Trade, investment and labour: interactions in international law

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PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van Rector Magnificus prof. mr. C.J.J.M. Stolker,
volgens besluit van het College voor Promoties
te verdedigen op donderdag 21 februari 2019
klokke 16.15 uur

door

Ruben Zandvliet

geboren te Venray

in 1986

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Lay-out: Anne-Marie Krens – Tekstbeeld – Oegstgeest

To my mother, Diana van Herwaarden, in loving memory.

Acknowledgements

Although writing this PhD thesis sometimes felt like a solitary endeavour, I could not have done it without the support of many people. First of all, I would like to thank my promotor, Nico Schrijver. Nico sparked my interest in pursuing a PhD after my studies in Leiden and New York, and has been a wonderful supervisor throughout the years. Our mutual interest in politics provided a continuous topic of conversation and a welcome distraction from discussions about the history of the ILO or investment protection standards. I could not have wished for a better co-promotor than Erik Koppe, whose meticulous reviews of my draft texts greatly improved the research. I am honoured that my committee members, Niels Blokker, Klara Boonstra, Nicola Jägers, Paul van der Heijden and Friedl Weiss, were not only involved in the examination of my final thesis, but that I got to know all of them in different ways throughout the course of my project. In particular, I thank Paul for inviting me to a session of the ILO Committee on Freedom of Association, which allowed me to observe tripartism in action.

I thank Hanna Bosdriesz and Vid Prislan for their friendship and willingness to be my paranymphs. Hanna's passion for human rights is truly inspiring. Our conversations on Guatemala provided me with insights that no academic paper or arbitral award can provide. With Vid, I co-authored two articles on investment-labour linkage. This project has been extremely valuable to the course of my research. His profound knowledge of international investment law opened my eyes to the field of law in my research with which I was least familiar. I also thank my other former colleagues at the Leiden Law School. The Grotius Centre for International Legal Studies was a place of unity in diversity, both with regard to research topics as well as personal backgrounds. Probably my most productive weeks of writing I spent with Ingrid, Nelleke and Vestert in Renkum. The combination of kitchen-table research, long walks and Zomergasten could have lasted much longer. During the winter and spring of 2015 I had the pleasure of working at the Lauterpacht Centre for International Law at the University of Cambridge as a visiting scholar. This research visit has been sponsored by the Leiden University Fund/van Beuningen Fund and the Cornelis van Vollenhoven Stichting. I am grateful for their support.

I also would like to thank two mentors outside of academia. Paul Kalma gave me the opportunity to take my first steps in the political arena as well as the business and human rights field. Maria Anne van Dijk proves every

day that corporate activism on the Zuidas can thrive. I am proud to be part of the journey.

Finally, I would like to thank my family. There are no words to describe my gratitude to Heike for giving me so much space to finish my research and for all the other ways in which she has supported me over the last years. Lauren and David have truly enriched our lives. I am looking forward to spending my weekends reading fairy tales instead of law journals, and to all other wonderful things that lie ahead.

Ruben Zandvliet
November 2018

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List of abbreviations

AA	Association Agreement
ACP	African, Caribbean and Pacific
AFL-CIO	American Federation of Labor and Congress of Industrial Organizations
AG	Advocate General of the European Court of Justice
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
ASEAN	Association of Southeast Asian Nations
BEE	Black Economic Empowerment
BIT	Bilateral Investment Treaty
BLEU	Belgium-Luxembourg Economic Union
BP	British Petroleum
CARIFORUM	Caribbean Forum
CAS	(Conference) Committee on the Application of Standards
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CETA	Comprehensive Economic and Trade Agreement
COMESA	Common Market for Eastern and Southern Africa
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CRC	Committee on the Rights of the Child
DG	Directorate General
ECE	Evaluation Committee of Experts
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EComHR	European Commission of Human Rights
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EFTA	European Free Trade Association
EPA	Economic Partnership Agreement
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FPS	Full Protection and Security
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services

GATT	General Agreement on Tariffs and Trade
GB	Governing Body
HRC	Human Rights Committee
HRU	Human Rights Undertaking
IALL	International Association of Labour Legislation
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
IILS	International Institute for Labour Studies
IIME Declaration	International Investment and Multinational Enterprises
IISD	International Institute for Sustainable Development
ILA	International Law Association
ILC	International Labour Conference
ILO	International Labour Organization
Iran-US CTR	Iran-United States Claims Tribunal
IRLR	Internationally Recognized Labour Rights
ISDS	Investor-State Dispute Settlement
ITUC	International Trade Union Confederation
LDC	Least Developed Country
MAI	Multilateral Agreement on Investment
MMDA	Model Mine Development Agreement
MNE	Multinational Enterprise
NAAEC	North American Agreement on Environmental Cooperation
NAALC	North American Agreement on Labor Cooperation
NAFTA	North American Free Trade Agreement
NAO	National Administrative Office
NCP	National Contract Point
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OTLA	Office of Trade and Labor Affairs
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PPM	Process and Production Methods
PTIA	Preferential Trade and Investment Agreement
SADC	Southern African Development Community
SCM	Subsidies and Countervailing Measures
SIA	Sustainability Impact Assessment
SUTSP	Sindicato Unico de Trabajadores de la Secretaria de Pesca
TFEU	Treaty on the Functioning of the European Union
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UAE	United Arab Emirates
UDHR	Universal Declaration of Human Rights
UN	United Nations

UNCITRAL	United Nations Commission on International Trade Law
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNICEF	United Nations Children's Fund
UNRIAA	United Nations Reports of International Arbitral Awards
USMCA	United States-Mexico-Canada Agreement
WTO	World Trade Organization

1 Introduction

1.1 INTRODUCTION

On 25 March 1911 fire broke out in the Triangle Shirtwaste Factory in New York City, killing 146 garment workers. The disaster led to an expansion of labour regulation in the United States. As noted by Frances Perkins, who was an eyewitness and who would later become Secretary of Labor under President Franklin Roosevelt: "The Triangle Fire was the first day of the new deal."[1]

More than a hundred years later sweatshops still exist and industrial accidents still occur. The most dreadful example is the collapse of the Rana Plaza building in 2013 in Bangladesh, in which 1,134 workers were killed. Comparisons with the Triangle Shirtwaste fire and its legislative aftermath have been made to demonstrate the catalysing effect of such events.[2] But whereas the response in 1911 was purely domestic, in the twenty-first century labour conditions have become a matter of international concern. This is primarily caused by the profoundly changed outlook of the global economy. The numerous smaller production units in the Rana Plaza building were part of the value chains of large multinational enterprises (MNEs) and produced for global markets. While Bangladesh bears the primary responsibility to remedy unsafe labour conditions, the contemporary global economy is characterized by "the incongruity between the apparent territoriality of the law and the transnational logic of capital."[3] This raises questions about the moral and legal responsibility of consumers, business entities and other states, as well as the means through which this can be fulfilled.[4] The question "whether new regulatory modes and mechanisms ... or institutions need to be pursued in

1 Leon Stein, *The Triangle Fire* (Cornell University Press 2011) xvi.

2 Sarah Labowitz, 'Factory safety and labor protections; the difference between the Triangle Shirtwaist factory fire and Rana Plaza' (*Center for Business and Human Rights NYU Stern*, 25 March 2016) <http://bhr.stern.nyu.edu/blogs/105th-anniversary-triangle-shirtwaist> accessed 24 June 2018.

3 The IGLP Law and Global Production Working Group, 'The role of law in global value chains: a research manifesto' (2016) 4 London Review of International Law 57, 63-64.

4 Iris Marion Young, 'Responsibility and Global Labor Justice' (2004) 12 The Journal of Political Philosophy 365.

complement to, or in instead of, traditional international labour law" is thus becoming increasingly important.[5]

Conditioning market access on the fulfilment of certain minimum labour standards in the exporting state, and the inclusion of specific labour clauses in preferential trade and investment agreements (PTIAs) are amongst the mechanisms that have emerged over the last thirty years. In the case of Bangladesh, the United States and the European Union, where many of the MNEs involved in the catastrophe are incorporated, have used their economic leverage to compel the country to improve its labour laws and their enforcement. While the US decided to suspend preferential trade with Bangladesh, as the country failed to comply with the labour conditionalities that US domestic trade legislation imposes on beneficiary states, the EU maintained its trade preferences but used the threat of withdrawal to implement the 'Bangladesh Sustainability Compact'.[6] According to some authors, however, this does not go far enough. Baker, referring to the alleged lack of labour law reform in Bangladesh, argued that states should have "the right and duty to refuse goods from countries that violate [international labour standards]."[7]

The United States and the European Union do not grant unilateral tariff preferences to Guatemala, another example of a state with a problematic track record concerning the observance of international labour standards. Instead, it is a party to free trade agreements with the US, the EU and the European Free Trade Association (EFTA) states.[8] These treaties all contain labour provisions: reciprocal and binding obligations under international law, which require the observance and enforcement of minimum labour standards. In 2014, the United States instituted the first-ever labour arbitration based on a free trade agreement, alleging that Guatemala failed "to effectively enforce its labor laws", which would constitute a violation of Article 16.2 of the United States – Central America and the Dominican Republic Free Trade Agreement (CAFTA-DR). All claims were dismissed. So far, the panel report in this case is the only case-law on PTIA labour provisions.

The withdrawal of trade preferences, the idea that states should have a right or a duty to refuse certain goods, and the arbitration between the US and Guatemala have in common that they link the observance of labour standards to international trade and investment law. This body of law enables economic

5 Frank Hendrickx and others, 'The Architecture of Global Labor Governance' (2016) 155 International Labour Review 339, 341 (internal reference omitted).

6 Paul van der Heijden and Ruben Zandvliet, 'Enforcement of Fundamental Labor Rights. The Network Approach: Closing the Governance Gaps in Low-Wage Manufacturing Industries' (The Hague Institute for Global Justice: Policy Brief No. 12, September 2014) 5-6.

7 Kevin Baker, 'Death in Bangladesh: Trinagle fire redux' (Reuters, 6 June 2013) <http://blogs.reuters.com/great-debate/2013/06/06/death-in-bangladesh-triangle-fire-redux> accessed 24 June 2018.

8 The EFTA consists of Iceland, Liechtenstein, Norway and Switzerland.

globalization and the very existence of international value chains. Notably, this role was initially assumed by international labour law. The premise that states would unilaterally decide to open-up their markets and trade freely, provided that there was some form of institutionalized cooperation on labour issues, was abandoned in the wake of the Great Depression. After the Second World War, international economic law developed separately from international labour law. None of the attempts to link these two areas of law, which are at least partially based on a similar rationale, were successful. This changed in 1994, when the North American Agreement on Labor Cooperation (NAALC) was concluded in conjunction with the North American Free Trade Agreement (NAFTA). Since the NAALC, labour standards have (again) become an inherent part of international economic law. Campling *et al* argue that:

> we are currently witnessing a period of experimentation whereby different models of labour provisions are operating in bilateral trade agreements between different trading partners. These models differ greatly in terms of scope of trade, scope of labour provisions, methods of promotion and methods of enforcement.[9]

This period is likely to continue, for trade as well as investment agreements. According to the 2015 World Investment Report states increasingly recognize that their investment treaties interact with labour, characterizing the period since the 2008 financial crisis as an "era of re-orientation" for international investment law.[10] The trade-labour and investment-labour nexus have different dynamics, however. International trade law does not restrict the ability of states to regulate their domestic labour market,[11] but disciplines the use

9 Liam Campling et al, 'Can labour provisions work beyond the border? Evaluating the effects of EU free trade agreements' (2016) 155 International Labour Review 357, 360. Similarly, Addo notes that preferential trade agreements "could serve as a model and testing ground for future agreements." Kofi Addo, *Core Labour Standards and International Trade* (Springer 2015) 11.

10 UNCTAD, 'World Investment Report 2015: Reforming International Investment Governance' (United Nations 2015) 121, 126.

11 Some authors have argued that "government policies promoting workers' rights are considered barriers to trade and therefore subject to attack under WTO rules." Lori Wallach and Michelle Sforza, *The WTO: Five Years of Reasons to Resist Corporate Globalization* (Seven Stories Press 1999) at 59. However, labour legislation has been challenged before the WTO in only one case, concerning a French Decree banning asbestos due to carcinogenic risks for construction workers. The problem in this case was not whether France was allowed to protect its workers, but through what means this protection should be afforded. Canada, the complainant, argued that a full ban was disproportionate. However, both the Panel and Appellate Body in *EC–Asbestos* upheld the French legislation. In relation to an early GATT case that concerned a Belgian social security measure, Charnovitz correctly points out that the *Belgian Family Allowances* report does not put trade liberalization over collectively defined social preferences at the domestic level. It merely concerned the way in which the Belgian system was financed, and does not prejudice the existence of its family subsidy system as such. Steve Charnovitz, 'Belgian Family Allowances and the challenge of origin-based discrimination' (2005) 4 World Trade Review 7, 22.

of trade measures in response to foreign labour standards. In the context of investment law, this transnational element is lacking. Here, the main question is whether the protection of foreign investors through investment treaties could constrain the ability of states to improve domestic labour standards.[12]

1.2 Research question, scope and academic context of the study

This study offers a descriptive, conceptual and comparative account of trade-labour and investment-labour linkages. The central research question is: how do international trade and investment agreements constrain and support domestic and international labour law?

The terms 'constrain' and 'support' are used to describe whether or not a state's freedom to regulate is being limited as the result of international obligations. They are not used in a normative sense, i.e. constraints are bad and support is good. Indeed, they are often two sides of the same coin. The General Agreement on Tariffs and Trade (GATT), for example, disciplines the ability of states to restrict access to their markets. There are exceptions to this general rule, and one of the questions that is examined in this study is whether states can prohibit the importation of goods that are produced by children. If this is possible under current GATT rules, this 'supports' the ability of importing states to determine which goods enter its territory, and 'constrains' the exporting state in its ability to (de)regulate its labour market. Whether this is to be applauded or not is a different matter. While some approve the absence of international legal constraints to impose import bans, others consider them necessary. The arguments of those that argue against labour-related trade measures are not uniform. Some stress the importance of maintaining open trade relations, others argue that a prohibition on child labour products is not an effective means to improve the position of underage workers, or that trade restrictions unduly impede the legislative sovereignty of other states by arm-twisting them into accepting higher labour standards.[13]

The example of an import ban in response to child labour also shows that the term 'domestic labour law' as used in the introduction should be interpreted broadly. Admittedly, trade-restrictive measures by importing states

12 See e.g. Richard Gardner, 'International Measures for the Promotion and Protection of Foreign Investment' (1959) 53 American Society of International Law Proceedings 255, 262.

13 Barry and Reddy have identified five broad arguments against trade-labour linkage: (1) linkage is self-defeating or inconsequential, (2) linkage is an inferior means of promoting the goals it is intended to promote the goals it is intended to promote, (3) linkage creates an unfair distribution of burdens, (4) linkage is context blind and politically imperialistic, (5) linkage is infeasible. Most of the assumptions underlying the first four objections depend on economic analysis. Christian Barry and Sanjay G. Reddy, *International Trade and Labor Standards: A Proposal for Linkage* (Columbia University Press 2008) 12-22.

are not 'labour laws'. Some authors apply the term transnational (labour) law,[14] while others would place them in the category of domestic trade measures. This study adopts the latter terminology.

In addition to the effect of international trade and investment agreements on the powers of states to adopt domestic law, the constraint/support framework is used to examine their relationship with international labour law. An ILO research paper warns that:

> while [trade and investment] agreements may provide additional leverage to enforce labour standards, they may also increase fragmentation within international labour law and subject the interpretation and application of these standards to the legal findings of trade and investment law, all of which could, in the long term, weaken the international protection of workers.[15]

If this risk would materialize, trade and investment agreements thus 'constrain' international labour law. If a coherent interpretation between ILO norms and labour provisions in trade and investment agreements can be assured, the two systems can be seen as complementary, as the latter 'support' the observance of labour standards in the specific context of economic liberalization between states.

This study is part of a broader debate on the linkages between trade and investment law on the one hand, and human rights, labour and environmental protection on the other.[16] According to Lang, "the 'trade and' (or 'linkage') literature ... is the most important forum in which international trade law scholars have directly addressed many anti-globalisation critiques of the trading system"[17] Similarly, Harrison notes that "interaction between [international economic law] and human rights and environmental law has been the most commonly used case study of regime interaction at the international level."[18] Academic interest in labour-linkages extends well beyond inter-

14 Bob Hepple, *Labour Laws and Global Trade* (Hart Publishing 2005) 3. See also: Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar Publishing 2015).

15 Jordi Augustí-Panareda, Franz Ebert and Desirée LeClercq, 'Labour Provisions in Free Trade Agreements: Fostering their Consistency with the ILO Standards System, Background Paper Social Dimensions of Free Trade Agreements' (International Labour Office, March 2014) 5. (They refer to Valticos who recognized the risk of fragmentation in international labour law in 1979).

16 Alston notes that most of the literature on the linkage between trade and human rights interprets the latter as including labour rights, Philip Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 European Journal of International Law 815, 817.

17 Andrew Lang, 'Reflecting on 'Linkage': Cognitive and Institutional change in The International Trading System' (2007) 70 The Modern Law Review 523, 524.

18 James Harrison, 'The case for investigative legal pluralism in international economic law linkage debates: a strategy for enhancing the value of international legal discourse' (2014) 2 London Review of International Law 115, 117-118.

national legal scholarship. Social scientists examine the political motives of linkage policies,[19] and whether labour clauses in the European Union's external agreements should be considered "as part of its 'normative power' in world politics."[20] Economists have commented upon the justifications for, and implications of labour-linkages. The notion that labour laws are "luxury goods"[21] or "the stepchild of development" is well-rehearsed ever since their inception in the 19th century.[22] According to Engerman, improvements of labour standards are "the consequences of higher national income, with accompanying changing preferences regarding work time and work arrangements as income rose."[23] Linkages can be perceived as premature legal interventions that disturb this process. In fact, they may have perverse effects. As economists Hoekman and Kostecki argue:

> Using trade remedies to enforce labour standards would worsen the problems at which they are aimed (by forcing workers in targeted countries into informal or illegal activities). Unemployment will rise and, given the absence or weakness of social safety nets (unemployment insurance), can be expected to have a detrimental impact on poverty.[24]

Commenting on the confluence of academic disciplines in the study of labour-linkages, Langille argues that "trade lawyers and economists on the one hand, and labour and human rights lawyers on the other ... talk past each other. Allegations of economic illiteracy are countered with charges of moral philistinism. The wheels of the arguments on both sides spin freely; the cogs do not

19 See e.g. Lore Van den Putte, 'Divided we stand: the European Parliament's position on social trade in the post-Lisbon era' in Axel Marx and others (eds), *Global Governance of Labour Rights: Assessing the Effectiveness of Transnational Public and Private Initiatives* (Edward Elgar Publishing 2015) 63-82.

20 Jan Orbie and Lisa Tortell, 'From the social clause to the social dimension of globalization' in Jan Orbie and Lisa Tortell (eds), *The European Union and the Social Dimension of Globalization: How the EU influences the world* (Routledge 2009) 20.

21 Robert Howse, Brian Langille and Julien Burda, 'The World Trade Organization and Labour Rights: Man Bites Dog' in Virginia Leary and Daniel Warner (eds), *Social Issues, Globalization and International Institutions* (Martinus Nijhoff 2006) 159. The authors here oppose the view that: "Labour rights are thus a cost and a tax upon development – one which international investment will seek to avoid and which rational governments should refrain from imposing. Labour rights are a set of luxury goods to be purchased with the wealth generated by growth and after the event."

22 Michael Huberman, *Odd Couple: International Trade and Labor Standards in History* (Yale University Press 2012) 25.

23 Stanley Engerman, 'The History and Political Economy of International Labor Standards' in Kaushik Basu and others (eds), *International Labor Standards: History, Theory and Policy Options* (Blackwell Publishing 2003) 60.

24 Bernard Hoekman and Michel Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (3rd edn, Oxford University Press 2009) 627.

engage."[25] Arguably, this problem is most pressing when economists embark on normative terrain. In their above quote, Hoekman and Kostecki assume that labour-linkages are by definition meant to protect workers in the low-standard country. This is not necessarily the case. A prohibition on imports from Bangladesh could be a lever to induce improvements of labour standards in that country, but it could also be a means to protect workers in high-standard countries against sweatshop labour as a form of 'unfair competition'.

Another example in which economic research often determines one's normative position is the metaphor of the 'race-to-the-bottom': the idea that companies 'race' towards countries with the lowest labour standards, and that states respond by adjusting their labour law accordingly in order to retain or regain competitiveness. In recent years, many studies have shown that the risk of a race-to-the-bottom is exaggerated. Companies do not systematically exploit the opportunities of regulatory arbitrage, and states do not continuously downgrade their labour standards. This casts new light on the issue of regulatory competition, which provides part of the justification for international labour law. Indeed, on the basis of these economic studies, lawyers have concluded that there might not be a need to draft international legal arrangements that constrain states in pursuing their economic self-interest.[26] This study takes the reverse approach. Through an analysis of labour provisions in trade and investment agreements, it will examine what it is that states seek to achieve, i.e. what they consider to be the raison d'être of trade-labour and investment-labour linkages. Is this the prevention of a race-to-the-bottom, or do these provisions have different objectives? And what are the similarities and difference between trade-labour and investment-labour linkages in this regard?

In recent years, legal scholars have expressed discontent with the ways in which the interaction between international economic law and human rights, labour standards and environmental protection is characterized, theorized and investigated by their fellow lawyers. Lang argues that:

> in addition to generating discussion of how trade and non-trade values ought to be treated in the trade regime, the linkage debate performs the logically prior task of constituting particular values as either 'trade' or 'non-trade'. This is not an explicit process, but rather one which occurs purely as a result of the way that the terms of the debate have been established. When commentators argue, for example, about the appropriateness of 'linking trade and non-trade issues', or of 'balancing trade and non-trade values', it is clear that a shared understanding of what con-

25 Brian Langille, 'Eight Ways to think about International Labour Standards' (1997) 31 Journal of World Trade (1997) 27.

26 Brian Langille, 'What is International Labor Law For?' (2009) 3 Law & Ethics of Human Rights 62, 68.

> stitute 'trade values', 'trade objectives', and 'trade issues' is implicitly taken for granted, and serves as the basis for the conversation.[27]

Based on one's particular understanding and normative assessment of the values and interests represented by the different international regimes that are involved, lawyers have resorted to three strategies of resolving potential conflicts: (1) hierarchy, (2) displacement or (3) integration and interpretation.[28] For example, as labour rights could be seen as a subset of human rights norms, they emanate from moral imperatives and should therefore 'trump' trade rules that have no such basis.[29] These types of inquiries do not always advance the legal debate. For Lang, the problem is that they occlude questions about the "imagination and contestation of appropriate collective purposes on which to found the practice of international economic governance."[30]

While Lang's argument concerns the conceptual re-thinking of one area of law, i.e. multilateral trade law, Harrison makes the case for a more practical approach towards the study of regime interactions. He argues that "there is a need to shift the focus of the academic endeavour from an unending examination of the system itself, to a detailed investigation of substantive issues ... through the prism of different legal frameworks."[31] In other words: there is a need to recognize the plurality of legal regimes and expose particular instances in which two legal regimes (e.g. trade law and labour law) collide. This method will also be applied in this study. As Herbert Feis noted eight years after the International Labour Organization was founded: "[the] creation of a permanent institution to concern itself with labour conditions on an international scale was the product of experience which seemed to indicate its need, and not the product of theory."[32]

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27 Andrew Lang, 'Reflecting on 'Linkage': Cognitive and Institutional change in The International Trading System' (2007) 70 The Modern Law Review 523, 536.

28 James Harrison, 'The case for investigative legal pluralism in international economic law linkage debates: a strategy for enhancing the value of international legal discourse' (2014) 2 London Review of International Law 115, 124.

29 Tonia Novitz, 'Labour Standards and Trade: Need We Choose Between 'Human Rights' and 'Sustainable Development'?' in Henner Gött (ed) *Labour Standards in International Economic Law* (Springer 2018) 114 referring to the work of Ronald Dworkin.

30 Andrew Lang, *World Trade Law after Neoliberalism: Re-Imagining the Global Legal Order* (Oxford University Press 2011) 7.

31 James Harrison, 'The case for investigative legal pluralism in international economic law linkage debates: a strategy for enhancing the value of international legal discourse' (2014) 2 London Review of International Law 115, 137.

32 Herbert Feis, 'International labour legislation in the light of economic theory' (1927) 15 International Labour Review 491, 497-498.

1.3 SOURCES AND METHODOLOGY

The question how international trade and investment agreements constrain or support labour regulation will be answered on the basis of a broad variety of sources. The term 'sources' has two distinct meanings. In research in general, the term refers to the materials that are being studied. In legal research and descriptions of legal methodology, however, it typically refers to the sources of international law. These sources contain rights and obligations of subjects of international law. To complicate things further, in both contexts a distinction is made between 'primary' and 'secondary' or 'subsidiary' sources. Case law, for example, is a primary research source but a subsidiary source of international law.

The primary sources of international law are reflected in Article 38.1(a-c) of the Statute of the International Court of Justice.[33] They are, with no apparent hierarchy: treaties, custom and general principles of law.[34] Article 38.1(d) adds judicial decisions and doctrine as the "subsidiary means for the determination of rules of law."[35] This list is incomplete, however. Unilateral acts of states,[36] decisions of international organizations,[37] and agreements between states and international enterprises are also widely recognized as sources of international law.[38]

The analysis presented in this study relies primarily on four treaty regimes.[39] The main sources of international law that are thus examined are: (1) ILO conventions, (2) multilateral trade law, (3) bilateral investment treaties,

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33 James Crawford, *Brownlie's Principles of Public International Law 8th edition* (Oxford University Press 2012) 20.

34 Alain Pellet, 'Article 38' in Andreas Zimmermann and others (eds) *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012) 841-848.

35 In his commentary on Article 38 of the ICJ Statute, Pellet argues that: "jurisprudence and doctrine are not sources *of law* – or ... of rights and obligations for the contesting states: they are *documentary* 'sources' indicating where the Court can find evidence of the existence of the rules it is bound to apply by virtue of the other three sub-paragraphs." ibid 854. Thirlway adds that: "a judicial decision, in almost all cases, by definition adds something to the corpus of law on the subject of the dispute: if the law had been crystal clear before the decision, it is reasonable to suppose that the case would never have been fought." Hugh Thirlway, *The Sources of International Law* (Oxford University Press 2014) 118 (reference omitted).

36 This was first recognized in the two nuclear tests cases: *Nuclear Tests Case (Australia v France)* (Judgment) [1974] ICJ Rep 253, para 43, and *Nuclear Tests Case (New Zealand v France)* (Judgment) [1974], ICJ Rep 457, para 46.

37 Most importantly the decisions of the UN Security Council, see Art 25 UN Charter. On General Assembly Resolutions: James Crawford, *Brownlie's Principles of Public International Law 8th edition* (Oxford University Press 2012) 42.

38 Hugh Thirlway, *The Sources of International Law* (Oxford University Press 2014) 19-24.

39 The Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) and the Vienna Convention on the Law of Treaties (VCLT) are relied upon as customary international law. Whether international labour law also partially reflects customary international law, and what the possible implications would be, is discussed in chapter 2.

and (4) preferential trade and investment agreements. While they share the features that make them treaties under Article 2.1(a) of the Vienna Convention on the Law of Treaties (VCLT), there are also significant differences, ranging from the purpose of the legal regime, to the way in which the various agreements come into being and their dispute settlement and enforcement mechanisms. The substantive chapters of this study will discuss in more detail to what extent the VCLT rules on the adoption of treaties, reservations and interpretation are being applied in the different regimes.[40]

This thesis will draw from the work of bodies that are tasked with the settlement of disputes and the supervision of compliance. The 'jurisprudence' that is created in the supervision process of ILO Conventions is markedly different from that of the WTO or investment tribunals, however. While decisions of the WTO Dispute Settlement Mechanism and *ad hoc* investment tribunals are typically perceived as 'judicial decisions' in the meaning of Article 38.1(d) ICJ Statute,[41] the pronouncements of the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR)[42] and the Committee on Freedom of Association are considered 'quasi-judicial'.[43] Boyle and Chinkin, list the "interpretative guidance adopted by human rights treaty bodies" amongst a list of soft law sources.[44] This does not mean that it is less relevant than ICJ judgments or arbitral awards. Indeed, this status has not prevented the ICJ to rely on a "body of interpretative case law" which consisted "in particular" of the Human Rights Committee's findings in individual cases and its general comments.[45] The same applies to the regional human rights courts, which have drawn extensively on the work of the ILO supervisory bodies.[46]

40 More specifically, this concerns paragraphs 2.3.3.1 (reservations to ILO conventions), 2.3.4.1 (adoption of ILO conventions), 2.4.3 (interpretation of ILO conventions), 4.4.3.2 (application of Art 31.3(c) between investment treaties and ILO norms), and 5.8.3 (application of Art 31.3(c) between PTIA labour standards and ILO norms).

41 Hugh Thirlway, *The Sources of International Law* (Oxford University Press 2014) 121.

42 International Labour Conference (47th Session) Record of Proceedings: Appendix V (Geneva 5-26 June 1963) para 10, cited in: Abdul Koroma and Paul van der Heijden, 'Review of ILO Supervisory Mechanism' (International Labour Office 2016) para 51.

43 Ernest Haas, *Beyond the Nation-State: Functionalism and International Organization* (Stanford University Press 1964) 396-398.

44 Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 213.

45 *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Merits) [2010] ICJ Rep 639, para 66. On the 'quasi-judicial' status of the HRC, see: Thomas Buergenthal, 'The U.N. Human Rights Committee' in Jochen Frowein and Rüdiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law – Volume 5* (Kluwer Law International 2001) 367.

46 Franz Ebert and Martin Oelz, 'Bridging the gap between labour rights and human rights: The role of ILO law in regional human rights courts' (2012) International Institute for Labour Studies Discussion Paper DP/212/2012.

This study also uses various other types of instruments that have been given the label 'quasi-sources' or 'soft law'.[47] This includes inter-state soft law, such as ILO recommendations and the 1998 Declaration on Fundamental Principles and Rights at Work, as well as instruments in the field of corporate responsibility.[48] The label 'soft law' is contentious. Klabbers, for example, dismisses soft law from a conceptual point of view. According to him, it impairs the simplicity and formalism of law, making it "a ploy by the powers that be to strengthen their own position, to the detriment of others."[49] In 1983, Prosper Weil made the functionalist argument that "the proliferation of 'soft norms' ... does not help strengthen the international normative system."[50] Today, however, the function of soft law has attained more prominence than possible conceptual objections. Boyle thus argues that "it has generally been more helpful in the process of international law-making than it has been objectionable. It is inconceivable that modern treaty regimes or international organizations could function successfully without resort to it."[51] This view is shared by Pellet, who argues that "contrary to the views of positivist doctrine, it appears from a careful study of the case law of the [ICJ] that [quasi-sources] are not 'non-legal'."[52] Arguably, soft law performs at least three functions.[53] First, it could serve as a point of reference for *lex ferenda*. In other words: it is a factor in debates on what the law on a particular subject ought to be.[54] Secondly, soft law instruments may have a "catalytic effect" on the formation of customary international law.[55] Thirdly, soft law instruments

47 There is no general definition of soft law, however. According to Boyle and Chinkin, it "is simply a convenient description for a variety of non-legally binding instruments used in contemporary international relations." Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 212.

48 On the role of soft law in international labour law, see: Isabelle Duplessis, 'Soft international labour law: The preferred method of regulation in a decentralized society' in International Institute for Labour Studies (ed) *Governance, International Law and Corporate Social Responsibility* (International Labour Organization 2006).

49 Jan Klabbers, 'The Undesirability of Soft Law' (1998) 67 Nordic Journal of International Law 381, 387.

50 Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 American Journal of International Law 413, 414-415.

51 Alan Boyle, 'Soft Law in International Law-Making' in Malcolm Evans (ed) *International Law* (4th edn, Oxford University Press 2014) 133.

52 Alain Pellet, 'Article 38' in Andreas Zimmermann and others (eds) *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012) 774.

53 Cf. ibid 774, and Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 210-229.

54 Maupain notes that unratified conventions (i.e. 'hard law) have the same effect, both for the purpose of legislation as well as collective bargaining. Francis Maupain, *The Furture of the International Labour Organization in the Global Economy* (Hart Publishing 2013) 41.

55 Christine Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 International and Comparative Law Quarterly 850, 857. See also: Marko Divac Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General

may be used for the interpretation of treaties. This role is often attributed to ILO recommendations, which supplement conventions "by providing more detailed guidelines on how it could be applied."[56]

1.4 THESIS OUTLINE

In addition to this introductory chapter, the study consists of four substantive chapters and one concluding chapter. The four substantive chapters are concerned with international labour law, multilateral trade law, investment law and labour provisions in PTIAs, respectively.

Chapter 2 firstly provides an introduction to the origins and purpose of international labour regulation. Central to this part is the role of economic integration between states, which not only provided the *raison'd'être* of international labour law, but also a point of leverage to effectuate improvements of labour standards across countries. Chapter 3 then turns to multilateral trade law and the World Trade Organization. As the WTO Agreements do not contain obligations concerning its member states' domestic labour legislation, either to deregulate labour or to maintain a specific level of minimum labour standards, the discussion focuses on the question if, and to what extent, WTO law allows trade measures by importing states in response to low labour standards in other jurisdictions.

Chapter 4 is concerned with international investment law. Here, the discussion focuses on the question if, and to what extent, protection that is granted to foreign investors restricts the policy space of states to regulate labour domestically. Chapter 5 focuses on labour clauses in preferential trade and investment agreements. These clauses are self-standing treaty obligations, and thus supplement the international labour conventions that are drafted under the auspices of the ILO and labour obligations arising from human rights agreements. They address: (1) derogations from domestic labour standards by a state party, (2) the improvement of labour standards, and (3) issues related to domestic labour governance, and (4) the conduct of investors. As the latter type is closely connected to investment law, it will be addressed in chapter 4. In addition to providing a descriptive and comparative analysis of labour clauses in the first three categories, chapter 5 will address the issue of coherence with the legal framework of the ILO. Chapter 6 contains the conclusions

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Assembly in the Jurisprudence of the ICJ' (2006) 16 The European Journal of International Law 879, 898-904.

56 While not referring to the term 'interpretation' or the VCLT framework, an ILO publication notes that: "In many cases, a Convention lays down the basic principles to be implemented by ratifying countries, while a related Recommendation supplements the Convention by providing more detailed guidelines on how it could be applied." International Labour Office, 'Rules of the Game: A Brief Introduction to International Labour Standards' (3rd edn, Geneva 2014) 15.

of this study. It will bring the different fields of law together, and provides an integral evaluation of the trade-labour and investment-labour linkages that have been examined.

2 Economic Competition and the Development of International Labour Law

2.1 INTRODUCTION

The rhetoric on the relationship between economic globalization and labour has not changed significantly during the last century. United States Trade Representative Ron Kirk proclaimed in in 2009 that: "American workers should not be expected to compete against substandard labor practices."[1] This closely resembles a statement from the American Federation of Organized Trades and Labor Unions in 1881, which demanded from the US Congress that industry be provided with "full protection from the cheap labour of foreign countries."[2] Both statements reflect the idea that low labour standards give countries an 'unfair advantage' over high-standard ones. Implicit herein is the equally normative premise that it is possible to define what 'substandard' labour conditions are, and the argument that there should be means available for redress. The purpose of this chapter is to examine both elements, namely how a branch of international law developed that lays down obligations concerning the regulation of states' domestic labour markets, and how these norms are formulated, interpreted and enforced.

