



Re-Globe Seminar Cycle in Ravenna

*Incorporating Soft-law Instruments on
Corporate Social Responsibility in Preferential
Trade Agreements to Which the EU is a Party:
Legal Value and Concrete Effects*

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Introduction to CSR in PTAs

Main Point: Corporate Social Responsibility (CSR) references in “new generation” **Preferential Trade Agreements (PTAs)** are becoming more prominent, particularly in PTAs to which the European Union (EU) is a party.

These references often include international CSR standards from soft law instruments, raising important questions about their legal status.

CSR's references reflects:

- a) the growing integration of **sustainable development** and responsible business practices into international economic law; and
- b) the broader interaction between legal frameworks of varying normative value in trade agreements

Goal: To explore the legal value and practical effects of incorporating CSR soft law instrument into these agreements.

What is CSR?

Milton Friedman's View (1962): A company's sole responsibility is to increase profits.

CSR is based on the premise that companies are integral parts of the communities in which they operate and that, as such, they have an 'inherent duty' to address issues such as environmental sustainability, labour rights, and community development.

Broader Focus: CSR includes a wider range of stakeholders than shareholders such as employees, suppliers, customers, communities, and the environment.



What is CSR?

Definition: CSR is described as a broad concept that refers to the responsibility of companies to adhere to environmental, social, and governance (ESG) standards in carrying out their activities (alternatively described in terms of the decision-making processes it involves and the outcomes of these processes)

No single, universally accepted definition of CSR at the international level. Examples of definition:

EU: ‘The responsibility of enterprises for their impacts on society’; ‘A concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis’.

United Nations Industrial Development Organisation: ‘A management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders’

ILO: ‘A way in which enterprises give consideration to the impact of their operations on society and affirm their principles and values both in their own internal methods and processes and in their interaction with other actors’.

OECD: ‘Business’s contribution to sustainable development’



What is CSR?

No singular view regarding what the normative value of the companies' 'inherent duty' to adhere to minimum ESG standards.

Original CSR: Initially viewed as voluntary and rooted in corporate philanthropy (its typical instruments are those of self-regulation, including unilateral commitments, programs and strategies, and codes of conduct).

Shift: Over time, CSR has shifted from a mere philanthropic practice to a concept with a stronger normative value.

This shift is evident in certain trends in domestic legal systems:

- a) Domestic law making CSR mandatory under certain conditions.
- b) Climate change litigation before domestic courts.



What is CSR?

a) Domestic law may integrating specific CSR standards, making them mandatory under certain conditions.

Mauritius' CSR mandatory scheme: every profitable company in a year is required to set up a CSR fund equivalent to 2% of its chargeable income of the preceding year, and at least 75% of its CSR fund shall be remitted to the Ministry of Finance. The remitted CSR money is received and managed by the National Social Inclusion Foundation (NSIF), whose council consists of representatives from the government, the private sector, the NGO sector, and academia. The NSIF channels the CSR funding to programs in priority areas such as poverty alleviation, educational support, social housing, assistance to persons with disabilities, environmental protection, etc. After contributing the requisite amount to the NSIF, companies are allowed to manage the remaining CSR money according to their own CSR policies.

India's CSR mandatory scheme: requires large companies (defined by net worth, turnover, or net profit) to spend in every financial year at least 2% of their average net profits made in the preceding 3 years on qualified CSR programs. Each company shall establish a CSR board committee composed of three or more directors, and at least one of the committee members must be an independent director. The committee shall advise the board on how to spend the CSR fund and monitor the implementation. If the company fails to spend the requisite amount, the board shall explain the reasons for the non-compliance in an annual report.



What is CSR?

b) Climate change litigation before domestic courts

District Court of the Hague (The Netherlands), Judgment of 26 May 2021, *Milieudefensie and others v. Royal Dutch Shell*.

The Court found that Shell had a duty of care under Dutch law to take action to prevent dangerous climate change. This duty of care stems from the Dutch Civil Code. To substantiate such ‘duty of care’, the ruling heavily relied on various international soft law instruments related to CSR (even though they are not legally binding), like the United Nations Guiding Principles on Business and Human Rights (UNGPs). It emphasized that these frameworks play a crucial role in defining the expectations for corporate behaviour concerning environmental responsibilities in that they reflect a widely accepted standard of responsible corporate conduct.

The Court held Shell responsible for its contribution to climate change and ordered it to reduce its global carbon dioxide emissions by 45% by 2030 compared to 2019 levels.

Shell has appealed against the ruling and the first hearings have already taken place. A decision is expected by the end of this year.



