

Lina Lorenzoni Escobar

Sustainable Development
and International Investment:
A legal analysis of the EU's
policy from FTAs to CETA

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**Sustainable Development and International
Investment: A legal analysis of the EU's policy from
FTAs to CETA**

by

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I. Introduction

Sustainable development is increasingly becoming a ubiquitous statement. Referred to in different areas of the economy, of society, of policy planning, it is a concept of undoubted consensus – among economic actors, in civil society, among States. It is also a controversial concept: its flexibility is both a gateway to overlook it and to abuse it. The international investment regime (IIR) is not immune to sustainable development and if anything, has been particularly assessed against it. Scholars,¹ civil society,² governments:³ all have had a say on the worthiness of the regime in light of sustainable development.

The European Union (EU) prepares to partake in the sustainability debate of the IIR and possibly to take a leading role in it. Foreign Direct Investment (FDI), in fact, was included in the Common Commercial Policy (CCP) of the (EU) in 2009.⁴ The implications of this inclusion are still not fully clear. The negotiations of the Comprehensive Economic Trade Agreement (CETA) with Canada and of the Transatlantic Trade and Investment Partnership (TTIP) with the United States have so far sparked controversy. Critiques of the CETA and the TTIP have stated that these agreements are a threat to democracy, to rule of law, to environmental protection;⁵ that their “off shore” arbitration tribunals have no place for democracy and that their neutrality is but an illusion.⁶ They also state that CETA and TTIP induce regulatory chill: “*parliaments constrain themselves out of fear of being sued when it comes to passing laws that protect humans and the environment*”.⁷ The European Commission on the other hand has stated that CETA and TTIP in fact guarantee democracy, the environment, social

¹ See the Public Statement on the International Investment Regime of 31 August 2010, available at: <<http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/>> (last accessed 19 February 2015).

² See, among many other references, Member States and civil society call for reform of investor state dispute settlement, available at: <http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=879&Sitemap_x0020_Taxonomy=CSO> (last accessed 17 March 2015).

³ See, Australia’s rejection of Investor-State Dispute Settlement: Four potential contributing factors, available at: <<http://www.iisd.org/itn/2011/07/12/australias-rejection-of-investor-state-dispute-settlement-four-potential-contributing-factors/>>, (last accessed 17 March 2015); but also, on the withdrawal of Bolivia, Ecuador and Venezuela from ICSID, ICSID and Latin America, Criticism, withdrawal and search for alternatives, available at: <<http://www.brettonwoodsproject.org/2013/12/icsid-latin-america/>> (last accessed 17 March 2015).

⁴ The Treaty on the Functioning of the European Union, Article 206 sets forth that “*By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute (...) to (...) the progressive abolition of restrictions on international trade and on foreign direct investment (...)*” and article 207 states that “*the common commercial policy shall be based on uniform principles, particularly with regard to (...) the commercial aspects of (...) foreign direct investment (...)*”.

⁵ See ECI Update: Good reasons to go against TTIP and CETA, available at: <<http://www.globalmarshallplan.org/en/eci-update-good-reasons-go-against-ttip-and-ceta>> (last accessed 16 March 2015).

⁶ See Citizens against Ceta, What Government doesn’t want you to know about ISDS, available at: <<http://citizensagainstceta.blogspot.com/>> (last accessed 16 March 2015).

⁷ See ECI Update: Good reasons to go against TTIP and CETA, available at: <<http://www.globalmarshallplan.org/en/eci-update-good-reasons-go-against-ttip-and-ceta>> (last accessed 16 March 2015).

and labour rights.⁸ One cannot but wonder where the EU stands: does the EU have an understanding of sustainability? And is this understanding reflected in its economic covenants?

The EU is under an obligation to harmonize sustainability considerations with its Common Investment Policy (CIP). In fact, doctrinally, sustainable development and investment regulation are brought together in Article 205 of the Treaty on the Functioning of the European Union (TFEU). According to this article, the CCP: “*shall be guided by the principles, pursue the objectives and be conducted in accordance with*” Article 21 of the Lisbon Treaty. Article 21 regulates the action of the EU on the international scene, taking into consideration the fostering of “*sustainable economic, social and environmental development of developing countries*” and principles such as democracy, rule of law and human rights.

So far, the development of the EU’s CIP has been characterized by a piecemeal approach. It certainly has not yet been put in a comprehensive document. However, there are various statements regarding sustainable development in the CIP in a number of documents which have been issued by various EU bodies.⁹ However, these documents do not exist in a vacuum. In fact, there is a history of EU policy documents addressing sustainable development and also sustainable development and investment. The EU has also negotiated numerous Free Trade Agreements (FTAs) in the past, where sustainable development concerns have been voiced. Although the essential focus of FTAs is trade, as their name suggests – their sustainable development content is also relevant to investment.¹⁰

FTAs arguably reflect not only the evolution of the EU’s position on sustainable development in a general sense, but also the evolution of its position on FDI more specifically. An overview of EU FTAs should accordingly highlight the EU’s stand on these issues. If there is coherence on the part of the EU, this stand should also be reflected in CETA. Hence, looking into selected EU bilateral commitments should help identify and assess the EU’s coherence on sustainable development and FDI as negotiated in CETA. It should also help shed light on its CIP.

Before looking into the EU’s bilateral commitments, it is necessary to understand the EU’s conception of sustainable development in general and particularly in the context of FDI. While sustainable development essentially belongs to an international

⁸ According to the European Commission, CETA “*contains all the necessary guarantees to make sure that economic gains do not come at expense of democracy, consumer health and safety, social and labour rights, or the environment*”. See In focus, EU-Canada Comprehensive Economic and Trade Agreement (CETA), available at: <<http://ec.europa.eu/trade/policy/in-focus/ceta/>> (last accessed 19 February 2015).

⁹ Other aspects of the CIP have been developed, such as issues pertaining to financial responsibility. On this, see *Baetens/Kreijen/Varga*, *Vanderbilt Journal of Transnational Law*, 47 (Nr 5, 2014), 1203.

¹⁰ EU FTAs have contained a growing number of references to investment, either directly or indirectly, through intellectual property (IP) provisions or trade in services. Moreover, several forms of investment comprise of a trade component, rendering it impossible to draw a conceptually satisfactory line between them. See *Weiss*, in: Muchlinski/Ortino/Schreuer (eds), *The Oxford Handbook* 169 (191).

narrative,¹¹ the EU has developed specifics, which underpin its interpretation of sustainable development and its three pillars.

This contribution will proceed as follows: Initially, an overview of the evolution of sustainable development within the EU will be carried out (B.), followed by a more specific overview of its approach to sustainable development, referencing FDI (C.). This should establish a framework against which to assess a selection of FTAs – those the EU has entered into with Latin American countries or regional blocks (D.), and finally, the CETA (E.). Final conclusions will be made on whether or not sustainability issues in FDI are being addressed coherently by the EU in the wake of its new competence (F.).

II. On sustainable development in the European Union

Sustainable development became a mainstream concept on the international political agenda following the publication of the Brundtland Report of 1987 by the World Commission on Environment and Development.¹² Internationally, the consolidation of sustainable development began in the late 1980s, though there was a ‘light time lag’¹³ with its consolidation among policy in the European Communities. An overview of how sustainable development has evolved in EU policy shows that its milestones appear to be reactions to international ones:¹⁴ sustainable development in the EU has not been EU-driven, but rather externally driven, which, given the international origin of sustainable development, is not surprising. Having said that, the economic rationale of the EU’s foundation especially qualifies its understanding of sustainable development; its economic pillar particularly.¹⁵

1. 1973-1997: Maastricht and pre-Amsterdam discussions on sustainability

If one addresses the environmental component of sustainable development, it was being discussed as early as 1973, when the first Environmental Action Program began,

¹¹ A narrative which is reflected in the Rio Declaration on Environment and Development, available at: <<http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>> (last accessed 19 February 2015).

¹² The roots of the sustainable development can be traced well before Brundtland. In this sense, see *Sands*, BYOIL 65 (Nr 1, 1994) and *Schrijver*, *Evolution of Sustainable Development in International Law*, 35 ff.

¹³ Only with the Treaty of Amsterdam of 1997 was sustainable development “...*legally recognized in the treaties as an objective of the European Union and the European Community*”. See *Pallemaerts*, in *Pallemaerts/Azmanova* (eds), *The European Union and Sustainable Development*, 20.

¹⁴ Accordingly, it has also been argued that it was the first UN Conference on the Human Environment, held in Stockholm in 1972, that in fact boosted the EU’s environmental policy and the elaboration of the First Environmental Action Plan. See *Pallemaerts*, in *Jordan/Adelle* (eds) *Environmental Policy in the EU*, 346 (346).

¹⁵ See *Aldson*, *Environmental Law and Management* (23, 2011), 286, “...*EU environmental law and policy thus evolved through a growing realization that ‘an active policy for the protection and improvement of the environment can help economic growth and job creation’*”.

to the extent that it included the integration principle.¹⁶ The holistic concept of sustainable development as such has been on the agenda of European Councils since 1988, with the Rhodes European Council;¹⁷ however, the path to legal formalization or ‘juridification’¹⁸ of sustainable development within the EU did not begin until 1990, with the Dublin European Council.¹⁹ The Dublin Declaration expressed concern for the impending completion of the internal market, due in 1992. It stated that the EU should ‘accelerate’ its effort to ensure that the internal market’s development was ‘sustainable and environmentally sound’. There was particular concern with the areas of transport, energy and infrastructure,²⁰ thus expressing the need for better integration of environmental considerations into sectorial policies.²¹ The focus is largely an internal one, although the Dublin Declaration does refer to the ‘internal’ and ‘external’ dimensions of the Community’s environmental policy, which are “*inextricably linked*”. The Declaration further expresses “*acceptance of a wider responsibility*” on a global level.²² However, this acceptance of wider responsibilities is articulated, with regard to extra European countries, specifically developing ones, as an assistance to “*overcome their special difficulties*”, specifically their “*efforts to achieve long-term sustainable development*”.²³ In this sense, the reference to ‘external dimensions’ is to be understood in the framework of development cooperation.

Hence, the 1992 Maastricht Treaty came at a time when sustainable development, in particular its environmental dimension, already belonged to the policy language of the EU. However, Maastricht did not recognize sustainable development as

¹⁶ Aldson, *Environmental Law and Management* (23, 2011), 286. From there, the integration principle was included in the Single European Act, in its amended Article 130r with the phrasing, at paragraph 2, “...*Environmental protection requirements shall be a component of the Community’s other policies*”. See article 25 of the Single European Act, available at: <www.ec.europa.eu/archives/emu_history/documents/treaties/singleeuropeact.pdf> (last accessed 19 February 2015).

¹⁷ The Rhodes European Council in December 1988 adopted a ‘Declaration on the environment’ annexed to its Presidency Conclusions. It is telling that the Rhodes Council followed the Brundtland Report and the Brundtland Report is not explicitly mentioned, “...*the term ‘sustainable development’ does enter the political vocabulary of the European Council*”, see Pallemmaerts, in Pallemmaerts/Azmanova (eds), *The European Union and Sustainable Development*, 19 (21). The term sustainable development is mentioned in Annex II, ‘Declaration on the environment’, where it is stated, that “*Sustainable Development must be one of the overriding objectives of the Community policies*”. See page 11 of the Rhodes European Council, 2-3 December 1988, available at: <www.europarl.europa.eu/summits/rhodes/rh2_en.pdf> (last accessed 19 February 2015).

¹⁸ Pallemmaerts, in Jordan/Adelle (eds) *Environmental Policy in the EU*, 346 (359).

¹⁹ The Dublin European Council was “*less hesitant than the Rhodes Declaration in embracing the concept of sustainable development*”. See Pallemmaerts, in Pallemmaerts/Azmanova (ed), *The European Union and Sustainable Development*, 19 (21).

²⁰ See Annex II, “The Environmental Imperative, Declaration by the European Council”, of the Dublin Declaration, available at: <www.europarl.europa.eu/summits/dublin/du2_en.pdf> (last accessed 19 February 2015), 20.

²¹ Pallemmaerts, in Jordan/Adelle (eds) *Environmental Policy in the EU*, 346 (350).

²² See Annex II, “The Environmental Imperative, Declaration by the European Council”, of the Dublin Declaration, available at: <www.europarl.europa.eu/summits/dublin/du2_en.pdf> (last accessed 19 February 2015), 20.

²³ See Annex II, “The Environmental Imperative, Declaration by the European Council”, of the Dublin Declaration, available at: <www.europarl.europa.eu/summits/dublin/du2_en.pdf> (last accessed 19 February 2015), 20 and 23 respectively.

an objective of the EU.²⁴ The Maastricht Treaty in fact coupled the word ‘sustainable’ with economic and social progress, on one hand,²⁵ and ‘non-inflationary growth respecting the environment’, on the other.²⁶ It is noteworthy that the path to achieving these objectives is the creation of the internal market, by means of the establishment of its economic and monetary union. These elements are relevant to understand the narrative of the economic pillar of sustainable within the EU, to the point that some commentators have seen the EU’s ‘sustainable growth’ as completely unrelated to the broader international understanding of sustainable development.²⁷

Sustainable development, with regards to development cooperation, does make it into the Maastricht treaty. In particular, Title XVII, ‘Development cooperation’, Article 130u, highlights how the policy in the sphere of development cooperation “*shall foster sustainable economic and social development of developing countries*”.²⁸ Article 130v then states that the objectives of Article 130u are to be considered in the implementation of policies that are likely to affect developing countries; perhaps an anticipation of the impact assessments which would be incorporated years later. Regardless, this approach to sustainable development contrasts sharply with the adoption of the Fifth Environmental Action Programme the same year, importantly called, “Towards sustainability”.²⁹ In this document sustainable development is actually conceptualized as a long-term objective of EU policy.³⁰ The coexistence in time and space of the Fifth EAP and the Maastricht Treaty highlights a lack of coherence and unity in the narrative of sustainable development in the EU; this characterizes it still today.

2. 1997: Treaty of Amsterdam: Sustainable Development as an objective of the EU

The fact that EU milestones with regard to sustainable development mirror international developments, is further illustrated by the Treaty of Amsterdam: 1997 was

²⁴ *Pallemaerts*, in *Pallemaerts/Azmanova* (eds), *The European Union and Sustainable Development*, 19 (22).

²⁵ Article B: “*The Union shall set itself the following objectives: to promote economic and social progress which is balanced and sustainable...*”. See Treaty of Maastricht on European Union, available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1433416417799&uri=URISERV:xy0026>> (last accessed 4 June 2015).

²⁶ Article 2 of the Treaty establishing the European Community is amended and the task of the community becomes “*to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non inflationary growth respecting the environment...*”. See Treaty establishing the European Community, available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12002E/TXT>> (last accessed 4 June 2015).

²⁷ *Aldson*, *Environmental Law and Management* (23, 2011), 287. Frances Alston argues that the reference to sustainable growth makes it more a cosmetic modification, rather than a substantive one.

²⁸ See Treaty establishing the European Community, available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12002E/TXT>> (last accessed 19 February 2015).

²⁹ See “Towards Sustainability”, the European Community Programme of policy and action in relation to the environment and sustainable development, available at: <<http://ec.europa.eu/environment/archives/newprg/5th.htm>> (last accessed 19 February 2015).

³⁰ To the point that the Fifth EAP has also been considered the actual first strategy for sustainable development, addressing many themes that would be included in the future Sustainable Development Strategy. See *Pallemaerts*, in *Jordan/Adelle* (eds) *Environmental Policy in the EU*, 346 (350).

also the year of Rio+5.³¹ The Treaty of Amsterdam eventually led to the legal recognition of ‘balanced and sustainable development’ as an objective of the EU.³² Sustainable development is mentioned throughout the Treaty. Its seventh recital states that social and economic progress will take into account the principle of sustainable development.³³ Its Article 3c prescribes the integration of environmental protection requirements into community policies “*with a view to promoting sustainable development*”.³⁴ This provision is an initial guideline on implementation of sustainable development by means of the principle of integration, albeit limited to the environmental dimension of sustainable development. Finally, the objective of sustainable development is coupled with sustainable and non-inflationary growth in Article 2 of the Treaty establishing the European Community.³⁵ Sustainable and non-inflationary growth, having been introduced by the Treaty of Maastricht, thus remained with Amsterdam as a separate objective.³⁶

In response to the integration challenge of Article 3c as amended by the Amsterdam Treaty, the Cardiff European Council of 1998 prompted a sectorial integration of sustainable development within the policy areas of all the formations of the Council. However, this mandate was over-shadowed by the 2000 Lisbon Strategy.³⁷ Again, it would be extra-EU events which return focus to sustainable development, specifically the preparation of the Johannesburg World Summit of 2002.

³¹ *Pallemaerts*, in Jordan/Adelle (eds) *Environmental Policy in the EU*, 346 (350, 351): “*Although generally decried as a failure, the ‘Rio+5’ summit, held in June 1997 in New York, did result in an agreement for all countries to draw up a national strategy for sustainable development. This political commitment later proved instrumental in initiating the policy process which would lead to the adoption, in June 2001, of the EU SDS. More immediately, ‘Rio+5’ helped put the objective of sustainable development back on the internal political agenda of the EU in a year in which it was involved in yet another process of treaty reform*”.

