of a sustainable development chapter in the EU-South Korea FTA, and for a stronger

commitment in the EU-Colombia-Peru FTA, with the request for the inclusion of a binding Road Map on HR (EP,2012).

Moreover, the opinion is confirmed by the political commitment by the EP to the promotion of HR, expressed in 2006 in resolutions that demanded the inclusion of a HR clause in all bilateral partnership and cooperation agreements as a precondition for its assent, thereby codifying established practice. (EP,2006, pt. 10).

Notwithstanding the range of the EP ´s role in IIAs, the ToL still falls short from a leading role in the respect of the EU´s HR coherence in the CCP since art. 218(9) TFEU only attributes a consultant role to the EP in the decision process of suspension of agreements. A position that must be reviewed in order to provide the attribution of a leading role to the EP in the parliamentary committee as a supervisor, as well as a co-decider, in pair with the Council for the decision of the suspension of all FTAs.

2.3 Civil Society

During the first decades of the EU´s (EU) existence, mainly two constituencies, namely exporting and import-competing firms, tried to influence external trade policies (Dür and Bièvre ,2005). The increased liberalisation of EU trade policy in the WTO´s 1994 Uruguay Round agreements, and the nearly simultaneous liberalisation of intra EU trade as part of the Single Market Programme, led to the mobilisation of new constituencies (Dür and Bièvre ,2007, p. 72).

DÜR and DE BIÈVRE (2007, p. 72-75) followed by other authors (Olson, 1965; Lohmann, 1998, p. 812), argue that the NGOs pressure represent a small influence on EU policy outcomes due to difficulties in collective action and broad civil society mobilization (as understood by Antonio Gramsci) for EU trade policies related issues. As well as the limited capacity of NGOs representatives to provide detailed policy information and alternatives.

A position that we do not agree, supported by the historical research of BAILEY from 1983 to 1994(2001), where the author evidences the positive impact of the civil society and CSO´s in the policy making of the EU. Also, we are well aware that the HR discourse can represent a form of neo-colonialism through a standardization pattern of the political organization of societies and the constitution of liberal States at the hand of investors (Santos, 1997).

Our dissent is partially justified by the new political reality of the European and international civil society mobilization against FTAs such as TTIP, the Comprehensive Economic and Trade Agreement (CETA) and the Trade in Services Agreement (TISA). The mentioned authors ignore the effective opposition of the civil society to trade related agreements, such as the OECD´s Multilateral Agreement on Investment(MAI) that was not concluded due to intense public outcry and the dissent of developing countries.

Notwithstanding, we follow the common conclusion of DÜR and DE BIÈVRE that argue that, as the empirical analysis reveals, the mobilisation of new actors in the EU´s CCP policy has led to effective restructuring in the EU´s procedure, such as the forcing for the EC´s launching of a public consultation on investment protection and ISDS in the TTIP in 2015[23], not previewed by the EC strategy.

The limited role and impact of civil society actors in the CCP is explained by the prevalence of a Westphalian intergovernamentalism view of International relations were citizens are considered mere objects of law without effective legal and judicial remedies against intergovernmental power politics (Petersmann ,2013, p. 19), therefore ignoring its role in the fulfilment of art. 28 UDHR that states that:

> "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

[23] Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), available at: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179

The possibility of the creation of a structured policy based on European citizenship and belonging ties, enhancing the possibilities of the EU citizens to monitor and also to intervene, thus ensuring that a comprehensive balance of the different interests at stake and contributing to the shared construction of a HR-based EU´s CCP, , has given place to a centralization of the decision power and public relations strategy , (Corporate European Observatory,2013) (the "Brussels Bubble") , benefiting corporations´ agendas (Guardian ,2016 ; Euractiv,2016).

In fact, the business group's lobbies access to negotiators, decision-makers and information is so considerable that the relationship between them and the EC can be considered as "top-down lobbying" (Corporate Europe Observatory,2013a; Altintzis,2013, p.28).

The development of new European citizenship participation tools has proven to be inefficient to the bottom- up political demonstration of public will, as the rejection of the registration of the STOP TTIP ECI evidences (Euractiv, 2014).

2.4 Consultative committees and civil society dialogue

Opening up the public field for the development of the role of civil society in the EU´s CCP, and building upon the experience of the UN Economic and Social Council (art. 71 of the UN Charter) and of the European Economic and Social Committee (art. 257 Treaty of Nice), the new EU's FTAs present the legal instrument of the Domestic Advisory Group (DAG).

The DAGs competence differs between FTAs. Some are recognized as possessing the ability to submit opinions on their own initiative, while others not. The character of the participants can include only economic, social and environmental organisations, or also academia members.

This consultative body, firstly activated under the EU-South Korea FTA, with the legitimacy to adopt non- binding decisions, coupled with the annual Civil

Society Forum, aims to provide advice on the implementation of the agreement´s Trade and Sustainable Development Chapter.

Notwithstanding, such policy falls short when we consider the lack of transparency in the negotiation of FTAs and publication of the aims of the negotiations. A fact evidenced by the EESC (2011) that, based on the right of access to EP, Council and Commission documents as established by art. 42 of the Charter of Fundamental Rights of the EU and Regulation 1049/2001 criticizes the disparity on the access of negotiation documents by civil society and big business.

A clear example, among others[24], is a ECJ case (*Stichting Corporate Europe Observatory v. Commission,* ECJ,2013) based on an illegal action were DG Trade sent seventeen documents related to the EU-India FTA in full to lobby groups such as Business Europe and the Confederation of the European Food and Drink Industry, while the NGO Corporate Europe Observatory (CEO) received only censored versions of these documents.

Another evidence is the lack of publication of the EC´s negotiation mandates of TTIP and CETA (EU Obudsman,2014), published one year and half after the start of the negotiations (Euractiv,2014a).

As for the civil society dialogues, the aim to "address civil society concerns on trade policy", improving the "EU's trade policy-making through structured and qualitative dialogue"[25], results, according to the participant NGO representatives (Amnesty International et al , 2004 ; Hocking, 2004 , p. 24; Altintzis ,2013,p. 28) and business associations(Dür And De Bièvre, 2007 , p. 80) in sessions that have the form of unidirectional briefings rather than of dialogue.

Ideally, such consultations should begin at the pre-negotiating period, contributing to the construction of the EC´s negotiation mandates, establishing red

[24] Also, ECJ cases: *Kuijer v. Council*, ECJ, 2002; *Hautala v. Council*, ECJ, 1999; *WWF v. Council*, ECJ, 2007.

[25] DG Trade website on civil society engagement. [accessed on 10/1/2016]. Available at http://trade.ec.europa.eu/civilsoc/

and blues lines for the negotiations of FTAs and at the post negotiation period, enabling the accountability of the enforcement, through the comparison between negotiation guidelines and final text of the negotiation.

An exception until this moment only happened in the EU-Colombia/Peru FTA, due to pressure by the civil society for the adoption of a Road map for Human, Environmental and Labour Rights as a condition of the ratification of the agreement.

A paradigmatic case is the negotiation of the Southern African EPA´s that gathered criticism of non-state actors against the marginalisation of civil society through the consultative process.

In its 2007 Review Report (African Trade Policy Centre ,2007), the African Trade Policy Centre noted that it was difficult for non-state actors to obtain information relating to the ongoing negotiations, making difficult the inputs of Civil Society Organization ´s (CSO) to the negotiating process (Mambara, 2007, p.7).

The lack of information available in the public domain makes it increasingly difficult to monitor the efforts of non-state actors in their campaign and do not incite the civil society participation, eroding the consultative process.

Thus, EU CCP, and concomitantly, EUMS compliance with international HR obligations falls short to fulfil an adequate and effective civic participation in the EU´s CCP, in direct violation of the right of public participation as stated in 25(a) of the ICCPR.

So one can ask: albeit the incoherencies, what is the role of the EU as a proposer of an alternative investment model?

CHAPTER III – Analysis to the Normative Power Europe Thesis. Leading by example?

3.1 The European Union as a global actor for Human Rights?

It is of generalised knowledge that the EU project had at its origin the purpose of strengthening the economic power of its members through the establishment of a common market.

The fact that the Treaty of Paris (1951) didn't made any explicit reference to the Community duty to respect, protect or fulfil HR as either a foundational value or a guiding principle for action proves this argument (Búrca, 2011, p .649).

It was only in 1957 that the Treaty of Rome pushed the boundaries with its art. 130 that densified the European community mission to the promotion of democracy, rule of law and respect for HR as core objectives of the community development cooperation policy.

Notwithstanding the absence of a generalised tutelary provision of HR didn´t meant that the HR were out of the European Community scope. In 1969 the European Court of Justice (ECJ) asserted that fundamental rights were enshrined in the general principles of law that the Court protects (*Stauder v. City of Ulm*, ECJ,1969).

The Court's statement was motivated by the need to respond to the German Federal Constitutional Court decision[26] that threatened to disregard the primacy of EU law so long as the Community legal order lacked specific protection for fundamental rights[27].

[26] Solange I, German Federal Constitutional Court. Case 11/70. 1970 and Solange II, German Federal Constitutional Court. 3 CMLR 225. 22 October 1986.

[27] For a general overview of the role played by the ECJ since the early days of European integration, see (Witte ,1999; Rasmussen, 1988)

Since the 1970s the Community, after its inception, the EU published a series of documents that address the relationship with the Communities and the rest of the World, affirming its identity as a subject or "actor" of the International Legal Order.

Despite its late appearance, the express reference to HR in the Declaration on the European Identity in 1973 broke the silence, being referred as a fundamental element of the European Identity, together with the principles of representative democracy, the rule of law and social justice, being the fact that EUMS "play an active role in world affairs and contribute, while respecting the objectives and principles of the UN Charter , (...) leading to the definition of common positions on foreign policy" (EEC, 1973, p. 118).

Paradoxically, and despite the fact that in 1970 the Davignon report (EEC, 1970), which established the European Political Cooperation mechanism as a precursor of the Common Foreign and Security Policy (CFSP) didn´t referred to HR.

The global impact of the EU was the focus point in the member state negotiating positions in the Conference on Security and Cooperation in Europe, that resulted in the Helsinki Final Act of 1975(Smith,2008, p. 117).

However, the issue of rights promotion only surmounted the institutional silence in operational external strategies of the European Community after the end of the Cold War (Brandter and Rosas,1998).

In 1974, the State and Heads of Government gathered in Paris stressed the need for a comprehensive approach to the external problems that Europe faced and reaffirmed their determination to adopt common positions and coordinate its diplomatic action in all international areas that affected the interests of the European Community (EEC ,1974). This conclusion lead to the construction of the political

integration projects that emerged in the seventies and eighties, such as the Tindemans report on EU[28] or the Spinelli Treaty[29].

In 1977, a joint declaration by the EP, Council and the EC gave additional steps to define the respect of HR as a general binding principle underlying the establishment of the European Communities (EU,1977), a move that is perceived as the affirmation of the figure of the European Community as one of the main flagship defender of HR (EGAN and PECH,2015, p. 2).

In the process of the construction and densification of its basic structure, the EU emerged as an international political figure that gathered around a core of values that confers shape to the guidelines that encompass its actions internally, but especially beyond its geographical borders.

The objective of the generalised promotion of HR abroad only received treaty expression in 1992, in art. J (1) of the Treaty on EU signed at Maastricht, establishing the development and consolidation of democracy, the rule of law and respect for HR as an objective of the new CFSP.

It is relevant to note by way of example the Laeken Declaration of 14 and 15 December 2001, whose Part I ("Europe at a crossroads") includes a point on "The new role of Europe in a globalized world", which evoked the performance of a leading role in the new world order and their responsibilities in the governance of globalization. Part II ("Challenges and reforms in a renewed EU") identifies three main challenges, including how to develop the EU to be a stabilizing factor and a model in the new multipolar world (Mesquita,2011, p. 21).

The Working Group's Final Report VII - "EU External Action" of the Convention on the Future of Europe, recognizes the path taken by Europe as an "international player" and a progressive recognition of its role in the "world stage", stressing that,

[28] The Tindemans Report proposes that an image of cohesion image must be given to the outside world as well as a joint action in all essential areas of external relations, whether foreign policy, security, economic relations or cooperation, putting the collective strength of the EU in the service of justice and law in the World debates. (Tindemans, 1975)

[29] Its preamble states, in particular, the "need for Europe to assert its identity" (Spinelli,1984).

due to the challenges posed by globalization and increased interdependence between States and regions, Europe must be "a strong and credible player on the world stage, not only in economic terms." (European Convention,2003).

Further in 2001, the role of HR in the external relations of the European Community was extended by art. 181(a) of the Treaty of Nice, which confirmed the promotion of HR as a transversal objective encompassing all forms of cooperation with third countries.

With the ToL the level of commitment by the EU has been increased through the expansion of the boundaries of the EU external objectives, in a campaign to "uphold and promote its values and interests and contribute to the protection of its citizens" Art. 3(5) TEU. This, while being "guided by the principles which have inspired its own creation" Art. 21(1) TEU, with the established aim to contribute to the development of IL (Art. 3 (5), *in fine,* and art 21 (1), *in fine,* TEU).

The standard explanations for the founding treaties" silence on HR have been that such concerns were unrelated to the project of economic integration being undertaken and that the task of HR protection was left, instead, to the ECHR (Witte,1999, p.12).

According to the academic analysis of the EU commitment towards HR, the evolution is slow, encompassing more than fifty years, from a limited economic Community in which considerations of HR were deliberately delegated to the Council of Europe, to the emergence of a powerful political entity, today´s EU, in which protecting and promoting HR have become central commitments (Búrca,2011; Dauses,1985, p. 398).

According to this thread of analysis, the ECJ represented since the inception of the European project, and still continues to develop a position of torch bearer and solitary magnum voice for HR inside of the EU that through its great impact case

law, has set the tone for the main political EU institutions and EUMS to configure HR as the key element of the EU constitutional framework[30].

Promoting through progressive steps an increase of the enforcement of the EU's international obligations and commitments, reaching, through the recognition obtained by the European Convention of Human Rights (ECHR) and the supra regional EU system with its European Charter of Fundamental Rights (EUCFR), to a privileged place as the key actor for global HR progress[31].

In a historical analysis, the peak of commitment and energy allocated to the political support for the creation of a structured supranational HR regime was reached in the early 1950s.

In recent decades the level of political will was more hesitant and deeply contested, allowing the conclusion that, rather than a unidirectional progress, the development of the EU´s HR system in recent years has been marked by a dialectical tension manifested in the complex interaction between "mobilizing" actors seeking to strengthen the institutions for HR protection, including civil society actors, transnational networks, and supranational actors like the EC and the Court of Justice, and "resistant" governmental actors seeking to curb and deter the latter (Búrca, 2011, p. 651).

3.2 European Union´s and Member State's Extraterritorial obligations

The EU commitment towards respect, protection and fulfilment of HR derives from two main constellations of legal acts (Rosas,2011, pp. 11-12).

[30] See Jacobs (2001, p. 340) that considers that the foundations of the protection of fundamental rights at the EU level "were the work of the Court". See also Tizzano (2008, p.125) that refers that it "is safe to say that the protection of fundamental rights is one of the fields of law where the intervention of the European Court of Justice has been most remarkable and far-reaching."

[31] PERNICE suggests that the "Charter (...) may even serve as a model for modern instruments designed to protect fundamental rights worldwide." (Pernice,2008, p. 252). For an analysis of the progress narrative of international law, see (Miller and Bratspies,2008).

By one side, the international obligations of the EUMS, either international, under the aegis of the UN, either regional, coming from the ECHR.

On the other, the EU bounds itself through the enactment of legal texts derived from its secondary law competences. This thread can encompass regulations of a general nature instigating financing programmes for democracy and HR, more specific instruments concerning a certain region or sector which may include a HR-related component, instruments relating to unilateral trade preferences as well as decisions taken in the context of the CFSP (Brandter and Rosas, 1998, p. 468), such as legislative acts imposing economic and financial sanctions, also referred as "restrictive measures" (Frías, Samuel, White, 2011).

According to some authors, the model developed by the EU of HR-based, multilevel constitutionalism, transformed its political figure in the most successful "civilian power" for multilevel, democratic governance of international "aggregate public goods" such as protection of 'democratic peace' and peaceful settlement of disputes in Europe (Petersmann, 2012, p. 285).

Representing the only regional organisation that successfully realised the "4-stage sequence" of constitutional, legislative, administrative and judicial "institutionalization of public reason" as envisaged by RAWLS (1997).