This chapter lays the groundwork for the evaluation of trade-labour and investment-labour linkages in the subsequent chapters. It consists of three parts. Part 2.2 examines the origins of international labour law. Before the First World War many states expanded their international economic relations while concomitantly improving domestic labour legislation. This period is instructive with regard to the purpose that states assigned to international labour law, and also explains why it preceded both international human rights and international economic law. Furthermore, states applied different means to induce their trading partners to raise labour standards collectively. This included both unilateral trade measures, which are nowadays disciplined by the World Trade Organization, as well as bilateral labour treaties, which were a precursor to the foundation of the International Labour Organization.

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1 United States Trade Representative Ron Kirk, 'Remarks at Mon Valley Works – Edgar Thomson Plant' (16 July 2009).

2 Proceedings of the American Federation of Labor, 1881, Platform, point 11, cited in Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 126 International Labour Review 565, 568.

The remainder of this chapter is devoted to the ILO. Part 2.3 considers the purpose of international labour law at the time the ILO was founded, and introduces the ILO's institutional and legal framework. Part 2.4 then looks at two aspects of the implementation of ILO standards: the role of the organisation's supervisory bodies in the interpretation and development of international labour law, and the way in which the perceived ineffectiveness of the ILO influences the debate on trade-labour linkage.

2.2 THE ORIGINS OF INTERNATIONAL LABOUR LAW

2.2.1 Introduction

The purpose of this part is to provide an overview of the development of international labour law before the founding of the ILO in 1919. Section 2.2.2 sets out how labour law emerged as an international concern. Section 2.2.3 explores the methods that states applied during the initial phases of international cooperation. Section 2.2.4 then looks at the emergence of multilateral cooperation and discusses the work of the International Association of Labour Legislation.

2.2.2 Economic competition and the need for international cooperation

Across jurisdictions and throughout history, many different grounds have been advanced to justify the regulation of labour.[3] Generally, the purpose of labour law is to address the asymmetric relationship between employers and workers. It does so by offering procedural as well as substantive guarantees. Procedural labour rights safeguard the right of workers to organise in trade unions, to bargain collectively on wages and employment conditions, and recognizes industrial action as a legitimate means to pressure employers.[4] Substantive guarantees, on the other hand, can be divided into labour market conditions, including statutory minimum wages and hours of work, and working condi-

3 See Harry Arthurs, 'Labour Law After Labour' in Guy Davidov and Brian Langille (eds) *The Idea of Labour Law* (Oxford University Press 2011) 13-14. This variety also exists at a descriptive level. In the United States 'labour law' refers to collective labour relations, while the term 'employment law' covers individual contracts and legislative interventions on working conditions. Restrictions on access to the workforce, such as statutory age limits, or laws governing unemployment insurance and pensions may also not be labelled 'labour law'. In Europe, the label 'social law' is often used to describe this broader scope. Importantly, even the most inclusive definitions do not intend to cover all redistributive policies that influence the supply of labour, such as taxation or childcare.

4 The term 'industrial action' is not synonymous to strikes, but refers to all measures taken by trade unions that reduce productivity with the aim of putting pressure on employers.

tions, such as health and safety standards.[5] Both procedural and substantive norms are interventions in the labour market, i.e. the market where the supply of labour (workers) meets the demand for labour (employers) and wages and employment conditions are set.

From the 18th century, it was recognized that domestic regulation could have ramifications for a country's comparative advantage.[6] At a meeting in 1831, the wool manufacturers from Scotland and the north of England passed a resolution that conveyed their concerns about a proposal to limit the hours of work to eleven hours per day, prohibit night work for children and establish a minimum age of nine years. It stated that:

> [The measures] will raise the price of goods to the consumers, which will affect the home trade considerably, and will produce the most serious effects upon the prosperity of this district, by tending to foster the manufacturers of foreign nations, our trade with whom depends upon the cheap and advantageous terms on which we now supply them with goods, and whose manufacturers would be enabled by an advance of price successfully to compete with the British Merchant.[7]

Charles Hindley (1796-1857), a British Member of Parliament who had advocated the legislation, was later questioned by a Royal Commission that investigated conditions in factories. Here he made his first plea for international cooperation, stating that labour conditions "would be as proper a subject of treaty with foreign nations as the annihilation of the slave trade."[8] The idea of international labour legislation also gained support in continental Europe. Daniel Legrand, a Swiss national who lived from 1783 to 1859, wrote a in a plea to political leaders:

> In modern industrial Europe there are certain matters that individual nations cannot regulate except in the form of an agreement between the interested powers .... An international labour law is the only possible solution to the great social problem of granting moral and material well-being to the working class without working a hardship upon the manufacturers or upsetting the competitive balance between the industries of these countries... . An international factory law has an immense advantage over national laws. It can afford moral and material benefits to the

5 Stanley Engerman, 'The History and Political Economy of International Labor Standards' in Kaushik Basu and others (eds), *International Labor Standards: History, Theory and Policy Options* (Blackwell Publishing 2003) 10.

6 See e.g. Adam Smith, *An inquiry into the nature and causes of the Wealth of Nations* (first published 1776, Thomas Nelson 1843) 358 who makes this point, although not specifically in relation to the regulation of labour.

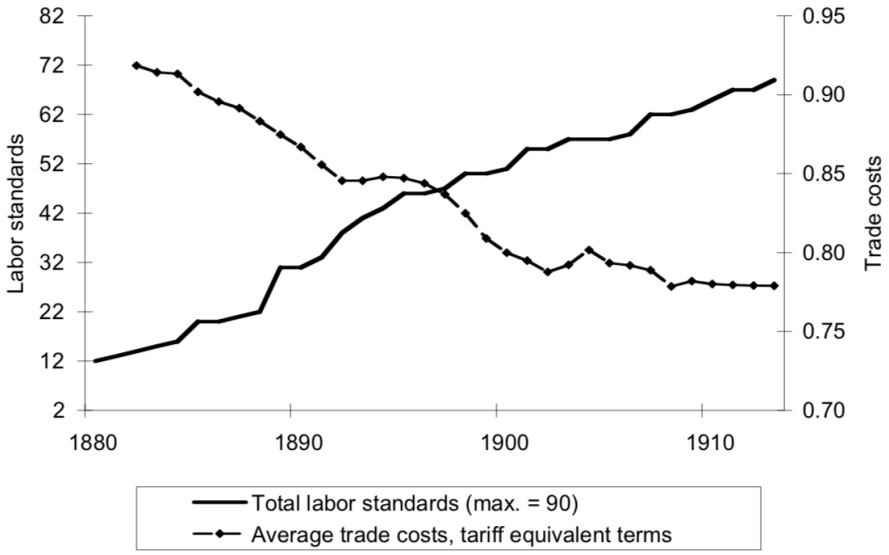
7 John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 11-13.

8 Ibid 15.

working class without prejudice to the manufacturers and without the least shock to international competition.[9]

The social reformers' fear of "the tyranny of competition" was not theoretical.[10] In the 19th century the economies in Western Europe became increasingly integrated. With regard to the free movement of people the 'first globalization' even exceeded the current integration of the world economy. During this period states also developed national labour legislation. This encompassed the introduction of factory inspections, minimum age legislation, regulation of hours of work and insurance systems to protect against accidents, unemployment and sickness.[11]

Figure 2.1: The rise of trade integration and labour standards, 1880-1913



Source: Michael Huberman and Christopher Meissner, 'Riding the Wave of Trade: Explaining the Rise of Labor Regulation in the Golden Age of Globalization' (NBER Working Paper No 15374, 2009) 44.

9 Daniel Legrand, *Appel respectueux adressé aux gouvernements des Pays Industriels dans le but de provoquer une Loi Internationale sur le travail industriel dont les dispositions seraient à arrêter par leurs délégués en un congrès lors de l'Exposition Universelle à Paris* (Paris or Strassbourg, 1855), translated and quoted in: John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 40.

10 John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 47.

11 Michael Huberman, *Odd Couple: International Trade and Labor Standards in History* (Yale University Press 2012) 14.

Figure 2.1 shows the cumulative of the adoption of labour legislation on five different issues in eighteen states.[12] This is juxtaposed against the fall in trade costs, a proxy to determine the level of economic integration.

The simultaneous expansion of domestic labour legislation and the decrease in trade costs appears to contradict Legrand's assertion that "an international labour law is the only possible solution." Indeed, international coordination was not a precondition to the adoption of domestic labour law. The first steps in the improvement of labour conditions were inspired by humanitarian reasons. Legislation responded to problems that were so grave "that the public conscience would not tolerate the postponement of national legislation to abolish them to await international action."[13] Moreover, these improvements were not seen as harmful to the competitive position of national industries. However, when legislative effort began to focus on "less serious abuses" the need for harmonization became more important.[14]

2.2.3 The quid pro quo between improving labour standards and tariff reductions

In the absence of an institutional mechanism for the regulation of labour, however, states applied a wide range of trade measures (or threats to invoke them) to support the introduction of domestic social legislation. Huberman, an economic historian, argues that:

> Even in the absence of international oversight, states had options to harmonize the regulatory environment. Until 1900 or so, coercion prevailed over persuasion and negotiation. States threatened import restrictions on selected products of trading partners; failed to renew or abrogated commercial treaties and most-favored-nation clauses; or, in extreme cases, initiated trade wars to cut of competitors' entry into their markets.[15]

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12 The five standards that are included in the analysis are: 1) the introduction of factory inspection, (2) minimum work age 12 years, (3) night work by women prohibited, (4) 11-hour working day for women, and (5) accident compensation.

13 Arthur Fontaine, 'A Review of International Labour Legislation' in E. John Solano (ed) *Labour as an International Problem* (MacMillan and Co 1920) 172

14 Ibid 172; Banks points to the fact that 19th century labour legislation was not fully developed, and argues that: "the argument that no jurisdiction could improve its labour laws without risking its industrial competitiveness appears to have exerted a profound restraining influence on labour policy in Europe during much of the nineteenth century, and was the most important reason for the founding of the International Labour Organization." Kevin Banks, 'The impact of globalization on labour standards: A second look at the evidence' in John Craig and Michael Lynk (eds) *Globalization and the Future of Labour Law* (Cambridge University Press 2006) 107.

15 Michael Huberman, *Odd Couple: International Trade and Labor Standards in History* (Yale University Press 2012) 41 (internal reference omitted).

Unilateral trade measures were also used to offset the domestic impact of foreign unfree labour. When in 1833 slavery was abolished within the British Empire, its colonies faced significant competition from countries like Cuba and Brazil. During the 1830s and 1840s, the British Parliament therefore discussed several proposals to differentiate its sugar tariffs for sugar produced by slave labour and free labour.[16] While the abolition was inspired by humanitarian concerns, the slave-trade treaties and the imposition of tariffs were necessary 'flanking' policies to reduce its economic burden. With other forms of unfree labour a different logic applied. During the 19th century many countries banned the importation of goods produced by prison labour.[17] Here, the aim was not to create the conditions necessary to abolish such labour domestically, but rather to prevent 'unfair' competition between foreign state-sponsored prison labour on the one hand, and domestic private enterprises and free workers on the other.[18]

From the 1870s onwards attempts were made to replace the protection of workers through tariff measures by reciprocal labour treaties, although the use of tariff measures and quotas extended well into the 20th century.[19] German academic socialists who advocated a treaty between Prussia and Austria presented their proposals as "[p]rotection without a tariff" and anticipated an important role for existing commercial treaties to be expanded and to also cover labour standards.[20] Whereas domestic labour legislation was inspired by humanitarian considerations, the need for international cooperation was an economic issue. As one contemporary author argued that: "Factory legislation, particularly the stabilization of the normal workday, must be international; its place is in commercial treaties".[21] Initially, treaties focused on labour migration, covering both the freedom of establishment as well as some material aspects of working abroad. This was done through separate agreements or in broader treaties of friendship, commerce and navigation. Later, states began to conclude bilateral treaties that were specifically concerned with

16 See William Green, *British Slave Emancipation: The Sugar Colonies and the Great Experiment* (Clarendon Press 1976) 191-260; and Howard Temperley, *British Antislavery, 1833-1870* (University of South Carolina Press 1972) 137-67 on this episode.

17 Stanley Engerman, 'The History and Political Economy of International Labor Standards' in Kaushik Basu and others (eds), *International Labor Standards: History, Theory and Policy Options* (Blackwell Publishing 2003) 31; and Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 126 International Labour Review 565, 570.

18 In the US, it was expressly provided that restrictions only applied regarding products that were not produces (sufficiently) in the US, see Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 126 International Labour Review 565, 570.

19 Ibid 568 and 571.

20 John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 83.

21 Ibid 86-87 (emphasis omitted).

labour issues. It started with agreements on saving funds that guaranteed access to certain financial services for foreign workers, and later shifted to a comprehensive extension of accident insurance coverage.[22]

These bilateral accident insurance treaties were seen as a prelude to labour agreements with a broader scope.[23] The agreement between Germany and Austria-Hungary of 1905, for example, provided that broader harmonization of labour standards would follow. The only comprehensive agreement that entered into force before World War One, however, was concluded in 1904 between France and Italy.[24] Both countries had been engaged in a trade war between 1886 and the early 1890s, which had been especially harmful to Italian wine makers.[25] Eventually a deal was reached in which France agreed on non-discrimination provisions in respect to Italian migrant workers, and lowered tariffs on Italian imports, while Italy would enforce a comprehensive set of labour standards that would benefit their own workers. The broader purpose of the labour agreements, however narrow in scope, was to strengthen commercial relations between states.[26] Ten of the eighteen bilateral partnerships on labour standards after 1900 also had trade agreement that guaranteed most favoured nation (MFN) treatment. It was thus tacitly understood that improvements of labour laws would prevent retaliation through tariff measures and form a precondition for the conclusion of MFN treaties that would deepen economic integration.[27]

2.2.4 The International Association of Labour Legislation and the emergence of multilateralism

After 1890, unilateral trade measures and bilateral accords were complemented by multilateral initiatives. In March 1890, fifteen states gathered during the Berlin Conference, the first multilateral inter-governmental meeting to solely discuss labour standards. There was no intention to conclude a binding agree-

22 Michael Huberman, *Odd Couple: International Trade and Labor Standards in History* (Yale University Press 2012) 77-79

23 Boutelle Ellsworth Lowe, *The International Protection of Labor: International Labor Organization, history and law* (Macmillan 1935) 171 and 194-95; Michael Huberman and Christopher Meissner, 'Riding the Wave of Trade: Explaining the Rise of Labor Regulation in the Golden Age of Globalization' (NBER Working Paper No. 15374, 2009) 13-14.

24 Michael Huberman, *Odd Couple: International Trade and Labor Standards in History* (Yale University Press 2012) 80 fn 27.

25 Ibid 80.

26 Ibid 14, also: Boutelle Ellsworth Lowe, *The International Protection of Labor: International Labor Organization, history and law* (Macmillan 1935) 143-144.

27 Michael Huberman, *Odd Couple: International Trade and Labor Standards in History* (Yale University Press 2012) 67; and Michael Huberman and Christopher Meissner, 'Riding the Wave of Trade: Explaining the Rise of Labor Regulation in the Golden Age of Globalization' (NBER Working Paper No. 15374, 2009) 14.

ment or to establish some kind of permanent institution. Eventually five resolutions were adopted, regarding work in mines, Sunday labour, child labour (up to 14 years), 'labour of the young' (14-18 years) and female labour. Compliance with the Berlin resolutions was voluntary, but it called upon states to periodically publish statistics and information about legislative and administrative measures. In 1891, a British inquiry concluded that the conference had set in motion some concrete improvements in the domestic legislation of the participating states.[28]

States showed little inclination to hold additional meetings in the years following the Berlin Conference. However, a diverse range of actors continued to carry the cause of social reform through non-governmental, transnational initiatives. On one side, there was the Second International, which consisted of Marxists, trade unionists and anarchists whose goal it was to gain full political control and socialise the means of production. On the other side were their political opponents who embraced social reform to provide a reformist alternative to communism. For many this coincided with their religious conviction. Pope Leo XIII for example, who "praised social reform with almost as much ardour as he had denounced Marxian socialism," discussed its importance in his 1891 encyclical *Rerum Novarum*.[29]

In 1897, a non-governmental conference was organized in Brussels. The delegates, mostly academics, parliamentarians and economists, decided to establish the International Association of Labour Legislation (IALL).[30] The IALL officially commenced its work in 1901. Although private in form, it was financed by states and is often regarded as the predecessor of the ILO. The purpose of the IALL was to conduct comparative studies of domestic labour laws and to organise intergovernmental conferences.[31] It focused on night work for women and occupational health, especially in the production of products containing lead colours and white phosphorus.[32] By concentrating on a few subjects and on the basis of years of study and preparation, the IALL had a different mode of operation than the Berlin Conference, which was a

28 John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 143.

29 Ibid 146-147.

30 John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 150-151. The French name of the IALL was *L'Association internationale pour la protection légale des travailleurs.* This explains the use of the English translation 'International Association for the Legal Protection of Workers' in some literature and on the website of the ILO.

31 Victor-Yves Ghebali, *The International Labour Organisation: A case Study on the Evolution of U.N. Specialised Agencies* (Martinus Nijhoff Publishers 1989) 4-5; Malcolm Delevingne, 'The Pre-War History of International Labor Legislation' in James Shotwell (ed) *The Origins of the International Labor Organization* (Columbia University Press 1934) 30 contains extracts of the IALL statute.

32 Malcolm Delevingne, 'The Pre-War History of International Labor Legislation' in James Shotwell (ed) *The Origins of the International Labor Organization* (Columbia University Press 1934) 32.

one-time diplomatic conference and reached political, non-binding conclusions on a broader range of issues.

In 1905, after four years of work by the IALL, representatives of fourteen states assembled in Berne for a 'technical' conference to negotiate the first two multilateral conventions on labour standards: one concerning the production of matches containing white phosphorus, and the other prohibiting night work for women. Although relatively uncontroversial from a humanitarian point of view – many states had already adopted domestic legislation on both issues – states deemed it necessary to "equalize the conditions of industrial competition."[33] White phosphorus was a leading cause of necrosis among workers in the match industry.[34] Some countries had already banned the substance, while others had managed to eradicate necrosis through hygienic measures.[35] For these reasons, states were less concerned with the content of a possible treaty than with the question whether their competitors would participate.[36] Notably, the main obligation under the 1906 White Phosphorus Convention is the prohibition of "the manufacture, importation and sale of matches which contain white (yellow) phosphorus."[37]

States had also introduced domestic legislation concerning night work by women. However, the various laws contained differences on age limits, hours of rest, coverage of specific industries and exemptions.[38] The convention that was concluded harmonized some of these issues, but contained a compromise to exempt manufacturers with less than ten employees. This exemption also attests to the fact that the purpose of international agreement was not to

33 Ibid 33.

34 Necrosis is the irreversible death of body tissue.

35 John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 163.

36 The negotiations in Berne on White Phosphorus were particularly concerned with the question whether Japan and British India, both important manufacturing countries, would also accede to the treaty. Unlike Britain, India did not take part in the conference. See John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 163.

37 Art 1 International Convention Prohibiting the use of White (Yellow) Phosphorus in the Manufacture of Matches (1906). After the establishment of the ILO, it adopted a non-binding instrument recommending its members to adhere to this convention.
To this day, it remains the only ILO instrument to explicitly call for trade measures in order to effectuate the purpose of banning a practice or substance that is harmful to workers. Art 1 ILO Recommendation R006: White Phosphorus Recommendation (Recommendation concerning the Application of the Berne Convention of 1906, on the Prohibition of the Use of White Phosphorus in the Manufacture of Matches) (1st Conference Session, Washington 28 November 1919).

38 John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 164; Malcolm Delevingne, 'The Pre-War History of International Labor Legislation' in James Shotwell (ed) *The Origins of the International Labor Organization* (Columbia University Press 1934) 33-34.

guarantee healthy employment conditions for all women but a more pragmatic project to mitigate the competitive advantage of low labour standards.[39]

The multilateral treaties were not accompanied by an institutionalized monitoring mechanism. Proposals by Switzerland and Great Britain to include provisions on international enforcement and interpretation were not accepted.[40] Signatories to both conventions were only bound to "communicate with one another upon the measures that they had taken to execute the conventions and the manner in which the measures were enforced."[41] Some states diligently carried out their treaty obligations by changing their domestic labour laws, but others either refused to ratify the conventions out of competitiveness concerns,[42] or because they already adhered to the standards contained therein before the Berne meetings.[43]

39 It did not appear in the 1919 Convention. One year later, a second, diplomatic conference convened in Berne 1906 with the purpose of transforming the understandings into treaties. The white phosphorus convention was signed by 7 out of 14 states represented. Japan was not represented, and signalled that it had no intention to ratify. In response five other states also refused to sign. Despite a provision that the convention would not apply automatically to colonies and dependencies, Britain only wanted to sign the phosphorus agreement if all other states would do so. See John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 165-6. In contrast, the Night Work Convention was signed by all participating states. They entered into force in 1912 and 1913, respectively, see Malcolm Delevingne, 'The Pre-War History of International Labor Legislation' in James Shotwell (ed) *The Origins of the International Labor Organization* (Columbia University Press 1934) at 47. Also in this text, some amendments were agreed upon to provide more flexibility for states that had no previous regulation on night work, and for non-European countries where climatic condition required work during cooler night hours.

40 Malcolm Delevingne, 'The Pre-War History of International Labor Legislation' in James Shotwell (ed) *The Origins of the International Labor Organization* (Columbia University Press 1934) 39-40 on the Swiss proposal to that "any differences arising between any of the Parties in regard to the interpretation or the enforcement of conventions should be settled by arbitration." This proposal was not discussed according to Delevingne, and 44-45 on the British proposal to establish a commission that would supervise compliance with the convention and deal with matters of interpretation and complaints, and a proposal to submit disputes to arbitration. Germany fiercely opposed the proposals as they would infringe upon its sovereignty. Delevingne also notes, however, that there was a fear of undue socialist influence in the commission.

41 John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 165.

42 Michael Huberman, *Odd Couple: International Trade and Labor Standards in History* (Yale University Press 2012) 73.

43 Stanley Engerman, 'The History and Political Economy of International Labor Standards' in Kaushik Basu and others (eds), *International Labor Standards: History, Theory and Policy Options* (Blackwell Publishing 2003) 37; and John Follows, *Antecedents of the International Labour Organization* (Clarendon Press 1951) 167.

2.3 The International Labour Organization

2.3.1 Introduction

This part introduces the institutional and legal framework of the International Labour Organization, which was established in 1919 pursuant to the Versailles Peace Treaty. Section 2.3.2 discusses the establishment of the ILO as well as its institutional framework. Section 2.3.3 examines the purpose of international labour law, and how this purpose has developed over time. Section 2.3.4 turns to the legal framework and the sources of international labour law.

2.3.2 The establishment of the ILO and its institutional framework

The October Revolution of 1917 made clear that improving working conditions was not only necessary to sustain an open trading system, but also to preserve political stability within, and peace between states. A liberal economic system could only be maintained when states would embrace a social and credible alternative to Bolshevism.[44] Soon after its assembly in January 1919, the Paris Peace Conference established the Commission on International Labour Legislation, which was tasked with the design of the labour arrangements that would eventually become part of the Treaty of Versailles. Chapter XIII famously declared that "labour should not be regarded *merely* as a commodity or article of commerce," which illustrates the *sui generis* nature of labour as an economic construct with inherent social importance.[45]

The first annual meeting of the newly established organization was held in Washington, from 29 October to 29 November 1919. Thirty-nine states attended. The United States hosted the initial meeting, but did not join the ILO until 1934. Over the years, its membership grew to 187 states. Already at the first conference, six treaties were adopted, dealing with hours of work, unemployment, and the protection of women and children. Since then, the

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44 See Paul O'Higgins, 'The interaction of the ILO, the Council of Europe and European Union labour standards' in Bob Hepple (ed), *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (Cambridge University Press 2002) 55. Morse, the Director-General of the ILO between 1948 and 1970, argued however that the inclusion of a labour chapter in the Treaty of Versailles was simply the consequence of the fact that the attention for "the hardships which nineteenth-century industrialization and economic competition inflicted upon workers" had become part of mainstream politics, and the peace conference provided a window of opportunity to address these issues on a multilateral level. See David Morse, *The origin and evolution of the I.L.O. and its role in the world community* (W.F. Humphrey Press 1969) 7.

45 Emphasis added. The word 'merely' was deleted at the 1944 Philadelphia Declaration. Most contemporary literature uses the 1944 wording. See e.g. Christine Kaufmann, *Globalisation and Labour Rights: The Conflict Between Core Labour Rights and International Economic Law* (Hart Publishing 2007) 51.

'international labour code' – as the body of international labour law is occasionally referred to – has expanded enormously. With 189 binding conventions, six protocols and 205 non-binding 'recommendations', no issue in international law is covered by so many instruments that are intended to have a universal scope.

The ILO has three organs: the General Conference (the Conference, or International Labour Conference),[46] the Governing Body (GB) and the International Labour Office (the Office).[47] The Conference is the organization's plenary and convenes once a year. It decides on the adoption of new conventions and recommendations, the organisation's work programme and budget and the composition of the Governing Body. It is also involved in the supervision of member states' compliance with their treaty obligations. The main institutional feature of the Conference is its tripartite composition. Article 3.1 of the ILO Constitution provides that once a state becomes a member of the ILO, it is required to comprise a delegation to the Conference of two government delegates,[48] one employer delegate and one worker delegate.[49] These latter delegates are independent from their governments and, according to Article 5, should be nominated "in agreement with the industrial organizations … which are most representative of employers and workpeople … in their respective countries."[50] The Governing Body is the ILO's executive organ. It consists of fifty-six members and has the same tripartite composition as the Conference. The members of "chief industrial importance" may appoint ten of the twenty-eight government representatives while the others are elected by the Conference.[51] The Governing Body takes decisions on ILO policy, prepares the Conference, elects the Director-General. The International Labour Office is the organisation's permanent secretariat, which is headed by the Director-General and responsible for the general affairs of the organisation.[52]

The importance of tripartism for the ILO can hardly be underestimated. Maupain defines the term as "the free confrontation and reconciliation of the respective interests of genuine worker and employer representatives with the

46 The ILO Constitution uses the term 'General Conference'. The more common name is 'International Labour Conference'.

47 Art 2 ILO Constitution.

48 Both government delegates have a vote. This division was agreed upon to prevent the possibility that states could be outvoted, see: Anthony Alcock, *History of the International Labour Organisation* (Macmillan 1971) 21-2.

49 Art 3.1 ILO Constitution.

50 Art 5 ILO Constitution.

51 Art 7.2, ILO Constitution, these are: Brazil, China, France, Germany, India, Italy, Japan, the Russian Federation, the United Kingdom and the United States. Article 7.3 provides that "The Governing Body shall as occasion requires determine which are the Members of the Organization of chief industrial importance and shall make rules to ensure that all questions relating to the selection of the Members of chief industrial importance are considered by an impartial committee before being decided by the Governing Body."

52 Art 10 ILO Constitution.

active involvement of governments."[53] Through their role in the Conference and the Governing Body, trade unions and employer organisations (together referred to as the 'social partners') are involved in the adoption of normative instruments and their supervision, as well as almost all matters regarding the organisation's internal affairs and policy decisions. Although this is a corollary of the way in which employment relations are nowadays governed at the domestic level in many states, institutionalized forms of cooperation between social partners were uncommon before the ILO was founded.

In many states, there are multiple workers' and employers' organisations. Consequently, the requirement of Article 5 that non-governmental delegates should be "most representative" has been a ponderous issue. As early as 1922 the Council of the League of Nations requested the Permanent Court of International Justice (PCIJ) to issue an Advisory Opinion on the question whether the worker delegate from the Netherlands was nominated in accordance with the relevant provision. A dispute had arisen after the Dutch government had nominated a worker delegate that had been agreed upon by three trade union confederations. When combined, the membership of these three unions outnumbered the single largest union, which had provided the Conference delegate at the ILO's first two meetings. The Court concluded that the procedure followed by the Netherlands was in accordance with the Treaty of Versailles. Although the Court held that "other things being equal, the most numerous will be the most representative,"[54] governments should take all industrial organisations into account when appointing a delegate as this person "represents all workers belonging to a particular Member."[55]

Even more contentious than disputes that arise out of trade union pluralism is the accreditation of workers' and employers' representatives from states where these organizations are not independent from the government. This problem emerged in the 1930s, when several communist countries joined the ILO and a fascist regime had come to power in Italy. The Credentials Committee of the International Labour Conference separates the legal obligations on freedom of association from the appointment of delegates. It held that while freedom of association is an objective of the organisation, it is not a prerequisite for membership nor part of the "attributes to membership."[56] While this distinction relieves the pressure from the Credentials Committee to discuss member states' compliance with ILO standards on freedom of association, it

53 Francis Maupain, 'New Foundation of New Facade? The ILO and the 2008 Declaration on Social Justice in a Fair Globalization' (2009) 20 European Journal of International Law 823, 825.

54 *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference (Advisory Opinion)* PCIJ Rep Series B No 1 (31 July 1922) 19.

55 Ibid 23.

56 Nicolas Valticos and Geraldo von Potobsky, *International Labour Law* (2nd edn Kluwer Law and Tax Publishers 1995) 38.

shows the difficulty of maintaining the integrity of the tripartite governance system.

2.3.3 The purpose of the ILO

2.3.3.1 Early perspectives: social justice and the coordination problem

The alleged coordination problem that motivated the negotiation of labour standards before World War I is made explicit in the preamble to the ILO's Constitution. After an enumeration of some of the pressing issues of the time, such as regulation of hours of work and the protection of workers against sickness, it is stated that: "the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries." The Covenant of the League of Nations reiterates the presumed relationship between labour standards and comparative advantage where it is stated that its members: "will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and *in all countries to which their commercial and industrial relations extend*, and for that purpose will establish and maintain the necessary international organisations."[57] In other words: states with which no economic relations existed did not necessarily have to be involved. James Shotwell, who was part of the American delegation to the Paris Peace Conference, thus argued that the name 'International Labour Organization' was a misnomer as "[what] was created was an international economic organization to deal with labor problems."[58] This view is shared by political economist Karl Polanyi, who argued that: "The League of Nations itself had been supplemented by the International Labour Office partly in order to equalize conditions of competition among the nations so that trade might be liberated without danger to standards of living."[59]

The issue of economic competition was frequently raised in the International Labour Conference. Similar to the early days of domestic labour legislation, states did not await the conclusion of ILO conventions. They were nonetheless deemed important "in order to protect such countries as have

57 Art 23(a) Covenant of the League of Nations (emphasis added).

58 James Shotwell (ed), *The Origins of the International Labor Organization: Vol. I: History* (Columbia University Press 1934) xxi-xxii.

59 Karl Polanyi, *The Great Transformation* (first published 1944, Beacon Press 2001) 27-28. Also in more recent legal scholarship, this point is reiterated. According to Friedl Weiss, the ILO "was the first ever international economic organization" and "probably saved capitalism, at any rate in the west." Friedl Weiss, 'Elusive Coherence in International Law and Institutions: the Labour – Trade Debate' in Marise Cremona et al (eds) *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann* (Martinus Nijhoff 2014) 582.

already recognized these claims by progressive legislation," as a delegate from Czechoslovakia argued in the context of the eight-hour working day.[60] For the adoption of new conventions, economic necessity was assumed rather than something that required evidence. When in 1922 the PCIJ issued an advisory opinion on the competence of the ILO with regard to agricultural work, it noted *in dicta* that the economic dimension was self-evident with regard to any industry, including navigation, agriculture and fishing, in which:

> [the] adoption of humane conditions of labour ... might to some extent be retarded by the danger that such conditions would form a handicap against the nations which had adopted them and in favour of those which had not, in the competition of the markets of the world.[61]

The notion that the purpose of international labour law is to guarantee fair competition affects the conceptualization of labour treaties. These are to be seen as contractual arrangements, based on reciprocal inter-state exchanges of obligations, rather than instruments with a more normative – *ordre public* – character; the category to which human rights conventions belong.[62] This is one of the reasons why the ILO has never accepted reservations to its conventions.[63] As Director-General Thomas stated in a 1927 memorandum:

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60 International Labor Conference (1st Session) Record of Proceedings (Washington DC 1919) 54.

61 *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture* (Advisory Opinion) PCIJ Rep Series B No 13 (12 August 1922) 25.

62 Although the distinction is not absolute, it played an important role in the work of the International Law Commission in the 1950s on the acceptability of reservations. Klabbers summarizes the underlying notion as follows: "Whereas with a contractual treaty, a reservation may disturb the balance of commitments between the parties, with normative treaties no such balance exists." Jan Klabbers, 'On Human Rights Treaties, Contractual Conceptions and Reservations' in Ineta Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Springer 2004) 161. On the non-reciprocal nature of human rights conventions and the conditions under which reservations are allowed, see: Human Rights Committee, 'General Comment No 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant' (11 November 1994) CCPR/C/21/Rev.1/Add.6, esp para 17.

63 The other being the tripartite nature of decision-making within the International Labour Conference. This argument was also advanced in 1927, but contemporary works on international labour law perceive it as the sole objection against reservations. See e.g. Nicolas Valticos and Geraldo von Potobsky, *International Labour Law* (2nd edn Kluwer Law and Tax Publishers 1995) 272. The International Labour Office itself submitted a comprehensive memorandum to the International Court of Justice on the subject in 1951 in the context of the ICJ's Advisory Opinion on 'Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide'. See: International Labour Office, 'Memorandum by the International Labour Office on the Practice of Reservations to Multilateral Conventions' (Official Bulletin Vol XXXIV, No 3, 31 December 1951) 274-288.

> The object of the [ILO] is to safeguard conditions of labour against the detrimental influence of international competition; and this is the reason why labour conventions must establish a network of mutual obligations among the various States. It is essential that exact reciprocity should be preserved in these obligations, and to that end the Peace Treaties establish an extremely detailed procedure for the enforcement of the conventions. It is perfectly obvious that the admission of reservations on the occasion of ratification would soon destroy the practical value of the international engagements in question and upset the balance which it is the object of the conventions to establish as regards industrial competition.[64]

Apart from the legislative agenda, the ILO was also engaged in the broader debate on economic policy.[65] Curbing international competition as a means to mitigate its 'detrimental influence' was not an option. The founding fathers of the ILOs were ardent free traders.[66] The exploitation of comparative advantage through trade was considered necessary to raise employment levels, while the quality of employment was to be safeguarded through the coordination of standards.[67] In 1931, for example, ILO Director-General Butler condemned the protectionist measures that states applied in the wake of the economic depression. His statement is striking considering the fact that today, international labour law and trade-labour linkages are sometimes regarded as 'disguised protectionism'. Butler wrote:

> Side by side with these effects of customs duties, the same disturbing effects result from the indirect and sometimes veiled protection which is practised by customs formalities, marks or certificates of origin, internal taxes, transport charges or

64 Director of the International Labour Office, 'Admissibility of Reservations to General Conventions' (15 June 1927), published as Annex 967a of 8 League of Nations Official Journal (1927) 883-884.

65 Economic policy was a concern of the League of Nations, but the ILO was closely involved with the League's activities in this field, including the 1933 World Economic Conference in London. Patricia Clavin, *Securing the World Economy: The Reinvention of the League of Nations 1920-1946* (Oxford University Press 2013) 85 and 90.