³² Article 1.5, Part One (Substantive Amendments) of the Treaty of Amsterdam, available at <www.europa.eu/eu-law/decision-making/treaties/pdf/treaty_of_amsterdam/treaty_of_amsterdam_en.pdf> (last accessed 19 February 2015).

³³ Article 1. 2, Part One (Substantive Amendments) of the Treaty of Amsterdam, available at: <www.europa.eu/eu-law/decision-making/treaties/pdf/treaty_of_amsterdam/treaty_of_amsterdam_en.pdf> (last accessed 19 February 2015).

³⁴ *Ibid.*, Article 2. 4.

³⁵ *Ibid.*, Article 2.2, Part One (Substantive Amendments) of the Treaty of Amsterdam: “*The Community shall have as its task, ... to promote ... a harmonious, balanced and sustainable development of economic activities ... sustainable and non inflationary growth ...*”.

³⁶ But without the proviso of “respecting the environment”. See *Pallemaerts*, in Jordan/Adelle (eds) *Environmental Policy in the EU*, 346 (351).

³⁷ “*The aim of the Lisbon Strategy, launched in March 2000 by the EU heads of state and government, was to make Europe “the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion”*”; See The Lisbon Strategy in short, available at: <<http://portal.cor.europa.eu/europe2020/Profiles/Pages/TheLisbonStrategyinshort.aspx>> (last accessed 19 February 2015). Thus it was the economic rationale that was the first preoccupation of the EU in 2000, not all the complex implications of sustainable development. See *Pallemaerts*, in Jordan/Adelle (eds) *Environmental Policy in the EU*, 346 (352).

3. 2001: Gothenburg European Council and the European Union Strategy for Sustainable Development

In 1999, the Helsinki European Council invited the Commission to present a proposal for a long-term strategy “...*dovetailing policies for economically, socially and ecologically sustainable development*”.³⁸ This invitation eventually led to the European Union Strategy for Sustainable Development (SDS). The history of the SDS is built on the interaction of interventions from the Commission and the Council. In this sense, it is ‘a collection’³⁹ of different documents issued from different EU bodies.

The process was launched by the Commission, which promoted a consultation seeking input on what a strategy on sustainable development could look like. This resulted in the Communication from the Commission ‘A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development’,⁴⁰ proposed to the Gothenburg European Council of 2002. This communication embraces the Brundtland definition of sustainable development and highlights the long-term vision sustainable development represents: “*clear, stable, long-term objectives*”⁴¹ must be set forth, in particular to orient businesses and their investments. The Communication also addresses its relationship with the Lisbon Strategy. The SDS would involve the inclusion of an environmental dimension in the Lisbon Strategy, given that “...*economic growth, social cohesion and environmental protection must go hand in hand*”. The Commission’s communication thus proceeds to set forth policy proposals, which comprehend (a) an improvement of policy coherence, estimating economic, environmental and social impacts “*inside and outside of the EU*”; (b) an overall encouragement of technology; (c) the improvement of communication with citizens and businesses and (d) the taking into account of the global dimension. The Commission asserts that both internal and external policies must support third countries’ efforts to achieve ‘development that is more sustainable’, particularly in developing countries. Notwithstanding this latter policy of making sustainable development global, the priorities for action set forth in Section III are articulated in terms of measures on the EU level.

The Gothenburg Presidency Conclusions welcomed the submission of the Commission’s communication and reiterated that a strategy for sustainable development

³⁸ Point 50, Section III (A Competitive, Job-Generating, Sustainable Economy), Presidency Conclusions of the Helsinki European Council 10 and 11 December 1999, available at: <www.europarl.europa.eu/summits/hel1_en.thm> (last accessed 19 February 2015). In launching this process, the European Council looked for the promotion of sustainable development in manners that differed from the integration set forth in article 3c. See *Pallemaerts*, in *Pallemaerts/Azmanova* (eds), *The European Union and Sustainable Development*, 19 (27).

³⁹ *Pallemaerts*, in *Pallemaerts/Azmanova* (eds), *The European Union and Sustainable Development*, 19 (27).

⁴⁰ See, COM(2001)264 final, Communication from the Commission, A Sustainable Europe for a Better World, A European Union Strategy for Sustainable Development of 15 May 2001, available at: <www.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0264&from=EN> (last accessed 19 February 2015).

⁴¹ *Ibid.*, 2.

adds an environmental dimension to the SDS.⁴² They further stress the importance of policy coordination, both on the level of the Member States and the Union (paragraphs 23 and 24), of reviewing the SDS (paragraph 25) and of specific objectives in the areas of climate change, transport, public health and responsible management of natural resources (paragraphs 28 and following). In addition, paragraph 24 of the Presidency Conclusions reaffirms the inclusion in all major policies of a ‘sustainable impact assessment’, the purpose of which is to cover their potential economic, social and environmental consequences. In this sense, one could already venture to say that it is with regard to the global dimension of sustainable development that the Gothenburg Presidency Conclusions seem to make a contribution, while still reiterating the development cooperation aspect of the Union’s commitment to sustainable development globally.⁴³

A further piece to the puzzle is the second communication from the Commission, entitled ‘Towards a Global Partnership for Sustainable Development’.⁴⁴ This communication embodies a more mature take on the external dimension of the SDS. In fact, it does not solely focus on the (paternalistic) development cooperation approach, but it reinforces the flip side of the Union’s responsibilities with regard to external consequences of its internal policies.⁴⁵ In this second communication, the Commission addresses the issue of policy coherence, which had already been dealt with from an internal market perspective, making it a global issue. Point 3.4. of the communication (Improving the coherence of European Union policies) clearly states the possibility of

⁴² Paragraphs 19 and following of the Presidency Conclusions of the Gothenburg European Council, 15 and 16 June 2001, available at: < http://ec.europa.eu/smart-regulation/impact/background/docs/goteborg_concl_en.pdf> (last accessed 19 February 2015). This wording, in particular the use of the indeterminate article ‘a’ before ‘strategy’, has been interpreted by Pallemmaerts as a non-adoption of the Commission’s proposal and thus it would be the Gothenburg Presidency Conclusions that are actually the framework of the SDS, although largely built up on the Commission’s Communication. See *Pallemmaerts*, in Jordan/Adelle (eds) *Environmental Policy in the EU*, 346 (353).

⁴³ “*The Union will seek to make sustainable development an objective in bilateral development cooperation and in all international organisations and specialized agencies*”. See paragraph 26 of the Presidency Conclusions of the Gothenburg European Council, 15 and 16 June 2001, available at: <http://ec.europa.eu/smart-regulation/impact/background/docs/goteborg_concl_en.pdf> (last accessed 19 February 2015).

⁴⁴ On this however the actual contribution of this Communication to the SDS, there are critical comments. Pallemmaerts states that “*This second Commission communication on the SDS was not formally submitted to, let alone endorsed by, the European Council. It was therefore never an integral part of the SDS, notwithstanding the Commission’s claim that it should be viewed as such*”. See *Pallemmaerts*, in Jordan/Adelle (eds) *Environmental Policy in the EU*, 346 (353).

⁴⁵ If one were to reaffirm the input extra-EU developments have had on the EU’s internal narrative of sustainable development, then the impending Johannesburg Summit must be considered. The reference to the “global government gap” and to the European Union’s position to “assume a leading role in the pursuit of global sustainable development”, are telling in this sense and reveal the EU’s will to legitimize its negotiating position at the Summit. See, COM (2002) 82, 12.2.2002 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Towards a global partnership for sustainable development, from 13.2.2002 available at: <http://ec.europa.eu/regional_policy/archive/innovation/pdf/library/globalpartner_sustaindev_en.pdf> (last accessed 19 February 2015), 4. This however did not save the Union from a “credibility problem” at the Summit. See *Pallemmaerts*, in Jordan/Adelle (eds) *Environmental Policy in the EU*, 346 (354).

domestic EU policies having ‘negative spill-over effects’ on third countries and the possibility of an overall conflict of EU policies with sustainable development objectives. Policy coherence thus becomes a complex issue with internal and external dimensions, in which sustainable development must be integrated. In order to do so, impact assessments are suggested, as well as the adaptation of existing key policies to “*the internal and external objectives of sustainable development*” and tackling coherence problems.⁴⁶ This communication is also noteworthy as it addresses issues relating to sustainable development in bilateral and regional agreements and in foreign direct investment.⁴⁷

The review of implementation of the SDS (paragraph 25 of the Presidency Conclusions of the Gothenburg Council and Point 4 of the Commission’s Communication ‘Towards a global partnership for sustainable development’) has been assessed critically: although it does take place, it would be carried out in a pro-forma manner,⁴⁸ thus falling short of its purpose. The SDS was nevertheless subject to a renewal in 2006 and to a final review in 2009.

4. 2005: Luxembourg Declaration on principles for sustainable development

The Presidency conclusions of the Luxembourg Council, 16th and 17th June 2005 devote Annex I to a “Declaration on guiding principles for sustainable development”.⁴⁹ The Presidency Conclusions *per se* do reiterate the European Council’s understanding of sustainable development as ‘a key principle’ that governs the EU’s policies and activities (Point 8) and that it should be increasingly integrated into national and international programmes and strategies (Point 39). However, it is the Declaration on guiding principles for sustainable development - annexed to the Presidency conclusions - which it is important to focus on. The Declaration highlights key objectives the Union commits to, which in part reflect the traditional three pillars of sustainable development: environmental protection, social equity and cohesion, economic prosperity; adding the objective of ‘meeting our international responsibilities’. This last objective highlights an additional characterization of sustainable development within the EU, which is not limited to cooperation, but actively engages assessment of

⁴⁶ COM (2002) 82, 12.2.2002 Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Towards a global partnership for sustainable development, from 13.2.2002, available at: <http://ec.europa.eu/regional_policy/archive/innovation/pdf/library/globalpartner_sustaindev_en.pdf> (last accessed 19 February 2015), 14.

⁴⁷ The submission of the Communication was “welcomed” by the European Council in the Presidency Conclusions of the Barcelona European Council of 15 and 16 March 2002, at point 9.

⁴⁸ *Pallemaerts*, in Jordan/Adelle (eds) *Environmental Policy in the EU*, 346 (354).

⁴⁹ See Brussels European Council 16 and 17 June 2005, Presidency Conclusions, available at: <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/85349.pdf> (last accessed 19 February 2015). The initiative was preceded by very little political confrontation, in a context of mainstream debate on the future of the Constitution, which had been just rejected in France and in the Netherlands. This indeed reinforces the narrative of extra-EU events, or in this case, an intra-EU event but unrelated to sustainable development, as engines for steps forward in the EU’s sustainable development policy. See *Pallemaerts*, in Jordan/Adelle (eds) *Environmental Policy in the EU*, 346 (357).

the Union's policies (“...ensure that the European Union's internal and external policies are consistent with global sustainable development and its international commitments”). While the document does not contain a definition of sustainable development, the principles that it sets forth do articulate the concept, albeit in broad terms. The document refers to “policy guiding principles”, described as the “...underlying values of a dynamic European model of society”: promotion and protection of fundamental human rights, solidarity within and between generations, open and democratic society, involvement of citizens, involvement of business and social partners, policy coherence and governance, policy integration, use of best available knowledge, precautionary principle and polluter pays.

5. 2006: Renewed European Union Strategy for Sustainable development and following progress reports.

After the halt given to the project of the European Constitution, the SDS might have appeared as an appropriate means to ‘re-legitimize the EU’.⁵⁰ In December 2005, the Commission expressed a desire to assess progress, shortcomings and further challenges for sustainable development as an objective of the EU.⁵¹ The result of this communication was a renewed SDS adopted at the Brussels European Council of 2006.⁵² In this document, the European Council confirms the Brundtland approach to sustainable development, including the principles of democracy, gender equality, solidarity, the rule of law and respect for fundamental rights (Point 1). It recalls the key objectives and guiding principles approved by the European Council in 2005.⁵³ It regards sustainable development as a challenge featuring internal and external complexities, given the dual understanding of sustainable development: on one hand stands the ‘promotion’ of sustainable development worldwide and on the other hand, the need to ensure that the EU’s internal and external policies are consistent with sustainable development.⁵⁴

Consequently, the issue of coordination and consistency of policy decisions is addressed in this document, not only at all levels of government but also between the

⁵⁰ *Pallemaerts*, in Jordan/Adelle (eds) *Environmental Policy in the EU*, 346 (357).

⁵¹ European Commission, COM(2005)658 final, Communication from the Commission to the Council and the European Parliament on the review of the sustainable Development Strategy, A platform for action of 13 February 2005, available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0658&from=EN>> (last accessed 19 February 2015), 5.

⁵² See Council of the European Union, Review of the EU Sustainable Development Strategy (EU SDS) – Renewed Strategy of 9 June 2006, available at: <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010117%202006%20INIT>> (last accessed 19 February 2015).

⁵³ European Commission, COM(2005)218 final, Communication from the Commission to the Council and the European Parliament, Draft Declaration on Guiding Principles for Sustainable Development of 25 May 2005, available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52005DC0218>> (last accessed 19 February 2015), 3.

⁵⁴ See Council of the European Union, Review of the EU Sustainable Development Strategy (EU SDS) – Renewed Strategy of 9 June 2006, available at: <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010117%202006%20INIT>> (last accessed 19 February 2015), 20.

SDS as such with the Lisbon Strategy (today Europe 2020).⁵⁵ Coordination between the SDS and the Lisbon Strategy is addressed in terms of ‘synergies’ and complementarity. Accordingly, the Renewed Strategy is explicit in acknowledging the contribution of the Lisbon Strategy to sustainable development, through its focus on increasing competitiveness, economic growth and job creation (in other words, economic development).⁵⁶ Notwithstanding this professed complementarity, it does appear that the Lisbon Strategy has precedence: the review process of the SDS would have to take account of the ‘priorities under the Lisbon Strategy for growth and jobs’.⁵⁷ The issue of coordination of the SDS with the Lisbon Strategy - or of Europe 2020 at present - escapes the purpose of the present analysis. It does however appear to reaffirm the economic rationale which was behind the EU in the beginning and the particular weight, or development, given to the economic pillar. In the European Union it is reinforced, with a strategy of its own, which seems at odds with sustainable development as one overarching and holistic objective.

The EU is aware of this contradiction and addresses it again in the 2006 SDS’ most recent progress report, which dates back to 2009.⁵⁸ This report reiterates sustainability as a “long-term vision” and it again devotes Point 4 to explaining the relationship between the SDS and the Lisbon Strategy. The difference is with timeframes: the SDS is ‘long-term’ and it promotes ‘forward-looking reflections on sustainability’, whereas the Lisbon Strategy is ‘dynamic’ and requires ‘short-term policy action’.⁵⁹ The European Economic and Social Committee’s opinion (EESC Opinion) on the 2009 review⁶⁰ is heavily critical and assesses the current standing of the SDS as being in crisis.⁶¹

This ambivalent⁶² approach to sustainable development appears to be confirmed with the apparent decline of the SDS in the aftermath of the Lisbon Treaty. In the

⁵⁵ *Ibid.*, 6.

⁵⁶ *Ibid.*, 6.

⁵⁷ *Pallemaerts*, in Jordan/Adelle (eds) *Environmental Policy in the EU*, 346 (359).

⁵⁸ See COM(2009)400 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Mainstreaming sustainable development into EU policies: 2009 Review of the European Union Strategy for Sustainable Development* of 24 July 2009, available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009DC0400&from=EN>> (last accessed 19 February 2015).

⁵⁹ *Ibid.*, 13.

⁶⁰ See EESC Opinion: *Outlook for the sustainable development strategy* of 5 November 2009, available at: <<http://www.eesc.europa.eu/?i=portal.en.nat-opinions.19433>> (last accessed 19 February 2015).

⁶¹ The Report is rather blunt and revealing of the shortcomings of EU sustainable development strategies in a broader sense. The EESC Opinion initially expresses the need for better coordination within the Commission (point 1.5) but also with the Lisbon Strategy (point 1.7) and highlights the fact that the Commission does not suggest any measures to achieve implementation of the SDS (point 2.1). According to the EESC, the crisis of the SDS would be due to lack of will or ability to implement it in practice (point 3.5) and to the fragmentation of programs - there would be a difference of vision between sustainable development and programmes for growth and competitiveness (point 3.7). Additionally, both strategies would have different political weight (point 4.3.).

⁶² *Pallemaerts*, in *Pallemaerts/Azmanova* (eds), *The European Union and Sustainable Development*, 19 (32).

new Europe 2020 Strategy, which replaces the Lisbon Strategy, the words “sustainable development” fail to appear.⁶³ The future will tell if this is an actual ‘mainstreaming into oblivion’⁶⁴ of sustainable development, precisely at a moment where the Lisbon Treaty would make it an overriding objective of the EU.

6. 2009: *The Lisbon Treaty*

Sustainable development is mentioned twice in Article 3 TEU, reflecting its internal (Article 3.3) and external (Article 3.5) dimensions.⁶⁵ Article 3.3 establishes that the Union will work for the sustainable development of Europe. This is described as ‘balanced’ economic growth, a competitive ‘social’ market economy, protection for the environment, and technological advances, among others. Whereas Article 3.5 addresses the Union’s relations “with the wider world”: the Union shall contribute to the sustainable development of the planet.⁶⁶ While development cooperation is still relevant and present, the understanding of the EU’s contribution to sustainable development in the context of its external relations is, by now, clearly one that engages internal policy making as well.