The EU strategy for promoting HR coherence of the international agreements in which it takes part are mainly based on the three tools of "HR clauses", "HR dialogues" and "HR assistance", the later put into practice through the European Instrument for Democracy and HR, European Development Fund, Development Cooperation Instrument, European Neighbourhood Policy Instrument and the Instrument for Stability (Petersmann, 2013, p.22).

The two key aspects that contribute for the dissipation of any doubts about the integration of fundamental rights in the EU's powers are the formal reception of these rights, the primary law of the EUCFR proclaimed in 2000 with the changes

introduced in 2007, and the award to that of the same status as the Treaties and, on the other hand, by setting the goal of EU accession to the ECHR.

Through art. art. 21(1) TEU, the EU as committed itself to embrace the figure of a global promoter of HR and democracy.

Despite the vast array of policies, the EU continues to face the structural criticism[32] of limited HR expertise in EU institutions, having an *ad hoc* character with the limited influence and insufficient coordination of specialised actors, such as the EU Council's Working Party on HR, the HR Department in the EEAS , the EP´s Sub-Committee on HR, and the Fundamental Rights Agency (FRA) (Petersmann , 2013, p.22).

As it is known, the extraterritorial obligations of States are derived, among other relevant international treaties, from art. 2 and 11 of the ICESCR (CESCR,1999 and 2003).

Moreover, the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights constitutes a further step for the establishment of international guidelines for the respect, protection and fulfilment of HR.

According to BARTELS (2014), there are four types of extraterritorial situations to which HR obligations can apply, being the first extraterritorial acts of States representatives, the second relates to territories that are controlled by a state, the third concerns extraditions and expulsions of persons to a country where they might be at risk, and the fourth relates to State acts that take place domestically but which have an effect on persons outside of that territory.

[32] Moreover, CSO´s often complement the HR policy focus of other international actors on civil and political rights, as evidenced by the input Amnesty International to the Court of Justice of the Economic Community of West African States that considered the Nigerian government responsible for environmental and HR abuses by oil companies. Amnesty International Report available at: http://business-humanrights.org/en/amnesty-intl-report-on-impact-of-oil-industry-on-human-rights-in-nigeria-and-company-responses

In relation to extraterritorial obligations, the States negative HR obligations, represent the obligation of a State not to engage in any conduct that would infringe the rights of a person abroad, thereby respecting HR.

Despite the fact that the negative obligation to respect HR only applies to State conducts, the positive obligation to protect HR, represents an *onus* to the State to grant that non- state actors do not contend with HR of other persons.

Such *onus* can require the State to take positive steps directed at the acts of private persons, such as by regulating the extraterritorial activities of EU national corporations, and thus protecting HR in third countries.

According to SORNARAJAH (2010, p.164 and 170), a state which profits from the repatriation of the profits which the multinational corporation makes must be credited with the duty to ensure that such profits are made without mass violations of human rights given that there is not only a duty to provide a remedy but that, in the case of violations of *ius cogens* norms committed by nationals abroad, international law recognises a positive duty to prosecute the offenders.

Moreover, the obligation to fulfil HR encompasses the commitments to facilitate HR, by providing an enabling environment, to promote HR, by raising awareness and to provide, through direct provision of rights (UN,2007,para 12), including social rights and legal mechanisms for the protection of HR violations[33].

Finally, and transversal to all that has been said is the duty of international collaboration.

In the EU law such obligations, are broadly stated in art. s 3(5) and 21 TEU.

[33] See Siliadin case, were a female minor present in a foreign country without any registration, brought her case before the ECHR claiming a violation of the European Convention due to the failure of the respondent state to protect her from her employers, who were forcing her to work without pay for more than fifteen hours per day. The ECHR reviewed the quality of domestic legislation criminalizing behaviours like the one to which the applicant was subjected, and concluded that the existing legislation did not deal specifically with the right guaranteed by the European Convention and therefore failed to provide effective penalties. Consequently, the Court held that the respondent state failed to comply with its obligation to punish the breach of a specific expression of the right to work by third-party individuals. (Siliadin v. France, ECHR, 2005, 333, 340–47.)

The theory of extraterritorial responsibility of States for actions of their nationals was widely accepted during the XX century, being the XIX century *Alabama Claims*[34] between the US and UK the main example in the legal theory.

However, as rightly pointed by SORNARAJAH (2010, p. 160), in the last decades the legal understanding has changed since IL underwent a change as power-based and state-centred positivism gained sway over international legal thought. Being understood that the State could only be held responsible for the acts of its own organs and not for those of its nationals.

The IL Commission understands in its article 11 of the International Law articles on State responsibility that:

> "The conduct of a person or a group of persons not acting on behalf of the State shall not be considered an act of the State under international law" (1996, p. 125).

However, the EU's obligation to protect HR in relation to acts of third parties, based on an interpretation of the word "uphold" used in art. 3(5) TEU, faces the opposition of the ECJ's recent decision in the *Mugraby* case[35] that states that there is not any such obligation impending on the EU.

In our understanding, such decision is a manifestation of the thought of the fragmentation of the IL. It ignores the fundamental principles of EU law derived from the ECHR and the constitutional traditions of the Member States (Art. 6(3)

[34] The ***Alabama* Claims** were a series of demands for damages sought by the government of the United States from the United Kingdom in 1869, for the attacks upon Union merchant ships by Confederate Navy commerce raiders built in British shipyards during the American Civil War. The claims focused chiefly on the most famous of these raiders, the CSS *Alabama*, which took more than sixty prizes before she was sunk off the French coast in 1864.
After international arbitration endorsed the American position in 1872, Britain settled the matter by paying the United States $15.5 million, ending the dispute and leading to a treaty that restored friendly relations between Britain and the United States.

[35] The applicant argued that the Commission and Council were obliged to adopt "appropriate measures" under the EU-Lebanon association agreement. The General Court and, on appeal, the Grand Chamber of the CJEU disagreed, stating that the 'non-execution' clause in this agreement established a right to adopt "appropriate measures", not an obligation to do so. (*Mugraby, ECJ* ,2012, para.70).

TEU), the ECFR (Art. 6(1) TEU) and its absence of jurisdictional, territorial conditions (art. 51(1) TUE) (Bonavita, 2011**,** p.260) or customary IL.

Moreover, art. 56 of the UN Charter requires UN members “”to take joint and separate action in cooperation with the [UN] for the achievement of the purposes set forth in art. 55, that is the “promotion of universal respect for and observance of HR and fundamental freedoms for all”.

Considering the relevance of the ECHR it is relevant to mention that art. 1 imposes obligations on states parties only in respect of “persons within their jurisdiction”.

Despite the fact that the ECHR does not details the range of “jurisdiction” referred in art. 1, the European Court of Human Rights (ECtHR) case law, in *Bankovic case*, sets the tone for the rejection of the State's obligation to protect HR abroad for non-state actors decisions. In this case, the applicant argued that the ECHR applied to persons affected by the North Atlantic Treaty Organization (NATO) bombings in Belgrade. The Court considered that the applicants’ submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Art. 1 of the Convention. (*Banković v. Belgium*, 2001, p. 351–52)

However, through its general comments, the CESCR has set the tone for an international obligation of States to protect HR in third countries[36].

[36] In 1997, the CESCR stated, in the context of economic sanctions, particularly in light of the sanctions on Iraq:
“Just as the international community insists that any targeted State must respect the civil and political rights of its citizens, so too must that State and the international community itself do everything possible to protect at least the core content of the economic, social and cultural rights of the affected peoples of that State (…) While this obligation of every State is derived from the commitment in the Charter of the UN to promote respect for all HR, it should also be recalled that every permanent member of the Security Council has signed the Covenant, although two ,China and the United States, have yet to ratify it”. (CESCR,1997, para. 7-8).
In 2000, the Committee said, in its General Comment on the right to health:

A path followed by the ICJ *Namibia opinion*, where it argued that the UN Charter imposes HR obligations on its members in situations of effective territorial control (*Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, ICJ, 1971, para 131*)*. In *Wall opinion* the Court argued that the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child applied to extraterritorial acts carried out "in the exercise of [a state's] jurisdiction" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, advisory opinion*, ICJ. 2004. paras 111, 112 and 113).

The ICJ confirmed the ruling with respect to the ICCPR in the *DRC v. Uganda Case* (*Democratic Republic of the Congo v. Uganda*, ICJ. 2005. para 219).

Adding to the IL defence of the obligation to protect HR in third countries, the customary IL also sheds some light on this subject impending on the States to

"To comply with their international obligations in relation to art. 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable IL" (CESCR,2000, para. 39).

The Committee used the same terminology in its 2002 Comment on the right to water, although now the reference to the "protection" of rights is only a recommendation:

"To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party's jurisdiction should not deprive another country of the ability to realise the right to water for persons in its jurisdiction. … Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries (CESCR, 2002, para. 31-32)

This model was also used in the 2007 Comment on the right to social security:

"To comply with their international obligations in relation to the right to social security, States parties have to respect the enjoyment of the right by refraining from actions that interfere, directly or indirectly, with the enjoyment of the right to social security in other countries. … States parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries" (CESCR,2007, para. 53-54).

In relation to the right to health, it has also said that there is an obligation to "protect" HR in third countries by regulating private actors where this is possible" (CESCR, 2000, para. 41).

In its more recent 2011 Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights, the Committee refers to its General Comments on the rights to water, work and social security, using the term "should" in connection with the right to "protect" and "shall encourage" in connection with the right to "fulfil" (CESCR, 2011, paras 5-7).

interpret treaties according to the rule of law applicable between the parties (art. 31(3)(c) VCLT).

Concerning to the economic sanctions on populations in third countries, the responsibility for HR violations committed by third states, the duties arising from grave breaches of peremptory norms by third states and, finally, the due diligence that requires States not to allow their territories to be used in a manner that harms HR in third countries, is confirmed by the ECtHR (*X and Y v. Netherlands*, ECtHR, 1985, Point 8-9; Kiliç *v. Turkey*, ECtHR. 2000. point 96; Kaya *v. Turkey*, ECtHR. 2000, point 181).

Moreover, the *Trail Smelter* arbitration case encompasses a legal argument for the accountability of States action abroad, referring that:

> "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence" (*Trail Smelter. US v. Canada,* UN, 1949, point. 1965).

An opinion reinforced, in the *Corfu Channel* case, where the ICJ referred that:

> "Every State have an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"

adding that:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail" (*Corfu Channel, ICJ*. 1948).

The same legal argument is defended in the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, that upheld the refraining of the States to intentionally aid and abet another state in the EC of a wrongful act (art. 16), directing or controlling the EC of the

wrongful act by another state (art. 17), and coercing another state to commit a wrongful act (art. 18).

In this argument we follow the theory of the tacit complicity proposed by JIMENEZ de ARECHAGA and TANZI (1991, p. 359) that, based on GROTIUS theory of IR, argue that "the State which becomes aware that an individual intends to commit a crime against another state or one of its nationals, and does not prevent it or the state which extends protection to the offender by refusing to extradite or punish him gives tacit approval to his act. The State thus becomes an accomplice in his crime and establishes a link of solidarity with him: from such relationship the responsibility of the State arises".

A declaration that resonates in the teleology of the primacy of general international law in face of contracted obligations referred under art. 103 of the UN Charter, even before the delegation of EUMS power to the EU under the ToL. A position equally supported by the UN (2008, pp. 6 and 50) that refers that "States cannot release themselves from these obligations simply by delegating powers relevant to their implementation to the EU" and "incur in international responsibility to the extent that the EU does not fulfil those duties".

Moreover, focusing on the active concern of EUMS, AHMED and BUTLER (2006, p. 782) argue that "EUMS have the responsibility to ensure that their HR obligations will receive an equivalent protection even if they have delegated power to international organisations", a commitment that prevails "irrespective of the degree of control exercised by the States in question over the impugned action".

A position followed by the ECtHR case law[37].

[37] *Heinz v. Contracting Parties to the European Patent Convention*, European Commission of Human Rights, 1994; *Matthews v. UK, European Court of Human Rights*, ECtHR. ,1999, para. 3; *Capital Bank Ad v. Bulgaria*, ECtHR. ,2005, para. 111; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, ECtHR, 2005.

An understanding stressed in the H.L.R. judgment regarding deportation, where the ECtHR recognized an indirect horizontal effect to the extraterritorial dimension of due diligence in relation to art. 3 of the ECHR. The ECtHR found that the right is to be protected from the risk of a foreseeable violation abroad even if "the danger emanates from persons [. . .] who are not public officials.", although, limited by the fact that "[i]t must be shown that [. . .] the authorities of the receiving state are not able to obviate the risk by providing appropriate protection." (H.L.R. v. France, ECtHR, 1997, para. 745.)

3.3 Promotion of Human Rights through Trade and Investment

Following the publication in July of 2000 of the UN Global Compact[38], 2001 was the year that the EU expressly committed itself to promoting social norms through trade agreements (EC,2001), a turning point for the establishment of trade as the most relevant instrument of the EU's toolbox to promote internationally accepted social norms and to strengthen the international legal framework of promotion and protection within the ILO, WTO and OECD.

Albeit in a measured way, already in 1995, the Council´s Strategic Framework for HR, denoted specific actions concerning bilateral instruments to "make trade work in a way that helps HR" (Council of The European Union, 2012).

This has followed the exhortation to ensure coherence between its outputs and the external relations of the Community made by the Single European Act (SEA) (Art. 30 (5) SEA), which entrusted the position of defender of legal coherence to the Commission and Presidency.

A strategy later pushed forwards with the Treaty of Maastricht that introduced a single institutional framework of pillars[39].

[38] For more information, see: https://www.unglobalcompact.org/what-is-gc/mission/principles.
[39] For an analysis of the coherence and interrelation of the pillar system see (Portela and Raube,2011).

A pledge repeated in 2003, in the European security strategy, where it was stated that "the best means of strengthening the international order are the dissemination of the principles of good governance, supporting social and political reform, fight against corruption and abuse of power, the right rule of establishment and protection of HR (...) a key aspect of our policy, which should give even better weight is to contribute to better governance through assistance programs, conditionality and targeted trade measures" (European Council, 2003).

Trade is generally considered the most powerful instrument in the EU's external relations, due to the fact that the EU can use the access to its large market as a leverage towards external partners, promoting social norms, environmental goals and HR (Smith and Woolcock,1999, p. 439), therefore becoming a global model, carrier of a "normative difference" (Manners,2002, pg. 241).

The conceptualization of a value-based trade and investment policy represents an amplification of the accountability field, convening different actors to the organization of a socialized process of coherence.

Notwithstanding the scarce research done after the 2001 EU Communication demonstrates that the level of commitment, scope, enforceability and promotion of these social norms differs between trade agreements (Peels,2011; Orbie, 2011).

A paradox even more evident when considering the contradiction of the EU's trade policy-making when confronting the EU´s 2010 Trade strategy, "Trade, Growth and World Affairs" (EC,2010a) and it's under consideration of the role of HR in trade and investment relations and the inherent normative goals. Bearing little resemblance with the "harnessing globalisation" discourse introduced by EU Trade Commissioner Pascal Lamy (1999-2004) and continued by his successor Peter Mandelson (2004-2008) (Putte [et al.] ,2013, p. 36).

The establishment of a new legal interrelation between the role of the EU as a normative power and global promoter of HR is supported by the ToL that states that the CCP shall be conducted in the context of the principles and objectives of the

EU's external action (art. 207 TFEU.), including equality and solidarity (art. 21 (1) TEU), as pillars for the achievement of fair trade (art. 3 TEU).

Once acquired the exclusive competence to negotiate IIAs with third countries, the EC later stated that the EU investment policy should be aimed at achieving better results than the results that have been obtained individually by EUMS, considering concomitantly the best practices of the EUMS in the construction of a EU IIA model (EC,2010b).

That is, considering the level of post-establishment protection granted to investors by EUMS BITs (Luca, 2013, p. 68), increasing the level of protection and promotion of HR, or at least maintaining the same level of reference.

The key pillars of reference for comparison of levels of protection of non-trade values in investment treaties are the protection of the freedom of action of the contracting parties in regulating in the interest of non-trade values, in direct relation of national sovereignty, democracy primacy, and, the promotion of the rule of law, HR, environment, sustainable development, when elaborating and negotiating EU IIAS, as required by arts. 21 and 22 TEU.

In its commitment to promote HR through IIAs (EC,2010b,p. 9) , the EC , followed by the Council[40] considers that the common investment policy has to "continue to allow the EU, and the EUMS to adopt and enforce measures necessary to pursue public policy objectives", such as the protection of the environment, decent work, health and safety at work, consumer protection, cultural diversity, development policy and competition policy (EC,2010b,p.9). For the fulfilment of this aim the EU resorts to the Investment Court System (ICS) as a mean of investment dispute settlement between investor and host state. A "alternative" (Euractiv,2015), to the widely contested ISDS mechanism (STOP TTIP Campaign,2015).