CSR in International Law

Trend: CSR is increasingly becoming standardized in international legal instruments, evolving from a voluntary principle to a more normative one.

Consequently → corporations, in addition to having a moral and social responsibility to observe certain standards, are also subject to increasing accountability to do *so in accordance with international law*.

Institut de Droit International: companies ‘*shall make sure* that corporations *respect* corporate social responsibility’ (Article 19 of Resolution of 4 September 2021, *Human Rights and Private International Law*, p. 7).



Soft Law Instruments in PTAs

What is soft law? legal instruments (guidelines, principles, declarations, or standards) that are not legally binding in the same way as formal laws (known as “hard law”) but still carry significance in influencing behaviour, policymaking, and international relations.

Role of soft law in this context: They require states to encourage the adoption of CSR practices by companies operating under their jurisdiction and ‘guide’ corporate behaviour without imposing legal obligations, while creating a framework for accountability.

- Ten Principles of the United Nations Global Compact of 1999
- United Nations (UN) Guiding Principles on Business and Human Rights of 2011 (**recently recalled in the 2024 Pact for the Future**)
- International Labour Organization (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of 1977 (updated in 2022)
- Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises on Responsible Business Conduct of 1976 (updated in 2023)

Which refer to...

- ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998 (updated in 2022)
- UN 2030 Agenda for Sustainable Development



Soft Law Instruments in PTAs

Why using soft law?

Flexibility: Soft law instruments are easier to negotiate, adopt, and amend compared to binding legal instruments. They avoid ratification challenges, entry into force, and public scrutiny, allowing for greater adaptability in response to emerging global challenges.

Impact on companies: Soft law instruments do not only require states to promote the adoption of CSR policies among businesses operating under their jurisdiction, but they directly involve companies, requiring them to align their activities with international standards, promoting greater accountability.

Bypassing the limitations of international legal personality of companies.



Soft Law Instruments in PTAs

UN Guiding Principles

‘6. States should promote respect for human rights by business enterprises with which they conduct commercial transactions’.

‘11. Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved’.

ILO Tripartite Declaration

‘13. With a view to stimulating sustainable economic growth and development, raising living standards, meeting employment requirements and overcoming unemployment and underemployment, governments should declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment, and decent work’.

‘16. Multinational enterprises, particularly when operating in developing countries, should endeavour to increase employment opportunities and standards, taking into account the employment policies and objectives of the governments, as well as security of employment and the long-term development of the enterprise’.



Soft Law Instruments in PTAs

UN Global Compact

‘Principle 7: Businesses should support a precautionary approach to environmental challenges;

Principle 8: undertake initiatives to promote greater environmental responsibility; and

Principle 9: encourage the development and diffusion of environmentally friendly technologies’.

OECD Guidelines

‘Enterprises should:

1. Contribute to economic, environmental and social progress with a view to achieving sustainable development.

2. Respect the internationally recognised human rights of those affected by their activities.

3. Encourage local capacity building through close co-operation with the local community, including business interests, as well as developing the enterprise’s activities in domestic and foreign markets, consistent with the need for sound commercial practice’.



CSR soft law instruments in ‘new generation’ PTAs

What are PTAs?: Article XXIV(5) of the 1947 General Agreement on Tariffs and Trade (GATT) allows the contracting parties, by way of exception to the most-favoured-nation principle (Article I), to establish *preferential agreements* that create free trade areas and/or customs unions in order to ‘facilitate a closer integration of the economies of the countries participating’ (Article XXIV(4)).

Why ‘new generation’? These agreements, in addition to introducing measures for economic and trade integration, address a wide range of issues, including investment protection, IP rights, and the promotion of sustainable development.

Since the 2000s, CSR soft law instruments has been referenced in many PTAs, especially due to the stalled WTO Doha Round negotiations.

Many PTAs today refer to international CSR standards (as of 2021, more than 70),

EU leadership: The EU has been at the forefront of including CSR references in PTAs as part of its broader strategy to integrate sustainable development and responsible business practices into its trade policy.



CSR soft law instruments in ‘new generation’ PTAs

Techniques: CSR soft law references in PTAs may appear in the preamble or operative provisions. Such references can be ‘direct’ or ‘indirect’.

Preamble: although not formally binding, provides valuable context for the interpretation of the treaty, also articulating its object and purpose.

Example: The Preamble of the 2016 Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU states that the parties encourage ‘enterprises operating within their territory or subject to their jurisdiction to respect internationally recognised guidelines and principles of corporate social responsibility, including the OECD Guidelines for Multinational Enterprises’.