7. *Addressing the international agenda: Millennium Development Goals and the post-2015 agenda*

The most recent activity of the Commission with regard to sustainable development has been the addressing of the post-2015 agenda's concerns, in relation to the Millennium Development Goals (MDGs) agreed on an international level. In February 2013, the Commission issued the Communication from the Commission to the European Parliament, the Council, the European Economic and social Committee and the Committee of the Regions: A decent life for all: the aim of which was to end poverty and give the world a sustainable future.⁶⁷ While the whole document addresses the achievement of the MDGs, Point 3.3 is relevant in highlighting the prominence Europe 2020 has gained over the SDS. In fact, the Commission points out that the pursuit of sustainable development will be carried out ‘in particular’ through Europe 2020, which covers “... *resource efficiency, low carbon economy, research and innovation, employment, social inclusion and youth*”. Emphasis is thus placed on the content of the

⁶³ *Pallemaerts*, in Jordan/Adelle (eds) *Environmental Policy in the EU*, 346 (361).

⁶⁴ *Ibid.*

⁶⁵ See the Lisbon Treaty, available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2010:083:FULL&from=EN>> (last accessed 19 February 2015).

⁶⁶ The external action of the EU further develops this external dimension. Articles 21, 2, d and 21, 2, f includes aims such as fostering sustainable development of developing countries and engaging in measures to improve sustainable management of global natural resources, respectively; See *Pallemaerts*, in Jordan/Adelle (eds) *Environmental Policy in the EU*, 346 (360).

⁶⁷ See European Commission, COM(2013)92 final, Communication from the Commission to the European Parliament, the Council, the European Economic and social Committee and the Committee of the Regions, A decent life for all: Ending poverty and giving the world a sustainable future of 27 February 2013, available at: <http://ec.europa.eu/europeaid/documents/2013-02-22_communication_a_decent_life_for_all_post_2015_en.pdf> (last accessed 19 February 2015).

economic pillar as a means to nurture the holistic understanding of sustainable development. Of course the Commission then points out that Europe 2020 builds on the SDS, however it is the implementation of Europe 2020, which should contribute to “...greater coherence, mainstreaming and integration of the three dimensions of sustainable development in EU policies at large...”. The SDS does not appear to play a part, outside of its legacy of integration.

A year later, in June 2014, the Commission issued another communication: Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A decent life for all: from vision to collective action.⁶⁸ This communication is oriented around the post 2015 agenda, again addressing the MDGs. Point 2, in which the vision and principles of the Communication are presented, emphasises technology, which stands ‘at the core of the EU’s vision as the means to eradicate poverty’. The new Global Partnership, which is proposed in the document (Point 5), sees trade and trade openness as a means for the eradication of poverty and the achievement of sustainable development. Progress in accountability and monitoring are also seen as necessary in order for a post-2015 framework to succeed. Target areas are identified (among which human rights, rule of law, good governance, effective institutions, gender equality, environmental protection, sustainable settlements, inclusive and sustainable growth, *inter alia*; i.e., all elements that add up to the pillars of sustainable development) and their interlinkages ought to be addressed to avoid ‘working in silos’ and to ‘ensure balanced progress’ of the three pillars.

8. Conclusions

There is no comprehensive policy on sustainable development in the EU, though there is an EU narrative on sustainable development. This narrative embraces inter and intra-generational equity (Brundtland), and the three economic, environmental and social pillars. The EU has managed to expand on these pillars and to address some of the concerns with their implementation, with particular emphasis on the economic pillar. Given the lack of an overarching policy, their interlinkages and reciprocal complementarity are still insufficiently developed. One could summarize the EU’s interpretation of the three pillars as follows:

⁶⁸ European Commission, COM(2014)335 Final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A decent Life for all: from vision to collective action of 2 June 2014, available at: <<http://ec.europa.eu/europeaid/sites/devco/files/part1-a-decent-life-for-all.pdf>> (last accessed 19 February 2015).

SUSTAINABLE DEVELOPMENT	Economic pillar	Market Economy Economic liberalization Regional integration Innovation and technology	Solidarity within/between generations	Citizen/business/social partners involvement
	Environmental pillar	Precautionary principle Polluter pays Sustainable consumption/production		
	Social pillar	Fundamental rights Democratic society/rule of law Social participation Participation of civil society		

References to sustainable development in economic agreements encompass this substantive content.

III. On Foreign Direct Investment in the European Union

The EU has been addressing the concerns behind the structure and content of the IIR long before FDI entered the CCP. It has thus anticipated many sustainable development related issues. More broadly though, the EU has a long-standing concern with human rights implications of its cooperation and trade agreements. While not specific to international economic agreements, the inclusion of so-called “essential clauses” or human rights clauses, with their conditionality mechanism, is a historical predecessor sustainability concerns in economic agreements. The draft model of the “essential clause” was proposed by the European Commission back in 1995,⁶⁹ bound by non-execution in case of breach. Such clauses are relevant to the promotion and protection of human rights, an aspect that increasingly occupies the IIR, but their inconsistent incorporation in EU agreements has been subject to criticism.⁷⁰

The following remarks will focus on concerns relating to FDI and sustainable development.

⁶⁹ European Commission, COM (95)216 final, Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries of 23 May 1995, available at: <<http://aei.pitt.edu/4097/1/4097.pdf>> (last accessed 12 May 2015).

⁷⁰ *Bartels*, Study requested by the European Parliament’s Committee on International Trade, November 2008, 3, available at: <http://www.europarl.europa.eu/RegData/etudes/etudes/join/2008/406991/EXPO-INTA_ET%282008%29406991_EN.pdf> (last accessed 12 May 2015).

1. *Before Lisbon: Towards a Global Partnership in 2002 and the 2006 Minimum Platform on Investment*

The Commission's Communication, 'Towards a global partnership for sustainable development', already addressed issues related to FDI. In fact, FDI is conceptualized as a tool for sustainable development: private capital flows add financial resources, which can then be invested in health, education and technology; these are "...a *pre-requisite for genuinely sustainable development*".⁷¹ The communication additionally attempts a (loose) definition of FDI, which it characterizes as being long term, with a lasting interest in the host economy.⁷² The communication additionally underscores the fact that the EU must ensure that sustainable development is addressed in its regional and bilateral agreements in a manner that is 'mutually consistent'.⁷³ Consistency and coherence being major concerns, the communication provides guidelines on how to achieve them. Two actions are suggested under Point 3.1. (Harnessing globalization: trade for sustainable development): the inclusion of a commitment to sustainable development within the agreement, with the establishment of dialogue on best practices, and the encouragement of European companies to implement CSR, adhering to the OECD guidelines for foreign investors.⁷⁴

In 2006, the "Minimum platform on Investment" (MPI)⁷⁵ was launched, which, unlike the Global Partnership that preceded it, addressed foreign investment systematically, making it the first EU document concerned with the EU's approach towards the IIR.⁷⁶ The MPI touches upon some of the issues that have proved to be highly controversial topics in the IIR. First, it addresses the issue of regulatory sovereignty; a topic that still stands at the centre of the debate today. Chapter I, General Provisions of the draft, clearly states the right to regulate in order 'to meet legitimate policy objectives', of each party. The right to regulate is additionally coupled with an exceptions clause, in a similar manner to that of Article XX GATT: under the conditionality of excluding that the measure is unjustifiably discriminatory, arbitrary, or a disguised restriction of establishment, nothing prevents the party from taking measures that are necessary to protect public morals, order or security, to protect human, animal, plant life or health, and to conserve exhaustible natural resources.

Finally, the document includes the draft proposal of a non-lowering of standards clause, to be included in the preamble of future agreements. The wording of the pro-

⁷¹ European Commission, COM (2002) 82 final, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Towards a global partnership for sustainable development of 13 February 2002, available at: <http://ec.europa.eu/regional_policy/archive/innovation/pdf/library/globalpartner_sustaindev_en.pdf> (last accessed 19 February 2015), 5.

⁷² *Ibid.*, 18: "...typically involves a long-term relationship between the parent and the affiliate and reflects a lasting interest in the host economy".

⁷³ *Ibid.*, 8.

⁷⁴ *Ibid.*, 9.

⁷⁵ European Commission, D (2006) 9219, Communication from the Commission, Minimum platform on investment for EU FTAs – Provisions on establishment in template for a Title on "Establishment, trade in services and e-commerce of 28 July 2006, available at: <http://www.iisd.org/pdf/2006/itn_ecom.pdf> (last accessed 19 February 2015).

⁷⁶ *Shan/Zhang*, The European Journal of International Law, 21(Nr 4, 2011), 1049 (1051).

posed draft states that FDI shall not be encouraged by lowering or relaxing standards, and also that the parties will not offer to waive or derogate such legislation and standards.⁷⁷ The purpose of including the aforementioned clause is “to implement EU Treaties core principles and European Council decisions that aim at fostering sustainable development”.

2. After Lisbon: Towards a comprehensive European international investment policy

In 2010, shortly after the Lisbon Treaty came into force,⁷⁸ the Commission addressed the new investment competence of the EU in its communication “Towards a comprehensive European international investment policy”.⁷⁹ It is interesting that the first concern of the document is to explore how the EU can develop an international investment policy that increases competitiveness and contributes to the objectives of Europe 2020.⁸⁰ There is no mention of SDS, not even when the issue of consistency with other policies of the Union and member states is addressed.⁸¹ It is sustainable growth that is promoted, although elements of sustainable development are mentioned, such as protection of the environment, health, cultural diversity, *i.a.*

First, the communication addresses the definition of FDI, which reflects the long-lasting link already emphasized in the Global Partnership communication: FDI establishes ‘lasting’ and ‘direct’ links with the undertaking that receives the capital. According to the Commission:

*“This contrasts with foreign direct investments where there is no intention to influence the management and control of an undertaking. Such investments, which are often of a more short-term and sometimes speculative nature, are commonly referred to as “portfolio investments”.*⁸²

⁷⁷ European Commission, D (2006) 9219, Communication from the Commission, Minimum platform on investment for EU FTAs – Provisions on establishment in template for a Title on “Establishment, trade in services and e-commerce of 28 July 2008, available at: <http://www.iisd.org/pdf/2006/itn_ecom.pdf> (last accessed 19 February 2015), 44.

⁷⁸ The Treaty of Lisbon came into force on 1 December 2009, available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2010:083:FULL&from=EN>> (last accessed 19 February 2015).

⁷⁹ European Commission, COM (2010) 343 final, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Towards a comprehensive European international investment policy of 7 July 2010, available at: <http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf> (last accessed 19 February 2015).

⁸⁰ *Ibid.*, 2 “...how the Union may develop an international investment policy that increases EU competitiveness and thus contributes to the objectives of smart, sustainable and inclusive growth, as set out in the Europe 2020 strategy”.

⁸¹ *Ibid.*, point 3.c: “Investment agreements should be consistent with the other policies of the Union and its Member States, including policies on the protection of the environment, decent work, health and safety at work, consumer protection, cultural diversity, development policy and competition policy”.

⁸² *Ibid.*, 2.

In making this differentiation, the document clearly focuses on foreign direct investment and not on “portfolio investments”.⁸³

The communication is concerned with investment protection, a common trait with member state BITs, but also with investment promotion and liberalization. In this context, it states that a CIP ought to address investors’ needs more comprehensively, from pre to post-admission.⁸⁴ Furthermore, in pursuing its CIP, the best available standards ought to be met. It follows that non-discrimination standards such as MFN and national treatment are mentioned, but also “BIT” standards, such as ‘fair and equitable treatment’, ‘full protection and security’ and even ‘umbrella clauses’.⁸⁵ Having said that, the Commission clearly expresses that a “*one-size-fits-all model would not be feasible or desirable*”. Among those aspects of traditional member state BITs that the Commission considers maintaining in the CIP, is the investor-state-dispute settlement.⁸⁶ The Commission’s take on the adoption of these standards has evolved and they are being critically reframed, while its 2010 Communication appears to embrace the core traits of the existing IIR. However, it also addresses some of the critiques that plague it: there ought to be a ‘clear balance’ between investor protection and the right to regulate in the public interest. This in particular is thought of with regard to the EU and its member states, whose faculty of pursuing public policy measures cannot be hindered.⁸⁷ Finally, the challenges of ISDS are addressed, expressing concerns with transparency (“*including requests for arbitration, submissions, open hearings, amicus curiae briefs and publication of awards*”), consistency and predictability (with the suggestion to use quasi-permanent arbitrators and/or appellate mechanisms), and exploring the possibility of rules for the conduct of arbitration.⁸⁸ All of these scenarios are still being explored.

Sustainable development is mentioned when the external action of the Union and the principles that govern it, are addressed. These principles, among which are sustainable development, rule of law and human rights, ought to also guide the CIP.

It is in this context that the OECD Guidelines for Multinational Enterprises (OECD Guidelines) are mentioned as an instrument which helps balance the rights and responsibilities of investors. The reference to the OECD Guidelines highlights a non-binding interpretation of Corporate Social Responsibility (CSR), which is nonetheless in line with suggestions on how to draft socially responsible investment agreements.⁸⁹

⁸³ *Brown/Alcover-Llubià*, in: Sauvant (ed) Yearbook on International Investment Law & Policy, 145 (159).

⁸⁴ European Commission, COM (2010) 343 final, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Towards a comprehensive European international investment policy of 7 July 2010, available at: <http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf> (last accessed 19 February 2015), Point 2(b).

⁸⁵ *Ibid.*, point 3.c.

⁸⁶ *Ibid.*, point 3.d.

⁸⁷ *Ibid.*, point 3.c.: “*Investment policy will continue to allow the Union, and the Member States to adopt and enforce measures necessary to pursue public policy objectives*”.

⁸⁸ *Ibid.*, point 3.d.

⁸⁹ See International Institute for Sustainable Development, IISD Model Agreement on Investment for Sustainable development, April 2005, available at: <http://www.iisd.org/pdf/2005/investment_

The EESC issued an opinion on this communication⁹⁰ which stresses the importance of enhancing the competitiveness of the EU, but also underscores that investors' obligations towards sustainable development have to be taken into account in other areas of EU policy. Additionally, the EESC urges the EU to take a critical look at the IIR and to develop “state of the art and sustainable” treaties, where long-term investment in host countries is encouraged with lasting economic benefits.

3. EU Parliament's resolution No. 3 of 6th April 2011

In 2011 the EU Parliament responded to the Commission's communication through its Resolution No. 3 of 6th April 2011.⁹¹ While the EU Parliament ‘welcomes’ the Commission's communication, it urges to ‘better address’ the right to regulate (described as a ‘public capacity’ – Point 6) and stresses the importance of building a CIP “*which promotes high-quality investments and makes a positive contribution to ... sustainable development*” (Point 2).

In particular, the EU Parliament is concerned with vague language – a concern which did not appear in the Commission's Communication-, in this sense it urges the Commission to better define what protected investment would be (excluding ‘speculative investment’ – Point 11), what the definition of “foreign investor” would be (in order to avoid abusive practices of treaty shopping), and broadly speaking to better define non discrimination provisions, fair and equitable treatment (suggesting the level of treatment established by customary international law) and the extent of protection against direct and indirect expropriation (“*giving a definition that establishes a clear balance between public welfare objectives and private interests...*”) (Point 19).

The concern with vagueness of language stems from the perceived discretion of international arbitrators;⁹² it would lead to the ruling out of legitimate public regula-

model_int_agreement.pdf> (last accessed 19 February 2015); In particular, Article 16 of the model agreement (“Corporate Social Responsibility”) specifically states that investors “should” apply the OECD Guidelines.

⁹⁰ European Economic and Social Committee, CESE 1184/2011 – REX/320, 13 July 2011, Opinion on the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Towards a comprehensive European International investment policy of 13 July 2011, available at: <<http://www.eesc.europa.eu/?i=portal.en.rex-opinions.18522>> (last accessed 19 February 2015).

⁹¹ European Parliament, Resolution of 6th April 2011 on the future European international investment policy (2010/2203(INI)), available at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2011-0141+0+DOC+PDF+V0//EN>> (last accessed 19 February 2015).

⁹² The concern with vagueness of language is a justified one and has been associated with an unleashed discretion of arbitrators. However, it does appear that danger lies less in the discretion of arbitrators, and more in the shortcomings of having to interpret vague texts to begin with. An overview of the fair and equitable treatment (FET) standard shows the disparate results this can lead to. A time period of approximately 10 years, from 2000 to 2010, shows FET being interpreted exclusively in light of the sole effects doctrine, in the Metalclad award of 2000; under the prism of proportionality of the measure with the public interest, in the Tecmed award of 2003; in light of the police powers doctrine in the Methanex award of 2005. If this were a straightforward evolution in time it would underline a progression in jurisprudence, but the Glamis award of 2009, goes back to considering the purpose of the measure a secondary criterion in face of its economic impact. This inconsistency can of course be explained by the fact that, regardless of the conver-

tions (Point 24), which is why the EU Parliament prompts the Commission to specifically include, in future agreements, clauses that lay down the right to regulate (Point 25). On the substantive level, the Parliament further reiterates the importance of the non-lowering of standards clauses (Point 30).