[40] "In keeping with existing practices by Member States and in accordance with Art. 205 TFEU and Art. 21 TEU, the European policy in investment matters should be guided by principles such as the rule of law, human rights, and sustainable development" (Council of The European Union,2010, point 17).

Under the new European investment policy, the EC establishes the OECD Guidelines for Multinational Enterprises[41] as an axis of reference to balance investors rights and responsibilities(EC,2010b,p.9), in clear contrast with the official position of the Council, which is silent in this respect.

Despite the fact that, as assessed by some authors that, BITs have the effect of generally promoting the rule of law as a mean of indirectly fostering economic development (Wälde, 2009, pp. 513–4), also, in the interest of national investors (Echandi, 2011, pp. 13–4).

Differently, the EP has been supporting the inclusion in all FTAs of a reference to the OECD Guidelines for Multinational Enterprises (EP,2011, point 27). The latter would reinforce the primacy of the inclusion of the corporate social responsibility, and effective social and environmental clauses. The EP advises the EC to assess how such clauses have been included in EUMS BITs and how they could be included in future stand-alone investment agreements as well (EP,2011, points 28 and 29).

Considering the possibility, in a globalized neoliberal FDI framework , of the "race to the bottom" of the legal HR and environment protections, the EP stresses the keynote role of the clauses contained in some recent investment agreements that prevent the watering-down of social and environmental legislation in order to attract investment (EP,2011, point 30), such as the US-Panama Trade Promotion Agreement[42], the US BIT model of 2012[43], and some recent BITs between Belgium-Luxembourg and third countries[44], as well as in some recent FTAs such as the EU-South Korea FTA (arts. 13.3, 13.4.3 and 13.7 EU-South Korea FTA).

[41] Available at: http://mneguidelines.oecd.org/text/

[42] Chapter Sixteen (Labour) and Chapter Seventeen (Environment) US–Panama Trade Promotion Agreement of 28 June 2007.

[43] Art. 12 (Investment and Environment) and art. 13 (Investment and Labour) US BIT model of 2012.

[44] Art. 5 (Environment) and art. 6 (Labour) Belgium-Luxembourg-United Arab Emirates BIT of 2004; art. 5 (Environment) and art. 6 (Labour) Belgium-Luxembourg-Ethiopia of 2006; and art. VII (Environment) and art. VIII (Labour) Belgium-Luxembourg-Colombia of 2009.

These clauses, coupled with "in accordance with host State´s laws"[45] provisions as stated by the Council (Council of the European Union, 2010), can contribute to promote and strengthen the compliance by foreign investors of domestic legislations and regulations of the host contracting party, which encompass international rules on HR, environment protection and ILO core labour standards (Luca, 2013, p. 75).

Due to the large inconsistency in the arbitral case law as to the scope of application of the "in accordance with local laws" provisions[46], the reference to the OECD guidelines or other corporate social responsibility principles a first step to support and the application of the concept of "illegal investment" (Luca, 2013, p. 77) and strengthen the strand of arbitral cases already endorsing such approach.

As widely understood, such disparity of outcomes is the expression of a fragmented legal-institutional structure (Smith,2008; Portela and Raube, 2011, p. 5) at the EU and EUMS level. To assure coherence on the CCP[47], the external policies must be complementary, clear at the intra-institutional level(Christiansen, 2001), and structured according to the EU values contracted in the treaties[48]. A commitment for a concerted external HR policy that was initially developed in the Strategic Framework and Action Plan on HR and Democracy (Council of the European Union, 2012, Action 11 and 15), in the former 2012-2014 "HR and Democracy Package" and the Action Plan on HR and Democracy for the period 2015-

[45] That report the interpretation of the clauses of the investor obligations to the national legislation of the host country.

[46] According to the ICSID in the case *Fakes* v. *Turkey* (2010), violations by investors of domestic rules that do not regard admission or establishment of foreign investments —even when they incorporate international law rules on human rights or against corruption— would not amount to a breach of the legality requirement and, therefore would not lead to denial of international protection to investments performed and made in contrast with such domestic rules or international rules.

[47] A position in line with the EC understanding (EC,2006, p.5-6): "first and foremost, political agreement among EUMS on the goals [is] to be achieved through the EU. This requires a strong partnership between the EU institutions and a clear focus on a limited number of strategic priorities where Europe can make the difference, rather than dispersing efforts across the board. This is the condition *sine qua non* [...] For the EU, there is the additional challenge in ensuring coherence between EU and national actions".

[48]With a hierarchical argumentation, using the term "vertical coherence" and "horizontal coherence" see (Hillion and Wessel,2008, pp. 79-121).

2019(EC,2015). However, as mentioned further in this thesis, such aim has not yet been reached.

3.4 The role of the European Union in multilateral trade frameworks and the transition to regional policies

As referred supra, since the 2000s, capitalizing its economic and political position, the EU adopted a position of promoter of HR inside multilateral frameworks (EC,2003), such as the WTO or the OECD MAI negotiations. However, due to the current depletion of the international multilateral project of the WTO after the failure of the Doha round due to diverging interests between developed and developing countries (Jones, 2010), and the failure of the OECD MAI negotiations, the EU is resorting to regional and bilateral trade and investment talks (Berceanu,2013), using trade as a vehicle to export its standards of law and democracy, using a "carrot and stick" approach to trade.

Such political position is often analysed with caution, being considered that the contrast between the safeguard of legitimate interests of business, consumers, workers and civil society, "in a spirit of *reciprocity and mutual benefit*" (EC,2010a, p. 3), and the unlawful protection of the domestic market against foreign competition, is minimal (Gstöhl and Hanf, 2014, p. 747).

Despite the opposition of such a-geographical critic, HR have mingled up in international trade law, particularly at the regional level, were EUMS´s BITs and EU's FTAs have represented an active tool for the EU's neighbourhood policy (Blockmans and Łazowski, 2006, p. 653) and development of ties with countries with historical relations with EUMS.

This is the case of the FTA with Switzerland (1973) and the association agreements containing free trade chapters with Tunisia (1998), Morocco (2000),

Israel (2000), Jordan (2002), Lebanon (2003), Egypt (2004), Algeria (2005) and the interim Agreement with the Palestine Authority (1997).

In fact, a review of the EU and EUMS IIAs reveals that both are broadly oriented towards the so called developing countries, with the exception of some eastern European EUMS BITs with countries like Australia, Canada, Norway, Switzerland or the United States, which were negotiated prior to the accession to the EU.

3.5 The European Union as a trade model. Analysis of the Normative Power Europe theory

Considering the historic relevance of Europe in the international economy, and following the seminal work of MANNERS (2001) about the concept of the "Normative Power Europe" (NPE) in the beginning of the 2000s, a burgeoning body of research concerning the EU as a proposer of a new international trade model has been developed in the last decade, in pair with the development of the research of the phenomenon of "normative globalization" (Aggestam, 2008).

The research is supported by some documents and acts of the EU that use the "global actor" expression, as with the EU budget for 2011 whose item 4 is entitled "EU as a global actor".

According to the founder of NPE thesis, the EU is a distinctively normative power in world politics that, unlike so-called military or civilian powers, its influence rests on the ability to shape conceptions of "normal" in international relations (Manners, 2002, p. 239).

A statement that follows the continuous reshaping of the EU policies, a fact that does not allow for the construction of a coherent and relatively permanent external policy.

Therefore, according to the apologists of the NPE theory, it is correct to affirm that the EU transfers its norms, in part, through attraction and socialization

(Checkel,2005; Leonard, 2005), profiting whenever possible to develop a policy of "transference through conditionality" (Manners, 2002, p. 245).

Therefore, harnessing its material power for the pursuit of normative goals, mostly through the application of HR conditionality clauses in its external economic partnerships (Donno, 2012, p. 4).

It is essential to mention that the concept of NPE is passible of several interpretations. For DE ZUTTER (2010), an actor is a normative power if it just diffuses its norms in the international system, while SJURSEN (2006) argues that the concept of NPE is too indiscriminate if not accompanied with a conceptual apparatus that allows to distinguish acceptable and legitimate norms.

Historically, the path of the EU to become a global actor for HR was set up by the 1975 Lomé Convention (Lomé I)[49] , a trade and aid agreement between the European Economic Community (EEC) and 71 African, Caribbean, and Pacific (ACP) countries. It constitutes the EU's first agreement with non-EUMS to feature a legally binding reference to HR (Smith, 1998, p.262; Babarinde and Faber, 2004).

With the legal framework in place and the international concern around business with post-colonial countries, the Council of Ministers proclaimed in a resolution of November 1991 that HR clauses will be inserted in future cooperation agreements with developing countries (Council of The European Communities, 1991, para. 10).

Later on 1995, the EC generalised the practice of the inclusion of the conditionally policy in all agreements with third parties (Commission of the European Communities ,1995), materialized in a "essential elements clause" that encompasses democracy and HR values, accompanied by a mechanism for consultation and suspension of cooperation in the case of the assessment of a contracting party that the other is violating the clause.

[49] Followed by Lomé II (January 1981 to February 1985), Lomé III (1985-1990) (March 1985 for trade provisions and May 1986 for aid, Lomé IV (1990 to 1995) and finally Lomé IV bis, signed in 1994 to 1995.

The first reference to the essential elements clause was the model clause (Cuyckens, 2010) present in the Cotonou Agreement of 2000 that replaced the Lomé Convention:

> "Respect for HR, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement."

Notwithstanding, the EU's conditionality policy is not an isolated case, given that several Western countries employ conditionality clauses and enforcement mechanisms in FTAs, particularly in the case coups d´état and failed elections (Donno, 2012, p. 5). However, the EU´s policy possesses two differentiating elements.

The first consists in the broad spectre of the EU conditionality clause that encompasses "HR, democratic principles and the rule of law" (Fierro, 2003), unlike the narrower reference to labour rights that is favoured by the U.S. in its trade agreements (Mosley, 2010 pp. 70-75; Hafner-Burton, 2009) and within the WTO´s Generalized System of Preferences (GSP), which is limited to workers' rights (Orbie, 2011).

Secondly, the apposition of the "essential elements clause" with higher protection (Figure 5) (when compared with other economic actors such as the US or Canada) is mandatory, being included in all association, partnership, and cooperation agreements, despite punctual resistance of negotiating parties like Mexico[50] (DOMÍNGUEZ, 2010, p.9) and India(WOUTERS , 2013, p. 10). These are examples that demonstrate that sometimes the effectiveness of the EU mandatory rule can encounter barriers when the other negotiating party demonstrates a similar level of political power.

[50] Ultimately, the EU´s insistence forced the Mexican government to accept the first treaty in its history that conditioned relations on respect for democracy and human rights. (Donno, 2012, p. 6).

This implies the need to move beyond the question of whether HR provisions matter, asking instead *for whom* they matter[51].

According to MANNERS (2009, p. 3), the promotion of the EU's principles and values is more effective through engagement and dialogue tools, as accession procedures, stabilisation and/or association agreements, the European Neighbourhood Policy, and Generalised System of Preferences(GSP), and finally, "arrangements". Thus, giving prevalence to persuasion and argumentation encompassing "constructive engagement, the institutionalisation of relations, and the encouragement of multilateral and plurilateral dialogue between participants". Following on the argument that impacts are "normatively sustainable if they lead to socialisation[52], partnership and ownership[53], for the involved parties" (Manners, 2009a , p. 796).

Moreover, the NPE proposers consider that the interdependence of standards that characterize the contemporary international system create also "windows of opportunity" for the affirmation of the international normative action of the EU, particularly in terms of communication of the vectors that make up its axiological dimension and are disseminated to the environment external through "cognitive persuasion" policies (Michalski, 2005).

In contrast to the NPE school of thought, that emphasises norms and political identity in the propagation of a political model and values, the Neorealist School of international relations argues that values are a weak variable in the international scene, unable to influence systemic structures, as States coexist in an anarchic international system primarily seeking relative or absolute gains (Jorgensen,2006, p. 51). Being HR considered a piece among others in foreign policy, and not

[51] For an analysis of the scale of vulnerability for each region see (Donno, 2012, pp. 11 and ff.).

[52] Understood as "a process of engagement, debate and understanding" (Manners,2009, p. 3).

[53] Understood as involving "practices of joint or local ownership as a result of partner involvement and consultation", (Manners,2009, p. 3).

possessing a central position, since normative goals are constrained by the structural dynamics of the international system (Waltz, 2004, p. 5).

In this line of thought, the EU's foreign policy is seen as primarily focused on rational decisions that pursue "political and strategic security, and the economic well-being of its EUMS" (Hyde-Price, 2008, p. 32).

The non-priority role of HR in the EU's external policy does not presupposes an insignificant role, inasmuch as, following HYDE-PRICE´s argument (2006, p. 222-223), the EU has an interest in shaping the international scenario through external HR-based policies to ensure stability and security, representing the collective effort of the EUMS that is attended after the given primacy to national security and other fundamental national interests.

Therefore, from the neorealist perspective, in the case of conflict between values and strategic national interests or the balance-of-power in the international system, priority is given to the second, only existing political space for HR promotion as the case of the support for the abolishment of the death penalty when it has little impact on trade (Hyde-Price, 2006, p. 223).

An argument clearly illustrated in the EU's Global Europe strategy (EC, 2006) that attempts to provide a leadership figure in the multilateral trade negotiations through a shift in the EU's policies towards trade by emphasizing competition and corporate-driven growth rather than development objectives.

Such low impact is justified by the limited use of the "negative" threats of closure of the EU market (Woolcock,2013, p.125).

Through the lenses of the neorealist thought and the post-colonialist legal studies, the conditioned promotion of HR by the EU outside its borders can be assessed as an imperial demonstration of power, through the imposition of "domestic constraints on other actors through various forms of economic and political domination", as in the present case of the imposition of regulatory standards that would favour European businesses (Zielonka,2008, pp. 480-481).

Nevertheless, the neorealist view of international relations faces the critique of neglecting the idiosyncrasies of the decision-making process of the EU's CFSP when envisaging the EU as a unilateral actor (Smith, 2008, p. 11), and also the lack of an analysis of domestic pressures and the bargaining that takes place in the decision-making process (Hyde-Price, 2006, p. 219).

According to the position of the liberal intergovernamentalism thesis (Moravcsik, 1993), there is a point of concordance with the neorealist understanding of the rational action of states when acting in the international scene, although it recognises that the EU's decision-making encompasses a plethora of political data resulting from the interaction between actors, being the result of national pressures that influence the EUMS actions, combined with bargaining at intergovernmental negotiations(Moravcsik, 1993, p.517).

Being so, the liberal intergovernamentalism thesis argues that national preferences produce bargaining power at the intergovernmental level, representing a point of start for the obtainment of a common decision between EUMS (Thomas, 2009, p. 250).

A decision that also reflects the bargaining power of each state at the EU and international *fora* and where those who gain the least impose conditions (Moravcsik, 1998, p. 3).

This is the differentiating point between neorealism and the liberal intergovernamentalism theories, whereas the first argues that multilateral institutions affect rational actors at the bargaining stage(Pollack, 2006, p. 50), the second understands that international institutions such as the EU do not exert power over state preferences and policy outcomes, representing merely a platform for pursuing EUMS national interests(Verhoeff and Niemann, 2011, p. 1282), since "normative power rarely resists profitable economic arrangements" (Laidi, 2008, p. 7).

Without surprise, the assessment of the critiques of the NPE establishes the rule of trade-off as a method of political decision at the core of the EU, arguing that EUMS will only give up their individual bilateral policies if the gains of doing so are worth losing decision-making sovereignty (Gordon, 1997, p. 81). This mostly results in an inability to obtain a common stance on HR abuses, mainly relying on diplomacy to change the behaviour of its trade partners.

CHAPTER IV – European Union Conditionality Policy

4.1 Multinationals, Foreign direct investment and Human Rights: an empirical evidence

As referred above, our objective in the present thesis is the assessment of the responsiveness of the EU to its HR commitments and its effective expression in the global economic *fora*, having present its impact in third countries, moreover, through decisions of EU-based investors.

According to empirical studies, investors react to HR violations (BLANTON and BLANTON, 2007; BLANTON and BLANTON, 2009) and to HR NGO´s "naming and shaming" strategies (Colin, Clay and Flynn, 2013).

This assessment contradicts early studies (O'Donnell, 1973; Evans, 1979; Huntington and Nelson, 1976) that conclude that multinational corporations invest and support governments in countries with repressive mechanisms, capable to maintain order and guarantee operations with low HR patterns. Thus creating incentives for authoritarian governments to maintain and even strengthen repressive systems that guarantee cheap labour and low levels of political organization and mobilization of the working class to attract investment.

