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Social Clauses and Trade Agreements – a Virtuous Convention or a Hidden Protectionist Measure?

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Ai miei fratelli, Ricardo e Giancarlo,
per avermi instillato il seme della curiosità
spronandomi a non accontentarmi mai
delle apparenze e a ricercare
sempre l'altra faccia della medaglia.

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Introduction

How many times, throughout our life time, have we heard elder people saying “In my day things were very different”? Well, nowadays this way of saying isn’t anymore a domain of elder people as one can easily hear, issuing from the mouth of a person born in the 1990s, those exact words. This to say that, in the last twenty years, the speed at which things change around us has increased at an exponential rate; everything becomes obsolete in the blink of an eye and the pace at which we have to go to keep up is getting higher and higher every day. But what is there, underneath it all? In one word, Globalization.

Significant advancements in technology, communication, transportation and physical materials have led to a world that is always more integrated; despite countries still preserve some of their cultural and folkloristic aspects, which are deeply rooted in their society, we are acquiring more and more worldwide common aspects. Without the risk of exaggerating, it could be said that we all have similar tastes, we all use similar goods and benefit from similar services; for instance, it wouldn’t be strange if I went out and found myself dressed exactly like a 25 years old Chinese young lady, something that would have been highly unthinkable just twenty years ago. To make a point, what allows me and anyone else, in most of the globalized countries of the world, to be able to attain from the same basket of goods? The falling of the world barriers, consequence of globalization, and fostered by trade liberalization. One only need to think that, while in 1960 trade represented 25% of world GDP, in 2015 it represented 57,9% of world GDP and even higher peaks have been reached in 2008 when trade accounted for about 61% of world GDP; this means that, in monetary terms, of all goods and services produced by the world economic system, trade represented \$341 billion in 1960, \$42 trillion in 2015 and \$38 trillion in 2008, with an impressive growth of 32,9% in the last 50 years¹.

In a world were trade gradually assumed such an important role, the urge for nations to ally in order to guarantee each other preferential trade conditions has increased at the same pace at which trade grew; and, as it happens for every phenomenon that becomes relevant at a

¹ Source: World Bank

global level, the need for an international structure to regulate it started to build up. The first attempt to create such a structure for trade occurred in 1947 when the International Conference on Trade and Employment drew up the Havana Charter for the constitution of the International Trade Organization (ITO); negotiations eventually failed, due to the opposition of the United States, and it wasn't until 1994 that the first international governmental organization responsible for regulating international trade, that goes under the name of World Trade Organization (WTO), was created. Yet, in the meantime, despite the absence of an international organization that supported them, international trade agreements started to proliferate; no matter which were the countries with which the deal was made, the common aim was to promote imports and exports among the Parties involved. This goal can be achieved in two ways:

1. By eliminating tariffs, which are taxes imposed on imported and exported goods and services;
2. By eliminating Non-Tariff Barriers (NTBs), which are a form to restrict trade using mechanisms other than the imposition of tariffs (i.e.: quotas, embargoes, subsidies, and suchlike).

In such a delicate context, in which issues can easily arise due to state's tendency to pursue their own economical advantage even at the expense of other parties involved, the introduction of WTO certainly helped both in drawing up trade agreements in an equitable and beneficial way, and in trying to settle disputes that might arise throughout the duration of the agreement. Yet one important aspect has been overlooked by WTO: the protection of social rights; this has been completely left in the hands of the International Labour Organization (ILO) as stated during the 1996 WTO Ministerial Meeting in Singapore:

“We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them.”²

² WT/MIN (96)/DEC, Singapore, 18 December 1996.

Consulted at <https://www.wto.org/english/thewto_e/minist_e/min96_e/singapore_declaration96_e.pdf>

In fact, one of the major aftermaths of globalization has been the regulatory vacuum created by the inability of international organizations to substitute for states in guaranteeing social rights as firms started to assume a new organizational architecture and Transnational Corporations (TNCs) started to proliferate. The core of the problem was that, as globalization took hold, improved means of communication and lower transportation costs allowed companies to destructure their value chain and relocate parts of it in foreign countries, where they could pursue price advantages in order to lower the final price of their products and become more competitive; while TNCs, following the same approach, located or relocated their subsidiaries in different countries depending on which offered the best conditions in order for them to gain the highest competitive advantage they could get. The issues don't lie much within these phenomena but with the consequences they brought; on one side, for host countries willing to attract Foreign Direct Investments (FDIs) this situation has triggered a deregulation process at the expense of the labour force's conditions, on the other side, the lowering of products' prices, due to much lower labour costs achieved in foreign countries, caused an unfair competition with competing products produced in home country. In this context, the role of social clauses integrated in trade agreements, gained paramount importance.

Through this dissertation I will then strive to frame properly, in relation to the issues aforementioned, what is the ongoing situation on both host and domestic countries, and to understand what are internationally recognized institutions doing in order to address these problems. All this to achieve the final objective, which is, to understand whether social clauses can be singled out as a protectionist measure applied by developed countries in order to undermine developing countries' comparative advantage, or whether they are actually a virtuous convention which has the only aim of protecting social rights by guaranteeing at least minimum standards for decent living and decent working conditions to all human beings, despite of what is deemed socially acceptable by their home country. In doing this I will, first of all, thoroughly analyse what are the main issues of a global labour market, what characterizes the mechanisms on which I am questioning myself, namely, trade agreements and social clauses, why should social clause be included in trade agreements, and what are the claims of proponents and opponents of the integration of social clauses within trade agreements. Secondly, I will analyse three case studies, for which the introduction of social

clauses (or similar mechanisms) in trade agreements have represented, for different reasons, an important part of the overall agreement; this will help me gather quantitative data, as well as pragmatic evidences, on what have been/would be the effects of integrating social clauses in trade agreements, in order to sustain my case.

1. The use of social clauses in trade agreements

1.1 Issues of a global labour market

Globalization has characterized the past three decades with a process that has been depicted by Raymond Vernon as the “shrinking of space”³: a reduction of physical distances due to technological revolution, followed by the elimination of barriers to movement of people and goods, of capital and resources, of knowledge and data. While there is no universally agreed definition, the term has been defined by the Governing Body of the ILO “as a process of rapid economic integration among countries driven by the liberalization of trade, investment and capital flows as well as rapid technological change.”⁴ The great influence that globalization process has had in the world economy can be depicted by the fact that today’s world GDP is highly influenced by international trade; in fact the average share of exports and imports of goods and commercial services in world GDP increased significantly from 20 percent in 1995 to 30 percent in 2014 (in value terms) as we can see from *tab. 1*⁵.

The direct consequence of the lifting of trade barriers, technological advances and continually falling transportation and communication costs has been an increasingly fierce competition which became even harsher with the homogenization of consumers’ preferences, products standards and production methods. This particular economic environment has revealed itself exceptionally favourable for the expansion of Transnational Corporations (TNCs) which are among the world's biggest economic institutions. An analysis⁶ of over 43,000 TNCs has identified a relatively small group of companies, with disproportionate power over the global economy; of those companies, there was a core of 1,318 companies with interlocking ownership which represent around 60% of global revenues by collectively owning through,

³ Vernon R., "Storm Over the Multinationals: The Real Issues", Cambridge, Massachusetts: Harvard University Press, 1977.

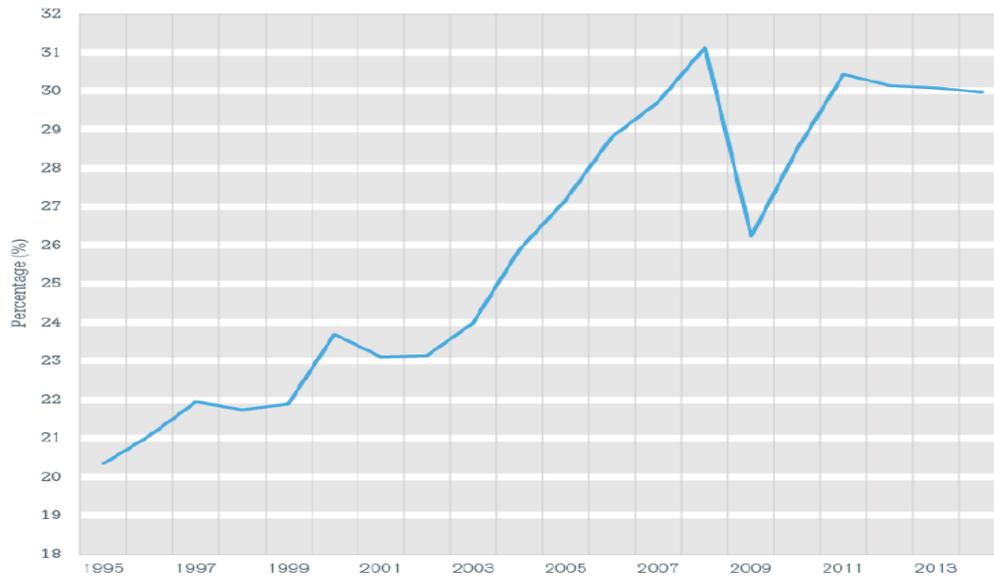
⁴ GB.276/WP/SDL/1, 276th session, Geneva, November 1999.
Consulted at <<http://www.ilo.org/public/english/standards/relm/gb/docs/gb276/sdl-1.htm>>

⁵ WTO International Trade Statistics, 2015.
Consulted at <https://www.wto.org/english/res_e/statis_e/its2015_e/its2015_e.pdf>

⁶ "The network of global corporate control", Swiss Federal Technology Institute, 2011, table S1, p.33.
Consulted at <http://arxiv.org/PS_cache/arxiv/pdf/1107/1107.5728v2.pdf>

their shares, the majority of the world’s large blue chip and manufacturing firms. Moreover, about 147 of those firms (roughly 1%) were described as “super entities” that control 40 percent of the total wealth in the network, and the most staggering fact is that of the 100 largest economies in the world, 51 are corporations and only 49 are countries (based on a comparison of corporate sales and country GDPs).

Table 1: Ratio of trade in goods and commercial services to GDP 1995 - 2014.



Source: WTO International Trade Statistics, 2015

Note: Trade to GDP ratio is estimated as total trade of goods and commercial services under BPM5 (exports + imports, balance of payments basis) divided by GDP, which is measured in nominal terms and with market exchange rates.

An important feature of TNCs is that, due to their particular configuration, they can shift production where markets and costs advantages are more favourable; in fact, different parts of a TNC’s production process can be performed by subsidiaries and subcontractors in different countries. The combination of flexible production processes, economic strength, possible technological spillover and potential for employment generation, typical of TNCs, has resulted in a worldwide regulatory competition that is, the implementation of ad-hoc regulations with the aim of attracting assets that are looking for the most convenient location to install their productive infrastructure; the grave fact connected to this practice is that, in doing so, legislators act as economic operators instead of having as regulatory aim the wellbeing of the citizens. This phenomenon, also known as *regulatory dumping* has led TNCs to practice what has been later defined as *law shopping*, which is the act of looking for the

most favourable country where to install ones' productive infrastructure based on the country's regulatory system. A direct consequence of these phenomenon has been the rapid expansion of Export Processing Zones (EPZs) defined by ILO as "industrial zones with special incentives set up to attract foreign investors, in which imported materials undergo some degree of processing before being exported again"⁷. Even though these particular kind of zones have existed since 1929 (when the Free Zone Consortium of Cadiz was founded), the massive expansion of these free zones is clearly connected to the proliferation of TNCs in the mid-1990s as we can see in *tab. 2*.

Table 2: Estimates of the development of Exporting Processing Zones

Years	1975	1986	1997	2002	2006
Number of countries with EPZs	25	47	93	116	130
Number of EPZs or similar types of zones	79	176	845	3000	3500
Employment (millions)	n.a.	n.a.	22,5	43	66
- of which China	n.a.	n.a.	18	30	40
- of which countries with figures available	0,8	1,9	4,5	13	26

*Source: ILO database on export processing zones (Revised), Jean-Pierre Singa Boyenge, 2007*⁸

In origin, the purpose of these special zones was to allow enterprises to import materials for processing in a specific country without having to pay any duty, as the final product would have finally been re-exported. This is still the case today, yet significant issues added up to this initial purpose as globalization got a foothold; in order to attract TNCs' investments in their own territory, many countries, especially underdeveloped ones, apart from EPZs' natural benefits, such as tax exemption and particularly favourable business regulations, added incentives to companies that decided to establish in their EPZs, amongst which the most notable were the guarantees of local cheap and compliant labour and a union – free environment. Even though, in most countries, this practices are not openly declared, in some countries the exploitation of workers in EPZs is supported by a special legislation that restricts

⁷ Consulted at <http://www.ilo.org/actrav/areas/WCMS_DOC_ATR_ARE_EPZ_EN/lang--en/index.htm>

⁸ Consulted at <http://staging.ilo.org/public/libdoc/ilo/2007/107B09_80_engl.pdf>

freedom of association, collective bargaining and the right to strike. For instance, we can recall the case of South Korea where the right to form unions and bargain collectively in its EPZs was legally restricted until the advent of democratization in 1987; and even though restrictions were lifted in those years, this lasted only until 1989 when the government re-imposed restrictions on strikes by ruling that EPZ firms are public interests' companies, which effectively restricts the right to strike and requires mandatory arbitration in most cases.⁹ The EPZs' case is a clear example of one of the most notably worst effects of globalization: *social dumping* which has been defined as “any practice pursued by an enterprise that deliberately violates or circumvents legislation in the social field or takes advantage of differentials in practice and/or legislation in the social field in order to gain an economic advantage, notably in terms of competitiveness, the state also playing a determinant role in this process.”¹⁰ This, apart from being a deplorable practice, is often a clear violation of ILO's core labour principles defined in the 1998 *Declaration on fundamental principles and rights at work*, as most of the States involved in these practices are also ILO member states.¹¹

Going to the core of the problem, we can understand that the fundamental issue connected to the de-territorialisation of economic activities implemented by companies worldwide, is the *denationalization* and *deconstruction* of labour law's judicial systems. As Renner asserts: “current state of international political institutions is rather deplorable, especially when it comes to regulating global economy”¹²; in fact, many are the states that, in searching for greater competitiveness, are devaluating national social policies, for instance, by restricting social rights or by putting into act *sweatshop*¹³ strategies. A great contribution for the

⁹ “Workers' Rights in Export Processing Zones”, US Department of Labour Bureau of International Labour Affairs, 1990.

¹⁰ Vaughan-Whitehead D., “EU Enlargement versus Social Europe? The Uncertain Future of the European Social Model”, Edward Elgar, Cheltenham, 2003.

¹¹ During the 86th session of the International Labour Conference on 2-18 June 1998 the Convention has been declared mandatory for all member States without the need to ratify it: “[...] Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, [...]”
Consulted at < <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm>>

¹² Renner M., “Death by complexity - The financial crisis and the crisis of law in world society” in “The financial crisis in constitutional perspective - the dark side of functional differentiation” Kjaer P., Teubner G., Febbrajo A., Oxford: Hart, 2011.

expansion of this phenomenon has been given by WTO's founding charter¹⁴ which has greatly facilitated the access to developed countries' markets especially by underdeveloped countries by either eliminating or reducing commercial barriers to trade, opening the way to and unregulated competition between first and third world countries in which the one who mostly pay the costs is the labour force, submitted to deteriorated social standards.

Summing up, the social concerns linked to competition arising from deregulation consequently to the global process of trade and investment liberalization are:

- alarming levels of social dumping
- sharp increase in social inequality
- growing income inequality
- emergence of new areas of poverty in the advanced countries¹⁵

These issues of major importance must be tackled by governments who should enforce regulation in order to protect workers and their representatives; amongst others, two possible solutions seem the most viable way to do so: (1) regulative interdependence and (2) inter-crossed regulation¹⁶.

1. For what concerns the perspective of a regulatory interdependence, the aim is to conceive a common regulation space between interconnected states in order to obtain an ideal level playing field (also referred to as "luck egalitarianism") by which, all economic players, despite having different chances to succeed, are still granted to play by the same set of rules:

"When luck egalitarianism is fully satisfied, the only inequalities that are acceptable are such that those who get the short end of the stick could have become as well off as anyone else by pursuing a course of action it would have been reasonable for them to take and not impossible for them to take and not so difficult to pursue that it would be unreasonable to hold them responsible for not pursuing it."¹⁷

¹³ "A factory or workshop, especially in the clothing industry, where manual workers are employed at very low wages for long hours and under poor conditions", Oxford Dictionaries, 2016.

¹⁴ Consulted at <https://www.wto.org/english/docs_e/legal_e/legal_e.htm#finalact>

¹⁵ Perulli A., "Sustainability, Social Rights and International Trade: the TTIP", International Journal of Comparative Labour Law and Industrial Relations, vol. 32., pp. 473-495, 2015.

¹⁶ Brino V., Perulli A., "Manuale di diritto internazionale del lavoro", Torino, G. Giappichelli Editore, Vol. 1, 2015.

The final outcome would be a system of connecting regimes in which different regulatory bodies are horizontally connected in order to assure a global regulation of supranational legal sources.

2. With inter-crossed regulation or co-regulation, states could establish a regulative model which overcomes the dichotomies of the traditional legal orders in favour of a more advanced juridical pluralism. The means through which this could be achieved is the combination of both *hard* and *soft law* together with the aim of integrating the existing different levels of regulation: national, international, supranational and transnational.

The regulating mechanisms identified in order to succeed in this intent could be:

- 1) traditional regulation, conducted by public authorities and connected to a sanctioning system;
- 2) mechanisms of economic regulation, concerning market conditions, and their regulation, connected to either positive or negative sanctions responsible for influencing actors' behaviours;
- 3) mechanisms of auto-regulation, by which private association independently regulate the behaviours of their members towards internationally recognized socially responsible behaviours;
- 4) voluntarism of single private subjects that decide to behave in a socially responsible manner, despite the absence of sanctions;
- 5) regulation through information devices, such as training and education programs, publication of reports by internationally recognized agencies, products certification, and suchlike.¹⁸

In the following chapters we will focus in particular on the mechanisms of economic regulation that have been initiated worldwide, paying particular attention to the ways in which these systems of regulation have been implemented and which are the competent bodies designated to monitor and address the process.

¹⁷ Arneson R., "Equality of Opportunity", The Stanford Encyclopaedia of Philosophy, 2015.

¹⁸ Brino V., Perulli A., "Manuale di diritto internazionale del lavoro", Torino, G. Giappichelli Editore, Vol. 1, 2015.

1.2 What are trade agreements?

In the last years before the end of World War II, countries were striving to find new solutions in order to reform the world trading system in a durable way; in fact, the war's aftermaths highlighted the urgent need for new practices and higher standards that would have guaranteed each country's ability to maintain its exports, to be able to compete internationally, to preserve its exchange rate while fulfilling its employment obligations; this especially in order to avoid another war. From 1 – 22 of July 1944, 730 delegates from the 44 allied Nations met in Bretton Woods for the United Nations Monetary and Financial Conference, with the aim of regulating the international and financial order that had been undermined during the war years. The agreements taken during the conference led to the creation of the International Bank for Reconstruction and Development (IBRD) and the International Monetary Fund (IMF); alongside with these the creation of a third international organization with the responsibility of regulating trade was discussed. So, at the proposal of the United States, the United Nations Economic and Social Committee commenced the preparatory work in order to draft a charter for an International Trade Organization (ITO), an organization with broad regulatory powers with special responsibility for the regulation of trade. The Preparatory Committee of the ITO met for the first time in London between October and November 1946 and work was continued from April to November 1947. An essential part of the preparatory work of the ITO has been negotiated in Geneva in 1947; a complex set of rules was discussed in order to adjudicate disputes, and a mechanism for constructing a system that was both rules-driven and sensitive to outcomes was defined. These negotiations led to the international agreement known as General Agreement on Tariffs and Trade (GATT), which application was signed by the first eight countries on 30 October 1947 and which was, as we'll recall later, the only thing that remained from this period of negotiations.

With a resolution dated, February 18, 1946, the Economic and Social Council of the United Nations, resolved to call an International Conference on Trade and Employment for the purpose of promoting the expansion of the production, exchange and consumption of goods.¹⁹ The Conference, which met at Havana on November 21, 1947, drew up the Havana Charter

¹⁹ From the "Final act and related documents" related to the United Nations conference on trade and employment held at Havana, Cuba, from November 21 1947 to March 24 1948. Consulted at < https://www.wto.org/english/docs_e/legal_e/havana_e.pdf>

for an International Trade Organization to be submitted to the Governments represented. On March 24, 1948 the final text had been signed by 53 countries but ratification in some national legislatures proved impossible. The most serious opposition was in the US Congress; the most usual argument against the new organization was that it would be involved into internal economic issues. In 1950, the United States government announced that it would not seek Congressional ratification of the Havana Charter, and at that point the ITO was declared officially dead.

In the absence of an international organization for trade, countries turned, from the early 1950s, to the only existing international institution for trade, the GATT, to handle problems concerning their trade relations. Even though it was contemplated that the GATT would have been applied for several years until the ITO came into force, since the ITO was never brought into being, the GATT gradually became the cornerstone for international governmental cooperation on trade matters. It was only in 1994, at its eighth round of negotiations, that GATT was replaced by the World Trade Organization (WTO), the first international governmental organization responsible of regulating international trade. Despite not having an international body which helped negotiating global trade agreements, enforcing them and responding to complaints, such is the WTO, a great number of trade agreements have been stipulated both before and after the foundation of WTO.

There are basically three types of trade agreements:

- (1) Unilateral trade agreements: one country reduces its import restrictions without any formal agreement for reciprocity from its trade partners; in other words, is an agreement that is imposed on one nation by another, and benefits one nation only. With this kind of agreement one country on its own decides to lower tariffs, make international investment easier, lower taxes, reform its border customs in an attempt to attract foreign capital.
- (2) Bilateral trade agreements: “an agreement between two countries setting out the conditions under which trade between them will be conducted. If both parties are already WTO members enjoying the attendant non-discrimination, market access and other benefits, the main additional reason for a bilateral agreement may be a program of bilateral trade facilitation and trade promotion activities. If one party is not a member of the WTO, the agreement will normally provide for most favoured nation treatment and national treatment, protection of intellectual property rights, consultation and dispute settlement, and other principles and mechanisms necessary for ensuring smooth trade flows and the

speedy resolution of problems.”²⁰

- (3) Multi-lateral trade agreements: “intergovernmental agreements aimed at expanding and liberalizing international trade under non-discriminatory, predictable and transparent conditions set out in an array of rights and obligations. The motivation for taking on these obligations is that all members will increase their welfare by adhering to a common standard of conduct in the management of their trade relations. Typically, such agreements have numerous members representing small, medium-sized and large trading nations. Membership of this kind of agreement is open-ended, but countries wishing to accede usually have to demonstrate that their trade regimes are in keeping with the aims of the agreement, and that the access conditions to their markets roughly match those of existing members.”²¹

Apart from the first kind of trade agreements all the other go under the name of Regional Trade Agreements (RTAs) by which we intend all of those "actions by governments to liberalize or facilitate trade on a regional basis, sometimes through free-trade areas or customs unions”.²²

In terms of numbers it is important to highlight that, at the present day, some 635 notifications of RTAs had been received by the GATT/WTO, of which 423 were in force and these WTO figures correspond to 460 physical RTAs, of which 267 are currently in force.²³ As we can see from *tab. 3* the number of RTAs has significantly increased since the establishment of WTO in 1995; this, amongst other things, contributes to show the importance of the role covered by this international organization, being it the back-bone of trade agreements.

²⁰ *Ibid.* note 20

²¹ *Ibid.* note 20

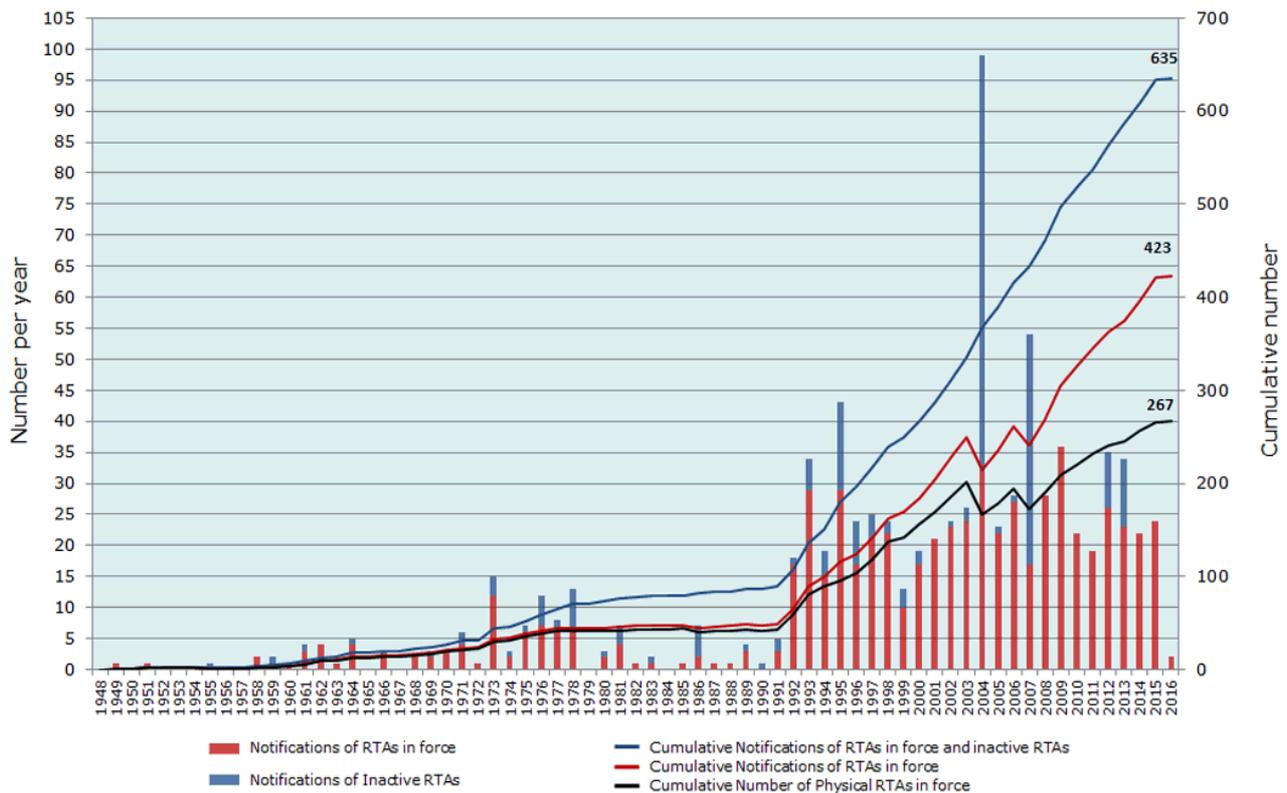
²² Definition by the Dictionary of trade policy terms.