The Parliament finally stresses that the EU's future policy must promote an investment, which is sustainable. Part of this implies the inclusion in all future agreements of a reference to the updated OECD Guidelines for Multinational Enterprises (Point 27). It is interesting to note that Point 37 of the resolution suggests the inclusion of investor obligations "*in terms of compliance with human rights and anti-corruption standards as part of a broader partnership between the EU and developing countries for the purpose of reducing poverty*". The emphasis on anti-corruption standards and human rights compliance would, curiously, be solely for developing and least developed countries. The Parliament sets a double standard, one that builds on the long tradition of a double "external dimension" for sustainable development, the oldest one being the dimension of development cooperation.

Finally, regarding dispute settlement, the Parliament calls on the Commission to include transparency, mechanisms of appeal, obligation to exhaust local judicial remedies "*where they are reliable enough to guarantee due process*" (an arguably unhelpful precision), *amicus curiae* briefs (Point 31).

4. *A renewed EU strategy 2011-14 for Corporate Social Responsibility*

This document⁹³ was preceded in 2001 by the so-called "Green Paper", presented by the Commission to promote a European framework for CSR.⁹⁴ CSR at the time

gence of substantial contents of BITs, they are nonetheless different treaties, each of them calling for their own interpretation, and broadly speaking, there is a different set of cards involved. However, a sense of dismay is inevitable since these awards tend to be looked upon as a corpus, primarily in arbitral practice, and because of the erratic consideration of state regulation. All of this is good enough an argument in favour of clarification of language. See, respectively: *ICSID Metalclad Corporation v. the United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, available at: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC542_En&caseId=C155> (last accessed 19 February 2015); See *Técnicas Medioambientales TECMED S.A. v. The United Mexican States* ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, available at: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC602_En&caseId=C186> (last accessed 19 February 2015); *Methanex Corporation v. United States of America* Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, available at: <<http://www.state.gov/documents/organization/51052.pdf>>; 'Glamis Gold, Ltd. V. United States of America', Award, 8 June 2009 <http://italaw.com/documents/Glamis_Award.pdf> (last accessed 19 February 2015).

⁹³ European Commission, COM (2011) 681 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A renewed EU strategy 2011-14 for Corporate Social Responsibility of 25 October 2011, available at: <http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/new-csr/act_enpdf> (last accessed 19 February 2015).

⁹⁴ European Commission, COM (2001) 366 final, Green Paper, Promoting a European framework for Corporate Social Responsibility of 18 July 2001, available at: <http://www.europarl.europa.eu/meetdocs/committees/deve/20020122/com%282001%29366_en.pdf> (last accessed 12 May 2015).

was seen as an opportunity for the EU as it could contribute to the strategic goal of sustainable economic growth (point 6) and was understood in explicit voluntary terms (“...a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis” – point 20). The document further referenced the global implications of CSR as well, which underlies European companies’ investments outside of the EU.

The renewed strategy defines CSR as “*the responsibility of enterprises for their impacts on society*” (Point 3.1.). This definition, which sets aside the reference to the explicit voluntary nature of CSR of its 2001 definition, would allegedly imply a “more obligatory” approach towards it.⁹⁵ Furthermore, in its new strategy, CSR is highlighted as a sustainability tool both by the Commission and the Parliament in their respective documents on the future of EU CIP. Furthermore, the same document states that enterprises can contribute to sustainable development and that CSR inheres to Europe 2020’s objective of sustainable growth:

“CSR underpins the objectives of the Europe 2020 strategy for smart, sustainable and inclusive growth... CSR offers a set of values on which to build a more cohesive society and on which to base the transition to a sustainable economic system.”

5. *Commission’s Fact Sheet, March 2014: Investment Protection and Investor-to-State Dispute Settlement (ISDS) in EU agreements*

After much controversy surrounding whether or not the investment regime is beneficial to begin with, the Commission takes the stand that it is: investment is ‘vital’ and investors need to be ‘treated fairly’ when abroad. The Commission addresses two concerns regarding the international investment regime: substantive and procedural. Substantive issues are condensed under the verbs ‘to improve’ and ‘to clarify’: the right to regulate in the public interest will be included; indirect expropriation and fair and equitable treatment will be clarified.

The bulk of innovation lies with the procedural aspects, clearly, as ISDS has raised the most concerns among stakeholders. The improvement of the dispute settlement system will be channelled through several means. The first one is the prevention of abuse of the system, meaning early dismissal of unfounded claims and also discouragement of frivolous or tactical claims, by making an investor who loses in such cases pay all the costs incurred. Consistency continues to be a concern with arbitration, which is reflected in the appeals mechanism that is suggested; as well as transparency of arbitration, where prevention of conflicts of interest should be carried out by means of a code of conduct. It is interesting to recognise the safeguard mechanism, which allows governments to control the interpretation of investment provisions.

⁹⁵ *Waleson*, Legal Issues of Economic Integration, 42 (Nr 2, 2015), 143 (156).

6. *Public consultation on modalities for investment protection and ISDS in TTIP*

The public consultation spells out the most recent policy stance of the EU in the face of investment agreements. It is interesting that the ‘overall’ ratio of international investment agreements is broadened, not only to ensure respect of ‘certain fundamental principles of treatment’ for foreign investors, but also to maintain the right to take measures for public good. In particular, the specific EU objective in said agreements is to “*strengthen the balance between investment protection and the right to regulate*” (p. 2). The public consultation then proceeds to explain, on a substantive and procedural level, how the EU believes this balance can be achieved.

On the substantive level, there are two approaches.

The first one regards definitions and clarification of language, which are extended to all major features of traditional investment treaty language. This goes from defining investor and investment, which implies an engagement with ‘substantial business activities’ (Page 3), to defining those standards that set non-discriminatory treatment for investors. Regarding national treatment, the EU’s interpretation is that it is undisputed for already established investors, but that the right of establishment is subject to the state’s discretion, as certain markets or sectors can be protected. Regarding most favoured nation treatment, the EU wants to avoid the importation of standards, meaning that MFN does not allow procedural or even substantive provisions to be exported from other agreements. It is suggested that there be clarification regarding fair and equitable treatment (FET) by setting a limited list of basic rights, the breach of which could lead a state to be held responsible. Said rights are: denial of justice; the disregard of the fundamental principles of due process; manifest arbitrariness; targeted discrimination based on gender, race or religious belief; and abusive treatment, such as coercion, duress or harassment (a list that can be mutually updated by the parties involved in the agreement). Under FET, legitimate expectations are limited to clear and specific representations on which an investor has relied.

A second approach is to emphasise the State’s right to regulate. The right to regulate directly inheres to the definition of indirect expropriation. The document clearly states:

“...non-discriminatory measures taken for legitimate public purposes, such as to protect health or the environment, cannot be considered equivalent to an expropriation, unless they are manifestly excessive in light of their purpose.” (page 7).

Additionally, in the framework of the right to regulate, the EU contemplates exceptions and safeguards to non-discriminatory provisions, allowing differences of treatment where necessary to achieve public policy objectives (Page 5). Some exceptions are vertical, competition matters for instance, which will not be subject to ISDS, and some exceptions will apply to situations of crisis. Prudential regulation is included (Page 9), which, in light of the financial crisis, evokes the on-going Argentinian saga. Most importantly, the right to regulate is confirmed as a basic underlying principle, which will arguably have a clause of its own and thus directly influence arbitral tribunals during the assessment of disputes.

This approach to the right to regulate as a basic principle (arguably for the sake of sustainable development in its holistic conception) incorporates the Parliament’s suggestions, and shifts the right to regulate from the periphery of the agreement to the

core. The nuance is important as the right to regulate conceives sustainable development as *part* of the investment agreement, and not as its *exception*.⁹⁶ This marks a qualitative difference from the trade regime, where sustainable development considerations tend to stand in a collateral position,⁹⁷ but also with traditional BITs. Non-lowering of standards however is not voiced as a concern in this context. It would appear an issue that is less urgent with an “equal” trading partner perhaps, a speculation that is partially confirmed with CETA, as we will see below.

Finally, the possibility for the parties to adopt interpretations of the agreement is contemplated, and said interpretations would then be binding on arbitral tribunals.

On the procedural level, while “domestic remedies would be preferable” (Page 9), the EU acknowledges the inevitability of ISDS (given that TTIP provisions – but this can be generalized to IIA provisions – cannot be invoked in domestic courts). Consequently, the EU sets parameters in order to make ISDS transparent, accountable and reflective of the public interest. This means enhancing transparency, making documents public, hearings open and allowing civil society submissions. It also means avoiding multiple claims, so that governments do not end up paying more than is due, but also in order to ensure consistency on different levels of adjudication. The suggested means to avoid multiple claims are preference to domestic courts or mediation, on one hand, and the preclusion of the same matter to be brought before both a domestic court and an ISDS tribunal. The ethical behaviour of arbitrators is addressed by including a binding code of conduct and identifying procedures to remove or eventually request a reversal of a finding, should a conflict of interests be identified. Expertise in international investment law and in general international law will be among the competences to include names in a proposed roster. The dismissal of frivolous claims represents another concern; the proposal of having the losing party bear all the costs is reiterated. Finally, prudential regulations will not be subject to ISDS, and eventually parties can intervene in order to filter such claims (arguably politicising the system). This same intervention is contemplated as parties can intervene in disputes in order to give their interpretations of relevant provisions. Finally, an appellate mechanism is contemplated.

On 13th January 2015, the European Commission issued a report on the online consultation on investment protection and investor-to-state dispute settlement in the Transatlantic Trade and Investment Partnership Agreement,⁹⁸ where no definite decision is made on the adoption of an ISDS in the TTIP. While this is puzzling in light of the CETA agreement, where ISDS is in fact a feature, it would appear that the latest stance of the EU with regard to investment is largely settled on the substantive

⁹⁶ See *Leader*, *New York Law School Review*, 805; *Leader's* theory of “collateralism” is applied to human rights in the international trade regime, particularly the World Trade Organization (WTO).

⁹⁷ The obvious example is article XX GATT; The article spells out those exceptional cases in which member states can discriminate in trade.

⁹⁸ European Commission, Report on the online consultation on investment and trade protection and investor-to-state dispute settlement in the Transatlantic Trade and Investment Partnership Agreement, Strasbourg, 13 January 2015, available at: <http://europa.eu/rapid/press-release_MEMO-15-3202_en.htm> (last accessed 19 February 2015).

level only. The procedural level, notwithstanding significant improvements, is on standby.

7. Conclusions

This overview of the evolution of the EU approach to the IIR highlights how, in a way, it has also been reactive to external events or in this case concerns - the criticism and backlash of the IIR and the pressure from civil society for its improvement (or for it to be made away with). The response from EU bodies has been to introduce features that are ancillary to sustainable development, tools to preserve it, as sustainable development is arguably dependent on regulatory frameworks, a prerogative of sovereign states.

These ancillary features can be summarized under the substantive-procedural framework. The procedural aspect, which is also the most controversial one in public opinion, has no definite conclusion:

ANCILLARY TO SUSTAINABLE DEVELOPMENT	Substantive features	Human rights and restrictive action clause
		Non-lowering of standards
		Exceptions/carve outs
		Right to regulate
		CSR
		Review of implementation
		Prudential regulation
		Party interpretation
	Procedural features	A reformed ISDS?

IV. The evolution of sustainable development and its ancillary features in EU FTAs

The evolution of sustainable development concerns is fully reflected in EU FTAs. If, for the sake of CETA, one stays on the American continent, one can indeed retrace the EU's evolution on this subject beginning with the FTA entered into with Mexico in 1997, the same year of the Amsterdam Treaty. As regional blocks or countries of the continent have entered into FTAs with the EU, one sees a perfect reflection of the EU's evolution on sustainable development. CETA would accordingly be the culmination – for now - of this evolution.

Of course investment is not the major focus of FTAs, although investment promotion has been mentioned since the agreement with Mexico.⁹⁹ However, investment does filter through the cracks of intellectual property and trade in services, particularly

⁹⁹ Article 14,b of the Economic Partnership between the European Community and the United Mexican States: (...) “*support for the development of a legal environment conducive to investment between the Parties, where appropriate, by the conclusion between the Member States and Mexico, of agreements to promote and protect investment and agreements to prevent double taxation*”, of 8 December 1997, available at: <[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22000A1028\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22000A1028(01):EN:NOT)> (last accessed 19 February 2015).

through the so-called “commercial presence”, Mode 3, which signifies a commitment to the establishment of foreign investment.¹⁰⁰

1. 1997 EU-MEXICO agreement: Incipient sustainable development considerations

The EU-Mexico agreement of 1997¹⁰¹ was concluded as an ‘Economic Partnership, Political Coordination and Cooperation Agreement’, with the scope of institutionalizing a dialogue between the two contracting parties and strengthening their economic and social relations.¹⁰² It has two branches that develop the trade provisions within it, one related to trade in goods¹⁰³ and the other related to trade in services.¹⁰⁴

Due to the inclusion of the final Declaration of the World Summit for Social Development in Copenhagen in the preamble, sustainable development, with its three pillars, permeates the EU-Mexico agreement and should guide future cooperation and agreements stemming therefrom. Some elements of sustainable development are further reiterated in the body of the agreement. At the time, the EU’s narrative was also not fully consolidated, which is why the references to sustainable development are articulated in language referring to international instruments. Having said that, the landmarks of the economic pillar under the EU understanding are already present, while reference to ancillary features is virtually absent, but for a few exceptions. This is not an anticipation of EU outlooks on FDI, but rather a pretty well-established trade regime feature.

The follow-up to the implementation of the agreement and the issues that may arise from it is formulated in broad terms, so that sustainable development, while not being an explicit reference, may be included.

¹⁰⁰ *Vandeveldde*, J. Int’l L. & Pol’y, 157 (176).

¹⁰¹ European Union, Economic Partnership, Political Coordination And Cooperation Agreement Between the European Community and its Member States, of the one part, and the United Mexican States, of the other part of 8 December 1997, available at: <[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22000A1028\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22000A1028(01):EN:NOT)> (last accessed 19 February 2015).

¹⁰² *Ibid.* See article 2: “Nature and Scope” of the agreement.

¹⁰³ See Decision No 2/2000 of the EC-Mexico Joint Council of 23 March 2000 at <[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22000D0630\(02\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22000D0630(02):EN:HTML)> (last accessed 19 February 2015).

¹⁰⁴ See decision No 02/2001 of the EC-Mexico Joint Council of 27 February 2001 at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:070:0007:0050:EN:PDF>> (last accessed 19 February 2015).

EU-MEXICO		
<i>Signed 8 December 1997 – Entered into force 1 July 2000</i> ¹⁰⁵		
SUSTAINABLE DEVELOPMENT	ECONOMIC PILLAR Market Economy Economic liberalization Regional integration Transfer of technology	<u>PREAMBLE</u> “CONSIDERING their attachment to the principles of the <i>market economy</i> and mindful of the importance of their commitment to (...) the rules of the World Trade Organisation (<i>WTO</i>) (...), with particular emphasis on the importance of <i>open regionalism</i> ” <u>ARTICLE 14 INDUSTRIAL COOPERATION</u> “2. Such cooperation shall focus in particular on (...) boosting trade, investment and industrial cooperation and <i>technology-transfer</i> projects;” <u>ARTICLE 23 COOPERATION ON ENERGY</u> “2. Cooperation in this sector shall mainly be carried out through (...) <i>transfer of technology</i> (...)”
	ENVIRONMENTAL PILLAR Prevention/reduction of Pollution Sustainable consumption and production	<u>PREAMBLE</u> “MINDFUL of the importance that both parties attach to the proper implementation of the principle of <i>sustainable development</i> , as agreed and set out in Agenda 21 of the 1992 Rio declaration on Environment and Development;” <u>ART. 34.2 COOPERATION ON THE ENVIRONMENT AND NATURAL RESOURCES</u> “The Parties undertake to develop cooperation to <i>prevent degradation</i> of the environment; to promote the <i>conservation and sustainable management of natural resources</i> ; (...)”
	SOCIAL PILLAR Human rights and restrictive action clause Democracy Social development Fundamental rights Participation of civil society	<u>PREAMBLE</u> “CONSIDERING the importance which both Parties attach to the principles and values set out in the <i>final Declaration of the World Summit for Social Development in Copenhagen in March 1995</i> (...)” <u>ARTICLE 1 BASIS OF THE AGREEMENT</u> “The <i>respect for democratic principles and fundamental human rights</i> , proclaimed by the Universal Declaration of Human Rights, underpins the domestic and external policies of both Parties and constitutes an <i>essential element</i> of this Agreement.” <u>ARTICLE 36: COOPERATION ON SOCIAL AFFAIRS AND POVERTY</u> “(...) This should include topics related to vulnerable groups and regions such as: indigenous population, (...)” <u>ARTICLE 58: FULFILMENT OF OBLIGATIONS</u> “(...) If either Party considers that the other Party has failed to fulfil an obligation under this Agreement, it may take appropriate measures. (...)”
ANCILLARY TO SUSTAINABLE DEVELOPMENT	NON-LOWERING-OF-STANDARDS CLAUSE	---
	EXCEPTIONS/CARVE OUTS	<u>ARTICLE 4. OBJECTIVE</u> The objective of this Title is to establish a framework to encourage the development of trade in goods and services (...) taking into account the sensitive nature of certain products* and service sectors and in accordance

¹⁰⁵ Source Organization of American States, Foreign Trade Information System, available at: <http://www.sice.oas.org/agreements_e.asp> (last accessed 19 February 2015).

		with the relevant WTO rules. *This was then implemented in article 27 of decision 2 of 2001, “ <i>Exceptions</i> ”, these being: (a) public morals, public order and public security; (b) human, animal or plant life or health; (c) “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Title (...)”
	RIGHT TO REGULATE	----
	CSR	----
	REVIEW AND IMPLEMENTATION	ARTICLE 45. JOINT COUNCIL A Joint Council is hereby established which shall <i>supervise the implementation</i> of this Agreement. It shall meet at ministerial level, at regular intervals, and when circumstances require. It shall <i>examine any major issues arising within the framework of this Agreement and any other bilateral or international issues of mutual interest.</i>

2. 2002 EU-Chile Agreement: Development of sustainable development’s three pillars

This agreement¹⁰⁶ establishes an association between Chile and the EU and is broad in scope. It is also more sophisticated than the EU-Mexico agreement with regard to sustainable development provisions, a natural consequence of coinciding with the launch of the EU SDS and with a greater level of debate in the EU on sustainable development. In the EU-Chile agreement, sustainable development appears not only in preamble language (“*considering the need to promote economic and social progress for their peoples, taking into account the principle of sustainable development and environmental protection requirements*”) but in the body of the text too (“*The promotion of sustainable economic and social development and the equitable distribution of the benefits of the Association are guiding principles for the implementation of this agreement*”¹⁰⁷). Unlike its Mexican predecessor, civil society appears as a resource to attain shared and correct implementation of the agreement. This feature will be maintained in the following agreements negotiated with Latin American countries or regional blocks. Review and implementation of the agreement is nonetheless largely focused on the progressive liberalization of trade, and no explicit reference is made to the sustainability impact of the agreement. Nonetheless, since review can consider “any issue” arising from the agreement, there would arguably be space for sustainability considerations to be included.