According to recent research (Garriga,2014; Blanton and Blanton, 2007), HR violations have a negative impact on FDI. Either indirectly, through the blocking of the favourable conditions for investment, as "an environment unconducive to violence", through the creation of political instability or social conflict (Sorens and Ruger, 2012, p. 428), or directly, by affecting the reputation of the investor.

Before a bifurcation between expected profits or negative impact on reputation, the research demonstrates that investors avoid countries with low HR records (Garriga, 2015, p. 7).

A plethora of studies conclude that HR respect attracts FDI (Garriga, 2015, p. 7; Busse, 2005; Harms and Ursprung, 2002; Jensen, 2003), have a direct positive effect on political rights and civil liberties.

As stressed by LIPSON (1991, p. 498) a key point of reference for HR respect is the adhesion to international HR regimes that, provides information about policy commitments as "promises about future national behaviour".

HR respect also represents a pressure to States due to the costs of international exposure of non-compliance that can encompass not only reputational costs, but also cost of retaliation of a decision that violates HR.

Moreover, it is equally concluded that the HR records in the host country are relevant not only to socially responsible companies, but also for companies in general that have incentives. In particular, the access to funds from socially responsible institutional investors[54] and government agencies that pose as a requirement for the allocation of funds a positive result on quantitative and qualitative assessments of governance practices (Clark And Hebb, 2005, p. 2029).

Notwithstanding such screening process also represents an exposure of the host countries HR records and international commitments, thus generating a negative pressure and costs on countries and investors that directly or indirectly violate HR, given that the publication of the assessments conditions not only the screening fund but also other economic actors (Davis and Ruhe, 2003, p. 277), since empirical data demonstrates that economic actors rely on informational shortcuts (Biglaiser, Hicks and Huggins, 2008).

[54] Socially responsible investment represents a relevant share of the market of investment. Between 2012 and 2014, global socially responsible investment assets grew from $13.3 to $21.4 trillion. For more information *see,* GLOBAL SUSTAINABLE INVESTMENT ALLIANCE - Global Sustainable Investment Review 2014, available at http://bit.ly/1FSoj9C [accessed on 7/12/2015]. Moreover, at the European level, the evolution between 2011 and 2013 represent a 11% increase of a total of 58.961 Millions of Euros. For more information see EUROSIF - European SRI Study 2014, available at*: http://www.eurosif.org/publication/european-sri-study-2014/* [accessed on 7/12/2015]

For example, investors have punished companies for operating in Myanmar or Sudan, even if that companies were not directly involved in labour or HR violations (Chesterman, 2008, p. 580)

However, as CLARK and HEBB (2005, p. 2029) correctly remember, the concern of the institutional investors about the social impact of their investments does not equal to the investors moral agenda, given the fact that social responsible investors, mainly hedge funds, only respond to a market demand for Socially Responsible Investment(SRI) giving a preference to companies that provide information and arguments to justify their own decisions in front of beneficiaries and shareholders.

Either at EUMS or EU level, the EU´s view of SRI is considered still as conducted by the global pattern rather than a driving force (Steurer, Margula and Martinuzzi, 2008, p. 5).

4.2 European Union's Corporate Social Responsibility policy

In face of the constant calls of the EP for the inclusion of provisions on corporate social responsibility (CSR) in IIAs (EP, 2010; EP, 2011, para. 27) , and before the relation between FDI and (between others , e.g.) land grabbing[55] (figure 6) as pointed by Schutter(2011) the results have been disappointing given that the best major express commitments made by the EU until now are art. 13 (6)[56] of the EU-

[55] 'Land grabbing' occurs when local communities and individuals lose access to land that they previously used, threatening their livelihoods. This land is acquired by outside private investors, companies, governments, and funds. Communities and individuals can be poorly informed of the consequences, with little rights to stop the land acquisition. The land is then typically used for commodity crops, including agrofuels and sold on the overseas market to places like Europe.
Whether by force, intimidation, or deception, communities who lose access to their land are left without the means to sustain their livelihoods, ending up landless and dispossessed. Land grabbing is often accompanied by severe environmental degradation, the destruction of healthy ecosystems, water, soil and air.

[56] "The Parties shall strive to facilitate and promote trade and foreign direct investment in environmental goods and services, including environmental technologies, sustainable renewable energy, energy efficient

Korea FTA, art. 271(3) and (4) of the EU-Colombia/Peru FTA[57] and article 196 (2) of the EU-Cariforum FTA[58].

Although, we consider that such legal commitments, reinforced by the accountability within the legal framework of the trade committees instituted by the referred FTAs, are an advantage in the EU HR external Policy Commitment

Moreover, such measures possess a qualified statute, when compared with non-binding general international legal proposals (such as the UN Global Compact, the UN Principles on Responsible Investment , the Monterrey Consensus of the International Conference on Financing for Development, the UN Guiding Principles on Business and HR , the ILO´s Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the OECD Guidelines for Multinational Enterprises, the OECD Due Diligence Guidance for Responsible Supply Chains, ISO 26000: Social Responsibility , the International Fund for Agricultural Development Principles on Responsible Agricultural Investment and the International Chamber of Commerce (ICC) Revised Guidelines for International Investment) or specific ones (such as the field of extraction of natural products, the Extractive Industries Transparency Initiative) or the information and communications technology sector (such as the Global Network Initiative).

products and services and eco-labelled goods, including through addressing related non-tariff barriers. The Parties shall strive to facilitate and promote trade in goods that contribute to sustainable development, including goods that are the subject of schemes such as fair and ethical trade and those involving corporate social responsibility and accountability."

[57] "3. The Parties agree to promote best business practices related to corporate social responsibility."
"4. The Parties recognise that flexible, voluntary, and incentive-based mechanisms can contribute to coherence between trade practices and the objectives of sustainable development. In this regard, and in accordance with its respective laws and policies, each Party will encourage the development and use of such mechanisms."

[58] "2. Subject to the provisions of Article 7, the Parties agree to cooperate, including by facilitating support, in the following areas:
(d) enforcement of adherence to national legislation and work regulation, including training and capacity building initiatives of labour inspectors, and promoting corporate social responsibility through public information and reporting."

Based on an increased value investment theory derived from (surprisingly) the ICSID case law, such clauses represent an enabling legislation for the next step on the advancement of the positive discrimination of corporations based on the compliance of CSR principles and blocking any objection to the EU's regulation of the activities of EU corporations in the partner country.

Accordingly, an unscrupulous investor is not entitled to protection within the treaty.

Protection depends on the extent of the benefit it brings the host State and the extent to which it has promoted the economic objectives of the host State.

The inclusion of performance requirements to the investment is a step to be taken by the EU, having also relevance the use of the fair and equitable standard, as fairness must take into account the effect of the investment on the host State as well as the measures that the state takes which affect the foreign investor. As an example see (*Robert Azinian and others v. Mexico*, ICSID ,1997; *Patrick Mitchell v. Democratic Republic of the Congo*,1999).

Such enabling legislation follows the due diligence principle of IL that provides that every State should, to the best of its respective ability, fight breaches of international law by implementing preventive and punishment measures. See 14(3) International Law Commission norms on State Responsibility.

A relevant example of CSR reporting requirements is the EU´s Directive 2014/95 on disclosure of non-financial and diversity information by certain large undertakings and groups. Any public-interest entities which are parent undertakings of a large group of 500 employees or more shall publish a consolidated non-financial statement containing information to the extent necessary for an understanding of the group's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, including:

(a)a brief description of the group's business model;

(b)a description of the policies pursued by the group in relation to those matters, including due diligence processes implemented;

(c)the outcome of those policies;

(d)the principal risks related to those matters linked to the group's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the group manages those risks;

(e)non-financial key performance indicators relevant to the particular business.

Corporations are not only expected to avoid behaviours that are directly complicit with state abuses of human rights, but also must not benefit from such abuses and must refrain from acts that might undermine state efforts to protect human rights (UN ECOSOC, 2003, paras. 3and 11).

Notwithstanding our express agreement with the positions of the EU referred before in this section, the last decade has proved that such non-binding CSR codes do not fulfil the desired purpose before the outsourcing reality of investment.

Not to be confused with FDI, the recent trend of multinational corporations outsourcing services to host state corporations circumvents the reality of a traditional view of FDI and CSR controls of investors (such as is the EU´s Directive 2014/95,) thus expressing the vague enforceability of such codes on the reality of international economic flows and its impact on HR, materialized in the

catastrophe in Savar, India of the landslip of the Rana Plaza building[59] or the persecution of the Ogoni people in Nigeria[60].

4.3 The Essential elements clause of the European Union´s Investment agreements

[59] The 2013 Savar building collapse or Rana Plaza collapse was a structural failure that occurred on Wednesday, 24 April 2013 in the Savar Upazila of Dhaka, Bangladesh where an eight-story commercial and industrial building named Rana Plaza collapsed.

Five garment factories were housed in the Rana Plaza building producing clothing for U.S., Canadian and European clothing labels and retailers through outsourcing. Eighty percent of the workers were young women, 18, 19, 20 years of age. Their standard shift was 13 to 14 ½ hours, from 8:00 a.m. to 9:00 or 10:30 p.m., toiling 90 to 100 hours a week with just two days off a month. Young "helpers" earned 12 cents an hour, while "junior operators" took home 22 cents an hour, $10.56 a week, and senior sewers received 24 cents an hour and $12.48 a week.

The building contained clothing factories, a bank, apartments, and several shops. The shops and the bank on the lower floors immediately closed after cracks were discovered in the building. The building's owners ignored the 3,639 workers warnings to avoid using the building after cracks had appeared the day before. Garment workers were forced to return the following day, and the building collapsed during the morning rush-hour.

The search for the dead ended on 13 May 2013 with a death toll of 1,130. Approximately 2,500 injured people were rescued from the building alive. It is considered the deadliest garment-factory accident in history, as well as the deadliest accidental structural failure in modern human history. (Wikipedia [1])

[60] The Ogoni people have been victims of human rights violations for many years. In 1956, four years before Nigerian Independence, Royal Dutch/Shell, in collaboration with the British government, found a commercially viable oil field on the Niger Delta and began oil production in 1958. In a 15-year period from 1976 to 1991 there were reportedly 2,976 oil spills of about 2.1 million barrels of oil in Ogoniland, accounting for about 40% of the total oil spills of the Royal Dutch/Shell company worldwide.

In 1990, under the leadership of activist and environmentalist Ken Saro-Wiwa, the Movement of the Survival of the Ogoni People (MOSOP) planned to take action against the Federal Republic of Nigeria and the oil companies. In October 1990, MOSOP presented *The Ogoni Bill of Rights* to the government. The Bill hoped to gain political and economic autonomy for the Ogoni people, leaving them in control of the natural resources of Ogoniland protecting against further land degradation. The movement lost steam in 1994 after Saro-Wiwa and several other MOSOP leaders were executed by the Nigerian government with direct help of means and funding by Shell corporation.

In 1993, following protests that were designed to stop contractors from laying a new pipeline for Shell, the Mobile Police raided the area to quell the unrest. In the chaos that followed, it has been alleged that 27 villages were raided, resulting in the death of 2,000 Ogoni people and displacement of 80,000.

In a 2011 assessment of over 200 locations in Ogoniland by the United Nations Environment Programme (UNEP) found that impacts of the 50 years of oil production in the region extended deeper than previously thought. Because of oil spills, oil flaring, and waste discharge, the alluvial soil of the Niger Delta is no longer viable for agriculture. Furthermore, in many areas that seemed to be unaffected, groundwater was found to have high levels of hydrocarbons or were contaminated with benzene, a carcinogen, at 900 levels above WHO guidelines. (Wikipedia [2])

The inception of the EU's external policy on HR conditionality dates back to the wake of Ugandan HR violations in the late 1970s, during the Idi Amin's military dictatorship, from the urgency of the creation of a legal mechanism to suspend the EEC´s obligation to make payments to Uganda under the Stabilization System of Export Revenues Fund (STABEX)[61].

Taking in consideration that the member states of the EEC were a major trade and investment partner in postcolonial African states, pursuing economic relationships with countries embroiled in conflict and with a low profile for HR respect and protection such as Uganda, Liberia and Equatorial Guinea, the incoherence between the promotion of HR discourse and the partnership with dictatorial regimes, complacent with major atrocities was manifest.

The international spotlight was directioned to the EEC project, which prompted the EUMS to seek to introduce a HR clause into the Lomé Convention and other trade and cooperation agreements, allowing the suspension of EEC´s obligations under those agreements in the event of HR violations (Bartels, 2014, p. 6) by using the *rebus sic stantibus* principle[62].

However, the *rebus sic stantibus* principle does not resonates on the nature of HR violations, since such fact is uncertain and not unexpected.

In this case, the emphasis should be placed on the essential nature of the HR clause, representing its breach a "violation of a provision essential to the accomplishment of the object and purpose of the treaty" (art. 60(3)(b) VCLT), being possible to understand such legal act as a repudiation of the treaty through the conduction of an action or omission contrary to the core aim of the treaty (art. 60(3)(a) VCLT).

[61] For more information, *see: http://europa.eu/rapid/press-release_ECA-95-2_en.htm?locale=en*

[62] The principle of *rebus sic stantibus* (Latin: "things standing thus") stipulates that, where there has been a fundamental change of circumstances, a party may withdraw from or terminate the treaty in question. An obvious example would be one in which a relevant island has become submerged.

HR were only mentioned in 1989, in art. 5 of the Lomé IV Convention with ACP Countries[63]. Even so, it was a loose commitment considering the fact that mentions only pacts and not a single operational mechanism, emphasising the sole fact that "entails respect of and promotion of all HR" (Hachez, 2015, p. 8).

Despite its low operability, the pioneer HR clause (Bartels, 2005,pp. iv and ff) was a beginning for the actual HR clauses (Figure 1) , now contained in agreements with over 120 countries in the world[64]. Contributing to the contextualization of HR in the international *fora*, given the fact that, despite the ever growing number of countries signatories of international conventions governing HR, the rhetoric-action gap is still considerably wide since enforcement mechanisms remain relatively weak and based on non-binding mechanisms.

There still exists a niche of countries that did not signed the major international HR conventions, and those that signed may submit reservations, which deplete the concrete effectiveness of the provisions.

As an example, the US is a benchmark for the protection of children's rights in its programme of conditionality. Yet it has failed to ratify the UN Convention on Rights of the Child.

In this respect, the standard EU "essential elements" clause states as follows:

> "Respect for democratic principles and fundamental HR, as laid down in the UDHR, and for the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement" (art. 1 of the EU-Central America Association Agreement).

The adoption of the UDHR as a reference point for HR is a comfortable commitment, given the fact that ensures the mobilization of customary IL, entrenched in the UDHR.

[63] Fourth ACP-EEC Convention, signed in Lomé on 15 December 1989, available at: http://www.caricom.org/jsp/community_organs/epa_unit/Cotonou_Agreement_&_Lome4_lome4.pdf

[64] A database of all EU agreements containing the human rights clause is available at: http://ec.europa.eu/world/agreements.

However, "essential elements" clauses can subscribe other international texts not expressly provided in the *corpus* of the clause, as the case of the Korea referring also to "other relevant international HR instruments". A clause, following the argument of BARTELS (2014, p. 9), with a broader scope and "future-proof" since it makes the reference to future treaties to be signed by the contracting parties.

In the case of an agreement celebrated between the EU and members of the Council of Europe or the OSCE, a reference can also be made to the constituent instruments of these organizations, as in the case of the essential elements clauses in the EU agreements with Georgia and Moldova, stating that:

> "Respect for the democratic principles, HR and fundamental freedoms, as proclaimed in the UDHR and as defined in the European Convention of HR, the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and the Charter of Paris for a New Europe of 1990 shall form the basis of the domestic and external policies of the Parties and constitutes an essential element of this Agreement."

In this case, the formal potential of protection and promotion of HR is augmented by the increased level of human rights protection, when compared to the UDHR.

Also the reference to the Helsinki Final Act and the Charter of Paris enhances the protection of minority rights and provide detail on the nature of democratic principles.

Moreover, the bilateral commitment to respect, protect and fulfil HR, resulting from the essential elements clause of the EU IIAs, represents an international obligation of the contracting states, to comply with internal and in international policies.

Such measures allow the parties to regard serious and persistent HR violations and serious interruptions of democratic processes as a "material breach" of the agreement in line with the VCLT, constituting relevant legal facts for the decision

of the full or partial suspension of the agreement, in line with the procedural conditions laid down in Art. 65 (EC,1995, pts. 7-8).