66 Michael Huberman, *Odd Couple: International Trade and Labor Standards in History* (Yale University Press 2012) 72. Indeed, the ILO has never advocated the use of trade restrictive measures. In his 1994 report, Director-General Hansenne spoke out against unilateral trade restrictive measures, but suggested that a new ILO Convention could be concluded in which states would be obliged to "abstain from applying unilateral trade restrictions ... in exchange for a greater commitment by their trading partners to strive towards the social progress expected from Members of the [WTO]." International Labour Conference (81st Session) Report of the Director-General: Defending Values, Promoting Change (Geneva 1994) 62-63

67 At the first ILC in 1919, the Italian Worker Delegate Baldesi submitted a proposal for a more equitable system of distribution of raw materials, which would help to alleviate poverty. The majority of delegates, however, concluded that these types of trade-restrictive proposals were not within the competence of the ILO. As Alcock puts it: "Unable to tackle the whole phenomenon of unemployment, including the economic causes, the ILO had soon learnt that it had to restrict itself to the limiting of its social effects." Anthony Alcock, *History of the International Labour Organisation* (Macmillan 1971) 45.

> facilities by land or sea, bonuses and all kinds of subsidies or encouragements to exports.[68]

In addition he dismissed the American Smooth-Hawley tariff of 1930, which "was intended to secure to the workers of the United States a certain stability of employment, and to defend them against the hardships of the depression" but "threatened simultaneously to create unemployment elsewhere."[69] Up to the last report before the outbreak of World War II, the ILO's successive Directors-General criticized protectionist policies and praised "successful efforts ... to counteract autarkic trends by constructive trade agreements."[70]

The Second World War marks a watershed in the history of the ILO. While its objective to realize social justice in the context of global economic competition remained valid, its role in international economic governance declined. New institutions and legal instruments in the area of trade, investment and finance were adopted. This body of international economic law took over the ILO's role as the 'enabler' of economic globalization. At the same time, however, new justifications for international labour law emerged.

2.3.3.2 Contemporary perspectives: fundamental rights and sustainable development

In May 1944 the International Labour Conference adopted the Declaration of Philadelphia, containing a comprehensive restatement of the organisation's aims and objectives.[71] It reflected Keynesian economic thought, which combines the objective of full employment, distributive policies and collective bargaining at the national level with a liberal international trade regime.[72] To effectuate this vision, the ILO saw a role for itself as a clearinghouse to examine "international economic and financial policies and measures" in light of the objective of social justice.[73] The concomitant establishment of other international organizations and agreements with an economic mandate diminished the role of the ILO in this area. However, since the Second World War it has significantly expanded its scope of work beyond standard-setting towards the promotion of employment, development cooperation and the promotion of social dialogue.

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68 International Labour Conference (15th Session) Report of the Director: First Part (Geneva 1931) 26.

69 Ibid 26.

70 International Labour Conference (25th Session) Report of the Director: The World of Industry and Labour' Geneva 1939) 13.

71 International Labour Conference (26th Session) Declaration concerning the aims and purposes of the International Labour Organization (Philadelphia 1944). Eddy Lee, 'The Declaration of Philadelphia: Retrospect and prospect' (1994) 133 International Labour Review (1994) 467.

72 Arts III and IV Declaration of Philadelphia.

73 Art II Declaration of Philadelphia.

Notably, the Declaration of Philadelphia does not refer to the coordination problem as the main reason for international cooperation in the field of labour. Instead it viewed social justice as a matter of human dignity, which in itself is enough to justify international action.[74] International human rights law emerged during this period. As such, "[the Declaration of Philadelphia] anticipated and set a pattern for the United Nations Charter and the Universal Declaration of Human Rights."[75] This is also reflected in some of the conventions that were adopted subsequent to the war, such as the 1957 Abolition of Forced Labour Convention that addressed *inter alia* forced labour as a means of political coercion.[76] The substantive provisions of these conventions classify individual workers as rights-holders.[77] This has implications for the interpretation of these conventions, as well as for their potentially self-executing nature in the domestic legal order of state parties.[78]

The reorientation towards a rights-based approach culminated in the adoption of the *1998 Declaration on Fundamental Principles and Rights at Work*. This declaration, which will be discussed in detail below, created a hierarchy in the ILO legal framework by designating four labour standards as 'fundamental rights', namely (1) freedom of association and the effective recognition of the right to collective bargaining, (2) the elimination of all forms of forced or compulsory labour, (3) the effective abolition of child labour, and (4) the elimination of discrimination in respect of employment and occupation.

This shift from protective labour law towards a rights-based paradigm has also been observed at the domestic level.[79] The fundamental labour rights are often portrayed as 'market-friendly': they would be consistent with the ideology of free trade, and are possibly even a source of comparative advant-

74 At the annual International Labour Conference, the discourse of universal human rights became increasingly important. In 1945, for example, a Canadian Government Delegate stated that "The rights of men and women and children, and of workers and all others the whole world over, are human rights. These rights are not given to us by Government or by industry; they come to us through creation itself... . The International Labour Organisation, therefore, and every nation of the world, must build upon that one solid, indestructible foundation: human rights." International Labour Conference (27th Session), Record of Proceedings (Paris 1945) 113.

75 Anthony Alcock, *History of the International Labour Organisation* (Macmillan 1971) 183.

76 Tonia Novitz, *International and European protection of the right to strike: a comparative study of standards set by the International Labour Organization, the Council of Europe and the European Union* (Oxford University Press 2003) 99.

77 The main example can be found in Art 2 of ILO Convention No 87 concerning Freedom of Association and Protection of the Right to Organise: "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."

78 Virginia Leary, *International Labour Conventions and National Law: The Effectiveness of the Automatic Incorporation of Treaties in National Legal Systems* (Martinus Nijhoff Publishers 1982)

79 Bob Hepple and Bruno Veneziani (eds), *The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries 1945-2004* (Hart Publishing 2009) 15.

age. Notably, the critics of economic globalization also embrace the fundamental rights paradigm, as it "forecloses the discussion of efficiency and welfare by an appeal to an overriding value that justifies labour law."[80] The relationship between economic law and human rights may not necessarily be antagonistic, but if conflicts occur the moral foundations of human rights give it a higher degree of legitimacy than economic law. In other words: using the deontological language of human rights to describe the negative impact of utilitarian economic law leaves little room for trade-offs in policy decisions, but requires the conflict to be resolved in favour of human rights. According to Collins: "Once a fundamental right is at stake, it tends to exclude from consideration or at least override any other policies or principles, except, probably, appeals to other rights."[81]

Conceptualizing labour law as an enabler of economic development has also allowed alignment with the notion of sustainable development. The World Commission on Environment and Development – commonly known as the Brundtland Commission – defined sustainable development as development "that meets the need of the present without compromising the ability of future generations to meet their needs."[82] At the time it was not discussed whether 'needs' also encompassed human or labour rights. Later, consensus emerged that sustainable developments consists of three "interdependent and mutually reinforcing pillars": economic development, social development and environmental protection.[83]

From the mid-1990s the ILO and other international organisations began to link labour standards and sustainable development. The final report of the 1995 World Summit for Sustainable Development explicitly linked implementation of – what would later be qualified as – fundamental labour rights to the achievement of sustainable development.[84] This was reaffirmed in the 1998 Declaration,[85] and the 2008 Declaration on Social Justice for a Fair Globalization.[86] The latter proclaims that the ILO aims to "facilitate meaningful and coherent social policy and sustainable development."[87] Notably, the ILO not

80 Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) 139.

81 Ibid.

82 World Commission on Environment and Development, 'Our Common Future' (Oxford University Press 1987) at 37.

83 United Nations, 'Johannesburg Declaration on Sustainable Development' (4 September 2002) UN Doc A/CONF.199/20, 1.

84 United Nations, 'Report of the World Summit for Social Development' (19 April 1995) A/CONF.166/9, 12.

85 International Labour Conference (86th Session) ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (Geneva 18 June 1998, annex revised 15 June 2010) emphasis added.

86 International Labour Conference (97th Session) ILO Declaration on Social Justice for a Fair Globalization (Geneva 10 June 2008).

87 Art II(A), 2008 Declaration.

only uses the concept as a means to justify its normative instruments but has also developed a 'Green Jobs Initiative' with the United Nations Environmental Program.[88] Vice versa, the outcome documents of multilateral conferences on sustainable development contain ample references to labour, including child labour, occupational health issues, youth unemployment and decent work.[89] The most recent development in this respect is the inclusion of 'decent work' and employment in the 2015 Sustainable Development Goals.[90]

2.3.4 The legal framework

2.3.4.1 Conventions

International labour law is mainly based on treaty obligations. Since 1919 the International Labour Conference has adopted 189 Conventions, including six protocols. The subjects covered are diverse, ranging from freedom of association to social security and from forced labour to maternity protection. Over the last years, attempts have been made to streamline ILO instruments. Of the 189 Conventions, only 77 are considered up-to-date. The other instruments are to be revised or are considered redundant. Since 2015, the International Labour Conference may decide to abrogate these conventions.[91]

Conventions are treaties within the meaning of Article 2.1(a) of the Vienna Convention on the Law of Treaties (VCLT). Article 9.2 of the VCLT holds that for the adoption of treaties in legislative conferences, "two-thirds of the States present and voting" decide on the adoption of treaties.[92] Due to its tripartite composition, however, new ILO conventions are adopted by a two-third majority in the International Labour Conference.[93] If a normal majority of the votes would have sufficed, it would be possible to adopt a convention with only 35% of the government delegates voting in favour. Likewise, if all non-governmental delegates oppose adoption of a proposal, even unanimous consent

88 UNEP, 'Green Jobs: Towards decent work in a sustainable, low-carbon world' (2008).
89 UNGA Res 66/288 (11 September 2012) 'The future we want' UN Doc A/RES/66/288.
90 UNGA Res 70/1 (21 October 2015) 'Transforming our world: the 2030 Agenda for Sustainable Development' UN Doc A/RES/70/1.
91 Art 19.9 ILO Constitution.
92 Art 9.2 VCLT.
93 The same procedure applies to ILO Recommendations, which are discussed in the subsequent section. Article 5 VCLT allows *lex specialis* of international organizations. The ILO, together with other specialized agencies of the UN, was heavily involved in the drafting of the VCLT, see: Virginia Leary, *International Labour Conventions and National Law: The Effectiveness of the Automatic Incorporation of Treaties in National Legal Systems* (Martinus Nijhoff Publishers 1982) 16.

amongst states cannot prevent that it is voted down.[94] Support from the social partners is thus necessary for every convention.

The second main difference relates to the obligations of ILO members prior to the ratification of a new convention. When the Conference adopts a convention, it is signed by the President of the Conference and the ILO Director-General. This deviates from the procedure foreseen in Articles 7 to 12 of the VCLT, which provides for the consent of states. The difference influences the obligations of states prior to ratification of an ILO convention. Article 18 VCLT, provides that states are "obliged to refrain from acts which would defeat the object and purpose of a treaty" when it signs a treaty or otherwise indicates its intention to become a party. After the adoption of an ILO Convention by the Conference, however, the member states incur procedural rather than substantive obligations. Article 19 of the ILO Constitution requires that adopted conventions be "communicated to all Members for ratification."[95] If a state decided not to ratify the convention "no further obligation shall rest upon the member except that it shall report to the Director-General ... at appropriate intervals ... the position of its law and practice in regard to the matters dealt with in the Convention".[96] The proposition that Article 18 VCLT does not apply to ILO Conventions has been confirmed in a case before the highest administrative court of the Netherlands.[97]

When the ILO was founded, the obligation to submit new conventions to the domestic ratification procedure was regarded one of the innovative features of the new system.[98] A British proposal to let conventions become binding on all ILO members upon adoption by the Conference was defeated. Such a procedure would be diametrically opposed to the law of treaties, both at the time of the ILO's founding as well as the VCLT regime. However, it does illustrate that the ILO was perceived as a new form of cooperation that challenged international legal doctrine at the time. In 1937, Jenks wrote:

> It will be clear ... that the Organisation is essentially a practical compromise between two contrasted theories of world organisation. Its present Constitution appears to correspond to a transitional phase in a process of evolution beyond the sovereign State. Its Constitution represents a bolder innovation in political thinking than the Covenant of the League of Nations but still falls far short of the framework of the super-State.[99]

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94 In practice however, employer delegates are reluctant to support new standards and majorities depend on coalitions between workers and governments.

95 Art 19.5(a) ILO Constitution.

96 Art 19.5(e) ILO Constitution.

97 Catherine Brölmann, 'Specialized Rules of Treaty Interpretation: International Organizations' in Duncan Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press, 2012) 517-518.

98 Anthony Alcock, *History of the International Labour Organisation* (Macmillan 1971) 22.

99 Wilfred Jenks, 'The Significance for International Law of the Tripartite Character of The International Labour Organisation' (1937) 22 Transactions of the Grotius Society (The Eastern Press 1937) 45, 57.

Revolutionary ideas such as the automatic binding force of new conventions can be explained by the fear of free-rider behaviour: ratification by a state may create a disincentive for its competitors to ratify the same convention. But despite early attempts to portray ILO conventions as "projects of municipal legislation" they are normal treaties that only become binding upon their ratification.[100]

Low ratification levels have been a continuous concern for the ILO.[101] Some conventions have attained almost universal recognition; the 1999 Worst Forms of Child Labour Convention is ratified by 182 states, while other conventions are ratified by only a few. This provoked a debate about the drivers behind ratification. Empirical studies of ILO ratifications show that states have a variety of motives, such as peer-group ratifications, the dominant political orientation, or to what extent domestic constituencies (such as labour unions) press for ratification.[102] Consequently, many states ratify conventions that they do not (yet) comply with. Landy, in his study on the ILO, coined the term "empty ratifications" to describe this practice.[103] The pejorative indicates that he does not consider the ratification of treaties that are already complied with to be symbolic, as is sometimes suggested.[104] To the contrary, he is wary of the opposite scenario, in which a state first ratifies a treaty and subsequently takes steps towards its implementation. As early as 1937, Arnold McNair, in his role as Rapporteur of the ILO Committee of Experts, warned against the ratification of conventions prior to their implementation. This practice, according to McNair, constitutes an "infringement of the principle of scrupulous

100 Virginia Leary, *International Labour Conventions and National Law: The Effectiveness of the Automatic Incorporation of Treaties in National Legal Systems* (Martinus Nijhoff Publishers 1982) 11-12.

101 Efrén Córdova, 'Some Reflections on the Overproduction of International Labor Standards' (1993) 14 Comparative Labor Law Journal 138.

102 Bernhard Boockmann, 'The Ratification of ILO Conventions: A Hazard Rate Analysis' (2001) 13 Economics and Politics 281; and Bernard Boockmann, 'Mixed Motives: An Empirical Analysis of ILO Roll-Call Voting' (2003) 14 Constitutional Political Economy 263.

103 Ernest Landy, *The Effectiveness of International Supervision: Thirty Years of ILO Experience* (Stevens & Sons 1966) 83-90, discussing "empty ratifications," where countries decide to ratify conventions even though they lack the economic conditions enabling them to comply with the obligations assumed. This conclusion aligns with Hathaway's study on a number of human rights treaties, that often ratification "[offers] rewards for positions rather than for effects." Oona Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale Journal of International Law 1935, 2007 (see internal quotation).

104 According to Flanagan, an economist, the main motive to become a party to ILO conventions is pre-existing compliance. If a state does not yet comply, it would mean that costly domestic legislation would have to be adopted that may compromise its competitive position. This, he argues, is not how states act. Ratification is the result of improvements of domestic labour conditions instead of the other way around, which makes the act of ratification "largely symbolic." Robert Flanagan, *Globalization and Labor Conditions: Working Conditions and Worker Rights in a Global Economy* (Oxford University Press 2006) 169.

respect for the mutual international undertakings implied by the ratification of a Convention ... ."[105]

Under the view held by Landy and McNair, states are thus supposed to implement conventions before ratification. But even if it has complied with the terms of a newly drafted convention for a significant period of time, perhaps even before the issue was even considered by the ILO, ratification is still meaningful as it could prevent backsliding. In this sense, the role of the convention is not to alter certain policies, but to prevent states from doing so by 'locking-in' existing labour standards in international agreements.[106]

2.3.4.2 Recommendations

Recommendations adopted by the International Labour Conference constitute the second prong of the international labour code. Since 1919, 205 recommendations have been adopted. Article 19.1 of the ILO Constitution provides that they may (1) complement conventions containing additional or more detailed rules, or (2) deal with subjects that are not (yet) "suitable or appropriate ... for a Convention."[107] The fact that recommendations are not subject to ratification as multilateral treaties does not mean that they have no relevance for member states' domestic labour law. The ILO Constitution obliges member states to "bring the Recommendation before the authority or authorities within whose competence the matter lies for the enactment of legislation of other action"[108] and, more importantly, to report whether they are complied with in domestic law and practice.[109]

Recommendations do not only contain additional norms, but may also have an interpretative function as they "indicate to members of the underlying Convention their minimum obligations if they are seeking to comply with treaty obligations that are otherwise extremely vague."[110] However, ILO Recommendations appear to fall outside the scope of Article 31 of the Vienna

105 International Labour Conference (23rd Session) Summary of Annual Reports under Article 22 of the International Labour Organisation, Appendix, Report of the Committee of Experts on the Application of Conventions (Geneva 1937) 4.

106 Nicolas Valticos and Geraldo von Potobsky, *International Labour Law* (2nd edn Kluwer Law and Tax Publishers 1995) 29. This is especially important in relation to the ILO's economic purpose. Indeed, to lock in existing labour standards is the main function of labour provisions in preferential trade and investment agreements. Art 4.3 of the labour chapter in the EU-Canada Comprehensive Trade and Economic Agreement (CAFTA), for example, provides that: "A Party shall not fail to effectively enforce its labour law ... as an encouragement for trade or investment." Unlike ILO conventions, these non-derogation provisions do not contain material norms but merely require the effective enforcement or non-amendment of existing domestic labour legislation.

107 Art 19.1 ILO Constitution.

108 Art 19.6(b) ILO Constitution.

109 Art 19.6(d) ILO Constitution.

110 José Alvarez, *International Organizations as Law-makers* (Oxford University Press 2005) 229.

Convention on the Law of Treaties. This article, which lays down the general rule of interpretation of treaties, provides in paragraph 3 that account shall be taken of: "(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions." In addition, paragraph 4 stipulates that: "A special meaning shall be given to a term if it is established that the parties so intended." Both provisions thus give precedence to the right of 'the parties' to agree on the interpretations of treaties that apply between them. Allowing this practice at the ILO would encounter the same problem as reservations, namely the deposition of the social partners. Importantly, the VCLT does refer to the possibility of *lex specialis* by international organisations in relation to the interpretation of treaties drafted under their auspices. The interpretative role of recommendations is not explicitly foreseen in the ILO Constitution, but it is an important tool for the Conference to provide more detailed guidance in relation to conventions. The 2010 HIV and AIDS Recommendation (No 200), for example, influences the scope of the 1958 Convention concerning Discrimination in Respect of Employment and Occupation (No 111) and has even had an effect on generic non-discrimination provisions in human rights law.[111]

2.3.4.3 Flexibility of international labour standards

Whereas the debate on the appropriate mechanism for the ratification of ILO conventions emanates from the fear that some states may be unwilling to participate, other states may be unable to do so because of resource constraints. This poses a dilemma. As former ILO Director-General Hansenne has noted: "either the provisions [the Conventions] contain are made more flexible so as to make them more accessible to the majority, in which case the Conventions would lose some of their character; or else they include a minimum number of strict obligations, and the Conventions run the risk of being ratified by disappointingly few countries."[112]

This dilemma also exists outside the ILO. In general international law, reservations are the main instrument to modify otherwise more stringent treaty obligations. At the ILO, however, reservations are not allowed.[113] The International Covenant on Economic, Social and Cultural Rights (ICESCR) takes a different approach. Upon ratification, state parties commit themselves to the

111 The European Court of Human Rights has refered to ILO Recommendation No 200 in multiple cases concerning occupational discrimination. See *Case of Kiyutin v Russia* App no 2700/10 (ECtHR, 10 March 2011) para 67; *I.B. v Grèce* App no 552/10 (ECtHR, 3 October 2013) paras 32, 60, 84.

112 International Labour Conference (81st Session) Report of the Director-General: Defending Values, Promoting Change (Geneva 1994) 48.

113 George Politakis, 'Deconstructing Flexibility in International Labour' in George Politkis (ed), *Les Normes Internationales du Travail: Un Partimoine Pour L'Avenir* (International Labour Office 2004) 467.

ICESCR's "minimum core obligations" that become more demanding as the state's resources increase.[114] This is known as "progressive realization" and is a core difference with obligations under civil and political rights treaties.[115]

Unlike the ICESCR, the legal framework of the ILO is not unitary. It consists of nearly two-hundred conventions with diverging subject-matters and legal character. To adopt a general notion of progressive implementation would, for example, be incompatible with the object and purpose of the conventions on forced labour. Instead, differentiation of obligations is determined on a treaty-by-treaty basis. Article 19.3 of the ILO Constitution provides that:

> In framing any Convention or Recommendation of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organisation, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.

This provision has had a great impact on ILO treaty-making.[116] Many conventions contain flexibility devices in order to accommodate states at different levels of economic development.[117] Some contain language that is similar to the ICESCR. Article 2.3 of the 1990 Night Work Convention (No 171) provides that protective measures "may be applied progressively." Other conventions contain qualified or unspecified language, providing that states should comply with certain norms "as far as possible"[118] or that incomes should enable "a suitable standard of living."[119] In general, flexibility devices have in common that they allow states to adapt the scope of obligations *ratione materiae* or *ratione*

114 Committee on Economic, Social and Cultural Rights, 'General Comment No 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' (14 December 1990) E/1991/23, para 10.

115 Ibid, para 1.

116 J.F. McMahon, 'The Legislative Techniques of the International Labour Organization' 1967) 41 British Yearbook of International Law 1965-1966 1, 31-41; George Politakis, 'Deconstructing Flexibility in International Labour' in George Politakis (ed), *Les Normes Internationales du Travail: Un Partimoine Pour L'Avenir* (International Labour Office 2004) 463 stating that "flexibility is today omnipresent in the Organization's standards work."

117 Whereas the provision is intended to accommodate developing countries in the ILO system, arguments for more flexibility have also been advanced by developed economies. This started in the 1970s when states increasingly rejected "the ILO's Keynesian labour market policies." Ignacio Donoso Rubio, 'Economic Limits on International Regulation: A Case Study of ILO Standard-Setting' (1998) 24 Queens Law Journal 189, 214. Duplessis uses the term 'softness' rather than 'flexibility'. She notices a clear trend towards softness in the area of precarious work, on which the ILO adopted three conventions between 1994 and 1997. Isabelle Duplessis, 'Soft international labour law: The preferred method of regulation in a decentralized society' International Institute for Labour Studies (ed), *Governance, International Law & Corporate Social Responsibility* (ILC Research Series 106, 2008) 28-29.

118 See e.g. Art 4.1 ILO Convention 177.

119 Art 7.3(b) ILO Convention 177.

personae in order to account for "the evolution of national socio-economic conditions."[120]

The use of flexibility devices in order to allow for progressive implementation of ILO conventions invokes the question whether states are allowed to take retrogressive steps in times of economic decline. The Committee on Economic, Social and Cultural Rights (CESCR) accepts economic justifications for weakened protection, but such measures "require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."[121] The ILO has not made general statements on how to deal with this issue. In practice, its supervisory bodies do not accept retrogressive measures that affect tripartite governance. During economic crises governments often involve themselves more actively in wage policy, and sometimes annul collective agreements between social partners, or forces them to renegotiate.[122] The Committee on Freedom of Association (CFA) has consistently held that such measures are not allowed. In a complaint brought against Greece in 2010, it urged for "full conformity with the principles of freedom of association and the effective recognition of collective bargaining and the relevant ratified ILO Conventions" even though it was:

> ... [deeply] aware that the measures giving rise to this complaint have been taken within a context qualified as grave and exceptional, provoked by a financial and economic crisis, and while recognizing the efforts made by the Government and the social partners to tackle these daunting times.[123]

Although it has been argued that "there was no scope for flexibility in Conventions on fundamental human rights and basic freedoms,"[124] many of the obligations under the conventions that are said to embody 'fundamental rights' leave some degree of discretion to the state parties. Under the 1999 Worst Forms of Child Labour Convention (No 182), for example, states have to

120 For different classifications see Jean-Michel Servais, 'Flexibility and Rigidity in International Labour Standards' (1986) 125 International Labour Review 193, 197; George Politakis, 'Deconstructing Flexibility in International Labour' in George Politakis (ed), *Les Normes Internationales du Travail: Un Partimoine Pour L'Avenir* (International Labour Office 2004) 469.

121 Committee on Economic, Social and Cultural Rights, 'General Comment No 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)' (14 December 1990) E/1991/23, para 9.

122 International Labour Organization, 'Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO' (5th edn, International Labour Office 2006) para 1021.

123 *Greece (Case No 2820)* (21 October 2010) Report of the Committee on Freedom of Association No 365 (Vol XCV 2012 Series B No 3) para 1003.

124 International Labour Office, 'Report of the Working Party on International Labour Standards' (Official Bulletin – Special Issue, Vol LXX, Series A, 1987) para 7.

establish "appropriate mechanisms"[125] and "take effective and time-bound measures"[126] in order to eliminate child labour. The Convention concerning Minimum Age for Admission to Employment (No 138) is even more flexible, where it provides that: "Each Member for which this Convention is in force undertakes to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work ...."[127] The ILO supervisory bodies can further substantiate "vague and accommodating terms"[128] and verify whether states indeed take on more demanding obligations when economic conditions allow this.

2.3.4.4 The 1998 Declaration on Fundamental Principles and Rights at Work

The almost 400 conventions and recommendations are not equally important. Since 1998, when the International Labour Conference adopted the Declaration on Fundamental Principles and Rights at Work, much scholarship is focusses on the so-called 'fundamental' or 'core' labour rights: (1) freedom of association and the effective recognition of the right to collective bargaining, (2) the elimination of all forms of forced or compulsory labour, (3) the effective abolition of child labour, and (4) the elimination of discrimination in respect of employment and occupation.[129]According to the 1998 Declaration ILO mem-

125 Art 5 ILO Convention 182.

126 Art 7.1 ILO Convention 182.

127 Art 1 ILO Convention 138.

128 George Politakis, 'Deconstructing Flexibility in International Labour' in George Politakis (ed), *Les Normes Internationales du Travail: Un Partimoine Pour L'Avenir* (International Labour Office 2004) 483.

129 The idea of a hierarchy within international labour law was not new. According to the Committee of Experts on the Application of Conventions and Recommendations (CEACR), all ILO members "by virtue of their membership of the Organization, are bound to respect the fundamental principles contained in its Constitution, particularly those concerning freedom of association (...) ." International Labour Conference (81st Session) Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4B) Freedom of Association and Collective Bargaining (Geneva 1994) para 19. The special status of freedom of association is attested to by the Committee on Freedom of Association (CFA), which together with the CEACR are the main pillars of the ILO's supervisory mechanism. The CFA has jurisdiction to hear complaints against ILO member states irrespective of whether they have ratified Conventions Nos 87 and 98. The 1998 Declaration has not extended the scope of institutional obligations to three other areas of international labour law. In his 1994 report, ILO Director-General Hansenne had put forward the idea to introduce a CFA-like supervisory procedure for discrimination, child labour and forced labour. See: International Labour Conference (81st Session) Report of the Director-General: Defending Values, Promoting Change (Geneva 1994) 52-53, and: Francis Maupain, 'International Labor Organization: Recommendations and Similar Instruments' in Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press 2000) 387-388 pointing out that this proposal failed due to strong opposition from governments and the employers' representat-

ber states have, irrespective of ratification of the eight 'underlying' conventions in these four areas, "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."[130]

But as the instrument itself is non-binding under international law, the question arises what 'the principles' are that the Declaration refers to, and how they relate to existing treaties that do contain legally binding norms in the four areas that are covered. Two views can be distinguished. The first is that the 'principles' under the 1998 Declaration are less demanding than the norms contained in the underlying conventions. Alston points to the various ways in which the word 'principles' is used in international relations, and concludes that: "the Declaration legitimates the use of a regressive terminology."[131] In other words: the 1998 Declaration is a step back from the detailed and legally binding conventions on freedom of association, non-discrimination, forced labour and child labour. The related political concern is that states will thus opt for this less demanding version at the expense of the "legalism" of the conventions.[132]

The second view is that the 1998 Declaration contains obligations that exceed the ILO conventions. According to Maupain: "The Declaration's admittedly ambiguous reference to 'principles' was designed to leave the door open to progressive evolution of the scope of these principles without having to wait for the cumbersome amendment of the relevant Conventions."[133] It is unclear, however, where this 'progressive evolution' takes place. New rules or interpretations of rules may emerge from the 'regular' system of ILO conventions. But during the negotiations on the 1998 Declaration, attempts to explicitly link it to treaty-based international labour law were rejected.[134] The 'follow-up mechanism' of the 1998 Declaration merely requires states to report on the extent to which they comply with non-ratified fundamental conventions. The practical application of the follow-up mechanism confirms that states tend to provide rather general information, and do not consider themselves legally

ives. But although the 1998 Declaration elevated these issues to the same normative plane as freedom of association, it neither extends the jurisdiction *ratione materiae* of the CFA nor create a similar adversarial mechanism.

130 Art 2 1998 Declaration.

131 Philip Alston, ''Core Labour Standards' and the Transformation of the International Labour Rights Regime' (2004) 15 European Journal of International Law 457, 483.

132 Ibid 460.

133 Francis Maupain, 'ILO Normative Action in its Second Century: Escaping the Double Bind? in Adelle Blackett and Anne Trebilcock (eds) *Research Handbook on Transnational Labour Law* (Edward Elgar Publishing 2015) 308, fn 31.

134 Isabelle Duplessis, 'Soft international labour law: The preferred method of regulation in a decentralized society' International Institute for Labour Studies (ed), *Governance, International Law & Corporate Social Responsibility* (ILC Research Series 106, 2008) 30.

bound through treaty, custom, or their ILO membership.[135] The review of the submitted reports by the Governing Body also explicitly states that it has no legal implications.[136] The follow-up mechanism therefore has little relevance for a better understanding of the content of the fundamental principles. There are no legal parameters to construct a distinction between full implementation of conventions and adherence to the principles contained therein. Even if the fear that the 1998 Declaration is less demanding that the underlying conventions is overstated, Alston is correct to point out that there remains a degree of "uncertainty as to the precise content to be accorded to the principles."[137]

The 1998 Declaration also raises a conceptual issue. The prioritization of four norms and their designation as 'fundamental rights' appears to deviate from the economic purpose of the ILO. The 1998 Declaration is not perceived as an instrument to overcome the coordination problem that is caused by international trade and investment. Instead, it is premised upon a purely normative, rights-based approach. The 1994 report by Director-General Hansenne was primarily motivated by the end of the Cold War and the perceived triumph of liberal democracy.[138] These events challenged the legitimacy of the organisation that was *inter alia* created to provide a social market-based alternative to communism.[139] During the 1980s neoliberalism had become the dominant political ideology in much of the Western world and Latin America. It has thus been argued that the selection of the four norms that were

135 In 2013 the United States, for example, reported that it "pursues the elimination of discrimination in respect of employment and occupation through a combination of law enforcement, administrative action and public outreach." Governing Body (317th Session) Review of annual reports under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, GB.317/INS/3 (Geneva, March 2013) para 121.

136 Governing Body (325th Session) Review of annual reports under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, GB.325/INS/4 (Geneva, October-November 2015) GB.325/INS/4, 1.

137 Philip Alston, 'Core Labour Standards and the Transformation of the International Labour Rights Regime' in Virginia Leary and Daniel Warner (eds) *Social Issues, Globalisation and International Institutions: Labour Rights in the EU, ILO, OECD and WTO* (Martinus Nijhoff Publishers 2006) 17.

138 Francis Maupain, 'New Foundation of New Facade? The ILO and the 2008 Declaration on Social Justice in a Fair Globalization' (2009) 20 European Journal of International Law 823, 826.

139 Philip Alston, ''Core Labour Standards' and the Transformation of the International Labour Rights Regime' (2004) 15 European Journal of International Law 457, 464; and Francis Maupain, 'The Liberalization of International Trade and the Universal Recognition of Workers' Fundamental Rights: The New ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up' in Linos Alexander Sicilianos and Maria Gavouneli (eds), *Scientific and Technological Developments and Human Rights* (Ant. N. Sakkoulas Publishers 2001) 35, at 44 and 47, respectively.

included aligns with a neoliberal conception of the labour market.[140] According to Plant, neoliberalism values a legal framework that enables the free market to function effectively, and dismisses rules that pursue "some overall end, goal or purpose" such as social justice.[141] Commenting on the 1998 Declaration, Alston argues that:

> probably the most convincing way of explaining the standards that were chosen is that those contained in the 'core' are process, rather than result-oriented, rights. This approach is supported by Hansenne's claim in his 1994 report that 'the essential obligation [under the ILO Constitution] is not to achieve results but rather to pursue certain means or lines of conduct'.[142]

The conceptual harmony between the free market and fundamental labour rights is not necessarily reflected in the substantive obligations of the eight underlying conventions. The United States, for example, has indicated that ratification of the 1930 Forced Labour Convention (No 29) "runs counter to the current trend towards privatization of prison management."[143] Similarly, trade unions and collective bargaining have a troublesome relationship with neoliberal labour market policies.[144]

However, the view that the fundamental norms are, or are intended to be, benign to the market is shared by scholars like Kaufmann,[145] Hepple,[146] and McCrudden and Davies. According to the latter: "Confining our list of labor rights to those that serve to increase freedom of choice, and freedom of contract, means that such labor rights would seem not only theoretically consistent with the ideology of free trade, but also required by it."[147]

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140 Brian Langille, 'Core Labour Rights – The True Story' in Virginia Leary and Daniel Warner (eds) *Social Issues, Globalisation and International Institutions: Labour Rights in the EU, ILO, OECD and WTO* (Martinus Nijhoff Publishers 2006) 118 noting that "core labour rights are treated with suspicion by human rights promotors precisely because they are seen to rest upon the neoliberal terrain."

141 Raymond Plant, *The Neo-liberal State* (Oxford University Press 2010) 6.

142 Philip Alston, 'Core Labour Standards and the Transformation of the International Labour Rights Regime' in Virginia Leary and Daniel Warner (eds) *Social Issues, Globalisation and International Institutions: Labour Rights in the EU, ILO, OECD and WTO* (Martinus Nijhoff Publishers 2006) 41 (internal reference omitted).

143 Governing Body (268th Session), Committee on Legal Issues and International Labour Standards, GB.268/LILS/7 (Gevena, March 1997) para 8.

144 For example, Rae Cooper and Bradon Ellem, 'The Neoliberal State, Trade Unions and Collective Bargaining in Australia' (2008) 46 British Journal of Industrial Relations 532. Historically, even the prohibition of child labour has been perceived as an unnecessary intervention in the freedom of contract.

145 Christine Kaufmann, *Globalisation and Labour Rights: The Conflict between Core Labour Rights and International Economic Law* (Hart Publishing 2007) 70.