¹⁰⁶ European Union, Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part of 30 December 2002, available at: <<http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=438>> (last accessed 19 February 2015).

¹⁰⁷ *Ibid.* Article 1.2.

EU-CHILE <i>Signed 18 November 2002 – Entered into force 1 February 2003</i> ¹⁰⁸		
SUSTAINABLE DEVELOPMENT	ECONOMIC PILLAR	<p>Market Economy Economic liberalization Regional integration Transfer of technology</p> <p>PREAMBLE “CONSIDERING the importance the Parties attach to the principles and rules which govern <i>international trade</i>, in particular those contained in the Agreement establishing the <i>World Trade Organisation</i> (...);”</p> <p>ARTICLE 16.2. GENERAL OBJECTIVES “2. The Parties re-affirm the importance of <i>economic, financial and technical cooperation</i>, as a means of contributing towards implementing the objectives and principles derived from this Agreement.”</p>
	ENVIRONMENTAL PILLAR	<p>Prevention/reduction of Pollution Sustainable consumption and production</p> <p>ARTICLE 28. COOPERATION ON THE ENVIRONMENT “1. The aim of cooperation shall be to <i>encourage conservation and improvement</i> of the environment, prevention of contamination and degradation of natural resources and ecosystems, and <i>rational use of the latter in the interests of sustainable development</i>”.</p>
	SOCIAL PILLAR	<p>Human rights and restrictive actions clause Democracy Social development Fundamental rights Participation of civil society</p> <p>PREAMBLE “CONSIDERING the importance the Parties attach to the principles and values set out in the Final Declaration of the <i>World Summit for Social Development</i> held in Copenhagen in March 1995”</p> <p>ARTICLE 1.1. PRINCIPLES “Respect for <i>democratic principles</i> and <i>fundamental human rights</i> as laid down in the United Nations Universal Declaration of Human Rights and for the principle of the <i>rule of law</i> underpins the internal and international policies of the Parties and constitutes an <i>essential element</i> of this Agreement.”</p> <p>ARTICLE 11. CIVIL SOCIETY “The Parties will also promote <i>regular meetings</i> of representatives of the Chilean and the European Union’s <i>civil societies</i>, including the academic community, social and economic partners, and non-governmental organisations in order to keep them informed on the implementation of this Agreement and gather their suggestions for its improvement.”</p> <p>ARTICLE 12.2. OBJECTIVES “The main objective of the political dialogue between the Parties is the promotion, dissemination, further development and common defence of <i>democratic values</i>, such as the <i>respect for human rights</i>, (...).”</p> <p>ARTICLE 16.1. GENERAL OBJECTIVES The Parties shall establish close cooperation aimed at: ... b) promoting <i>social development</i>, which should go <i>hand in hand with economic development and the protection of the environment</i>. The Parties will give particular priority to respect for basic social rights;</p> <p>ARTICLE 44. _____ SOCIAL COOPERATION “1. The Parties recognise the importance of <i>social development, which must go hand in hand with economic development</i>. (...), notably by promoting the relevant conventions of the International Labour Organisation covering such topics as the freedom of association, the right to collective bargaining and non-discrimination, the abolition of forced and child labour and equal treatment between men and women.”</p> <p>ARTICLE 200. FULFILLMENT OF OBLIGATIONS “(.) 2. If one of the Parties considers that the other Party has failed to fulfil</p>

¹⁰⁸ Source Organization of American States, Foreign Trade Information System, available at: <http://www.sice.oas.org/agreements_e.asp> (19 February 2015).

		an obligation under this Agreement it may take appropriate measures. (...)
ANCILLARY FEATURES ANCILLARY TO SUSTAINABLE DEVELOPMENT	NON-LOWERING-OF-STANDARDS CLAUSE	----
	EXCEPTIONS/CARVE OUTS	<u>ARTICLE 135. EXCEPTIONS</u> “(...) nothing in this Title shall be construed to prevent the adoption or enforcement by either Party of measures: (a) necessary to protect public morals or to maintain public order and public security; (b) necessary to protect human, animal or plant life or health; (c) relating to the conservation of exhaustible natural resources if such measures are applied in conjunction with restrictions on the domestic supply or consumption of services or on domestic investments; (d) necessary for the protection of national treasures of artistic, historic or archaeological value; (e) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Title (...)”
	RIGHT TO REGULATE	----
	CSR	----
	REVIEW AND IMPLEMENTATION	<u>ARTICLE 162. REVIEW AND IMPLEMENTATION</u> The Association Committee shall review the implementation of this Title every two years, unless otherwise agreed by the Parties; <i>it shall consider any issue arising from it</i> ; and take appropriate action in the exercise of its functions. It shall, in particular, fulfil the following tasks: (a) coordinate exchanges between the Parties regarding the development and implementation of information technology systems in the field of public procurement; (b) make appropriate recommendations regarding the cooperation between the Parties; and (c) adopt decisions where provided for under this Title

3. 2008 EU-CARIFORUM Agreement: Introduction of the right to regulate and the non-lowering of standards

The EU-CARIFORUM agreement¹⁰⁹ has been praised as attempting to ensure a balance of interests between capital exporting countries and their capital-importing counterparts.¹¹⁰ European sources have described this agreement as “*relatively unique in North-South relations in that it combines trade provisions and development cooperation*”, with sustainable development as its presiding principle.¹¹¹ This does not come as a surprise, since the EU-CARIFORUM agreement follows the Luxembourg Declaration on principles for sustainable development of 2006, the 2006 Renewed SDS and the Council minimum platform on investment, which included the right to regulate as well as the provision on the non-lowering of standards. Accordingly, the EU-CARIFORUM Agreement does set a considerably different standard in terms of sustainable development provisions, compared with its two predecessors, with a definite

¹⁰⁹ European Union, Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, 30.10.2008, available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:289:0003:1955:EN:PDF>> (last accessed 19 February 2015).

¹¹⁰ *Dimopoulos*, JWIT, vii (11).

¹¹¹ European Union, Monitoring the implementation & results of the CARIFORUM-EU EPA Agreement, Final Report, September 2014. Available at: http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152824.pdf (last accessed 19 February 2015).

jump forward with regard to ancillary provisions. In some aspects it is more daring than its successors: here language on the responsibility of investors is more than just exhortatory.¹¹² Of course one must put forward that the CARIFORUM countries¹¹³ already shared the Cotonou Agreement,¹¹⁴ which meant there existed a shared and mature understanding of economic, social and environmental development concerns.

In the EU-CARIFORUM agreement, sustainable development as such is the heading of Article 3. This recalls some provisions of the Cotonou Agreement¹¹⁵ and commits the contracting parties to apply the EU-CARIFORUM agreement, fully taking into account “*the human, cultural, economic, social, health and environmental best interests of their respective population and of future generations*”¹¹⁶ and to “*work cooperatively towards the realisation of a sustainable development...*”¹¹⁷

EU-CARIFORUM		
<i>Signed 15 October 2008 – Entered into force 29 December 2008</i> ¹¹⁸		
SUSTAINABLE DEVELOPMENT	<p>ECONOMIC PILLAR</p> <p>Market Economy Economic liberalization Regional integration Transfer of technology</p>	<p><u>ARTICLE 4. REGIONAL INTEGRATION</u></p> <p>“1. The Parties recognise that <i>regional integration</i> is an integral element of their partnership and a powerful instrument to achieve the objectives of this Agreement.”</p> <p><u>ARTICLE 60. OBJECTIVE, SCOPE AND COVERAGE</u></p> <p>“1. The Parties and the Signatory CARIFORUM States, reaffirming their commitments under the <i>WTO Agreement</i> and with a view to facilitating the <i>regional integration and sustainable development</i> of the Signatory CARIFORUM States (...), hereby lay down the necessary arrangements for the <i>progressive, reciprocal and asymmetric liberalisation of investment</i> and trade in services and for cooperation on e-commerce.”</p> <p><u>ARTICLE 135. COOPERATION IN THE AREA OF COMPETITIVENESS AND INNOVATION</u></p> <p>“2. (...) the Parties agree to <i>cooperate</i> (...) in the following areas: (...) (g) intensification of activities to promote linkages, <i>innovation and technology transfer</i> between CARIFORUM and European Community partners.”</p>

¹¹² The EU-CARIFORUM agreement has an article devoted to bestow obligations on investors – Article 72. CSR is maintained but is merely encouraged in the EU-COLPERU and EU-CENTRAL agreements.

¹¹³ CARIFORUM stands for Caribbean Forum of ACP States, which is composed of 15 countries: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Haiti, Jamaica, St Lucia, St Vincent, St Kitts and Nevis, Surinam, Trinidad and Tobago.

¹¹⁴ For the version of the Cotonou Agreement, see <<http://www.europarl.europa.eu/document/activities/cont/201306/20130605ATT67340/20130605ATT67340EN.pdf>> (last accessed 19 February 2015).

¹¹⁵ Namely, Articles 1, 2 and 9 which promote sustainable economic, environmental and social development as well as democratic principles and the rule of law.

¹¹⁶ Article 3.2. of the EU-CARIFORUM agreement.

¹¹⁷ Article 3.3. of the EU-CARIFORUM agreement.

¹¹⁸ Source Organization of American States, Foreign Trade Information System, available at: <http://www.sice.oas.org/agreements_e.asp> (last accessed 19 February 2015).

	<p>ENVIRONMENTAL PILLAR Prevention/reduction of Pollution Sustainable consumption and production</p>	<p><u>ARTICLE 183.1.OBJECTIVES AND SUSTAINABLE DEVELOPMENT CONTEXT</u> “1.The Parties reaffirm that the principles of <i>sustainable management of natural resources and the environment</i> are to be applied and integrated at every level of their partnership, as part of their overriding <i>commitment to sustainable development</i> as set out in Articles 1 and 2 of the Cotonou Agreement. 5. The Parties and the Signatory CARIFORUM States are resolved to make efforts to <i>facilitate trade in goods and services which the Parties consider to be beneficial to the environment</i>. Such products may include environmental technologies, renewable and energy-efficient goods and services and eco-labelled goods.”</p> <p><u>ARTICLE 185. REGIONAL INTEGRATION AND USE OF INTERNATIONAL ENVIRONMENTAL STANDARDS</u> “The Parties agree that in the absence of <i>relevant environmental standards in national or regional legislation</i>, they shall seek to adopt and implement the relevant <i>international standards, guidelines or recommendations</i>, where practical and appropriate.”</p>
	<p>SOCIAL PILLAR Human rights and restrictive action clause Democracy Social development Fundamental rights Participation of civil society</p>	<p><u>ARTICLE 2. PRINCIPLES</u> “1.This Agreement is based on the <i>Fundamental Principles as well as the Essential and Fundamental Elements of the Cotonou Agreement</i>, as set out in Articles 2 and 9, respectively, of the Cotonou Agreement. This Agreement shall build on the provisions of the Cotonou Agreement and the previous ACP- EC Partnership Agreements in the area of regional cooperation and integration as well as economic and trade cooperation.”</p> <p>ARTICLE 96. ESSENTIAL ELEMENTS: CONSULTATION PROCEDURE AND APPROPRIATE MEASURES AS REGARDS HUMAN RIGHTS, DEMOCRATIC PRINCIPLES AND THE RULE OF LAW</p> <p><u>ARTICLE 191. OBJECTIVES AND MULTILATERAL COMMITMENTS</u> “1. The Parties reaffirm their commitment to the internationally recognised core <i>labour standards</i>, as defined by the relevant International Labour Organization (ILO) Conventions, and in particular the freedom of association and the right to collective bargaining, the abolition of forced labour, the elimination of the worst forms of child labour and non- discrimination in respect to employment. (...)”</p> <p><u>ARTICLE 232. CARIFORUM-EC CONSULTATIVE COMMITTEE</u> “1. A <i>CARIFORUM-EC Consultative Committee</i> is hereby established with the task of assisting the Joint CARIFORUM-EC Council to <i>promote dialogue and cooperation between representatives of organisations of civil society</i>, including the academic community, and social and economic partners. Such dialogue and cooperation shall encompass all economic, social and environmental aspects of the relations between the EC Party and CARIFORUM States, as they arise in the context of the implementation of this Agreement...”</p>
<p>ANCILLARY TO SUSTAINABLE DEVELOPMENT</p>	<p>NON-LOWERING-OF-STANDARDS CLAUSE</p>	<p><u>ARTICLE 73. MAINTENANCE OF STANDARDS</u> “The EC Party and the Signatory CARIFORUM States shall ensure that <i>foreign direct investment is not encouraged by lowering</i> domestic environmental, labour or occupational health and safety legislation and standards or by <i>relaxing</i> core labour standards or laws aimed at protecting and promoting cultural diversity.”</p>

	<p>RIGHT TO REGULATE</p>	<p><u>ARTICLE 184. LEVELS OF PROTECTION AND RIGHT TO REGULATE</u></p> <p>“1. Recognising the <i>right of the Parties</i> and the Signatory CARIFORUM States <i>to regulate</i> in order to achieve their own level of domestic environmental and public health protection and their own sustainable development priorities (...)”</p> <p><u>ARTICLE 192. LEVELS OF PROTECTION AND RIGHT TO REGULATE</u></p> <p>“(...) each Party and Signatory CARIFORUM State shall ensure that its own social and labour regulations and policies provide for and encourage <i>high levels of social and labour standards consistent with the internationally recognised rights</i> set forth in Article 191 and shall strive to continue to improve those laws and policies.</p>
	<p>EXCEPTIONS/CARVE OUTS</p>	<p><u>ARTICLE 224. GENERAL EXCEPTION CLAUSE</u>¹¹⁹</p> <p>“1. (...) nothing in this Agreement shall be construed to prevent the adoption or enforcement by the EC Party, the CARIFORUM States or a Signatory CARIFORUM State of measures which: (a) are necessary to protect public security and public morals or to maintain public order; (b) are necessary to protect human, animal or plant life or health; (c) are necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement (...)”</p>
	<p>CSR</p>	<p><u>ARTICLE 72: BEHAVIOUR OF INVESTORS</u></p> <p>“The EC Party and the Signatory CARIFORUM States shall cooperate and take, within their own respective territories, such measures as may be necessary, inter alia, through domestic legislation, to <i>ensure that</i>: (a) Investors be forbidden from, and held liable for, offering, promising or giving any undue pecuniary or other advantage, whether directly or through intermediaries, to any public official or member of his or her family or business associates or other person in close proximity to the official, for that person or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, or in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an investment. (b) Investors act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights at Work, 1998, to which the EC Party and the Signatory CARIFORUM States are parties. (c) Investors do not manage or operate their investments in a manner that circumvents international environmental or labour obligations arising from agreements to which the EC Party and the Signatory CARIFORUM States are parties. (d) Investors establish and maintain, where appropriate, local community liaison processes, especially in projects involving extensive natural resource-based activities, in so far that they do not nullify or impair the benefits accruing to the other Party under the terms of a specific commitment.”</p>
	<p>REVIEW OF IMPLEMENTATION</p>	<p><u>ARTICLE 5 MONITORING</u></p> <p>“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 for 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”.</p>

¹¹⁹ Interestingly, this is also “*the first international agreement that extends the scope of the exception to investment provisions*”. See *Dimopoulos* in: Dupuy/Petersman/Francioni (eds.), *Human Rights in International Investment Law and Arbitration*, 565 (585).