This, only after, the consideration of a period of three months between notification to the other contracting State of the existence of a relevant fact for the decision of suspension of the agreement, except in "cases of special urgency".

Such measures should not only be based on objective and fair criteria, but adapted to the variety of situations that can arise, keeping in mind that, in the selection and implementation of the measures, it is crucial that the population should not be penalized for the behaviour of its government (EC ,1995, p. 7-8).

Also the definition of essential elements can represent a benchmark for a consultation procedure in the event of non-compliance, moreover enabling a contracting party to take unilateral measures in the event that the other party fails to comply.

Currently, HR clauses are also included in other EU instruments , such as autonomous instruments on financial and technical cooperation(Reg. 1638/2006 and Reg. 1905/2006), financing agreements with developing countries (Annex I of the 2012 Model General Conditions to Financing Agreements and Art 23(1) of the European Development Fund) , integration agreements, association agreements ,sectoral trade agreements and in the EU's Generalised System of Preferences (GSP) (Regulation Nº 978/2012 of 25 October 2012).

Sectoral trade agreements traditionally did not included any reference to HR, a fact criticized by the EP (2010, para. 12).

A reality changed in 2013 with the protocols to the EU-Morocco and EU-Cote d´Ivoire Fisheries Partnership Agreements that contain express clauses linking the protocols to HR clauses in other applicable agreements.

A progress that, in the case of the EU-Morocco protocol, represents a relevant step for the discourse of self-determination rights of the people of Western Sahara (Dawidowicz, 2013).

Since its enactment the model of essential elements clause has been formulated in various ways in other EU agreements.

It can be affirmed that the essential elements clause present in art. 1 of the EU-Korea Framework Agreement is the most developed clause until the present moment, with an extensive reference to EU values:

> "The Parties confirm their attachment to democratic principles, HR and fundamental freedoms, and the rule of law. Respect for democratic principles and HR and fundamental freedoms as laid down in the UDHR and other relevant international HR instruments, which reflect the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement".

However, this mere reference is not self-sufficient.

4.4 The Non-execution clauses of the European Union´s Investment agreements

As stated above, the HR clause lacks coercive power. However, and in consonance with art. 60 (1) VCLT, when associated to a legal enforcement mechanism, HR clauses, corresponding to their original rationale, allow the unilateral suspension of the agreement with immediate effects in the case of a HR violation by the other party.

This mechanism, referred as non-execution clause, allows the party to adopt "appropriate measures" that can take the shape of the suspension of any obligations between the parties such as financial or trade obligations and obligations outside of the agreement containing the non-execution clause[65].

[65] *See* the list of potential measures that may be taken in response to serious human rights' violations or serious interruptions of democratic process contained in Annex 2 of Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries', COM (95), pg. 216:
- alteration of the contents of cooperation programmes or the channels used;

The discretionary margin attributed by the "appropriate measures" concept is a broad one, encompassing either negative and positive measures.

The EC stated in 1991 that "the Community can choose an active promotion of HR or a negative response to serious and systematic violations," and that before a decision it "will wherever possible give preference to the positive approach of support and encouragement" (EC, 1991, p. 6).

It is now routine for trade agreements to be concluded by the EU and the EUMS jointly, making these what is known as 'mixed agreements'. This means that the EU should act in matters for which it is competent and the EUMS in matters for which they are competent. This can complicate the adoption of 'appropriate measures' falling within the competences of both the EU and the EUMS.

To account for this, in relation to the HR clause in the Cotonou Agreement, the EU and the EUMS have concluded an internal agreement in which the EUMS authorise the EU Council to take decisions concerning 'appropriate measures', and which further specifies that such decisions are taken by qualified majority voting (which the EUMS undertake to implement).

Later in 1991 and following up the March EC resolution, the Council and EUMS adopted a resolution (Council of the European Communities, 1991, p. 122) that contributed to the understanding of the legal operational value of the positive measures, describing them as including dialogue, as well as "active support" for various initiatives enhancing respect for HR, democracy and the rule of law.

However, and, notwithstanding the priority previously given by the EC´s resolution on positive measures, the Council reserved for itself the option of taking

- reduction of cultural, scientific, and technical cooperation programmes;
- postponement of a Joint Committee meeting;
- suspension of high-level bilateral contacts;
- postponement of new projects;
- refusal to follow up partner's initiatives;
- trade embargoes;
- suspension of arms sales, suspension of military cooperation;
-suspension of cooperation;

negative measures "in the event of grave and persistent HR violations or the serious interruption of democratic processes" (idem, 1991, p. 122). Taking in consideration a proportional requirement, being the last measure the suspension of cooperation with the States concerned (idem, 1991, p. 122, para. 6).

According to the wording of the non-execution clause, some conditions must be observed for the adoption of "appropriate measures" (such as art. 96 (2) (a) of the Cotonou agreement).

In consideration of its unilateral character, and following on the significance of the word "appropriate", all non-execution clauses state that measures should be adopted progressively. Giving priority to measures that least disrupt the scope of the agreement, and adopted temporarily, following the principle of proportionality without affecting the EU's humanitarian aid and local development aid programs that proceed through unofficial channels (EC, 1991, p. 7). And after the notification and attempt of mediation by the general committee eventually established in the agreement.

According to the non-execution clause, the general committee must receive the information and mediate between the parties, except in cases of "special urgency", understood as comprising grave violations of HR clauses.

Following an analysis of the non-execution clauses introduced in EU IIAs, the doctrine and EU institutions (EP,2006) commonly identify two temporally strands.

The first, the former "Baltic clause", enacted in agreements with Baltic states prior to their accession to the EU, provided an authorization to a party to suspend the application of the agreement in cause with immediate effect in case of a serious breach of essential provisions. A clause that, due to its inflexibility, was progressively substituted by the current "Bulgarian clause", that allows either contracting party to adopt appropriate measures in case of breach by the other party, after the conduction of a consultation by the party or by a competent committee established by the treaty, (EC ,1995, p. 8).

The EP is, however, not involved in the temporary suspension of an international agreement. Rule 91 of the EP's Rules of Procedure only provides that the EC will make a statement to the EP in the event that it proposes to suspend an agreement, which will be followed by a debate and possible recommendations.

This is to be decided by the Council on the basis of the same voting requirements as for the conclusion of the agreement, following a proposal by the EC (art. 218 (9) TFEU).

The non –execution clause demonstrates a low level of effectiveness since the decision process occurs at the level of the westphalian political institutions of the EU, leaving aside the role of the CSO's and other actors in the referentiation of a fact liable to activate such clause and in the initiation of the process.

4.5 The Human Rights exception clause of the European Union´s Investment agreements

In pair with the non-execution clause, the HR exception clause shows a different scope and role in the IIAs.

As a unilateral measure, it entails the insertion of a new HR exception to the agreement permitting a party to adopt the necessary measures to comply with its HR obligations under the essential elements clause such as public morals, health and safety, and environmental protection, without any strict connection to the obligations in the agreement.

Firstly, enacted in an agreement in 1947 and since then introduced in all trade agreements and also few investment agreements, the policy was followed by an express recognition in art. 36 TFEU following on the ECJ case law that defended the use of apposition of such mechanisms in the form of extensive “mandatory requirements”.

Despite the commitment to enforce HR, materialised in the non-execution clause, until this moment none of the EU IIAs provided for the creation of a permanent committee mandated to monitor the implementation of the essential elements clause in the agreement, an absence that contrasts with other permanent monitoring mechanisms, dedicated to specific subjects.

The relative exception is the EU Colombia-Peru agreement, were a Subcommittee on Trade and Sustainable Development, based on the ILO peer review mechanism was established, with the participation of the civil society, both through national committees and in bilateral annual dialogues.

Through its functioning, if consultations in this joint committee are not successful, the matter may be referred to a Group of Experts, which would then have the power to examine whether there has been a failure to comply with the relevant obligations. However, there is not a trade sanction provided in cases of non - compliance.

Ad hoc implementation is always possible, exemplified in the case of the subcommittees on HR and democratic principles constituted under the EU-Morocco Association Agreement (Association Council Decision No 1/2003 [2003] OJ L79/14, Annex 1.).

A second possibility of *ad hoc* monitoring mechanisms are primary bilateral councils established by the agreements, and in some cases within civil society consultative committees and bilateral parliamentary committees (Bartels, 2014, p. 10).

4.6 Sustainable development in the EU´s FTAs

At the dawn of 2008, the EU-Cariforum Economic Partnership Agreements (EPA) established the EU's practice of apposition of “sustainable development” chapters containing broader considerations based in the EU´s publicized values and on US

and Canadian FTA provisions, referring to a commitment with labour and environmental standards, including ILO core labour standards.

Considering the historical acquis of the United Nations Conference on Trade and Development (UNCTAD), that relates international trade and development theory since 1964 and the Brundtland Report that proposed the principle of sustainable development (UN,1987), the enation of the EU´s "sustainable development" chapters is decades late form the UN position.

The sustainable development chapters contain provisions on labour standards and environmental standards that envision minimum obligations based on multilateral agreements (usually ILO core labour principles[66] and certain multilateral environmental agreements[67]) and obligations requiring the contracting parties not to reduce their levels of protection.

According to BARTELS, despite the apparent overlap between such clauses and HR clauses, justified by an unclear adoption of sustainable development policies by the EU and a narrow view of the HR clause as, *expressis verbis*, limited to political situations, it does not undermine the validity or effectiveness of either of these sets of provisions (Bartels, 2012, p. 297), giving the injured party a choice of options.

Moreover, as stated by FIERRO, this type of sustainability clause does not provide any kind of "stick" to the EU in case one of the other parties violate HR (Fierro, 2003, p. 211).

[66] Such as the freedom of association (Convention 87), the effective recognition of the right to collective bargaining (Convention 98), the elimination of all forms of forced or compulsory labour (Conventions 29 and 105), the effective abolition of child labour (Convention 182), the elimination of discrimination in respect of employment and occupation (Convention 111), Minimum Age Convention (Convention 138) and Equal Remuneration Convention (Convention 100).

[67] Such as the Montreal Protocol on Substances that Deplete the Ozone Layer, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the Stockholm Convention on Persistent Organic Pollutants, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Convention on Biological Diversity, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity and the Kyoto Protocol to the United Nations Framework Convention on Climate Change.

A fact that can be related to the conclusions of the study of ORBIE et al.(2009) that emphasizes the resistances of EU member states to the inclusion of binding labour standards in trade agreements. Leading to formulations like as article 3(4) of Chapter XV of the EU-Vietnam FTA that refers that "each Party, will also consider the ratification of other conventions that are classified as up to date by the ILO, taking into account its domestic circumstances."

More than the obligation to comply, art. 21(2) TEU states that the EU is obliged not only to respect HR, but also to cooperate with the third state in assisting that state to comply with its own HR obligations, coupled with the EUMS´s obligation to cooperate referred under art. 56 of the UN Charter.

That is, if an obligation binding on the third state is an obstacle to the third state´s ability to comply with its own HR obligations, it is incumbent on the EU to cooperate by suspending, to the necessary extent, the application of that obligation.

The inclusion of Sustainable development chapters in IIAs is a praiseworthy decision that demonstrates formal commitment to the international and EU values, following the EP´s strong support to the inclusion of a list of minimum social and environmental standards that must be respected by all trading partners, including the ratification and the effective implementation of the ILO's core labour standards (EP, 2010).

A position followed by the EC through the use of the model “essential elements” clause that makes an express reference to internationally recognised core labour standards as defined by relevant ILO Conventions, to the principles reaffirmed in Ministerial Declarations at the UN and at ILO levels, with an emphasis to the right of freedom of association and collective bargaining, abolition of the use of forced and child labour.

However, as we will refer on point 4.7, the EU FDI policy on negotiation of normative frameworks for sustainable development presents regional differences and incoherencies.

4.7 Assessing the impact of the EU conditionality policy

i) Inconsistency

According to DONNO (2012, p. 7), despite NPE arguments based on the fact that "principles, actions *and impact* are equally important for NPE" (Manners, 2002, p. 246), the analysis has been focussed mainly over the EU's principles and actions, limits of the EU's commitments to norms, and catalogued inconsistencies in the EU's promotion of HR, rather than on the more exhaustive assessment of its impact.

According to ORBIE (2011, p. 161) the Union's activities do increasingly correspond to what would be expected of a normative power, but that "its normative impact remains unclear".

Taking in consideration the arguments for the decreeing of HR clauses and enforcement mechanisms in EU IIAs, it is therefore legitimate to recognise that such legal framework constitutes a valuable tool for the provisional assessment of HR risks and impacts enhancing the management of decisions throughout the enforcement period of the IIA, in particular in operating low HR records contexts.

It enables a division of roles and responsibilities between State´s duties and companies HR responsibilities, facilitating the early identification of HR risks and impacts, including potential legal liabilities.

However, we do not agree with the EU view of management of "HR costs" in IIA´s based on an economic analysis of law, a clear manifestation of the neoliberal discourse of "negative externalities" widely proposed in the international economic law.

It is relevant to stress that such legal instruments represent international commitments, thus an international obligation that can develop the role of policy guidelines and expectation on compliance, being used by stakeholders for advocacy

purposes and other lobby strategies, providing also a powerful justification for enforcement in the event of non-compliance.

Punishment is more likely to be viewed as appropriate and warranted when a state rejects a formal commitment, compared to a situation of violation of a diffuse right in which the state has not made an explicit promise to adhere to standards of behaviour (Donno, 2012, p. 10).

Also, international commitments represent strong arguments at the interim decision level of multilateral institutions, like on the case of the Council in the EU, particularly when used to pressure reluctant EUMS in the possibility of opposition on the enforcement of conditionality mechanisms due to national strategic interests or political ties with the country in question (Smith, 1998, p. 272-3).

According to DONNO (2012), a reduction in both EU aid and trade is more likely in countries that are party to economic agreements with a conditionality clause. This enables the conclusion that such clauses are used as a tool for rewarding and punishing governments for their HR records.

Notwithstanding the added value of the HR clause and enforcement mechanisms, the EU's conditionality policy is not immune to criticism concerning the legality, consistency, and effectiveness of the HR clauses, respective mechanisms and political dialogue tools.

Despite the merit of the EU's positive approach on HR promotion in its CCP, the results fall short when compared with the proposed aims of the EU's external policy.

Having as a primary reference the UDHR, the HR clause demonstrates moderate political commitment and openness to participation when based in a non-binding tool that has little or no legal relationship on the specificities of the FTAs[68] , reaffirming only the States commitments.

68 As exemplified in art. 268º of the Trade Agreement between the European Union and Colombia and Peru: "Recognising the sovereign right of each Party to establish its domestic policies and priorities on sustainable development, and its own levels of environmental and labour protection, consistent with

An opinion seconded by BRANDTER and ROSAS (1998, p. 475) and ZWAGEMAKERS (2012, p. 4).

However, we take in good consideration the pioneer path taken in the HR clause used in the EU-Korea FTA (art. 1 (1)) that mentions: "as laid down in the UDHR and *other relevant international HR instruments*", which allows for a broader and more relevant scope of protection.

ii) Post-colonial discourse and lack of coherence

All in all, we denote the broad discretion of the EU's conditionality policy, that, demonstrating a strong commitment to HR before the global South countries, present an indulgent and euphemist commitment towards other countries.

The position adopted is criticized by those global South countries and by academics that research on the topic of third world approaches to international law (Chimni , 2006) (TWAIL) and post-colonialist legal studies , pointing to the EU has presenting an implicit role of condescending arbiter (Zwagemakers, 2012, p. 4) perpetuating its role as a post-colonial power (HURT,2003, p.161), exerting protectionism (Hafner-Burton,2009, p. 16) and therefore, legitimizing the designation as "conflicted trade power" (Meunier and Nicolaidis,2006).

A position that could be perceived as paternalism and promoter of a eurocentric view of HR (Mutua,1996).

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the internationally recognised standards and agreements referred to in Art.s 269 and 270, and to adopt or modify accordingly its relevant laws, regulations and policies; each Party shall strive to ensure that its relevant laws and policies provide for and encourage high levels of environmental and labour protection.

Art. 277/3:" The Parties recognise the right of each Party to a reasonable exercise of discretion with regard to decisions on resource allocation relating to investigation, control and enforcement of domestic environmental and labour regulations and standards, while not undermining the fulfilment of the obligations undertaken under this Title."

And art. 277/4: "Nothing in this Title shall be construed to empower the authorities of a Party to undertake labour and environmental law enforcement activities in the territory of another Party."

Moreover, considering the commitment of the EU in 1995 to include HR clauses in all EU agreements, the EU has been more keen to apply such clauses in agreements with countries from the global South than with countries from the global North, leading to accusations of incoherence and double standards, being the inclusion of HR clauses with northern countries viewed as an attempt to appease domestic constituencies than to influence outcomes abroad (Donno, 2012, p. 2).