146 Bob Hepple (ed), *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (Cambridge University Press 2002) 15.

147 Christopher McCrudden and Anne Davies, 'A Perspective on Trade and Labour Rights' (2000) 21 Journal of International Economic Law 43, 51-52; Drusilla Brown, 'International

Consequently, civil and political freedoms of workers are prioritized over the economic and social rights elements of the international labour code.[148]

2.3.4.5 Labour standards as part of customary international law

The recognition that (a subset of) international labour standards amount to customary international law would significantly expand the number of states that are bound by those norms. There are no studies that have systematically investigated the customary status of international labour law norms. Nonetheless, two arguments have been advanced in order to demonstrate that the four 'fundamental labour rights' have attained this status. The first is related to the near universal acceptance of the 1998 Declaration. Addo argues that the nineteen ILO members that abstained from voting when the declaration was adopted have since then complied with the follow-up mechanism, which "could be considered as state practice."[149] However, the follow up mechanism merely requires states to report to what extent they have implemented non-ratified fundamental conventions. It does not assess the validity of these statements or provide for an external assessment. It is therefore impossible to infer that because states participate in this process, there is state practice, let alone *opinio juris*, in support of customary status of the substantive norms.

The second argument looks at the broader origins of the fundamental labour norms. Kaufmann and Heri note that:

> [t]he core labour rights of the ILO Declaration – with the exception of the abolition of child labour – can be traced back all the way to the Universal Declaration of Human Rights of 1948 .... [A]ccording to a majority of scholars the Declaration

Trade and Core Labour Standards: A Survey of the Recent Literature' (Discussion Paper 2000-05) 4; The European Commission also supported this idea, see: Commission of the European Communities, 'Communication from the Commission to the Council – The Trading System and Internationally Recognized Labour Standards' COM(96) 402 final (Brussels, 24 July 1996) 12, stating that: "[The core labour standards] could directly improve working conditions and therefore represent a framework within which other standards could become established. They could be regarded as prerequisites for social development."

148 Philip Alston, 'Core Labour Standards and the Transformation of the International Labour Rights Regime' in Virginia Leary and Daniel Warner (eds) *Social Issues, Globalisation and International Institutions: Labour Rights in the EU, ILO, OECD and WTO* (Martinus Nijhoff Publishers 2006) 42. See generally on the incompatibility of economic and social rights and neoliberalism: Joe Wills, 'The World Turned Upside Down? Neo-Liberalism, Socioeconomic Rights and Hegemony' (2014) 27 Leiden Journal of International Law 11.

149 Kofi Addo, *Core Labour Standards and International Trade* (Springer 2015) 117. The 1998 Declaration has been praised in lofty language. The norms would serve as the ILO's "normative polestar", see Laurence R. Helfer, 'Understanding Change in International Organizations: Globalization and Innovation in the ILO' (2006) 59 Vanderbilt Law Review 649, 720, and are "constitutive of the essence of humanity," according to Brian Langille, 'Seeking Post-Seattle Clarity – and Inspiration' in Joanne Conaghan, Richard Michael Fischl, and Karl Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford University Press 2002) 152.

> further elaborates on human rights that are meanwhile recognized as customary international law.[150]

However, this general assertion is more controversial than the authors admit. In 1991, Schachter observed that: "Although only a few legal scholars have taken this position (that the UDHR amounts to customary law, RZ), they are often cited by human rights advocates in national tribunals and in publications."[151] Whereas the UDHR as such has not attained the status of customary international law, "some important human rights included" in the document have.[152] Also more recent commentaries on the customary status of the norms in the UDHR do not unequivocally support the proposition that the document as a whole reflects customary international law.[153]

A number of sources have commented upon the customary law status of specific labour norms. This provides a mixed picture. Humbert, in her study on child labour in international law, concludes that the prohibition of child labour is not part of customary international law.[154] This is different with regard to forced labour. The Commission of Inquiry that was established by the Governing Body to investigate the situation of forced labour in Myanmar held in 1998 that: "there exists now in international law a *peremptory norm* prohibiting any recourse to forced labour and that the right not to be compelled to perform forced or compulsory labour is one of the basic human rights."[155] Peremptory norms – or *ius cogens* – and customary international law are conceptually distinct, as the former is concerned with the character

150 Christine Kaufmann and Simone Heri, 'Globalisation and Core Labour Rights: What Role for the World Bank and the International Monetary Fund?' (NCCR Working Paper No. 2008/01, 2008) 5-6.

151 Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff Publishers 1991) 337.

152 Ibid.

153 Hilary Charlesworth, 'Universal Declaration of Human Rights (1948)' in Rüdiger Wolfrum (ed) Max Planck Encyclopedia of Public International Law (online ed, Oxford University Press 2008) reflects on the debate on the basis of ICJ materials, domestic case law and theory but does not make a claim; Malcolm Shaw, *International Law* (8th edn, Cambridge University Press 2018) 217 notes that "certain human rights may now be regarded as having enterered into the category" but lists only a few examples and does not reflect upon the UDHR; James Crawford, *Brownlie's Principles of Public International Law 8th edition* (Oxford University Press 2012) 642-3 notes that "it is now generally accepted that the fundamental principles of human rights form part of customary international law, although not everyone would agree on the identity of the fundamental principles." In his section on the UDHR (636-637) he concludes that "many of its provisions reflect general principles of law or elementary considerations of humanity" while emphasising the "indirect legal effect of the UDHR.

154 Franziska Humbert, *The Challenge of Child Labour in International Law* (Cambridge University Press 2009).

155 International Labour Office, 'Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention 1930 (No. 29)' (Official Bulletin – Special Edition, Vol LXXXI, Series B, 2 July 1998) para 203, emphasis added.

of a norm and the latter with the source of a norm. However, as "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole" the possibility of non-customary *ius cogens* norms appears only to exist in theory.[156]

In addition, there is a handful of domestic court cases that have reflected upon the *ius cogens* and the customary status of the prohibition of forced labour. In *Doe v Unocal Corporation*, the United States Court of Appeals for the Ninth Circuit held that forced labour constitutes a *ius cogens* violation.[157] The decision has been criticized on two main grounds. Firstly, it fails to separate between slavery – which is accepted as a violation of *ius cogens* – and forced labour.[158] Secondly, it does not take into account the fact that the 1930 Forced Labour Convention contains a list of exceptions, which are by definition not allowed in relation to *ius cogens* norms.[159] In 2007 a US District Court accepted that forced labour is prohibited under customary international law, but noted that: "The critical question is whether that norm is sufficiently specific, universal and binding as applied to the circumstances alleged in this particular case."[160] Absent a systematic inquiry into state practice and *opinio juris*, however, the ILO Commission of Inquiry and the US court cases are insufficient authorities to conclude that the prohibition of forced labour is a customary norm of international law.

On the right to freedom of association and collective bargaining and the right to non-discrimination in occupation and employment there are few sources that explicitly confirm or deny customary status. Only the 1975 Fact-Finding and Conciliation Commission on Chile, which was chaired by former President of the ICJ Bustamante, noted that:

> Chile has not ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87), which, accordingly has no binding effect for this country. However, by its membership of the International Labour Organisation, Chile is bound to respect a certain number of general rules which have been established for the common good of the peoples of the twentieth century. Among these principles, freedom of association has become a customary rule above the Conventions.[161]

156 Art 53 VCLT.

157 *John Doe I et al v UNOCAL Corp et al*, 395 F.3d 932 (9th Cir 2002) 946.

158 Tawny Aine Bridgeford, 'Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism' (2003) 18 American University International Law Review 1009, 1045.

159 Ibid.

160 *Roe v Bridgestone*, 492 F. Supp. 2d 988 (S.D. Ind. 2007).

161 Governing Body (196th Session) Report of the Fact-Finding and Conciliation Commission on Freedom of Association Concerning the Case of Chile, GB.196/4/9 (Geneva, May 1975) para 466.

The Commission seems to conflate obligations deriving from ILO membership with the existence of a customary norm. Since 1975 none of the ILO organs or supervisory bodies have proclaimed the customary status of the right to freedom of association.[162]

An additional problem with regard to the status of labour standards in customary international law is the ascertainment of the precise legal norm. While the conventions on freedom of association and collective bargaining are rather succinct, the ILO supervisory bodies have developed a detailed jurisprudence. Does the lack of state practice or *opinio juris* on, the rights of minority unions or the prohibition of compulsory arbitration procedures – to take two elements from that jurisprudence – impair a finding that *the* right to freedom of association and collective bargaining can be considered custom? Providing answers to these questions does not fall within the scope of the present study. Given the persisting uncertainty about the customary status of international labour law, this study will only consider treaty-based norms.

2.4 Implementation of ILO standards

2.4.1 Introduction

After having considered the form and content of international labour law, we now turn to the supervisory function of the ILO. Section 2.4.2 provides an overview of the structure of the ILO supervisory procedures and the mandates of the respective bodies. Section 2.4.3 examines the interpretation of international labour conventions and the constraints imposed by the ILO Constitution. Section 2.4.4 examines the dichotomized perspectives on the question whether the ILO is 'effective' and the implications of this debate on the question whether labour standards should be included in trade and investment agreements.

2.4.2 The ILO supervisory procedures

2.4.2.1 Structure of ILO supervisory procedures

With the establishment of an international system of labour standards, the question arose how these standards were to be supervised and enforced. In the run-up to the Treaty of Versailles, it had been advocated that a "super-parliament of nations with the power to enforce its decrees on all peoples"

162 The one time it was raised in a complaint against Canada, the Committee on Freedom of Association ignored the issue. See: *Canada (Case No 2821)* (6 October 2010) Report of the Committee on Freedom of Association No 364 (Vol XCV 2012 Series B No 2) para 339.

should be established.[163] Eventually states embraced a compromise between the (perceived) trade-off between universal membership and coercive enforcement. George Barnes, himself a moderate socialist and Labour Party minister, wrote in 1920 that:

> In establishing an organisation for international labour legislation, it is therefore essential to secure the co-operation of as many nations as possible. To do this successfully it is important to eliminate from the scheme, as far as possible, coercive measures to enforce the observance of the conventions agreed upon by the representatives of the contracting states. National honour, public opinion, the moral obligations or good faith and diplomacy should be relied upon, and should almost invariably suffice to secure the observance of conventions, provided that they are practicable and based upon justice and good reason.[164]

This comment reflects a similar dilemma as in the debate on the flexibility of ILO standards; namely how to involve as many states as possible while creating a legal framework that is both meaningful and recognizes differences in economic development between states?

The current supervisory mechanism of the ILO consists of five different procedures: two based on reports submitted by the member states, and three special procedures. Under the ILO Constitution, member states have to submit two types of information. First, there are requirements to report on the alignment of national law with unratified conventions and recommendations. Although recommendations cannot be ratified, states are obliged to inform the ILO on the actions that have been taken in pursuit of the recommendation's objectives and on "the position of the law and practice in their country in regard to the matters dealt with in the Recommendation ... ."[165] Second, Article 22 provides that members comprise "an annual report" which contains information on "the measures which it has taken to give effect to the provisions of Conventions to which it is a party." These reports are important as they provide the basis for the ILO to determine whether a state is compliant with its treaty obligations.

The Treaty of Versailles did not yet provide for a procedure to subject these reports to an external assessment. As reporting without a further factual and normative inquiry proved to be inadequate, the Conference of 1926 adopted a Resolution which led to the establishment the Committee of Experts on the Application of Conventions and Recommendations (CEARC).[166] The CEARC

163 George Barnes, 'The Scope and Purpose of International Labour Legislation' in E. John Solano (ed) *Labour as an International Problem* (MacMillan and Co. 1920) 5.

164 Ibid.

165 Art 19.6 ILO Constitution.

166 International Labour Conference (8th Session) Resolution concerning the methods by which the Conference can make use of the reports submitted under Article 408 of the Treaty of Versailles (Geneva 1926).

has the task "to indicate the extent to which each member State's legislation and practice are in conformity with ratified Conventions and the extent to which member States have fulfilled their obligations under the ILO Constitution in relation to standards."[167] Currently, the CEARC consists of nineteen eminent lawyers who are appointed by the Governing Body for three-year terms.

The CEARC conducts, in its own words, an "independent technical examination."[168] It publishes two annual reports: the 'General Report', which contains observations and direct requests concerning particular states, and a 'General Survey' which provides a broad overview of one specific theme. While the CEACR's primary task is to scrutinize state reports, it also examines to what extent states have implemented recommendations from *ad hoc* committees that have investigated representations and complaints. The CEARC may issue 'observations' when it identifies "more serious or long-standing cases of failure to fulfil obligations."[169] In subsequent reports the CEACR then assesses whether the situation has improved. Through 'direct requests' the CEARC may solicit more information, or "engage in a continuing dialogue with governments often when the questions raised are primarily of a technical nature."[170] The CEACR reports are submitted to the Conference Committee on the Application of Standards (CAS), which is a tripartite standing committee of the International Labour Conference. The main task of the CAS is to "examine a number of individual cases concerning the application of ratified Conventions which have been the subject of observations by the Committee of Experts."[171] Unlike at the CEARC, which only communicates with member states in writing, the CAS invites these states to appear at its session and comment upon the alleged failure to comply with their treaty obligations.

The 'follow-up' mechanism to the 1998 Declaration launched a second type of reporting obligation, which *de facto* modifies the obligation under Article 19.5 of the ILO Convention to provide for a stricter follow-up with respect to non-ratification of the fundamental conventions.[172] States' submissions regarding their intention to ratify as well as other relevant developments in their domestic legislation are summarized in an 'Annual Review Report'. The narrow focus of these reports allows a more comprehensive discussion. Whereas Article 19.5 requires the submission of information "at appropriate intervals" the 1998

167 International Labour Conference (104th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A) General Report and observations concerning particular countries (Geneva 2015) 2.

168 International Labour Conference (100th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A) General Report and observations concerning particular countries (Geneva 2011) 4.

169 International Labour Conference (104th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A) General Report and observations concerning particular countries (Geneva 2015) 2.

170 Ibid, para 53.

171 Ibid 4.

172 This change has not led to the amendment of the ILO Constitution.

Declaration's follow-up mechanism is published annually. The more systematic approach enables the ILO to establish "country baseline tables" to monitor progress.[173] Unlike the CEARC's General Report, however, the Annual Reports are merely descriptive and do not contain factual or normative assessments. The 'Global Reports' constitute the second prong of the follow-up to the 1998 Declaration. The subject of these reports rotates annually between the four fundamental standards and provides a comprehensive overview of domestic legislation that subject. Unlike the Annual Reports, the Global Report also contains information on states that have ratified the relevant conventions.

In addition to these two report-based methods, the ILO has three grievance mechanisms: (1) a representations procedure, (2) a special procedure concerning freedom of association, and (3) a complaints procedure. The former two are open to worker and employer organisations. Article 24 of the ILO Constitution provides that representations may be submitted when "any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party." After informing the member state, the Governing Body may appoint a tripartite committee to investigate the matter. The role of the tripartite committee is not laid-down in the ILO Constitution but has developed in practice. The findings and recommendations of the committee are sent to the Governing Body. When it adopts the report, the matter is passed on to the CEACR in order to monitor whether the recommendations are implemented. Alternatively, the Governing Body may establish a Commission of Inquiry under the (more stringent) complaints procedure.

With regard to issues related to freedom of association, workers' and employers' organisations may submit cases to the Committee on Freedom of Association (CFA). The CFA is a standing body with a tripartite composition and an independent chair. It is unique in international law, as it has jurisdiction to receive complaints against ILO member states irrespective of whether they have ratified the ILO conventions on freedom of association and collective bargaining.[174] According to the CEACR, "the legal basis for this concept resides in the Constitution of the ILO and the Declaration of Philadelphia".[175] Consequently, the CFA uses the word 'principles' instead of 'obligations' when states have not ratified the relevant conventions. Since 1951, the CFA has examined over 3000 cases, which makes it by far the most productive of the three special procedures. Importantly, it publishes the 'Digest of Decisions

173 International Labour Conference (99th Session), Review of the follow-up to the 1998 ILO Declaration on Fundamental Principles and Rights at Work, Report VII (Geneva 2010) para 8.

174 Arguably, the Human Rights Council comes closest to this procedure, as it also assesses state conduct irrespective of treaty obligations. But see Philip Alston, ''Core Labour Standards' and the Transformation of the International Labour Rights Regime' (2004) 15 European Journal of International Law 457, 481.

175 International Labour Conference (81st Session) Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4B) Freedom of Association and Collective Bargaining (Geneva 1994) para 19.

and Principles', which serves as the authoritative interpretation of the right to freedom of association and collective bargaining within the ILO.[176]

The complaints procedure, which completes the ILO's supervisory mechanism, may be initiated by individual delegates to the ILO, the Governing Body, or by a member state that has ratified the convention that the complaint is concerned with. The ILO Constitution describes the complaints procedure in detail.[177]Complaints are investigated by a Commission of Inquiry, which publishes a report containing its findings and possible recommendations. These reports contain much stronger language than the CEARC reports, and explicitly note whether a state has 'violated' a convention.[178] Under Article 29.2 of the ILO Constitution, the respondent government has to communicate "whether or not it accepts the recommendations contained in the report of the Commission; and if not, whether it proposes to refer the complaint to the International Court of Justice." In practice, the latter option has never been used. If the member state fails to carry out the recommendations made by the Commission of Inquiry or the ICJ, the Governing Body may invoke Article 33 of the ILO Constitution and "recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith."

2.4.2.2 The Myanmar complaint and economic countermeasures

In 1996, twenty-five worker delegates filed a joint complaint against Myanmar regarding the country's non-observance of the Forced Labour Convention (1930, No 29).[179] After a Commission of Inquiry found that Myanmar violated its

176 International Labour Organization, 'Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO' (5th edn, International Labour Office 2006). In 2018, the ILO published an updated version: International Labour Organization, 'Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association' (6th edn, International Labour Office 2018). This research refers solely to the 2006 edition.

177 Arts 26-33 ILO Constitution.

178 See for example the Report of the Commission of Inquiry report in the Zimbabwe complaint procedure in 2010, which reads: "The Commission of Inquiry concludes that there was systematic, and even systemic, violation of the Conventions in the country." International Labour Office, 'Truth, reconciliation and Justice in Zimbabwe: Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by the Government of Zimbabwe the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)' (Official Bulletin – Special Supplement, Vol XCIII, Series B, 2010) x.

179 See generally, Francis Maupain, 'Is the ILO Effective in Upholding Workers' Rights?: Reflections on the Myanmar Experience' in Philip Alston (ed) *Labour Rights as Human Rights* (Oxford University Press 2005); and Richard Horsey, *Ending Forced Labour in Myanmar: Engaging a Pariah Regime* (Routledge 2011).

treaty obligations in law and practice,[180] the Governing Body called upon the Conference to:

> recommend to the Organization's constituents as a whole – governments, employers and workers – that they ... review ... the relations [with Myanmar] and take appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labour referred to by the Commission of Inquiry, and to contribute as far as possible to the implementation of its recommendations.[181]

The Conference approved these recommendations in June 2000.[182] In response, the United States adopted the US Burmese Freedom and Democracy Act of 2003, which imposed a ban on all products from the country, included a specific reference to the ILO resolution. Furthermore, it held that the import ban could only be lifted after consultations with, *inter alia*, "the ILO Secretary General" [sic].[183]

Under the original ILO Constitution only states could file complaints. According to Maupain, the procedure was conceived to hear claims from "other States parties to a Convention whose competitive position might be affected by the failure of a ratifying country to comply."[184] The original text of Article 28.2 of the ILO Constitution – now Article 33 – held that when a Commission of Inquiry found a violation, "[i]t shall also indicate in this report the measures, if any, *of an economic character* against a defaulting Government which it considers to be appropriate, and which it considers other Governments would be justified in adopting" (emphasis added). It has been argued that this was directly influenced by a more concrete proposal by the British government in 1919,[185] which argued that:

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180 International Labour Office, Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention 1930 (No. 29) (Geneva, 2 July 1998) 536.

181 Governing Body (277th Session) Measures, including action under article 33 of the Constitution of the International Labour Organization, to secure compliance by the Government of Myanmar with the recommendations of the Commission of Inquiry established to examine the observance of the Forced Labour Convention, 1930 (No. 29), GB.277/6(Add.1) (Geneva, March 2000).

182 International Labour Conference (88th Session) Record of Proceedings: Resolution concerning the measures recommended by the Governing Body under article 33 of the ILO Constitution on the subject of Myanmar (Geneva 2000) 37.

183 Burmese Freedom and Democracy Act of 2003, Public Law 108-61, 108th Congress (117 Stat 864). Whether these economic sanctions are permissible under WTO law will be discussed in Chapter 3.

184 Francis Maupain, 'ILO Normative Action in its Second Century: Escaping the Double Bind? in Adelle Blackett and Anne Trebilcock (eds) *Research Handbook on Transnational Labour Law* (Edward Elgar Publishing 2015) 310.

185 Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 575.

> The appropriate penalty ... appears to be that when a two-thirds majority of the Conference is satisfied that the terms of the Convention have not been carried out, the signatory States should discriminate against the articles produced under the conditions of unfair competition proved to exist unless those conditions were remedied within one year or such longer period as the Conference might decide.[186]

Eventually, the ILO Constitution only provided for a general framework with regard to the imposition of economic countermeasures.[187] States retained discretion to adopt sanctions, and to decide whether these should be targeted against certain products – as the British proposal suggested – or against the country as a whole.

The removal of the reference to 'economic' measures from Article 33 in 1946 was not intended as a rejection of such measures. Instead, the Conference envisaged a broader range of possibilities, including referral to the UN Security Council.[188] The sanctions pursuant to the Myanmar resolution are thus allowed under ILO law.[189] Notably, however, the United States had not suffered an economic injury due to Myanmar's violations of the Forced Labour Convention. The sanctions were not intended to offset a negative impact to the competitive position of the United States, but were merely as a lever to induce Myanmar to change its practices.

Arguably, the way Maupain portrays the rationale of the complaints procedure is too narrow. As early as 1963, the Commission of Inquiry that was established to examine a complaint filed by Portugal against Liberia qualified the possibility to submit complaints a "constitutional right."[190] It

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186 Memorandum on the Machinery and Procedure Required for the International Regulation of Industrial Conditions, Prepared in the British Delegation (15-20 January 1919) 125, reprinted in: James Shotwell (ed), *The Origins of the International Labor Organization: Vol. II* (Columbia University Press 1934) Document 25.

187 Suggestions by the United States to prohibit international trade in goods "in the production of which children under the age of 16 years have been employed or permitted to work" and "in the production of which convict labor has been employed or permitted" were not accepted, see James Shotwell (ed), *The Origins of the International Labor Organization: Vol. II* (Columbia University Press 1934) Document 37. This also applied to a US proposal to include a provision in the 1957 Abolition of Forced Labour Convention "prohibiting products of forced labour in international commerce" was not accepted. International Labour Conference (39th Session), Record of Proceedings (Geneva 1956) 724. Notably, however, this was due to the rather late introduction of the amendment by the United States, and other ILO Members demanded more time to study the proposal.

188 International Labour Conference (29th Session) Constitutional Questions – Part 1: Reports of the Conference Delegation on Constitutional Questions (Montreal 1946) para 64.

189 Their compatibility with WTO law is a different matter, which will be discussed in the subsequent chapter.

190 International Labour Office, 'Report of the Commission Appointed under Article 26 of the Constitution of the International Labour Organisation to Examine the Complaint Filed by the Government of Portugal concerning the Observance by the Government of Liberia of the Forced Labour Convention, 1930 (No 29)' (Official Bulletin Vol XLVI No 2, April 1963) p 154.

sided with Judge Jessup, who commented in his concurring opinion to the ICJ's judgment in the *South-West Africa Cases* on an earlier Commission of Inquiry report in the case between Ghana and Portugal, concerning the latter's observance of the 1957 Abolition of Forced Labour Convention (No 105):

> The fact which this case establishes is that a State may have a legal interest in the observance, in the territories of another State, of general welfare treaty provisions and that it may assert such interest without alleging any impact upon its own nationals or its direct so-called tangible or material interests.[191]

The right to invoke the responsibility of states for a breach of an ILO convention mirrors Article 48.1(a) of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts. It provides non-injured states with the right to invoke responsibility in case "the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group." Notably, trade law and human rights law are both examples of regimes with obligations *erga omnes partes*.[192] The 'collective interest' which forms the rationale of the complaints procedure may thus well be economic, but not at the individual level.

2.4.3 Interpretation of ILO Conventions

When assessing whether states comply with the conventions they have ratified, it is inevitable that the supervisory bodies engage in some degree of interpretation.[193] But whereas under the international and regional human rights covenants the interpretative role of their respective supervisory bodies and courts is either implicitly or explicitly provided, Article 37(a) of the ILO Constitution provides that: "Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice."[194] Alternatively, paragraph (b) provides for the possibility to establish an *ad hoc* tribunal for this purpose.[195]

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191 *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Separate Opinion Judge Jessup) [1962] ICJ Rep 319, 428.

192 Draft Articles on the Responsibility of International Organizations with Commentaries, Yearbook of the International Law Commission, Vol II, Part Two (2011) 126. Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005) 126-7.

193 José Alvarez, *International Organizations as Law-makers* (Oxford University Press 2005) 453.

194 According to the rules of the ICJ itself such a request would lead to an Advisory Opinion instead of a binding judgment. However, through its Constitution the ILO indicates the outcome will be treated as a binding interpretation.

195 Art 37.2 ILO Constitution. This provision was added in 1946.

Since the PCIJ in 1932 confirmed the expansive interpretation of the 1919 ILO Convention concerning Employment of Women during the Night,[196] no similar question has been put before it or its successor.[197] This has not prevented the ILO's supervisory bodies from exercising an "interpretive function."[198] In its 2012 report, the Committee of Experts stated:

> the Committee has regularly made clear that, while its terms of reference do not authorize it to give definitive interpretations of Conventions – competence to do so being vested in the International Court of Justice (ICJ) under article 37 of the ILO Constitution – in order to carry out its mandate of evaluating and assessing the application and implementation of Conventions, it must consider and express its views on the legal scope and meaning of the provisions of these Conventions... . at least as far back as the 1950s, the Committee has expressed its views on the meaning of specific ILO instruments in terms that inevitably reflect an interpretive vocabulary.[199]

The extent to which the supervisory bodies have to interpret the conventions may depend on their level of specificity and flexibility.[200] Furthermore, the Conference could influence the interpretation of conventions through the subsequent adoption of a recommendation. The reference to 'definitive interpretations' should be understood as an acknowledgment that if the Inter-

196 *Interpretation of the Convention of 1919 concerning Employment of Women during the Night* (Advisory Opinion) PCIJ Rep Series A/B No 50 (15 November 1932).

197 Although the idea to request an advisory opinion or establish an *ad hoc* tribunal has been entertained several times, see: Justin Fraterman, 'Article 37(2) of the ILO Constitution: Can an ILO Interpretive Tribunal end the Hegemony of International Trade Law?' (2011) 42 Georgetown Journal of International Law 879, 889-890.

198 Nicolas Valticos and Geraldo von Potobsky, *International Labour Law* (2nd edn Kluwer Law and Tax Publishers 1995) 68. The International Labour Office also issues interpretations of Conventions at the request of Member states, which are published in the organisation's Official Bulletin. These opinions cover general matters of international labour law, such as the question whether reservations to Conventions are allowed or to what extent labour standards apply during armed conflict. The Office carefully emphasises that it does not deal with questions of compliance by member states and that its statements have no official status. According to McMahon, however: "it is precisely because the International Labour Office has claimed so little that it has achieved so much. By making such modest claims for its opinions, the Labour Office deflects any possible challenges of its constitutional power to give them at all." J.F. McMahon, 'The Legislative Techniques of the International Labour Organization' 1967) 41 British Yearbook of International Law 1965-1966 1, 100; José Alvarez, *International Organizations as Law-makers* (Oxford University Press 2005) 225-226.

199 International Labour Conference (102nd Session) Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A) General Report and observations concerning particular countries (Geneva 2013) para 34. It should be noted that the recommendations of the experts of the CEACR and the tripartite CFA are 'legitimized' by their subsequent adoption by the International Labour Conference and the Governing Body, respectively.

200 Nicolas Valticos and Geraldo von Potobsky, *International Labour Law* (2nd edn Kluwer Law and Tax Publishers 1995) 68-69.

national Court of Justice or an *ad hoc* tribunal established under Article 37.2 ILO Constitution would deviate from the conclusions of the CEACR or CFA, the former prevails.

The corollary of the absence of a mandate to interpret ILO conventions is the lack of constitutional guidance on the method of interpretation. Normally, this would mean that the Vienna Convention on the Law of Treaties (VCLT) applies, which rules on treaty interpretation are generally recognized as customary international law. The VCLT provides that the ordinary meaning, context and object and purpose are the primary means of interpretation.[201] Only when interpretation according to Article 31 remains "ambiguous or obscure" or when this "leads to a result which is manifestly absurd or unreasonable" can the *travaux préparatoires* or other subsidiary means of interpretation be invoked.[202] The CEARC, however, relies mostly on the *travaux préparatoires*, which reflects the discussions between the tripartite constituents of the ILO.[203] The lack of a constitutional mandate arguably requires closer adherence to the intentions of the drafters. This leads to the paradoxical conclusion that (perceived) legitimacy problems lead to more emphasis on means of interpretation that are nowadays regarded merely subsidiary by the general rules of international law.[204]

Within the ILO the employers group has been the most vocal opponent of an expansive interpretation of international labour law. Their concern is not that interpretation as such is unacceptable, but that the influence of the interpretative work of the CEARC "outside of the ILO" is problematic.[205] At

201 Art 31.1 VCLT.

202 Art 32 VCLT.

203 Wilfred Jenks, 'The Significance for International Law of the Tripartite Character of The International Labour Organisation' (1937) 22 Transactions of the Grotius Society (The Eastern Press 1937) 66-67. Thirty-one years later, Jenks participated in the United Nations Conference on the Law of Treaties as the observer for the ILO, where he reiterated this point, and commented more broadly on the draft of what would later become the VCLT and ILO *lex specialis*. United Nations Conference on the Law of Treaties, 'Official Records: First session – Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole' (26 March-24 May 1968) 36-37.

204 The same is observed in relation to the GATT dispute settlement system before it was transformed by the WTO Agreement, see: Christoph Feddersen, 'Focusing on Substantive Law in International Economic Relations: The *Public Morals* of GATT's Article XX(a) and "Conventional" Rules of Interpretation' (1998) 7 Minnesota Journal of Global Trade 75, 87-88.

205 International Labour Conference (101th Session) Report of the Committee on the Application of Standards, Report III (Part 1A) General Report and observations concerning particular countries (Geneva 2012) para 145. The concerns of the employers are antipodal to those of Philip Alston in his critique of the 1998 Declaration. Both recognize that the consensus on four core labour standards accelerated the appropriation of ILO norms by external instruments, both in the domain of soft and hard law. Alston was concerned that this would enable external actors to interpret and apply labour standards as they please. The employers, on the other hand, are concerned that external actors would unjustly follow the ILO Committees.

the 2012 International Labour Conference, the employers' spokesperson held that:

> The eight fundamental Conventions were important not only within the ILO, but also because other international institutions regularly used them in their activities. The fundamental Conventions were embedded in the UN Global Compact, the OECD Guidelines for Multinational Enterprises, and the UN Human Rights Council's "Protect, Respect and Remedy" framework. The ILO's supervisory machinery related to member States only, not to businesses, so it was vital that, when other international institutions used the fundamental Conventions, such use was correct.[206]

The employers' concerns are primarily related to non-binding instruments in the domain of corporate responsibility. The central question is whether references to particular conventions implies a recognition of the interpretative work of the various supervisory bodies. Substantively, the right to strike is the main bone of contention. Although not mentioned in Convention No 87, the CEARC and the CFA have consistently held that this right is essential to the effective exercise of freedom of association.[207] Both committees actively monitor compliance with this right in their examination of reports and complaints, and have developed parameters which can be found in the Digest on Freedom of Association.[208] As such, the right to strike is a product of the interpretation of Convention No 87 that has never been confirmed by the International Court of Justice or an *ad hoc* tribunal. Nonetheless, the work of the ILO supervisory bodies is relied upon outside the ILO. For example, in the Enerji v Turkey case before the European Court of Human Rights, the Court relied on the pronouncements of the ILO supervisory bodies when it held that Article 11 of the European Convention, which protects the right to freedom of association, without mentioning the right to strike, protects this right nonetheless.[209]

In 2016, the chairpersons of the CEARC and the CFA published a joint report in which they conducted a thorough review of the ILO supervisory mechanism. They conclude that "it is generally acknowledged that some degree of interpretation is necessary in order for the CEACR to conduct its examination

206 Ibid, para 146.

207 In fact, as early as 1927, twenty-one years before the first convention on the issue was adopted, an ILO report stated that is considered it impossible to draw a distinction between the right to strike and the right to organise as "limitations of the right to strike are also limitations of the right of combination for trade purposes ... ." International Labour Conference (10th Session) Freedom of Association: Report and Draft Questionnaire (Geneva 1927) 101.

208 International Labour Organization, 'Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO' (5th edn, International Labour Office 2006) paras 520-676.

209 *Affaire Enerji Yapi-Yol Sen c Turquie* App no 68959/01 (ECtHR, 21 April 2009) para 24.

of reports, and for the CFA to investigate and examine complaints."[210] Since the report, the debate over the mandate of the supervisory bodies has toned-down. Nonetheless, La Hovary observes that "the CEACR has changed its practice" as it "made more 'direct requests' in its 2014 report, which are less visible and less accessible than 'observations' and are not the object of discussions in the CAS, and it has at the same time reduced the length of its observations."[211] In this would continue, it could hamper the development of international labour law. This is not only a problem for the ILO, but also for the 'other international institutions' that may use the jurisprudence of the ILO supervisory bodies to achieve a coherent meaning between ILO norms and other sources of international labour law.

2.4.4 Perspectives on the effectiveness of the ILO in relation to the trade-labour debate

After more than ninety years of experience with legal instruments, monitoring and supervision, the efficacy of international labour law remains contested.[212] In one of the first empirical studies, Ernest Landy concluded that "I.L.O. supervision has proved its powers of persuasion in relation to a sizable proportion of the violations with which it had to deal.[213] Ernest Haas, writing in the same era, asserted that the ILO has "a record of which any international agency can be intensely proud."[214] Since 1964 the CEACR explicitly lists 'cases of progress' to express satisfaction with the way in which its observations led to concrete improvements in the implementation of labour standards. Although definitive statements on causality remain difficult,[215] several studies have used these cases of progress to assess the impact of the Committee of Experts. Gravel and Charbonneau-Jobin, for example, examined cases of progress on

210 Governing Body (326th Session) The Standards Initiative: Joint report of the Chairpersons of the Committee on the Application of Conventions and Recommendations and the Committee on Freedom of Association, GB.326/LILS/3/1 (Geneva, February 2016) para 132.

211 Claire La Hovary, 'The ILO's Mandate and Capacity: Creating, Proliferating and Supervising Labour Standards for a Globalized Economy,' in Henner Gött (ed) *Labour Standards in International Economic Law* (Springer 2018) 47.

212 Petersmann notes for example that "The 183 multilateral treaties on labour and social standards adopted in the ILO similarly suffer from inadequate enforcement mechanisms." Ernst-Ulrich Petersmann, 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of the Worldwide Organizations: Lessons from European Integration' (2002) 13 European Journal of International Law 621, 625.

213 Ernest Landy, *The Effectiveness of International Supervision: Thirty Years of I.L.O Experience* (Stevens & Sons 1966) 198.

214 Ernest Haas, *Beyond the Nation-State: Functionalism and International Organization* (Stanford University Press 1964) 258.