Consulted at

<<http://ctr.c.sice.oas.org/trc/WTO/Documents/Dictionary%20of%20trade%20policy%20terms.pdf>>

²³ *Source:* WTO's RTAs database

Table 3 - Evolution of Regional Trade Agreements in the world, 1948-2016



Source: WTO Secretariat

In a wider perspective its understandable how WTO's contribution to sustain and promote *fair trade* along with free trade could result in an extremely valuable resource in order to solve current issues of global labour market, of which we discussed on previous chapter. This been said, to date, WTO's only steps towards this virtuous path have been taken during the WTO Ministerial Meeting in Singapore in 1996, after which present ministers declared:

"We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage

developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration."²⁴

This declaration has some very positive aspects, for instance WTO's commitment to the observance of core labour standards and the recognition of ILO as the competent body to set these standards, but still, no word was mentioned on a possible complementary relationship between WTO and ILO which would strengthen the linkages between trade liberalization and core labour standards. Possible reasons for WTO's reluctance in promoting a trade-labour link could be the presence of power asymmetries within the organization and among its members, together with the limitations that WTO's Dispute Settlement Procedures (DSP) would introduce in social rights matters.²⁵

Apart from WTO's fundamental role on trade agreements, what was the actual impact of trade liberalization on labour market? The variables through which we will try to give an answer to this question are: 1) levels of employment, 2) variations on wages, 3) levels of informality and 4) levels of empowerment of labour unions. Cases mentioned on *Tab. 4* allow us to perform a more focused analysis.

Table 4 - Empirical findings of the effect of trade liberalization on labour market outcomes

Labour Market Outcome	Empirical Study	Effect of Trade Liberalization
Unemployment	(1) Edwards and Cox (1996) for Chilean 1970s trade reform. (2) Rama (1994) for 39 sectors in Uruguay during 1979-86. (3) Revenga (1994) for 1985-87 Mexican trade liberalization. (4) Dasgupta et al. (2002) for 59 countries, including Middle East and North Africa (MENA) economies. (5) Goldberg and Pavcnik (2007) for 1980s and 1990s urban sector in Colombia.	(1) Weak links with aggregate unemployment. (2) Increases in manufacturing sectors. (3) Increases moderately. (4) Decreases for non-MENA countries, no effect for MENA countries. (5) No association.
Wages	(1) Krishna et al. (2012) for 1990-98 Brazilian trade liberalization. (2) Amiti and Davis (2011) for 1991-2000 Indonesian trade liberalization. (3) Peluffo (2011) for Uruguayan manufacturing sector following MERCOSUR creation. (4) Hanson (2003), Hanson and Harrison (1999), and Cragg and Epelbaum (1996) for the 1980s and 1990s Mexican trade liberalization episodes. (5) Attanasio et al. (2003) for the 1980s and 1990s tariff reductions in Colombia.	(1) Greater increase in wage dispersion for high-education workers relative to low education workers. (2) Decrease in domestic-oriented firms, increase in export-oriented and importing firms. (3) Wages increase, and the white collar – blue collar workers wage gap decreases. (4) Increase in wage dispersion between high-skilled and low-skilled workers. (5) Increase in wage dispersion.

²⁴ WT/MIN (96)/DEC, Singapore, 18 December 1996.

Consulted at <https://www.wto.org/english/thewto_e/minist_e/min96_e/singapore_declaration96_e.pdf>

²⁵ Thoene U. "The strategic use of the labour rights discourse - revisiting the 'social clause' debate in trade agreements", *Justicia Juris*, 10 (2), 59-70, 2014.

<p style="text-align: center;">Informality</p>	<p>(1) Goldberg and Pavcnik (2003) for the 1980s and 1990s trade liberalization in Brazil and Colombia. (2) Alemán-Castilla (2006) for the Mexican experience under NAFTA. (3) Viollaz (2010) for Buenos Aires, Argentina, during 1980-2001. (4) Dunusinghe (2011) for the 1996-2007 trade liberalization experience in Sri Lanka. (5) Paz (2012) for Brazil. (6) Fugazza and Fiess (2010) using international cross-section and panel data.</p>	<p>(1) Weak evidence of an increase in informality. (2) Decreases in tradable industries, with a stronger effect in export-oriented industries. (3) Increases. (4) Higher informality in more liberalized industries. (5) Increases with unilateral liberalization, but decreases with bilateral liberalization. (6) Decreases with trade openness.</p>
<p style="text-align: center;">Labour Unions Strength</p>	<p>(1) Dumont et al. (2010) for Belgian firms. (2) Abraham et al. (2009) for Belgian manufacturing firms. (3) Piazza (2005) for 15 advanced countries after the 1980s. (4) Arbache (2004) for the 1990s Brazilian trade liberalization episode.</p>	<p>(1) Bargaining power of employees falls with imports and offshoring for low-skilled workers. (2) Import competition weakens unions' bargaining power. (3) Union militancy decreases with globalization. (4) Unions increase their influence on the wage structure and wage dispersion.</p>

Source: "Social dimensions of free trade agreements" International Labour Organization; International Institute for Labour Studies. - Geneva: ILO, 2013.

On the overall we can state that:

- 1) for what concerns levels of employment, the impact of trade liberalization is either irrelevant or negative, in the sense that for two out of five case studies linkages have been found between trade liberalization and the increase of unemployment levels;
- 2) for what concerns variations on wages, the impact of trade liberalization is variable though most cases point-out an increase for export-oriented firms along with an increased wage dispersion;
- 3) for what concerns levels of informality, the impact of trade liberalization is positive in the sense that levels have increased in most of the case studies analysed;
- 4) for what concerns levels of empowerment of labour unions, the impact of trade liberalization is negative in the sense that labour unions and employees' bargaining power result weakened from it.

1.3 What is a social clause?

With the term social clause we refer to a legal provision in trade agreements which aims at improving labour conditions in exporting countries by allowing sanctions to be taken against exporters who fail to observe minimum standards; the sanctions usually make it possible to restrict or halt the importation or preferential importation conditions of products originating in countries, industries or firms where labour conditions are inferior to minimum standards.²⁶

²⁶ Van Liemt G., "Minimum labour standards and international trade: would a social clause work?", international labour review, Vol. 128, No. 4, 1989.

The first aspect we should confront with, concerns the minimum standards; in particular, what are the minimum rules that a signatory of a trade agreement, in which a social clause is included, should comply with in order not to incur into sanctions? In regards to this the ILO's 1998 Declaration of Fundamental Principles and Rights at Work identifies a set of social rights that were recognized as fundamental by the Copenhagen Summit for social development²⁷, and that were contemplated also in the UN's Universal Declaration of Human Rights²⁸ and on the 1966 ONU Covenant on Civil and Political Rights²⁹. But which are, specifically, these core labour standards? As identified by the International Labour Conference on 2-18 June 1998, these are:

“[...] namely:

- (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.”³⁰

For what concerns freedom of association and effective recognition of the right to collective bargaining (Conv. n. 87/1948; Conv. n. 98/1949) their importance stems from the fact that globalization has amplified the risks of opportunistic behaviours from States and firms which, in order to attract foreign capitals, often diminish production costs at the expense of the labour

²⁷ Commission Recommendation 2000/581/EC of 15 September 2000 on the ratification of International Labour Organisation (ILO) Convention No 182 of 17 June 1999 concerning the prohibition and immediate action for the elimination of the worst forms of child labour [Official Journal L 243 of 28.09.2000].

ILO Declaration on Fundamental Principles and Rights at Work, 1998

"The Declaration confirms the core labour standards as identified by the Copenhagen Summit and states that all ILO members, even if they have not yet ratified the basic conventions, are required by virtue of their ILO membership to promote and to comply with the principles related to the fundamental rights set out in the ILO Conventions."

Consulted at <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:c11902&from=IT>>

²⁸ Consulted at <http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf>

²⁹ Consulted at <<http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>>

³⁰ ILO, "ILO Declaration on Fundamental Principles and Rights at Work", adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998.

Consulted at <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_467653.pdf>

force's conditions. With these conventions elevated to core labour standard, ILO is trying to protect the rights of workers who are the weakest part in the unbalanced relationship between employer and employee. The elimination of forced and compulsory labour (Conv. n. 29/1930; Conv. 105/1957) together with the abolition of child labour (Conv. n. 138/1973; Conv. 182/1999) are instead more intimately connected with the defence of fundamental human rights, which must never, under any condition, be sacrificed on the altar of higher incomes. Finally, the elimination of discrimination in respect of employment and occupation (Conv. n. 100/1951; Conv. n. 111/1958) regards the respect of human rights with the elimination of discrimination in the work place, already highlighted in the Declaration of Philadelphia when it was stated that: "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity".³¹

Since ILO 1998 Declaration identified these core labour standards, many regional trade agreements refer to it in their social clauses. Even though this is certainly a socially commendable practice, what would be desirable is that ILO introduced efficient control systems together with procedures of assistance and technical consultation aimed at supporting states in the implementation of core labour standards, and that states, not only committed to observing these standards but that they implemented enforcing mechanisms that ILO is currently lacking. In fact, even if ILO actively promotes the ratification and supervision of Conventions, it cannot force compliance or impose sanctions to transgressors as its system is based on persuasion and peer pressure to encourage states to meet their obligations.

For what concerns the type of social clauses that can be introduced in international trade agreements we can distinguish two types³²:

(1) Conditional provisions:

1. Pre-ratification conditionality: the respect of specific social standards is made conditional in order to conclude the trade agreement. This kind of provision is mainly concerned with legislative issues in domestic social standards as it deals with

³¹ Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia). Consulted at <http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-islamabad/documents/policy/wcms_142941.pdf>

³² International Labour Organization, "Social dimensions of free trade agreements", International Institute for Labour Studies, Geneva, 2013.

deficiencies prior to the ratification of the agreement. As so, it has often led to significant positive changes in labour legislation of the host country, improving workers' rights and adopting legal protection. This kind of conditionality has been used especially in the US, where trade agreements since 2006 have, as requirement for ratification, conditions on domestic labour standards; condition which has been strongly demanded by US civil society actors such as the United States Labour Advisory Council. *Tab. 5* summarizes the effects on labour issues of pre-ratification conditionality in US trade agreements; as we can see from the table, all agreements stipulated after 2006 have led to an effective improvement of labour standards in the host State.

Table 5 - Pre-ratification effects on labour issues in United States trade agreements

Agreement and entry into force	Improvements in domestic labor standards prior to ratification demanded by civil society	United States publicly demanded changes in domestic labor standards as condition ratification	Labor standards improved in relation to the trade agreement
Morocco (2006); Bahrain (2006); Oman (2009); Peru (2009); Colombia (2012); Panama (2013)	Yes	Yes	Yes
CAFTA-DR (2004)	Yes	No, but joint commitments for CAFTA-DR countries to gradually modify labor laws and practice	-
Jordan (2001); Chile (2004); Australia (2005); Korea (2012)	Yes	No	-
Israel (1985); Canada (1989); NAFTA (1994); Singapore (2004)	Not apparent	No	-

Source: ILS, based on Luce and Turner³³

2. Post-ratification conditionality: the trade agreement is concluded despite the effective efficiency of the existing domestic labour law; yet it includes enforcement mechanisms with the aim of guaranteeing the application of labour standards that can lead, in case of certified breaches, to the withdrawal of trade benefits or to monetary sanctions. These kind of trade agreements usually provide for cooperative activities, for this reasons they are identified as labour provision combining conditional and promotional aspects. In particular, when considering enforcement mechanisms, we intend the

³³Luce, S. and Turner, L. Forthcoming, " Pre-Ratification effects of U.S. trade agreements on labour standards", ILS Background Paper, Geneva, ILO, 2012.

dispute settlement mechanism and the complaint mechanism; The former consists of a process of formal consultations which can lead to the establishment of a panel that can make a binding determination on allegations, the latter instead is a mechanism where third parties can present allegations regarding non-compliance with labour provisions by the other States parties. *Tab. 6* shows some examples of conditional-promotional approach to labour provisions.

Table 6 - Examples of the conditional-promotional approach to labour provisions

Name and date of entry into force of the trade agreement	Content regarding labour provisions			Implementation mechanisms		
	Minimum standards	Enforce national labour law***	Not to encourage trade or investment through weakening labour laws	mechanism	Mechanism for third-party petitions	Dispute settlement mechanism
NAFTA/NAALC (1994) *	“Strive to improve” standards in the area of fundamental principles and rights at work (FPRW), ³⁴ minimum working conditions, and migrant rights	Yes, but not exclusively	–	Trinational labour commission and through national contact points	Yes	Labour-specific mechanism allowing for fines up to 0.07 per cent of total trade volume (goods) (only in the case of non-application of national labour law in the areas of child labour, occupational safety and health, and minimum wage)
Canada-Chile Agreement on Labour Cooperation (1997) *	Respect standards in the area of FPRW as referred to in the ILO 1998 Declaration, as well as minimum working conditions** and migrant rights		Yes (in the areas mentioned)	Bilateral labour body and national contact points	Yes	Labour-specific dispute settlement mechanism allowing for fines up to US\$ 15 million (in the case of Jordan: unlimited) for violations relating to issues covered by the ILO 1998 Declaration; to be paid into a special labour rights fund
EU-Cariforum Trade Agreement (2008)	Reaffirms the obligations under the 1998 Declaration and the ILO’s	Yes, but not exclusive	Yes	Bilateral cooperation and consultation framework with stakeholder participation	–	settlement mechanism of the agreement applicable allowing for measures, such as the modification of labour cooperation activities

Source: IILS, based on information collected on various trade agreements.

Notes:

* These labour provisions are contained in side agreements to the trade agreement.

** The term “minimum working conditions” is used to describe minimum standards regarding hours of work, minimum wages and occupational safety and health.

*** In the area of minimum labour standards to the extent that it “affects trade” or is “trade-related”.

(2) Promotional provisions: trade agreements using this approach typically combine binding and non-binding commitments to labour standards with provisions on cooperation,

³⁴ *Ibid.* note 9

dialogue and monitoring; with this kind of provisions countries show commitment to labour concerns and at the same time they enable capacity building. The means through which they try to reach these aims are usually a combination of knowledge-sharing and technical assistance; in particular, under North-South trade agreements technical cooperation activities and institutional capacity building are prioritized, while in the South-South trade agreements activities usually consist in dialogue and policy development, at times with the involvement of social partners or with the technical assistance of ILO. It's worth mentioning that this is part of ILO's obligations as stated in ILO 1998 Declaration on Fundamental Principles and Rights at Work:

"Recognizes the obligation on the Organization to assist its Members, in response to their established and expressed needs, in order to attain these objectives by making full use of its constitutional, operational and budgetary resources, including, by the mobilization of external resources and support, as well as by encouraging other international organizations with which the ILO has established relations, pursuant to article 12 of its Constitution, to support these efforts:

- (a) by offering technical cooperation and advisory services to promote the ratification and implementation of the fundamental Conventions;
- (b) by assisting those Members not yet in a position to ratify some or all of these Conventions in their efforts to respect, to promote and to realize the principles concerning fundamental rights which are the subject of these Conventions; and
- (c) by helping the Members in their efforts to create a climate for economic and social development."³⁵

1.4 Necessity of a social clause in trade agreements

Linking labour standards to trade agreements is a practice that has taken foot already on the second half of the 19th century originating in unilateral trade agreements; the issue that they were designated to solve, at that time, regarded prison and forced labour which threatened the profitability of domestic manufacturers in importing nations as exported goods made by prisoners have a production cost close to zero, resulting far less costly than domestic products. To avoid the risk that imported goods would cut domestic prices in a predatory way, a few

³⁵ *Ibid.* note 9

countries, pioneered by United States in 1890, banned the import of products made using prison labour. When ILO adopted the Forced Labour Convention (n. 29) in 1930, which states that "Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period"³⁶, the US, apart from ratifying the convention, integrated the laws that prohibited the import of goods produced with prison labour within their national trade legislation (19 USC 1307). In fact, ILO's Convention actually excluded prison labour from the convention as stated in Art. 2.2 (c) "any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations"³⁷. A more specific approach to protect labour rights was adopted by the US after 1984 with the Caribbean Basin Recovery Act, an unilateral trade agreement between the United States and designated countries of the Caribbean area: Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Costa Rica, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Montserrat, Netherlands Antilles, Nicaragua, Panama, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, and British Virgin Islands. This agreement which exempted all goods, marked or eligible to be marked as a product of a CBERA beneficiary country, from the Merchandise Processing Fee (MPF)³⁸ was provided with a clause that could lead to the revocation of trade preferences for all those countries that didn't comply with internationally recognized worker's rights by which they intended:

- "(A) the right of association;
- (B) the right to organize and bargain collectively;
- (C) a prohibition on the use of any form of forced or compulsory labour;
- (D) a minimum age for the employment of children, and a prohibition on the worst

³⁶ ILO Forced Labour Convention (N.29) Art. 1.1

Consulted at

<http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::p12100_instrument_id:312174>

³⁷ *Ibid.* note 26

³⁸ Consulted at <<https://www.cbp.gov/trade/priority-issues/trade-agreements/special-trade-legislation/caribbean-basin-initiative/cbera>>

forms of child labour, as defined in paragraph (6); and
(E) acceptable conditions of work with respect to minimum wages, hours of work,
and occupational safety and health.”³⁹

With the same objective the European Economic Community (CEE) implemented the Generalized System of Preferences (GSP) in 1971, which lowers tariffs and allows a completely duty-free access for imports from 178 developing countries and territories into the CEE market with the aim of eradicating poverty and promoting sustainable development in the developing countries. The most innovative part of the GSP though was introduced in 1994, ratifying for the first time a direct link between free commerce and respect of fundamental social rights; in fact, the new GSP, by including special incentive arrangements for the protection of labour rights grants an additional reduction of 5 percentage points for all the ad valorem duties of products covered by the arrangements and an additional reduction of 20% for textiles and clothing and 30% for specific duties.⁴⁰ These special arrangements are available exclusively for countries complying with the core labour standards as depicted in the 1998 ILO Declaration on Fundamental Rights and Principles at Work. The most remarkable fact is that this disposition was applied notwithstanding GATT’s Most Favoured Nation (MSF) clause, which states that:

“With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”⁴¹

³⁹ Consulted at < <https://www.law.cornell.edu/uscode/text/19/2467>>

⁴⁰ Consulted at <http://trade.ec.europa.eu/doclib/docs/2004/march/tradoc_116448.pdf>

⁴¹ Art. 1.1 of “The text of General Agreement on Tariffs and Trade”, Geneva, 1986.
Consulted at <https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf>

As we can see from the dispositions discussed above, regulation, for what concerns linking free trade and social rights protection, can't be entrusted to national law, which has progressively lost its legitimacy as globalization took hold, nor to international law, which despite the efficiency in isolating a set of core labour standards, lacks of enforcement mechanisms that would make them legally binding. The possible solutions at this stage could be two: following the neoclassical model, which sustains that competition is best left unregulated since regulations are perceived to interfere with market forces, acting as a constraint to grow and impeding countries to reach their highest level of prosperity, markets should remain unregulated in order to reach a Pareto optimal situation; while if a new institutional model is followed, which asserts that all markets should operate within a framework of regulations, markets would benefit from the integration of social norms in the international regulation of trades. Recognizing that a neoclassical model assumes that the market is perfectly competitive, and that information asymmetries, monopolies, positive and negative externalities which are present in all markets worldwide, distort the competition, we will follow the new institutional model, trying to justify the integration of social norms.

There are fundamentally two kinds of justification for the introduction of social norms within market regulation:

(1) a rational justification in accordance with the scope

(2) a rational justification in accordance with the value.⁴²

(1) The first kind of justification is directly concerned with market regulation and competition law; in this setting social norms could guarantee the respect of the principle of equity in international trade, by limiting social dumping.⁴³ The motivation is based on the idea of *fair trade*, as the protection of fundamental social rights can be justified by understanding that the violation of these norms from exporting states would cause damages to the economies of those states that are respectful of a supranational level playing field; in other words, in order to protect social rights, all the countries involved in international trade should comply with these norms, otherwise the unfair competitive advantage gained by the state that sets off these norms will distort competition leading to

⁴² Perulli A., "Globalizzazione, *governance* e diritti sociali", in "Globalizzazione e rapporti di lavoro" a cura di Napoli M., Vita e Pensiero, Milano, 2006.

⁴³ Perulli A., "Diritti sociali fondamentali e regolazione del mercato nell'azione esterna dell'Unione europea", *Rivista Giuridica del Lavoro e della Previdenza Sociale*, vol.2, pp. 321-345, 2013.

market failure.

- (2) The second type of justification is related to the fact that a socially equitable production and a market that is not distorted by the missed application of core labour standards enhance the value-based dimension of fundamental rights; in this sense the market justification is overshadowed by a business ethics which, despite limiting the freedom of trade, supports democracy and human rights linking them to the principle of sustainable development, which aim is to balance economical freedom, social rights and environmental protection. The focus, from this perspective would be the identification on labour principles that cannot be abnegated for country-specific cultural or economic situations.

Having justified the reasons to sustain the introduction of a social clause in trade agreements, the next step is to understand how to make the application of social clauses legally binding in a global perspective; the organization to which we are referring is obviously the World Trade Organization which has a centralized decisional power when referring to international trade. As we have already discussed in *par. 1.3*, the perspective of the insertion of a social clause hasn't still got a foothold in this system; the reason is to be found in a political-structural factor which is at the basis of WTO's idea of international labour distribution that is, the neoclassical model of comparative advantage, as stated in 1996 Singapore Ministerial Declaration:

“We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question.”⁴⁴

Despite this, the struggle to obtain the inclusion of a social clause within the WTO system is still standing and the theme will be most probably put in discussion in the immediate future.

But if this would actually happen, where could a social clause be integrated within the WTO

⁴⁴ *ibid.* note 22

mechanism?⁴⁵

- Art. VI of GATT, concerning anti-dumping and countervailing duties, condemns the practice of *dumping* intended as “products of one country are introduced into the commerce of another country at less than the normal value of the products”⁴⁶, a definition which doesn’t consider the differential costs of production as a possible cause of dumping, in this way differing from the notion of *social dumping* as we know it.⁴⁷ Yet, *social dumping* practices could be seen as a mean of public subsidy; the fact that states are not imposing producers to work observing labours’ rights, could be seen as a concession that they are giving to producers in order to lower production costs, in other words, a subsidy. In this sense, a failure in protecting social rights could lead offended states to levy a countervailing duty as stated in Art. VI cl. 2:

“In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product [...]”⁴⁸

- A social clause could also be included in the so-called “safeguard clause” mentioned in Art. XIX 1(b):

“If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part

⁴⁵ *ibid.* note 40

⁴⁶ *Ibid.* note 39

⁴⁷ See note 8 for the definition of “social dumping”

⁴⁸ *Ibid.* note 39

or to withdraw or modify the concession.”⁴⁹

In this case the disrespect of social rights could be seen as a condition that can “cause or threat serious injury to domestic producers” and the aforementioned sanction could be applied.

- In Art. XX instead, we can find the “general exceptions” norm in which a social clause could be included without too many distortions or interpretative twist and turns of the norm; in particular, this article enumerates a list of measures for which “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party”⁵⁰. Amongst these, the ones that would be relevant in terms of social rights protection are: the one regarding measures “necessary to protect human, animal or plant life or health”⁵¹ as *social dumping* is effectively a practice that can damage human life or health, and the one regarding measures “relating to the products of prison labour”⁵² as it allows to adopt protectionist measures basing the evaluation of the damage on the production process of a good.
- Finally, Art. XXIII states that:

“If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of [...] (c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned”⁵³

⁴⁹ *Ibid.* note 39

⁵⁰ *Ibid.* note 39

⁵¹ Art. XX (b) *ibid.* note 39

⁵² Art. XX (e) *ibid.* note 39

⁵³ *Ibid.* note 39

In this case a social clause could be integrated as the violation of social rights could be thought of as “any other situation” that is nullifying or impairing the benefits guaranteed by the agreement.

On 13 December 2007, the 27 EU Heads of State or Government signed the Treaty of Lisbon entered into force on 1 December 2009, after having been ratified by all EU countries in accordance with their respective constitutional requirements. The aim of this treaty was to reform the two treaties which form the constitutional basis of the EU: the Maastricht Treaty (1993), updated as the Treaty on European Union (TEU) and the Treaty of Rome (1958), updated as the Treaty on the Functioning of the European Union (TFEU). The enlargement of the EU, which has added 16 new member states since the Maastricht Treaty entered into force, together with globalization, that became an established phenomenon at the beginning of the 1990s, made the need to reform the structure of the EU and the way in which it functions, an urgent issue. Even though the Treaty of Lisbon didn't succeed in its initial intent of abrogating the founding Treaties of the EU and replacing them with a single text, it did succeed in introducing concrete human rights obligations applicable to EU's external action; moreover, it gave the status of primary law to the EU Charter on Fundamental Rights and Freedoms (EU Charter) and contributed to the EU's accession to the European Convention on Human Rights (ECHR).

Before going into detail on what are the specific provisions subject matter of human rights obligations introduced by the Treaty of Lisbon, we must understand what are the external situations to which human rights obligations can apply, and what type of obligations can be actually put in act. There are essentially four types of extraterritorial situations that can arise, namely⁵⁴:

1. Extraterritorial acts; for instance, the acts of diplomats or military officials.
2. Acts related to territories controlled by a European state; for instance, military occupation.
3. Acts involving extraditions and expulsion of a person to a country where they might be at risk.
4. Acts that can take place in the home country but that have an effect on persons outside of that territory.

⁵⁴ Bartels L., “A Model Human Rights Clause for the EU's International Trade Agreements”, University of Cambridge - Faculty of Law, German Institute for Human Rights and Misereor, 2014.

For what concerns the obligations, these can be divided into three main categories⁵⁵:

1. Obligation to **respect** human rights: it requires a state not to engage in any conduct that would violate human rights, in this sense the state refrains from committing certain actions. This is a negative obligation as it limits the state's conduct in forbidding it to take certain actions.
2. Obligation to **protect** human rights: it requires states to ensure that every person can enjoy its human rights without any other actor preventing them to do so. This is a positive obligation as it forces states to engage in certain conducts.
3. Obligation to **fulfil** human rights: it's a positive obligation as it requires states to cooperate internationally in order to promote respect for human rights and it implies the obligations to **facilitate** the adoption of human rights, to **promote** them by raising awareness and to **provide** directly the rights, for instance through financial assistance.

Having clear all of these aspects we will now analyse in what ways the Treaty of Lisbon amends the two founding treaties of the EU. For what concerns the TEU, the most relevant aspects regarding the protection of human rights are addressed in Art. 3(5) and in Art. 21 (1) (2) (3); The former regards the way in which the EU should approach in relating to foreign countries, as it states that:

“In its relations with the wider world, the Union shall uphold and promote its values⁵⁶ and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.”⁵⁷

⁵⁵ *Ibid.* note 52

⁵⁶ It refers to the values declared in Art. 2 Consolidated TEU, namely:
“respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

⁵⁷ Art. 3 (5) Consolidated TEU
Consulted at <<http://eur-lex.europa.eu/legal-content/IT/TXT/?uri=celex%3A12012E%2FTXT>>

Art. 21, which specifically tackles the aspect of the EU's external actions, apart from reinforcing what is stated in Art. 3(5), adds proper obligations that EU's member states must carry out; in detail:

“The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. [...]”