4. 2012 EU-AC Agreement: A reaffirmation of sustainable development and its ancillary features

The EU-AC agreement¹²⁰ was negotiated jointly by Colombia and Peru, two members of the Andean Community (AC), at a moment where the AC was not in a political position from which to negotiate as such. In fact, although negotiations were initially launched for an Association Agreement between the EU and the AC, with the withdrawal of Bolivia first and Ecuador later,¹²¹ they were downgraded to trade only. The Parliament gave its consent to the EU-AC agreement on 11th December 2012 and Peru and Colombia have applied it provisionally since 1st March 2013 and 1st August 2013, respectively. In 2014 Ecuador resumed talks to accede to the agreement, since the agreement preserved its regional approach, allowing the remaining AC countries to join.¹²² An agreement with Ecuador was reached in July 2014 and its text has been released “for information purposes”; it is, at the time of writing, subject to revision and eventually to a ratification process.¹²³

Notwithstanding this “downgrading” of the agreement, likely a consequence of the failed “bet” on the Andean regional integration, the EU-AC agreement is rather sophisticated and very well articulated with regards to sustainable development. This can be explained with the initial comprehensive nature of the text and of the controversies that accompanied its drafting, but also with the evolved EU narrative addressing sustainable development concerns in FDI, since in 2011 both the Commission and the Parliament had voiced their approach through their respective Communication Towards a Comprehensive European International Investment Policy and Resolution of April 2011.

In fact, the preamble has rich and repeated references to sustainable development. It expresses that the parties' desire “*to promote comprehensive economic development*” (its objectives being the reduction of poverty, the creation of new employment opportunities, improved working conditions and a higher living standard), which is achieved “*by liberalising and expanding trade and investment between their territories; (...)*”. Liberalisation of trade and investment is thus aim-oriented; it is aimed at promoting this comprehensive economic development, which in turn is described with features that echo sustainable development.

¹²⁰ European Union, Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part of 26 June 2012, available at: <http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147704.pdf> (last accessed 19 February 2015).

¹²¹ Bolivia withdrew after several controversies on the IP Chapter and Ecuador suspended its participation in July 2009. For a chronology of the negotiation procedure, see Health Action International Europe, Intellectual Property and Access to Medicines: The European Union- Andean Community Trade Agreements, available at: <http://www.haiweb.org/12022009/12Feb2009_Issue_Quick_Sheet_EU-CAN_Trade_Agreements.pdf> (last accessed 19 February 2015).

¹²² Article 239 of the Trade Agreement between the European Union and Colombia and Peru, Accession of New Member states to the European Union.

¹²³ See European Commission, Directorate-General for Trade, EU and Ecuador publish text of trade agreement, 23 September 2014, available at: <http://www.sice.oas.org/TPD/AND_EU/negotiations/ECU_EU_release_text_e.pdf> (last accessed 19 February 2015).

The preamble further states that the parties are committed to an implementation of the agreement that is “*in accordance with the objective of sustainable development ...*”. All three pillars are to be found in the references to economic progress, labour rights and environmental protection and are further detailed in the text of the agreement.

An observation must be noted with regard to the right to use “*to the greatest extent, the flexibilities provided for in the multilateral framework for the protection of public interest*”. The mentioning of the multilateral framework, i.e. the World Trade Organization (WTO), primarily identifies public interest, with exceptions (via GATT Article XX). Nevertheless, public interest is present in the body of the text as an independent category, i.e. not an exception and not bound to the multilateral framework.¹²⁴

Finally, Title IX is dedicated to trade and sustainable development, which allows a substantial development of provisions such as the non-lowering of standards and regulatory sovereignty. The title goes further, encouraging the parties to promote best practices of CSR. The detailed reference to sustainable development also allows the pillars to gain more content. The social pillar specifically pinpoints international labour standards as binding and specifically lists standards (freedom of association and right to collective bargaining, elimination of forced or compulsory labour, of child labour and of discrimination). Moreover, general principles of environmental law inhabit the environmental pillar, as Article 270 binds trade to multilateral environmental standards.

It is the EU-AC agreement that introduces specific references to the monitoring and review of the implementation of the agreement in light of sustainable development.

EU-AC	
<i>Signed by the EU in June 2012, provisionally applied by Peru and Colombia in March and August 2013, respectively</i> ¹²⁵	
SUSTAINABLE DEVELOPMENT	<p>ECONOMIC PILLAR Market Economy Economic liberalization Open Regionalism Transfer of technology</p> <p>PREAMBLE “BUILDING on their respective rights and obligations under the Marrakesh Agreement Establishing the <i>World Trade Organization</i>” “RECOGNISING the importance of the respective <i>regional integration</i> processes of the European Union, and of the signatory Andean Countries within the framework of the Andean Community.”</p> <p>ARTICLE 3. ESTABLISHMENT OF A FREE TRADE AREA The Parties hereby establish a <i>free trade area</i>, in conformity with Article XXIV of the General Agreement on Tariffs and Trade of 1994 (hereinafter referred to as "GATT 1994") and Article V of the General Agreement on Trade in Services (hereinafter referred to as "GATS").</p> <p>TITLE XIII. TECHNICAL ASSISTANCE AND TRADE-BUILDING CAPACITY. ARTICLE 324. OBJECTIVES “(...) the Parties agree to attach particular importance to cooperation initiatives aimed at: (...) (a) (...) the <i>transfer of technology</i>”</p>

¹²⁴ Namely in Article 268: “*Right to Regulate and Levels of protection*” and also among the objectives listed in Article 4, albeit only in relation to intellectual property (letter g).

¹²⁵ Source Organization of American States, Foreign Trade Information System, available at: <http://www.sice.oas.org/TPD/AND_EU/AND_EU_e.ASP> (last accessed 19 February 2015).

	<p>ENVIRONMENTAL PILLAR</p> <p>Prevention/reduction of Pollution</p> <p>Sustainable consumption and production</p>	<p><u>ARTICLE 270. MULTILATERAL ENVIRONMENTAL STANDARDS AND AGREEMENTS</u></p> <p>“2. The Parties reaffirm their commitment to effectively implement in their laws and practices the following <i>multilateral environmental agreements</i>: the Montreal Protocol on Substances that Deplete the Ozone Layer adopted on 16 September of 1987, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal adopted on 22 March 1989, the Stockholm Convention on Persistent Organic Pollutants adopted on 22 May 2001, the Convention on International Trade in Endangered Species of Wild Fauna and Flora signed on 3 March 1973 (hereinafter referred to as "CITES"), the CBD, the Cartagena Protocol on Biosafety to the CBD adopted on 29 January 2000, the Kyoto Protocol to the United Nations Framework Convention on Climate Change adopted on 11 December 1997 (hereinafter referred to as "Kyoto Protocol") and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade adopted on 10 September 1998.”</p> <p><u>ARTICLE 271. TRADE FAVOURING SUSTAINABLE DEVELOPMENT</u></p> <p>“2. The Parties shall strive to <i>facilitate and promote trade and foreign direct investment in environmental goods and services</i>.”</p>
	<p>SOCIAL PILLAR</p> <p>Human rights and restrictive action clause</p> <p>Democracy</p> <p>Social development</p> <p>Fundamental rights</p> <p>Participation of civil society</p>	<p><u>ARTICLE 1. GENERAL PRINCIPLES</u></p> <p>“Respect for <i>democratic principles</i> and <i>fundamental human rights</i>, as laid down in the Universal Declaration of Human Rights, and for the principle of the <i>rule of law</i>, underpins the internal and international policies of the Parties. Respect for these principles constitutes an <i>essential element</i> of this Agreement.”</p> <p><u>ARTICLE 8. FULFILLMENT OF OBLIGATIONS</u></p> <p>“(…). 3. Without prejudice to the existing mechanisms for political dialogue between the Parties, any Party may immediately adopt appropriate measures in accordance with international law in case of violation by another Party of the essential elements referred to in Articles 1 and 2 of this Agreement. (...)”.</p> <p><u>ARTICLE 269. MULTILATERAL LABOUR STANDARDS AND AGREEMENTS</u></p> <p>“(…) 3. Each Party commits to the promotion and effective implementation (...) of internationally recognised core labour standards as contained in the fundamental Conventions of the International Labour Organisation (hereinafter referred to as the "ILO"): (a) the freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.”</p> <p><u>ARTICLE 282. DIALOGUE WITH CIVIL SOCIETY</u></p> <p>1. Subject to Article 280 paragraph 3, the Sub-committee on Trade and Sustainable Development shall convene once a year, unless otherwise agreed by the Parties, a <i>session with civil society organisations and the public at large, in order to carry out a dialogue on matters related to the implementation of this Title</i>. The Parties shall agree on the procedure for such sessions with civil society no later than one year following the entry into force of this Agreement.</p>

ANCILLARY TO SUSTAINABLE DEVELOPMENT	NON-LOWERING-OF-STANDARDS CLAUSE	<p>ARTICLE 277. UPHOLDING LEVELS OF PROTECTION</p> <p>“1. <i>No Party shall encourage trade or investment by reducing the levels of protection</i> afforded in its environmental and labour laws. Accordingly, no Party shall <i>waive or otherwise derogate</i> from its environmental and labour laws in a manner that reduces the protection afforded in those laws, to encourage trade or investment.”</p>
	EXCEPTIONS/ CARVE OUTS	<p>ARTICLE 167. GENERAL EXCEPTIONS</p> <p>“1. (...) nothing in this Title and Title V (Current Payments and Capital Movements) shall be construed to prevent the adoption or enforcement by any Party of measures: (a) necessary to protect public security or public morals or to maintain public order; (b) necessary to protect human, animal or plant life or health, including those environmental necessary to this effect; (c) relating to the conservation of living and non-living exhaustible natural resources, if such measures are applied in conjunction with restrictions on domestic investors or on the domestic supply or consumption of services; (d) necessary for the protection of national treasures of artistic, historic or archaeological value; (e) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Title and Title V (Current Payments and Capital Movements) (...)”</p>
	RIGHT TO REGULATE	<p>ARTICLE 268. RIGHT TO REGULATE AND LEVELS OF PROTECTION</p> <p>“Recognising <i>the sovereign right of each Party to establish its domestic policies and priorities on sustainable development</i>, and its own levels of environmental and labour protection, (...), and to <i>adopt or modify accordingly its relevant laws, regulations and policies</i>; each Party shall strive to ensure that its relevant laws and policies provide for and encourage high levels of environmental and labour protection.”</p> <p>ARTICLE 270. MULTILATERAL ENVIRONMENTAL STANDARDS AND AGREEMENTS</p> <p>“4. Nothing in this Agreement shall limit the right of a Party to adopt or maintain measures to implement the agreements referred to in paragraph 2.”</p>
	CSR	<p>ART. 271. TRADE FAVOURING SUSTAINABLE DEVELOPMENT</p> <p>“The Parties agree to promote best business practices related to corporate social responsibility.”</p>
	REVIEW OF IMPLEMENTATION	<p>ARTICLE 279. REVIEW OF SUSTAINABILITY IMPACTS</p> <p>Each Party commits to <i>review, monitor and assess the impact of the implementation</i> of this Agreement on <i>labour</i> and <i>environment</i>, as it deems appropriate, through its respective domestic and participative processes.</p> <p>ARTICLE 280. INSTITUTIONAL AND MONITORING MECHANISM</p> <p>1. Each Party shall designate an office within its administration that shall serve as contact point to the other Parties for the purposes of <i>implementing trade-related aspects of sustainable development</i> and channelling all matters and communications that may arise in relation to this Title. (...)</p>

5. *2012 EU-CENTRAL agreement: A consolidation of sustainable development and its ancillary features*

The EU-CENTRAL agreement¹²⁶ is also an association agreement; therefore it addresses cooperation in many venues and develops trade extensively. Again, investment is not regulated, although its increase among contracting parties¹²⁷ is fostered.¹²⁸ In any case, the EU-CENTRAL agreement confirms the trend seen while analysing its predecessors diachronically and consolidates sustainable development, both in the preamble of FTAs and in their body. The preamble of the EU-CENTRAL agreement thus invokes sustainable development and takes its promotion further: “*through a development partnership involving all relevant stakeholders, including civil society and the private sector, (...).*”

As is the case with the EU-CARIFORUM and EU-AC agreements, there is a title devoted to trade and sustainable development (Title VII), in which the following comprehensive statement is made:

*“The Parties reaffirm their commitment to achieving sustainable development, whose pillars – economic development, social development and environmental protection – are interdependent and mutually reinforcing. The Parties underline the benefit of considering trade related social and environmental issues as part of a global approach to trade and sustainable development.”*¹²⁹

Moreover, the sustainability of the agreement will be monitored, assessed and reviewed.¹³⁰

¹²⁶ European Union, Agreement establishing an association between Central America, on the one hand, and the European Union and its Member States, on the other of 29 June 2012, available at: <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=689>> (last accessed 19 February 2015).

¹²⁷ Contracting parties of the EU-CENTRAL agreement are the EU on one side, and Costa Rica, Guatemala, El Salvador, Honduras, Nicaragua and Panama on the other side.

¹²⁸ Article 78 (“Objectives”) states in its letter (e) that one of the objectives of the agreement is the “*development of a climate conducive to increased investment flows, the improvement of the conditions of establishment between the Parties on the basis of the principle of non-discrimination and the facilitation of trade and investment among the Parties through current payments and capital movements related to direct investment*”.

¹²⁹ Article 284.2 of the Agreement establishing an association between Central America, on the one hand, and the European Union and its Member States, on the other of 29 June 2012, available at: <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=689>> (last accessed 19 February 2015).

¹³⁰ *Ibid.* Article 293 (“Sustainability Review”): “*The Parties commit to jointly reviewing, monitoring and assessing the contribution of Part IV of this Agreement, including cooperation agreements (...), to sustainable development*”.

EU-CENTRAL		
Signed on 29 June 2012 by the EU – Trade Pillar provisionally applied since 1 st August with Honduras, Nicaragua and Panama, since 1 st October 2013 with Costa Rica and El Salvador, since 1 st December 2013 with Guatemala ¹³¹		
SUSTAINABLE DEVELOPMENT	<p>ECONOMIC PILLAR Market Economy Economic liberalization Regional integration Transfer of technology</p>	<p><u>PREAMBLE</u> “RECOGNISING the progress achieved in the <i>Central American economic integration process</i>, (...); REAFFIRMING the importance that the Parties attach to the principles and rules which govern <i>international trade</i>, (...)”</p> <p><u>ARTICLE 77. ESTABLISHMENT OF A FREE TRADE AREA AND RELATION TO THE WTO AGREEMENT</u> “1. The Parties to this Agreement, (...) hereby establish a <i>free trade area</i>. 2. The Parties reaffirm their existing rights and obligations with respect to each other under the WTO Agreement.”</p> <p><u>ARTICLE 231. TRANSFER OF TECHNOLOGY</u> “1. The Parties agree to exchange views and information on their practices and policies affecting <i>transfer of technology</i>, (...). Particular attention shall be paid to the conditions necessary to create an adequate enabling environment for technology transfer between the Parties, (...)”</p> <p><u>ARTICLE 303. GENERAL PROVISIONS</u> “1. The Parties (...) reaffirm their will to strengthen and deepen their respective <i>regional economic integration processes</i>, (...)”</p>
	<p>ENVIRONMENTAL PILLAR Prevention/reduction of Pollution Sustainable consumption and production</p>	<p><u>ARTICLE 20. ENVIRONMENT</u> “1. The Parties shall promote a dialogue in the areas of <i>environment</i> and <i>sustainable development</i> (...), 2. This dialogue shall be aimed, inter alia, at (...) the <i>protection and sustainable management of forests</i> to, inter alia, reduce emissions from deforestation and forest degradation, (...)”</p> <p><u>ARTICLE 287. MULTILATERAL ENVIRONMENTAL STANDARDS AND AGREEMENTS</u> “(…) 2. The Parties reaffirm their commitment to effectively implement in their laws and practice the <i>multilateral environmental agreements</i> to which they are parties including: (a) the Montreal Protocol on Substances that Deplete the Ozone Layer; (b) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; (c) the Stockholm Convention on Persistent Organic Pollutants; (d) the Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter referred to as "CITES"); (e) the Convention on Biological Diversity; (f) the Cartagena Protocol on Biosafety to the Convention on Biological Diversity; and (g) the Kyoto Protocol to the United Nations Framework Convention on Climate Change”</p> <p><u>ART. 288. TRADE FAVOURING SUSTAINABLE DEVELOPMENT</u> “Parties shall endeavour to (...) 2. facilitate and promote <i>trade and foreign direct investment in environmental technologies and services</i>, renewable-energy and energy-efficient products and services, (...)”</p>

¹³¹ <http://ec.europa.eu/trade/policy/countries-and-regions/regions/central-america/> (last accessed 19 February 2015).