215 Eric Gravel and Cloé Charbonneau-Jobin, 'The Committee of Experts on the Application of Conventions and Recommendations: its Dynamic and Impact' (ILO 2003) 26.

the implementation of the eight core Conventions from 1977 to 2003. The authors conclude that: "[the] supervisory machinery, of which the Committee of Experts is one of the central components, has shown considerable effectiveness over the years, as illustrated by the constantly increasing number of cases of progress."[216] A similar study from 2001 on the Committee on Freedom of Association found that it "demonstrated undoubted effectiveness."[217] In addition, many studies have looked at the general impact of certain conventions,[218] the impact of certain conventions in certain member states,[219] or the impact of the ILO in certain member states.[220]

In one of the few critical empirical studies, Weisband notes that "ILO member states routinely defy the influences of shame stemming from CEARC censure."[221] In his analysis of regional responsiveness, he finds that Asian members "are least amenable to pressures stemming from efforts to mobilize shame and, among the regions, most willing to reject the legitimacy of the ILO monitoring regime."[222] To a large extent, however, this can be contributed to a number of "global pariahs," while "the majority of ILO members remain in sound standing relative to global benchmarks of compliance and responsiveness."[223] He does not propose to abandon the non-coercive style of supervision but expects it to contribute, in the long run, to the erosion of the pariah regimes' legitimacy.

Generally, the notion that the ILO is capable of inducing states to (continue to) comply with their treaty obligations is contested. This has led to a situation in which some authors conclude that the ILO "is generally credited with having developed the most effective review methods among the global organizations,"[224] while others dismiss it "as a slow, cumbersome and low-profile institution [that] has not made the impact it should in the new political eco-

216 Ibid 75. Please note that the authors did not evaluate these cases of progress themselves.
217 Eric Gravel, Isabelle Duplessis, Bernard Gernigon, 'The Committee on Freedom of Association: Its Impact over 50 years' (International Labour Office 2001) 65.
218 For example, Geraldo von Potobsky, 'Freedom of association: The impact of Convention No. 87 and ILO action' (1998) 137 International Labour Review 195; Franziska Humbert, *The Challenge of Child Labour in International Law* (Cambridge University Press 2009) 192.
219 See e.g.: Edward Potter, 'Freedom of Association, the Right to Organize and Collective Bargaining: The Impact on U.S. Law and Practice of Ratification of ILO Conventions No. 87 & No. 98' (Labour Policy Association, Inc. 1984).
220 See e.g.: Edward Potter, 'The Growing Importance of the International Labour Organization: the View from the United States' in John Craig and Michael Lynk (eds) *Globalization and the Future of Labour Law* (Cambridge University Press 2006).
221 Edward Weisband, 'Discursive Multilateralism: Global Benchmarks, Shame, and Learning in the ILO Labor Standards Monitoring Regime' (2000) 44 International Studies Quarterly 643, 658.
222 Ibid 659.
223 Ibid 661.
224 Thomas van Dervort, *International law and organization: an introduction* (Sage 1998) 214.

nomy."[225] It is unlikely that this dichotomy will soon be resolved. There is no commonly accepted definition or methodology to determine when international law is effective.

A recurring argument in the debate about international labour law in particular is its perceived ineffectiveness *relative* to international trade and investment law.[226] The methods of 'moral persuasion' and the 'mobilization of shame' of the ILO do not provide for the same 'teeth' as the WTO which ultimately allows for economic retaliation. This juxtaposition influences the perceived need for labour provisions in trade and investment agreements. Addo summarizes this point as follows:

> Whilst the debate surrounding [the imposition of sanctions on countries with weak labour standards] is not new, it has recently been pushed to the top of the international trade agenda. This is because the ILO, as the custodian of the labour standards, appears to lack the enforcement powers necessary to achieve compliance, which is relevant to the debate as to whether labour standards should be left to the ILO or added to the WTO agenda since the WTO, through its dispute settlement mechanism, has *more effective* procedures for surveillance and suspension of concessions.[227]

The same argument is made in the context of preferential trade and investment agreements (PTIAs). According to Abel, their labour chapters "should compensate the lack of hard enforcement mechanisms in the ILO".[228]

The comparison between the ILO supervisory mechanism and dispute settlement in international economic law is problematic for various reasons, including the nature of the underlying obligations and the assumptions about the use of economic sanctions as a means to induce compliance. Providing a more nuanced evaluation of the ILO's supervisory mechanism, Manfred Weiss argues that although "the monitoring machinery of the ILO is not very efficient

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225 Financial Times (24 March 1999) 3, Quoted in: Sean Cooney, 'Testing Times for the ILO: Institutional Reform for the New International Political Economy' (1999) 20 Comparative Labour Law & Policy Journal 365, 399. Similar statements are made by Joseph and Thomas. Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (Oxford University Press 2011) 131; Chantal Thomas, 'The WTO and labor rights: strategies of linkage' in Sarah Joseph, David Kinley and Jeff Waincymer (eds) *The World Trade Organization and Human Rights: Interdisciplinary Perspectives* (Edward Elgar Publishing 2009) 281.

226 Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (Oxford University Press 2011) 295: "The relative strengths of the respective global trade and social justice systems should be evened out."

227 Kofi Addo, *Core Labour Standards and International Trade* (Springer 2015) 6 (emphasis added); See also Eddy Lee, 'Globalization and Labour Standards: A review of issues' (1997) 136 International Labour Review 173, 178.

228 Patrick Abel, 'Comparative Conclusions on Arbitral Dispute Settlement in Trade-Labour Matters Under US FTAs,' in Henner Gött (ed) *Labour Standards in International Economic Law* (Springer 2018) 158.

... the impact of the monitoring bodies should not be underestimated."[229] This is the case because:

> The committee of experts and the committee on freedom of association have produced an impressive amount of case law. Even if the binding effect of this case law is problematic, it may be argued that in many jurisdictions it serves as a point of reference and hence may have an impact on shaping the legal structure in many countries.[230]

His argument can be extended to international legal structures. This primarily concerns the international and regional human rights instruments, but increasingly also the field of international economic law. As explained above in relation to the ECtHR's *Enerji v Turkey* case, the lack of a binding effect does not prevent the use of the work of the supervisory bodies by courts or other adjudicators outside the ILO. The following chapters will explore the relevance of the work of the ILO supervisory bodies in international trade and investment law in more depth.

2.5 Concluding remarks

According to the 19th century economist and politician George Campbell, "two great discoveries have been made in the science of government: the one is the immense advantage of abolishing restrictions on trade; the other is the absolute necessity of imposing restrictions upon labour."[231] At the time it was felt that only the latter warranted a form of institutionalized cooperation between states. International labour law was thus seen as an important mechanism to facilitate economic globalization. In fact, it was even contemplated whether international labour law was conceptually part of international economic law.[232] The establishment of the International Labour Organization in 1919 invoked similar comments. Although the ILO had no role in the development of international trade and investment law, it was nonetheless perceived as an international economic organization.

The debates on the features of international labour law during its formative years still resonate today. What is the purpose of this area of international law? How should treaties be monitored and enforced? And to what extent

229 Manfred Weiss, 'International Labour Standards: A Complex Public-Private Policy Mix' (2013) 29 The International Journal of Comparative Labour Law and Industrial Relations 7, 9-10.

230 Ibid.

231 George Campbell (Duke of Argyll), *The Reign of Law* (4rd American edn, George Routledge & Sons 1873) 334-335.

232 Georg Schwarzenberger, 'The Principles and Standards of International Economic Law' (1966) 117 Recueil des Cours 1, 8.

should different levels of economic development be reckoned with?[233] These issues remain relevant for the ILO, which faces some important challenges in the wake of its 2019 centenary, but also for the body of international labour law that has developed outside the organization, including labour provisions in trade and investment agreements. In this regard, the question of monitoring and enforcement is of particular relevance, as trade-labour linkages are sometimes portrayed as 'more effective' than the ILO supervisory procedures. The latter are premised on "the sanction of publicity" instead of "the economic weapon".[234] This was a deliberate decision, as the ILO's founders had to find a balance between two objectives. On the one hand, there was a need for meaningful standards that did not reflect the lowest common denominator. On the other hand, differences in levels of economic development between members had to be taken into account.

Although the ILO's supervisory mechanism was not premised on the use of economic countermeasures, ILO member states that were – for whatever reason – displeased with the level of labour standards of another ILO member could unilaterally resort to such measures. The legality of labour-related trade measures is a matter for international trade law. With the establishment of the GATT, and later the WTO, a legal framework was established which constrains the ability of states to apply trade measures in order to induce other states to improve their labour standards. The extent of these constraints will be examined in the following chapter.

233 Malcolm Delevingne, 'The Pre-War History of International Labor Legislation' in James Shotwell (ed) *The Origins of the International Labor Organization* (Columbia University Press 1934) at 39.

234 B.H. Sumner, 'Review of International Labour Legislation by H.J.W. Hetherington' (1921) 31 The Economic Journal 84, 85.

3 Multilateral Trade Law and Labour

3.1 INTRODUCTION

When looking at the work of the World Trade Organization (WTO), one may get the impression that trade-labour linkage has never progressed beyond the ivory towers of academia. Its only official statement on the subject is the Ministerial Declaration of 1996, in which the WTO member states declared that the ILO is the sole competent body to deal with labour standards.[1] The dichotomy between trade and labour that the Singapore Declaration embraced is remarkable. As was discussed in chapter 2, both legal regimes were historically linked and mutually supportive of each other's purposes. International labour law was intended to reap the benefits of international trade without compromising the efficacy of domestic social legislation. And trade policy has been concerned with labour issues since the abolition of the slave trade in the early 19th century and was actively used to induce low-standard trade partners to improve their domestic labour legislation.[2]

Part 3.2 of this chapter examines the conceptual relationship between trade and labour from the perspective of trade law, and will map the history of attempts to link the two in multilateral trade law. Importantly, the debate on the role of labour standards in multilateral trade law does not depend on the existence of specific labour provisions. States can, and sometimes do adopt trade-restrictive measures that respond to concerns with foreign labour standards irrespective of an explicit provision in multilateral trade law that mandates such actions. They could adopt import bans against products made by child workers, award social labels to products that are not made by child workers, or implement comprehensive economic sanctions against countries that violate international labour standards on a systematic and widespread scale. The question is, however, whether such measures are compliant with WTO law. As a preliminary matter, part 3.3 examines whether it is possible to perceive low labour standards as unfair trade practices, and consequently as actionable under WTO law. Part 3.4 is concerned with the legality of unilateral labour-related trade measures under WTO law. Part 3.5 describes the

1 World Trade Organization, 'Singapore Ministerial Declaration' (18 December 1996) WT/MIN(96)/DEC. This statement was renewed at the Doha Conference in 2001.

2 Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 126 International Labour Review 565.

operation and legality of labour rights conditionality in the Generalized System of Preferences, by which the United States and the European Union unilaterally grant trade benefits to developing countries.

3.2 Introduction to multilateral trade-labour linkage

3.2.1 Introduction

This part chronicles the attempts to link the multilateral trade regime that was erected after the Second World War to the observance of some minimum level of labour standards. Section 3.2.2 discusses the 1947 Havana Charter for an International Trade Organization (ITO). As the Charter never entered into force, the trade regime developed on the basis of the General Agreement on Tariffs and Trade (GATT), which was intended as a provisional arrangement. Unlike the ITO, neither the GATT nor its successor, the World Trade Organization (WTO), contains labour-related provisions. Section 3.2.3 examines the debate on trade-labour linkage during the GATT (1948-1994) and WTO (1995-present) eras. After a mapping of some of the historic milestones in this debate, it compares the characteristics of treaty-based labour provisions with the justification of unilateral labour-related trade measures under a legal framework that lacks any explicit guidance.

3.2.2 Labour and employment in the Havana Charter

After the IMF and the World Bank were founded in 1944, attention shifted towards the establishment of an international organisation that would focus on the liberalization of global trade. Negotiations were held between 1946 and 1948, leading to the adoption of the 'Havana Charter for an International Trade Organization'.[3] A significant part of the Charter is devoted to employment and labour policies. Already in the 1941 Atlantic Charter, in which the United States and the United Kingdom provided a blueprint for the post-war economic order, both states expressed their "desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement and social security."[4] The inclusion of express provisions concerning employment was not controversial. Also at the domestic level, trade unions were generally supportive of international trade, provided that domestic labour regulation and social arrange-

3 United Nations Conference on Trade and Employment, 'Final Act – Havana Charter for an International Trade Organization' (signed 24 March 1948) UN Doc E/CONF.2/78.

4 Atlantic Charter (14 August 1941).

ments were maintained and expanded.[5] The inclusion of an employment chapter in the Havana Charter casted this compromise in international legal commitments.[6]

Translating general goals into concrete and feasible obligations proved to be more difficult. This was especially the case with the issue of employment. The United Kingdom advocated for "positive measures of international co-operation" without specifying what these might entail.[7] The final text of the Havana Charter is of a similar general character. Apart from the obligation to "take action designed to achieve and maintain full and productive employment" it does not prescribe any specific policies and contains weak provisions on international coordination.

The employment provisions were discussed separately from a clause on 'fair labour standards,' which was included following a proposal by Cuba. The *travaux préparatoires* of the committee that prepared the final text shows little controversy. Two concerns were raised. First, a "single comprehensive standard" would harm the interests of developing countries, so a labour clause should take differences in productivity into account. Second, it warned that the International Trade Organization should not duplicate the work of the ILO.[8] Representatives of the ILO attended meetings of the committee and suggested textual amendments.[9] A proposal by South Africa that all labour-related complaints should be referred to the ILO was dismissed. Instead, arrangements were made for cooperation and consultation between both organizations.[10]

The labour clause was eventually inserted at the end of the employment chapter. Article 7 of the Havana Charter provided:

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5 Elissa Alben, 'GATT and the Fair Wage: A Historical Perspective on the Labor- Trade Link' (2001) 101 Columbia Law Review 1401, 1429. During the war US trade unions were already developing proposals on trade-labour linkage in international agreements. Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 126 International Labour Review 565, 575.

6 See chapter 2 on 'Employment and Economic Activity,' which includes the clause on fair labour standards.

7 Richard Gardner, *Sterling-Dollar Diplomacy in Current Perspective: The Origins and Prospects of Our International Economic Order* (Columbia University Press 1969), 274 and 278.

8 United Nations Economic and Social Council, 'Report of the First Session of the Preparatory Committee of the International Conference on Trade and Employment' (31 October 1946) E/PC/T/33, 5. See also: Philip Alston, 'International Trade as an Instrument of Positive Human Rights Policy' (1982) 4 Human Rights Quarterly 155, 171.

9 United Nations Conference on Trade and Employment, 'Reports of Committees and Principal Sub-committees' (September 1948) ICITO 1/8.

10 Interim Commission for the International Trade Organization, 'Relations between the International Labour Organization and the International Trade Organization' (17 August 1948) Limited A, ICITO/EC.2/2/Add.6, which contains the text of the draft agreement.

Fair Labour Standards

1. The Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognize that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.
2. Members which are also members of the International Labour Organisation shall co- operate with that organization in giving effect to this undertaking.
3. In all matters relating to labour standards that may be referred to the Organization in accordance with the provisions of Articles 94 or 95, it shall consult and co-operate with the International Labour Organisation.

The last sentence of the first paragraph echoes the premise contained in the preamble of the 1919 ILO Constitution, namely that there is an inherent link between international economic competition and the regulation of labour standards at the domestic level.[11] This link forms an important part of the ILO's *raison d'être*. For the purpose of the Havana Charter it is also indispensable. The preparatory committee dismissed the amendment by Argentina to omit the references to production for export, but stated that: "The principles of the Charter should be applied to all workers, whether or not they were engaged in production for export."[12] Due to the inclusion of the word 'particularly', "any unfair labour conditions which create difficulties in international trade" fall under the scope of Article 7.[13] Consequently, maintaining unfair labour conditions in a sector that competes with imports from other states in order to substitute these with domestic products would also be actionable.[14]

More problematic is the determination of what constitutes 'unfair' labour conditions. At the time, this was not a major point of contention. Rather, Article 7 is deliberately indeterminate. As the Turkish delegate in the preparatory committee noted: "fair labour standards should not be defined or dealt with in the Charter but should be left to international conventions under the ILO. Overlapping and duplication should be avoided. Articles 89 and 90,

11 "Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries."

12 United Nations Conference on Trade and Employment, 'First Committee: Employment and Economic Activity – Summary Record of the Fifth Meeting' (5 December 1947) E/CONF.2/C.1/SR.5, 1.

13 United Nations Conference on Trade and Employment 'First Committee: Employment and Economic Activity – Report of Sub-Committee A – "Fair Labour Standards"' (16 December 1947) E/CONF.2/C.1/9, 3.

14 Elissa Alben, 'GATT and the Fair Wage: A Historical Perspective on the Labor- Trade Link' (2001) 101 Columbia Law Review 1401, 1431.

together with consultation with the ILO were sufficient to provide for all contingencies."[15] The only clarification made by the committee confirmed that the phrase 'fair labour standards' was sufficiently broad to encompass social security, hence there was no need for an amendment to this effect.[16] The open wording also enabled linkage with future ILO conventions. At the time the ILO had not yet adopted conventions or recommendations concerning non-discrimination, for example. This prompted detailed amendments by Mexico and Haiti to expressly prohibit discrimination based on nationality, origin, race, religion or sex, including equal pay for equal work, and to oblige states to impose penalties on employers who acted in contravention to non-discrimination rules.[17] The majority of the committee members:

> felt that the question of non-discrimination in respect of the employment of labour could not be dealt with appropriately or adequately in a charter of an international trade organization. To the extent, however, that provisions concerning non-discriminatory treatment of labour may have been, or may in the future be, incorporated in other 'international declarations, conventions and agreements' to which Members may subscribe the present language of the Article recognizes that measures relating to employment must take fully into account of such provisions.[18]

Notably, in defining its material scope Article 7 does not refer to the ILO, but to "inter-governmental declarations, conventions and agreements." On the issue of non-discrimination for example, it was recognised that "other bodies such as the Commission on Human Rights" were also involved and could play a role in future standard-setting.[19]

The quoted passage also appears to indicate that whether a member of the International Trade Organization has 'subscribed' to an international instrument containing labour standards is relevant. However, this is not supported by the full drafting history. Indeed, the reference to 'declarations' was primarily included in recognition of the ILO's 1944 Declaration of Philadelphia, which was adopted by the International Labour Conference just a

15 United Nations Conference on Trade and Employment, 'First Committee: Employment and Economic Activity – Summary Record of the Sixth Meeting' (8 December 1947) E/CONF.2/C.1/SR.6, 3. Articles 89 and 90 became Articles 94 and 95 in the final draft, dealing with the reference of disputes to the Executive Board and the Conference, respectively.

16 United Nations Conference on Trade and Employment, 'First Committee: Employment and Economic Activity – Report of Sub-Committee A – "Fair Labour Standards"' (16 December 1947) E/CONF.2/C.1/9, 2-3.

17 United Nations Conference on Trade and Employment, 'First Committee: Employment and Economic Activity – Annotated Agenda for Chapter II – Employment and Economic Activity' (8 December 1947) E/CONF.2/C.1/7, 6.

18 United Nations Conference on Trade and Employment, 'Sub-committee A of the First Committee – Report of the Drafting Group on Article 4' (13 December 1947) E/CONF.2/C.1/A/W.1, 5.

19 Ibid 4.

few years earlier.[20] Furthermore, paragraph 7(2) imposes a specific obligation to co-operate with the ILO if a state is a member of that organization. This implies that paragraph 7.1 equally applies to members of the International Trade Organization that are not a member of the ILO, and consequently have not ratified any labour conventions.

Complaints under Article 7 were subjected to the regular dispute settlement provisions, contained in Articles 92 to 97. An amendment by Uruguay to expressly allow unilateral economic measures was not adopted. It provided that: "Nothing in this Charter shall be construed as preventing the adoption by a Member or reasonable and equitable measures to protect its industries from the competition of like products under sub-standard conditions of labour and pay."[21] Instead, the Committee decided that: "The taking of counter-action in respect of any labour condition coming within the Article and causing injury to a Member should be subject to the approval of the Organization."[22] Article 92.2 of the Havana Charter thus provided that members "undertake, without prejudice to any other international agreement, that they will not have recourse to unilateral economic measures of any kind contrary to the provisions of this Charter."[23]

The procedure for dispute settlement under the ITO consisted of three prongs. Members were firstly called upon to resolve a matter through consultations or arbitration.[24] If this was unsuccessful, the Executive Board of the ITO would conduct an investigation and was authorized to recommend compliance measures or allow the suspension of benefits vis-à-vis the member or members that acted in contravention to the Charter.[25] Upon the request of a member state involved in the dispute, the Executive Board could refer the matter to the ITO's Conference, which could "confirm, modify or reverse" the decision of the Executive Board.[26] Consequently, the imposition of economic measures in response to unfair labour conditions was thus possible, but always subjected

20 United Nations Conference on Trade and Employment, 'First Committee: Employment and Economic Activity – Report of Sub-Committee A – "Fair Labour Standards"' (16 December 1947) E/CONF.2/C.1/9, 2.

21 United Nations Conference on Trade and Employment, 'First Committee: Employment and Economic Activity – Annotated Agenda for Chapter II – Employment and Economic Activity' (8 December 1947) E/CONF.2/C.1/7, 5.

22 United Nations Conference on Trade and Employment 'Sub-committee A of the First Committee – Report of the Drafting Group on Article 4' (13 December 1947) E/CONF.2/C.1/A/W.1, 2.

23 At the time the Havana Charter was drafted, Article 33 of the ILO Constitution still expressly allowed for the authorization of economic sanctions when a member failed to comply with the recommendations of a Commission of Inquiry or the International Court of Justice. As the Havana Charter was without prejudice to such measures, unilateral economic sanctions pursuant to an Article 33 resolution by the ILC would not breach the Havana Charter.

24 Art 93 Havana Charter.

25 Art 94 Havana Charter.

26 Art 95.1 Havana Charter.

to prior approval of the organization. Furthermore, the countermeasures that were foreseen could not go beyond compensatory measures to offset "the benefit which has been nullified or impaired."[27] The rationale of economic measures authorised by the ITO was thus narrower than the ILO Article 33 procedure, which leaves open the possibility for punitive rather than restorative measures.

The emergency action procedure in Article 40 of the Havana Charter formed the only exception to the rule that trade measures had to be authorised by the organization. Article 40 allowed for temporary suspension or modification of concessions when a sudden and unexpected increase in imports that causes or threatens "serious injury to domestic producers in that territory of like or directly competitive products."[28] The potential causes of the import surge are not specified. Depression of labour costs could be amongst the reasons why a state obtains a sudden and unexpected competitive advantage. Indeed, the preparatory committee saw Article 40 as a short-term means to prevent social dumping, while Article 7 could be applied against more persistent cases.[29]

The Havana Charter never entered into force, mainly because of opposition in the US Senate.[30] The General Agreement on Tariffs and Trade, which was negotiated as an as an interim agreement on trade in goods, subsequently developed into the *de facto* multilateral trade framework.[31] Article XXIX(1) GATT provides that "[t]he contracting parties undertake to observe to the fullest extent ... the general principles of" the Havana Charter. The WTO Panel in *Mexico–Telecommunications* used the Havana Charter to interpret the meaning of the term "anti-competitive practices."[32] The applicability of Article XXIX GATT to the Havana Charter's labour clause has occasionally been raised.[33] As no case concerning trade restrictive measures in response to foreign 'unfair labour standards' has even reached a GATT panel or the WTO Dispute Settlement Body this has never been tested in practice. Arguably, however, Article 7 will

27 Art 94.3 Havana Charter.

28 Art 40.1(a) Havana Charter.

29 United Nations Conference on Trade and Employment, 'Third Committee: Commercial Policy – Report of Sub-Committee D on Articles 40, 41 and 43 (28 January 1948) E/CONF.2/C.3/37, para 20.

30 For a detailed discussion of the reasons, see: William Diebold, 'The End of the I.T.O.' (Princeton University Essays in International Finance No 16, October 1952).

31 Protocol of Provisional Application (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 308.

32 WTO, *Mexico: Measures Affecting Telecommunications Services – Report of the Panel* (2 April 2004) WT/DS204/R, para 7.236. John Jackson, *World Trade and the Law of GATT* (The Michie Company 1969) 46-49 on when the Havana Charter is relevant for the interpretation of GATT.

33 General Agreement on Tariffs and Trade, 'Relationship of Internationally-Recognized Worker Rights to International Trade – Request for the establishment of a working party – Communication from the United States' (28 October 1987) L/6243.

not be relevant in situations in which a state aims to justify trade restrictions based on their trading partners' level of labour standards. The provision would have established a framework and a dispute settlement procedure to determine (un)fairness of labour standards, thus preventing states from taking unilateral measures in the first place.

3.2.3 Labour and employment in the GATT and WTO era

3.2.3.1 The quest for a labour clause

As the GATT was supposed to be a temporary agreement on trade in goods, to be subsumed by the International Trade Organization,[34] it does not contain references to employment and fair labour standards, apart from a preambular reference that the contracting parties strive to ensure full employment, and Article XX(e) which allows trade restrictions relating to products of prison labour. This does not mean that labour was not discussed. To the contrary, since the start of the GATT there has been a debate whether the agreement should be amended to include provisions describing the obligations of the participating states.

The debate started when Japan sought accession to the GATT in the early 1950s. The United States and the United Kingdom had severe concerns regarding low wages, hours of work and restrictive freedom of association laws in Japan.[35] The 1952 session of the GATT contracting parties conducted a formal review of Japanese labour standards. Negotiators were not only concerned with the low level of wages and labour conditions, but also with the question whether Japan could ensure that it would not derogate, either through amending its labour laws, lack of public enforcement or lack of effective countervailing trade union power. The rationale behind the criticism was not that Japan failed to guarantee certain basic rights to its workers, but the potential impact of low Japanese wages on the competitiveness of the US and UK.[36] This was especially pertinent for the UK, whose labour-intensive textile industry was in direct competition with its Japanese counterpart. To find a permanent solution for the accession of low-wage countries to the GATT, officials from

34 Susan Ariel Aaronson, *Trade and the American Dream: A Social History of Postwar Trade Policy* (The University Press of Kentucky 1996) 62.

35 Elissa Alben, 'GATT and the Fair Wage: A Historical Perspective on the Labor- Trade Link' (2001) 101 Columbia Law Review 1401, 1434. Indeed, other countries had concerns about the integration of Japan into the GATT as well, and fifteen contracting parties invoked Article XXXV GATT in order to prevent application of the GATT *inter se*. See: John Jackson, *The Jurisprudence of the GATT and the WTO: Insights on treaty law and economic relations* (Cambridge University Press 2000) 62.

36 Elissa Alben, 'GATT and the Fair Wage: A Historical Perspective on the Labor- Trade Link' (2001) 101 Columbia Law Review 1401, 1435.

the US State Department suggested for the first time to amend the GATT with "a fair labor standards provision of multilateral application which is derived from the Havana ITO Charter."[37] The rationale was that an amendment could prevent *ad hoc* (and thus potentially discriminatory) invocation of labour concerns in future accession negotiations.[38] The amendment to the GATT that was informally suggested read:

> The Contracting Parties recognize (1) that all countries have a common interest in the achievement and maintenance of fair labor standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit, and (2) that unfair labor conditions (i.e., the maintenance of labor conditions below those which the productivity of the industry and the economy at large would justify), particularly in production for export, may create difficulties in international trade which nullify or impair benefits under this Agreement. In matters relating to labor standards that may be referred to the Contracting Parties under Article XXIII they shall consult with the International Labour Organization.[39]

During the official meetings on the accession of Japan, however, the US did not seek an amendment but merely asserted that "the provisions of Article XXIII were broad enough to cover cases involving competition on the basis of unfair labour conditions."[40] Article XXIII GATT is concerned with nullification and impairment. It provides for procedure that allows states to complain against conduct that, as such, is not GATT incompliant but nevertheless impairs the negotiated commitments.

In 1953 the nullification and impairment procedure was thus at the core of the trade-labour debate, but it was unclear whether an additional interpretative declaration was necessary in order to clarify that "the existence of unfair labour conditions, particularly in production for export, would be a situation justifying recourse to Article XXIII."[41] Although other states were reportedly indifferent on whether to support or oppose a declaration,[42] the General Session of the GATT contracting parties did not consider any labour-related amendments or declarations. In 1955 Japan acceded to the GATT without the

37 US Department of States, 'Internal Memorandum Regarding Japanese Membership in GATT' (31 December 31 1952), cited in ibid.

38 Ibid.

39 US Commission on Foreign Economic Policy, 'Staff Papers' (Washington, 1954) 437-438

40 General Agreement on Tariffs and Trade, 'Summary Record of the Sixth Meeting' (29 September 1953) SR.8/6.

41 General Agreement on Tariffs and Trade, 'Ad Hoc Committee on Agenda and Intersessional Business – Report on the Accession of Japan' (13 February 1953) L/76, 5. Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 126 International Labour Review 565, 574-575.

42 Elissa Alben, 'GATT and the Fair Wage: A Historical Perspective on the Labor- Trade Link' (2001) 101 Columbia Law Review 1401, 1437, citing a telegram from the US Consulate in Geneva to the Secretary of State.

other members taking any action to address the initial concerns regarding wages and labour conditions. Arguably however, part of the reason why Japan eventually acceded to GATT was related to the fact that during the accession negotiations (1952-1956) it ratified ten ILO conventions.[43] This included the 1949 Right to Organise and Collective Bargaining Convention (No 98) and the 1947 Labour Inspection Convention (No 81). The Japanese accession also accelerated discussions within the GATT about a special arrangement that would allow selective safeguard measures against textile imports from low-wage economies.[44] This was eventually adopted in 1961 and continued to exist until the World Trade Organization was established in 1995.[45]

The first attempt to amend the GATT was tabled during the 1979 Tokyo Round. During the final stages of the negotiations, the United States submitted a two-page paper containing suggestions for a GATT working group on 'minimum international labour standards'.[46] During the discussion of the US memorandum, other states indicated that labour was not an "immediate task" of the GATT or was simply irrelevant.[47] Consequently, this first concrete proposal for trade-labour linkage since 1953 died in vain. During the subsequent Uruguay Round of trade negotiations, which ran between 1986 and 1994, the United States narrowed its ambitions. In 1986,[48] 1987[49] and 1990[50] attempts were made to discuss labour issues in the GATT through studies or working groups. On the other side of the Atlantic, the European Parliament was the most vocal actor. Since the 1980s it adopted various resolutions on the role of labour standards in the multilateral trade regime, although the specific

43 Ibid 1438-1439.

44 Niels Blokker, 'International Regulation of World Trade in Textiles' (PhD Thesis University of Leiden 1989) 68-69.

45 Niels Blokker and Jan Deelstra, 'Towards a Termination of the Multi-Fibre Arrangement?' (1994) 28 Journal of World Trade 97.

46 General Agreement on Tariffs and Trade, 'Minimum International Labour Standards' (11 October 1979) CG.18/W/34.

47 General Agreement on Tariffs and Trade, 'Note on the Tenth Meeting of the Consultative Group of Eighteen' (23 November 1979) CG.18/10 5-6.

48 General Agreement on Tariffs and Trade, 'Worker Rights – Prep Com' (25 June 1986) (86)W/43.

49 General Agreement on Tariffs and Trade, 'Relationship of Internationally-Recognized Worker Rights to International Trade – Communication from the United States' (3 July 1987) L/6196; General Agreement on Tariffs and Trade, 'Relationship of Internationally-Recognized Worker Rights to International Trade – Request for the establishment of a working party – Communication from the United States' (28 October 1987) L/6243.

50 General Agreement on Tariffs and Trade, 'Communication for the United States Concerning the Relationship of Internationally-Recognized Labour Standards to International Trade' (21 September 1990) L/6729. For the discussion of the US proposal, see: General Agreement on Tariffs and Trade, 'Minutes of Meeting' (1 November 1990) C/M.245, 23-28.

demands of the European Parliament differ per resolution.[51] Nonetheless, even modest attempts to create a working group on trade-labour linkage were rejected by the GATT contracting parties.[52]

The Uruguay Round resulted in the creation of the World Trade Organization. The inaugural Ministerial Conference of the WTO was held in Singapore in 1996. Labour was once again on the agenda. In the final document the ministers were able to formulate a consensus on labour. This has been the only political statement on labour standards in the post-war multilateral trade regime.[53] The Declaration states that:

> 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,

51 In 1988, it supported a "consultative committee to be set up jointly by GATT and the ILO," that would be concerned with a broad set of ILO standards. European Parliament, 'Resolution of 18 November 1988 on the stage reached in the multilateral trade negotiations within the Uruguay round of GATT' (19 December 1988) OJ C 326/315, para 77. The Parliament envisioned that the joint committee would review compliance with ILO standards "relating to freedom of association, the right to negotiate collective agreements, working time, minimum age of employment, protection of workers' jobs, discrimination, forced labour, and work inspection, together with all standards failure to comply with which is liable to disrupt trade and distort competition." Two resolutions that were adopted two years later no longer envisioned a joint committee, but called on the European Commission for "social provisions" in the Multifibre Arrangement, which was the special regime for textile products, and for the inclusion of "social clauses" in the GATT. European Parliament, 'Resolution of 11 October 1990 on the possible renewal of the Multifibre Arrangement or the subsequent regime after 1991' (12 November 1990) OJ C 284/152, para 30; European Parliament, 'Resolution of 11 October 1990 on the possible renewal of the Multifibre Arrangement or the subsequent regime after 1991' (12 November 1990) OJ C 284/152, para 152.

52 Developing countries were fiercely opposed. Support amongst the member states and institutions of the European Communities was fragmented. While France, Belgium, the Netherlands, Denmark and the European Parliament were in favour of a social clause, Germany, the United Kingdom and the Council of the European Communities were less enthusiastic. See: Jan Orbie and Lisa Tortell, 'From the social clause to the social dimension of globalization' in Jan Orbie and Lisa Tortell (eds) *The European Union and the Social Dimension of Globalization* (Routledge 2009) 6-7. Rafael Peels and Marialaura Fino, 'Pushed out the Door, Back in through the Window: The Role of the ILO in EU and US Trade Agreements in Facilitating the Decent Work Agenda' (2015) 6 Global Labour Journal 189, 191-192.

53 The Singapore Declaration did not end the political debate at the WTO. At the 1999 Ministerial Conference in Seattle, US President Clinton again advocated the idea of a WTO working group on trade and labour which would eventually lead to a sanction mechanism. The idea was supported by many of the 30.000 to 40.000 protesters present at the Conference. Developing countries, however, had not changed their position and threatened to veto any deal that would include reference to labour standards.

> 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.[54]

Since the 1996 Singapore Declaration the issue of trade-labour linkage has continued to be raised at various Ministerial Conferences but states never reached agreement on even the most minimal proposals.[55] Meanwhile, scholars have considered the legal implications of the Singapore Declaration. According to Guzman, it shows that the WTO is "determined to keep labor issues at a distance."[56] Other scholars have argued that mentioning labour standards is already a large step,[57] that the Declaration, while dismissing the option of an amendment to the WTO Agreements, does nothing to prevent the Appellate Body from an expansive interpretation of existing provisions,[58] or even that the Appellate Body could use the Singapore Declaration as a "justification" to take labour standards into account when interpreting the WTO Agreements.[59]

3.2.3.2 The difference between labour clauses and labour-related trade measures

The failure to amend the legal framework of the GATT and the WTO has shifted attention to the interpretation of the current rules. Before turning to these rules, this section will reflect upon the purpose of the measures that are at the heart of that analysis. There are important operational and conceptual differences between labour clauses, like Article 7 of the Havana Charter, and the trade measures that could potentially be justified under WTO law. As a consequence, they should not be seen as substitutes.