“The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

- (a) safeguard its values, fundamental interests, security, independence and integrity;
- (b) consolidate and support democracy, the rule of law, human rights and the principles of international law; [...]

“The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.”

As we can see from this complex set of provisions, which are recalled also in Art. 205, 207, 208 TFEU, their extraterritorial scope is very broad as they not only cover extraterritorial acts but also policies with extraterritorial effects, covering all four types of extraterritorial situations. For what concerns the type of obligations to which the EU is bonded Art. 21 (3) TEU imposes the obligation to **respect** human rights, while both Art. 3(5) and 21 TEU impose the obligation to **fulfil** human rights by **promoting** human rights in its relations with external countries, by defining and pursuing common policies and actions and by working for a high degree of cooperation in all fields of international relations.

For what concerns other obligations binding EU and its member states, we have already

recalled them being connected to the EU Charter and the ECHR (as recognized in Art. 6 (1)⁵⁸ (3)⁵⁹ TEU); apart from these, EU and its members are also submitted to the standards set by international human rights treaties and to customary international law. Despite the fact that all of them provide a great quantity of obligations in terms of human rights' respect, the institution that provides the most clear and straightforward obligations aimed at respecting human rights in third countries is the customary international law; amongst these the most notable are:

- the effects of economic sanctions: as stated in Art. 50 (1) (b) of UN's Responsibility of States for Internationally Wrongful Acts:

“countermeasures shall not affect [...] obligations for the protection of human rights”⁶⁰

- the ancillary responsibility for human rights violations committed by third states: Art. 16, 17 and 18 of UN's Responsibility of States for Internationally Wrongful Acts state respectively that:

“A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if (a) that State does so with knowledge of the circumstances of the internationally wrongful act [...]”⁶¹

“A State which directs and controls another State in the commission of an

⁵⁸ Art. 6 (1) TEU:

“The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”

⁵⁹ Art. 6 (3) TEU:

“Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.”

⁶⁰ Consulted at <http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf>

⁶¹ Art. 16 of the Responsibility of States for Internationally Wrongful Acts

internationally wrongful act by the latter is internationally responsible for that act if (a) that State does so with knowledge of the circumstances of the internationally wrongful act [...]⁶²

“ A State which coerces another State to commit an act is internationally responsible for that act if [...] (b) the coercing State does so with knowledge of the circumstances of the act. ”⁶³

- duties arising from grave breaches of binding norms by third states: Art. 41(1)(2) of UN's Responsibility of States for Internationally Wrongful Acts affirms that:

“1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40 [peremptory norm]

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40 [peremptory norm], nor render aid or assistance in maintaining that situation. ”⁶⁴

As this article is not to be considered by itself a *jus cogens* obligation, it should be included within a social clause in order to become a “non-execution” clause.

- the requirement that states do not allow their territories to be used in a manner that causes trans-boundary harm: this obligation has its foundation in 1941 Trail Smelter arbitration during which the tribunal declared that:

“[...] under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is

⁶² Art. 17 of the Responsibility of States for Internationally Wrongful Acts

⁶³ Art. 18 of the Responsibility of States for Internationally Wrongful Acts

⁶⁴ *Ibid.* note 58

established by clear and convincing evidence.”⁶⁵

This statement was then further emphasized in the 1949 Corfu Channel case at the end of which the International Court of Justice declared that:

“every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”⁶⁶

Though these cases can be indirectly read as a requirement for states to protect human rights in third countries, the acts to which they refer are only cases of physical harm which cuts off a fair share of human rights that should be protected.

All the obligations imposed to EU and its member states, of which we have previously seen the most important ones, make us come to the conclusion that, in most of the cases, a social clause is not needed in trade agreements between EU and third parties in order to guarantee the respect of human rights or their promotion. The only time in which the inclusion of a social clause is really needed is when a norm in the international agreement stands in the way of EU's ability to comply with its human rights obligations. An example could regard agreements containing an obligation to provide financial cooperation; in this case a social clause is needed in order to allow EU to stop the financial cooperation if this cooperation could be casually connected with human rights violations in the other country. If it failed in doing so and if the knowledge of the circumstances can be proved, the EU would be sanctioned for not abiding by the rules stated in Art. 16, 17 and 18 of UN's Responsibility of States for Internationally Wrongful Acts. Another possible crucial point could be found in trade obligations which, in the look out for reaching an ultimate equilibrium between the countries involved in the agreement, can and do alter the distribution of income and distort competition; apart from that, it can also impede government actions which require exceptional measures and impact the ability of countries to provide funds for poverty relief and

⁶⁵ Trail Smelter (US/Canada), 1941, taken from “Reports of international arbitral awards” Vol. III. Consulted at <http://legal.un.org/riaa/cases/vol_III/1905-1982.pdf>

⁶⁶ International Court of Justice, “The Corfu case”, 1949. Consulted at <<http://www.icj-cij.org/docket/files/1/1645.pdf>>

development. Where these situations can't be solved through financial support, the introduction of a social clause is needed in order to balance the inequalities that have risen as aftermaths of trade agreements; these social clauses should guarantee the possibility to adopt safeguard measures and to apply countervailing duties as exceptions for emergency situations, including, amongst these, situations in which human rights are being violated in third countries.

1.5 Developed and underdeveloped countries: in what ways does their response to social clauses differ?

The way in which the introduction of a social clause is perceived, changes considerably depending on the subject consulted. Generally speaking we could say that the proponents are trade unions and developed countries while the opponents are, unanimously, the developing countries.⁶⁷

For what concerns proponents, the reasons for which they claim that the introduction of a social clause is urgently needed in all trade agreements are:

1. The absence of a social clause makes competition unfair and imported products, which have been produced with extremely low labour costs, are claimed responsible for the unprecedented job losses in competing industries of developed countries.
2. The presence of a social clause would avoid a race-to-the bottom in labour standards, as the availability of abundant cheap labour in developing countries attracts foreign investment resulting in the establishment of production centres in those countries.
3. The presence of a social clause could be a way to improve labour standards in developing countries, at least for what concerns the effective implementation of core labour standards.

We'll now discuss each of these points in order to comprehend thoroughly whether or not they can be valid reasons to impose the introduction of social clauses in trade agreements:

1. The elevated levels of unemployment registered in developed countries in the last decade can certainly be, at least in part, explained by the delocalization of production processes and the progressive fall of trade barriers that have been brought about by globalization. But, apart from the fact that globalization in itself has been a process carried on mainly

⁶⁷ Bazillier R., Rana A. T., "Social clauses in Free-Trade Agreements: an efficient tool to improve labour standards", Mimeo, 2015.

by developed countries which involved in it developing countries, we can't assess that this trail of unemployment can be totally blamed on manufactured goods in developing countries. In fact, not in all industries the weight of labour costs is as elevated as to make such a significant difference in final costs, one need only think that many production processes that in developing countries are still carried out by hand, in developed countries are completely automate; and this automation process, by the way, apart from lowering final costs, is another explanation for labour displacement. Moreover, we have to take into account the severe crisis that stroke a large chunk of developed countries starting from 2007, which has led them to face many years of recession. So, on the overall, the claim of an unfair competition can be convincing but not in the form that it has been depicted as a major phenomenon; considering all of the factors aforementioned, it can be effectively relevant only for direct competitors in industries which require elevated labour costs.

2. We've previously discussed this factor and literature has firmly sustained that the lack of social clauses in trade agreements, elimination of trade barriers together with a lack of international regulation support has led to a race-to-the bottom in labour standards. Still, we have to consider two important aspects; first of all, the share of labour costs in total production costs is not always high enough to be a determinant factor for the location of the industry, in other words, not for all the producers the decision of offshoring the production process to developing countries can result a winning solution, as advantages given by low labour costs can be more than offset by the disadvantages of inadequate infrastructures, vulnerability to bottlenecks, lower labour skills and lack of raw materials.⁶⁸ Secondly, even though it's true that FDI flows have steadily grown in developing countries in the last two decades, it is also true that this is not only due to availability of cheap labour; in fact, in 1993 China, Malaysia, Argentina and Mexico, which have relatively higher labour costs if compared to other developing countries, have accounted for 63.5% of FDI flows⁶⁹, and what is possibly even more relevant is that 70%

⁶⁸ Effects of International Trade and International Labour Standards on Employment, Working Conditions and Development in Non-Aligned and Other Developing Countries, NAC/LM/CONF.5/DOC.5, 1995.

⁶⁹ Chandrasekhar C. P., "Linkage as Leverage: International Capital and the Social Clause", in LABOUR, ENVIRONMENT AND GLOBALISATION, 11, 14, J. John & Anuradha M. Chenoy editors, 1996.

of global capital movement takes place in between developed countries.⁷⁰

3. This assertion has been proved to be supported by quantitative research carried out by Brazillier R. and Rana A.T. in their study on how the influence of social clauses included in trade agreement managed to improve labour standards⁷¹; from their outcomes they have found that social clauses have a strong and positive impact on ratifications of ILO conventions as they've measured an average increase of 27 percentage points of low and middle income countries ratifications after they had signed trade agreements including social clauses. Despite this, there are two relevant aspects connected to the introduction of higher labour standards that must be taken into consideration; the first one is that the imposition of a social clause would affected only export-oriented industries. This could result in one of two ways: either it would create disparities within the labour force of a country causing severe imbalances, or it could lead to a labour standards' improvement in industries connected to exporting ones and eventually spread to all the other industries⁷²; even tough the second outcome is obviously more desirable, we have to take into account the possibility of the first one. The second relevant aspect is that, in order to deal with the costs of implementing higher labour standards, employers may decide to cut labour costs by firing employees in excess; in formulating social clauses, developed countries must take into account this possible aftermath and give alternative solutions for displaced labour in order to avoid even bigger issues. Apart from this, unavoidable is to mention that the United States, who are amongst the biggest supporters of the introduction of social clauses in trade agreements, have not, up-to-date, ratified six out of the eight ILO fundamental conventions, namely: Conv. 29/1930, Conv. 87/1948, Conv. 98/1949, Conv. 100/1951, Conv. 111/1950, Conv. 138/1973⁷³; asserting that they weren't able to ratify these conventions as they conflicted with domestic laws and practices, assuring that their constitution and laws guarantee labour force the same rights.

⁷⁰ Roy A., "Globalisation and the World Working Class", in LABOUR, ENVIRONMENT AND GLOBALISATION, J. John & Anuradha M. Chenoy editors, 1996.

⁷¹ *Ibid.* note 65

⁷² Chenoy A. M., WTO, "The Social Clause and Women Workers", in 16 Asian Women Workers Newsletter 1, 1997.

⁷³ Consulted at
<http://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:102871>

For what concerns the opponents, the reasons for which they claim that social clauses should not be introduced in trade agreements are⁷⁴:

1. They believe that social clauses are a form of hidden protectionism implemented by developed countries, who use them as a way of guaranteeing themselves the best out of trade agreements without having to face the negative aspects that come with trade liberalization.
2. The introduction of social clauses would eliminate developing countries' comparative advantage that lies mainly in low labour costs.
3. Violations of labour standards don't take place only in the export-oriented industries and, as so, the introduction of social clauses and the elevation of labour standards would benefit only a small portion of labour force in developing countries.
4. Sanctions can be counterproductive and harm the people they are meant to help, as costs would not fall on employers as they would most certainly transfer them to employees.

Just as we did for pros, we'll now analyse the cons of introducing social clauses in trade agreements in order to understand thoroughly the opponents' position.

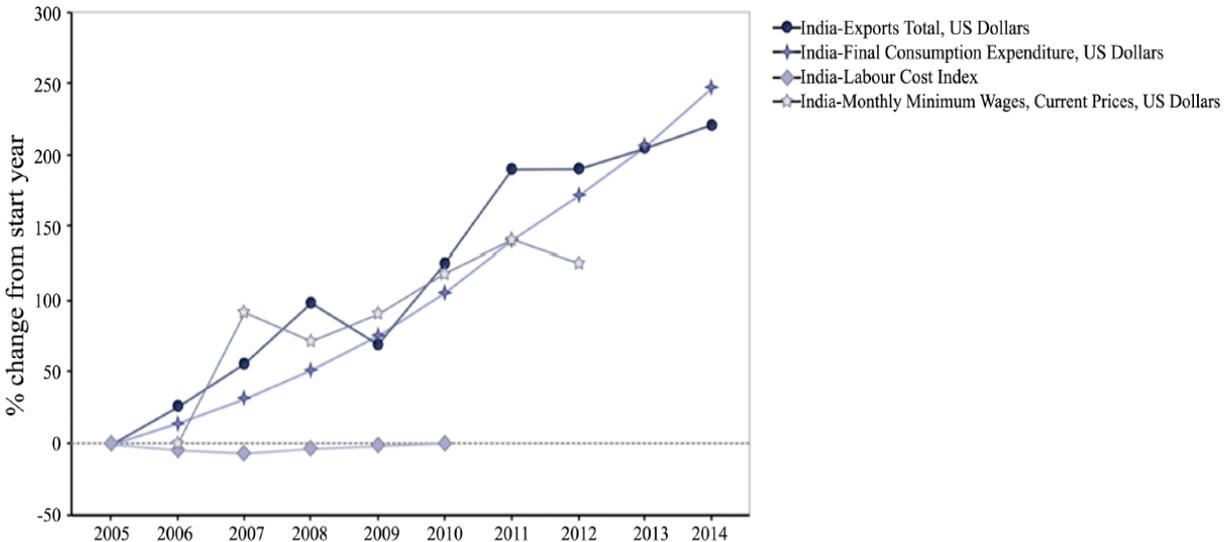
1. Despite this being the flagship motivation driven forward by opponents, there are reports and quantitative proofs that have triggered doubts about it being effectively so. The 1956 Social Aspects of European Economic Co-operation, also known as the "Ohlin Report", found that states with better social protection and higher wages would not be affected by the unfair competition from states with a worst social protection and lower wages and, if so, this could affect them only in the short term, as "Increasing productivity may be reflected in falling prices with stable money wages or in rising money wages with stable prices"⁷⁵. Besides, if production keeps maintaining low wages this will make developing countries pursue an export-led growth path, forming a vicious cycle in which export in these countries increases dramatically by reason of the declining prices which these countries chase to gain larger comparative advantage. Consequently, developing countries become much more dependent on export while, sooner or later, supply will finally exceed

⁷⁴ *Ibid.* note 65

⁷⁵ ILO, "Social Aspects of European Economic Co-operation", Geneva, 1956.

demand.⁷⁶ On the contrary, by raising minimum labour standards the domestic market consuming capacity will increase thus reducing the dependence on export. A valid example of the statements made can be seen in the case of India; an analysis made between 2005 and 2014 shows that, not only raising minimum wages does not reduce exports or significantly increments labour costs, but it also facilitates domestic consumption and promotes exports⁷⁷, as we can see from *fig. 1*.

Figure 1 - Exports total, final consumption expenditure, labour cost index and monthly minimum wages in India



Source: Chen H., “Social clause in Trade Agreements and China’s experience”, University of Warwick, UK, 2015.

⁷⁶ Palley, T. I., “The Economic Case for International Labour Standards”, Cambridge Journal of Economy Society, 28, (2), 2004.

⁷⁷ Chen H., “Social clause in Trade Agreements and China’s experience”, University of Warwick, UK, 2015.

2. The comparative advantage⁷⁸ arising from costs differential between nations is the basis for international trades, as so, it is in the interest of developing nations to protect their strongest, if not only, comparative advantage which is low labour costs. Developed nations instead, despite not counting on the lowest labour work costs, can rely (in different degrees, depending on the country we are referring to) on command over and access to capital, technology advantages and marketing facilities; these alone should guarantee greater comparative advantages, with the introduction of trade agreements, if compared to developing countries. However, it is unfortunately true that working conditions under which labour force is submitted are deplorable and miserable; still, by introducing binding social clauses in trade agreements, the ones who would be most affected would be the same ones that are forced to work under inhuman conditions. In fact, it's only in the interests of developing countries' capitalists that labour standards remain low, and whatever consequence in terms of costs should social clauses imply, it is credible to think that these cost will be translated in even lower wages to employees, putting them in an, if possible, even worst condition, thus labour costs would remain the same and developing countries could manage to maintain their comparative advantage.⁷⁹

For what concerns points 3 and 4, they have already been broadly discussed in point 3 of the proponents' reasons so we won't be discussing them over.

Now that we've seen pros and cons of introducing a social clause in trade agreements, the next question is, what should be done to improve the effectiveness of social clauses in order for them to be actually useful in third world countries which decide to adopt them?

A good starting point could be the introduction of a Labour Development Plan (LDP) in order to shift the focus from "non-compliance" to "enhancing workers' rights"⁸⁰. This kind of

⁷⁸ Defined by the Dictionary of trade policy terms as: "The theory first proposed by David Ricardo in 1817 that a country is more likely to export goods that it can produce relatively efficiently. The relative efficiency measure compares production costs of different goods in each country concerned, not the production cost of the same good in different countries. A country's comparative advantage is reflected in its unsubsidized exports to world markets which is then said to be a country's revealed comparative advantage. Comparative advantage is seldom static. Countries can acquire a comparative advantage through, for example, investing in the acquisition of skills by their workforces. Hence the concept of dynamic comparative advantage"

Consulted at

<<http://ctr.c.sice.oas.org/trc/WTO/Documents/Dictionary%20of%20trade%20policy%20terms.pdf>>

⁷⁹ Eddy L., "Globalisation and Labour Standards: A review of issues", 136 International Labour Review 181, 1997.

⁸⁰ International Labour Organization, "Social dimensions of free trade agreements", International Institute for

approach is innovative in many ways:

- its could be provided with time-bound goals which would allow countries to tackle issues gradually as specific targets aren't to be reached all at once.
- it could contain measurable commitments that are specific to the country context and could propose capacity-building activities that ought to be carried out by the party. In carrying out this process, social partners and relevant international organizations could support the involved party in order to grant it sustain and guide it in choices and actions to be taken.
- it could be linked to the trade agreement by making it a binding part of the labour provisions, in this way assuring a more comprehensive follow-up of the commitments and at the same time providing a framework for addressing disputes.
- it could provide additional incentives to reach certain goals; this, apart from making countries more eager to comply with conditions in order to reach the objectives, could also be a manner to stop concerns about social clauses being a disguised form of protectionism.
- it could provide financial assistance or capacity building especially in those countries where failure to comply with commitments is proved to be connected to a lack of financial resources.

2. Social clauses in trade agreements - analysis of three meaningful case studies

In the following chapter we are going to conduct an in-depth analysis on three illustrative cases of trade agreements in which the social clause, or more in general, the protection of labour rights, forms a consistent and inextricable part.

We will start off by analysing the North American Agreement on Labour Cooperation (NAALC), which was negotiated as a side (or parallel) agreement to the North American Free Trade Agreement (NAFTA) between US, Canada and Mexico. The reason for which we have taken it in consideration is that this agreement, that came into force on 1 January 1994, is the first example of the inclusion of labour agreements in trade negotiations.

We will continue by analysing the Association of Southeast Asian Nations (ASEAN) negotiated between Burnei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia,

Myanmar, Philippines, Singapore, Thailand and Vietnam and entered into force on 8 August 1967. This particular regional cooperation agreement is brought out as one of the most successful cases of implementation of social clauses and human rights related side agreements in trade matters.

Finally, we will analyse the Transatlantic Trade and Investment Partnership (TTIP), between United States and European Union, which hasn't still been concluded at the present day (23 September 2016, Ed.). This agreement will be analysed in every single part as it is expected to bring a great deal of innovation if negotiations are to be concluded, both for what concerns social issues and regulatory cooperation in standards setting.

2.1 North American Free Trade Agreement (NAFTA) and its side agreement North American Agreement on Labour Cooperation (NAALC) - the first prototype of social clause linked to a trade agreement

In the years between 1990 and 1992 the then US President, George H. W. Bush, negotiated with Mexican President, Carlos Salinas, and Canadian Prime Minister, Brian Mulroney, the North American Free Trade Agreement (NAFTA) which was completed by August 1992. The speed with which this agreement was concluded mustn't surprise as it was negotiated under fast-track authority which congress had given to the President under the *Omnibus Trade and Competitiveness Act of 1988*⁸¹ signed into law by President Ronald Regan and expired in 1991, only to be renewed in 1994 and 1999 by President Bill Clinton; this authority contained streamlined procedures for congressional consideration of a negotiated trade agreement, prohibited amendments and limited debate.⁸² In that same period the future President Bill Clinton, in running his campaign, had to confront with the many labour, environmental and human rights organizations that pressured him to repudiate NAFTA which was said to favour MNEs and investors at the expense of workers and environment. As he took office in January 1993, President Bill Clinton decided to support NAFTA but with the only condition that it had to be accompanied by side agreements dealing with labour and environmental matters;

⁸¹ Public Law 100-418— August 23, 1988

Consulted at <<https://www.gpo.gov/fdsys/pkg/STATUTE-102/pdf/STATUTE-102-Pg1107.pdf>>

⁸² Bolle M. J., "NAFTA Labour Side Agreement: Lessons for the Worker Rights and Fast-Track Debate", CRS Report for Congress, 2001.

by August of that same year the parallel agreements North American Agreement on Labour Cooperation (NAALC) and North American Agreement on Environmental Cooperation (NAAEC) had been drafted, and by November the US Congress had approved both of them together with NAFTA, which took effect starting from 1 January 1994. It's to be said that NAALC negotiations were also supported by the 1988 Trade Act which in Section 1101 b) (14) (A) stated that "the principal negotiating objectives of the United States regarding worker rights are [...] to promote respect for worker rights"⁸³

This fact gave rise to what has been called the "fast-track controversy"⁸⁴ which saw on one side MNEs and consumers, and on the other the representatives of organized labour. The former claimed that the fast-track reauthorization would have limited their ability to benefit from the comparative advantages of developing countries represented by lower production costs, due to lower wages and labour abundance, which would ultimately translate into lower final prices for goods and services. The latter instead want fast-track to include broad authority in labour provision matters as they claim that labour provisions linked to trade agreements would prevent unfair competition, helping the domestic labour-intensive markets to survive. Ultimately we can assert that the motivations which moved interested parties either to promote or to discourage the application of worker rights' provisions are much more economic than they are charitable. Through NAALC both parties were contented as its inclusion guaranteed the protection of domestic labour and at the same time it also protected MNEs and consumers' interests by strongly limiting the enforceable issues; in fact, as stated in Art.36, the only complaints (also referred to as "submissions") that can be brought up must regard "a matter that is trade-related and covered by mutually recognized labour laws".

Its important to highlight that NAFTA's preamble already asserted certain statements which are tightly linked to the protection of labour and for this reason are also recalled in NAALC's preamble; in particular:

"The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to:

CREATE an expanded and secure market for the goods and services produced in their

⁸³ *Ibid.* note 79

⁸⁴ *Ibid.* note 80

territories;

ENHANCE the competitiveness of their firms in global markets;

CREATE new employment opportunities and improve working conditions and living standards in their respective territories;

PROTECT, enhance and enforce basic workers' rights;”⁸⁵

From this starting point NAALC further enhances the labour aspects contained in NAFTA by setting the following goals:

“(a) improve working conditions and living standards in each Party's territory;

(b) promote, to the maximum extent possible, the labour principles set out in Annex 1;

(c) encourage cooperation to promote innovation and rising levels of productivity and quality;

(d) encourage, publication and exchange of information, data development and coordination, and joint studies to enhance mutually beneficial understanding of the laws and institutions governing labour in each Party's territory;

(e) pursue cooperative labour-related activities on the basis of mutual benefit;

(f) promote compliance with, and effective enforcement by each Party of, its labour law; and

(g) foster transparency in the administration of labour law.”⁸⁶

Annex 1, to which the text refers, are a list of guiding principles which “[...] indicate broad areas of concern where the Parties have developed, each in its own way, laws, regulations, procedures and practices that protect the rights and interests of their respective workforces.”⁸⁷

We will now enumerate these guiding principles separating them in three different groups which will be helpful when describing NAALC’s enforcement mechanisms:

GROUP I:

⁸⁵ North American Free Trade Agreement (NAFTA), 17 December 1992. Consulted at <<https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement?mvid=2#b5b817ee-c48a-4dda-b8d9-c4564e34ac4b>>

⁸⁶ North American Agreement on Labour Cooperation (NAALC), Part One, Objectives, 13 September 1993. Consulted at <http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005872.asp>

⁸⁷ *Ibid.* note 83, ANNEX 1

1. Freedom of association and protection of the right to organize
2. The right to bargain collectively
3. The right to strike

GROUP II:

4. Prohibition of forced labour
5. Protection of migrant workers
6. Elimination of employment discrimination
7. Equal pay for women and men
8. Compensation in cases of occupational injuries and illnesses\

GROUP III:

9. Minimum employment standards
10. Labour protections-for children and young persons
11. Prevention of occupational injuries and illnesses⁸⁸

One of the most peculiar aspects of NAALC, which we must have clear in mind before analysing its structural aspects, is that NAALC preserves the sovereignty of parties involved; as it's stated in Annex 1, concerning the labour principles:

“The following are guiding principles that the Parties are committed to promote, subject to each Party's domestic law, but do not establish common minimum standards for their domestic law.”⁸⁹

This means that no harmonization of principles is sought through this agreement as each country is free to adopt its own labour laws and enforce them as they see fit; in fact, if a country doesn't support a particular labour principle no complaint may be brought against it for failure to offer that particular attention to its labour force.⁹⁰ Sovereignty is also guaranteed by NAALC's enforcement mechanisms which is primarily based on cooperative consultations among the NAFTA partners and does not contemplate a permanent labour rights enforcement agency to supplant the domestic authorities of each country; this, if on one side means that

⁸⁸ *Ibid.* note 83, ANNEX 1

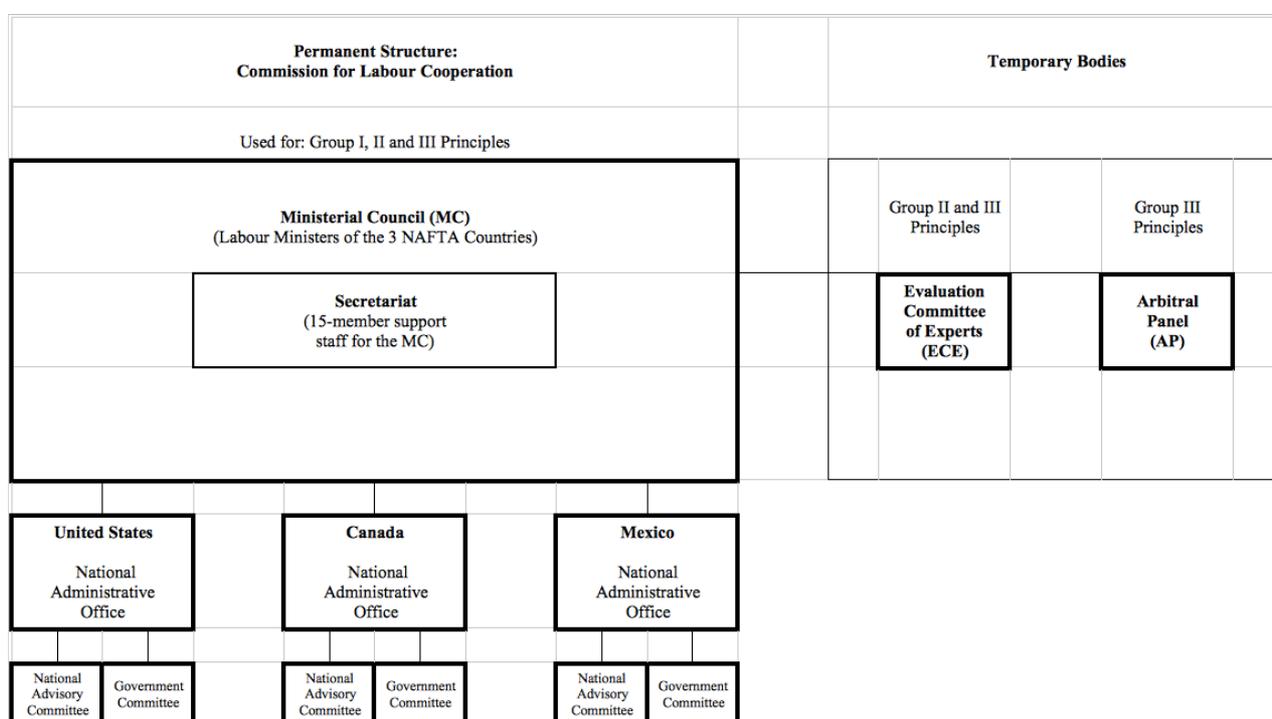
⁸⁹ *Ibid.* note 83, ANNEX 1

⁹⁰ *Ibid.* note 80

States loose part of their sovereignty by opening up to international and independent reviews over their performance in enforcing labour laws, on the other side does not force them in any way to strengthen their own labour laws and standards.⁹¹

Equipped with this knowledge, we will now do a closer analysis on what are the enforcement mechanisms provided by the NAALC, how they work and when can they be effectively leveraged. *Tab. 7* gives us an overview of which are the administrative structures set up by NAALC and for what principles they can be used.