CSR soft law instruments in ‘new generation’ PTAs

Indirect references to CSR soft law instruments in operative provisions

Examples

‘The Parties shall **support** the dissemination and use of **relevant internationally agreed instruments that have been endorsed or are supported by them** [concerning corporate social responsibility and responsible business conduct]...’ (Article 34(3) of the EU-Angola PTA).

‘The Parties shall **strive to facilitate and promote** trade in goods that contribute to sustainable development, including goods that are the subject of schemes such as fair and ethical trade and those involving corporate social responsibility and accountability’ (Article 13.6(2) of the EU-Korea PTA).

‘The Parties agree to **promote** best business practices related to corporate social responsibility’ (Article 271(3) of the EU-Colombia and Peru PTA).



CSR soft law instruments in ‘new generation’ PTAs

Direct references to CSR soft law instruments in operative provisions

Examples

‘The Parties shall **promote** corporate social responsibility and accountability and **encourage** responsible business practices, such as those promoted by the UN Global Compact of 2000, the International Labour Organization (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of 1977 as amended in 2006, and the OECD Guidelines for Multinational Enterprises of 1976 as amended in 2000’ (Article 422 of the EU-Ukraine PTA)

‘Each Party shall **promote**, including by **supporting** their dissemination and use, relevant international instruments, such as the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the United Nations Global Compact and the United Nations Guiding Principles on Business and Human Rights...’ (Article 19.12(2)(a) of the EU-New Zealand PTA)

When **promoting** trade and investment, the Parties should make special efforts to **promote** corporate social responsibility practices which are adopted on a voluntary basis. In this regard, each Party shall **refer to** relevant internationally accepted principles, standards or guidelines to which it has agreed or acceded, such as the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises, the UN Global Compact, and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. The Parties commit to exchanging information and cooperating on promoting corporate social responsibility? (Article 12.11(4) of the EU-Singapore PTA).

Legal value of the reference to CSR soft law instruments

The practice of incorporating soft law instruments into legally binding treaties enhances their normative status → but to what extent exactly? Can the renvoi be construed as turning soft law into hard law?

What is the relationship between binding and non-binding instruments? NO general rules on this specific issue.

Rules on the interpretation of treaties: Article 31(3) of the Vienna Convention on the Law of Treaties:

‘[For the purpose of the interpretation of a treaty, t]here shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty *or the application of its provisions*;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any *relevant rules of international law applicable* in the relations between the parties’.



Legal value of the reference to CSR soft law instruments

What is the role played by the principle of systemic integration?

Case study: *In the Matter of Guatemala* (2017)

An arbitral panel established pursuant to Chapter XX of the CAFTA-DR found that Guatemala had violated Article 16.1(2) of the CAFTA-DR by failing to ensure that its laws provided for labour standards consistent with the internationally recognised labour rights set forth in Article 16.8. To reach this conclusion, the panel relied on Article 31(3)(c) to interpret the parties' conventional obligations concerning the right of association and the right to organise and bargain collectively in light of the 1998 ILO Declaration, which is a soft law instrument.

However, the panel specified that this Declaration should be considered binding for the parties 'by virtue of their membership in th[e] Organisation.' Moreover, the Declaration is generally considered to codify (also) peremptory norms, and the ILO has reached (almost) universal participation.

ICJ's *Gabčíkovo-Nagymaros Project* case (1996)

'new norms and standards [which] have been developed, set forth in a great number of instruments ... have to be taken into consideration, and ... given proper weight' in the application and interpretation of commitments already made by the parties to a treaty.



Legal value of the reference to CSR soft law instruments

Discussion: Can soft law instruments become binding when referenced in PTAs?

Case-by-case analysis of the primary rules that articulate the renvoi, with particular attention to the language used and the intention of the parties.

The provision of a treaty – or any other binding instrument – can convert a non-binding instrument into a binding one. Example: the SPS Agreement incorporates international standards, guidelines, or recommendations such as non-binding WHO and FAO standards – making them binding for WTO members by stating that measures based on these standards are presumed to be consistent with the Agreement and with GATT 1994.

Notwithstanding the fact that reference to non-binding instruments in binding ones may increase the ‘sense of obligation’, there is no automatic conversion into hard law. But this approach enhances the accountability of businesses and governments in adhering to international CSR standards.



Concrete effects of the renvoi to CSR soft law instrument for the parties to the PTA?

Language used: the parties commit to ‘encouraging’ or ‘supporting’ the use, dissemination, adherence, implementation, and follow-up of CSR soft law instruments, or to ‘refer to’ them, or at the very least, to ‘recognise their importance’ and ‘take them into account’ when defining their CSR policies.