In addition, the assessment of the results of the EU's conditionality policy reveals a poor record of effectiveness, being pointed out that, implementation, monitoring, and evaluation usually takes place through the EU´s diplomatic missions, or through other existing EU structures which have other tasks and are not specifically tailored to the conditionality policy competing with other interests and policy priorities on the EU's agenda in third countries (Zwagemakers, 2012, p. 5).

More than the insufficient availability of operational mechanisms to implement, monitor and evaluate the EU's HR conditionality policy pointed out by some authors (Zwagemakers, 2012, p. 5), the conditionality policy in the CCP lacks concrete enforcement, consistency and HR indivisibility. It must follow the teleology of the word "conditionality".

A factor in which the geographical diversity of the HR clauses positioned in EU´s IIAs does not contribute to the legal certainty and consistency of the enforcement before relevant situations for the application since the "essential elements" vary between IIAs, referring in an inconsistent manner "the rule of law" or "respect for the principles of IL".

Such external policy, based on disparity, origin of legal uncertainty, repercussions on the EU's legitimacy and merit to link HR concerns with trade and investment fluxes, as already stated by the EC in 1995 when it referred that:

> "The use of two different formulas applied by regions (Hachez,2015, p. 9) (the "Baltic" and "Bulgarian" clauses) in the same part of the World could be interpreted as a discriminatory practice, putting the EC in a difficult position in

its negotiations with third countries. There is also a growing tendency to regain the margin of flexibility lost in the clauses themselves through an increasingly varied range of interpretative declarations" (EC,1995, p. 11).

It is acceptable the inclusion of such legal terms has a reference of past events or possible developments of HR violations by the other contracting party.

However, such practice, based on supplementary assessments of the HR record of the contracting party must be made the rule and included in all IIAs, and therefore in the EU´s model of HR clause.

Apart from the opposite direction to the fulfilment of commitment of development of international law, stated under art, 3 (5) TEU, we must stress: coherence is a basic political requisite for the construction of a legal project and one of the fundamental principles of rule of Law.

A commitment made by the EU in art. 7 TFEU.

A role attributed to the Council and the Commission, under art. 4(3) TEU, not forgetting the relevance of the Court of Justice in ensuring coherence and consistency in the formation of the EU foreign investment regulation and its integration within EU external relations.

However, in light of the broad discretion granted to the political institutions to determine the primacy of a policy objective, the Court has been hesitant to interfere with the policy options of EU institutions in external relations, as demonstrated in the Portugal v Council with the absence of an analysis of the effectiveness of the essential elements clause (C-268/94 Portugal v Council (1996) ECR I- 6177). (Dimopoulos,2011, p.223).

iii) Imposition of economic and political systems

The EU occasionally adds to the HR clause on an *ad-hoc* basis the concept of "respect for the principles of market economy".

In a consonant position with HACHEZ (2015, p. 15), we recognize such consideration of "principles of market economy" as an essential element presents, as having a dubious nature, only understandable with the eventual argument of some EUMS belief that market economy is somehow the only economic model conducive to the realisation of HR.

A fact evidenced by the stir created with the negotiation of the EU-China FTA in 2015, as the attribution by the EU to China of the status of market economy is a requisite for the negotiation of a considerable agreement between to considerable economic actors (EU Observer,2016).

As the UN Committee on Economic, Social and Cultural Rights noted (CESCR, 1990, note 119, para. 8), in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laisser-faire economy, or upon any other particular approach.

In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems.

The referred understanding constitutes an unfounded correlation mobilized in an inconsistent way in negotiations with countries with planned economies, which conflicts with the principle of self-determination, as stated in art. 1 (1) of the ICESCR.

Moreover, the requirement of non-interference is an established principle of international law, reaffirmed in the ICJ Nicaragua Case (Nicaragua v. United States of America, ICJ, 1986), were the ICJ rejected the US argument that the growing influence of communist power in Nicaragua was a matter which concerned all the states of the region. The Court indicated that it was not permissible under

international law for one state to dictate the economic system that another state should have.

iv) Possible redundancies

The legal uncertainty of the content of the "essential elements" clause is increased when possible redundancies are stated by the EU strategic papers, being the case of the objective of the EC to the inclusion of human trafficking in the HR clauses as stated in the EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016(EC,2012, p. 12), considering that in its own assessment that essential elements clauses encompass human trafficking.

v) Lack of enforcement of the conditionality policy

In line with the apposition of a HR clause in the negotiation phase of EU´s IIAs, there are also some remarks to be made in what concerns the effective enforcement of the conditionality policy.

Taking in consideration the history of the EU's conditionality policy, it is possible to conclude that the activation of the enforcement mechanisms is not frequent. The first critique is that the EU does not activate conditionality often enough, leading to the conclusion of some authors that the EU regularly leaves HR violations by partner countries unpunished (Bartels, 2008, p. 18).

A position shared by the EP (2008, para. 21) which considers that "the failure to take appropriate or restrictive measures in the event of a situation marked by persistent HR violations seriously undermines the EU's HR strategy, sanctions policy and credibility".

Furthermore, the discretionary enforcement of HR clauses constitutes for some authors a basis of inequality between relevant situations and countries (Keukeleire

and Delreux, 2014, p. 207; Døhlie Saltnes, 2013; Fierro, 2003, p. 309; Rosas, 2011, p. 13). The EU is rather quick to activate conditionality against harmless partners, whereas is much more reluctant to do so in regards to more powerful countries (Zwagemakers, 2012, p. 14).

Following on a EU Council´s 2009 policy document (EU Council ,2009) where the essential elements clauses are designated as "political clauses", BARTELS (2014, p. 12) refers that the EU´s HR clause has, in practice, been treated not as a HR clause but rather as a political clause, with occasional HR elements. Moreover, considering that the EU prioritises first generation HR over the second generation HR (Kerremans and Orbie, 2009, p. 638).

An argument proven by the fact that, until this moment, the essential elements clause has only been mobilized before ACP countries and only in limited cases such as coups or irregular elections, as demonstrated by figure 3.

An enforcement that, as evidenced by Figure 2, has limited impact on the sanctioned country.

The perceived irrelevance of HR clauses in trade agreements with the EU is a recurrent motive for non-compliance by third countries. Sri Lanka, Nicaragua, and India maintain that the EU´s HR requirements undermine the economic objectives of the trade agreement. Moreover, these countries refuse to comply with the HR clauses because they feel that the clauses infringe upon their national sovereignty and integrity.

Following on ROSAS ((2011, p. 13) argument, it is perhaps symptomatic that the mandate of the FRA, which possibly might contribute to a more systematic and coherent HR policy, does not extends to EU´s external relations.

In other strand of though, some authors argue, following the assessment of the eventual impact of the activation of the conditionality mechanisms and the cases of the real impact of the GSP+ sanctions taken against Belarus, Myanmar and Zimbabwe, that risking to apply sanctions just to see them fail would harm the

population rather than bolster the credibility of the EU's conditionality policy (Bartels, 2008, p. 18; Beke and Hachez, 2015; Meunier and Nicolaidis, 2006, p. 921).

The research (Smith,1998, p. 273; Donno, 2013) evidences that, when compared with other global actors, the EU is more proactive at protecting HR abroad, however it is also manifest the reluctance within the EU to employ sanctions, activating the conditionality mechanism, being given priority to political and dialogue when possible.

It is argued that sanctioning in not the central point of the EU's conditionality policy, being more relevant the highlight conferred to HR in the EU's international relations (IR) providing a basis for political dialogue, as proved by advanced evidence (Hafner-Burton, 2009).

In fact, according to the ECJ, the applications of sanctions in result of HR violations is a discretionary power possessed by the EU, meaning that the EU is not obliged to invoke the essential elements clause:

> "[Essential elements clauses] are not intended to permit or indeed to impose the recourse to and adoption of measures if the parties to that agreement fail to comply with the clause relating to fundamental rights contained in that art. 2 of the Association Agreement [EU-Lebanon] contains a provision on HR, which provides that the relations between the parties and all the provisions of the agreement itself are to be based on respect of democratic principles and fundamental HR" (Mugraby v Council and Commission, ECJ, 2011, para. 40).

Along with the selective enforcement critique, it is also stated that , the "positive measures policy" of the EU before IIAs partner countries frequently leads to middle term solutions as the suspension of meetings and technical co-operation programmes, even taking in consideration that , as evidenced in figure 3 , HR clauses have only been activated in severe HR violations, such as coups , flawed elections, or brutal occurrences of grave HR violations, ignoring cases of persistent

HR violations(EC,2012b), unless in case of deterioration of the reported situation (figure 3 of the annexes) .

An assessment that contradicts the EU's Strategic Framework and Action´s plan when states that:

> "When faced with violations of HR, the EU will make use of the full range of instruments at its disposal, including sanctions or condemnation. The EU will step up its effort to make best use of the HR clause in political framework agreements with third countries" (Council of the European Union, 2012, Action 11, p 3).

vi) Lack of an adequate monitoring mechanism

As referred *supra,* at this point none of the EU IIAs have established a permanent monitoring committee for the evaluation of compliance of HR obligations under the IIA.

Notwithstanding the possibility that of such evaluation can be conducted by the periodic political dialogue meetings, by the general committee detached of overseeing and managing the agreement, or by parliamentary committees created by some agreements, we consider that such function must be allocated to a specific organism.

Facing this evidence, one must conclude that, in general the EU's conditionality policy lacks any proper "operational mechanism" for implementation, monitoring of HR situations and evaluation of the effectiveness of sanctions, delegating such role to the diplomatic missions which lack time and resources to conduct the necessary local based work.

Furthermore, the assessments made by the general committees responsible for monitoring the compliance of the HR clause represent a weak input, failing to influence subsequent negotiations in any visible way. This, taking in consideration

that formal consultation mechanisms can only be triggered by another contracting party, thereby excluding individuals or CSO´s, and can only proceed upon common agreement of the contracting parties, resulting in the non- binding conclusions of an expert panel (e.g. art. 301.º /3 of the EU-Central America Agreement).

According to GSTÖHL and HANF (2014, p. 743) this fact does not constitutes a surprise considering that such consultation mechanisms have been conceived as a less compulsory alternative to the standard dispute settlement procedures such as ISDS from which the "sustainable development" matters are explicitly excluded[69].

In conclusion, and taking in consideration our evaluation of the "appropriate measures" enacted by the EU along its CCP policy in face of HR violations, the added value of the EU´s conditionality policy falls short from the expected of a "normative power", remembering more the remnants of post-colonialism politics.

vii) Recommendation: Inclusion of HR benchmarks

As a suggestion for the future effectiveness of the EU's conditionality policy, and following on the EP resolution on the EU-Azerbaijan Association Agreement, we support the inclusion in the future EU´s IIAs of HR benchmarks that provide a point of reference for the compliance of the HR obligations of the contracting parties. (EP, 2011b, para. 1 (c)).

Such referential tool would ideally be periodically updated, fulfilling its operability aim of automatic activation by the HRFASP of the adoption of "appropriate measures" when observed a failure to comply with the benchmarks.

[69] E.g. art. 284/4 EU-Central America association agreement states that "The Parties shall not have recourse to dispute settlement procedures under Title X (Dispute Settlement) of Part IV of this Agreement and to the Mediation Mechanism for Non-Tariff Measures under Title XI (Mediation Mechanism for Non-Tariff Measures) of Part IV of this Agreement for matters arising under this Title [trade and sustainable development]." However, the art. 206 of the EU-Cariforum constitutes an exception of this rule.

We agree with the suggestion made by BARTELS (2014, p. 14) that argues that such benchmarks must be in a side agreement rather than in the main agreement, which is of indefinite duration.

Moreover, WARD ((1998, p. 534-535) suggests a catalogue of the types of incidents that might activate suspension. Benefiting third states and other affected parties from deeper elaboration of the meaning to be attributed to human rights clauses.

CHAPTER V – Evaluation of the impact of European Union´s Investment agreements in Human Rights

5.1 Human Rights Impact Assessment and Sustainability Impact Assessment

The merit of a conditionality policy based on the centrality of HR as a pillar of a CCP depends on the assessment of the pre-existing conditions and situations of the HR record of the contracting countries before the ratification of the treaty in order to establish the positive and negative impacts of the political, economic and legislative measures required to operationalize an FDI policy.

A difficult task, as argued by the structuralist economics(Taylor,2004), since the effect of conditionality on the overall living condition of the general population is difficult to determine in quantitative terms.

Moreover, once in force, the IIA application will produce unexpected results, part of the constantly changing cycle of life of nations, be it at the political, economic and social levels.

Therefore, a compromised trade and investment policy based on the cosmopolitan theory of HR can only be realist when a thorough, fully open, transparent and participated impact assessment is conducted.

Such tools are even more pertinent when the UN Committee on Transnational Corporations proposed logic of screening agencies for investment, enacted by host states in order to assess the positive input of investment in the national economy, has been dismantled over time, due to international economic terrorism campaigns (Klein,2007) undertaken by the main promoters of a neoliberal view of FDI law.

The impact assessment tools follow the footsteps of the Environmental Impact Assessment(EIA), the first Impact Assessment tool, dating back to the 1960s, that structured the process of identifying, predicting, evaluating and mitigating the

biophysical, social, and other relevant effects of development proposals prior to major decisions and commitments(IAIA,2014).

Along with the EIA, other dedicated strands of impact assessment exist, such as the Social IA(SoIA), the process of analysis, monitoring and managing the intended and unintended social consequences, both positive and negative, of planned interventions, the Sustainability Impact Assessment(SIA), the Health Impact Assessment(HIA) and the Human Rights Impact Assessment (HRIA).

Due to the limits of the present text, we will reduce the scope of our analysis to the HRIA and SIA.

As a tool to measure the discrepancy between the international obligations of a State and the effective capacity of individuals, groups and communities to realize these rights, the HRIA and SIA can be used by CSOs, corporations, governments, and affected communities to determine and/or monitor the effectiveness of a strategy or policy destined to improve the HR compliance level within a community, region or State, as well as to monitor the positive or negative HR impacts of certain activities.

Among other benefits, impact assessment tools allow a deeper knowledge of the HR obligations, accountability and protection mechanisms in national and regional frameworks of the partner country, having as priority goal to prevent negative impacts on HR and increase positive ones.

Not ignoring the similitudes with other impact assessment tools, such as the general EU impact assessment, used to assess the viability of the establishment of negotiations with a third country for a new trade and investment agreement, HRIA and SIA, concerning their aim, rely on a specific methodology that set them apart from other types of impact assessment.

As for the HRIA, the HR normative framework and requirement of effective participation of rights holders constitutes the contrasting point, being mobilized to

access the HR compliance of an IIA or investment project, providing clarity in the drafting of an investment strategy.

More than the HR based framework, the participation of stakeholders in the assessment process constitutes the essential element of legitimacy to such mechanisms, a perspective that received considerable concern in the last decades, in particular, and the right to consultation of indigenous peoples (Amnesty International,2010).

The right to consultation and to free, prior and informed consent is articulated in art. 30 (2) of the UN Declaration on the Rights of Indigenous Peoples as well as in art. 2 (1) of the ILO Convention 169 on Indigenous and Tribal Peoples.

On the other hand, the SIA was firstly developed by DG Trade in 1999 for the WTO Doha Development Agenda negotiations, and since then conducted for all major EU bilateral and plurilateral trade negotiations.

They constitute a process undertaken during a trade negotiation which seeks to identify the potential economic, social and environmental impacts of a trade agreement and to consider complementary measures for mitigating negative effects (EC,2006c, p.7).

According to an EU report of 2011, impact assessments are a key element in the promotion of HR consistency (EC, 2011d, p. 19).

Notwithstanding the pioneer role of the EU in the development of an impact assessment tool strictly destined to FTAs with more than ten years of experience, the Academy (Bonanomi , 2014, p. 5) and CSO´s (International Federation For Human Rights , 2014 , p. 4) analysis of such tools evidence the shortcomings and flaws the EU´s policy, stating that HR impacts are not suitable, since such tools do not focus specifically on disadvantaged groups and do not include other benchmarks relevant to HRIAs.

A need to action recognized by the EU in the 2012´s EU Strategic Framework and Action Plan on HR and Democracy (Council of The European Union ,2012,

point 1) that incites the inclusion of HR in all impact assessments, with an express reference to FTAs.

Presenting a constructive critique, the Academia and CSOs have developed in the last years alternative tools for the current EU´s SIA, as the case of the guiding principles on HRIAs of FTAs of the authorship of the UN´s Special Rapporteur on the right to food (Schutter, 2011).