Table 7 - Administrative structure set up by NAALC



Source: Bolle M. J., “NAFTA Labour Side Agreement: Lessons for the Worker Rights and Fast-Track Debate”, CRS Report for Congress, 2001.

As we can see from *tab. 8*, there is (1) a permanent structure that NAALC requires to maintain independently of the occurrences and (2) two temporary bodies which must be established case-by-case and only if considered necessary.

(1) At the highest level, the permanent structure is formed by a Commission for Labour Cooperation which comprehends a Ministerial Council, formed by the Secretary or the Minister of the three parties involved, and a Secretariat, which includes labour lawyers,

⁹¹ Compa L., “NAFTA’s Labour Side Accord: a three year accounting”, Cornell University ILR School, 1997.

economists and other professionals experienced in labour affairs. The role of the Council is mainly to oversee the implementation of NAALC in the three involved countries, to supervise the activities of the Secretariat and to promote tri-national cooperative activities. The role of the Secretariat is instead, to produce comparative reports on labour laws of the three countries and to provide staff support to the Council, to the Evaluation Committee of Experts (ECE) and to the Arbitral Panel (AP). At a lower level, but closely linked with the Commission for Labour Cooperation we find the National Administrative Offices (NAOs) that NAALC requires each government to maintain within their Labour Departments. Their purpose is to serve as sources of information and points of contact with governmental agencies of the three countries, NAOs of the other parties and the Secretariat; moreover, it should “periodically publish a list, of public communications on labour law matters arising in the territory of another Party”.⁹²

Submissions may be filed by any citizen or organization of any country with a NAO, as asserted in Art. 4⁹³; for this aspect two important specifications must be done. First of all, complaints under the Agreement must regard labour law issues arising in the country of any other party as complaints can’t be filed with one’s own country NAO;⁹⁴ secondly, each NAO establishes its own domestic procedures for reviewing submissions. Complaints filed with a NAO must have as a scope the investigation on “labour law matters arising in the territory of another Party”.⁹⁵ During this process NAOs may consult each other and hold hearings in trying to solve the dispute through “cooperative consultation”; if this doesn’t bring to a solution, for matters regarding the 11 guiding principles⁹⁶, NAO may recommend in their “report of review” ministerial consultations at

⁹² *Ibid.* note 83, Art. 16

⁹³ *Ibid.* note 83, Art. 4:

“Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labour tribunals for the enforcement of the Party's labour law.”

⁹⁴ *Ibid.* note 83, Art.16

⁹⁵ *Ibid.* note 83, Art.16

⁹⁶ *Ibid.* note 83, Art. 22 (1):

“Any Party may request in writing consultations with another Party at the ministerial level regarding any matter within the scope of this Agreement.”

the Council Level, in this case, in order for things to evolve, at least one Minister/Secretary must accept the recommendation and request consultations.

- (2) If the issue is not solved at the ministerial level the MC may refer to an Evaluation Committee of Experts (ECE), which consists of three members that lie outside the commission selected by the MC from a roster of experts. Even though any minister may request consultation even if a complaint hasn't been filed, the condition for its creation is that the matter must be "trade-related" and "covered by mutually recognized labour laws"⁹⁷; within this scope, ECE's job is to "analyse, in the light of the objectives of this Agreement and in a non-adversarial manner, patterns of practice by each Party in the enforcement of its occupational safety and health or other technical labour standards as they apply to the particular matter considered by the Parties under Article 22". The most relevant aspects in this article are that, not only the ECE evaluation is precluded to labour principles included in GROUP I (namely: freedom of association and protection of the right to organize, the right to bargain collectively and the right to strike) but also, in requiring an ECE evaluation, the requesting Party must open its own record of labour law enforcement in the same subject matter to scrutiny. ECE's evaluation is concluded with a final report containing "a comparative assessment of the matter under consideration, its conclusions and where appropriate, practical recommendations that may assist the Parties in respect of the matter"⁹⁸ that must be presented to the MC for further discussion and finally published so that the Parties can provide written responses to the recommendations. After ECE's report is issued, if one Party still believes that the other Party is persisting in a pattern of failure in effectively enforcing labour principles of GROUP III (namely: minimum employment standards, labour protections for children and young persons, prevention of occupational injuries and illnesses), the "Council shall, on the written request of any consulting Party and by a two-thirds vote, convene an arbitral panel to consider the matter"⁹⁹. These are the fundamental conditions for which the MC can create the an Arbitral Panel (AP); this has to be composed by five members selected

⁹⁷ *Ibid.* note 83, Art. 23 (3)

⁹⁸ *Ibid.* note 83, Art. 25

⁹⁹ *Ibid.* note 83, Art. 29

from “a roster of up to 45 individuals who are willing and enable to serve as panelists”¹⁰⁰ who “may seek information and technical advice from any person or body that it deems appropriate”¹⁰¹. At the end of the period of consultations and investigations the AP must present to the disputing Parties an Initial Report in which they determine whether or not a persistent pattern of failure actually occurred, together with their recommendations for the resolution of the dispute which form an action plan that should be adopted and implemented by the Party complained against in order to “remedy the pattern of non-enforcement”¹⁰². After the initial report has been presented to the disputing Parties, the report is overviewed considering any comment made by the Parties and a Final Report is issued and transmitted to the MC for publication. At this point, if the action plan is not implemented by Party complained against the AP may impose a monetary enforcement; this “shall be no greater than .007 percent of total trade in goods between the Parties during the most recent year for which data are available”¹⁰³ and most important thing, it “shall be expended at the direction of the Council to improve or enhance the labour law enforcement in the Party complained against, consistent with its law”¹⁰⁴. Canada makes an exception for this last part of the process as, only in Canada, the Commission can collect the fine and enforce an action plan in summary proceedings before a Canadian court, as stated in Annex 41A.

¹⁰⁰ *Ibid.* note 83, Art. 30

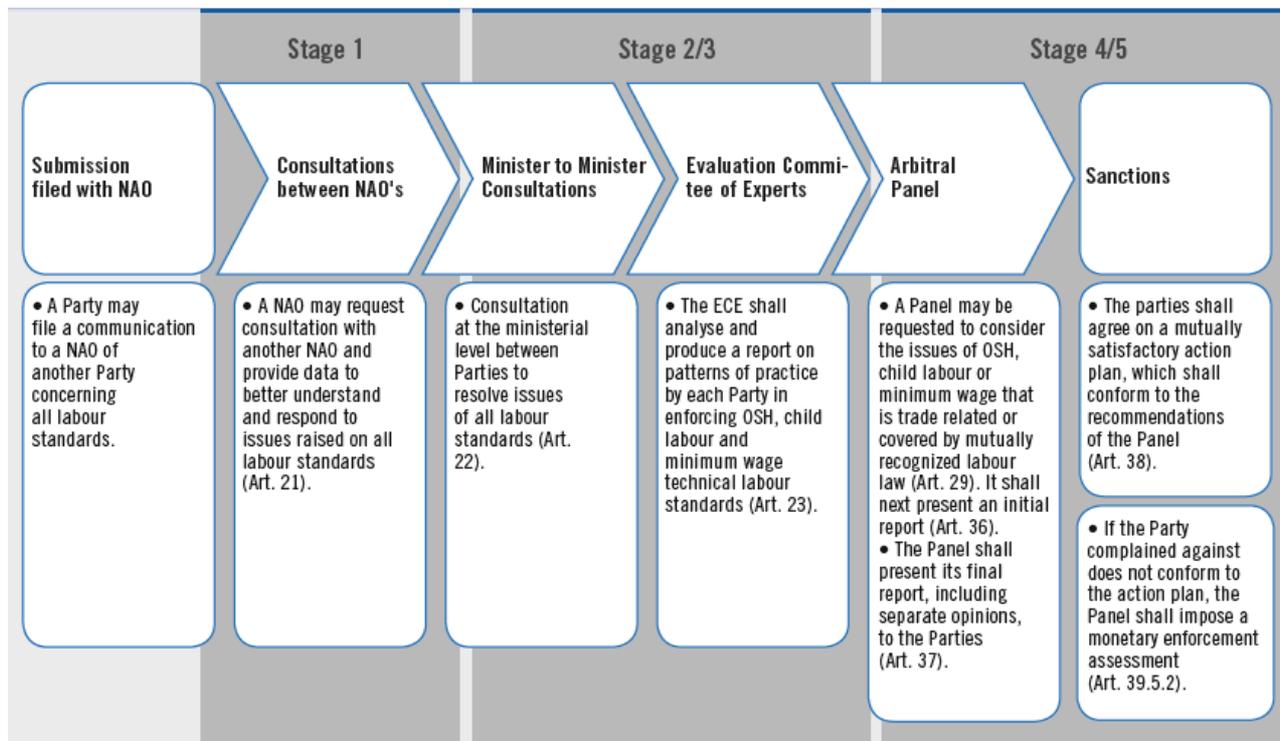
¹⁰¹ *Ibid.* note 83, Art. 35

¹⁰² *Ibid.* note 83, Art. 36

¹⁰³ *Ibid.* note 83, ANNEX 39

¹⁰⁴ *Ibid.* note 83, ANNEX 39

Figure 2 - NAALC public submission process

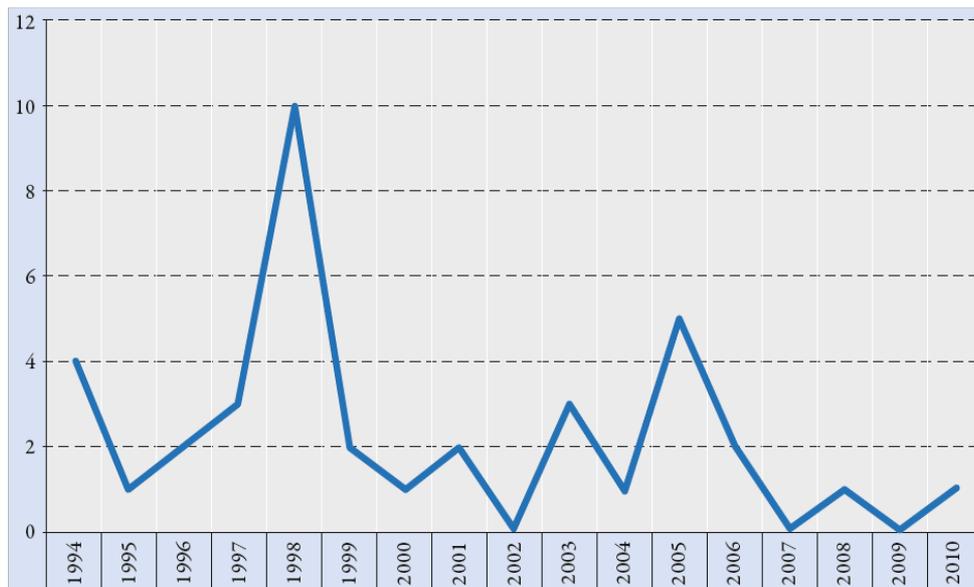


Source - ILLS, based on the legal provisions of the NAALC¹⁰⁵

After having analysed in detail this complex procedure, summarized in *Fig. 2*, it's inevitable to question oneself whether this enforcement mechanism has given proof to be useful in the years following the NAALC's entry into force. In doing this, we must bare in mind that, although final outcomes don't distinguish between nations, the number and the kind of complaints filed by each party differ considerably; for instance, in submissions against Mexico (26 between 1994 and 2011), the main issues were freedom of association, occupational injuries and illnesses, occupational safety and health, and minimum employment standards; in submissions against US (13 between 1994 and 2011), the main issues regarded the working conditions to which Mexican migrant workers are subjected; submissions against Canada (only 2 between 1994 and 2011) regarded instead issues connected to freedom of association and occupational injuries and illnesses. From *Fig. 3* we can clearly see that the great majority of the cases were filed in the first five years, tendency that culminated in 1998, with 10 submissions filed; from that moment the number of cases filed declined significantly only to partly recover in 2005 with 5 submissions filed.

¹⁰⁵ Luce, S. and Turner, L. Forthcoming, " Pre-Ratification effects of U.S. trade agreements on labor standards", IILS Background Paper, Geneva, ILO, 2012.

Figure 3 - Submissions filed under the NAALC between 1994 and 2010



Source: IILS, based on information extracted from complaint documents¹⁰⁶

The decrease in the number of cases filed can have can be justified by pointing out a few facts.

- (1) First of all, the length of the submission process is far too long and this fact is only getting worst as the period that needs to elapse between the date of filling and the signing of the ministerial agreement passed form being less than a year in 1994, to be up to four years in 2003.¹⁰⁷ This is not only due to the gradual decline in the attention given to submissions by the NAOs¹⁰⁸ but also to an over-reliance on governmental action; in fact, complaints are always filed through a government's NAO which, as complete and open-minded as they might be, will never be effective and transparent as an independent report filed by an NGO. Moreover, in taking decisions over a submission, governmental structures will always be influenced by political issues, like the fact that after a state has filed a submission against a another Party, this Party might subsequently start investigations on the accusing state for pure retaliatory purposes; and this might be the case also when no retaliatory purposes are involved, like when a state requires the MC to create an ECE for

¹⁰⁶ *Ibid.* note 103

¹⁰⁷ *Ibid.* note 103

¹⁰⁸ Delp, L., Arriaga, M., Palma, G., Urita, H, Valenzuela, A. " NAFTA's labour side agreement: Fading into oblivion? An assessment of workplace health and safety cases" UCLA Center for Labor Research and Education, University of California, 2004.

a case evaluation, the requesting state must open its own record of labour law enforcement in the same subject matter to scrutiny. This could increase the length of procedures as, in order to discourage people from filing complaints, NAALC structures could withhold consent for a period of time so long that in the end, complaining parties would either withdraw the complaint or, in any case, lose faith in this mechanism. The solution in this case could be to provide the NAALC structure with an independent body to review and pursue submissions against states; this body, apart from creating a greater legitimacy for the system, wouldn't have any of the concerns that usually dissuade governments from acting and this would enable the process to be more transparent and less politically-driven. Furthermore, this solution has already been applied to the other NAFTA side agreement (the NAAEC) under which environmental submissions are filed with the Commission of Environmental Cooperation (CEC) which is an independent international organization created by the NAAEC which bridges the gap between private actors and the government without the implication of political issues.

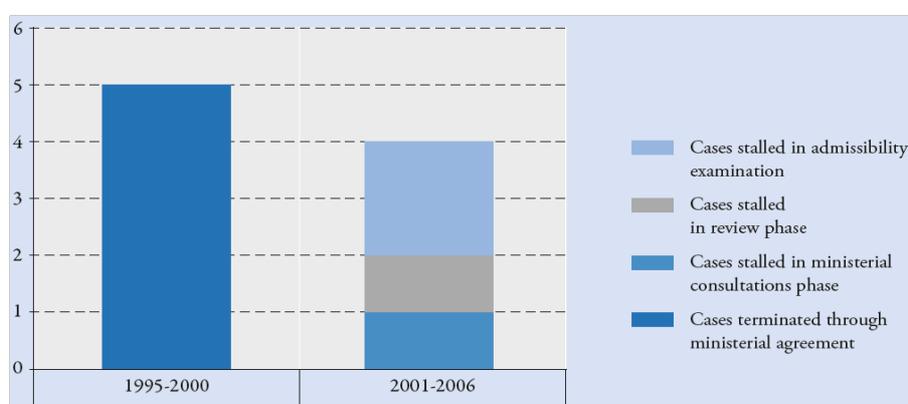
- (2) A second motivation to this declining appeal to this mechanism is that, even though NAALC's legal text allows any private actor to file a complaint, the most successful results are achieved mainly through public awareness and political pressure; one could say that the cases that achieved the highest goals are a result of "a series of legally sophisticated and well-researched petitions [...] all of which involved extensive political mobilization and the participation of multiple actors"¹⁰⁹. This, despite the fact that has brought to some important results, is one of the reasons for which submissions have been diminishing in the years; private citizens were discouraged in undertaking this kind of process by themselves and prefer to adhere to the complaints of large NGOs, whose only downside is that they choose cases according to their agenda.
- (3) A third and last motivation, is connected to the fact that not all labour principles can lead to monetary sanctions or to the temporary withdraw of NAFTA benefits; in fact, only guiding principles, which are part of GROUP III, are covered by this enforcement mechanism. A violation of GROUP I principles instead, can only hope to be solved through "cooperative consultation" at the MC level and, knowing how much this processes is both time-consuming and difficult to push forward, for reasons we've

¹⁰⁹ Pagnattaro M. A., "Levelling the Playing Field: Labor Provisions in CAFTA", 29 Fordham International Labour Journal, 2006.

explained in point (1), people will be discouraged right off the bat to file a submission to obtain only little and, at times, useless results. The reason for this disparity in treatment between different labour principles has been justified by US trade representative Mickey Kantor with the fact that limiting the means of resolution of these matters would avoid interference in labour management negotiations.¹¹⁰

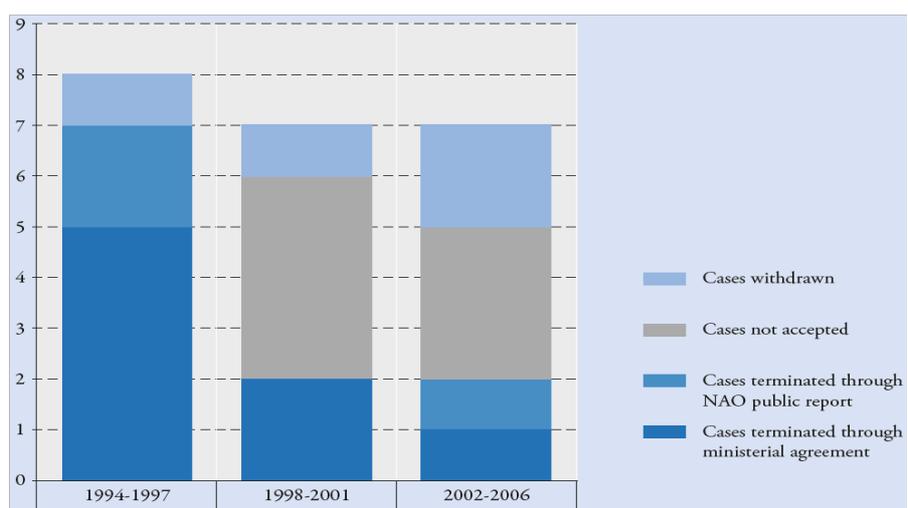
Fig. 4 and *fig. 5* can be very telling, in order to further understand the situation above-mentioned, as they show the procedural outcomes of submissions filed with Mexican and US NAOs, which are the ones which have totalled the highest number of submissions filed.

Figure 4 – Procedural outcomes of submissions to Mexican NAO



Source: IILS, based on information extracted from complaint documents¹¹¹

Figure 5 – Procedural outcomes of submissions to US NAO



Source: IILS, based on information extracted from complaint documents¹¹²

¹¹⁰Crandall E.C., “Will NAFTA's North American Agreement on Labor Cooperation Improve Enforcement of Mexican Labor Laws?” 7 *Transnational Law*, 1994.

¹¹¹ *Ibid.* note 103

¹¹² *Ibid.* note 103

In conclusion we can say that, despite its shortcomings, NAALC has been, so far, a positive experience; this mainly because it's been ground-breaking for what concerns the introduction of social clauses in trade agreements, *a fortiori* for the fact that its been introduce in a trade agreement in which there's a wide disproportion among the countries negotiating the trade, one need only think that at the time when the agreement entered into force US alone accounted for 85% of the economic activity in the trade area.¹¹³ Furthermore, complaint mechanisms and in particular cooperative activities promoted by the MC, have contributed significantly to raise the awareness on labour standards, especially in Mexico, where, due to under-development, in most of the cases workers weren't well aware of what were their own rights and how could they be claimed. Finally, the most notable accomplishment of the NAALC has been the significant increase of cross-boarder exchange, communication and collaboration between the three states' labour unions and labour researchers, for instance, the Communications Workers of America (CWA) developed thanks to NAALC, close ties with the *Sindicato de Telefonistas de la Republica Mexicana* (STRM). This, in a certain way, shouldn't surprise us, in fact, if we recall Art. 16 (3) which states that "Each NAO shall provide for the submission and receipt, [...] on labour law matters arising in the territory of another Party", we can understand that in such a system a well-organized network of communication can signify, for workers of the three parties, that there's a much higher possibility that labour issues will be solved, if only because of the fact that by utilizing a larger campaign, public awareness will increase on labour matters and consequently political pressure to solve specific issues will raise.

2.2 Association od Southeast Asian Nations (ASEAN) – the redemption of Southeast Asian nations in social matters

From the 1500s to the mid-1940s colonialism was imposed over Southeast Asia mainly by Europeans, Japanese, and Americans. The political and cultural impositions introduced by the colonizers obliged invaded countries to shut down and break up any kind of relationship they had with neighbour countries; this as a result of the nationalism that had strongly characterized the 20th century. The turning point, which culminated in the decolonization

¹¹³ Compa L., "NAFTA's Labor Side Accord: a three year accounting", Cornell University ILR School, 1997.

process that followed World War II, has been the invasion by the Empire of Japan of most of Southeast Asian countries (namely: Vietnam, Cambodia, Laos, Thailand, Malaysia, the Philippines, Indonesia, Singapore, Myanmar and East Timor); despite Japan had been eventually defeated, the fact the Western colonizing powers hadn't been able to protect their colonies from invasion during the war years, was used by the invaded countries as the triggering motivation to take the road towards independence. Yet, the independent nations, coming out from this decolonization process, weren't much prone to start tying alliances with one another; either for former colonial influences or for the fact that the entire world was conditioned by the division caused by Cold War, which was culminating in those same years. The entirely new situation in which Southeast Asian countries found themselves needed new measures and structures in order to become an enduring situation; Thailand, the only nation that had never been colonized, felt it was its duty to manage this complicated situation. The first attempt to deal with it has been the creation of the Association of Southeast Asia (ASA) in 1961, which tried to organize a regional co-operation between Thailand, Malaysia and the Philippines; this try didn't eventually last long as it was ended only a few years later for a territorial dispute between the Philippines and Malaysia concerning the jurisdiction of the North Borneo (Sabah) and the Sarawak territory. A later attempt in 1966, known as Asian and Pacific Council (ASPAC), emerged from a Republic of Korea diplomatic initiative. Australia, the Republic of China (Taiwan), Japan, South Korea (ROK), Malaysia, New Zealand, the Philippines, Thailand, and the Republic of Vietnam were founding members while Laos opted for observer status. In the following years ASPAC became an informal consultative forum on regional problems, including economic, social, cultural, political, and security issues¹¹⁴ but the admission of People's Republic of China and the consequent expulsion of Taiwan gave way to internal disputes which ended up disbanding the coalition in 1975. In the meantime, Thailand, which still hadn't given up on its ambitions to form a regional co-operation between Southeast Asian states, assumed the role of mediator in the dispute between Malaysia and the Philippines that had caused the end of the ASA; after many attempts, its efforts finally paid off and led to the reconciliation between Malaysia, the Philippines and Indonesia (Philippines' ally in this dispute). Now that this hurdle had been surmounted the path was clear to embark into a new attempt of cooperation – on the 8 August 1967 the Bangkok Declaration, signed

¹¹⁴ Introduction to the presentation of Braddick C.W.'s conference entitled "ASPAC: A Study in Failure?", which took place in Leeds on the 29 October 2010.

by the representatives of Indonesia, Malaysia, the Philippines, Singapore and Thailand, gave birth to the Association of Southeast Asian Nations (ASEAN).

As we have seen, in order to reach the goal of implementing a regional cooperation such as ASEAN, there have been a lot of struggles and failed attempts from Southeast Asian countries; this fact cannot but make us question on the reasons¹¹⁵ for which such result was perceived as urgent and necessary.

- (1) The first reason is that the withdrawal of colonial powers together with the weak conditions in which Southeast Asian countries found themselves after World War II left a power vacuum of which other countries could have taken advantage of, in order to, once again, invade them.
- (2) A second reason was that the cooperation with countries located in distant parts of the world had proved itself to be inefficacious after the failure of the Southeast Asia Treaty Organization (SEATO). This international organization for the collective defence of Southeast Asia was established with the Manila Pact in 1954 by the will of Australia, France, New Zealand, Pakistan, the Philippines, Thailand, the United Kingdom, and the United States. The failure of this organization, officialised on 30 June 1977, was mainly due to internal conflicts and disputes caused by the different perspectives that members coming from such different cultures could have on the same issue, not to mention the discrepancies on the aims pursued.
- (3) A third important reason was the overall mistrust in the actual hold up of promises made by western powers when allying to less powerful countries; apart from events occurred during the years in which the SEATO was still standing, what mostly fuelled this fear was something that later became known as “Western betrayal” which refers to “a sense of historical and moral responsibility” for the Western powers’ “abandonment of (Central and) Eastern Europe at the end of the Second World War”. The events to which this particularly refers to are the failure of United States, United Kingdom and France in meeting their legal, diplomatic and military obligations taken with Poland and Czechoslovakia when they did not intervene during the Munich Agreement, which allowed the annexation to Nazi Germany of parts of Czechoslovakia, and during the invasion of Poland by Germany and URSS occurred in 1939.