The first difference concerns the sequence of events. Article 7 of the Havana Charter would have obliged states to "take whatever action may be appropriate and feasible to eliminate [unfair labour conditions] within its territory." In case of non-compliance, another state party could have submitted the case

54 Singapore WTO Ministerial 1996, 'Ministerial Declaration' (18 December 1996) WT/MIN(96)/DEC.

55 Arne Van Daele, *International Labour Rights and the Social Clause: Friends of Foes* (Cameron May 2004) 398-404.

56 Andrew Guzman, 'Trade, Labor, Legitimacy' (2003) 91 California Law Review 885.

57 Thomas Cottier and Alexandra Caplazi, 'Labour Standards and World Trade Law: Interfacing Legitimate Concerns' in Thomas Cottier (ed) *The Challenge of WTO Law: Collected Essays* (Cameron May 2007). 10; Virginia Leary, 'The WTO and the Social Clause: Post-Singapore' (1997) 1 European Journal of International Law 118, 119; George Tsogas, *Labor regulation in a Global Economy* (M.E. Sharpe 2001) 45.

58 Cf. Robert Howse, 'The World Trade Organization and the Protection of Workers' Rights' (1999) 3 Journal of Small and Emerging Business Law 131, 168.

59 Hendrik Andersen, 'Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions' (2015) 18 Journal of International Economic Law 383, 404-405.

to arbitration and, in case no satisfactory solution was reached, to the Executive Board and eventually the ITO's Conference. In this process, the state that allegedly breached Article 7 had ample time to remedy the situation. Only after a lengthy process and under strict conditions could the Executive Board allow the complainant to "release the Member ... affected from obligations or the grant of concessions".[60] As was already mentioned, the ILO would be involved in this process, and the respondent state could appeal the decision before the Conference.

Justifying trade-restrictive measures through interpretation of the GATT and the other WTO agreements takes the reverse approach. First, a member state would take a trade-restrictive measure in response to a labour-related situation in another member state, for example the US Burmese Freedom and Democracy Act of 2003 that was mentioned above. The member state that is affected by this measure may then request consultations. If the dispute cannot be settled within sixty days, it can request the establishment of a panel, the decision of which can be appealed before the Appellate Body (AB). The panel or the AB can order that the measure is inconsistent with the provisions of the WTO agreements and order its withdrawal. There is no compensation for damages, except if the state fails to bring the measure into compliance.

Secondly, a case under Article 7 Havana Charter would have focused on the question whether the labour conditions in the respondent state were indeed 'unfair' and whether appropriate and feasible actions were taken to eliminate these concerns. Arguably, this allows for differentiation between developed and developing countries, requires an assessment of possible perverse effects when countermeasures are permitted, and furthers understanding the notion of 'fair labour standards' in international trade law. Interpretative questions under the current legal framework would not focus on the conduct of the state in which the alleged unfair labour conditions took place, but on the compatibility with WTO law of the trade measure that was taken in response. For example, a determination that t-shirts made by children and t-shirts made by adults are not 'like products' would further an understanding of the concept of likeness in Articles I and III GATT, and would allow states to discriminate between the two types of t-shirts. T-shirts made by children would no longer be sold on the markets of states that do not accept them, without requiring a judgment of why – and to whom – this would be unfair. For the legal analysis, it is immaterial whether the children were in direct competition with the domestic textiles industry in the importing country, or whether they would lose their jobs and end up in worse conditions as a result of the WTO compliant measures that restrict the sale of their t-shirts in international commerce. The observation that the other member state's labour standards are low – or lowered – would suffice.

60 Art 94.3 Havana Charter.

3.2.3.3 *Defining 'fair labour standards' in trade law*

During the drafting of the Havana Charter the indeterminacy of terms like 'fair labour standards' and 'sub-standard conditions of labour' had already been flagged.[61] In a series of 'Staff Papers' prepared for the Randall Commission, which was mandated by the US Congress in the early 1950s to examine *inter alia* the "[effects] on international trade of factors such as [...] labor practices and standards,"[62] three different benchmarks were distinguished: (1) domestic differentiation, (2) depression relative to productivity, and (3) violations of international standards. In the first, unfair competition occurs when in export-oriented production "wages are depressed relative to wages paid in other lines (of production) in that country."[63] Export processing zones which are exempt from (parts of) a state's labour legislation is one of the most salient example of domestic differentiation. Second, it is possible that in the country as a whole, wages "are depressed in all lines relative to that country's productivity."[64] It is noted, however, that this is difficult to observe, as: "The actual determination of wages in an economy ... is influenced by many factors in addition to productivity, such as the institutional fabric of the country, tradition, and the general attitudes of the people."[65] The third option equates 'fairness' with 'compliance with international standards'. As the Staff Papers note, "there has been great advance in the extent to which certain practices have been ruled to be "unfair" by common international agreement."[66]

The former two grounds, which are economic rather than legal benchmarks, were considered to be most suitable in international trade law as they do not require a normative assessment of another state's domestic labour legislation.[67] By itself, a normative inquiry could never be sufficient to determine unfairness, as – in the words of ILO Director-General Jenks in 1973 – "disruptive competition may come from producers whose labour standards are not low, and

61 United Nations Conference on Trade and Employment, 'First Committee: Employment and Economic Activity' (5 December 1947) E/CONF.2/C.1/5, 1.

62 Section 309(b)(7) Trade Agreements Extension Act of 1953, Public Law 215, 83rd Congress (67 Stat 475).

63 US Commission on Foreign Economic Policy, 'Staff Papers' (Washington, 1954) 433.

64 Ibid 434 (emphasis omitted).

65 Ibid 435.

66 Ibid 437. Cf. Friedl Weiss, who opposes the interchangeable use of 'international' and 'fair' labour standards. "The former concept refers to international agreements and instruments based on values widely shared in the international community" while the latter "are considered 'fair' by particular countries only which seek to use their own 'fair' standard as the socially correct yardstick for unilateral coercive action in an attempt to raise their competitors' production costs." Friedl Weiss, 'Internationally recognized labour standards and trade' in Friedl Weiss, Erik Denters and Paul de Waart (eds) International Economic Law with a Human Face (Kluwer Law International 1998) 81.

67 US Commission on Foreign Economic Policy, 'Staff Papers' (Washington, 1954) 436. "It is obvious that it would be difficult, if not impossible, to take any action telling other countries *how* we think they ought to improve their labor standards."

labour standards may be low without giving rise to international competitive difficulties."[68] The Staff Papers thus note that with respect to the possibilities for enforcement: "Protective remedies will be more palatable to most governments than the entering of complaints against their labor standards."[69]

What is not considered is that these protective remedies may have consequences that can be considered even more problematic than the initial 'unfair' situation. This can be illustrated by the introduction of the Child Labor Deterrence Act in 1993 by US Senator Harkin. In its 1997 annual report, UNICEF commented on the effect of the proposed legislation in Bangladesh. It notes that:

> when Senator Harkin reintroduced the Bill the following year, the impact was far more devastating: garment employers dismissed an estimated 50,000 children from their factories, approximately 75 per cent of all children in the industry. The consequences for the dismissed children and their parents were not anticipated. The children may have been freed, but at the same time they were trapped in a harsh environment with no skills, little or no education, and precious few alternatives.[70]

Even when the effects of trade measures in response to foreign 'unfair' labour conditions are less direct, economists argue that restricting trade will only aggravate problems, perpetuate poverty and hinder economic growth that eventually would allow the country to raise its labour standards.[71] Some have asserted moral arguments on this basis. Bhagwati, for example, who is one of the most vocal opponents of trade-labour linkage, has argued that "central to American thinking on the question of a Social Clause is the notion that competitive advantage can sometimes be morally 'illegitimate'. In particular, it is argued that if labour standards elsewhere are different and unacceptable morally, then the resulting competition is morally illegitimate and 'unfair'."[72] Other authors support striking a balance, noting that labour clauses may be

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68 International Labour Conference (58th Session) Report of the Director-General Part 1: Prosperity for Welfare: Social Purpose in Economic Growth and Change – The ILO Contribution (Geneva 1973) 38. Nonetheless, Jenks argued that a determination of the exporting state's compliance could be an important element of the inquiry, pointing specifically to the conventions on freedom of association, discrimination, child labour, minimum wages, weekly rest and labour inspections.

69 US Commission on Foreign Economic Policy, 'Staff Papers' (Washington, 1954) 438.

70 UNICEF, 'The State of the World's Children 1997' (Oxford University Press 1997) 60.

71 See e.g. Bernard Hoekman and Michel Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (3rd edn, Oxford University Press 2009) 627; Stanley Engerman, 'The History and Political Economy of International Labor Standards' in Kaushik Basu and others (eds), *International Labor Standards: History, Theory and Policy Options* (Blackwell Publishing 2003) 60.

72 Jagdish Bhagwati, 'Free Trade, 'Fairness' and the New Protectionism: Reflections on an agenda for the World Trade Organisation' (The Institute of Economic Affairs, IEA Occasional Papers 96, 1995) 27.

acceptable when factors like trade dependence and the level of economic development of a country alleged of 'low labour standards' are accounted for.[73]

As the aim of this study is to provide a legal analysis of the linkages between international trade and investment law and labour, it will not attempt to provide its own assessment of the meaning of fair labour standards. As David Kennedy argues there is no "objective intellectual instrument" to make such determinations.[74] However, as the example of the difference between labour clauses and labour-related trade measures shows, different legal mechanisms will provide different answers, either explicitly or implicitly.

3.3 Labour-related trade measures under WTO law

3.3.1 Introduction

The purpose of this part is twofold. It will first discuss whether derogations from existing labour standards may be actionable under WTO law. Section 3.3.2 will examine the social dumping and subsidies regimes. Section 3.3.3 then looks at the GATT provisions on nullification and impairment, which protect against the negation of negotiated market access commitments through actions that do not violate WTO obligations as such. Subsequently, section 3.3.4 examines the legality of unilateral labour-related trade measures, such as import bans and mandatory labelling requirements.

3.3.2 Foreign labour conditions as unfair trade practices

3.3.2.1 Social dumping

The issue of 'dumping' is regulated in Article VI(1) GATT and the Agreement on Implementation of Article VI, which is commonly referred to as the WTO Anti-Dumping Agreement. It refers to a practice "by which products of one country are introduced into the commerce of another country at less than the normal value of the products." This may be beneficial to consumers in that country but, according to Article VI(1) "is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry." To determine the 'normal value', a comparison is made between the export

73 Friedl Weiss, 'Internationally Recognized Labour Standards and Trade' (1996) 23 Legal Issues of European Integration 161, 177-178.

74 David Kennedy, 'A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy' (Princeton University Press 2016) 117-118

price of the product and its price when destined for consumption in the exporting state itself.[75] Dumping could occur through the sale of products below their costs, or when prices are differentiated between different countries.[76]

During the interbellum, various countries imposed duties against 'social dumping' in order to offset the comparative advantage of foreign goods that were produced by workers who worked excessive hours, prison workers or other violations of international labour standards.[77] Also today, social dumping is an often-heard term in commentaries on the impact of economic globalization. The question has thus been raised how the concept of social dumping relates to the anti-dumping rules in multilateral trade law. Ayoub, for example, argues that "child labor, for example, may be found to violate the antidumping provisions ... because employment of children artificially lowers production costs, thus giving the manufacturer an economic advantage for engaging in child employment."[78] Also the ILO and the OECD have discussed this issue in various reports, although without providing a sound legal analysis of the WTO framework.[79]

Article VI GATT is based upon Article 34 of the Havana Charter. The preparatory works of the Havana Charter reveal that states felt "that there was ... a need of clarification of definition in view of the variety of circumstances

75 Art 2.2(1) Anti-Dumping Agreement.

76 Mitsuo Matsushita et al, *The World Trade Organization: Law, Practice, and Policy* (3rd edn, Oxford University Press 2015) 376-8.

77 Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 126 International Labour Review 565, 576-577, discussing examples from Austria, Argentina, Spain and Cuba.

78 Lena Ayoub, '*Nike Just Does It* – and Why the United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for Their Labor Rights Violations' (1999) 11 DePaul Business Law Journal 395, 436. See also: Daniel Ehrenberg, 'The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor (1995) 20 Yale Journal of International Law 361, 416; Laura Ho, Catherine Powell and Leti Volpp, '(Dis)assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry' (1996) 31 Harvard Civil Rights-Civil Liberties Law Review 383, 398; Anjli Garg, 'A Child Labor Social Clause: Analysis and Proposal for Action' (1999) 31 New York University Journal of International Law and Politics 473, 486; and Elissa Alben, 'GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link' (2001) 101 Columbia Law Review 1401, 1418, who takes a more cautious approach, stating that: "to the extent that labor standards are correlated to a country's level of development, they should not be included in antidumping calculations."

79 For example: Governing Body (261st Session) The social dimensions of the liberalization of world trade, GB.261/WP/SLD/1 (Geneva, November 1994) 7-11; OECD, 'Trade Employment and Labour Standards: A Study of Core Workers' Rights and International Trade' (1996) 170-171.

in which dumping may occur, such as social dumping."[80] The delegate from the United States had stated earlier that:

> "Social dumping" in the form of prison or sweated labour, or different standards of living might also be included in the term "dumping" but social dumping was very difficult to define. It might be well, for practical purposes, to limit consideration to the general concept, and leave the more nebulous problems for later development... . The prohibition by the United States of imports made by convict labour was one slight recognition of the problem of "social dumping".[81]

Although social dumping was thus expressly discussed, it was considered too vague to be included in the Havana Charter.[82] Consequently, the Havana Charter and the GATT retained only a reference to 'dumping'. This term was not considered to be generic, however, as already during the drafting of the Havana Charter there was broad agreement that Article 34 "should be restricted to price dumping."[83] This was confirmed in a 1957 legal opinion from the GATT secretariat.[84]

In addition to the narrow focus on price dumping that emerges from the preparatory works, the term social dumping poses conceptual problems. There is no commonly accepted definition. Charnovitz describes social dumping as "the export of products that owe their competitiveness to low labour standards."[85] Siroën *et al* speak of "an impingement of workers' rights applied for the purposes of boosting competitiveness, in both the import and export market alike."[86] While Charnovitz thus uses a threshold that is not necessarily related to international obligations or domestic law, Siroën *et al* restrict social dumping to situations in which workers have already attained certain rights, but these are deliberately violated. A third definition, used by Grossman and Koopman, holds that: "Social dumping refers to costs that are for their part depressed

80 United Nations Economic and Social Council, 'Preparatory Committee of the International Conference on Trade and Employment: Committee II – Draft Report of the Technical Sub-Committee' (16 November 1946) E/FC/T/C.II/54, 12.

81 United Nations Economic and Social Council, 'Preparatory Committee of the International Conference on Trade and Employment: Committee II – Technical Sub-Committee, Sixth Meeting' (8 November 1946) E/PC/T/C.II/46, 13.

82 United Nations Conference on Trade and Employment, 'First Committee: Employment and Economic Activity – Summary Record of the Fifth Meeting' (5 December 1947) E/CONF.2/C.1/SR.5, 6.

83 United Nations Conference on Trade and Employment, 'Trade Committee – Commercial Policy – Notes on Nineteenth Meeting' (29 January 1948) E/CONF.2/C.3/C/W.20, 3

84 General Agreement on Tariffs and Trade, 'Anti-Dumping and Countervailing Duties – Secretariat Analysis of Legislation' (23 October 1957) L/712, 5.

85 Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 126 International Labour Review 565, 566.

86 Jean-Marc Siroën et al, 'The Use, Scope and Effectiveness of Labour and Social Aspects and Sustainable Development Provisions in Bilateral and Regional Free Trade Agreements' (Final Report for the European Commission 15 September 2008) VC/2007/0638, 36.

below a natural level by means of 'social oppression' facilitating unfair pricing strategies against foreign competitors."[87]

The three definitions have in common that they do not distinguish between the price of goods in the import and export markets, which is at the core of the determination of the normal value of a good. Siroën *et al* explicitly refer to the import effects, meaning that a lowering of labour standards may displace imports by domestic production. Charnovitz focuses only on exports, but does not mention a possible discrepancy between domestic prices and export prices. The same is true for Maupain, who dismisses the term social dumping as a "misleading analogy." He argues that: "The transposition of this concept [normal value, RZ] to the field of worker protection ... supposes that products from a country not respecting what are supposedly 'normal' labour standards have an unfair price advantage compared to those produced under working conditions meeting the relevant standard."[88]

Maupain does note that in the case of export processing zones it would be possible to identify 'abnormal' labour standards.[89] But the juxtaposition of 'normal' and 'abnormal' labour standards only matters when this creates a difference between domestic and export prices. The transposition of the concept of normal value to the field of worker protection would thus hinge on the existence of a dumping margin that is caused by discrepancies between labour standards for domestic production and labour standards for exports; for example when a country's labour law does not apply in its export processing zones.[90] There are many examples of restrictions of trade unionism, collective bargaining or discriminatory treatment of female workers in export processing zones (EPZs). For the purpose of the social dumping analogy, what is 'abnormal' is not that these practices exist or that that violate international standards, but the disparity they cause in domestic and export prices.

The corollary is that the WTO anti-dumping regime is designed to protect industries, not workers. Assume that there is a discrepancy in state A's labour standards applying to export processing zones and the rest of the country, and that this causes a price difference that can be qualified as dumping under the WTO rules. For WTO purposes, it is immaterial whether this is resolved by improving labour standards in the EPZ or by lowering them in the rest of the country. Apart from the practical problems that have been raised in the literature, such as the question whether it is possible to assess 'material injury'

87 Harald Grossman and Georg Koopman, 'Social Standards in International Trade: A New Protectionsist Wave? in Harald Sander and András Inotai (eds) *World Trade After the Uruguay Round: Prospects and Policy Options for the Twenty-first Century* (Routledge 1996) 116.

88 Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Hart Publishing 2013) 137.

89 Ibid.

90 Maupain mentiones export processing zones but only in determination of 'normal' working conditions.

in the case of social dumping,[91] the term as such should be decoupled from the WTO anti-dumping regime. Indeed, it is mainly used for its strong normative connotation. In this sense, it is the antagonist of 'decent work', a concept which also lacks specific legal meaning but articulates a general desire for social justice.[92]

3.3.2.2 Subsidies

Related to the concept of social dumping is the proposition that low labour standards constitute a subsidy, and are thus a possible violation of Article XVI GATT and the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). Article 1 of the SCM Agreement defines a subsidy as "a financial contribution by a government or any public body within the territory of a Member".[93] It subsequently provides a list of possible financial contributions, including grants, loans, fiscal incentives and the provision of non-infrastructure goods or services. Furthermore, the subsidy has to confer a benefit and it has to be "specific to an enterprise or industry or group of enterprises or industries."[94]

Subsidies are not necessarily prohibited. Rather, the SCM Agreement distinguishes between prohibited, actionable and non-actionable subsidies. The former covers *inter alia* export subsidies, as these have a clear trade distorting effect. Actionable subsidies are those that cause injury to the domestic industry of a WTO member.[95] The residual category of non-actionable subsidies includes all subsidies that are not specific or are excluded due to their purpose, such as research grants. The SCM Agreement provides two avenues for affected states: filing a complaint before the WTO dispute settlement body, or unilaterally imposing 'countervailing' measures to offset the economic injury caused by the subsidies.

91 Maryke Dessing, 'The Social Clause and Sustainable Development' (Sustainable Development and Trade Issues, ICTSD Resource Paper No 1, October 2001) 29.

92 Cf. Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Hart Publishing 2013) 136. The social dumping analogy is also rejected by other scholars, see for example: Janelle Diller and David Levy, 'Child Labor, Trade and Investment: Towards the Harmonization of International Law' (1997) 91 American Journal of International Law 663, 680; David Leebron, 'Linkages' (2002) 96 American Journal of International Law 5, 23, fn 61 on problems with the concept of social dumping.

93 Art 1.1(a)(1) Agreement on Subsidies and Countervailing Measures.

94 Art 2.1(a) Agreement on Subsidies and Countervailing Measures

95 Art 5 Agreement on Subsidies and Countervailing Measures

Similar to the social dumping discussion, the argument has been advanced that low labour standards may constitute a subsidy.[96] Tsogas, for example, argues that:

> Although proponents of a social clause generally recognize that partners to a free-trade agreement cannot be expected to have identical social conditions, it is also considered unacceptable for any country deliberately to maintain poor conditions in order to gain a trade advantage .... Such an approach could be considered as a form of government subsidy.[97]

It is unpersuasive that 'maintaining poor labour conditions' is covered by the definition of subsidies under the SCM Agreement.[98] Unlike the subsidies that are listed in Article 1, they are the result of an omission to legislate or enforce. More importantly, it is difficult to maintain that low standards are a financial contribution, and that there is a causal relationship with material damage to foreign producers.[99] There may be certain labour market policies that confer specific benefits to domestic producers. This includes exemptions to minimum wage or collective bargaining legislation in export processing zones, and investment contracts that contain stabilization clauses.[100] But to consider these 'tailored' labour market policies as subsidies is precluded by the fact that the SCM Agreement only covers financial benefits. Trade unions thus advocate amending Article 1 of the SCM Agreement to include non-financial subsidies,

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96 The origins of this argument can be traced back to the early 1900s. Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 126 International Labour Review 565, 577, referring to: Sydney and Beatrice Webb, *Industrial democracy* (Longmans, Green and Company 1902) at 868.

97 George Tsogas, *Labor regulation in a Global Economy* (M.E. Sharpe 2001) 35; see also Anjli Garg, 'A Child Labor Social Clause: Analysis and Proposal for Action' (1999) 31 New York University Journal of International Law and Politics 473, 486; Raj Bhala, 'Clarifying the Trade-Labor Link' (1998) 37 Columbia Journal of Transnational Law 11, 19; Daniel Ehrenberg, 'The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor' (1995) 20 Yale Journal of International Law 361, 403.

98 Other academic contributions on the interpretation of the SCM Agreement refer to similar concepts, such as "labour standards," Arne vanDaele, *International Labour Rights and the Social Clause: Friends or Foes* (Cameron May, 2005) 412, "poor labour conditions," Sean Turnell, 'Core Labour Standards and the WTO' (2002) Economic and Labour Relations Review 13, 16. "non-enforcement of labour standards," Steve Charnovitz, 'Promoting higher labor standards' in Brad Roberts (ed), *New Forces in the World Economy* (MIT Press 1996) 74 or "wages and working standards that depress the cost of production." Drusilla Brown, 'International Labor Standards in the World Trade Organization and the International Labor Organization' (2000) 82 Federal Reserve Bank of St. Louis Review 106.

99 Sean Turnell, 'Core Labour Standards and the WTO' (2002) Economic and Labour Relations Review 13, 17.

100 Stabilization clauses are provisions in contracts between host states and foreign investors which intend to freeze the applicability of host state legislation vis-à-vis the investor at a certain date, or provide compensation to the investor when the host state changes its domestic legislation.

including "violations of labour rights."[101] Indeed, only when the Agreement would be amended accordingly, the possibility to adopt countervailing measures in response to low labour standards may arise.

3.3.3 Foreign labour conditions as nullification and impairment of benefits

A third possibility is to argue that labour standards as such do not constitute a breach of WTO law, but that they nonetheless nullify or impair benefits that states have attained. Article XXIII.1 GATT contains a procedure to bring 'non-violation complaints' (NVC). This procedure may be invoked when:

> ... any benefit accruing to [any contracting party] 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 ... (*b*) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation.

The rationale of non-violation complaints is based on the possible substitution of tariff protection by other – WTO-compliant or non-compliant – policies that nullify or impair the effect of negotiated concessions. There are many areas that affect trade, but that are not regulated by the WTO. The NVC procedure thus gives substance to the general rule in the law of treaties that obligations must be performed in good faith.[102]

During the GATT-era all NVC cases concerned the payment of subsidies to allegedly offset the benefits of negotiated concessions.[103] However, the wording of Article XXIII is generic. In *EC–Asbestos* the Appellate Body confirmed that: "The use of the word 'any' suggests that measures of all types may give rise to such cause of action."[104] According to Mavroidis, Berman and Wu, this "leaves the door open to challenge any GATT-consistent behaviour."[105] Since it was raised in the accession negotiations with Japan in 1953, the possibility of applying the nullification or impairment procedure in the context of labour standards has not been discussed within GATT or WTO fora, nor tested in practice.[106] The idea was reinvigorated in the literature some fifty years

101 International Trade Union Confederation, 'The WTO and Export Processing Zones' (undated) <www.ituc-csi.org/IMG/pdf/WTO_and_EPZs.pdf> accessed 24 June 2018.

102 Art 26 VCLT.

103 Petros Mavroidis, George Bermann and Mark Wu, *The Law of the World Trade Organization (WTO): Documents Cases & Analysis* (West 2010) 895.

104 WTO, *European Communities: Measures Affecting Asbestos and Asbestos-Containing Products – Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R, para 188.

105 Petros Mavroidis, George Bermann and Mark Wu, *The Law of the World Trade Organization (WTO): Documents Cases & Analysis* (West 2010) 895.

106 General Agreement on Tariffs and Trade, 'Ad Hoc Committee on Agenda and Intersessional Business – Report on the Accession of Japan' (13 February 1953) L/76, para 12.

later. Bagwell and Staiger noted that the modifications in a state's labour market policies can have the same effect as the payment of subsidies:

> With its unilateral tariff options restricted, this government might be tempted to offer unilateral import relief to its producers by another route, namely, by eliminating costly environmental health and safety regulations, much as those concerned with the race-to-the bottom possibility would fear. [By] offering import relief with a reduction in labor or environmental standards, the government would in effect be unilaterally "withdrawing" market access concessions that it had previously negotiated, and in altering the balance of market access concessions it would thereby shift some of the costs of its import relief decision on to foreign exporters.[107]

Indeed, the basic logic of NVCs applies similarly to the various types of WTO-consistent measures that states can take to alter the distributive effect of trade negotiations. Bagwell and Staiger argue that an important benefit of NVCs compared to the insertion of labour provisions in the WTO Agreements is that the former are not static. They would not introduce a 'normative floor' below which no competition is allowed, such as compliance with the fundamental labour standards. As such a minimum level is static, states that are currently above this level may lower their domestic labour standards without violating the labour clause. However, states that are currently at or below the level of labour standards prescribed by the labour clause may be non-compliant with ILO norms on child labour, but as long as they do not downgrade their standards they do not cause a nullification or impairment.[108]

The problem of labour-related NVCs is threefold. First, practice shows considerable restraint by WTO members to bring NVCs at all, especially in the context of politically sensitive areas of domestic regulation such as labour law.[109] Second, to satisfy the burden of proof the complainant will have a hard time demonstrating that (1) the change in labour standards could not have been reasonably anticipated and (2) that these changes impaired the benefits accruing to the complaining party.[110] And third, as the exporting state's change in labour legislation is not a violation of the WTO Agreements, but merely nullifies or impairs the benefits of the importing state under those

107 Kyle Bagwell and Robert Staiger, 'The WTO as a Mechanism for Securing Market Access Property Rights: Implications for Global Labor and Environmental Issues' (2001) 15 Journal of Economic Perspectives 69, 81.

108 Ibid 83-84.

109 Petros Mavroidis, George Bermann and Mark Wu, *The Law of the World Trade Organization (WTO): Documents Cases & Analysis* (West 2010) 895.

110 Ibid 895-896. Janelle Diller and David Levy, 'Child Labor, Trade and Investment: Towards the Harmonization of International Law' (1997) 91 American Journal of International Law 663, 685.

agreements, a panel or the Appellate Body may only make non-binding recommendations.[111]

The argument that the NVC procedure may be used to address derogations from labour standards that were in force at the time the concessions were negotiated, implies that states can take their trading partners' labour standards into account during the negotiations. If state A knows that state B has a statutory minimum wage of 12 years for work in the textiles sector, it cannot bring a NVC after it has agreed to lower state B's tariffs in textiles. Indeed, as early as 1933, James Shotwell, who had been involved in the foundation of the ILO, argued that:

> labor conditions should be made one of the basic factors in tariff bargaining; that products made under specific labor conditions – internationally agreed upon – should be given preferential treatment, while articles made under oppressive or exploitative conditions should be subjected to higher duties and impositions.[112]

In 1953, the idea was included in the report of the Randall Commission in the United States, stating that "our negotiators should simply make clear that no tariff concessions will be granted on products made by workers receiving wages which are substandard in the exporting country.[113] One year later, the US Government expressed support for this position, although there is no evidence that this was put into practice.[114]

In reality, states face severe constraints when they would want to take their trading partners' labour standards into account during tariff negotiations. The most favoured nation (MFN) principle laid down in Article I GATT prohibits state A to levy a 50% tariff on child labour t-shirts from state B, while allowing exporters from state C – where there is no child labour – to pay a lower percentage. The more states are party to a trade agreement containing an MFN clause, the more difficult it is to impose high tariffs on goods that are produced under poor labour conditions in one of the member states.

111 Art 26 Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 of the WTO Agreements).

112 Harold Josephson, *James T. Shotwell and the Rise of Internationalism in America* (Associated University Pressess 1975) 206.

113 Report of the Commission on Foreign Economic Policy (23 January 1954) 62.

114 Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 126 International Labour Review 565, 579, citing President of the United States, 'Special message to the Congress on Foreign Economic Policy' (30 March 1954).

3.3.4 Trade measures in response to foreign labour conditions

3.3.4.1 PPMs and a typology of labour-related measures

While the MFN principle clearly precludes differentiation between WTO member states, it is less clear whether it prevents measures that distinguish between goods based on the labour conditions under which they are produced. In this context, labour conditions are commonly referred to as process and production methods (PPMs). More specifically, there are considered 'non-incorporated', or 'non-product-related' PPMs.[115] This allows for a distinction with process and production methods that do affect the end-product, such as the organic production of vegetables which leaves no residue of pesticides, as opposed to non-organically grown vegetables. The range of non-product-related PPMs (hereinafter simply referred to as PPMs) in limitless, from the catch of shrimp using turtle friendly devices to the production of textiles by adults who earn a living wage. The central question is thus to what extent trade measures that distinguish between products based on certain non-product-related PPMs are legal under WTO law.

The answer to this question first of all depends on the particular trade measure that is based on a PPM. At least four different options can be distinguished:

1. A ban on goods from a country or region due to non-compliance with certain labour standards, either in the production of those goods or in general. An example of this is the US Burmese Freedom and Democracy Act of 2003 that responded to the country's forced labour violations, which stipulated that: "the President shall ban the importation of any article that is a product of Burma."[116]

115 Steve Charnovitz, 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality' (2002) 27 Yale Journal of International Law 59, 65.

116 Section 3(a)(1) Burmese Freedom and Democracy Act of 2003, Public Law 108-61, 108th Congress (117 Stat 865). Section 301 of the US Trade Act contains a more general provision, authorizing the President to take economic measures in case of, *inter alia*, "unreasonable" policies "which burden or restrict United States commerce." Section 301 (a)(1) Trade Act of 1974, Public Law 93-618, 93rd Congress (88 Stat 2041). In the 1988 Omnibus Trade and Competitiveness Act, the definition of unreasonableness has been broadened to include: "any act, policy, or practice, or any combination of acts, policies, or practices, which – ... (iii) constitutes 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 labor, (IV) fails to provide a minimum age for the employment of children, or (IV) fails to provide standards for minimum wages, hours of work, and occupational safety and health of workers." Omnibus Trade and Competitiveness Act of 1988, Public Law 100-418, 100th Congress (102 Stat 1167). The 2015 Trade Facilitation and Trade Enforcement Act also amended Section 301, adding an additional ground for unreasonable policies against which the President may authorize trade measures, namely: "any act, policy, or practice, or any combination of acts, policies, or practices, which – ... (iv) constitutes a persistent pattern of conduct by the government of a foreign country under

2. A requirement that imported goods comply with certain PPMs. An example of this can be found in Section 307 of the US Tariff Act of 1930 (19 U.S.C. §1307), which prohibits the importation of "[a]ll goods, wares, articles, and merchandise mined, produced or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions." The definition of forced labour was copied almost verbatim from the ILO Forced Labour Convention No 29 that was adopted the same year. In 2000, the definition was expanded to also include "forced and indentured child labor."[117]
3. A requirement that importers exercise 'due diligence' when importing goods to verify that these have been produced in compliance with certain PPMs. An example is the European Regulation which imposes a range of specific requirements for supply chain due diligence on importers of the so-called 'conflict minerals' from conflict-affected and high-risk areas.[118] Although there are no similar arrangements that specifically address labour standards, the EU Regulation does note that child labour is a common human rights abuse in resource-rich, conflict-affected areas.[119]
4. A label attesting that goods have been produced in compliance with certain PPMs. An example is the Belgian 'Act for the Promotion of Socially Responsible Production,' which was adopted in 2002.[120] This law created a non-mandatory government-sponsored social labelling scheme that domestic and foreign producers could apply for, in order to demonstrate that their

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which that government fails to effectively enforce commitments under agreements to which the foreign country and the United States are parties, including with respect to ... labor". Sec 307 Trade Facilitation and Trade Enforcement Act of 2015, Public Law 114-125, 114th Congress (130 Stat 189). 'Agreements with respect to labour' arguably include the fourteen ILO Conventions that the United States has ratified, as well as the ICCPR and possibly the thirteen Free Trade Agreements and two Bilateral Investment Treaties that contain labour commitments. As Section 301 does not prescribe the type of measures that the President may take, they could be targeted at a country as a whole, or at the specific goods that have not been produced in accordance with the prescribed PPM.

117 Section 411(a) Trade and Development Act of 2000, Public Law 106-200, 106th Congress (114 Stat 298). The 2006 Decent Working Conditions and Fair Competition Act would have amended Section 307 to prohibit the importation of any "sweatshop good," which it defined as "any good, ware, article, or merchandise mined, produced, or manufactured wholly or in part in violation of core labor standards" but the bill was not adopted. See Section 201(b) Decent Working Conditions and Fair Competition Act, S. 3485, 109th Congress (text of 8 June 2006, not entered into force).

118 Regulation (EU) 2017/821 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L 130/1.

119 For an analysis of WTO compatibility of this regulation, see: Enrico Partiti and Steffen van der Velde, 'Curbing Supply-Chain Human Rights Violations Through Trade and Due Diligence. Possible WTO Concerns Raised by the EU Conflict Minerals Resolution' (2017) 51 Journal of World Trade 1043.

120 Wet van 27 februari 2002 ter bevordering van sociaal verantwoorde productie, *Belgisch Staatsblad* 26 maart 2002. (Law for the Promotion of Socially Responsible Production).

> products were made in compliance with the eight fundamental ILO Conventions.

These four options differ in many ways. As such, they are to be assessed under different provisions of the GATT and the TBT Agreement. The analysis below does not give a definite answer on the legality of these four examples. Rather, they illustrate the diverse types of labour-related trade measures that states could take and the difficulties of reconciling them with multilateral trade law.

3.3.4.2 Labour-related trade measures under the GATT

The legality of trade measures responding to labour-related PPMs is to be assessed against Articles I, III:4 and XI GATT, and Article 2 TBT Agreement. Whether the GATT or TBT applies to a measure depends on the concrete design of the trade restrictions that an importing state imposes in response to an exporting state's labour practices. In case these restrictions violate one of the GATT articles, recourse may be had to the general exceptions clause found in Article XX GATT. The TBT Agreement does not have a general exceptions clause.