	<p>SOCIAL PILLAR</p> <p>Human rights and restrictive action clause</p> <p>Democracy</p> <p>Social development</p> <p>Fundamental rights</p> <p>Participation of civil society</p>	<p>PREAMBLE</p> <p>“REAFFIRMING their respect for <i>democratic principles</i> and <i>fundamental human rights</i> as set out in the Universal Declaration of Human Rights;</p> <p>RECALLING their commitment to the principles of the <i>rule of law</i> and <i>good governance</i>,”</p> <p>ARTICLE 1. PRINCIPLES</p> <p>1. Respect for democratic principles and fundamental human rights, as laid down in the Universal Declaration of Human Rights, and for the rule of law, underpins the internal and international policies of both Parties and constitutes an <i>essential element</i> of this Agreement.</p> <p>ARTICLE 12. OBJECTIVES</p> <p>“The Parties agree that the objectives of the political dialogue (...) are to: (a) establish a privileged political partnership based notably on the respect for and the promotion of <i>democracy, peace, human rights, the rule of law, good governance</i> and <i>sustainable development</i>,”</p> <p>ARTICLE 13. AREAS</p> <p>“2. The political dialogue between the Parties shall prepare the way for new initiatives for pursuing (...): <i>regional integration; the rule of law; good governance; democracy; human rights; promotion and protection of the rights and fundamental freedoms of indigenous peoples and individuals</i>, as recognised by the United Nations Declaration on the Rights of Indigenous Peoples; <i>equal opportunities and gender equality</i>; (...).”</p> <p>ARTICLE 286. MULTILATERAL LABOUR STANDARDS AND AGREEMENTS</p> <p>“1. (...) the Parties recognise that full and productive employment and decent work (...), are key elements of sustainable development for all countries (...).</p> <p>The Parties, in accordance with their obligations as members of the ILO, reaffirm their commitments to respect, promote, and realise in good faith and in accordance with the ILO Constitution, the principles concerning the fundamental rights which are the subject of the fundamental ILO Conventions, namely: (a) the freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.”</p> <p>ARTICLE 295. CIVIL SOCIETY DIALOGUE FORUM</p> <p>1. The Parties agree to organise and facilitate a bi-regional <i>Civil Society Dialogue Forum for open dialogue, with a balanced representation of environmental, economic and social stakeholders</i>. The Civil Society Dialogue Forum shall conduct dialogue encompassing sustainable development aspects of trade relations between the Parties, as well as how cooperation may contribute to achieve the objectives of this Title. (...)</p> <p>ARTICLE 355. FULFILMENT OF THE OBLIGATIONS</p> <p>“(...) 2. If a Party considers that another Party has failed to fulfil an obligation under this Agreement, it may have recourse to appropriate measures. (...).”</p>
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ANCILLARY TO SUSTAINABLE DEVELOPMENT	NON-LOWERING-OF-STANDARDS CLAUSE	<p><u>ARTICLE 291. UPHOLDING LEVELS OF PROTECTION</u></p> <p>“1. The Parties recognise that it is inappropriate to encourage trade or investment by lowering the levels of protection afforded in domestic environmental and labour laws.</p> <p>2. A Party shall not waive or derogate from, or offer to waive or offer to derogate from, its labour or environmental legislation (...) as an encouragement for the establishment, acquisition, expansion or retention of an investment or an investor in its territory. (...)”</p>
	EXCEPTIONS/CARVE OUTS	<p><u>ARTICLE 203. GENERAL EXCEPTIONS</u></p> <p>“(...) Nothing in this Title shall be construed to prevent the adoption or enforcement by any Party of measures which are: (a) necessary to protect public security or public morals or to maintain public order; (b) necessary to protect human, animal or plant life or health; (c) relating to the conservation of exhaustible natural resources if such measures are applied in conjunction with restrictions on domestic investors or on the domestic supply or consumption of services; (d) necessary for the protection of national treasures of artistic, historic or archaeological value; (e) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Title (...)”</p>
	RIGHT TO REGULATE	<p><u>PREAMBLE</u></p> <p>“REAFFIRMING that the States in their exercise of sovereign power to exploit their natural resources, according to their own environmental and developmental policies, should promote sustainable development;”</p> <p><u>ARTICLE 285. RIGHT TO REGULATE AND LEVELS OF PROTECTION</u></p> <p>“1. The Parties reaffirm the respect for their respective Constitutions and for their <i>rights there under to regulate in order to set their own sustainable development priorities</i>, to establish their own levels of domestic environmental and social protection, and to adopt or modify accordingly their relevant laws and policies.”</p>
	CSR	<p><u>ARTICLE 288. TRADE FAVOURING SUSTAINABLE DEVELOPMENT</u></p> <p>“2. The Parties shall endeavour to (c) facilitate and promote trade in products that respond to sustainability considerations, (...) and including those schemes involving corporate social responsibility and accountability;”</p>
	REVIEW OF IMPLEMENTATION	<p><u>ARTICLE 293. SUSTAINABILITY REVIEW</u></p> <p>“The Parties commit to jointly <i>reviewing, monitoring and assessing the contribution</i> of Part IV of this Agreement, including cooperation activities under Article 302, to <i>sustainable development</i>”.</p> <p><u>ARTICLE 294. INSTITUTIONAL AND MONITORING MECHANISM</u></p> <p>“1. Each Party shall designate an office within its administration to serve as <i>Contact Point for the purpose of implementing trade-related aspects of sustainable development</i>. At the entry into force of this Agreement, the Parties shall submit to the Association Committee full contact information for their Contact Points”.</p>

6. Conclusions on EU FTAs with Latin American countries

The overview of sustainability provisions in EU FTAs with Latin American countries shows how these provisions go hand in hand with EU developments regarding sustainability and FDI. All of them have similar wording with regard to the human rights and restrictive action clause, which has been consistently introduced in EU

trade agreements with Latin American countries. Having said this, the human rights clause does not mention environment protection concerns, and thus a potential breach thereof would not legitimize restrictive actions.¹³²

The EU-CARICOM agreement is a benchmark: from this point on, the right to regulate, CSR and the non-lowering of standards clauses are always present, clauses which are absent in the Mexican and Chilean PTAs. Moreover, it is explicitly acknowledged that the right to regulate benefits, among others, the attainment of sustainable development.

While the concept of sustainable development in itself is not defined, the chronological evolution of the EU-LAC PTAs shows that some aspects of sustainable development are explicitly pinpointed. The social pillar is developed particularly in relation to labour law: labour standards are firmly identified with ILO core labour standards (collective bargaining, abolition of forced labour, elimination of the worst forms of labour and non-discrimination). Moreover, the respect of human rights and of the democratic rule have never been confined merely to the preamble of the agreements and have always been embodied by explicit reference to the Universal Declaration of Human Rights in the first articles of all agreements.¹³³ The environmental pillar is pinpointed by means of explicit reference to international covenants.

Indigenous rights, as part of the social pillar, are an important feature of EU FTAs with Latin American countries, particularly in the EU-CENTRAL agreement. The EU-Mexico agreement mentions indigenous populations as beneficiaries of cooperation. With the EU-CENTRAL agreement the take is less paternalistic, as they pass from a passive stand – beneficiaries – to active carriers of rights, with a mention made of the United Nations Declaration of Rights of Indigenous Peoples. However, the EU does not have a consolidated position on indigenous rights, since the EU-AC agreement, which is contemporary to the EU-CENTRAL one, does deal with indigenous rights in relation to traditional knowledge, in its IP chapter, but does not reference the UN Declaration of Rights of Indigenous Peoples.

There has thus been a consolidation of sustainable development in FTAs entered into with Latin American countries. Are these accordingly reflected in CETA, or will the convergence of interests of two traditionally capital-exporting states, such as Canada and the EU, determine a different recalibration of the IIR?¹³⁴

V. On Sustainable development in the CETA agreement

One preliminary characteristic of CETA is the underlying awareness of being an agreement with a dual nature - investment and trade. This is reflected in various articles,¹³⁵ among which is Article X.2 - this regulates the relation of the investment chap-

¹³² *Waleson*, *Legal Issues of Economic Integration*, 42 (Nr 2, 2015), 143 (160).

¹³³ In the EU-CARIFORM agreement, the reference is to the Cotonou Agreement, which ultimately includes the Universal Declaration via its preamble and its Article 9.

¹³⁴ *Roberts*, *AJIL*, 107 (No. 1, 2013), 45 (37).

¹³⁵ This kind of provisions reflect the “detailed approach” to drafting investment protection provisions already noted by Schill and Jacob. They had in fact remarked how the integration of trade and investment imply and “Increased sensitivity in treaty-drafting for overlap and conflicts among

ter with other chapters - Article X.5 on performance requirements – where it is clarified that it is without prejudice to WTO commitments of a party – , and Article X.11, on expropriation – where Points 5 and 6 regulate the relation with the TRIPS agreement. The dual nature of the agreement is also visible with its General Exceptions provision, which is incorporated into the agreement as a whole, leaving no dedicated provision within the investment chapter.

CETA is the first agreement, in which the EU exercises its FDI competence and thus it should give an idea of the EU's comprehensive take on FDI. While the existing document is by no means a definitive version,¹³⁶ it is not reflective of the whole of the historical EU sustainability debate. This is notably true with regard to substantive provisions, while conversely the procedural level has very interesting inputs, such as code of conduct for arbitrators, a draft on what an appellate mechanism would look like, filtering mechanisms for access to ISDS, preference for mediation and conciliation mechanisms.

However, the remarks that follow will focus on the substantive level of analysis. This is because ISDS is not a feature of FTAs, and thus, in the present exercise of tracing the EU's evolution and sedimentation of sustainability standards in FDI, there are no previous provisions with which to compare it. Having said this, if an ISDS system is put in place, whichever system it is, it will only be as good as the provisions it comes to interpret.

Regarding the “extra” sustainability debate, CETA is reflective of some provisions suggested in its midst, such as those concerns regarding investor and investment promotion (not just protection). Accordingly, CETA includes a Market Access provision, which is certainly an EU innovation and not something Canada contemplates in its Model BIT of 2004 (Canadian Model BIT).¹³⁷ Other features include the vertical exceptions to non-discriminatory treatment established while defining the scope of application. On the sustainability note, while CETA does not expressly list sustainable development or human rights or similar wordings in the vertical exception list, it has a reference to “activities carried out in the exercise of governmental authority”. Perhaps this could be an opening, in the venue of interpretation, to certain regulatory undertakings.

What can be expected in light of the FTAs focused on here, is for CETA to consolidate or perhaps make a further step in the definition of the three pillars of sustainable development (1). Those aspects where CETA would innovate on the international investment scene, at least in theory, and following the evolution of policy documents and FTAs, and with the exclusion of the reform of ISDS, can be classified in two main groups: those concerns relating to vagueness of language (2) and those features that we have here termed “ancillary” to sustainable development (3).

trade and investment and for concurrence of economic and competing non-economic concerns”. See *Schill/Jacob*, in: Sauvart, (ed), *Yearbook on international investment law and policy*, 2011-2012, 141 (145).

¹³⁶ CETA, available at: <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> (last accessed 19 February 2015).

¹³⁷ Canada Model Bilateral Investment Treaty, 2004, available at: <<http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf>> (last accessed 19 February 2015).

1. *The three pillars of sustainable development*

With regard to the economic pillar, there are no surprises. Market economy, regional integration and commitment to multilateral trade agreements are in the essence of CETA; and in fact its negotiation inheres to Europe 2020 as a way to promote smart and sustainable growth.

The environmental and social pillars are significantly developed, since the relation of trade with the environment and labour are subject to separate chapters. For the most part they follow an evolution highlighted within FTAs, whereby both pillars are progressively nailed down by explicit reference to international and multilateral commitments and covenants. It is interesting that there is a specific provision on “Rights and obligations relating to water”, specifically referred to as not being a good and thus not subject to the terms of the agreement.

Article X.16 of the draft, “Formal Requirements”, which is not present in the Canadian Model BIT, is an interesting provision with regard to transparency. It in fact establishes that national treatment and most favoured nation treatment do not prevent a party from requiring “routine information” from investors of the other party. While it is nonetheless granted that confidential information (“...*that may prejudice the competitive position of the investor...*”) may be protected, information must be disclosed “*in connection with the equitable and good faith application*” of the law.

Also with regards to the social pillar, it is noteworthy that there is no mention of indigenous peoples. While a reference to the UN Declaration would have been far-fetched, given Canada has not ratified the C169 ILO Convention, there is not even a brief reference to the protection of traditional knowledge. On the one hand this confirms the absence of an EU position on the framework of indigenous rights to be projected in its comprehensive agreements. On the other, it also confirms the declared undesirability of the one-size-fits-all approach,¹³⁸ which in this case goes in detriment of indigenous rights. Having said that, the special protection of indigenous peoples is less of an issue for the EU than it is for Canada. One can only speculate as to why there is no explicit reference to them. Notwithstanding, CETA does affirm the parties’ commitments to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, where the right to preserve the cultural identity of each party is recognized. However, much of this reference in fact addresses the cultural industry.

Finally, CETA does not include a human rights and restrictive actions clause, reaffirming the EU’s history of not including such a clause in agreements with developed countries.¹³⁹

¹³⁸ The Commission in 2010 disclaims the desirability or feasibility of a “one-size-fits-all” model and reserves the right to take the specific negotiation contexts into account on a case-by-case basis.

¹³⁹ *Bartels*, Study requested by the European Parliament’s Committee on International Trade, November 2008, 3, available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2008/406991/EXPO-INTA_ET%282008%29406991_EN.pdf (last accessed 12 May 2015).

2. *Vagueness of language*

An important and justified concern with the IIR has been its traditionally vague standards of investment protection, which historically have led to some decisions in which public interest has been sacrificed without due consideration. This is a concern that is addressed in CETA, in some instances reflecting the Canadian tradition, in others less so.

Accordingly, investor and investment are defined in more detail, although it is not clear whether the precedent debates on the “lasting interest” in the host country’s economy are entirely reflected. Certainly, ‘claims to money’ from purely commercial contracts are not included in the definition.

The non-discriminatory standard of MFN includes a feature, which can be seen as innovative if compared with previous Canadian praxis. In fact, MFN in CETA excludes not only dispute resolution provisions but also substantive obligations of other agreements. While the Canadian Model BIT makes no mention of either exclusion, in its praxis it has excluded ISDS from MFN treatment,¹⁴⁰ but not other “substantive provisions” from other agreements.

“Treatment of investors” or what is more typically known as fair and equitable treatment (FET), is shortlisted to specific behaviours and has several paragraphs of accompanying text. There does then appear to be a degree of innovation in CETA that is not preceded entirely by the Canadian praxis. In fact, the Canadian Model BIT includes three essential paragraphs, which are elaborated upon in the FTAs it has entered into. The FTA signed between Canada and Korea for instance does not use a ‘list approach’, although it does bring some clarification to FET by including the obligation “*not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process*” and generally refers to customary international law. CETA on the other hand lists a series of measures deemed contrary to FET, mostly related to fundamental substantive and procedural rights of investors,¹⁴¹ which can be updated by the parties. CETA also specifies that a tribunal may take into account “a specific representation” that created a legitimate expectation, a feature that is absent in previous Canadian practice and which is controversial with regard to its impact on regulatory sovereignty.¹⁴²

¹⁴⁰ See for instance Art. 804, 3 of the FTA between Canada and Colombia, Annex 804.1. of the FTA between Canada and Peru and finally, Article 8.4. of the FTA entered into by Canada and Korea. The latter was brought into force on 1st January 2015 and thus reflects Canada’s state of the art of MFN exclusions.

¹⁴¹ “A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes: Denial of justice in criminal, civil or administrative proceedings; Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; Manifest arbitrariness; Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; Abusive treatment of investors, such as coercion, duress and harassment; or A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.”

¹⁴² This has been criticized by civil society organizations as a hidden umbrella clause: the specific representations could be contracts, thus elevating contractual disputes to treaty disputes. See *Fuchs*, in: Sinclair/Trew/Mertins-Kirkwood (eds), Canadian Centre for Policy Alternatives, September 2014, available at: <[https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%](https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Policy%20Report%20-%202014)

Indirect expropriation is elaborated on to the point of excluding compensation when the non-discriminatory measure is in the public interest.¹⁴³ It is interesting that in CETA indirect expropriation is not the exact equivalent of a direct expropriation, insofar as it is explained that an indirect expropriation *substantially* deprives the investor of the attributes of its property. The negotiating parties of CETA have taken into account the arbitral jurisprudence on the substantive economic impact of the investment,¹⁴⁴ while a generic adverse effect does not necessarily establish that expropriation has occurred. Indirect expropriation is further pinned down by considering the duration of the measure (duration is not included in the Canadian Model BIT) and the character of the measure, which is assessed by taking into account, object, context and content thereof (a clarification that is also not present in the Canadian Model BIT).

3. *The non-lowering of standards, right to regulate and CSR*

When the Parliament and the Commission began addressing FDI and specifically sustainability concerns, two features emerged predominantly and were subsequently included in FTAs: non-lowering of standards and right to regulate. CSR tended to be encouraged, which is reflected in the most recent FTAs analysed in the present contribution.

In the present-day understanding, the right to regulate has emerged as “an underlying principle” for the EU’s approach to investment. This characterization as an underlying principle though, follows the public consultation on the TTIP. Notwithstanding, the right to regulate belongs to the historical EU narrative on FDI and sustainability, since the MPI of 2006.

Now, it is interesting and surprising to note that in fact the right to regulate receives no mention in the CETA investment chapter. This is unthinkable in light of the TTIP debate, and is also puzzling in light of the previous policy documents and commitments of the EU. Sure enough, a recital on the right to regulate is included in the CETA preamble, and subsequently the right to regulate is included in chapters on *trade* and the environment and *trade* and labour; yet given that the concern emerged predominantly with regard to investments, it is impossible to see why the right to regulate was not included in the investment chapter.