¹¹⁵ Thanat K., “ASEAN Conception and Evolution”, in the ASEAN Reader, Institute of Southeast Asian Studies, Singapore, 1992.

(4) Finally the last reason, which in some way embodies all of the previous ones, is that only by joining their forces Southeast Asian countries had the possibility to be heard, to strengthen their position and to protect themselves from Western powers; moreover, it was believed by all the countries which founded the ASEAN and all the countries which joined it later, that only through cooperation and integration big goals could be achieved, goals that individual efforts of each member state could have never even imagined to achieve. This thought was thoroughly expressed by the Philippine's Secretariat of Foreign Affairs, Narciso Ramos after the Bangkok Declaration was signed:

“The fragmented economies of Southeast Asia, (with) each country pursuing its own limited objectives and dissipating its meagre resources in the overlapping or even conflicting endeavours of sister states, carry the seeds of weakness in their incapacity for growth and their self-perpetuating dependence on the advanced, industrial nations. ASEAN, therefore, could marshal the still untapped potentials of this rich region through more substantial united action.”¹¹⁶

Enforced by the statement of Tun Abdul Razak, Deputy Prime Minister of Malaysia:

“We the nations and peoples of Southeast Asia, must get together and form by ourselves a new perspective and a new framework for our region. It is important that individually and jointly we should create a deep awareness that we cannot survive for long as independent but isolated peoples unless we also think and act together and unless we prove by deeds that we belong to a family of Southeast Asian nations bound together by ties of friendship and goodwill and imbued with our own ideals and aspirations and determined to shape our own destiny. [...] with the establishment of ASEAN, we have taken a firm and a bold step on that road.”¹¹⁷

¹¹⁶ Taken from the history of the founding of ASEAN.
Consulted at <<http://asean.org/asean/about-asean/history/>>

¹¹⁷ *Ibid.* note 114

For the reasons stated above we can, on the overall, claim that in the case of ASEAN, as in many other regional agreements, “it is not common ideals but common fears that generally hold groups and nations together”¹¹⁸.

Knowing that these were the intents when ASEAN was established, how have things changed from then and what measures have been taken in order to reach the sought goals? First of all, five more Southeast Asian countries joined the Association invoking Art. 4 of the Bangkok Declaration which states that:

“the Association is open for participation to all States in the South-East Asian Region subscribing to the aforementioned aims, principles and purposes.”¹¹⁹

These are, namely: Brunei Darussalam, joined on 8 January 1984, Vietnam, joined on 28 July 1995, Laos and Myanmar joined on 23 July 1997, and Cambodia joined on 30 April 1999. Despite the entering of these countries into ASEAN has resulted in a rapid growth driven by trade, investment and market reforms, the economic differences which came to be known as “development divide”¹²⁰, are still very pronounced, as we can see from *fig.6*. Another downside of this convergence process is that it has increased polarization within countries; in fact, an uneven distribution of gains has contributed to worsen an already critical income inequality situation. As we can see from *tab. 8* the Gini index¹²¹ is elevated in countries like Malaysia, Singapore, the Philippines and Thailand, and the percentage income share held by the highest 20% is for all the countries (for which the data is available) almost half of total income. All in all, we can still affirm that joining ASEAN has been a wise decision for these countries as, despite from the issues observed, the levels of poverty have been dramatically

¹¹⁸ Rajaratnam S., “ASEAN: The Way Ahead”, in *The ASEAN Reader*, Institute of Southeast Asian Studies, Singapore, 1992.

¹¹⁹ The Asean Declaration (Bangkok Declaration) Bangkok, 8 August 1967.
Consulted at < <http://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967/>>

¹²⁰ Menon J., “Narrowing the Development Divide in ASEAN: The Role of Policy” ADB Working Paper Series on Regional Economic Integration, No. 100, July 2012.

¹²¹ Definition by the OECD glossary of statistical terms: “The Gini index measures the extent to which the distribution of income (or, in some cases, consumption expenditure) among individuals or households within an economy deviates from a perfectly equal distribution. [...] A Gini index of zero represents perfect equality and 100, perfect inequality.”
Consulted at <<https://stats.oecd.org/glossary/detail.asp?ID=4842>>

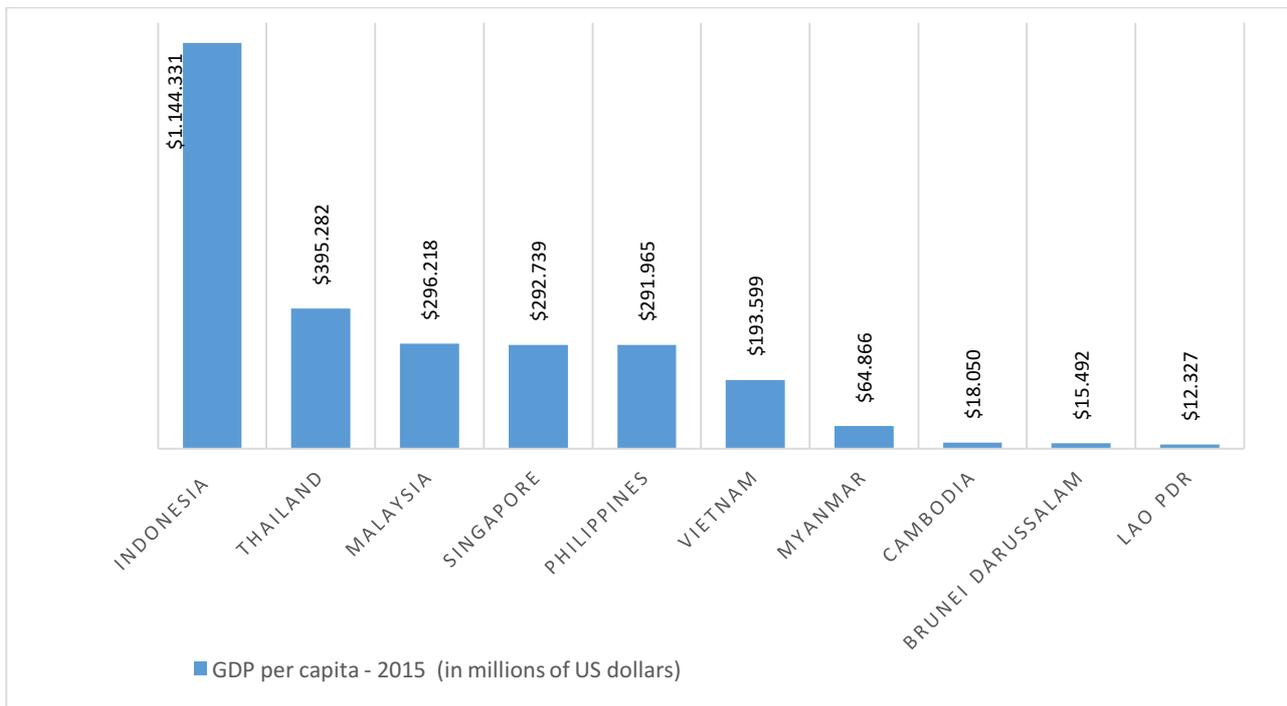
reduced and the Human Development Index (HDI) has grown at a steady pace in the period between 2000 and 2011, as we can see, respectively in *tab. 9* and *tab.10*.

*Table 8 – Inequality in ASEAN countries*¹²²

Country	GINI Index	Period	Highest 20%	Third 20%	Lowest 20%
Indonesia	35,6 (2009)	2002 – 2010	39,6 – 43,6	16,5 – 15,6	9,5 – 7,6
Malaysia	46,3 (2009)	2004 – 2009	51,4 – 51,4	13,6 – 13,7	4,7 – 4,6
Thailand	39,3 (2012)	2000 – 2010	49,7 – 46,5	13,7 – 14,8	6,2 – 6,6
Singapore	46,4 (2014)	...	...	...	...
Philippines	43,0 (2012)	2000 – 2009	52,3 – 49,6	13,1 – 13,8	5,4 – 6,0
Vietnam	38,7 (2012)	2002 – 2008	45,6 – 45,6	14,8 – 15,1	7,5 – 6,9
Cambodia	30,8 (2012)	2004 – 2010	44,2 – 42,7	15,2 – 15,6	7,9 – 8,4
Lao PDR	37,9 (2012)	2002 – 2007	43,3 – 44,9	15,6 – 15,1	8,1 – 7,6

Source: author’s interpretation of data provided by World Bank (2015)

Figure 6 – ASEAN member states’ GDP per capita



Source: author’s interpretation of data provided by World Bank (2015)

¹²² taken from: Menon J., “Narrowing the Development Divide in ASEAN: The Role of Policy” ADB Working Paper Series on Regional Economic Integration, No. 100, July 2012

Table 9 – Poverty levels in ASEAN countries¹²³

Country	Poverty Headcount Ratio at \$1.25 a day (PPP) (% of population)		Poverty Gap at \$ 1.25 a day (PPP) (%)		Poverty Headcount Ratio at National Poverty Line (% of population)		Poverty Headcount Ratio at Rural Poverty Line (% of rural population)		Poverty Headcount Ratio at urban Poverty Line (% of urban population)		Average Annual Rate of Total Poverty Reduction	
	Initial	Final	Initial	Final	Initial	Final	Initial	Final	Initial	Final	%	Period
Cambodia	37.69 (2004)	22.75 (2008)	10.20 (2004)	4.87 (2008)	34.7 (2004)	30.1 (2007)	37.8 (2004)	34.5 (2007)	17.6 (2004)	11.8 (2008)	1.55	2004 - 2010
Indonesia	29.31 (2002)	18.06 (2010)	6.03 (2002)	3.31 (2010)	18.2 (2002)	13.3 (2010)	21.1 (2002)	16.6 (2010)	14.5 (2002)	9.9 (2010)	0.61	2002 - 2010
Lao PDR	43.96 (2002)	33.88 (2008)	12.11 (2002)	8.95 (2008)	33.5 (2002)	27.6 (2008)	...	31.7 (2008)	...	17.4 (2008)	1.18	2003 - 2008
Myanmar	...	...	...	...	...	25.6 (2010)	...	29.2 (2010)	...	15.7 (2010)	1.30	2005 - 2010
Malaysia	0.54 (2004)	...	0.06 (2004)	...	5.7 (2004)	3.8 (2009)	11.9 (2004)	8.2 (2009)	2.5 (2004)	1.7 (2009)	0.38	2004 - 2009
Philippines	22.45 (2000)	18.42 (2009)	5.48 (2000)	3.72 (2009)	33.0 (2000)	26.5 (2009)	...	...	...	...	0.72	2000 - 2009
Thailand	3.04 (2000)	0.37 (2009)	0.50 (2000)	0.05 (2009)	21.0 (2000)	8.1 (2009)	26.5 (2000)	10.4 (2009)	8.6 (2000)	3.0 (2009)	1.43	2000 - 2009
Vietnam	40.05 (2002)	16.85 (2008)	11.20 (2002)	3.75 (2008)	28.9 (2002)	14.2 (2010)	35.6 (2002)	17.4 (2010)	6.7 (2002)	6.9 (2010)	0.70	2002 - 2006

Notes: [...] indicates that data is not available; PPP = Purchasing Power Parity¹²⁴

Source: World Bank (2012) - Average annual rate of total poverty reduction and 2010 poverty data for Myanmar and Viet Nam from P. Warr, J. Menon, and A. Yusuf (2010)¹²⁵.

Table 10 – Human Development Index (HDI) in ASEAN countries¹²⁶

HDI Rank	Country	2000	2005	2006	2007	2008	2009	2010	2011
26	Singapore	0.801	0.835	0.843	0.850	0.855	0.856	0.864	0.866
33	Brunei Darussalam	0.818	0.830	0.834	0.835	0.834	0.835	0.837	0.838
61	Malaysia	0.705	0.738	0.742	0.764	0.750	0.752	0.758	0.761
103	Thailand	0.626	0.656	0.661	0.670	0.672	0.673	0.680	0.682
112	Philippines	0.602	0.622	0.624	0.630	0.635	0.636	0.641	0.644
124	Indonesia	0.543	0.572	0.579	0.591	0.598	0.607	0.613	0.617
128	Vietnam	0.528	0.561	0.568	0.575	0.580	0.584	0.590	0.593

¹²³ *Ibid.* note 120

¹²⁴ Definition by Investopedia: “Purchasing power parity (PPP) is a theory in economics that approximates the total adjustment that must be made on the currency exchange rate between countries that allows the exchange to be equal to the purchasing power of each country’s currency.”

Consulted at < <http://www.investopedia.com/terms/p/ppp.asp>>

¹²⁵ Warr P., Menon J., and Yusuf A., “Regional Economic Impacts of Large Projects: A General Equilibrium Application to Cross-Border Infrastructure.” *Asian Development Review*, 27 (1), pp. 104–134, 2010.

¹²⁶ *Ibid.* note 120

138	Lao PDR	0.448	0.484	0.491	0.500	0.507	0.514	0.520	0.524
139	Cambodia	0.438	0.491	0.501	0.508	0.513	0.513	0.518	0.523
149	Myanmar	0.380	0.436	0.448	0.459	0.468	0.474	0.479	0.483

Source: United Nations Development Program

Strong of all the information acquired, we can say that despite the overall progress in ASEAN countries, much still needs to be done in order to narrow the gap between founders of ASEAN and newer members, and in a broader perspective, to bridge the gap between ASEAN countries and major world powers. In order to do so it is important to increase the speed and the breadth of policy reforms focusing on education and health in order to produce a working force more apt to actively participate in the growth process and adapt to structural changes. More than this, its fundamental to address the labour mobility in an adequate way both in sending and receiving countries in order to protect migrant workers' rights and to start governing labour migration in a way that avoids its harnessing for economic development purposes and cuts down the numbers of the informal market.¹²⁷

Now that we've identified, in an approximate way, what are the major issues with which ASEAN has to deal with, we're going to analyse them in-depth while describing the means it has found in order to tackle them.

The migration phenomenon is a matter of extremely high relevance on a global scale, only in 2013, the UN estimated that there were 232 millions of migrants globally; of these, 150 million are migrant workers amongst which 7.8% are concentrated in the region of Southeast Asia and the Pacific. Being in this area the total workers 335 million, and the migrant workers 11 million, we can state that 3.5% of the total working force is made up of migrants coming both from countries outside and within the region. For what concerns the internal migration phenomenon, the largest numbers of labour migrants were found in Malaysia, Singapore and Thailand, coming from Cambodia, Indonesia, Myanmar and the Philippines as shown in *Tab.11*.

¹²⁷ Menon J., "Narrowing the Development Divide in ASEAN: The Role of Policy" ADB Working Paper Series on Regional Economic Integration, No. 100, July 2012

Table 11 – Estimated number of migrants in ASEAN countries from other ASEAN countries (numbers in thousands)¹²⁸

Country of origin \ Country of destination	BN	KH	ID	LA	MY	MM	PH	SG	TH	VN	Total	
Brunei	BN	--	<1	<1	<1	<1	3	<1	<1	<1	4	
Cambodia	KH	<1	--	3	1	<1	<1	4	<1	19	<1	27
Indonesia	ID	5	<1	--	<1	744	<1	138	29	<1	4	921
Lao PDR	LA	<1	<1	4	--	<1	<1	5	<1	29	<1	39
Malaysia	MY	57	<1	47	<1	--	<1	56	304	1	2	468
Myanmar	MM	<1	<1	14	<1	<1	--	18	<1	109	<1	142
Philippines	PH	11	<1	36	<1	308	<1	--	2	1	2	361
Singapore	SG	2	<1	12	<1	92	<1	15	--	<1	<1	124
Thailand	TH	9	90	25	2	92	<1	30	<1	--	<1	248
Vietnam	VN	<1	109	17	10	1	<1	23	<1	8	--	170
Total	85	201	158	13	1238	1	294	336	169	10	2505	

Source: DRC Migration 2007, version 4

All of this information is to be read without considering the working population that works in informal sectors which, in a region like Southeast Asia, that is part of the developing world where low skilled workers are the vast majority, accounts for up to 60% of the working force¹²⁹.

In dealing with the matter of lack of social-protection for migrant workers we must first of all understand what do we mean with these terms; when referring to social-protection we are referring to the “ ‘protection’ provided by social security in case of social risks and needs”¹³⁰ and in particular, knowing that the term social protection is “ interchangeable with ‘social security’ ”¹³¹:

¹²⁸ Table taken from Mahidol Migration Centre, Institute for Population and Social Research “Migrant Workers’ Rights to Social Protection in ASEAN: Case Studies of Indonesia, Philippines, Singapore and Thailand”, Mahidol University, Thailand, 2011.

¹²⁹ Samydorai S., “Social Security for Migrant Workers in ASEAN”, Asian Labour Update 73, 2009.

¹³⁰ ILO, “World Social Security Report 2010/11- Providing coverage in times of crisis and beyond”.

Consulted at

<http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_146566.pdf>

¹³¹ *Ibid.* note 128

“The notion of social security [...] covers all measures providing benefits, whether in cash or in kind, to secure protection, inter alia, from: (a) lack of work-related income (or insufficient income) caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) lack of access or unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependants; (d) general poverty and social exclusion.”¹³²

While, when referring to migrant workers, we mean:

“a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”¹³³

Secondly, we must frame both the short-term and the long-term issues; while the former refer to the lack of all measures of protection that fall within the notion of social security abovementioned, the latter refers to the failure to pay migrants’ old age pensions, as the benefit to access to the social protection system in the migrants’ home country, when they return after many years of non contribution, is not assured.¹³⁴

The first step taken by ASEAN in order to address these issues can be found in the Vientiane Action Programme (2004 – 2010) where, in ANNEX 1, section 1.1.4.6 its declared the intention to elaborate “an ASEAN Instrument on the Protection and Promotion of the Rights of Migrant Workers”¹³⁵ (AIMW). In elaborating the draft of the AIMW it was decided that the key principles should have been written by the representatives of two labour receiving countries, Thailand and Myanmar, together with the representatives of two labour sending countries, Indonesia and the Philippines; however, ever since, in December 2009, the

¹³² *Ibid.* note 128

¹³³ Art. 2(1) of the “International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families”, Adopted by General Assembly resolution 45/158 of 18 December 1990. Consulted at <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx>>

¹³⁴ Mahidol Migration Centre, Institute for Population and Social Research “Migrant Workers’ Rights to Social Protection in ASEAN: Case Studies of Indonesia, Philippines, Singapore and Thailand”, Mahidol University, Thailand, 2011.

¹³⁵ “Vientiane Action Programme”, Lao PDR, 29 November 2004. Consulted at <<http://www.asean.org/storage/images/archive/VAP10th%20ASEAN%20Summit.pdf>>

proposal, advanced by representatives of labour sending countries, to institute a legally binding framework in order to include undocumented migrants under protection mechanisms, has been refused by Malaysia, the draft has been stalled¹³⁶. In the meantime, on January 2007, ASEAN decided to address the issue of the migrant workers in a ground-breaking way by signing the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (DPPMW). This document, despite “recognizing further the sovereignty of states in determining their own migration policy relating to migrant workers, including determining entry into their territory and under which conditions migrant workers may remain”¹³⁷, acknowledges “the need to address cases of abuse and violence against migrant workers whenever such cases occur”¹³⁸; in order to do so it establishes four general principles which foster the promotion, by both sending and receiving states, of “the full potential and dignity of migrant workers in a climate of freedom, equity, and stability”¹³⁹ and the cooperation “to resolve the cases of migrant workers who, through no fault of their own, have subsequently become undocumented”¹⁴⁰ even if clarifying the fact that “nothing in the present Declaration shall be interpreted as implying the regularisation of the situation of migrant workers who are undocumented”¹⁴¹. It then goes on setting out the obligations of receiving countries who must “intensify efforts to protect the fundamental human rights, promote the welfare and uphold human dignity of migrant workers”¹⁴², “facilitate access to resources and remedies through information, training and education” and “provide migrant workers, who may be victims of discrimination, abuse, exploitation, violence, with adequate access to the legal and judicial system”¹⁴³; and obligations of sending countries who must “ensure access to employment and livelihood opportunities for their citizens as sustainable alternatives to migration of workers”¹⁴⁴ and, for the cases in which these alternatives aren’t taken, “set up policies and

¹³⁶*Ibid.* note 132

¹³⁷ “ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers”, Philippines, 13 January 2007.

Consulted at <<http://www.ilo.org/dyn/migpractice/docs/117/Declaration.pdf>>

¹³⁸ *Ibid.* note 135

¹³⁹ *Ibid.* note 135

¹⁴⁰ *Ibid.* note 135

¹⁴¹ *Ibid.* note 135

¹⁴² *Ibid.* note 135

¹⁴³ *Ibid.* note 135

¹⁴⁴ *Ibid.* note 135

procedures to facilitate aspects of migration of workers, including recruitment, preparation for deployment overseas and protection of the migrant workers when abroad as well as repatriation and reintegration to the countries of origin”¹⁴⁵ which should solve what we’ve mentioned above as the thorniest issue in terms of lack of social security in the long term; moreover, sending states must “establish and promote legal practices to regulate recruitment of migrant workers and adopt mechanisms to eliminate recruitment malpractices through legal and valid contracts, regulation and accreditation of recruitment agencies and employers, and blacklisting of negligent/unlawful agencies”¹⁴⁶. It ends up by establishing the commitments taken by ASEAN amongst which the most relevant ones are to “promote decent, humane, productive, dignified and remunerative employment for migrant workers”¹⁴⁷, to “establish and implement human resource development programmes and reintegration programmes for migrant workers in their countries of origin”¹⁴⁸, which also tackles the same issue aforementioned, to “take concrete measures to prevent or curb the smuggling and trafficking in persons”¹⁴⁹ and to “promote capacity building by sharing of information, best practices as well as opportunities and challenges encountered by ASEAN Member Countries”¹⁵⁰. As we can see, this Declaration is extremely complete and efficient in dealing with all of the issues connected to migrant workers; however, if we consider that there’s a clause which recognizes the “sovereignty of states in determining their own migration policy relating to migrant workers”¹⁵¹, and that the appointed mechanisms which should ensure the implementation of these principles (AIMW) is in a situation of impasse which endures to this date [Ed. September 2016], we can realize that there’s the risk that, without effective measures and a supervisory mechanism, there would be an ineffective implementation of the Declaration. Yet, the previous assertion should be taken with a grain of salt, in fact, even though it is not provided with a specific body to implement protection and promotion of migrant workers’ rights, ASEAN is provided with a sound and functioning Labour Cooperation Structure which consists of¹⁵²:

¹⁴⁵ *Ibid.* note 135

¹⁴⁶ *Ibid.* note 135

¹⁴⁷ *Ibid.* note 135

¹⁴⁸ *Ibid.* note 135

¹⁴⁹ *Ibid.* note 135

¹⁵⁰ *Ibid.* note 135

¹⁵¹ *Ibid.* note 135

- ASEAN Labour Ministers Meeting (ALMM) which is held every two years with the aim of drawing up work programmes; with these, specific objectives and intermediate targets in defined areas are set and should be reached by ASEAN within a given period of time. Moreover, during the meetings the progress of implementation of previous action plans is reviewed, related action plans are considered, and so is the promotion and the cooperation with dialogue partners.
- Senior Labour Officials Meeting (SLOM) which has the task to monitor the progress of implementation of the ALM Programme and to establish subsidiary bodies if growth in labour cooperation requires so. To date SLOM has established four subsidiary bodies, namely:
 - Senior Labour Officials Meeting Working Group on Progressive Labour Practices to enhance the competitiveness of ASEAN (SLOM-WG); established as a permanent body in 2008, it focuses on priority areas including Human Resource, Social Security, Industrial Relations, Skills Development and Networking, Skills Recognition, Labour Law, Labour Statistics, and Decent Work.
 - ASEAN Committee on the Implementation of the Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW); established as a follow-up to the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, it's work focuses on four main principles:
 - “(1) Step up protection and promotion of the rights of migrant workers against exploitation and mistreatment
 - (2) Strengthen protection and promotion of the rights of migrant workers by enhancing labour migration governance in ASEAN Countries
 - (3) Regional cooperation to fight human trafficking in ASEAN
 - (4) Development of an ASEAN Instrument on the Protection and Promotion of the Rights of Migrant Workers”¹⁵³

¹⁵² “ASEAN Labour Ministers Meeting (ALMM)”

Consulted at <<http://asean.org/asean-socio-cultural/asean-labour-ministers-meeting-alm/>>

¹⁵³ “ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW) - Work Plan”, Singapore, September 2008.

- ASEAN Occupational Safety and Health Network (OSHNET), established in 1999, its aim is to promote cooperation in improving safety and health in the workplace in the ASEAN region as well as to serve as a platform to exchange experience and information in the field of occupational safety and health standards, training, research, inspection and national framework.
- SLOM Working Group on the HIV Prevention and Control in the Work Place, established in 2008, it has the aim of facilitating policy dialogue and information sharing among Member States on good practices and strategic actions on issues and areas related to HIV/AIDS in the Workplace and to be a platform for identifying ways forward on this subject.
- Moreover, ASEAN has maintained an ongoing relationship with ILO since 2003; this, in particular, has led to the the cooperation agreement between ILO and ASEAN signed in March 2007, in which, one of the purposes enumerated in Art.1 is the:

“cooperation in the implementation of programmes and projects, including but not limited to occupational health and safety, HIV/AIDS and the workplace, employment implications of trade agreements, labour market reforms and industrial relations, youth employment, vocational training, social security and labour migration”¹⁵⁴

Another step towards the endorsement of migrant workers has been taken in 2009 with the introduction of the ASEAN Socio-Cultural Community (ASCC) Blueprint which has dedicated a whole chapter to promoting social justice and rights, amongst which, the rights and welfare of migrant workers were one of the priorities. In particular, the strategic objectives linked to migrant worker’s, as stated in Art. 28, are to:

“Ensure fair and comprehensive migration policies and adequate protection for all migrant workers in accordance with the laws, regulations and policies

¹⁵⁴ “Cooperation Agreement between the Association of Southeast Asian Nations (ASEAN) Secretariat and the International Labour Office”, 20 March 2007.
Consulted at < http://asean.org/?static_post=cooperation-agreement-between-the-association-of-southeast-asian-nations-asean-secretariat-and-the-international-labour-office>

of respective ASEAN Member States as well as implement the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers”¹⁵⁵

Finally, the last provision that addresses thoroughly the matter of migrant workers is the ASEAN Labour Ministers’ Work Programme for 2010 – 2015 which, in dealing with the issue of the protection and promotion of labour rights, includes migrant and workers’ rights by imposing objectives, priorities and intermediate goals that had to be reached within 2015, as we can see from *Tab.12*.