Article I GATT contains obligations concerning MFN treatment, which prohibits differentiation between 'like' products originating in different countries. If the European Union, for example, imposes a 6.5% import tariff on 'articles of apparel and clothing accessories' this applies to clothing accessories produced in all WTO member states. Due to its broad scope the MFN obligation prohibits not only differentiation in applied tariffs, but covers "any advantage, favour, privilege or immunity." The prohibition to discriminate between foreign exporters at the border is complemented by Article XI, which prohibits quantitative import and export restrictions. It provides that:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Internal taxes and regulations, as opposed to border measures, are governed by the National Treatment (NT) obligation in Article III:2 and III:4 GATT respectively. These provisions prohibit discrimination between domestic and foreign producers. Paragraph 4, which is most relevant to assess labour-related trade measures, provides that:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

States may thus impose regulatory requirements on imported goods, but only if it applies these requirements equally to domestic like products. The distinction between internal regulations (Article III:4) or quantitative restrictions (Article XI) is not always clear as the enforcement of non-tariff measures also occurs at the moment of importation. In an interpretative note, it is clarified that:

> Any internal ... law, regulation or requirement ... which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal ... law, regulation or requirement ... and is accordingly subject to the provisions of Article III.

The scope of article III:4 GATT is thus rather broad. This is significant, as quantitative restrictions are by definition prohibited. General import bans such as the 2003 Burmese Freedom and Democracy Act are thus inconsistent with the GATT, unless they can be justified under the general exceptions clause found in Article XX. With regard to the adoption of internal fiscal and non-fiscal measures that are covered by Article III, the prescriptive jurisdiction of states is indefinite provided that these measures are not discriminatory in their design or effect. Before turning to the interpretation of the tem 'like product', however, the relationship between Article III GATT and the TBT Agreement requires some further clarification, in order to determine whether the legality of product specific trade measures, for example based on Section 307 of the US Tariff Act of 1930, would have to be examined on the basis of the GATT or the TBT Agreement.

3.3.4.3 Labour-related trade measures under the TBT Agreement

The TBT Agreement contains rules on 'technical regulations' and 'standards'.[121] Its purpose is to enable states to adopt technical regulations regarding "product characteristics or their related processes and production methods" as long as these are not discriminatory or unduly restrict international trade. Unlike the GATT, PPMs are thus central to the TBT Agreement. Most obligations in the TBT Agreement are concerned with technical regulations, which are:

> Document[s] which [lay] down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

121 WTO, *European Communities: Measures Affecting Asbestos and Asbestos Containing Products – Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R, para 80.

The term 'standards', on the other hand, refers to technical regulations that are not mandatory, but which are nonetheless "approved by a recognized body."[122] This includes governmental actors and non-governmental bodies that have "legal power to enforce a technical regulation."[123] Standards are subjected to significantly less stringent obligations.[124]

The first question that arises in the context of labour-related trade measures is thus whether it "lays down product characteristics or their related processes and production methods". The Panel in the *EC–Seal Products* case, which concerned the European ban on the importation of seal products, held that this ban constituted a technical regulation, as it "lays down product characteristics in the negative form by requiring that all products not contain seal."[125] The Appellate Body disagreed, and found that the ban was imposed subject to conditions based on criteria "relating to the identity of the hunter *or the type or purpose of the hunt from which the product is derived*."[126] Subsequently, it considered that there was no support in the text of the TBT Agreement or the case law "to suggest that the identity of the hunter, the type of hunt, or the purpose of the hunt could be viewed as product characteristics."[127]

Trade measures based on non-product-related PPMs, such as labour standards, are therefore outside the scope of the TBT Agreement and have to be examined under Article III:4 GATT. This does not apply to the Belgian social label, however, as 'mandatory' labelling schemes are explicitly covered by the definition of technical regulations.[128] Strictly non-governmental labels, which,

122 Art 2, Annex 1 TBT Agreement.

123 Annex 1.8 TBT.

124 Standards are subjected to the 'Code of Good Practice for the Preparation, Adoption and Application of Standards' (Code of Good Practice) which is found in Annex 3 of the TBT Agreement. It reiterates the MFN and NT obligations, and obliges standardizing bodies to "ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade." Article E, Annex 3 TBT Agreement. Furthermore, it holds that "[where] international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops [...]." Art F, Annex 3 TBT Agreement. The remainder of this section will focus on technical regulations and internal regulations that are covered by Article III:4 GATT.

125 WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Panel* (25 November 2013) WT/DS400/R and WT/DS401/R, para 7.106.

126 WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Appellate Body* (22 May 2014) WT/DS400/AB/R and WT/DS401/AB/R, para 5.41 (emphasis added).

127 Ibid, para 5.45.

128 Joost Pauwelyn, 'Non-Traditional Patterns of Global Regulation: Is the WTO 'Missing the Boat'?' in Chirstian Joerges and Ernst-Ulrich Petersmann (eds) *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart Publishing 2006) 222. The 2012 Appellate Body report in *US-Tuna II* interpreted the meaning of the phrase 'with which compliance is mandatory'. The United States argued that its legislation concerning claims on dolphin-safe tuna was not mandatory because it did not restrict market access to products that had obtained the label. The Appellate Body disagreed, and held that the measure was mandatory

according to Locke, "emerged as the dominant approach that global corporations and labor rights NGOs alike embrace to promote labor standards in global supply chains"[129] are not covered by the TBT Agreement.[130]

The main substantive obligations concerning technical regulations are set out in Articles 2.1 and 2.2 of the TBT Agreement. The former lays down an MFN and NT obligation. Like GATT Articles I and III, 'like products' are used as the benchmark to determine whether a technical regulation is discriminatory. Article 2.2 adds certain minimum requirements, providing that:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.

Importantly, the 'legitimate objective' criterion resembles the GATT's general exception clause. Unlike Article XX GATT, however, the list provided here is not limitative. Joseph has argued that: "Presumably, the protection of human

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for producers because they "must comply with the measure at issue in order to make any 'dolphin-safe' claim." WTO, *United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Appellate Body* (16 May 2012) WT/DS381/AB/R, para 196.

129 Richard Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy* (Cambridge University Press 2013) 11.

130 WTO law only disciplines market access restrictions that are attributable to public entities. The TBT Agreement does not contain any substantive obligations regarding private sector standards. Article 4.1 of the TBT Agreement obliges member states to ensure that non-governmental standardizing bodies accept and comply with the Code of Good Practice, but this only covers "non-governmental bodies which have legal power to enforce a technical regulation." Article 10.1.1 Annex 1 TBT Agreement For private standardizing bodies compliance with the Code of Good Practice is voluntary. Denkers also refers to the fact that an attempt by Canada "to extent the coverage of the TBT Agreement to voluntary eco-labelling schemes" failed to gain political support in the TBT Committee, see Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Intersentia 2008) 56. However, as Kudryavtsev argues, "[voluntary] private-sector standards may accrue more of less mandatory character through certain governmental involvement or incentives for their development or application." Arkady Kudryavtsev, 'Private Standardization and International Trade in Goods: Any WTO Law Implications for Domestic Regulation?' (Society of International Economic Law Working Paper No 2012/02, 2012) 5. If these hybrid forms of regulation are not covered by WTO disciplines, States could hide behind a "private veil." ibid 27. The WTO Panel in *Japan-Film* noted that: "past GATT cases demonstrate that the fact that an action is taken by private parties does not rule out the possibility that it may be deemed to be governmental if there is sufficient government involvement with it." WTO, *Japan: Measures Affecting Consumer Photographic Film and Paper – Report of the Panel* (31 March 1998) WT/DS44/R, para 10.56. Thus far, however, the involvement of States in the field of social labeling appears to be limited.

rights would suffice as a legitimate purpose."[131] While the near universal support for some human rights and labour rights norms certainly supports this contention, it is unclear whether an objective which is essentially extraterritorial will be considered legitimate. Arguably, a social label would stand a better chance when it is framed as a means to prevent deceptive practices. In the WTO *US–Tuna II* case, the Panel noted that: "The objective of preventing consumers of tuna products from being deceived by false dolphin-safe allegations falls within the broader goal of preventing deceptive practices."[132] Although the Appellate Body's analysis was focused on the objective of dolphin protection, and the question whether this coerced Mexico into adopting certain standards, the prevention of deceptive practices ground appears to allow for a broad spectrum of labelling measures. The same argument could be used to uphold a social label under the TBT.[133]

In addition to the legitimacy of the objective, a technical regulation cannot be "more trade restrictive than necessary" and must be applied in a non-discriminatory way. The next sector will examine the definition of 'like products' which is the benchmark to determine discrimination.

3.3.4.4 The definition of 'like' products in WTO law

The non-discrimination obligations of Articles I and III:4 GATT and 2.1 TBT Agreement apply only between two products that are 'like'. Hence, if the proposition is accepted that two t-shirts are not 'like' products when one is produced under working conditions that are in compliance with ILO standards, and one is produced by 8-year old children, there might be no obligation to treat those products equally. If these products are 'like', however, measures that disadvantage child labour products are *prima facie* non-compliant with the GATT.

There is no single definition of likeness in WTO law. In fact, the Appellate Body has explicitly held that its meaning in does not have to be consistent.[134]

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131 Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (Oxford University Press 2011) 127.

132 WTO, *United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Panel* (15 September 2011) WT/DS381/R, para 7.437.

133 The Belgian measure has never been challenged, although various countries have expressed their concerns with the Belgian measure in the WTO Committee on Technical Barriers to Trade (TBT Committee). Criticism ranged from the potential impact on international trade and general denunciations of trade-labour linkage to alleged inconsistency with WTO rules and risks of discriminatory application. See: World Trade Organization: Committee on Technical Barriers to Trade, 'Minutes of the Meeting Held on 30 March 2001' (8 May 2001) G/TBT/M/23, paras 9-18; and World Trade Organization: Committee on Technical Barriers to Trade, 'Minutes of the Meeting Held on 29 June 2001' (14 August 2001) G/TBT/M/24, paras 16-26.

134 WTO, *Japan: Taxes on Alcoholic Beverages – Report of the Appellate Body*, (4 October 1996) WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, 20-21.

In relation to Article III:4 GATT and 2.1 TBT Agreement, however, the AB has put the existence of a 'competitive relationship' at centre stage. Four criteria are used to determine whether such a relationship exists: (1) the product's characteristics, (2) its end-use, (3) consumers' tastes and preferences and (4) the tariff classification.[135] This list is not limitative *per se* as it is not directly derived from any of the WTO Agreements.

Distinctive process and production methods, such as the labour conditions under which a product is made, are thus not taken into account when determining the likeness of products. A number of GATT Panels have explicitly dismissed PPMs as a valid basis to determine the likeness of products.[136] The exclusion of labour conditions as a relevant factor in determining likeness is supported by the drafting history of the Havana Charter. In 1947, Uruguay unsuccessfully tabled an amendment to add to Article 7 that: "Nothing in this Charter shall be construed as preventing the adoption by a Member of reasonable and equitable measures to protect its industry from the competition of like products produced under sub-standard conditions of labour and pay."[137] The assumption appears to have been that the conditions of labour did not factor into the definition of likeness, and therefore a separate provision was necessary.

The argument that is typically advanced in the context of non-product-related PPMs is that they may influence the competitive relationship through the consumers' tastes and preferences, whilst not being reflected in the physical characteristics of the product. In *Philippines–Distilled Spirits*, a case that concerned likeness under Article III:2 GATT, the Appellate Body remarked *in dicta* that the element of consumer perception: "may reach beyond the products' properties, nature, and qualities, which concern the objective physical characteristics of the products. Indeed, consumer perception of products may be more concerned with consumers' tastes and habits than with physical character-

135 The former three criteria originate in a working party report in 1970, see General Agreement on Tariffs and Trade, 'Report by the Working Party on Border Tax Adjustments' (20 November 1970) L/3464, para 18. The latter was first applied in the 1981 GATT report *Spain: Tariff Treatment of Unroasted Coffee* (27 April 1981, adopted 11 June 1981) GATT BISD 28S/102, paras 4.6-4.8.

136 GATT, *United States: Restrictions on Imports of Tuna – Report of the Panel* (3 September 1991, unadopted) GATT BISD 39S/155, para 5.15. See also: Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures Addressing Non-Trade Concerns: A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (Ministry of Foreign Affairs of The Netherlands 2007) 63 contains a list of GATT panels in which the relevance of PPMs in the determination of likeness was also rejected.

137 United Nations Conference on Trade and Employment, 'First Committee: Employment and Economic Activity – Draft Chapter – Uruguay: Proposed Amendment' (4 December 1947) E/CONF.2/C.1/3/Add. 2. It is unclear why the amendment was rejected.

istics."[138] Accepting that a t-shirt produced by an adult is 'unlike' a t-shirt produced by a child would require a demonstration that consumer preference in favour of the former is so strong that a competitive relationship is almost non-existent.[139] This market-based approach has various disadvantages, such as the fact that reliance on consumer behaviour may lead to different definitions of likeness in developed countries (where consumers are able and willing to pay child labour free products) and developing countries.[140] The main problem with respect to this market-based approach is that there often is no market. Non-product related PPMs are by definition not visible in the end product. Without additional information consumers cannot make an informed decision, and data indicating the substitutability of the two types of t-shirts cannot be collected.

The exclusion of PPMs from the definition of likeness has been discussed extensively in the literature. Howse and Regan propose that 'like' ought to be defined as "not differing in any respect relevant to an actual non-protectionist policy"[141] based on the ordinary meaning of the term and the stated rationale of the NT obligation that measures "should not be applied ... so as to afford protection to domestic production."[142] This could be done by paying closer attention to the subjective intent and the practical effect of trade measures.[143] Also Van den Bossche, Schrijver and Faber have argued that increased consumer awareness on, and concern about labour conditions could potentially lead to a broader definition of like products.[144] Jackson, however, has argued that there is a textual basis for the exclusion of PPMs, as the WTO

138 WTO, *Philippines: Taxes on Distilled Spirits – Reports of the Appellate Body* (21 December 2011) WT/DS396/AB/R and WT/DS396/AB/R, para 132.

139 See in the context of environmental non-product-related PPMs, Barbara Cooreman, *Global Environmental Protection through Trade: A Systematic Approach to Extraterritoriality* (Edward Elgar Publishing 2017) 33-5.

140 Christiane R. Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* (Cambridge University Press 2011) 233-234.

141 Robert Howse and Donald Regan, 'The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy' (2000) 11 European Journal of International Law 249, 260.

142 Art III:1 GATT.

143 Robert Howse and Donald Regan, 'The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy' (2000) 11 European Journal of International Law 249, 265-268. In *US-Clove Cigarettes*, however, the AB dismissed an interpretation of likeness "that focused on the legitimate objectives and purposes of the technical regulation, rather than on the competitive relationship between and among the parties." WTO, *United States, Measures Affecting the Production and Sale of Clove Cigarettes – Report of the Appellate Body* (4 April 2012) WT/DS406/AB/R, para 112.

144 Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures Addressing Non-Trade Concerns: A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (Ministry of Foreign Affairs of The Netherlands 2007) 63.

Agreements, including Article III GATT, use the term 'product'.[145] Furthermore, he warns that: "With respect to the product/process problem, the issue is not so much whether this distinction can be justified in all contexts ... but rather how to develop some constraints on the potential *misuse* of process-oriented trade barriers (i.e. the 'slippery slope')."[146] Although a definite answer would depend on the structure of a specific trade measure, it can generally be concluded that it will likely be found in violation of Articles I, III:4 and XI GATT or Article 2 TBT Agreement.

3.4 JUSTIFICATIONS UNDER THE GATT GENERAL EXCEPTIONS CLAUSE

3.4.1 Introduction

Given the Appellate Body's rejection of the PPM concept to determine the (un)likeness of products and the *ipso facto* breach of WTO law in the case of quantitative import restrictions, legal scholars have devoted considerable attention to the general exception clause found in Article XX GATT.[147] Charnovitz, for example, argues that "[f]or ... PPMs, the most important WTO law is found in GATT Article XX."[148] This a notable shift from the early days of the GATT, as there is "no evidence that negotiators viewed Article XX was a solution to the labor standards problem."[149]

The test to determine whether an otherwise inconsistent restriction of international trade can be justified under the general exceptions clauses is done in two parts. First, the objective of the measure has to align with one of the policy areas listed in paragraphs (a) – (j) of Article XX GATT. In the context of labour, paragraphs (a), (b), (d) and (e) GATT can potentially be relied upon. These paragraphs deal with the protection of public morals, the protection of human life or health, compliance with non-inconsistent laws and regulations and the products of prison labour, respectively. Although the list of policy

145 John Jackson, 'Comments on Shrimp/Turtle and the Product/Process Distinction' (2000) 11 European Journal of International Law 303.

146 Ibid 304.

147 The GATS contains a similar provision in Article XIV. Labour-related restrictions on trade in services are not discussed in this chapter, but as the Appellate Body has used earlier case law on Article XIV GATS in interpretation Article XX GATT reference will be made to these cases.

148 Steve Charnovitz, 'The Law of Environmental 'PPMs' in the WTO: Debunking the Myth of Illegality' (2002) 27 Yale Journal of International Law 59, 101. Although Chanovitz commented on environmental PPMs, his statement rings true for labour PPMs as well. This is also true for country-based sanctions that are incompatible with Article XI GATT, such as those that were instituted against Myanmar in response to its forced labour practices.

149 Elissa Alben, 'GATT and the Fair Wage: A Historical Perspective on the Labor- Trade Link' (2001) 101 Columbia Law Review 1401, 1438.

areas is exhaustive,[150] the scope of the various exceptions is open to interpretation.

Sections 3.4.2 to 3.4.5 will examine these four policy grounds. Section 3.4.6 examines the obligations contained in the *chapeau* of Article XX, which aims to prevent (1) arbitrary and unjustifiable discrimination and (2) disguised restrictions on trade.[151]

3.4.2 Article XX(a): The protection of public morals

3.4.2.1 International labour standards as public morals

Article XX (a) permits GATT-inconsistent measures that are "necessary to protect public morals."[152] Like other elements of the general exception clause, this ground had been included in various trade agreements that were concluded before World War II.[153] The scope of some of these early treaties, such as the 1936 Commercial Agreement between the United States and Switzerland, was broader and allowed "prohibitions or restrictions (I) imposed on moral or *humanitarian* grounds."[154] The latter element has disappeared from contemporary trade agreements.[155]

In the context of the WTO, the public morals exception has been invoked in a handful of cases. In *US–Gambling*, which dealt with the public morals exception in the similar Article XIV(a) GATS, the panel held that "the term public morals denotes standards of right and wrong conduct by or on behalf of a community or nation."[156] It added that:

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150 WTO, *United States: Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body* (29 April 1996) WT/DS2/AB/R, 22.

151 Article XX GATT. The wording in Article XIV GATS is only marginally different, replacing "the same" with "like".

152 Christopher Feddersen, 'Focussing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation' (1998) 7 Minnesota Journal of Global Trade 75, 76, and Steve Charnovitz, 'The Moral Exception in GATT' (1998) 38 Virginia Journal of International Law 689, 742-43.

153 John Jackson, *World Trade and the Law of GATT: A Legal Analysis of the General Agreement on Tariffs and Trade* (The Michie Company 1969) 741.

154 Art XIV Commercial Agreement between the United States and Switzerland (signed 9 January 1936, ratified 7 May 1936) 1936 LNTS 232 (emphasis added).

155 Only the general exception clause in the Economic Partnership Agreement between the European Communities and the CARIFORUM states contains a footnote stating that: "The Parties agree that, in accordance with [the labour chapter], measures necessary to combat child labour shall be deemed to be included within the meaning of measures necessary to protect public morals or measures necessary for the protection of health." Art 224.1(a) EU-CARIFORUM EPA.

156 WTO, *United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Panel* (10 November 2004) WT/DS285/R, para 6.465 (internal quotation omitted).

> The content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values. [...] Members should be given some scope to define and apply for themselves the concepts of "public morals" and "public order" in their respective territories, according to their own systems and scales of values.[157]

This interpretation was confirmed in all subsequent panel and Appellate Body reports. While in *US–Gambling* the Panel also examined whether other jurisdictions motivated gambling restrictions on the basis of moral concerns,[158] this comparative approach was not followed in subsequent cases. The strong emphasis on moral preferences at the domestic level implies that international consensus, expressed through international law or comparative practices, is not required. Indeed, there are no international conventions that prohibit gambling services or set standards for censorship in audio-visual products. To the contrary, the *China–Audiovisuals* shows that import restrictions that are justified based on the protection of public morals may even conflict with the human right to freedom of expression.[159]

Nonetheless, the dominant perception amongst scholars who argue that trade sanctions in response to human rights violations can be justified under Article XX(a) is that this follows from the recognition of human rights in international law. Human rights as such are grounded in moral philosophy. Despite ongoing debates about moral relativism, different generations of rights and the relative value of legal entitlements, the post-World War II codification of international human rights law has been praised as establishing "a truly global morality."[160] A report published by the Office of the UN High Commissioner for Human Rights thus argues that "the term 'public morals' could arguably include human rights (recognized in international human rights treaties with broad membership [sic] and reflecting fundamental values) within its scope."[161]

This reasoning is easily extended to international labour rights.[162] Since the adoption of the 1998 Declaration, the concept of 'fundamental' or 'core' labour rights has become the main focal point.[163] Following the definition

157 Ibid, para 6.461.
158 Ibid, para 6.471.
159 Hendrik Andersen, 'Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions' (2015) 18 Journal of International Economic Law 383, 393-394.
160 Michael J. Perry, 'The Morality of Human Rights' (2013) 50 San Diego Law Review 775.
161 OHCHR, 'Human Rights and World Trade Agreements: Using general exception clauses to protect human rights' (HR/PUB/05/5, United Nations 2005) 9
162 Salman Bal, 'International Free Trade Agreements and Human Rights: reinterpreting Article XX of the GATT' (2001) 10 Minnesota Journal of Global Trade 62, 77.
163 See e.g.: Uyen P. Le, 'Online and Linked In: "Public Morals" in the Human Rights and Trade Networks' (2012) 38 North Carolina Journal of International Law and Commercial Regulation 107; Gabrielle Marceau, 'Trade and Labour' in Daniel Bethlehem and others

set in *US-Gambling*, assertions that within the body of ILO norms, the four fundamental labour rights are most likely to "be issues of public morals"[164] seek an objective determination based on international standards of morality that is not required by sub (a). So far, none of the issues that have been found to fall under public morals exception are governed by international law. The distinction between fundamental and technical ILO conventions does not affect the interpretation of Article XX, nor does it matter whether an issue is regulated at the international level at all. Accordingly, 'living wage' might as well be an issue of public morality as forced labour. Indeed, in a 2017 report, a WTO panel accepted the argument that the objective of "bridging the digital divide and promoting social inclusion" was accepted under Article XX(a).[165]

However, reliance on universal moral values mitigates the risk that Article XX(a) becomes a *carte blanche*.[166] States have a wide discretion to determine the scope of 'public morals', but the Appellate Body may consider the "importance of the interests at issue" in the necessity-test.[167] This test is part of Article XX(a), (b) and (d) and applies similarly to each paragraph.[168] It further examines the measure's contribution to the achievement of its objective, the trade restrictiveness of the measure and possible alternatives that are less trade

(eds) *The Oxford Handbook of International Trade Law* (Oxford University Press 2009) 550; Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Intersentia 2008) 181; Virginia Leary, 'Workers' Rights and International Trade' in Jagdish Bhagwati and Robert Hudec (eds) *Fair Trade and Harmonization: Prerequisites for Free Trade Vol II – Legal Analysis* (MIT Press 1996) 221; Stefan Zleptnig, *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements* (Martinus Nijhoff Publishers 2010) 207-208.

164 Gabrielle Marceau, 'Trade and Labour' in Daniel Bethlehem and others (eds) *The Oxford Handbook of International Trade Law* (Oxford University Press 2009) 550.

165 A broad range of non-binding international documents was submitted as evidence on the importance of access to information, including the 2015 Millennium Development Goals report. Eventually the argument failed on the necessity test. WTO, *Brazil: Certain Measures Concerning Taxation and Charges – Reports of the Panel* (30 August 2017) WT/DS472/R and WT/DS497/R, paras 7.561-7.568.

166 Christopher Feddersen, 'Focussing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation' (1998) 7 Minnesota Journal of Global Trade 75, 105-106; and Jeremy Marwell, 'Trade and Morality: The WTO Public Morals Exception after Gambling' (2006) 81 New York University Law Review 802, 815.

167 WTO, *United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Appellate Body* (7 April 2005) WT/DS285/AB/R, para 307. For example, in WTO, *Brazil: Measures Affecting Imports of Retreaded Tyres – Report of the Appellate Body* (3 December 2007) WT/DS332/AB/R, para 179 in which the AB agrees with the Panel that the protection of human life and health against dengue fever and malaria "is both vital and important in the highest degree" and that environmental protection is merely "important".

168 GATT, *Thailand: Restrictions on Importation of and Internal Taxes on Cigarettes* (5 October 1990, adopted 7 November 1990) GATT BISD 37S/200, para 74.

restrictive but make an equivalent contribution to the achievement of the objective.[169] In *Korea–Various Measures on Beef*, the Appellate Body held that:

> In sum, determination of whether a measure, which is not "indispensable", may nevertheless be "necessary" ... involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.[170]

Whether Article XX(a) can justify trade-restrictive measures in response to labour rights violations thus depends on the stated objective and the design of the measures, but it is unclear what the criteria are to determine the importance of the interests that are protected by a trade-restrictive measure.[171] Arguably, the importance of an 'interest' that is the subject of international conventions may be more easily assumed than interests which have no such basis.

3.4.2.2 Addressing foreign labour conditions through domestic consumer concerns

The interest that is protected by an import ban on goods produced with forced labour, for example, would be based on a norm that is expressed in a nearly universally ratified convention. However, if the ultimate purpose of the import ban is to abolish forced labour in the exporting state, this is an extraterritorial policy objective. Whether measures with extraterritorial effect are allowed under Article XX is a fiercely debated issue since the 1991 GATT report in *US–Tuna I*. The Panel found that if the US measure would be upheld, "each contracting party could unilaterally determine the life and health protection policies [and conservation policies] from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement."[172] It rejected the "extrajurisdictional application" of Article XX and held that the embargo could not be justified.[173]

During the WTO era Panels and the Appellate Body have carefully sidestepped the issue of extraterritoriality. In *US–Shrimp Turtle* the AB resolved the issue by observing that: "sea turtles are highly migratory animals, passing

169 WTO, *Brazil: Measures Affecting Imports of Retreaded Tyres – Report of the Appellate Body* (3 December 2007) WT/DS332/AB/R, para 178.

170 WTO, *Korea: Measures Affecting Imports of Fresh, Chilled and Frozen Beef – Reports of the Appellate Body* (11 December 2000) WT/DS161/AB/R and WT/DS169/AB/R, para 164.

171 Hendrik Andersen, 'Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions' (2015) 18 Journal of International Economic Law 383, 397.

172 GATT, *United States: Restrictions on Imports of Tuna – Report of the Panel* (3 September 1991, unadopted) GATT BISD 39S/155, paras 5.27 and 5.32.

173 Ibid, para 5.32.

in and out of waters subject to the rights of jurisdiction of various coastal states and the high seas."[174] As the species at stake also occurred in US waters, the issue of extraterritoriality did not occur. In *EC–Seal Products* the disputing parties did not make submissions on the territorial nexus on appeal. The AB merely noted two possible grounds, namely the fact that the EU Seal Regime was also applicable to seal hunting activities inside the EU and that it addressed "seal welfare concerns of 'citizens and consumers' in EU member States." It also remarked, however, that it "[recognized] the systemic importance of the question of whether there is an implied jurisdictional limitation in Article XX(a), and, if so, the nature and extent of that limitation".[175]

The Panel report considered the validity of the 'consumer concern' argument as a sufficient territorial nexus in more detail. Arguably, the circumvention of the extraterritoriality problem and the way the necessity of the measure was justified are the most striking elements of the case. As a result, *EC–Seal Products* has provoked much debate on its possible implications for the justification of labour-related trade measures.[176] According to the Panel, the moral objections of the European Union were twofold, namely "(a) the incidence of inhumane killing of seals; and (b) EU citizens' individual and collective participation as consumers in, and their exposure to, the economic activity which sustains the market for seal products derived from inhumane hunts."[177] Importantly, these two objectives have opposite strengths and weaknesses with respect to necessity and extraterritoriality. With regard to the former, the disputed EU Regulation states that: "Since the concerns of citizens and consumers extend to the killing and skinning of seals as such, it is also necessary to take action to reduce the demand leading to the marketing of seal products and, hence, the economic demand driving the commercial hunting of seals."[178] The necessity test did not pose a problem.[179] Alternatives that were proposed such as labelling were not regarded as feasible to

174 WTO, *United States, Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R, para 133.

175 WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Appellate Body* (22 May 2014) WT/DS400/AB/R and WT/DS401/AB/R, para 5.173.

176 See e.g. Ingo Venzke, 'What if? Counterfactual (Hi)Stories of International Law' (ACIL Research Paper 2016-21) 13; Thomas Cottier, 'The Implications of *EC –Seal Products* for the Protection of Core Labour Standards in WTO Law,' in Henner Gött (ed) *Labour Standards in International Economic Law* (Springer 2018) 69.

177 WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Panel* (25 November 2013) WT/DS400/R and WT/DS401/R, para 7.274.

178 Council Regulation (EC) 1007/2009 on trade in seal products (Seal Regulation) [2009] OJ L 286/36, para 10.

179 WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Panel* (25 November 2013) WT/DS400/R and WT/DS401/R, para 7.639; WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Appellate Body* (22 May 2014) WT/DS400/AB/R and WT/DS401/AB/R, para 5.290.

reduce demand as: "the reopening of the EU market could stimulate global demand so as to incentivize the killing of more seals."[180]

The second objective of the EU, to protect European citizens' from participating in, and being exposed to the market for seal products, is inward-looking. However, whereas the territorial nexus is clear, there are alternatives available that make it more difficult to satisfy the necessity requirement in relation to consumer protection. The EU Regulation which provides the legal basis for the import ban is somewhat ambiguous whether the problem is a lack of information or exposure to the immoral products as such. It specifically mentions Omega-3 capsules and garments as products that are difficult for consumers to identify as being derived from seals.[181] This could be resolved though labels: the public would still be exposed to seal Omega-3 on the pharmacy shelves, but could express their individual moral preference as consumers by opting for fish oil instead. Yet in assessing whether any less trade-restrictive measures were available that could make an equivalent or greater contribution, the alternatives proposed by Norway and Canada all focused on the possibility to conduct the seal hunt in a more humane way, and certify and label products accordingly.[182] The Panel held, however, that these alternatives risked the non-fulfilment of the objectives of the EU Seal Ban, to the extent that consumers remained 'exposed'.[183] The Panel and AB did not define this term, nor did they elaborate on how exposure could otherwise be mitigated.[184]

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180 WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Panel* (25 November 2013) WT/DS400/R and WT/DS401/R, para 7.503.

181 Council Regulation (EC) 1007/2009 on trade in seal products (Seal Regulation) [2009] OJ L 286/36, paras 3 and 7.

182 Canada's first written submission, paras. 557-560; Norway's first written submission, para 793. Cited in WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Panel* (25 November 2013) WT/DS400/R and WT/DS401/R, para 7.468 and WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Appellate Body* (22 May 2014) WT/DS400/AB/R and WT/DS401/AB/R, para 5.262.

183 WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Panel* (25 November 2013) WT/DS400/R and WT/DS401/R, para 7.503.

184 In a noteworthy court case in the United States, it was held that Section 307 of the US Tariff Act of 1930 was not intended to "shield the psyche of domestic consumers against foreign products produced through human rights violations." The reason was the consumptive demand exception, which allowed imports of prison and forced labour goods when domestic production did not meet the US' consumptive demands. It was thus held that the purpose of the law is "to protect domestic producers, production, and workers from the unfair competition which would result from the importation of foreign products produced by forced labor." *McKinney v U.S. Department of Treasury*, 799 F.2d 1544 (Fed. Cir. 1986) para 26 and 29. The 2015 Trade Facilitation and Trade Enforcement Act repealed the consumptive demand exception, thus increasing the prospects for successful reliance on Article XX(a) GATT if an import ban in response to forced labour practices would be challenged before the WTO. Sec 910 Trade Facilitation and Trade Enforcement Act of 2015, Public Law 114-125, 114th Congress (130 Stat 239-240).

The terms 'citizens' and 'consumers' are used in tandem throughout the EU Regulations and the Panel and AB reports. Based on the language of paragraph (a) it seems unnecessary to refer to consumers as a sub-group of citizens whose moral concerns are specifically at stake. In fact, a full trade ban and reliance on the prevention of exposure rather than the improvement of information pre-empts the expression of individual moral choices. When consumers know whether a product is made from seals (or by children), they can balance the product characteristics and prize against their moral preferences. Seal Omega-3 is advertised as healthier, better tasting and sometimes cheaper than fish products. However trivial this might be for a morally concerned consumer, by banning seal products from the market altogether the state forces consumers who do not share these strong moral preferences to spend their money differently than they would have done if they were fully informed about the content of the product.

It has been argued that the *EC–Seal Products* case does not provide a precedent for labour-related trade measures because in the labour context products are not 'inherently immoral'.[185] While there may be no reasonable alternatives to the methods of seal hunting, carpets and shoes are not always made by children. However, neither the party submissions nor the Panel and AB reports suggest that seal products are inherently immoral. The European Union did not dispute that humane methods of seal hunting exist. The problem was rather that these could not be applied effectively and consistently in the commercial seal hunt.[186] In fact, the impracticality of alternative hunting methods and the difficulty in differentiating between humanely and inhumanely killed seals was precisely the reason why the important ban was considered necessary, despite its severe trade restrictiveness.[187]

The real problem with regard to the necessity test in the labour context is that mere demand reduction does not alter the practice as such. The UNICEF report on Bangladesh cited above illustrates this point. This is not to say that trade measure can never contribute to the reduction of child labour. When a positive effect can be observed, however, this is by definition indirect. A trade ban does not improve labour conditions by itself, but at best creates

185 Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Hart Publishing 2013) 165.

186 WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Panel* (25 November 2013) WT/DS400/R and WT/DS401/R, para 7.182.

187 Ibid, paras. 7.496-7.467; WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Appellate Body* (22 May 2014) WT/DS400/AB/R and WT/DS401/AB/R, para 5.270. I wish to thank Robert Wardle for our discussions on this point. Other forms of trade-restrictive measures that the EU has undertaken out of animal welfare concerns also support this conclusion. In 2013 the EU imposed a ban on the marketing and importation of animal-tested cosmetics. As there is nothing inherently immoral about cosmetics, the justification for the trade measure is solely based on its production method. So far the EU Cosmetics Directive has not been challenged by a WTO member state.

economic pressure on the industry and the state to improve (or better enforce) its regulations.

However, when the stated purpose of the trade ban is to protect domestic consumers' moral concerns of (unknowingly) becoming an accomplice in child labour practices, the necessity of the measure has to be assessed against this domestic purpose. Whether the measure mitigates the practice as such is immaterial to this analysis. It has thus been argued that "there is a real risk that a ban might assuage consumer conscience without significantly impacting on the scale of the reprehensible practice, because it might simply allow production that involves the impugned practice to consolidate and expand toward internal markets."[188] Perverse effects are not accounted for when a ban is justified on the basis of consumer protection only. Consequently, there is a real possibility that the AB would uphold a measure that bans child labour or forced labour products, without requiring any evidence whether it affected the situation in the exporting state.