A real impact assessment would prioritize EU´s and EUMS obligations to respect, protect and fulfil HR, by considering a wide range of trade options, ideally including non-previously referred policy ones, regardless of the fact that they are in line with the trade and investment liberalisation agenda or not, which implies an analysis of the probable costs and benefits of the IIA in negotiation in the EU and in the partner country.

In the trade SIA of the EU–India FTA, for example, only the impacts of three predetermined liberalisation scenarios were assessed: of a "limited FTA", of a "broad FTA", and of a "broad plus FTA" (EU, 2009, pp. 440–441).

A thorough analysis must encompass *de facto* impacts of trade agreements, considering the interrelation of the political, social and economic dynamics they are expected to generate.

For that purpose, paying attention to the already foreseen in this matter in the EU SIA guidelines (EC, 2006c, p. 15) and recognizing the limits of the judgement of the impacts of an IIA in the territory of another partner country, the structure of the SIA must be reviewed in order to allow the possibility of a multinational impact analysis.

The past EU´s SIA have differed in character and approach. The EU–ACP Economic Partnership Agreements, focused exclusively on the EU´s trade partners, omitting any analysis of impacts on the EU. In contrast, the SIA of the EU–India FTA resulted in a synthesis report on the overall economic, social, and environmental impacts on both partners. The new-generation SIA of the EU–

Georgia and EU–Moldova DCFTAs includes very general reflections on the EU, but primarily focuses on the EU´s trading partner.

Moreover, the impact assessment must attribute a special focus to areas and groups where the possibility of threats to HR are most intense presenting the conclusions in a disaggregated manner, complying with the principle of non-discrimination.

In this field, the EU policy is inconstant attending to the ECJ case *Spain v Council* that annulled an EU Council Regulation on the grounds that it was disproportionate since the EU Council, not having conducted an impact assessment, was not able to show that it had taken into account all necessary factors in the decision to adopt the measure (*Spain v Council*, ECJ, para. 133-5).

The Court did not found that there was an obligation to conduct an impact assessment. The problem concerned the consequences of not conducting an impact assessment, namely that there was no evidence that relevant factors had been taken into account.

The same contravention of EU law was rightly pointed by FIDH, and confirmed by the EU Ombudsman, in the absence of a SIA in the EU-Vietnam agreement.

According to the EC, in its opinion to the draft recommendation of the EU Ombudsman, a HRIA is not necessary because the "mix of instruments" that the EC uses to deal with HR in Vietnam fulfils the "very same overarching purpose of an HRIA" and is sufficient to address the negative impacts the FTA may have (International Federation for Human Rights, 2015).

The assessment of alternative options for IIA measures depends on the responses available in the event that the assessment predicts negative impacts and differs between the HRIA and SIA methodology.

In the case of previewed negative impacts, the HRIA methodology suggests choosing among the following responses: the draft under negotiation should be

"terminated", "amended", "safeguards" should be inserted, "compensations" provided, or "mitigation measures" adopted (EC,2006c, III.3).

In contrast, the Trade SIA Handbook emphasises the need to introduce "mitigation and enhancement measures" to counteract negative impacts (EC,2006c, p 22).

Considering the resources and time for the conduction of an investment impact assessments, both HRIA and SIA methodology establish guidelines for the management of the limits of the analysis process.

Therefore, according to the SIA guidelines, the level of depth and detail should be adapted "to the likely significance of trade measures" (EC,2006c, p. 16) identified at the screening stage, being the concept of significance measured through criteria of "magnitude" and "reversibility" of an impact (EC,2006c, p. 32).

Such guidelines, based on a limited neoliberal economic analysis of law evidence a relative margin of arbitrariness when compared with the HRIA guidelines that establish that the prospective analysis of the proposed measures must focus primarily on the most vulnerable people.

Therefore, we agree with BONANOMI that evidences that in the "SIA practice, this procedure has led to the situation that only certain sectors have come under scrutiny. In the SIAs of the EU–ACP Economic Partnership Agreements, for example, although a wide range of sectors were considered at the screening stage, full assessments were carried out only of a few selected sectors. Such analysis is far from providing a comprehensive picture, and leads to a fragmented perception of the policy processes expected to emanate from the assessed trade agreement".

Stressing the fact that "none of the sector studies in these SIAs of the EU–ACP Economic Partnership Agreements examined the repercussions of such agreements on the smallholder farming sector. From a right to food perspective, this would most certainly have been required, given the fact that the smallholder sector is most

vulnerable to market integration. Instead, the West African study examined the impacts on the agro-industrial sector" (Bonanomi ,2014, p.18).

Despite the pertinence of the questions related to impact assessments referred so far, the central question is in fact the follow up phase of the conclusions of such reports.

In the case of evidenced HR-trade conflicts for an IIA, what is the decision process?

In this point both HRIA and SIA methodologies present different solutions.

While the HRIA methodology encompasses a HR approach to balance HR-trade conflicts in the decision process, presuming the full assessment of the HR–related benefits and costs, the SIA methodology remains silent on HR-trade conflicts in the decision process.

According to Principle V.6.1. of the HRIA guidelines, difficult choices have to be made "where FTAs contribute to economic growth and thus may facilitate the ability of the State […] to finance certain public goods […], while at the same time negatively affecting the State´s capacity to protect the rights of certain groups […]." Hence, the primary aim of trade HRIAs is "to clarify the nature of such choices, and to ensure that they are made on the basis of the best information available" (ibid, V.6.2.). The HR-trade conflicts in the decision process should be sought in a "open and democratic process" of "effective, free, active and meaningful participation" (ibid, V.6.3).

For example, while the SIA of the EU–Georgia and EU–Moldova DCFTAs contain statements on economic gains, it refrains from assessing whether the identified HR-trade conflicts are acceptable from a HR perspective or examines whether the recommended policy measures to cope with negative HR impacts are likely to be realised or not.

In order to take the maximum advantage of the IA, its conclusions must be integrated during the negotiating process of the IIA, a commitment not duly taken

by the EU as the research of GEORGE and KIRKPATRICK (2008, pp. 83-84) demonstrates, resulting in a conflict derived from the existing EU´s dual mechanism of IAs, materialized in one side by the confidential, competition-driven IAs which inform the negotiation mandate of the EC, and on the other side, by the SIAs which inform the public debate.

According to the authors that examined *inter alia* the effectiveness of the trade SIAs of the WTO Doha round and the SIA of the Euro-Mediterranean Free Trade Area, there were observed difficulties in "integrating the studies into the decision-making process in practice".

The authors mention two reasons for these limits. First, some studies were only concluded in the final phase of negotiations. In fact, regarding liberalisation of trade in industrial products, "bilateral agreements between the EU and most of the partner countries were concluded prior to the SIA study".

Secondly, the authors attributed little value to recommendations made in the EU Commission's position papers because they "tend to be non-specific, such as raising the awareness of EC delegations".

There is a clear deviation of the main objective of a SIA to "build an open process of consultation around trade policy, creating a basis for an informed discussion" (EC,2006c, p. 12), by "integrating contributions from stakeholders" (EC,2006c, p. 26).

According to ERGON´s research through interviews with stakeholders of the EU, the respondents reported that "many contractors and stakeholders believed that Brussels consultation meetings had become stale, partly as a result of dwindling stakeholder interest" (Ergon Associates, 2011, p. 6) explained in the "perception that the consultations have little influence on negotiation outcomes, and that it remained unclear whether and how their views were taken into account by the researchers" (Ergon Associates ,2011,. p. 4).

Therefore, we argue that the participation rate in stakeholder's consultations is in proportion with the effective integration of SIA results into the negotiation process.

Moreover, the priority given to economic modelling in detriment of stakeholder interviews and use of other qualitative sources contributes to that fact and represents a negative impact on the quality and reality presented in the final conclusions of the SIAs.

Regarding the new-generation SIAs represented by the EU–Georgia and EU–Moldova DCFTAs, a considerable number of stakeholder consultations were conducted when screening for main HR impacts. A specific survey was conducted among key stakeholders, in which they were asked to comment on the current HR situation in Georgia and Moldova, and on the expected effects of the DCFTA on HR in Georgia and Moldova. Further, specific discussions were held with local HR experts and HR–related NGOs.

In order to continuously improve the SIA framework, it would be worth evaluating and further developing the current SIA model, conferring a central role to qualitative analysis.

5.2 Ex-post monitoring

Other issue of concern regarding the relation of HR and impact assessment in IIA relates to the continuous evaluation of the enforcement of the treaty that examines to what extent the expected impacts have indeed materialised, to what degree recommended complementary measures have been implemented, and whether they have been effective or not.

Moreover, the conduction of an ex-post monitoring allows the assessment of the pertinence of the inclusion of additional safeguard clauses[70].

70 However, the SIA Handbook does not suggest amending a trade agreement ex post if incompatibilities are found at this later stage. Instead, it suggests listing "recommendations on how the agreement may be applied in practice" (Trade SIA Handbook, p. 23). A position that contrasts with the recommendation of the

As reference, art. 5 of the EU-Cariforum agreement states that:

"The Parties undertake to monitor continuously the operation of the Agreement through their respective participative processes and institutions, as well as those set up under this Agreement, in order to ensure that the objectives of the Agreement are realised, the Agreement is properly implemented and the benefits men, women, young people and children deriving from their Partnership are maximised.

The Parties also undertake to consult each other promptly over any problem that may arise."

The referred article is accompanied by a Joint Declaration on the Signing of the Economic Partnership Agreement:

"We understand that, in the context of our continued monitoring of the Agreement within its institutions, as provided for under art. 5 of the Agreement, a comprehensive review of the Agreement shall be undertaken not later than five years after the date of signature and at subsequent five-yearly intervals, in order to determine the impact of the Agreement, including the costs and consequences of implementation and we undertake to amend its provisions and adjust their application as necessary."

In order to maximise the conduction of an ex-post assessment, the final conclusions of the monitoring must be feed in into the recognition of relevant trade and investment policies of EU investors, either positive or negative, contributing to the adoption of the necessary measures, such as tax benefits or tax increases, expropriations of the investment project by the host state, termination of contracts, all guided by a CSR ranking of EU investors in the host country and a HR benchmark.

Guiding Principles on HR Impact Assessments of FTAs drafted by the UN Special Rapporteur on the Right to Food, A/HRC/19/59/&dd.5, Report of the Special Rapporteur on the Right to Food (Schutter,2011, p. 9).

CHAPTER VI – Alternatives to the EU IIA *praxis*

i) The Southern African Development Community (SADC) model of BIT

The current EU FDI model lacks, among other mentioned aspects, a civil society based perspective on its accountability and enforcement.

For this purpose, the compilation of the international legal experience of other economic blocs, countries and possible innovations, can provide some effective examples of alternative models to the EU path on international trade and investment policy.

One of the more mentioned and studied models is the Southern African Development Community (SADC) model of BIT that includes provisions on environmental and social IA, measures against corruption, minimum standards for HR, environment and labour, corporate governance, and the right of states to regulate and pursue their development goals (SADC,2012).

According to art. 13 of the SADC:

> **"**Investors or their Investments shall comply with environmental and social assessment screening criteria and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the host state for such an investment , the laws of the Home State for such an investment or the International Finance Corporation's performance standards on Environmental and Social Impact Assessment, whichever is more rigorous in relation to the Investment in question."

A clear reference is made to the centrality of precautionary principle in the conduction of the environmental impact assessment and to the following decisions taken in relation to a proposed investment, being an established commitment that:

> "environmental management plans shall include provision for the continued improvement of environmental management technologies and practices over the life of the Investment. Such improvements shall be consistent with applicable laws, but shall strive to exceed legally applicable standards and always maintain high levels of environmental performance consistent with best industry practice" (SADC,2012, art. 14(4)).

A commitment only enforceable through a national policy of the home state of the investor, as referred in art. 17:

> "investors and investments shall be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Home State in relation to the Investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State."

For that purpose:

> "Home States shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of Investors and Investments for damages resulting from alleged acts, decisions or omissions made by Investors in relation to their Investments in the territory of the Host State" (SADC,2012, art. 17. (2)).

Considering the present stagnation of CSR debate until the *terminus* of the UN negotiations for a binding CSR tool, the model under analysis rightly integrates an intra-CSR mechanism, in conformity with the centrality of HR, and the obviation of the race to the bottom tendency to attract FDI (Dimopoulos, 2011, p.10).

According to its art. 22 (2):

> "the State Parties recognize that it is inappropriate to encourage investment by relaxing domestic environmental and labour legislation(...)the State Parties shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from,

such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an Investment. If a State Party considers that the other State Party has offered such an encouragement, it may request consultations with the other State Party."

Therefore, we consider that the SADC model can constitute a reference model for the EU FTA model in its strategy of promotion of HR in the World through Trade following the Silver Thread[71] before economic gains.

ii) **Right to petition in EU FTAs**

Following on our argument on the relevance of the civil society as an active stakeholder in the EU´s external HR policy, and considering the lag in the EU's legal framework for HR accountability abroad, when compared with the US universal jurisdiction (Alien Tort Statute) we propose a legal mechanism for HR accountability in EU´s IIAs.

We take as a historical reference the North American Free Trade Agreement´s (NAFTA) and the Central America Free Trade Agreement´s (CAFTA) mechanisms that features a mechanism for investigations of alleged violations of labour and environmental IIA obligations. Both can be started by individual petitions filed in national contact office of the home country of the investor.

Similar mechanisms have been already adopted by the EU.

The EU GSP attributes a minor role to civil society actors in the enforcement of HR obligations of GSP beneficiaries and the assessment of information of the partner country for the eligibility of GSP+ benefits.

[71] The "Silver Thread policy" expression was coined by the former HRFASP, Catherine Ashton, when in her speech to the European Parliament on 13 December 2011 referred that "the EU works to have human rights running as a silver thread through a truly integrated range of external policies".

According to the GSP framework, the EC is required to assess all relevant information from civil society, social partners, the EP and the Council in determining whether a GSP+ beneficiary is effectively implementing its HR and sustainable development obligations.

Such information may also constitute evidence to the initiation of the procedure for withdrawing these preferences. (art. 14 (3) and 15(3) GSP).

However, the GSP regulation does not require the EC to refer to such information in forming its opinion.

The Trade Barriers Regulation allows companies and industry associations to bring a complaint to the EC alleging violations of WTO law and free trade agreements obligations which can lead to the bringing of legal action by the EU.

For such specific treaties, there is not any EU mechanism that could have as competent institutions the EEAS or the HRFASP.

What we propose is the constitution of a EU universal jurisdiction over private EU individuals (including corporations), a concept derived from the Peña-Irala v. Filartiga case (*Peña-Irala v. Filartiga*, US Court of Appeals, 1980), where the court has acknowledged that universal jurisdiction exists over gross human rights violations.

Our proposal is based in the "active personality jurisdiction", that stems from the notion that States have both a responsibility and a legitimate interest in preventing and punishing offenses committed by their own nationals, who remain their subjects even when they are abroad.

Although the EU continues to walk in the wrong direction, considering the EC amicus curiae filed in the U.S. Supreme Court case of *Sosa v. Alvarez-Machain* (*Sosa v. Alvarez-Machain*, U.S. Supreme Court, 2004) were the EC argued that a similar mechanism to the Alien Torts Act should not apply to European corporations that have allegedly committed human rights violations, considering that

corporations should only be subject to the jurisdiction of the state courts where the legal fact occurred, or in the state courts where the Corporation is registered.

Following on the International responsibility of States, in the case of violation of HR, the host State of the investor should also be accountable for the responsibility to promote and respect HR within its territory and nationals actions, having as reference art. 8 of the IL Commission's Draft Proposal on the Responsibility of States for Internationally Wrongful Acts (International Law Commission, 2001).

With this aim, we argue that the competence to receive the claims of HR violations under a FTA would be presented to an EEAS delegation and filled by the HRFASP, with the possibility of an EP resolution, therefore contributing to the evaluation and decision of the claim by the EC.

Conclusion

With a complex legal framework and, recurring to an enigmatic and hermetic jargon, the International Economic Law field of trade and investment represents very well the economic neoliberal aim to create a legal margin apart from the general IL and the Peoples decisions.

Through the lenses of the liberal intergovernamentalism theory of IR, the structuration of a EU FDI law based on HR coherence and conditionality is inexistent, as the centralization of decision power creates a Lilliputian city constructed on corporate influence and interests.

The concatenation of the political commitment for the "lead by example role" affirmed in the ToL with the present reality of international economic law overtaken by corporate marketing translates in reality into a neorealist view of IR entrenched on post-colonial theories of law.