Table 12 – ASEAN Labour Ministers’ Work Programme: Objectives, Priorities, and Intermediate Goals

Overall objective	To build towards the vision of a better quality of life, productive employment, and adequate social protection for ASEAN peoples through enhancing workforce, competitiveness, creating a harmonious and progressive workplace, and promotion of decent work for all.			
Strategic priorities	1. Legal Foundation Labour rights and conditions of work are protected in law and its application.	2. Institutional capacity Government bodies have the capacities to oversee enforcement of labour laws and regulations	3. Social Partners Informed social dialogue takes place among labour sector partners at the national and regional level	4. Labour Markets & Workforce Development Labour markets generate decent employment opportunities, and the workforce development system contributes to the creation of a competitive workforce.
Intermediate Goals	<ol style="list-style-type: none"> ALMs protect and promote labour rights, including those of migrant workers, in the region. Member States’ labour laws take into account ILO core labour standards and international benchmarks, where appropriate. 	<ol style="list-style-type: none"> ALMs promote regional best practices with respect to Labour Ministers’ inspectorates’ oversight of workplace compliance with labour laws and referencing to the ILO inspection standards, where appropriate. Member States effectively regulate occupational safety and health to ensure safe working conditions for ASEAN workers. Member States’ labour justice systems effectively resolve workplace disputes. Member States work to improve national social protection systems to cover risks faced by workers of ill health, disability, and old age. Member States provide employment services to job seekers/employers and effectively regulate the private employment agencies. Member States to facilitate policy dialogue and information sharing on good practices and strategic action on issues related to HIV/AIDS in the workplace. 	<ol style="list-style-type: none"> Unions, private sector or employer groups, and government representatives meet at national and regional levels, where appropriate, to discuss issues of common interest. Industrial relations at the firm – level in Member States encourage progressive labour practices. Cooperation by Member States with external labour sector partners (e.g., ILO, bilateral labour sector partners, and international labour NGOs and trade unions) is enhanced. 	<ol style="list-style-type: none"> Systems are in place that will promote the mobility of skilled labour within ASEAN. Employment, wage, working condition, skills demand, and other impacts on trade liberalisation and of global economic challenges are anticipated, analysed, monitored, and communicated to labour sector stakeholders and the public. Progressive labour practices with regard to workforce development, skills training and standards, labour productivity, and labour law continue to be promoted to enhance the competitiveness of firms and workforces, and thus of the ASEAN Member States and region overall. Labour market information is generated, regularly updated, and effectively disseminated.

Source: ASEAN Labour Ministers’ Work Programme for 2010 – 2015

Broadening now our perspective, we’re going to analyse what were the efforts taken by ASEAN in order to promote the respect of human rights in Member States. A first glaring

¹⁵⁵ ASEAN Socio-Cultural Community Blueprint, Jakarta, June 2009. Consulted at <<http://asean.org/wp-content/uploads/archive/5187-19.pdf>>

signal of ASEAN's strong commitment to the promotion and protection of human rights and fundamental freedoms was the establishment, on 23 October 2009, of the ASEAN Intergovernmental Commission on Human Rights (AICHR). This body's main activities consist in conducting thematic studies on topics including Corporate Social Responsibility (CSR), migration, trafficking in persons, rights to health, rights to education, right to life, right to peace, and several other; in conducting research, trainings and workshops on matters that are related to issues on human rights; and in drawing up documents that help engender a structural framework within ASEAN for the implementation of Human Rights in all the aspects addressed by the Association. Amongst these, the most important and valuable so far has been the ASEAN Human Rights Declaration. This document reflects ASEAN's aspiration to adhere "to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms"¹⁵⁶ as stated in the ASEAN Charter; this Declaration, that was adopted unanimously by ASEAN members at the Phnom Penh meeting in November 2012, was conceived to "help establish a framework for human rights cooperation"¹⁵⁷. The Declaration is divided in six parts, namely: general principles, civil and political rights, economic social and cultural rights, right to development, right to peace, and cooperation in the promotion and protection of human rights. Many of the articles recall, at times directly and at times indirectly, both the Universal Declaration of Human Rights (UDHR) and the UN International Covenant on Civil and Political Rights Charter of the United Nations; for instance, Art. 1 states that:

"All persons are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of humanity."¹⁵⁸

¹⁵⁶ The ASEAN Charter, December 2007.

Consulted at <http://www.asean.org/wp-content/uploads/2012/05/11.-October-2015-The-ASEAN-Charter-18th-Reprint-Amended-updated-on-05_-April-2016-IJP.pdf>

¹⁵⁷ "ASEAN Human Rights Declaration", Phnom Penh, Cambodia, 18 November 2012.

Consulted at <http://aichr.org/?dl_name=ASEAN-Human-Rights-Declaration.pdf>

¹⁵⁸ *Ibid.* note 155

which corresponds to Art. 1 of the UDHR, or Art. 14 which states that:

“No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment”¹⁵⁹

has its equivalent in Art. 7 of the ICCPR; apart from these, as it is stated in the preamble, the AHRD refers to the Charter of the United Nations and to the Vienna Declaration and Programme Action, to which ASEAN had previously adhered.

Despite the stir that this Declaration has brought by both for what concerns the way in which the issue of the protection of human rights is being addressed in an association of regional cooperation and mostly for it being between developing countries, the declaration has been widely criticized not only by ASEAN’s civil society but also by international human organizations such as Amnesty International which defines the AHRD as “deeply flawed”; in particular the concerns are focused on the contents of Arts. 6, 7 and 8 in the parts which state, respectively:

“The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives[...]¹⁶⁰

“[...] At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.”¹⁶¹

“The human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others. The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety,

¹⁵⁹ *Ibid.* note 155

¹⁶⁰ *Ibid.* note 155, Art. 6

¹⁶¹ *Ibid.* note 155, Art. 7

public morality, as well as the general welfare of the peoples in a democratic society.”¹⁶²

The terms under which human rights are subjected could potentially give rise to ASEAN member states to set aside human rights in order to protect national interest. As Wilder Tayler, Secretary General of the International Commission of Jurists, has said:

“The idea that all human rights are to be ‘balanced’ against individual responsibilities contradicts the very idea of human rights agreed upon in the 1948 Universal Declaration of Human Rights, which was affirmed by all States, including ASEAN Member States, in 1993 in the Vienna Declaration and Programme of Action. [...] Balancing human rights with responsibilities turns on its head the entire *raison d’être* of human rights”¹⁶³

In conclusion, we can affirm that a lot has been done by ASEAN in order to overcome human rights’ and labour rights’ issues, and even though the process has been and is still quite slow, much has improved in what concerns social protection, in particular with regard to migrant workers, in bridging income inequality between member states and most of all in eradicating extreme poverty from these countries. In my opinion, ASEAN should now focus, more than in expanding its means to protect human rights, in setting up efficient enforcing mechanisms on already existing regulatory frameworks; if all the efforts will be aimed at obtaining this then ASEAN could develop in a much more socially sustainable way.

¹⁶² *Ibid.* note 155, Art. 8

¹⁶³ Taken from the article “Postpone deeply flawed ASEAN Human Rights Declaration”, published by Amnesty International on 5 November 2012. Consulted at <<https://www.amnesty.org/en/press-releases/2012/11/postpone-deeply-flawed-asean-human-rights-declaration/>>

2.3 Transatlantic Trade and Investment Partnership (TTIP) – the new gold standard agreement¹⁶⁴ - what does it propose and what is the stage of negotiations?

Diplomatic relations between the US and the EU have been ongoing for more than 60 years, but it was only after the end of the Cold War that, the then European Community, composed of 12 member states, started a formal path of cooperation with the US. On 23 November 1990 at the Paris Commission on Security and Cooperation in Europe (CSCE) the Transatlantic Declaration (TAD) was adopted; this event was followed by the adoption of the New Transatlantic Agenda (NTA) on 3 December 1995 during the EU-US Biennial Summit in Madrid. As stated in the TAD, EU and US, through these documents “have decided to endow their relationship with long-term perspectives”¹⁶⁵ by envisaging common goals, close cooperation on economic, education, scientific and cultural matters, and by joining efforts in order to address trans-national challenges. Amongst the many initiatives launched under the NTA in the following two decades another mile stone was achieved in 2007 when a declaration during the EU-US Summit on enhancing transatlantic economic integration and growth resulted in the creation of the Transatlantic Economic Council (TEC); this constitutes the primary plenary forum for economic dialogue between US and EU which works in order to facilitate agreement on a wide range of economically important issues.¹⁶⁶ Yet, it was only after the entry into force of the Lisbon Treaty on 1 December 2009, that a Joint Obama – Van Rompuy – Barroso Statement urged a “High Level Working Group on Jobs and Growth (HLWG)” to prepare a mandate for negotiations of “an ambitious and comprehensive market opening arrangement”; this statement was followed by a meeting in Washington DC of the Transatlantic Economic Council (TEC), on 29 November 2011, in which concrete steps towards stronger economic cooperation between the EU and the US were discussed. In particular, consultations on initiatives that would have strengthen transatlantic economic ties focused on the development of common global rules and compatible transatlantic standards, cooperation among standard setters and regulators, and the deepening of research

¹⁶⁴ Perulli A., "Sustainability, Social Rights and International Trade: the TTIP", *International Journal of Comparative Labour Law and Industrial Relations*, vol. 32., pp. 473-495, 2015.

¹⁶⁵ “Transatlantic Declaration on EC-US Relations”, 1990.
Consulted at <https://eeas.europa.eu/us/docs/trans_declaration_90_en.pdf>

¹⁶⁶ Consulted at <<http://www.state.gov/p/eur/rt/eu/tec/c33255.htm>>

cooperation. Moreover, as afore mentioned, the TEC had the responsibility to establish a HLWG on jobs and growth to identify “policies and measures to increase US - EU trade and investment to support mutually beneficial job creation, economic growth, and international competitiveness.”¹⁶⁷

The final report elaborated by the HLWG on Jobs and Growth was released on 11 February 2013. The in-depth analysis that was conducted by this group of experts, led to a wide range of different possible paths that could be pursued in order to expand transatlantic trade and investment, toward which the HLWG was extremely favourable, as stated in their conclusions:

“Based on the analysis above, the HLWG recommends to U.S. and EU Leaders that the United States and the EU launch, in accordance with their respective domestic procedures, negotiations on a comprehensive, ambitious agreement that addresses a broad range of bilateral trade and investment issues, including regulatory issues, and contributes to the development of global rules”¹⁶⁸

An agreement of this kind, in fact, was believed to significantly expand trade and investment opportunities in both EU’s and US’ economies generating new business and employment, determining rules and disciplines that would address challenges to global trade and investment, while further strengthening the close strategic partnership between the United States and Europe. Moreover, as the countries involved already have substantially open economies, an agreement between them was believed to pave the way to create additional bilateral market openings and establish new trade rules that would become globally relevant. In compliance with the HLWG’s report results, on 13 February 2013 United States’ President, Barack Obama, European Council’s President, Herman Van Rompuy, and European Commission’s President, José Manuel Barroso, announced that the United States and the European Union were going to initiate the internal procedures necessary to launch negotiations on a Transatlantic Trade and Investment Partnership (TTIP), in order to advance

¹⁶⁷ Consulted at <http://trade.ec.europa.eu/consultations/documents/consul_148.pdf>

¹⁶⁸ High Level Working Group on Jobs and Growth, “Final Report”, 11 February 2013. Consulted at <http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf>

trade and investment liberalization and address regulatory and other non-tariff barriers. As we can perceive from their own words, much faith was placed in this agreement:

“Through this negotiation, the United States and the European Union will have the opportunity not only to expand trade and investment across the Atlantic, but also to contribute to the development of global rules that can strengthen the multilateral trading system.”¹⁶⁹

From that announcement a few months have passed before the first round of negotiations launched what has proved itself to be a long path full of obstacles and challenges. Between 7 – 12 July 2013, the first round took place in Brussels, meeting the objective of thoroughly discussing the full range of topics that were intended to be covered in this agreement. Other two rounds have taken place in 2013, four rounds took place both in 2014 and in 2015, and, to date, three rounds have been concluded in 2016. After the last round, that took place between 11 – 15 July 2016 in Brussels, EU Chief Negotiator for TTIP, Ignacio García Bercero, released a statement declaring they are, on the overall, positive about the state of negotiations:

“After this round we have a good sense about the outline of the future trade and investment agreement between the EU and the US and we have proposals for almost all chapters on the table. This was the objective that we set out also in public a few rounds ago and I am pleased we have kept this ambitious schedule. So, we know now that TTIP will have up to 30 chapters. And most of these chapters are in different stages of consolidation, meaning we have one text where the differences between the EU and the US are in brackets. We expect further consolidation of texts after the round.”¹⁷⁰

¹⁶⁹ Taken from the “Statement from United States President Barack Obama, European Council President Herman Van Rompuy and European Commission President José Manuel Barroso” Brussels/ Washington, 13 February 2013.

Consulted at <http://europa.eu/rapid/press-release_MEMO-13-94_en.htm>

¹⁷⁰ Taken from the “Statement by Ignacio García Bercero EU Chief Negotiator for TTIP”, Conclusion of the 13th TTIP Negotiation Round, 29 April 2016.

Consulted at <http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154480.pdf>

For what concerns TTIP's future perspectives Bercero quotes the words of the European Commissioner for Trade Malmström who stated that:

“ the EU has an ambitious trade agenda and remains engaged in pursuing and concluding the different negotiations in which it is involved.[...] On TTIP, therefore, the EU is prepared to make the political choices needed to close this deal with the current US Administration, provided that the substance is right.”¹⁷¹

Considering all the issues that have risen in the last four years of negotiations either between the two countries involved or between the countries and its citizens, it is way too audacious to believe that the agreement will be concluded before 20 January 2017, day when Barack Obama's presidency is set to end. Although it seems quite an herculean aim, the reasons for which it was set as a deadline are quite clear, as both the republican and the democratic candidate, who are currently running for the 45th presidency of the US, haven't showed much interest in positively concluding the agreement. On the contrary, for what concerns Donald J. Trump, the republican candidate, he has repeatedly declared himself sceptical on international unions:

“Americans must know that we're putting the American people first again on trade. [...] On trade, on immigration, on foreign policy. The jobs, incomes and security of the American worker will always be my first priority. No country has ever prospered that failed to put its own interests first. Both our friends and our enemies put their countries above ours and we, while being fair to them, must start doing the same. We will no longer surrender this country or its people to the false song of globalism. The nation-state remains the true foundation for happiness and harmony. I am sceptical of international unions that tie us up and bring America down and will never enter. And under my administration, we will never enter America into any agreement that reduces our ability to control our own affairs.”¹⁷².

¹⁷¹ *Ibid.* note 168

¹⁷² Taken from the “Transcript: Donald Trump's Foreign Policy Speech”, The New York Times, 27 April 2016.

Consulted at <http://www.nytimes.com/2016/04/28/us/politics/transcript-trump-foreign-policy.html?_r=0>

And even though he hasn't openly declared himself against TTIP (as he has done with TPP) in a recent interview with *Breitbart News*, he declared:

“I would make individual deals with individual countries and currency manipulation would be a preeminent part of every deal because that's the chief weapon that other countries use to take away our businesses and our jobs”¹⁷³.

For what concerns democratic candidate, Hillary Clinton, the situation is a bit more complicated to understand due to her changes of position during the last years. In fact, as Secretary of State, position that she has covered from 2009 to 2013, Clinton laid much of the groundwork for the TTIP negotiations, referring to it as an “economic NATO” that would strengthen ties between Europe and the United States with a view to increased geopolitical strength. In her memoir (published under the name of “Hard Choices”) Clinton expressed support for harmonizing regulations with the EU, a central element of TTIP, but also criticized certain types of Investor-State Dispute Settlement (ISDS) provisions, which would enable US and European companies to challenge laws and regulations before a tribunal. In her own words:

“We should be focused on ending currency manipulation, environmental destruction, and miserable working conditions in developing countries, as well as harmonizing regulations with the EU. And we should avoid some of the provisions sought by business interests, including our own, like giving them or their investors the power to sue foreign governments to weaken their environmental and public health rules[...].”¹⁷⁴

Despite of this, as a candidate for the presidential run, Clinton is keenly aware of public opinion which is not very favourable towards FTAs (according to a survey conducted by *YouGov* for the *Bertelsmann Foundation*, only 18 percent of Americans support the deal),

¹⁷³ Taken from the the article by Matthew Boyle “Exclusive — Donald Trump: Obama's Trans-Pacific Free-Trade Deal Is ‘Insanity’ ”, *Breitbart News*, Washington DC, 9 November 2015. Consulted at <<http://www.breitbart.com/big-government/2015/11/09/exclusive-donald-trump-obamas-trans-pacific-free-trade-deal-insanity/>>

¹⁷⁴ Clinton H. R., "Hard Choices", Simon & Schuster, 2015

and has not yet taken a clear position on TTIP. She has, however, come out in opposition to TPP, insisting that she would not agree to any deal that doesn't live up to "high standards" and assures that she would "hit pause and say 'no' to new trade agreements unless they create American jobs, raise wages, and improve our national security."¹⁷⁵ So, in conclusion, whether the opinion of the candidates is influenced or not by public opinion, it looks like TTIP's negotiation are likely to be overturned at the beginning of the new year; a more than valid reason for all the interested parties to rush over the end of the negotiations.

With the promise to return later on to matters of current concerns on the future of TTIP's negotiations, let's now focus on the Agreement that asserts to overthrow the old way of setting up trade agreements. The importance of this agreement stems from the fact that, even without a trade agreement being in force, EU-US trade relationship is a driving force for economic growth; with bilateral trade in goods amounting to over \$700 billion in 2014 which is already supporting 13 million jobs both in the EU and in the US, this market accounts for more than 50% of the global GDP in terms of value and 40% in terms of purchasing power.¹⁷⁶ This trade agreement is then supposed to eliminate all of those obstacles and burdens that are halting the further growth of trade and investment levels across this two world powers. In particular, the magnitude of this market is the key to understand how much could this trade agreement be revolutionary in influencing the rest of the world; for this reason, we'll now proceed in analysing thoroughly all the drafted provisions¹⁷⁷, in order to understand what we should expect from TTIP and to have all the instruments to discuss, later on, in what ways it could positively affect the signing countries and the rest of the world, and in what ways it could do so in a negative way.

¹⁷⁵ Taken from the factsheet "Hillary Clinton's Strategy to 'Make it in America' ", The Briefing, 1 April 2016.

Consulted at <<https://www.hillaryclinton.com/briefing/factsheets/2016/04/01/hillary-clintons-strategy-to-make-it-in-america/>>

¹⁷⁶ Position paper: "FTA position on TTIP", FTA, February 2016.

Consulted at <[http://itp.fta-intl.org/sites/default/files/FTA%20Position%20Paper%20-%20TTIP%20\(02.2016\)%20-%20SN%20final.pdf](http://itp.fta-intl.org/sites/default/files/FTA%20Position%20Paper%20-%20TTIP%20(02.2016)%20-%20SN%20final.pdf)>

¹⁷⁷ Readers must bear in mind that all the documentation that we will analyse and discuss from now on is, in part, made up of EU's declassified documents and, in part, made up of documents (i.e., factsheets, textual proposals) that the EU has made available for the European citizens (though the material is available to anyone who wants to access them), in order to make this negotiation as transparent and clear as possible. The same effort hasn't been done by the US, of which we have far less material. In this sense, the lack of documentation, could have biased the following analysis.

The TTIP will revolve around three pillars, followed by a conclusive part:

(1) market access

(2) regulatory co-operation

(3) rules

(4) Institutional, general and final provisions

Within these three parts TTIP aims, respectively, to remove all the customs duties that can possibly be removed, improving EU's and US' access to each others' services and public procurement markets; address and reduce behind-the-border barriers to trade and investment with full regard and respect for consumer, labour, environmental, health and other public policy goals; and to set new and clear rules on horizontal issues governing bilateral trade and investment, such as sustainable development, competition policy and how to integrate small business in trade, which might serve as examples to the rest of the world.

(1) Market Access:

The first part of the Agreement will be focused in helping EU/US companies to get better access to the overseas market outside EU/US. Namely, it will allow companies to export and import more goods and services to and from the EU/US, to be able to win government contracts, to determine in a more punctual and precise way the origin of the products and to be able to invest more easily in the EU/US. This macro-area of the agreement will be divided into more specific chapters in order to tackle every aspect of it:

- *Trade in goods and customs duties*¹⁷⁸:

In this chapter the aim is to remove every possible tariff barrier, such as customs duties, in order to cut the costs of exporting and importing goods between EU and US and vice versa; this will ultimately stimulate the economy of the countries involved, create new jobs and help companies grow and compete worldwide. Even though average customs duties between US and EU are fairly low (roughly 2%), there are specific cases in which US customs duties are still elevated, such as in clothes and shoes' (30%), raw tobacco's (350%) and peanuts' (130%) market. In these areas, TTIP's

¹⁷⁸ European Union's textual proposal for legal text on "National treatment and market access for goods", 21 March 2016.

Consulted at <http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154369.pdf>

intent will be to lower or cut off customs duties and eliminate other barriers to trade such as lengthy administrative checks.

- Services^{179;180}:

This chapter is relatively important as services account for 60% of the economy and jobs in the EU. The aim is to allow EU services companies to enter and compete in the US market without having to face all the difficulties that they currently have to face due to the limits imposed by their market. Not only the issue of access to the market will be tackled in this chapter, but it will also focus in increasing the mobility of professionals by recognizing qualifications in all the countries involved enabling them to enter the market more easily and agreeing on standards that allow to accelerate the process in order for individuals and firms to get licenses or formal approval to offer their services, and finally agreeing on new common rules for key industries. Being the services market a very delicate issue, the agreement will assure the protection of sensitive sectors, such as public services, culture and data protection, giving governments the right to set quality and safety standards and regulate services in other ways.

- Public procurement¹⁸¹:

This chapter focuses on removing the obstacles that EU and US face when bidding for public tenders overseas; as US and EU have the largest public contracts markets in the world, enhancing the possibility to bid would mean creating opportunities for companies to grow and increase their demand, and for markets to have greater economic efficiency and a better governance. Part of the chapter will also be dedicated to agreed rules to maximize the transparency and increase the efficiency in tendering for public contracts.

¹⁷⁹ European Union's textual proposal for “services, investment and e-commerce”, 31 July 2015.
Consulted at <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf>

¹⁸⁰ European Union's offer on “financial services”, 14 July 2016.
Consulted at <http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154794.pdf>

¹⁸¹ EU's Factsheet on Public procurement in TTIP
Consulted at
<http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153000.3%20Public%20Procurement.pdf>

- Rules of Origin (ROOs)¹⁸²:

This chapter identifies which products can be produced in the countries that have signed the agreement, guaranteeing that only products authentically linked to those countries can benefit from the TTIP's provisions. Apart from this, another objective is to start developing common rules on what is needed to prove a product's origin, always taking into account future trends in production and innovation.

(2) Regulatory Cooperation:

The second part of TTIP's agreement is extremely innovative as it has the aim of getting regulators from EU and US to work together much closer than they are already doing thanks to afore mentioned agreements. If both parties decide to cooperate in a more efficient way, and from early on, they could benefit from sharing resources and expertise to reach their public policy objectives whilst avoiding unnecessary duplications and barriers for trade and investment. At the same time, the agreement guarantees that cooperation will not be an obligation in those cases for which both parties consider that there's no value in working together. This section of the agreement consists in twelve chapters; the first three have a more general approach to the topic, while the last nine regard the kind of approach that will be applied to specific industries:

- Regulatory cooperation^{183;184}:

The benefits of a regulatory cooperation derive from the fact that, to the present day, in order to export to the US, EU firms must meet US rules on standards and vice versa; the hitch is that, often, these rules ensure the same level of safety or quality, but differ either in their technical details or in the procedures for checking if firms have met the rules. The duplication of these processes can be very costly and often discourage firms from investing overseas, especially when they are small sized firms that don't have too many resources to invest. Working together on regulations could cut those costs while

¹⁸² EU's Factsheet on Rules of Origin (ROOs) in TTIP.

Consulted at

<http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153001.4%20RoO%20REV%20150109.pdf>

¹⁸³ European Union's textual proposal on "Regulatory Cooperation", 21 March 2016.

Consulted at <http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf>

¹⁸⁴ European Union's textual proposal on "Good Regulatory Practices", 21 March 2016.

Consulted at <http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154380.pdf>

upholding the EU's strict levels of protection for people and the environment. In order to make this regulatory alignment process more gradual and less invasive, involved parties must first seek all of those standards that match but for which rules to apply them differ and subsequently recognize each other's rules; in this way exports will have to meet only one set of rules. Whereas for standards that do not match, the goal is to work together in order to outline new rules that will be effective for both parties, whenever this is possible. As for future regulations, EU and US regulators would work closer together to draw up rules that are compatible with each other's standards. In any of these cases the agreement safeguards regulators' independence, the precautionary principle and governments' right to regulate, as to guarantee the protection of the people and of the environment.

- *Technical Barriers to Trade (TBTs)*¹⁸⁵:

This chapter regards products' technical requirements, such as: size and shape, design, labelling, marking and packaging, function and performance, and conformity assessment requirements, such as: product testing, inspection and certification. These technical requirements are usually introduced by governments in the public interest in order to protect human health and safety, the environment, animals and plants lives and health. The aim within this Agreement is to promote convergence in regulatory approaches, by reducing or eliminating conflicting technical requirements in order to reduce unnecessary repetition and costs of procedures in place for checking products, and to facilitate access to information on rules applicable to products.

- *Food Safety and animal and plants health*¹⁸⁶:

This chapter concerns Sanitary and Phytosanitary (SPS) issues, that is, all those risks posed to a nation's livestock, plants and human population that originate from imports of animals, plant materials and food products. Even though EU and US laws both ensure a high level of protection, they sometimes use different means in order to do so, which can lead to costly duplication of checks on products that have already been proved to be safe. In this case the aim of the agreement is to facilitate trade between

¹⁸⁵ European Union's textual proposal on "Technical Barriers to Trade", 7 January 2015. Consulted at <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153025.pdf>

¹⁸⁶ European Union's textual proposal on " Sanitary and Phytosanitary Measures (SPS)", 7 January 2015. Consulted at <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153026.pdf>

the Parties to the greatest extent possible while preserving each Party's right to protect human, animal and plant life and health in its territory and respecting each Party's regulatory systems, risk assessment, risk management and policy development processes. The means for reaching this objective are the promotion of a single approval process for exports from all EU countries, that is already in place for US' exports directed to the EU, clearer and more transparent processes and time lines, and a basis for working together on regulations to avoid differences that would hinder trade.

- Specific industries:

a) *Chemicals*¹⁸⁷

the aims are: to create mechanisms for better cooperation between regulators within existing bodies, to promote the use of relevant international standards for classifying and labelling substances, to exchange information on new and emerging scientific issues, to avoid unnecessary costs caused by different regulations

b) *Cosmetics*¹⁸⁸

the aims are: to work closer together on scientific safety assessments, to work on alternative methods that would substitute animal testing and to push for the progressive elimination of animal testing worldwide, to improve technical cooperation between regulators in order to facilitate US approval of UV filters, to work together on labelling using international practices, to collaborate in new areas such as allergen labelling and market surveillance, and to create a basis for jointly developing state-of-the-art regulations on new areas not yet fully regulated.

c) *Engineering goods*¹⁸⁹

Making it clear that by "engineering goods" we intend devices such as fridges, plugs, mobile phones, tractors, and such likes. For this particular industry the

¹⁸⁷ EU's Factsheet on Chemicals in TTIP.