Because the right to regulate was not mentioned in the investment chapter, recourse to it can be made only via the preamble of the agreement. This makes it a secondary tool of interpretation in light of the Vienna Convention on the interpretation

20Office/2014/09/making_sense_of_the_ceta_INVESTMENT_0.pdf> (last accessed 19 February 2015).

¹⁴³ Although with the caveat: “*except in the rare circumstance where the impact of the measure or series of measures is so severe in the light of its purpose that it appears manifestly excessive*” (Annex X.11.3). One could debate on the extent to which this language is clarifying.

¹⁴⁴ *Tietjel Baetens*, The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership of 24 June 2014, available at: <<http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.html>> (last accessed 19 February 2015), 54 ff.

of treaties.¹⁴⁵ Eventually, trade in services could bring the right to regulate to the forefront through establishment or Mode 3, but this certainly falls short of the expectations that the discussion on the right to regulate in the framework of the IIR have generated, even before the TTIP debate. However, the possibility of adopting prudential regulation is admitted, which is an innovative feature if one looks at the preceding EU FTAs with Latin American countries, though it is a feature of the Canadian Model BIT nonetheless.¹⁴⁶

The same can be said of non-lowering of standards, also a clause historically proposed and discussed by the Parliament and the Commission when addressing the social and environmental concerns that emerge with the IIR. Such a clause is not included in the CETA investment chapter. Non-lowering of standard clauses, however, are included in the chapters on trade and the environment and trade and labour. They are also not limited to trade as they mention the inappropriateness of encouraging trade *or* investment, by lowering standards. While its position in the corpus of the agreement does not make this specification irrelevant, one cannot but wonder why non-lowering of standards has not been specifically addressed in the investment chapter.

Furthermore, on the non-lowering of standards, the provision on performance requirements could have been a window of opportunity for sustainability, at least considering the Canadian Model BIT. In fact, its Article 7.2 contains a relevant clarification, which CETA failed to include, in terms of pointing out that measures requiring an investment to use a certain technology in order to meet generally applicable health, safety or environmental requirements, shall not be construed as to be inconsistent with the exclusion of performance requirements in certain areas.

The encouragement of CSR follows this same fact pattern: it is included in the preamble of the agreement and in two chapters (trade and sustainable development and trade and environment), but not in the investment chapter. Again, given the heated debate on the responsibility of investors, and given that CSR is still only encouraged and not drafted in strong legal language, it was clumsy of negotiators not to mention it with specific regard to investment.¹⁴⁷

In the same line of argument, it is noteworthy that there is a chapter for trade and sustainable development, but not one for investment and sustainable development. The former reflects a settled tradition of the EU in its FTAs, while Canada traditionally includes a chapter on trade and the environment and trade and labour, which are included in CETA.

These shortcomings, which essentially put aside two important features (the non-lowering of standards and right to regulate) of the MPI, could be explained in several ways. One first explanation would be that having an equal, developed trading partner

¹⁴⁵ United Nations, Vienna convention on the law of treaties, Article 31, available at: <<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>> (last accessed 19 February 2015).

¹⁴⁶ Article 10.2, General Exceptions.

¹⁴⁷ Although it has been argued that the reference to internationally recognized standards and principles of CSR, excluding the word “voluntary”, would imply a more binding understanding of CSR. See *Waleson*, *Legal Issues of Economic Integration*, 42 (Nr 2, 2015), 143 (164).

in Canada, the EU did not feel the need to stress provisions that address concerns that at turn emerge predominantly with capital importing states. A double standard of sorts, where more is expected of developing countries, as a means to bind their international responsibility in face of presumably less committed governments. Perhaps a more convincing explanation is tied to the remark already made on the investment chapter being short of reflecting the entire EU debate on sustainability. Where the EU did have an established and implemented tradition, i.e. trade and sustainability aspects of trade, it was reflected in CETA. Conversely, despite the debate that has preceded the exercise of the new EU FDI competence, the EU has no established framework of reference. While this does not justify such vacuums in CETA, especially in light of the policy consensus that was already established on some features, it might explain them. Hence, the present draft of CETA is not a ripe expression of the EU's approach to sustainability in the IIR. This appears all the more evident in light of the on-going debate about the TTIP.

CETA <i>Agreement currently under legal review</i> ¹⁴⁸	
SUSTAINABLE DEVELOPMENT	<p>ECONOMIC PILLAR Market Economy Economic liberalization Regional integration Transfer of technology</p> <p>PREAMBLE</p> <p>“DESIRE to further strengthen their close economic relationship and build on their respective rights and obligations under the <i>Marrakesh Agreement</i> Establishing the World Trade Organization and other multilateral and bilateral instruments of cooperation;”</p> <p>“RECOGNIZING the strong link between innovation and trade, and the importance of innovation to future economic growth, Canada and the European Union affirm their <u>commitment to encourage the expansion of cooperation in the area of innovation, as well as the related areas of research and development, and science and technology...</u>”</p> <p>29. DIALOGUES AND BILATERAL COOPERATION ARTICLE X.03: BILATERAL COOPERATION ON BIOTECHNOLOGY... ARTICLE X.06: ENHANCED COOPERATION ON SCIENCE, TECHNOLOGY, RESEARCH AND INNOVATION... “1. The Parties acknowledge the interdependence of science, technology, research and innovation, and international trade and investment in increasing industrial competitiveness and social and economic prosperity.”</p>
	<p>ENVIRONMENTAL PILLAR Prevention/reduction of Pollution Sustainable consumption and production</p> <p>SECTION B – INITIAL PROVISIONS ARTICLE X.08: RIGHTS AND OBLIGATIONS RELATING TO WATER “1. The Parties recognize that water in its natural state, such as water in lakes, rivers, reservoirs, aquifers and water basins, is not a good or a product and therefore, except for Chapter XX – Trade and Environment and Chapter XX – Sustainable Development, is not subject to the terms of this Agreement. ...”</p> <p>POINT 10, SECTION 2 X.4 MARKET ACCESS [allowed market access restrictions] “Measures seeking to <u>ensure the conservation and protection of natural resources on the environment</u>, including limitations on the availability, number and scope of concessions granted, and the imposition of moratoria or bans”.</p> <p>CHAPTER XX: TRADE AND ENVIRONMENT ARTICLE X.1: CONTEXT AND OBJECTIVES The Parties recognize that the environment is a fundamental pillar of sustainable development and the contribution that trade could make to sustainable development. They stress that enhanced cooperation between the Parties to protect and conserve the environment brings benefits which will promote sustainable development, strengthen the environmental governance of the Parties, <u>build on international environmental agreements to which they are party</u> and complement the objectives of the CETA.</p> <p>ARTICLE 3: CO-OPERATION AND PROMOTION OF TRADE SUPPORTING SUSTAINABLE DEVELOPMENT “2. The Parties affirm that trade should promote sustainable development. Accordingly,..., each Party shall strive to promote trade and economic flows and practices that contribute to enhancing decent work and environmental protection, including by: Encouraging the <u>integration of sustainability considerations in private and public consumption decisions</u>; and Promoting the development, establishment, maintenance or improvement of <u>environmental performance goals and standards</u>.”</p> <p>ARTICLE X.9: TRADE FAVOURING ENVIRONMENT PROTECTION “The Parties are resolved to make efforts to <u>facilitate and promote trade and</u></p>

¹⁴⁸ See <http://ec.europa.eu/trade/policy/in-focus/ceta/> (last accessed 19 February 2015).

		<p><i>investment in environmental goods and services...</i> 2. The Parties shall, consistent with their international obligations, pay special attention to facilitating the removal of obstacles to trade or investment concerning goods and services of particular relevance for climate change mitigation in particular renewable energy goods and related services.”</p>
	<p>SOCIAL PILLAR</p> <p>Human rights and restrictive action Clause Democracy Social development Fundamental rights Participation of civil society</p>	<p>PREAMBLE “RECOGNIZING the importance of international security, <i>democracy, human rights</i> and the <i>rule of law</i> for the development of international trade and economic cooperation; ... REAFFIRMING their strong attachment to democracy and to fundamental rights as laid down in the <i>Universal Declaration of Human Rights...</i>”</p> <p>CHAPTER ON TRADE AND SUSTAINABLE DEVELOPMENT ARTICLE 5: CIVIL SOCIETY FORUM “1. The Parties shall facilitate a <i>joint Civil Society Forum</i> comprising representatives of civil society organisations established in their territories, including participants in the domestic consultative mechanisms referred to in Article 8.3 of Chapter ... (Trade and Labour) and in Article X.13 of Chapter ... (Trade and Environment), in order to conduct a <i>dialogue encompassing sustainable development aspects of this Agreement.</i>”</p> <p>CHAPTER X+1 TRADE AND LABOUR ARTICLE 3: MULTILATERAL LABOUR STANDARDS AND AGREEMENTS “1. Each Party shall ensure that its labour law and practices embody and provide protection for the fundamental principles and rights at work, and reaffirm its commitment to respecting, promoting and realising such principles and rights in accordance with its <i>obligations as member of the ILO and its commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up</i>, adopted by the International Labour Conference at its 86th Session in 1998. (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.”</p>
<p>ANCILLARY TO SUSTAINABLE DEVELOPMENT</p>	<p>NON-LOWERING-OF-STANDARDS CLAUSE</p>	<p>CHAPTER XX TRADE AND ENVIRONMENT ARTICLE X.5: UPHOLDING LEVELS OF PROTECTION The Parties recognize that it is <i>inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in domestic environmental laws</i>. A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental laws as an encouragement for trade or investment. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws, as an encouragement for trade or the establishment, acquisition, expansion or retention of an investment of an investor in its territory.</p> <p>CHAPTER X+1 TRADE AND LABOUR ARTICLE 4: UPHOLDING LEVELS OF PROTECTION 1. The <i>Parties recognise that it is inappropriate to encourage trade or investment by lowering the levels of protection embodied in domestic labour law and standards.</i> 2. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour law, as an encouragement for trade or the establishment, acquisition, expansion or retention of an investment or an investor in its territory.</p>

EXCEPTIONS/CARVE OUTS	<p>SECTION B – INITIAL PROVISIONS ARTICLE X.08: RIGHTS AND OBLIGATIONS RELATING TO WATER “1. The Parties recognize that <i>water</i> in its natural state, such as water in lakes, rivers, reservoirs, aquifers and water basins, is <i>not a good or a product</i> and therefore, except for Chapter XX – Trade and Environment and Chapter XX – Sustainable Development, is <i>not subject to the terms of this Agreement...</i>”</p> <p>Point 32 EXCEPTIONS ARTICLE X.02: GENERAL EXCEPTIONS “1. For the purposes of Chapters X through Y and Chapter Z ..., <i>GATT 1994 Article XX is incorporated</i> into and made part of this Agreement. ... 2. For the purposes of Chapters X, Y, and Z ..., a Party may adopt or enforce a measure necessary: (a) to protect public security or public morals or to maintain public order (x); (b) to protect human, animal or plant life or health; (c) to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter ...”;</p> <p>ARTICLE X.05: NATIONAL SECURITY “This Agreement does not... prevent a Party from taking an action that it considers necessary to protect its essential security interests: to prevent a Party from taking any action in order to carry out its international obligations for the purpose of maintaining international peace and security”.</p>
RIGHT TO REGULATE	<p><u>PREAMBLE</u> RECOGNIZING that the provisions of this Agreement preserve the <i>right to regulate</i> within their territories and resolving to <i>preserve their flexibility to achieve legitimate policy objectives</i>, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity; a</p> <p>SECTION B – INITIAL PROVISIONS ARTICLE X.08: RIGHTS AND OBLIGATIONS RELATING TO WATER “2. Each Party has the <i>right to protect and preserve its natural water resources</i> and nothing in this Agreement obliges a Party to permit the commercial use of water for any purpose, including its withdrawal, extraction or diversion for export in bulk.”</p> <p>CHAPTER X+1: TRADE AND LABOUR ARTICLE 2: RIGHT TO REGULATE AND LEVELS OF PROTECTION “Recognising the <i>right of each Party to set its labour priorities, to establish its levels of labour protection and to adopt or modify its relevant laws and policies</i> accordingly in a manner compatible with its international labour commitments, including those in this Chapter, each Party shall strive to continue to improve those laws and policies with the goal of providing high levels of labour protection.”</p> <p>CHAPTER XX TRADE AND ENVIRONMENT ARTICLE X.4: RIGHT TO REGULATE AND LEVELS OF PROTECTION “Recognizing the <i>right of each Party to set its own environmental priorities, to establish its own domestic levels of environmental protection, and to adopt or modify its relevant laws and policies</i> accordingly in a manner consistent with the multi-lateral environmental agreements to which they are a party and with this Agreement, each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental protection and shall strive to continue to improve those laws and policies and their underlying levels of protection.”</p>

	CSR	<p><u>PREAMBLE</u> “<i>ENCOURAGE</i> enterprises operating within their territory or subject to their jurisdiction to respect internationally recognized standards and <i>principles of corporate social responsibility</i>, notably the OECD Guidelines for multinational enterprises and to pursue best practices of responsible business conduct;...”</p> <p>CHAPTER XX: TRADE AND SUSTAINABLE DEVELOPMENT ARTICLE 3: CO-OPERATION AND PROMOTION OF TRADE SUPPORTING SUSTAINABLE DEVELOPMENT “... <i>Encouraging</i> voluntary <i>best practices of corporate social responsibility by enterprises</i>, such as those embodied in the OECD Guidelines for Multilateral Enterprises,...”</p>
	REVIEW OF IMPLEMENTATION	<p>CHAPTER XX: TRADE AND SUSTAINABLE DEVELOPMENT ARTICLE 3: CO-OPERATION AND PROMOTION OF TRADE SUPPORTING SUSTAINABLE DEVELOPMENT “The Parties recognise the importance of <i>addressing specific sustainable development issues by assessing the potential economic, social and environmental impacts of possible actions</i>, taking account of the views of stakeholders. Therefore, to identify any need for action that may arise in connection with this Agreement, each Party commits to <i>review, monitor and assess the impact of the implementation of this Agreement</i> on sustainable development in its territory. The Parties may agree to carry out joint assessments. ...”</p>
	PRUDENTIAL REGULATION	<p>15. FINANCIAL SERVICES. ARTICLE 15: PRUDENTIAL CARVE-OUT “<i>Nothing in this Agreement shall prevent a Party from adopting or maintaining reasonable measures for prudential reasons</i>, including: ...”</p>

VI. Conclusions

Most of the backlash against the current IIR is directly related to the perception of omnipotent and obscure arbitral tribunals, which would give greater weight to investor rights than to State regulatory prerogatives, thus encroaching on a State’s ability to regulate in the public interest. While the truth of this perception is debatable,¹⁴⁹ the issue of interpretation and consistency of interpretation in face of vague standards of protection is a real one. It is perhaps not arbitration that is the bigger evil, but rather the quality of the text subject to interpretation. This is also why, together with the proposal to reform ISDS, the other important part of the discussion on the reform of the IIR gravitates around recalibrating substantive provisions.

The EU engages with this recalibration when addressing sustainable development in its approach to FDI. This engagement is reflected in its FTAs. The Latin American FTAs analysed in the present contribution tend to progressively include the EU’s developments with regards to FDI and sustainable development, notwithstanding that FTAs are not investment agreements to begin with. One would presume then, that the settled practice of these FTAs, with regards to sustainability concerns within FDI, would be reflected in CETA. This is not exactly the case.

While the issue of vagueness of traditional protection provisions is extensively addressed in CETA, with their reformulation, CETA’s investment chapter lacks those

¹⁴⁹ *Tietjel Baetens*, The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership, of 24 June 2014, available at: <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-ids-in-the-ttip.html> (last accessed 19 February 2015), 54 ff.

ancillary features EU bodies promoted in the beginning. It is true that the right to regulate, the non-lowering of standards and CSR are included in CETA's preamble, thus permeating its investment chapter. However, the fact that they are not included in the investment chapter diminishes not only their symbolic status but also their weight, and thus the counterbalancing role they could play in the face of investor-protective provisions. More importantly, this highlights an overall shortcoming of the EU's CIP.

In fact, while the TTIP negotiations are putting to the test the achievements of CETA, and thus of any consolidation of the EU CIP CETA would represent, the EU has failed to reflect in CETA the consistent evolution on sustainable development reflected in its FTAs and internal policy. This is troubling insofar as ancillary provisions in FTAs with Latin America were included *because* of concerns related to investment.

Overwhelmed with the task of creating its CIP, the EU seems to forget it has already taken a stance on what would be a 'minimum platform' for it. This minimum platform tackled substantive issues, which, perhaps more than other features proposed to reform ISDS, are essential to the improvement of the IIR. One cannot think of a coherent and convincing reason for the EU to promote a sustainability agenda in policy documents and in relations with the developing world, as the FTAs with Latin America have highlighted, and then omit important aspects of them with Canada.

The current debate promoted by civil society with regard to the TTIP negotiations shows how sustainability issues in investment law cannot be reduced to tokens and must be coherently assessed and addressed. The EU is thus being forced to bring its sustainable development policy to the fore, very much repeating its history of developing its approach to sustainable development when triggered by external events. In this case, the outstanding public opinion mobilization with TTIP. Further debates on CETA and the TTIP will show whether or not the EU will finally address sustainable development as an overarching objective and thus take a global lead on the operationalization of sustainable development in the IIR.

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