Having deposited the majority of its energy and resources in the multilateralism international policy strategy, enabled by the end of the Cold War (BALDUCCI,2008, p. 4), and, with the stagnation of the WTO debate (that results from the affirmation of the position of the oppressed Global South, derived from the remnants of the New International Economic Order philosophy) , the EU is now a global actor unfitted for the development of an alternative model of interrelation in the international trade scene.

With the expansion of the EU, it is possible to conclude that the community of foundational principles is not sufficient for a EUMS liberal intergovernamentalist incentive to the development of a political platform that reflects an international trade role model for the EU.

The incentive to take action in this field must be based in the positive correlation between HR respect and FDI flows which, as evidenced by the research of the last

decade, can be an argument for a political decision on a EU HR based approach to international trade law.

The effort deposited on the "Silver Thread policy" continues to delegate the responsibility of control and enforcement of EU activities on external multilateral institutions such as the ECtHR, the OECD and the ICSID model, manifesting a difficulty and unwillingness for the creation of a universal jurisdiction of the EU as a *conditio sine qua non* of the desired global role model of the European project.

In our understanding, and considering the elements previously advanced, after the constant failure of agreement for the constitution of an international investment model (progressively reducing the geographical *fora* of negotiation, i.e. decreasing the field of debate from the WTO level, after, to the OECD level , and then to the small regional level) , the recent FTA´s between global North countries (Figure 4) such as the TTIP and CETA , that aim the establishment of FTA´s between big global economic actors, will have an impact on the non-contracting countries, thus indirectly resuming and imposing the promotion a neoliberal WTO agenda based on the "Washington Consensus"[72].

[72] The Washington Consensus refers to a set of broadly widely criticized neoliberal free market economic ideas, supported by economists and international organisations, such as the International Monetary Fund, the World Bank, the EU and the US.
The Washington consensus advocated, free trade, floating exchange rates, free markets and macroeconomic stability.
The ten principles originally stated by John Williamson in 1989, are:

1. Low government borrowing. Avoidance of large fiscal deficits relative to GDP;
2. Redirection of public spending from subsidies ("especially indiscriminate subsidies") toward broad-based provision of key pro-growth, pro-poor services like primary education, primary health care and infrastructure investment;
3. Tax reform, broadening the tax base and adopting moderate marginal tax rates;
4. Interest rates that are market determined and positive (but moderate) in real terms;
5. Competitive exchange rates;
6. Trade liberalization: liberalization of imports, with particular emphasis on elimination of quantitative restrictions (licensing, etc.); any trade protection to be provided by low and relatively uniform tariffs;
7. Liberalization of inward foreign direct investment;
8. Privatization of state enterprises;
9. Deregulation: abolition of regulations that impede market entry or restrict competition, except for those justified on safety, environmental and consumer protection grounds, and prudential oversight of financial institutions;
10. Legal security for property rights.

The recourse to a neoliberal growth-based philosophy allied to extractivist policies that consider the shared resources (Commons) as "Global Public Goods" (see Golub and Maréchal,2010) and thus possible of being object to concessions to private actors, represents a blindness on the ecological and social effects of the Anthropocene philosophy as critically studied by Social and Political Ecology and to the international commitments on "climate change", the Rights of Future generations and the Right to Development in conjunction with the doctrine of permanent sovereignty over natural resources.

The present destiny of the EU is to choose. A decision between a multilateral investment mechanism created during a post-colonialist era, based on unaccountable negotiations and negative impacts and actors and far from the Peoples, or various others options based on the values of life and autonomy, through open and transparent negotiations that result in periodic decisions. A question not only for the EU institutions.

For a thorough critical analysis of the Washington Consensus and its development into the "Inclusive growth" theory see (Saad- Filho, 2010)

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Annexes

Figure 1: Evolution of the implementation of the EU HR Clause

Source: DONNO, 2012, p. 33

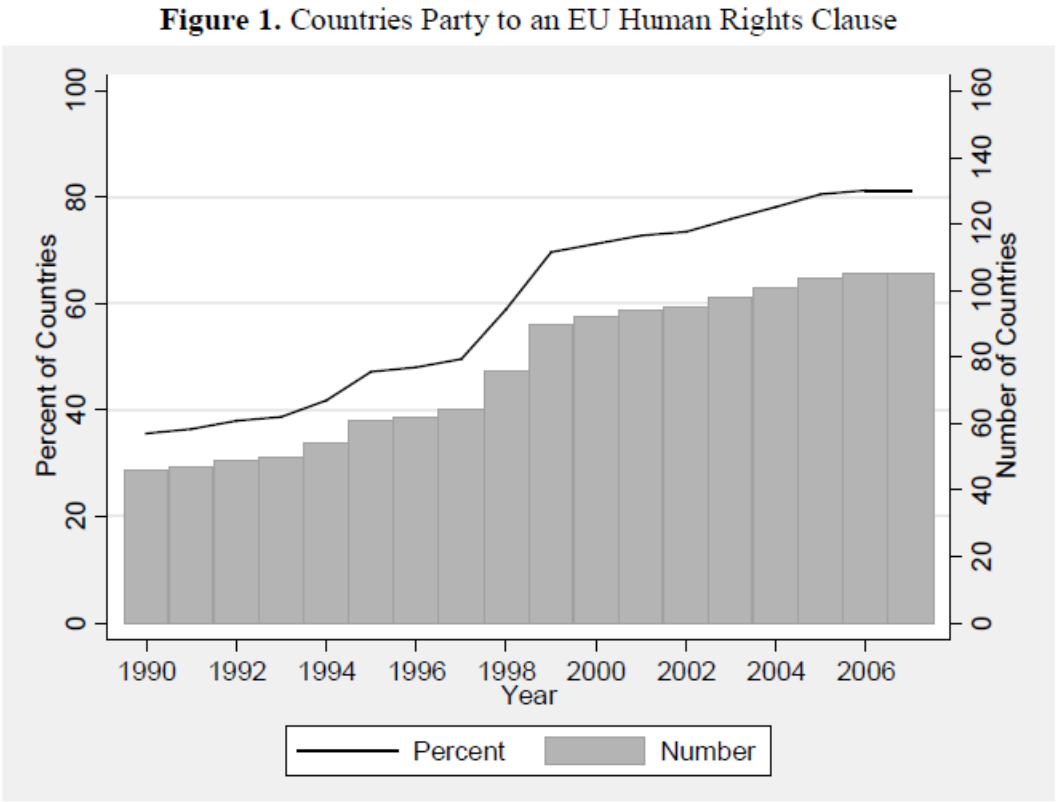

Figure 2: Reduction in EU Aid and Trade in response to coups and violation of physical integrity rights

Source: DONNO, 2012, p. 33

Figure 2. Reduction in EU Aid and Trade in Response to Coups and Violations of Physical Integrity Rights

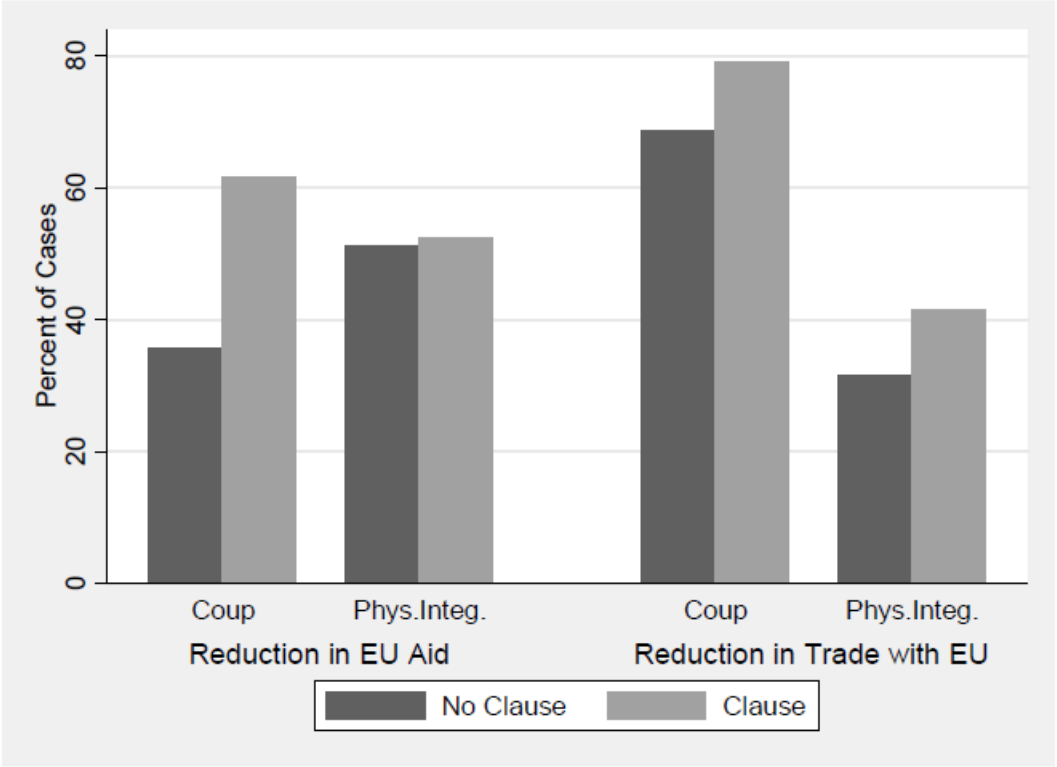

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Figure 3: Evolution of the enforcement of the Non execution clause

Source: KEUKELEIRE and DELREUX, 2014, p. 207

Year	Country	Coup d´état	Flawed elections	Human rights violations	Rule of Law
2011	Guinea-Bissau			X	X
2010	Niger	X			
2009	Niger		X		
2009	Madagascar	X			
2009	Guinea	X			
2008	Mauritania	X			
2007	Fiji	X			
2005	Mauritania	X			
2004	Guinea		X		
2004	Togo		X	X	
2003	Guinea-Bissau	X			
2003	Central African Republic	X			
2001	Zimbabwe		X	X	X
2001	Liberia		X	X	X
2001	Côte d´Ivoire		X		
2000	Fiji	X			
2000	Haiti		X		

2000	Côte d´Ivoire	X			
1999	Guinea-Bissau	X			
1999	Comoros	X			
1999	Niger	X			
1998	Togo		X		
1996	Niger	X			

Figure 4: EU trade agreements map

Source: DG Trade [accessed on 2/2/2016]. Available at: http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149622.png

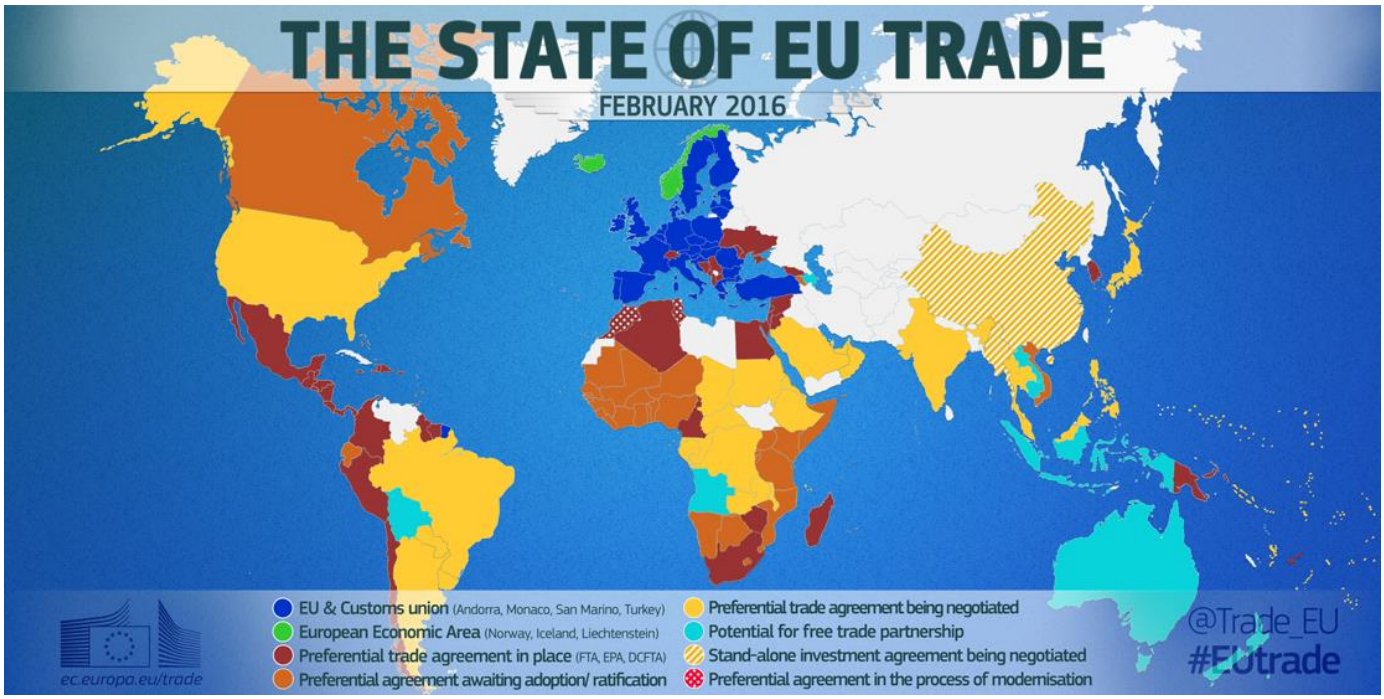
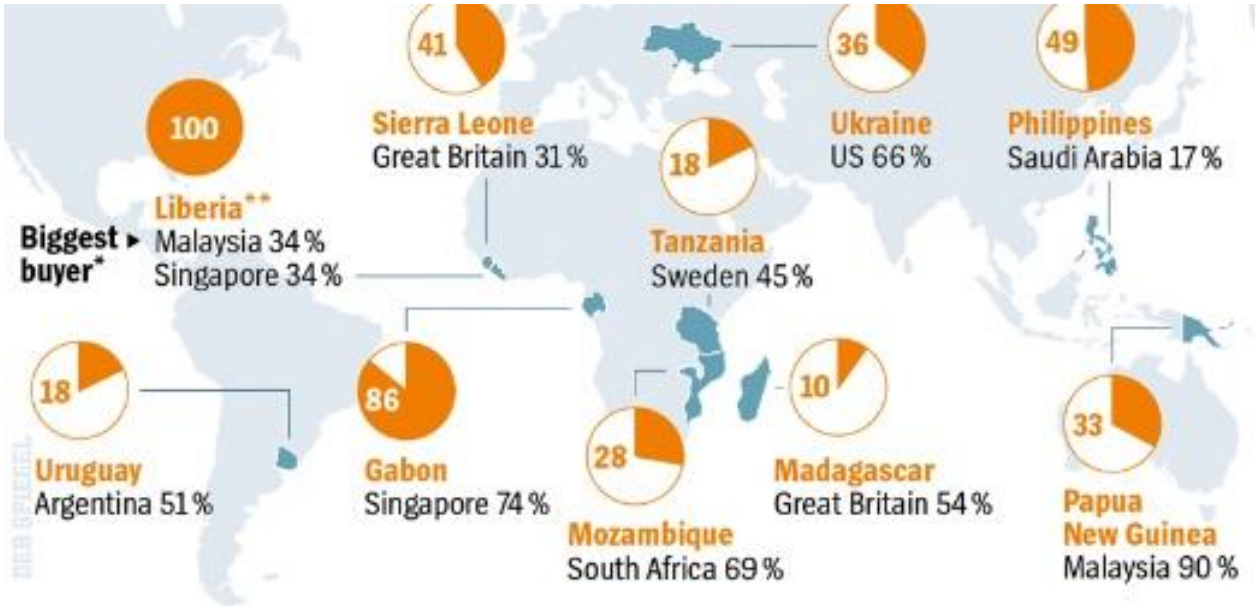


Figure 5: Comparison of the Human rights protected under trade agreements of the European Union, United States and Canada

	European Union	**United States**	**Canada**
Human Rights Guidelines	Universal human rights and specific rights	Specific human rights	Specific human rights
Rights provided	Labor rights, due process, political participation, and privacy rights	Due process, political participation, access to affordable medicines, and labor rights.	Due process, political participation, labor rights, cultural and indigenous rights
Enforcement mechanism	Human rights violations lead to diplomatic dialogue and possible suspension under the non- execution clause depending on nature of violation.	In the new agreements, labor rights can be disputed under dispute settlement body affiliated with the agreement. Process begins with bilateral dialogue.	Only labor rights (monetary penalties). Process begins with bilateral dialogue .

Figure 6: Map of land grabbing in the World, investor countries and destiny of investment

Source: Der Spiegel, 2013



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