Consulted at <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153005.pdf>

¹⁸⁸ EU's Factsheet on Cosmetics in TTIP.

Consulted at <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153006.4.2%20Cosmetics.pdf>

¹⁸⁹ EU's Factsheet on Engineering Goods in TTIP.

Consulted at <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153007.4.3%20Engineering.pdf>

aims are: to reduce the differences between the markets for what concerns technical regulations and standards, and procedures for checking whether a product meets them, to make technical requirements and checking that procedures are compatible with each other, to cut the cost of checking if a product conforms to US standards.

d) *Medical devices*¹⁹⁰

the aims are: to ensure faster access to life-saving devices streamlining approval procedures, to elaborate better procedures for monitoring products and recalling them when necessary, for regulators to base their work on the International Medical Devices Regulatory Forum (IMDRF), to base the national systems for identifying and tracing medical devices on the international Unique Device Identification (UDI) system, to make sure the EU's and US' UDI databases are compatible with each other, to work towards recognizing each other's Quality Management Systems (QMS) audits, to create a basis for jointly developing state-of-the-art regulations on new areas not yet fully regulated.

e) *information and communication technology (ICT)*¹⁹¹

the aims are: to enforce regulations in the EU and US, to increase cooperation on e-labelling (setting standards for providing product information to consumers in electronic format), on e-accessibility (making ICT easy to use for people with disabilities), on interoperability (enabling users to exchange data easily between different products) avoiding unnecessary differences and guaranteeing a high level of consumer protection, to set common principles for certifying ICT products, especially for encoding and decoding information.

¹⁹⁰ EU's Factsheet on Medical devices in TTIP.

Consulted at

<http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153008.4.5%20Med%20devices.pdf>

¹⁹¹ EU's Factsheet on information and communication technology (ICT) in TTIP.

Consulted at <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153009.pdf>

*f) Pharmaceuticals*¹⁹²

this chapter will be divided in three main areas: inspections, approvals, and innovation.

For what concerns inspections, by which we intend how regulators check the way companies make medicines regularly to ensure they meet strict EU/US standards, the main aims are: to recognize each other's inspections of manufacturing plants, based on principles and guidelines known as 'Good Manufacturing Practice (GMP)', which ensure companies produce their medicines consistently, and with the required quality standards.

For what concerns approvals, by which we intend the time and resources a pharmaceutical company needs to devote to get a new medicine onto the market, the main aims are: to avoid the need for a company to carry out the same studies twice in order for both EU and US regulators to approve its product, to exchange information that makes it easier to decide whether to approve medicines

For what concerns innovation, which is about developing new medicines by working at the cutting edge of science that can become a challenge for regulators when they have to check if those products are safe, the main aims are: to work closer together in areas where the International Conference on Harmonization (ICH) hasn't yet agreed on international rules.

*g) Textiles*¹⁹³

the main aims are: to work together on labelling of textiles and clothes, which means a mutual recognition of care instruction symbols and agreeing on names for new fibres, to work together on product safety and consumer's protection and on standards and testing methods.

¹⁹² EU's Factsheet on Pharmaceuticals in TTIP.

Consulted at

<http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153010.4.7%20Pharmaceuticals.pdf>

¹⁹³ EU's Factsheet on Textiles in TTIP.

Consulted at <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153011.4.8%20Textiles.pdf>

*h) Vehicles*¹⁹⁴

the main aims are: to agree where EU and US technical standards match recognizing as many as possible of their respective requirements as equivalent to each other, to develop global regulations under the UN and encourage other countries to adopt them, to expand the list of technical standards for vehicles which the United Nations Economic Commission for Europe (UNECE) agreed in 1998, to agree to harmonize certain EU and US regulations, especially for new technologies where there are not yet any regulations, to co-ordinate plans for new regulations and for research into new technologies.

(3) Rules:

The third part of the TTIP agreement has the objective of developing rules in several areas that would not only be relevant to this particular bilateral commerce, but would also contribute to the progressive strengthening of the multilateral trading system.

This section consists of eight chapters in which rules are defined in areas that are necessary for companies to be able to fully exploit TTIP:

- *Trade and Sustainable Development (TSD)*¹⁹⁵:

This chapter is crucial as it has a very ambitious aim, which is to guarantee that economic growth, development, environmental protection and social progress concur so that increased levels of trade won't come at the expense of workers or the environment. The fact that a chapter containing these disposals has been considered fundamental for both parties from the very beginning can be deduced from the final report of the High Level Working Group on jobs and growth: "The EU and the United States are both committed to high levels of protection for the environment and workers. The HLWG recommends that the two sides explore opportunities to address these important issues, taking into account work done in the Sustainable Development Chapter of EU trade agreements and the Environment and Labour Chapters of U.S. trade agreements."

The main objective that both parties aim at through this chapter is to avoid any race to

¹⁹⁴ EU's Factsheet on Vehicles in TTIP.

Consulted at <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153012.4.9%20Vehicles.pdf>

¹⁹⁵ European Union's textual proposal on "Trade and Sustainable Development", 14 July 2016.

Consulted at <http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154800.pdf>

the bottom with the purpose of enhancing competitiveness, they seek to do this by reinforcing labour and environmental governance, by encouraging civil society involvement on TSD issues, promoting Corporate Social Responsibility and by firmly supporting core international standards and conventions for labour and environment protection.

- *Energy and Raw Materials (ERMs)*¹⁹⁶:

This chapter is focused in guaranteeing a more stable and sustainable access to natural resources. This is a big challenge for EU as it increasingly depends on natural resources coming from non-member countries; indeed, it was estimated that more than half (53.5 %) of the EU's gross inland energy consumption in 2014 came from imported sources; this often translates into an unstable access to energy and raw materials and in a competitive disadvantaged situation. The aim in this case is, apart from promoting the development of new green energy in the future, to promote sustainability in the use of traditional fuels and to create a strong set of sustainable trade and investment rules in order to facilitate access to energy and raw materials. Moreover, the goal is to make trade and investment more transparent and non-discriminatory by promoting competition and transparent rules, included in matters of resource exploitation and access to infrastructures and to contribute to the development of new rules in this area.

- *Customs and trade facilitation*¹⁹⁷:

This chapter is intended to facilitate custom rules and controls in order to make exporting easier, in fact, to the present day, products exported from EU to the US and vice versa have to be checked by customs officers to make sure they meet the country's rules and regulations, to stop harmful or illegal goods before they enter the local market and to make sure that companies pay any customs duties and taxes that are due for specific types of products. New rules in this sector could streamline the procedures making them more efficient, in this way saving time, money and hassle for all companies. This process, though, should not be very arduous as both EU and US are members of the World Trade Organization (WTO) which has already agreed on an

¹⁹⁶ European Union's textual proposal on "Energy and Raw Materials", 14 July 2016. Consulted at <http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154801.pdf>

¹⁹⁷ European Union's textual proposal on "Customs and Trade Facilitation", 7 January 2015. Consulted at <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153027.pdf>

international Agreement on Trade Facilitation (TFA) which sets out procedures that a country's customs authorities should apply when a foreign company or individuals wants to export goods to that country.

- *Small and Medium - sized Enterprises (SMEs)*¹⁹⁸:

With this chapter the intent is to make sure that smaller firms, by which we intend the ones with less than 250 staff members, can make the most out of TTIP, by recognizing that they contribute significantly to economic growth, employment, and innovation, and further recognizing the existing robust dialogue on ways to increase SMEs' participation in trade and the cooperative work on SMEs.

In EU SMEs account for more than two thirds of people working in the private sector and are esteemed to create far more new jobs than other parts of the economy. The issue in their case is that, even though they have fewer personnel and less money than bigger companies, they have to sustain the same trade barriers, which often translates in abandoning the idea of exporting outside the member states.

With TTIP's new rules the intent is to remove customs duties, simplify customs procedures, reduce the cost of diverging standards and improve protection of intellectual property rights. Moreover, SMEs will be granted access to the information they need to help with exporting or investing abroad, giving them more details on things like customs duties, taxes, regulations, customs procedures and market opportunities.

- *Investment*¹⁹⁹:

Investment is an extremely important part of the agreement as it is one of the main triggers for jobs' growth, in fact, as companies invest abroad, they expand and become more competitive globally which usually translates in a higher level of recruitment of staff back home; moreover, foreign companies investing in home territory also boost job's growth as they recruit at least part of the personnel locally.

In this chapter new rules aim at encouraging investments, by which we intend every

¹⁹⁸ European Union's textual proposal on "Small and Medium-Sized Enterprises", 7 January 2015. Consulted at <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153028.pdf>

¹⁹⁹ European Union's textual proposal on "Investment Protection and Resolution of Investment Disputes", 12 November 2015. Consulted at <http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf>

kind of asset which has the characteristics of an investment, for instance: a certain duration, the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk (i.e.: an enterprise, equity participation in an enterprise, a loan to an enterprise, intellectual property rights, and such likes). The goal is to make it easier for EU companies to invest in the US and vice versa and to give the investor more protection when investing in the host nation by reducing the element of uncertainty; in particular, the guarantees that TTIP wants to assure are that neither US or EU can discriminate against each other's investors, and that both will treat them in line with the "standards of investment protection".

TTIP poses itself as a pioneer creating a new way of protecting investments by setting up a new Investment Court System (ICS) which would substitute Investor-to-State Dispute Settlement system (ISDS) that was frequently accused to be a system that lacked of legitimacy and transparency. The purpose of both systems is to make sure governments respect the basic "standards of investment protection" and to enable governments and investors to resolve any potential dispute that arises between them in a fair and impartial way, however, in doing this, the new ICS brings in some revolutionary changes. First of all, it would be composed by judges publicly appointed by the EU and US with the following limitations: its Investment Tribunal must be composed of 15 judges of which five have to be EU nationals, five have to be US nationals, and five have to be nationals of other countries; its Appeals Tribunal must be composed of six judges of which two have to be EU nationals, two have to be US nationals and two have to be nationals of other countries. At this point it is relevant, in my opinion, to recall an important difference between ISDS and ICS which is that, the decisions issued by the ISDS are without appeal. Moreover, all judges, to be admitted, would have to hold qualifications comparable to judges in other international courts, would have to be assigned to each case on a random basis to guarantee their independence, and each case or appeal would be heard by three judges (one EU judge, one US judge and one judge from a third country), they would be submitted to a set of strict rules on ethics, and would be banned from working as legal counsel on any other investment disputes while they act as judge. Other innovations brought about by the ICS would be a new mediation mechanism to help solve disputes amicably and avoid litigation, tighter deadlines than in the past and specific provisions to make it easier

for smaller companies (SMEs) to access the system. It's important to underline that only claims that alleged one of the four basic guarantees for foreign investors can be brought to the Investment Court System by the investor. In particular, these guarantees are: not to discriminate against each other's investors on the grounds of nationality, not to take control of their assets without paying them compensation, to allow foreign investors to eventually transfer funds related to their investments to and from their home country, to protect foreign investors against being unfairly treated in certain other ways (i.e.: denial of justice, targeted discrimination). In proposing this innovative system, regulators consider important to clarify that:

“The provisions of this section shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity”²⁰⁰

and that investment protection provisions cannot be interpreted as a commitment by governments not to change their laws in the future.

- Competition²⁰¹:

This chapter focuses on drafting new rules to avoid firms to colluding to fix prices or abusing market power, to ensure that private companies can compete with State-Owned Enterprises (SOEs) on equal terms, and grant that state subsidies are given in the most possible transparent way. Fair, free and undistorted competition, where granted, can ensure a level playing field between firms, as an effective competition enforcement contributes to making markets work better by ensuring that all companies compete on their merits which would benefit consumers, businesses and the economy as a whole. Yet there are factors that can and do distort competition, in particular we are referring the advantages that State-Owned Enterprises (SOEs) can exploit but that

²⁰⁰ Art. 2(1) of European Union's proposal for “Investment Protection and Resolution of Investment Disputes”, made public on 12 November 2015.
Consulted at <http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf>

²⁰¹ European Union's textual proposal on “Competition”, 7 January 2015.
Consulted at <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153029.pdf>

are denied to companies in the private sector, and the transparency of subsidies that governments sometimes give to companies. So the aim is to enforce competition laws that can be applied both in EU and in the US, to ensure that SOEs with monopoly powers or special rights do not discriminate against private companies by developing a joint platform of rules which could be used in other agreements/forums to address concerns raised by the development of state capitalism, to agree rules on transparency for subsidies to companies, and to prohibit certain types of subsidies, in particular those given to support insolvent or ailing companies without a credible restructuring plan.

- *Intellectual Propriety Rights (IPR) and Geographical Indications (GIs)*^{202;203}:

Intellectual property rights (IPR) are one of the principal means through which companies, creators and inventors generate returns on their investments in knowledge, innovation and creativity. In particular, by IPRs we intend patents, trademarks and designs, copyright and geographical indications (GIs), which allow firms or individuals who invent, improve, brand or create new products or services, to stop their unauthorized use and to make money from their effort and investment.

Through the granting of temporary exclusive rights, IP is directly linked to the production and distribution of new and authentic goods and services, from which all citizens benefit. The key to maintain this system working is an optimal and economically efficient IP infrastructure which spans the legal recognition, registration, use and balanced enforcement of all forms of IPRs.

Both EU and US have developed over the years a modern, integrated IPR infrastructure which makes a major contribution to economic growth and job creation, while at the same time ensuring that a proper balance is struck between the interests of rights-holders and users. For this reason, TTIP won't cover subjects already comprised in existing IPR infrastructures but would rather focus on cooperation and a few core issues such as listing all the international IP agreements to which both sides are committed, establishing common general principles and high-standard agreed

²⁰² European Union's textual proposal on "intellectual property rights", 31 July 2015. Consulted at <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153672.pdf>

²⁰³ European Union's outline of text tabled for discussion with the US on "Geographical Indications (GIs)", 21 March 2016. Consulted at <http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154385.%20Paper%20-%20GIs%20skeleton%20FINAL.pdf>

principles on key topics, binding commitments on a limited number of significant IP issues and cooperating on areas of common interest.

In conclusion, the aim of this chapter is to protect the people and firms that come up with new ideas and use them to make high quality products by enforcing IPR rules in a balanced way, to encourage investment in R&D, to agree with the US on a list of international IPR agreements which the EU and US have signed, to binding commitments on issues like geographical indications (GIs) and aspects of copyright that the EU already protects (i.e.: resale rights for visual artists, public performance and broadcasting rights, etc.).

- *Government - Government Dispute Settlement (GGDS)*²⁰⁴:

The objective of this chapter is to establish an effective and efficient mechanism for avoiding and settling any dispute between EU and US governments arising from the interpretation and the application of TTIP's provisions. The system that wants to be implemented is the one that is already in place at the World Trade Organization (WTO), which we will now look over in detail. Within WTO, the responsibility of settling disputes is in the hands of the Dispute Settlement Body, which consists of all WTO members and has the sole authority to establish "panels" of experts to consider the case.

The procedure for dispute settlement is made up of two main stages:

1. First stage: consultation. Before taking any other actions the countries in dispute have to talk to each other to see if they can settle their differences by themselves. If that fails, they can also ask the WTO director-general to mediate or try to help in any other way.
2. Second stage: the panel. If consultations fail, the complaining country can ask for a panel to be appointed. The country "in the dock" can block the creation of a panel once, but when the Dispute Settlement Body meets for a second time, the appointment can no longer be blocked.

Officially, the panel helps the Dispute Settlement Body to make rulings or recommendations. But because the panel's report can only be rejected by consensus in

²⁰⁴ European Union's textual proposal on "Dispute Settlement (Government to Government)", 7 January 2015.

Consulted at <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153032.pdf>

the Dispute Settlement Body, its conclusions are difficult to overturn; note that the panel's findings have to be based on the agreements recalled. Before the first hearing each side in the dispute presents its written case to the panel; during the first hearing the complaining country, the responding country, and those that have announced they have an interest in the dispute, make their case at the panel; after that the countries involved submit written rebuttals and present oral arguments at the panel's second meeting. After the panel has consulted experts or appointed an expert review group to prepare an advisory report it submits the descriptive sections of its report to the two sides; the panel then issues an interim report, including its findings and conclusions. The period of review of the advisory report must not exceed two weeks and during that time, the panel may hold additional meetings with the two Parties. A final report is submitted to the Parties and three weeks later, it is made available to all WTO members. If the panel decides that the disputed trade measure does breach a WTO agreement or an obligation, it recommends an amendment of the said measure in order to comply with WTO rules. The report becomes the Dispute Settlement Body's ruling or recommendation within 60 days unless a consensus rejects it and both sides can appeal the report.

Knowing how does the role model system work, TTIP's aim is that EU and the US decide in advance which arbitrators are eligible to sit on panels, rather than choosing them on a case-by-case basis increasing mutual trust in the arbitrators and their rulings. Even though WTO's system is taken as a model, with TTIP they've tried to improve it by making it more transparent; in fact, hearings are to be held in public, interested parties, such as non-governmental organizations, will be able to give their views in writing and all views submitted to the panel of arbitrators are to be published.

(4) Institutional, general and final provisions:

This last part of TTIP is focused on establishing institutions and provisions in order to assure the correct implementation of the agreement, as well as evaluating step by step whether the changes introduced are effectively improving the general situation or if they are creating unexpected issues, and in that case specific entities are designated to find ways to solve the problems occurred.

In particular, in order to achieve the afore said goals, TTIP established a Joint

Committee, specialized committees, a Transatlantic Regulators' Forum, a Transatlantic Legislators' Dialogue, Domestic Advisory Groups and a Civil Society Forum.

- Joint Committee²⁰⁵:

It's a committee including representatives of both Parties, that has to meet no later than one year after the entry into force of the Agreement and meet at least once a year thereafter, unless the Parties decide otherwise. The meeting shall be co-chaired by the United States Trade Representative and the Member of the European Commission responsible for Trade, or their respective designees.

The meetings must focus on new initiatives and existing cooperation initiatives under this Agreement with the participation of the relevant regulators concerned at political level. Every three years the Joint Committee must review the overall progress achieved and suggest improvements regarding regulatory cooperation. Moreover, it must supervise and facilitate the implementation and application of this Agreement; supervise, guide and coordinate the activities of all specialized committees and working groups; consider ways to further enhance trade, investment and regulatory cooperation between the Parties; guide and facilitate the implementation and application of regulatory cooperation under this Agreement; seek appropriate ways and methods of preventing or solving problems which might arise in areas covered by this Agreement, and solve disputes that may arise regarding the interpretation or application of this Agreement; and consider any other matter of interest relating to an area covered by this Agreement.

- Transatlantic Regulators' Forum²⁰⁶:

The Forum shall meet no later than one year after the entry into force of the Agreement and then meet at least once a year or when either Party thinks it is appropriate to do so. It shall be composed of Senior Officials of both Parties, responsible for cross-cutting issues of regulatory policies and good regulatory practices, senior officials, responsible for international trade, and senior regulators, responsible for specific areas.

The meetings must focus on discussing general trends in regulatory cooperation,

²⁰⁵ European Union's textual proposal on “Institutional, General and Final Provisions”, 14 July 2016. Consulted at <http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154802.pdf>

²⁰⁶ *Ibid.* note 203

including EU/US cooperation in multilateral fora; considering regulatory cooperation activities covered by specific or sectorial provisions in the Agreement with a particular focus on identifying new initiatives and the progress made on the implementation of regulatory cooperation work plans; preparing a joint overview of EU/US regulatory cooperation, which then have to be subjected to endorsement by the Joint Committee; organizing public sessions involving EU and US stakeholders.

- Specialized Committees²⁰⁷:

The following specialized committees must be established under the patronage of the Joint Committee. In particular they are: a Market Access Committee, comprising Committees on Government Procurement, Energy and Raw Materials and Intellectual Property Rights, Committees on Agriculture, the Committee on Wine and Spirits and the Committee on Geographical Matters arising in the area of rules of origin, origin procedures, sanitary and phytosanitary measures, and technical barriers to trade may be addressed by the Market Access Committee; a Committee on Services and Investment, a Committee on Mutual Recognition of Professional Qualifications; a Committee on Trade and Sustainable Development; a Committee on Small and Medium-sized Enterprises. A Committee on Technical Barriers to Trade; a Committee on Sanitary and Phytosanitary Measures; and finally, a Joint Customs Cooperation Committee.

- Transatlantic Legislators' Dialogue²⁰⁸:

The Transatlantic Legislators' Dialogue aims at enhancing the dialogue between European and American Federal Legislators, the European Parliament and the American Congress; it is based on the principle that EU-US relations go far beyond foreign policy or trade issues, and also involve other fields of legislation. Its role is to ensure that this Agreement and its future implementation is accompanied, as appropriate, by a deepening of transatlantic parliamentary cooperation.

- Domestic Advisory Groups²⁰⁹:

Each Party shall convene a new or consult an existing domestic advisory group with the task of advising on issues related to the Agreement which, in covering its role, may

²⁰⁷ *Ibid.* note 203

²⁰⁸ *Ibid.* note 203

²⁰⁹ *Ibid.* note 203

submit views or recommendations on the implementation of the Agreement. The domestic advisory groups shall include independent representative organizations of civil society in a balanced representation of economic, social, and environmental stakeholders (employers and workers' organizations, NGOs, business groups, consumers' groups, and public health associations).

- Civil Society Forum²¹⁰:

The Civil Society Forum shall be convened by the Joint Committee at least once a year and must consist of a forum composed of representatives of independent civil society organizations established in their territories, including participants of the domestic advisory groups in order to conduct a dialogue on the implementation and application of this Agreement. The Parties shall promote a balanced representation of all relevant interests including independent representative organizations of employers, workers, environmental interests, business groups, consumers' groups, and public health associations.

Now that we have a general overview of the possible contents of the Agreement, we'll focus our attention to the most relevant part of the Agreement for the purposes of this dissertation: the Trade and Sustainable Development (TSD) chapter.

On his work on "Sustainability, social rights and international trade: the TTIP", professor Adalberto Perulli poses a very relevant question on the TTIP matter:

“The question arises whether the TTIP will be a liberalistic instrument using trade as a Trojan horse to dismantle social protection and extend deregulation, or whether it will represent an opportunity to strengthen the link between the liberalization of trade and social rights, within a value system that traces its cultural and historical roots to the ILO Constitution.”²¹¹

Through an extensive analysis of EU's position papers on the TSD chapter we'll try to prove that a well structured TSD chapter could actually represent the opportunity to strengthen the link between trade liberalization and social rights through the promotion of these.

²¹⁰ *Ibid.* note 203

²¹¹ Perulli A., "Sustainability, Social Rights and International Trade: the TTIP", *International Journal of Comparative Labour Law and Industrial Relations*, vol. 32., pp. 473-495, 2015.

First of all, as the context for the chapter builds “on the recognition by the Parties of sustainable development as a principle endorsed and supported by the international community”²¹², it’s fundamental to understand what do we mean when we talk about sustainable development; in the words of the World Commission on Environment and Development:

“Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.”²¹³

In this perspective the chapter will focus on three “interdependent and mutually reinforcing dimensions: economic, social and environmental”²¹⁴ with the overreaching objective of sustainable development, which will be pursued through a shared approach and the promotion of dialogue and cooperation.

Focusing on the labour aspects the chapter is composed of six key building blocks²¹⁵:

(1) Multilateral labour standards and agreements:

This part would promote:

- The ILO core labour standards, to which it will make direct reference, and their follow-up, in order to assure their respect, promotion and effective implementation in law and practice. The recall to these standards is common in most social clauses stipulated within trade agreements (even if at times the reference is not direct); yet, for the TTIP,

²¹² EU position paper on “Trade and Sustainable Development chapter/Labour and Environment: EU Paper outlining key issues and elements for provisions in the TTIP”, tabled for discussion with the US in the negotiating round of 19 – 23 May 2014, made public on 7 January 2015. Consulted at <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153024.pdf>

²¹³ World Commission on Environment and Development, “Report of the World Commission on Environment and Development: Our Common Future”, urged by the General Assembly of the UN, 1987. Consulted at <<http://www.un-documents.net/our-common-future.pdf>>

²¹⁴ *Ibid.* note 176

²¹⁵ Kraatz S., “The Transatlantic Trade and Investment Partnership (TTIP) and Labour”, Policy Department A: for the Employment and Social Affairs Committee, European Parliament, 1 December 2014. Consulted at <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/536315/IPOL_BRI\(2014\)536315_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/536315/IPOL_BRI(2014)536315_EN.pdf)>

this is only the entry level of the planned social clause. In fact, the intention is to implement “thematic core labour standards articles”²¹⁶ which, for each core labour standard, “would 1) recall relevant international instruments, 2) list key principles to which the Parties are committed, 3) define specific commitments on actions to achieve those principles.”²¹⁷

- The commitment to the Decent Work Agenda, covering its four fundamental pillars: 1) promotion of decent employment, 2) enhancement of social protection, 3) strengthen of social dialogue, 4) promotion of standards and fundamental principles and rights at work.
- The commitment of the Parties to other ILO labour standards, such as those contained in the 2008 Declaration on Social Justice for a Fair Globalization, and to the effective implementation, in law and in practice, of other ratified ILO Conventions.
- The ongoing engagement towards ratification of non-ratified fundamental ILO Conventions by ILO member states.
- “The recognition that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for protectionist trade purposes”²¹⁸. This principle in particular, reassures that TTIP refuses to be used, at least in its intentions, as an instrument that promotes states’ potential protectionist ambitions.

(2) Domestic law:

This part guarantees the states’ sovereignty on regulation matters linked to labour and environment protection. In particular, it “recognise and protect each Party's right to regulate its own domestic environmental, and labour, including social, protection at the levels it deems appropriate, in a manner consistent with internationally recognised standards and agreements”²¹⁹ still requiring each Party to be committed to provide for and encourage high levels of protection under a process of ongoing improvement.

²¹⁶ European Commission Issue paper for the “Roundtable on labour rights and civil society participation in TTIP”, Brussels, 12 November 2014.

Consulted at

<http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153014.1%20SD%20discussion%20paper%20-%20approach,%20issues,%20questions.pdf>

²¹⁷ *Ibid.* note 180

²¹⁸ *Ibid.* note 176

²¹⁹ *Ibid.* note 176

(3) Promotion and cooperation:

This part emphasizes how important it is for the Parties to work together on the promotion and the formulation of labour policies connected to trade-related aspects, as well as on the advancement of joint activities between member states or including third states to identify priority areas that call for the resolution of labour issues. In fact, cooperation is the only perspective for a successful achievement of mutually shared goals.