Nature of obligation?: While the adoption of CSR by companies is voluntary by nature, these terms still create legal obligations for the parties to the PTA to strive for the implementation of CSR policies within their jurisdiction. These provisions do not legally bind companies to adopt CSR practices, but they create a framework that makes compliance expected.

Case study: *Korea Labour Commitment* case (2021) (decided by a panel of experts established under Article 13.15 of the EU-Korea PTA, following unsuccessful bilateral consultations).

The EU argued that...

- 1) ...certain provisions of South Korea’s 1997 Trade Union and Labour Relations Adjustment Act (TULRAA) were not consistent with its obligations to ‘commit to respecting, promoting and realising, in [its] laws and practices’, the fundamental principle of freedom of association as ‘arising from membership of the ILO and the 1998 ILO Declaration’, pursuant to Article 13.4(3) of the EU-Korea PTA.
- 2) ...South Korea had not fulfilled the obligations set out in the last sentence of Article 13.4(3), which states that ‘the parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions’.

Concrete effects of the renvoi to CSR soft law instrument for the parties to the PTA?

Article 13.4(3) of the EU-South Korea PTA: ‘The Parties, in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up ... **commit to** respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, 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.

The Parties reaffirm the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the European Union have ratified respectively. The Parties **will make continued and sustained efforts** towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as ‘up-to-date’ by the ILO’.

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2) ...South Korea had not fulfilled the obligations set out in the last sentence of Article 13.4(3), which states that ‘the parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions’.



Concrete effects of the renvoi to CSR soft law instrument for the parties to the PTA?

Regarding the first claim, it is noteworthy that the panel of experts rejected South Korea's argument that the use of the term 'commit' under Article 13.4(3) implies merely an aspiration, or something less than 'shall respect, promote and realise'. Instead, it found that the ordinary meaning of this expression represents a legally binding obligation.

The panel of experts notes that formulations of this kind, involving expressions like 'commit to promoting', are particularly appropriate 'given that the Parties have chosen to *refer to an external, pre-existing source of obligation, which is then made legally binding by the terms of their Agreement.*'

Important not to overlook the fact that the 1998 ILO Declaration itself specifies that all ILO members, including South Korea, 'have an obligation to respect, to promote, and to realise, in good faith and in accordance with the ILO Constitution, the principles concerning fundamental labour rights', including freedom of association.

Regarding the second claim, the panel of experts clarified that, although the term 'will' is sometimes used as opposed to 'shall' to indicate a lower level of legal obligation, in the absence of specific evidence showing the agreement of the Parties to convey such a meaning, the term 'will' implies an intention and is largely indistinguishable from 'shall', thereby establishing a binding legal obligation.

Furthermore, the panel specified that the use of the verb 'promote' does not diminish its normativity value but implies a positive obligation (of conduct) on states.



Miscellanea

Challenge of ensuring compliance with CSR standards in multinational corporations operating in multiple jurisdictions.

CSR's voluntary inherent nature.

Dispute resolution processes in PTAs increasingly address CSR-related issues → These mechanisms help to ensure compliance with CSR provisions, especially in areas related to sustainable development



Conclusion: Shift towards normative CSR frameworks

Trend: CSR is gradually shifting from a voluntary commitment to a an international ‘norm’.

While CSR references in PTAs are often couched in hortatory language and flexible terms, they possess the potential to be interpreted as implying stronger commitments than might first be assumed.

Global Impact: This trend underscores CSR’s growing role in global governance and sustainable business practices.

The legal status of these references and their enforceability will continue to shape international business conduct.

More research is needed to clarify the legal value and practical effects of CSR in PTAs.



Further readings

On soft law instruments, in general:

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A Boyle, 'Soft Law in International Law-Making' in M Evans (ed), *International Law* (5th edn, CUP 2018) 119.

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J Paterson, 'Corporate Governance and Corporate Social Responsibility' in I Bantekas and M A Stein (eds), *The Cambridge Companion to Business & Human Rights Law* (CUP 2021) 65;

R McCorquodale, *Business and Human Rights* (2nd edn, OUP 2024).

On PTAs of 'new generation' and CSR:

E Baroncini, 'La strategia dell'Unione Europea per il contenzioso internazionale sul libero scambio' (2022) 61 *Diritto comunitario e degli scambi internazionali* 1;

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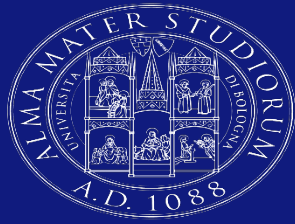
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J-P Gond et al, 'How corporate social responsibility and sustainable development functions impact the workplace: A review of the literature' (2022) 71 ILO Working Paper 1.





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