(4) Cross-cutting/horizontal issues:

This part is focused in committing economic and administrative institutions in the promotion of sustainable development and in particular in the upholding of the levels of protection; reckoning that, it is inappropriate to reduce the level of labour protection in order to encourage trade and/or attract foreign investments. In this sense, good administrative practices are promoted so that Parties commit to “take into account available scientific and technical information as well as relevant international guidelines and principles [...] when preparing and implementing measures aimed at protecting the environment or working conditions which may have an impact on trade or investment”²²⁰ while taking into account the importance of transparency with regard to implemented measures. Within this context, the most innovative aspect is the introduction, in a social clause, of the Corporate Social Responsibility (CSR) as an instrument that can positively contribute to the strengthening of the linkage between social rights and trade liberalization; in this sense, the adoption of internationally recognised principles and guidelines on CSR (such as UN Global Compact, OECD Guidelines for Multinational Enterprises and ILO Tripartite declaration on Multinational Enterprises) is strongly promoted for companies and governments.

(5) Conflict resolution:

This part foresees the implementation of a dispute settlement mechanism appointed to “deal with disagreements or controversies on any matters arising under the chapter”²²¹. Starting with the assumption that the Parties must undertake this process with the intention to strive to arrive at a mutually satisfactory resolution of the matter, three levels of governmental consultation are provided: at the first level officials of the Parties must consult each other in order to find a possible solution; if this isn't the outcome a

²²⁰ *Ibid.* note 176

²²¹ *Ibid.* note 176

government – to – government joint body must oversee the implementation of the chapter in considering the matter of the disagreement; the third level is reached only if a mutually satisfactory resolution hasn't yet been brought out, in this case a Party can request to convene a panel of independent experts with the aim of examining the matter and issuing a report for which they rely “on the relevant procedural elements foreseen under the general Dispute Settlement chapter of the Agreement, while providing for differentiation as needed”²²²; at this point Parties must comply to the report issued by the panel in order to finally solve the points of contention. We must point out that this part of the chapter not only is not innovative, but it could even be described as retrograde for two main reasons; the first is that it does not foresee the implementation of any kind of *hard law*, such as monetary enforcement mechanisms which could either result in fines or in a temporary suspension of tariff benefits granted by the trade agreement; the second reason is that, in order to be innovative, the failure to comply with labour principles should be subjected to the same dispute settlement mechanisms to which leads the non-compliance with any other provision of the Agreement, in other words, the non-compliance of any matter within the trade Agreement should be treated with the same order of importance. This issue could be solved with the introduction of a “social conditionality clause inspired by Art. 20 of the GATT”²²³, as we had proposed when analysing NAALC agreement in chapter 2.1²²⁴, which could be properly modified in order to allow states to exempt from trade agreement's obligations and take protectionist measures to ensure labour rights are being preserved; or, otherwise, by setting the TSD as a non-execution clause, so that the violation of its promoted principles triggers the immediate suspension of trade benefits for the violating Party.

(6) Participative mechanisms for civil society:

This part concerns the innovative role entrusted to civil society which foresees the “establishment of domestic advisory bodies, made up of relevant independent, balanced and representative stakeholders which would provide views and advice to their own Party

²²² *Ibid.* note 176

²²³ Perulli A., "Sustainability, Social Rights and International Trade: the TTIP", *International Journal of Comparative Labour Law and Industrial Relations*, vol. 32., pp. 473-495, 2015.

²²⁴ Consult page 25 for more details

on issues relating to the chapter, including on their own (individual or joint) initiative”²²⁵. The role of this body isn’t confined to a mere ornamental function but permeates all of the issues relating to the TSD chapter; in this sense the domestic advisory body can intervene in any form it considers suitable to assure that labour issues are being addressed in the best possible way. By this line of thinking the TTIP contemplates the integration of a Sustainability Impact Assessment (SIA) mechanism which “is a trade-specific tool for supporting major trade negotiations”²²⁶ that provides “the Commission with an in-depth analysis of the potential economic, social, human rights, and environmental impacts of ongoing trade negotiations and are a prime opportunity for stakeholders in both the EU and the partner countries to share their views with negotiators” resulting as “a key tool for the conduct of sound, evidence-based and transparent trade negotiations”. The revolutionary aspect is that this mechanism, which is usually implemented only *ex ante*, during the constitution of trade agreements, is expected to be implemented also *ex post*, when the agreement is already up and running; in this sense the role of civil society, which is one of the parts that most of all undergoes the outcomes of trade agreements, assumes a central role in giving feedback and valuable advices on what is working and what, instead, should be modified. Note that, in order for this mechanisms to result useful, it is important for feedbacks to be followed by amendments and proper modifications. Finally, we can state that, if all of these aspects are to be included in the TSD chapter and if appropriate amendments are made in order to improve those aspects that we have aforementioned as not fully assuring the protection of labour rights, no protectionist aims could be possibly pursued by interested parts and, above all, trade agreements and social rights could be linked in such a way that this TSD chapter could become a model to be followed in the negotiation of future trade agreements worldwide.

To conclude our analysis, we’ll now focus on what are the expected outcomes of TTIP, being this a thorny issue as many have argued that the possible negative outcomes of the Agreement could significantly exceed the expected benefits, but is this really the case?

²²⁵ *Ibid.* note 176

²²⁶ European Commission’s definition of “Sustainability Impact Assessment”.
Consulted at <<http://ec.europa.eu/trade/policy/policy-making/analysis/sustainability-impact-assessments/>>

An economical analysis of TTIP carried out by Gabriel Felbermayr²²⁷, compares all the expected outcomes of TTIP implementation that have been predicted by seven different studies, namely: the study commissioned by the EU Commission in 2013 and carried out by the Center for Economic Policy Research (CEPR); the ifo-Bertelsmann study (2013); the study conducted by CEPII (2013); the study conducted by Aichele et al. (2014); the study conducted by Capaldo(2014); and, finally, the studies commissioned by Economic Policy, conducted in 2015: Egger et al. and Felbermayr et al.. We will focus our attention on six of them and not take into consideration the Capaldo model, for it is structurally very different from the other cited works and cannot be easily compared. Before starting our analysis, its important to point out that the study conducted by Egger et al. uses the same model as CEPR and the study by Felbermayr et al. updates the ifo-Bertelsmann model, using more recent data and a larger country sample. This said, *Tab. 13* illustrates the predicted outcomes for each study while *Fig. 7* provides a visual explanation of how *tab.13* should be read.

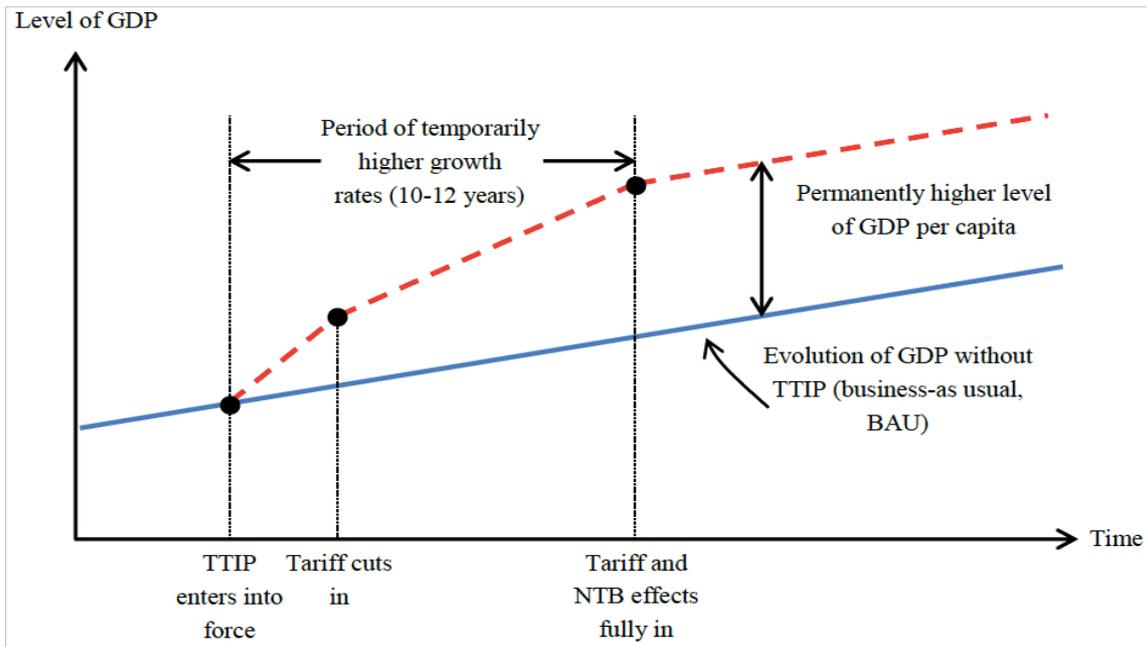
Table 13 – Overall effects for EU (main scenario)

	CEPR (2013)	Ifo-Bertelsmann (2013)	CEPII (2013)	Aichele et al. (2014)	Egger et al. (2015)	Felbermayr et al. (2015)
GDP effect	0,5%	5,0%	0,3%	2,1%	2,3%	3,9%
Wage effect	0,5%	2,3%	n.a.	2,1%	n.a.	3,9%
Jobs	0	+1,3 mn	0	0	0	0

Source: data from studies cited in the table, table re-elaborated from Felbermayr G., “Economic Analysis of TTIP”, Ifo Working Paper No.215, April 2016.

²²⁷ Felbermayr G., “Economic analysis of TTIP”, CESifo working Paper no. 215, 2016.

Fig. 7 – Effect of TTIP on the level of GDP



Source: data from WTI (2016), figure from Felbermayr G., “Economic Analysis of TTIP”, Ifo Working Paper No.215, April 2016.

Note: red-dotted line refers to a TTIP-scenario; blue line refers to Business-As-Usual (BAU) or, otherwise, a scenario without TTIP.

Looking at *fig. 7* we must take into account that:

- an average long-run gain of 2% would mean that the future level of GDP would be permanently 2% higher with TTIP compared to a scenario that doesn't contemplate it; this can be done with any of the results by substituting them to the 2% provision.
- The “future” is not neatly defined, but it must be contemplated as “the agreement would certainly not yield all its effects on the day of its ratification”²²⁸; in fact, in most industries, tariff reduction will be gradual and the elimination of Non-Trade-Barriers will take even longer to bring costs down.
- In the period during which the agreement becomes effective (approximately estimated from 10 to 12 years), GDP grows at a higher rate than it would without TTIP; yet, on the long-run, while the TTIP growth effect disappears, the higher level of GDP remains.

Tab. 14 instead, shows what could be the potential effects of TTIP on real per capita income, not only for the two Parties of the trade Agreement, but also for a selected list of EU member states.

²²⁸ *Ibid.* note 192

Tab.14 - potential effects of TTIP on real per capita income

	CEPR (2013)		ifo-Bertelsmann (2013)	CEPII (2013)		Aichele et al (2014)		Egger et al (2015)		Felbermayr et al. (2015)	
	NO	YES	NO	NO	YES	NO	YES	NO	YES	NO	YES
Spillovers											
US	0,3%	0,4%	13,4%	0,3%	0,5%	2,7%	3,4%	1,0%	1,1%	4,9%	7,1%
EU	0,4%	0,5%	---	0,3%	0,5%	2,1%	2,7%	2,3%	3,0%	3,9%	---
Austria	---	0,4%	---	---	---	2,4%	2,8%	---	---	2,8%	5,6%
Germany	---	0,6%	4,7%	0,3%	0,5%	2,6%	3,4%	1,4%	2,3%	3,5%	7,1%
France	---	0,3%	2,6%	0,2%	0,4%	2,2%	2,0%	1,3%	1,9%	3,5%	7,2%
UK	---	0,4%	9,7%	0,3%	0,4%	2,3%	2,8%	1,8%	2,2%	5,1%	9,0%
Italy	---	0,5%	4,9%	---	---	1,2%	1,7%	1,5%	2,2%	3,9%	7,7%
Spain	---	0,4%	6,6%	---	---	1,2%	1,8%	0,8%	1,4%	5,6%	9,6%
Poland	---	0,9%	---	0,2%	0,5%	---	---	---	---	---	---

Source: data from studies cited in the table, table re-elaborated from Felbermayr G., “Economic Analysis of TTIP”, Ifo Working Paper No.215, April 2016.

Beside the differences that characterize the various studies, on the overall we can say that TTIP would increase real per capita income both in the US and EU as well as in its member states; yet, gains are not huge, but still, if we take into account the fact that many past RTAs between EU or EU’s member states and the US have already lowered tariffs and Non-Tariff Measures (NTMs), it is remarkable that a gain, which in average will stand at 2%²²⁹, is still possible. What all studies conclude is that the bulk of gains comes from NTBs elimination, for instance, CEPR (2013) predicts an 80% contribution of the total potential gains comes from these and not from direct tariffs elimination, as they are already, in most of the cases, very low; so real gain will come, for instance, from simplification of bureaucratic procedures, regulatory convergence and optimization of rules.

Now, for a more detailed analysis of economical results, we’ll take into account the CEPR (2013) study which has been used by the TTIP Commission when making the assessment of the likely benefits of the Agreement. As we have seen in *tab. 14*, taking into account the spillover effects the economic gains would represent an increase by 0,5% in US GDP, and an increase by 0,4% in EU GDP by 2027, compared to a scenario in which TTIP is not in place; in terms of monetary gains, these would represent an increase by €120 billion of the EU economy and an increase by €95 billion of the US economy. In terms of trade flows this

²²⁹ *Ibid.* note 192

growth translates into an increase by 28% of EU exports to the US, equivalent to an increment of €187 billion worth of exports, and imports from the US will increase by €159 billion. While EU and US exports to the rest of the world would increase by, respectively, €33 billion and €80 billion, the overall total exports for EU and US would increment by 6% and 8% respectively which translates into an additional €220 billion and €240 billion worth of sales of goods and services for EU and US based producers. For what concerns the overall imports instead, these will increase by 5% both in the EU and in the US which is worth €226 billion and €200 billion respectively. Finally, it must be noted that, in terms of wages, TTIP would have a positive impact both on skilled and un-skilled workers' wages which are esteemed to rise of roughly 0,5%²³⁰.

To take stocks, we have seen that, on the overall the implementation of TTIP could potentially translate into very large benefits, not only for involved Parties, but for third countries worldwide. In fact, not only economic gains could be converted into positive spillovers in these countries, but major benefits could result from regulatory cooperation which could set worldwide standards, lowering the overall costs of trade, and from the implementation of a new type of social clause; this, in fact, could become a smoking gun in proving that the integration of social clauses within trade agreements does not constitute a protectionist measure imposed by developed states in order to jeopardise developing countries' comparative advantage.

In conclusion, what is the ongoing situation of TTIP's negotiations? Certainly 2016 hasn't been a favourable year, so far, for TTIP; despite favourable outlooks of EU Chief Negotiator for TTIP, Ignacio García Bercero, which we have mentioned at the beginning of chapter 2.3²³¹, prospects aren't too encouraging. The afore mentioned situation of the US that is dealing with the impending election of the 45th President, scheduled for the 8 November 2016, has already influenced TTIP's negotiators to take a step back on issuing final decisions on the Agreement; yet, if this was to be the only impediment, perhaps the fact that negotiation could lead to a final agreement, within 2016, could be within the realm of possibility. However, the insurgence of another event has further lowered the odds that negotiations will be concluded

²³⁰ Data from this paragraph is taken from TTIP, "The economic analysis explained", September 2013. Consulted at <http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf>

²³¹ Consult pages 71-72 for more details.

within this year; on 23 June 2016 a referendum, known as *Brexit*, called by former Prime Minister of the UK, David Cameron, questioned British citizens on their preferences related to their will to stay within the European Union (*remain* faction) or to back out from it (*leave* faction). With a turnout of 72%, meaning that more than 30 million people had expressed their preference, the *leave* faction won by 51,9% to 48,1%²³², confirming the country's will to abandon its long-standing "family" that was the EU. Despite the fact that, in order for the "leave" to become definitive and for its outcomes to start giving the first signs, probably a few years still have to pass, this decision has shocked both Great Britain and the rest of EU's Member States as no one was really prepared for it. In such a turbulent climate we can't but expect that decisions on a future Agreement between US and EU will have to wait for an improved climate to come; to affirm this suspicion, promptly declarations came from German Vice-Chancellor Sigmar Gabriel which announced to German broadcaster ZDF on 28 August 2016:

"In my opinion the negotiations with the United States have de facto failed, because we Europeans did not want to subject ourselves to American demands, even though nobody is really admitting it."²³³

To back up this statement, François Hollande, President of France is reported as saying at a meeting of left-wing politicians in Paris:

"At this stage [of the talks] France says, 'No'."²³⁴

At the current juncture, it's not possible to disentangle the effects of all these factors, the only solution we have is to stand by and watch the coming decisions that will be taken by empowered parts.

²³² Data taken from the article "EU referendum: The result in maps and charts", BBC News, 24 June 2016. Consulted at <<http://www.bbc.com/news/uk-politics-36616028>>

²³³ Translation of parts of the interview with German Vice-Chancellor, Sigmar Gabriel, consulted at <<http://www.zdf.de/ZDFmediathek/beitrag/video/2822508/ZDF-Sommerinterview-mit-Sigmar-Gabriel#/beitrag/video/2822508/ZDF-Sommerinterview-mit-Sigmar-Gabriel>>

²³⁴ Sims A., Stone J., "TTIP has failed – but no one is admitting it, says German Vice-Chancellor Sigmar Gabriel", Independent, 28 August 2016. Consulted at <<http://www.independent.co.uk/news/world/europe/ttip-trade-deal-agreement-failed-brexit-latest-news-eu-us-germany-vice-chancellor-a7213876.html>>

Conclusions

At the beginning of this dissertation I questioned myself whether or not social clauses could be singled out as a protectionist measure applied by developed countries in order to undermine developing countries' comparative advantage; the work carried out allowed me to draw some hypothesis which paved the way to deliver a possible answer to that question.

The aspect on which one should pose major concerns is the inability of international organizations to substitute for states in guaranteeing social rights; in fact, this has led to three very alarming phenomena; briefly:

1. *Regulatory dumping*, which consists in the lowering of regulatory measures, carried on by host countries, in order to attract Foreign Direct Investments (FDIs);
2. *Law shopping*, which is closely connected to regulatory dumping as it is, the look for the most favourable regulatory system from companies, and especially Transnational Companies (TNCs), in order to lower costs as much as possible and gain a comparative advantage on the overall and, if possible, an absolute advantage among direct competitors.
3. *Social dumping*, to define which I'll borrow the words of Vaughan-Whitehead D., who describes it as "any practice pursued by an enterprise that deliberately violates or circumvents legislation in the social field or takes advantage of differentials in practice and/or legislation in the social field in order to gain an economic advantage, notably in terms of competitiveness, the state also playing a determinant role in this process."²³⁵

The only possible solutions, in order to mitigate these phenomena, are a combination of regulative interdependence, based on a system of *connecting regimes* (i.e., the linkage between corporate activities and social rights), and an inter-crossed regulation which seeks to combine both *hard* and *soft law* with the aim of integrating different levels of regulation (national, international, supranational and transnational).

²³⁵ Vaughan-Whitehead D., "EU Enlargement versus Social Europe? The Uncertain Future of the European Social Model", Edward Elgar, Cheltenham, 2003.

The organization which, more than all, has worked towards the elimination of *regulatory dumping*, *law shopping* and *social dumping* phenomena, following the path of the aforementioned solution, has been, doubtlessly, the International Labour Organization (ILO). Most notably, its biggest effort in trying to implement minimum standards in social rights protection matters has resulted in the 1998 *Declaration of Fundamental Principles and Rights at Work* which has identified four core labour standards:

- “(a) freedom of association and the effective recognition of the right to collective bargaining [Conv. n. 87/1948; Conv. n. 98/1949];
- (b) the elimination of all forms of forced or compulsory labour [Conv. n. 29/1930; Conv. n. 105/1957];
- (c) the effective abolition of child labour [Conv. n. 138/1973; Conv. n. 182/1999];
- and
- (d) the elimination of discrimination in respect of employment and occupation [Conv. n. 100/1951; Conv. n. 111/1958].”²³⁶

This Declaration, not only made these minimum standards compulsory for all ILO’s member states, without the need of ratification, but it also served as a template for many states, which deliberately decided to integrate it as a social clause within their trade agreements, referring to it either in a direct or in an indirect way.

ILO’s 1998 Declaration, along with many other provisions emanated from ILO since it was established in 1919, could have by now solved, or at least mitigated all the problems related to labour rights protection, as its member states account for 187 countries worldwide out of a total of 194 countries. Yet there is one point in which ILO has a major deficiency, which is the lack of effective enforcement mechanisms; in fact, ILO’s enforcement mechanism is based on the idea of “mobilisation of shame”²³⁷ and the application of peer pressure which, as you can all imagine, aren’t very effective techniques on which one should base such important matters.

²³⁶ ILO, “ILO Declaration on Fundamental Principles and Rights at Work”, adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998. Consulted at <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_467653.pdf>

²³⁷ Davidov G., Langille B., “The idea of labour law”, Oxford University Press, New York, 2011.

Throughout the dissertation I have also seen what could be the rational justifications for the introduction of a social clause in trade agreements; I've distinguished between a rational justification in accordance with the scope and a rational justification in accordance with the value. At the end I've concluded that the introduction of a social clause could both guarantee the respect of the principle of equity in international trade and that, if these weren't to be a sufficient justification, I could build upon the fact that a socially equitable production and a market that is not distorted by the missed application of core labour standards enhance the value-based dimension of fundamental rights.

I've then further analysed the reasons of proponents (shall read "developed countries") and opponents (shall read "developing countries"), to understand thoroughly what is their battle cry. And, at this point, I've come to the conclusion that proponents' claims have much stronger reasons than opponents, with all the exceptions that must be taken into account; so, in my personal opinion, social clauses shouldn't be seen, in most cases, as a protectionist measure but must, instead, be perceived as a virtuous convention that aims at enforcing the protection of human rights worldwide. In support of my thesis, came the three case studies that have been analysed in chapter 2, namely:

1. The North American Agreement on Labour Cooperation (NAALC), side agreement of the North American Free Trade Agreement (NAFTA)
2. The Association of Southeast Asian Nations (ASEAN)
3. The Transatlantic Trade and Investment Partnership (TTIP)

For what concerns the first two case studies, data has proved my case, as the introduction of the NAALC has certainly benefitted member states, in particular the one that mostly needed improvement in this area, that is Mexico, in creating social awareness on social rights matters and in improving labour conditions especially thanks to the network of trade unions that resulted from the implementation of this Agreement. For what concerns ASEAN, social rights protection systems that were implemented under this Agreement helped eradicating poverty and in particular, the attention dedicated to migrant workers, helped them gaining awareness on what their rights should be leading to a likely path of improvement of their conditions.

For what concerns TTIP instead, the most notable facts were the attempt to improve existing devices in trying to fix the flaws detected throughout the years of their implementation; I'm referring to the proposal of the International Court System (ICS) that, if approved, would

substitute the fallacious Investor-State Dispute Settlement (ISDS) system, and the proposal of the Trade and Sustainable Development (TSD) chapter which, again, if approved, could well become a template for future social clauses to be inserted in trade agreements. In the TTIP case, to further strengthen my thesis, there's the crucial fact that the Agreement is a North – North agreement, concluded between two developed countries that could even do without the integration of a social clause. In fact, it would be enough for the European Union to play by the rules imposed to it by the afore mentioned Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), and for the United States to play by the rules imposed by Section 301 of the 1947 Trade Act²³⁸, which provides for “foreign import restrictions and export subsidies” to be implemented “whenever the President determines that a foreign country or instrumentality engages in discriminatory or other acts or policies which are unjustifiable²³⁹ or unreasonable and which burden or restrict United States commerce”, to guarantee the protection of social rights. Instead, the fact that they both strive in order to implement a social clause that further enhances the safeguard of social rights proves how much this mechanism has no protectionism purposes.

The only thing that could possibly draw a veil of negativity in this, on the overall positive, perspective is the fact that negotiations between EU and US are currently in a situation of impasse, due to the reasons afore mentioned but also to the fact that, as German Vice-Chancellor, Sigmar Gabriel, has highlighted, in 14 rounds of talks, the two sides haven't agreed on a single common item out of 27 chapters being discussed. In my personal opinion, these statements don't come without a cause, which makes me suspect that Ignacio García Bercero's declarations, released after the 14th round of TTIP's negotiations, was only an

²³⁸ U.S. Trade Act of 1974, Title III, Chapter I, Section 301(a) (2).

Consulted at <<https://www.gpo.gov/fdsys/pkg/STATUTE-88/pdf/STATUTE-88-Pg1978-2.pdf>>

²³⁹“Acts, policies, and practices that are unreasonable include, but are not limited to, any act, policy or practice, or any combination of acts, policies, or practices, which [...] constitute a persistent pattern of conduct that: (I) denies workers the right of association, (II) denies workers the right to organize and bargain collectively, (III) permits any form of forced or compulsory labour, (IV) fails to provide a minimum age for the employment of children, or (V) fails to provide standards for minimum wages, hours of work, and occupational safety and health of workers.”

Section 2411(d)(B)(iii) (I-V) of the “United States Code”, 2000 Edition.

Consulted at

<[https://books.google.it/books?id=M2vSJIIcx6QC&pg=PA518&lpg=PA518&dq=persistent+pattern+of+conduct+that:+\(i\)+denies+workers+the+right+of+association&source=bl&ots=cTe0YDvvTR&sig=18vj8JIB6N57smyFg0ot1gqy9Jg&hl=it&sa=X&ved=0ahUKEwjJqLWa483PAhVCtBQKHRkQBuMQ6AEIzAB#v=onepage&q&f=false](https://books.google.it/books?id=M2vSJIIcx6QC&pg=PA518&lpg=PA518&dq=persistent+pattern+of+conduct+that:+(i)+denies+workers+the+right+of+association&source=bl&ots=cTe0YDvvTR&sig=18vj8JIB6N57smyFg0ot1gqy9Jg&hl=it&sa=X&ved=0ahUKEwjJqLWa483PAhVCtBQKHRkQBuMQ6AEIzAB#v=onepage&q&f=false)>

attempt to naively cover up an unfavourable situation. Despite this, it must be taken into account that in the run-up to 2017's federal elections, Sigmar Gabriel is supposed to challenge current leader Angela Merkel for the chancellorship; under this light, his declarations could be seen as a way to earn points in the eyes of German citizens, whose opinion on TTIP remarkably changed in the last few years. In fact, only one out of five believes that TTIP is a good idea, while one in three rejects the agreement completely; one need only think that two years ago a significant majority of 88% favoured free trade in general while currently, only about half of them still considers free trade a good idea and more than a quarter reject it entirely²⁴⁰.

In conclusion, I would say that, besides having framed the final aim of social clauses, much needs to be done in order to implement functional and effective enforcement mechanisms both in international organizations responsible for the implementation of social rights, first and foremost, the ILO, and in particular trade agreements, where social clause disposition, most of the times, have only access to the lowest form of protection, unlike all the other economical dispositions of the trade.

²⁴⁰ Bluth C., "Attitudes to Global Trade and TTIP in Germany and the United States", GED studies, Bertelsmann Stiftung, Gütersloh, 2016. Consulted at <https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/NW_Attitudes_global_trade_and_TTIP.pdf>

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