3.4.3 Article XX (b): The protection of human life or health

Whereas the purpose of paragraph (a) is to protect the moral standards of domestic citizens, paragraph (b) can be used to justify GATT-incompliant trade measures which are "necessary to protect human, animal or plant life or health." This raises the question to what extent this exception applies to measures that aim to protect the life or health of workers.[189] Similar to paragraph (a), there is uncertainty with regard to measures which are aimed at improving the life or health of people in other jurisdictions.

Arguably, the necessity requirement and the issue of extraterritoriality, which are closely connected, pose a bigger problem here than they do for the application of Article XX(a). If it would be accepted that Article XX(b) could be used to justify trade measures in response to working conditions that pose a risk to the life or health of foreign workers, it would first be necessary to establish the level of protection that is considered appropriate. When concern-

188 Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Hart Publishing 2013) 165.

189 Numerous studies have examined the health risks of labour rights violations. The ILO has adopted twenty Conventions, one Protocol and twenty-seven Recommendations concerning occupational health and safety. In addition, health risks may emanate from violations of other labour standards, ranging from child labour to working time. Indeed, the Worst Forms of Child Labour Convention (No. 182) notes that "the term the worst forms of child labour comprises ... (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children." (Emphasis omitted). See for an argument in favour of the application of Article XX(b): Paul Cook, 'Law of Trade in Human Rights: A Legal Analysis of the Intersection of the General Agreement on Tariffs and Trade's Article XX(b) and Labor Rights of Children' (2013) 3 Labor & Employment Law Forum 461.

ing domestic workers, this level is set by the state whose nationals incur the health risks. When these risks are borne by foreign workers, there are three possible benchmarks: (1) the importing state determines the level of protection it deems appropriate for foreign workers, (2) the level is derived from international standards, such as the relevant ILO conventions, or (3) the importing state determines whether the exporting state effectively enforces the level of occupational health and safety standards set by the exporting state.

The jurisdictional limitations of paragraph (b) have been explored in various cases concerning animal welfare. According to the GATT Panel in the *US–Tuna Dolphin II* case: "[...] measures taken so as to *force other countries to change their policies*, and that were effective only if such changes occurred, could not be considered "necessary" for the protection of animal life or health in the sense of Article XX (b)."[190] One could argue that this would not apply when the importing state uses international standards as a benchmark to assess the health and safety standards in the exporting state. However, treaties such as the 1981 Occupational Safety and Health Convention do not prescribe a certain level of standards. Instead, it requires states to "formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment."[191] The convention is therefore too indeterminate to be used as a benchmark that the WTO Dispute Settlement Body can rely on. Furthermore, reliance on ILO conventions that the exporting state has ratified provides a perverse incentive not to ratify, as this increases the chance of trade restrictions when the convention is not complied with. An alternative would be that the importing state merely assesses whether the exporting state adheres to its own health and safety regulations. Assuming the effective implementation and enforcement of these regulations, the exporting state would not be required to "change their policies." This approach resembles the obligation contained in many preferential trade and investment agreements that requires states to effectively enforce their domestic labour standards.

In addition to the problem of finding an adequate benchmark to determine the level of protection that the importing state deems adequate for workers in the exporting state without impeding the latter's regulatory sovereignty, the import restriction has to be 'necessary'. Here, the same problem applies that was discussed in connection to the public morals exception, namely that if the trade measure has an effect, this effect is by definition indirect. One can thus conclude that even if the importing state takes trade measures because the exporting state fails to comply with its own occupational health and safety regulations, the aim of the measure is still coercive and therefore unlikely to be accepted under Article XX(b) GATT.

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190 GATT, *United States: Restrictions on Imports of Tuna – Report of the Panel* (16 June 1994, unadopted) DS29/R, para 5.39 (emphasis added).

191 Art 4.1 1981 Occupational Safety and Health Convention (No. 155).

This is not to say that paragraph (b) cannot be used in labour-related cases. To the contrary, in the *EC–Asbestos* case, the AB upheld a French prohibition of the use of asbestos and products containing asbestos.[192] This ban was to a large extent motivated by the carcinogenic risk posed to construction workers in France. Despite the fact that it concerned an inward-oriented measure, ILO instruments played an important role in this case. The organization had long been concerned with the occupational health risks of asbestos. In 1984, it had published Code of Practice on Safety in the Use of Asbestos, followed in 1986 by a Convention and a Recommendation concerning Safety in the Use of Asbestos. Canada argued that the measure constituted a "technical regulation" under the TBT Agreement, as this agreement provides that technical regulations have to be based on international standards when these exist.[193] If the ILO instruments could be qualified as 'international standards' within the meaning of the TBT Agreement, France could not opt for more stringent requirements "except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued [...]."[194] While the AB agreed that the ban constituted a technical regulation, it did not address the status of the ILO instruments.

In addition, Canada argued that the French ban could not be deemed 'necessary' as the controlled use of asbestos was a reasonably available alternative in light of the perceived health risks.[195] The ILO Asbestos Convention called for the prohibition of crocidolite fibres, but not the various other types. As such the international instruments as such provided for alternative measures that were less trade restrictive than the French ban.[196] The AB did not accept the argument. Importantly, WTO member states "have the right to determine the level of protection of health that they consider appropriate in a given situation."[197] This means that insofar as the purpose of an internationally agreed rule is more limited, this rule is not a reasonably available alternative. The European Communities thus pointed out that the aim of the French Decree was "consistent with the WTO and ILO recommendations"[198] but that the exist-

192 WTO, *European Communities: Measures Affecting Asbestos and Asbestos Containing Products – Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R.

193 Art 2.4 TBT Agreement.

194 Also 2.4 TBT Agreement. Canada's argument is cited in WTO, *European Communities: Measures Affecting Asbestos and Asbestos Containing Products – Report of the Panel* (18 September 2000) WT/DS135/R, para 5.520, see also WTO, *European Communities: Measures Affecting Asbestos and Asbestos Containing Products – Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R, para 17.

195 WTO, *European Communities: Measures Affecting Asbestos and Asbestos Containing Products – Report of the Panel* (18 September 2000) WT/DS135/R, para 3.496.

196 Ibid, para 3.125.

197 WTO, *European Communities: Measures Affecting Asbestos and Asbestos Containing Products – Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R, para 168.

198 WTO, *European Communities: Measures Affecting Asbestos and Asbestos Containing Products – Report of the Panel* (18 September 2000) WT/DS135/R, para 3.113.

ence of international rules did not preclude states from seeking higher protection.

In conclusion, therefore, paragraph (b) may allow states to ban the import of certain *goods* that pose health risks to *their* workers, but is unlikely to justify GATT-inconsistent measures with extraterritorial effect.

3.4.4 Article XX(d): Securing compliance with non-inconsistent laws or regulations

The next paragraph of Article XX that could potentially be considered in the context of international labour standards allows WTO members to take measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement [...]." It further provides a non-exhaustive list of covered policies, which include customs enforcement, state trading enterprises, intellectual property rights and the prevention of deceptive practices. During the drafting of the Havana Charter, Cuba had proposed an amendment to expand the latter ground by adding "the prevention of deceptive or disloyal practices in commerce, harmful to normal production and labour"[199] It is unclear what kind of measures it intended to exempt from the scope of the Charter, but the negotiating parties decided that Cuba's "objective was covered for short-term purposes by paragraph 1 of Article 40 and for long-term purposes by Article ... [7] in combination with Articles ... [93, 94 and 95]",[200] referring to the emergency actions clause and the labour clause, respectively.

Article XX(d) has been invoked in several cases. In *Mexico–Taxes on Soft Drinks*, Mexico had imposed taxes on soft drinks that where sweetened by additives other than cane sugar. Mexico argued that the taxes were a countermeasure, imposed to secure compliance by the United States of its obligations under the North American Free Trade Agreement (NAFTA). According to the Appellate Body:

> the central issue raised in this appeal is whether the terms "to secure compliance with laws or regulations" in Article XX(d) of the GATT 1994 encompass WTO-inconsistent measures applied by a WTO Member to secure compliance with another WTO Member's obligations under an international agreement.[201]

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199 United Nations Conference on Trade and Employment, 'Third Committee: Commercial Policy – Revised Annotated Agenda for Chapter IV' (8 December 1947) E/CONF.2/C.3/11, 5.

200 United Nations Conference on Trade and Employment, 'Third Committee: Commercial Policy – Report of Sub-Committee D on Articles 40,41 and 43 (28 January 1948) E/CONF.2/C.3/37, para 20.

201 WTO, *Mexico*: *Tax Measures on Soft Drinks and other Beverages – Report of the Appellate Body* (6 March 2006) WT/DS308/AB/R, para 68.

If this question would be answered affirmatively, paragraph (d) could arguably be used to exempt trade measures (such as import restrictions in response to child- or forced labour) from the scope of the GATT when they are taken (1) pursuant a resolution on the basis of Article 33 of the ILO Constitution, or (2) as countermeasures to enforce obligations *erga omnes*.[202] Arguably, both are *as such* not inconsistent with the GATT.

The central question in *Mexico–Taxes on Soft Drinks* concerned the scope of the terms "laws and regulations." The AB report stated that these:

> cover rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system.[203]

While the AB thus leaves some room for trade measures based on international labour law, it does impose the additional hurdle that the labour obligations need to have been incorporated in domestic law or have direct effect. The AB reached this conclusion on the basis of textual interpretation,[204] the observation that the illustrative list in paragraph (d) are almost exclusively issues that are not regulated by international law,[205] and the fact that other GATT provisions explicitly distinguish between 'laws and regulations' and 'international agreements'.[206] The decision has been criticised as being "illustrative of the attitude of WTO adjudicating bodies towards non-WTO law" and argued that it is "highly implausible that this is the last word of the AB on this score."[207]

In the 2016 *India–Solar Cells* case, the claimant argued that the UN 'The Future We Want' Resolution, which contains the outcomes of the Rio+20 summit held in 2012 imposed certain "international law obligations" that it sought to comply with.[208] Notably, the discussion did not focus on the question whether a UN Security Council resolution can indeed contain such obligations, but on the question whether the international legal obligations invoked by India had direct effect in its domestic legal order. Eventually the Panel and

202 Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Intersentia 2008) 109.

203 WTO, *Mexico*: *Tax Measures on Soft Drinks and other Beverages – Report of the Appellate Body* (6 March 2006) WT/DS308/AB/R, para 79.

204 Ibid, para 69: "We agree with the United States that one does not immediately think about international law when confronted with the term "laws" in the plural."

205 Ibid, para 70.

206 Ibid, para 71.

207 Petros Mavroidis, *Trade in goods: the GATT and the other WTO agreements regulating trade in goods* (2nd edn, Oxford University Press 2012) 342.

208 WTO, *India: Certain Measures Relating to Solar Cells and Solar Modules – Report of the Panel* (24 February 2016) WT/DS456/ R, para 7.269

the Appellate Body decided they did not, following the line of argument set out in *Mexico–Taxes on Soft Drinks*.[209]

Arguably, if the ILO Article 33 Resolution on Myanmar had explicitly called for trade sanctions, WTO member states that would give direct effect to such resolutions in their domestic legal system could justify trade sanctions under Article XX(d) GATT. In general, however, the exclusion of international legal obligations under the realm of "laws or regulations" means that in most cases Article XX(d) GATT cannot be used to justify WTO-inconsistent trade measures, even if these are based upon a mandate by the ILO or in response to obligations *erga omnes*.[210] Also, the question is whether such measures survive the necessity test under Article XX(d).

3.4.5 Article XX(e): Products of prison labour

Paragraph (e) allows member states to take trade restrictive measures "relating to the products of prison labour." This is the only explicit reference to labour conditions in the WTO legal framework. So far, no WTO member state has relied on the exception before a Panel or the Appellate Body.[211] The reason for this might be that Article XX(e) is rather straightforward: it allows qualitative or quantitative restrictions on imports of foreign prison labour. This is premised upon the idea that prison labour leads to unfair competition with free labour, as prisoners are often required to work and minimum wage legislation is not applicable. It has also been argued that states have "a social preference ... not to transact with goods made in prison,"[212] which resembles the consumer-based rationale under paragraph (a) advocated by the European Union in the *Seals* case.

A state can thus legally impose additional tariffs or issue a full ban on prison labour goods, but they have no obligation to do so. A proposal by the United States to include a provision in the 1919 Paris Peace Treaty, stating

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209 WTO, *India: Certain Measures Relating to Solar Cells and Solar Modules – Report of the Appellate Body* (16 September 2016) WT/DS456/AB/ R, para 5.149.

210 Salman Bal, 'International Free Trade Agreements and Human Rights: reinterpreting Article XX of the GATT' (2001) 10 Minnesota Journal of Global Trade 62, 87-97; and Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Intersentia 2008) 189-191.

211 Only one Panel made an *in dicta* remark that Article XX(e) "does not permit a Member to make entry of imported goods into its territory conditional upon the exporting Member's policy on prison labour. This paragraph only refers to the products of prison labour." WTO, *United States, Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R, para 7.45 fn 649.

212 Petros Mavroidis, *Trade in goods: the GATT and the other WTO agreements regulating trade in goods* (2nd edn, Oxford University Press 2012) 344. In practice, there are brands such as 'Prison Blues,' which use their origin to market their products and are in the same prize-range as some established brands.

that "[n]o article or commodity shall be shipped or delivered in international commerce in the production of which convict labor has been employed or permitted", was not accepted.[213] Notably, Article XIV GATS does not contain a similar provision, although prison labour increasingly includes the provision of services such as call-center work.[214]

Paragraph (e) is the only provision in Article XX GATT with clear extraterritorial implications.[215] Determining the scope of Article XX(e) consists of two parts. First, measures have to 'relate to' the products of prison labour. This is a lower threshold than the necessity-test of paragraphs (a), (b) and (d).[216] The Appellate Body clarified in several cases that the measure must be "primarily aimed at" the purported policy goal.[217]

The interpretation of the term 'products of prison labour' has attracted most attention. Regarding the products that may be prohibited, the term "can be understood either in a narrow (products wholly originating in prisons) or in a wide sense (products with inputs produced in prisons and other detention establishments)."[218] The fact that states dismissed replacing the term 'products of prison labour' by 'prison-made goods' supports the latter interpretation.[219]

More importantly, the question has been raised whether 'prison labour' should be interpreted to also include other forms of involuntary labour. According to Lenzerini, "one may reasonably sustain the extension of its scope

213 Memorandum: Prohibition of Prison Made Goods in International Commerce, Submitted by the National Committee on Prisons and Prison Labor (22 March 1919) in James Shotwell (ed) *The Origins of the International Labor Organization Vol II* (Columbia University Press 1934) 365.

214 Jason Burke, 'Chained to their desks: prisoners will staff call centre within Indian jail' *The Guardian* (1 February 2011) < https://www.theguardian.com/world/2011/feb/01/call-centre-inside-indian-jail> 13 Mat 2018.

215 While in theory the provision could also be used to justify export restrictions on products from domestic convict labour, this has no economic rationale.

216 WTO, *United States: Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body* (29 April 1996) WT/DS2/AB/R, 17-18. "It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interests or policy sought to be promoted or realized."

217 WTO, *United States, Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R, paras. 135-137; WTO, *United States: Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body* (29 April 1996) WT/DS2/AB/R, para 19.

218 Petros Mavroidis, *Trade in goods: the GATT and the other WTO agreements regulating trade in goods* (2nd edn, Oxford University Press 2012) 344.

219 United Nations Economic and Social Council, 'Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Technical Sub-Committee' (11 February 1947) E/PC/T/C.6/55/Rev.1, 47. Although the amendment suggested here was concerned with the general exceptions clause in the draft Havana Charter, the narrower formulation was considered and could have been extended to the GATT negotiations. The term 'prison-made goods' had been included in the Commercial Agreement between the United States and Switzerland (signed 9 January 1936, ratified 7 May 1936) 1936 LNTS 232.

to forms of work analogous to prison labour, such as forced labour or work carried out under conditions of slavery, and those forms of child labour which imply the substantial withdrawal of the victim's capacity of choice and self-determination."[220] Support for this position is far from univocal, however.[221] There have been no attempts by the GATT contracting parties, or later the WTO members, to clarify the meaning of the term. Only the 1987 Leutwiler Report states that "there is no disagreement that countries do not have to accept the products of *slave or prison* labour. A specific GATT rule allows countries to prohibit imports of such products."[222] While the report was commissioned by GATT Director-General Dunkel, it did not purport to be an official interpretation of the agreement. At best, it reflects a tacit understanding of states' that there was or there ought to be a legal basis to prohibit the importation of products of slave labour.

The preparatory works of the GATT are clearer. Article XX(e) originates from the 1927 International Convention for the Abolition of Import and Export Restrictions.[223] On the occasion of its ratification, the United States maintained that "the provision [...] excepting from the scope of the Convention prohibitions or restrictions applying to prison-made goods, includes goods the product of forced or slave labor however employed."[224] When the GATT was negotiated twenty years later the United States proposed a separate provision, however, which would have laid down a general obligation to eliminate

220 Federico Lenzerini, 'International Trade and Child Labour Standards' in Francesco Francioni (ed) *Environment, Human Rights & International Trade* (Hart Publishing 2001) 301. See also: Patricia Stirling, 'The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization' (1996) 11 American University Journal of International Law & Policy 1, 36-39, who, referring to paragraph (e), argues that "human rights were a driving force in its inclusion." See also: Virgina Leary, 'Workers' Rights and International Trade: the Social Clause' in Jagdish Bhagwati and Robert Hudec (eds) *Fair Trade and Harmonization: Prerequisites for Free Trade Vol II – Legal Analysis* (MIT Press 1996) 204; and Janelle Diller and David Levy, 'Child Labor, Trade and Investment: Towards the Harmonization of International Law' (1997) 91 American Journal of International Law 663, 684, 688-689 who add the argument that US practice in treaties predating the GATT also supported the understanding that prison labour should be understood as forced labour.

221 Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 126 International Labour Review 565, 571; and Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Intersentia 2008) 194.

222 *Trade Policies for a Better Future: The 'Leutwiler Report', the GATT and the Uruguay Round* (Martinus Nijhoff Publishers 1987) 36 (emphasis added.)

223 International Convention for the Abolition of Import and Export Restrictions (signed 8 November 1927, not in force) 97 LNTS 393.

224 Letter of Ratification from President Hebert Hoover to the League of Nations, 20 September 1929, quoted by Janelle Diller and David Levy, 'Child Labor, Trade and Investment: Towards the Harmonization of International Law' (1997) 91 American Journal of International Law 663, 684.

"involuntary ... forms or conditions of employment" in the Havana Charter.[225] The amendment was not accepted.

In contemporary human rights law, there is a clear separation between prison labour and forced labour. Most countries allow prison labour. It raises complicated moral and economic questions, such as the applicability of minimum wage legislation or human rights guarantees in privatized prisons. But the international agreements that prohibit forced labour carefully distinguish it from other forms of unfree labour. ILO Convention No 29 explicitly excludes "any work or service exacted from any person as a consequence of a conviction in a court of law" from the definition of forced labour, "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."[226] The ICCPR also excludes from the definition of forced or compulsory labour: "Any work or service (...) normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention."[227] Similar definitions can be found in the European Convention on Human Rights and the American Convention on Human Rights.[228]

Unlike the ICCPR and ECHR, ILO Convention 29 and the ACHR differentiate between prison labour under the supervision of public and private authorities. This gives the ILO Committee of Experts limited jurisdiction to scrutinize prison labour in privatized prisons, or in situations where prisoners are set to work for a private company.[229] In this context the Committee has reiterated the logic of Article XX(e) GATT, when it warned that "there is the need to avoid unfair competition' between the captive workforce and the free labour market."[230] The Committee has not, however, warned for unfair competition

225 United Nations Conference on Trade and Employment, 'First Committee: Employment and Economic Activity: Draft Charter – United States: Proposed Amendment' (8 December 1947) E/CONF.2/C.1/7/Add.1.

226 Art 2.2(c) ILO Forced Labour Convention. In its 1990 GATT Trade Policy Review, New Zealand noted that the purpose of its import prohibition of "[g]oods manufactured or produced by prison labour" was to "implement the provisions of the International Labour Organisation Convention No. 29." This statement thus appears to be misguided, as Convention No. 29 is not concerned with prison labour and does not require States to introduce import bans. General Agreement on Tariffs and Trade, 'Trade Policy Review Mechanism – New Zealand, Report by the Secretariat' (5 July 1999) C/RM/S/9B, 12.

227 Art 8.3(c)(i) ICCPR.

228 Art 4.3(a) European Convention on Human Rights; Article 6.3(a) American Convention on Human Rights.

229 Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights* (Intersentia 2011) 424-429.

230 International Labour Conference (96th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1B) General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105) (Geneva 2007) para 122; International Labour Conference (89th Session) Report of the Director General: Stopping Forced Labour – Global Report under the Follow-up to the ILO Declaration on Fundamental Rights at Work (Geneva 2001) para

as the result of forced labour. The state of international law is thus paradoxical: on the one hand, international law prohibits forced labour, but not prison labour. On the other hand, import restrictions on prison labour products are explicitly allowed while import restrictions on forced labour products can only be justified on the basis of the general public morals exception.

3.4.6 The *chapeau*-test

If it is accepted that labour-related trade measures are covered by one of the substantive paragraphs of Article XX, the next step is to assess whether these measures comply with the requirements set forth in its introductory paragraph. The *chapeau* of Article XX requires that "measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and that they do not constitute "a disguised restriction on international trade." Its purpose is to prevent abusive invocations of Article XX.[231]

3.4.6.1 Arbitrary or unjustifiable discrimination

The prohibition to discriminate between countries where the same conditions prevail entails both a comparison between the importing and the exporting states as well as between various exporting states.[232] In the context of labour-related trade measures, this requires the importing state to show that different labour conditions prevail between countries whose exports have been subject to the measures and countries that have not been affected. Arguably, two types of arguments can be advanced.

The first concerns factual differences in labour conditions. However, factual comparisons invoke a plethora of questions. For example, Myanmar has been the only country that has faced comprehensive economic sanctions due to violations of the ILO Forced Labour Convention No 29. But are there no countries where similar conditions prevail(ed)? It is possible to distinguish three factors that make this case unique: (1) the duration of the violations, (2) the gravity of the violations and (3) the active role of the government.[233] But there are other well-reported cases of government sponsored forced and child labour in the world, which have been on the agenda of the ILO and UN human rights mechanisms for years. In Uzbekistan, every year about one million

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231 Petros Mavroidis, *Trade in goods: the GATT and the other WTO agreements regulating trade in goods* (2nd edn, Oxford University Press 2012) 359.

232 WTO, *United States: Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body* (29 April 1996) WT/DS2/AB/R, 23-24.

233 Richard Horsey, *Ending Forced Labour in Myanmar: Engaging a pariah regime* (London and New York 2011) 6.

people are sent out to the country's cotton fields to participate in the harvest. The government effectively oversees this operation. It sets quota for the number of family members that have to participate, and made it a mandatory part of school curricula for children.[234] There are many different factors that may determine the gravity of forced labour violations, ranging from the number of workers to the type of work.[235] Comparing labour rights violations in the targeted state with other situations on the basis of factual differences will invoke severe criticism, irrespective of the outcome.

The second possibility is to emphasise 'legal' differences. An undisputed and important difference between Myanmar and Uzbekistan is that only the former has been the subject of an ILO Article 33 Resolution. This does not depart from the text of the *chapeau*, but merely 'outsources' the factual comparison of conditions within different countries to the ILO. The main difficulty here is where the line should be drawn. During the last 100 years, only one Article 33 Resolution has been adopted. There are alternative yardsticks, however, such as the findings of Commissions of Inquiry, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) or the Committee on Freedom of Association (CFA).

In its analysis of unjustifiable discrimination, the Appellate Body in *US–Shrimp* stated that measures must be sufficiently flexible to allow for differences in exporting states. It held that:

> it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members.[236]

In this case, the United States only allowed the importation of shrimp caught with a particular fishing method. It subsequently modified its measure to allow other fishing methods with equivalent effect, but which were cheaper than the method initially prescribed.[237] While this criterion is arguably not relevant

234 International Labour Conference (93th Session) Report of the Director-General: A Global Alliance Against Forced Labour – Global Report under the Follow-up to the ILO Declaration on Fundamental Rights at Work (Geneva 2005) 25; and 'In the land of cotton' *The Economist* (16 October 2013).

235 Other factors could include: (1) the number of people involved in forced labour, (2) the age of people involved in forced labour, (3) the type of work, (4) the type of penalties that were imposed in case of refusal to work, (5) remuneration, (6) working conditions, (7) involvement of state actors, (8) international obligations of the state, and (9) condemnation by the ILO or UN.

236 WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) para 164.

237 Petros Mavroidis, George Bermann and Mark Wu, *The Law of the World Trade Organization (WTO): Documents Cases & Analysis* (West 2010) 713.

in the case of forced labour, differences in economic development could play a role in the evaluation of trade measures that respond to other types of labour concerns.

3.4.6.2 Disguised restriction on international trade

The second prong of the *chapeau* holds that a measure may not be a disguised restriction on international trade. 'Restriction' is to be understood broadly as it also includes situations of disguised discrimination.[238] According to the AB: "The fundamental theme [of the *chapeau*, RZ] is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX."[239] While panels and the Appellate Body consider the discrimination and disguised restriction elements of the *chapeau* separately they do "impart meaning to one another."[240] While the other requirements of Article XX are mostly concerned with the concrete application of trade measures, and ignore their political motives, the panel in *EC–Asbestos* held that:

> In accordance with the approach defined in Article 31 of the Vienna Convention, we note that, as ordinarily understood, the verb "to disguise" implies an intention... . Accordingly, a restriction which formally meets the requirements of Article XX(b) will constitute an abuse if such compliance is in fact only a disguise to conceal the pursuit of trade-restrictive objectives... . Nevertheless, we note that, in the same case, the Appellate Body suggested that the protective application of a measure can most often be discerned from its design, architecture and revealing structure.[241]

The *chapeau* of Article XX thus provides a test to assess whether labour-related trade measures have a (disguised) protectionist purpose. According to the Appellate Body the *chapeau* expresses the principle of good faith, which it considers to be both a general principle of law and a customary rule of international law that prevents the abusive exercise of states' rights.[242]

An *abus de droit* problem could arguably arise when the invocation of an exception listed in Article XX breaches the object and purpose of another treaty to which the disputing states are a party. The Appellate Body in *US–Shrimp Turtle* noted that: "The Inter-American Convention [for the Protection and

238 WTO, *United States: Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body* (29 April 1996) WT/DS2/AB/R, 25.
239 Ibid, 25.
240 Ibid, 25.
241 WTO, *European Communities: Measures Affecting Asbestos and Asbestos Containing Products – Report of the Panel* (18 September 2000) WT/DS135/R, para 8.236.
242 WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) para 158.

Conservation of Sea Turtles] demonstrates the conviction of its signatories, including the United States, that consensual and multilateral procedures are available and feasible for the establishment of programs for the conservation of sea turtles."[243] It continued to argue that:

> The Inter-American Convention thus provides convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition .... Finally, the record also does not show that the appellant, the United States, attempted to have recourse to such international mechanisms as exist to achieve cooperative efforts to protect and conserve sea turtles before imposing the import ban.[244]

This statement builds upon the findings in the *US–Gasoline* case, in which the AB lamented the United States for failing to enter into "cooperative arrangements" with exporting states.[245]

However, it is unlikely that ILO conventions would be regarded as 'an alternative course of action' to secure the same policy goal as a trade measure. In the *US–Tuna II* case, which was decided thirteen years after *US–Shrimp*, Mexico argued that compliance with the Agreement on International Dolphin Conservation Program would have the same material effect as the US labelling scheme, but would be less trade restrictive.[246] Although these claims were made under the TBT Agreement, they concerned similar requirements as the *chapeau* of Article XX GATT. The Appellate Body, however, noted that the US was allowed to set a higher degree of protection than under the relevant international agreement.[247] In other words: in the presence of international agreements on the same subject-matter, the legitimacy of states' objectives does not depend on the level of protection established in that agreement, or to the means of implementation foreseen in the agreement. Instead, the importing state's definition of the purpose of the measure in terms of the level of protection it seeks to establish is decisive.

243 Ibid, para 170.
244 Ibid, para 171.
245 WTO, *United States: Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body* (29 April 1996) WT/DS2/AB/R, 25
246 WTO, *United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Panel* (15 September 2011) WT/DS381/R, para 7.612.
247 WTO, *United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Appellate Body* (16 May 2012) WT/DS381/AB/R, para 330.

3.5 LABOUR CONDITIONALITY IN THE GENERALIZED SYSTEM OF PREFERENCES

3.5.1 Introduction

This part examines the only domain in multilateral trade law in which trade-labour linkage is systematically put into practice: the Generalized System of Preferences (GSP). Section 3.5.2 looks at the legal basis for the GSP in the multilateral trade system and the debate about the permissibility of labour conditionality. Sections 3.5.3 and 3.5.4 explore the systems of labour conditionality in the preferential trade legislation of the United States and the European Union, respectively.

3.5.2 The Generalized System of Preferences

3.5.2.1 Article I GATT and the Enabling Clause

In the 1950s and 1960s, developing countries started to express their discontent with the GATT. They felt that it did not serve their interest, and argued for lower tariffs on primary commodities and some more fundamental changes to the GATT's legal system. This culminated in the adoption of a new Part IV on 'Trade and Development' that entered into force in 1966.[248] It laid down 'best efforts' commitments for the developed states,[249] and stated that tariff concessions that would be inconsistent with development objectives were not expected. Another priority of the developing countries was to obtain an exception to the MFN obligation of Article I GATT based on development status.[250] This debate took place within the United Nations Conference on Trade and Development (UNCTAD), which had also been involved in the preparations of Part IV.[251]

In 1968 the UNCTAD member states agreed on the necessity of a "generalized non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least

248 Protocol amending the General Agreement on Tariffs and Trade to introduce a Part IV on Trade and Development and to amend Annex I (8 February 1965) 572 UNTS 320.

249 At the time, such provisions were not considered to have any legal effect, see Sonia Rolland, 'Development at the WTO' (Oxford University Press 2012) 70.

250 MFN was a main feature of bilateral commercial treaties before World War II. At the same time, however, many states granted preferential tariffs to their former colonies after World War II. This is reflected in Article I(2) GATT, which is known as the 'grandfathering clause'. It exempts preferences that were in place before 1 January 1948 from the scope of the MFN obligation.

251 David Pollock, Joseph Love and David Kerner, 'Prebish at UNCTAD' in Edgar Dosman (ed) *Raúl Prebish, Power, Principles and the Ethics of Development* (Inter-American Development Bank 2006) 41.

advanced among the developed countries."[252] The UNCTAD resolution did not affect the interpretation of the GATT, however. If a member would thus adopt a generalized system of preferences (GSP) and lower tariffs for developing countries while maintaining them for the developed GATT-members, it would breach its MFN obligation. To overcome this problem, the GATT Ministerial Conference adopted a temporary waiver in 1971 that expressly allowed member states to deviate from their obligations under Article I for the purpose of establishing a GSP.[253] Eight years later the waiver was extended indefinitely through the adoption of the so-called 'Enabling Clause'.[254] It states that "notwithstanding [Article I GATT] contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties." The subsequent articles provide some additional rules. Importantly, Article 3(c) provides that:

> Any differential and more favorable treatment provided under this clause shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

At the establishment of the WTO in 1995 the Enabling Clause was made an integral part of the WTO framework. Having a GSP is voluntary, but if a state adopts one it must comply with the terms set by the Enabling Clause.[255] Both the European Union and the United States have a GSP in place which grant access to developing countries on the fulfilment of certain labour standards. The question arises whether such conditionalities comply with the requirement in Article 3(c). In other words: does the Enabling Clause only allows discrimination between developed and developing countries, or is it possible to distinguish between developing countries that have and that have not ratified certain ILO conventions, for example?

3.5.2.2 The EC–Tariff Preferences case and the notion of 'development needs'

In 2002 India challenged the European drug trafficking conditionalities before the WTO Dispute Settlement Body. Apart from their general GSP scheme, the

252 UNCTAD, Resolution 21(II): Preferential or free entry of exports of manufactures and semi-manufactures of developing countries to the developed countries, adopted at the 78th plenary meeting (27 March 1968).

253 Generalized System of Preferences, Decision of 25 June 1971, BISD 18S/24.

254 General Agreement on Tariffs and Trade, 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries' (28 November 1979) L/4903.

255 Lorand Bartels, 'The Appellate Body Report in European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries and Its Implications for Conditionality in GSP Programmes' in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi (eds) *Human Rights and International Trade* (Oxford University Press 2005) 469.

European Communities operated three 'special incentive arrangements' that provided additional tariff cuts to developing countries that committed to the implementation of (1) labour standards, (2) environmental standards, or (3) anti-drug trafficking programmes.[256] The latter included eleven Latin-American countries and Pakistan, much to the dislike of India, which argued that the Enabling Clause solely allows discrimination between developed and developing countries, but no further differentiation on the basis of conditionalities.

The 2004 Appellate Body report ruled the drug arrangement in breach of the Enabling Clause and constrained the types of conditionalities that GSP granting states can impose.[257] Unlike the panel however, the Appellate Body did not consider all forms of differentiation to be impermissible. Instead, it held that the requirement of Article 3(c) Enabling Clause that GSPs "shall be designed ... to respond positively to the development, financial and trade needs" allows to differentiate between developing countries. These development needs must be objectively identified and effectively addressed by the tariff preference.[258] The European conditions on drug trafficking were found to be non-compliant with this requirement, as its list of beneficiary countries was closed. Without clear criteria to determine whether countries could qualify for the special incentives, the European Communities could not substantiate that it responded to an objectively defined development need. Notably, however, the AB did not clarify the concept of 'development needs'.[259]

Arguably, the interpretation of this term hinges on one's conceptualization of 'development'. The Appellate Body emphasised that the purpose of the Enabling Clause is to foster "economic development,"[260] rather than 'sustainable development', which is the term that features in the preamble of the WTO Agreement. In the literature, it has thus been suggested that the term 'development needs' should be defined as "an undertaking, process, input, objective or policy that is required to achieve one or several goals of economic development."[261] Under this definition of development needs, the protection of trade union rights *as such* should be a driver to achieve economic development, for example. Commenting upon the diverse range of conditionalities that the United States and the European Union apply, the

256 Council Regulation (EC) 2501/2001 applying a scheme of generalized tariff preferences for the period from 1 January 2002 to 31 December 2004 (GSP Regulation 2002-2004) [2001] OJ L346/1.

257 WTO, *European Communities: Conditions for the grating of tariff preferences to developing countries – Report of the Appellate Body* (7 April 2004) WT/DS246/AB/R.

258 Ibid, para 173.

259 Ibid, paras 187-188.

260 Ibid, para 92.

261 Suyash Paliwal, 'Strengthening the Link in Linkage: Defining "Development Needs" in WTO Law' (2012) 27 American University International Law Review 37, 73. See also: Vichithri Jayasinghe, 'The Legality of the European Union's Special Incentive Arrangement' (2015) 18 Journal of International Economic Law 555, 567.

author warns that: "[a]dvocates of human rights protections and good governance as development needs within the WTO's contemplation face the uphill battle of relating these goals back to some driver of economic development."[262]

Arguably however, the Appellate Body does not require a causal link between (compliance with) the condition and economic development. It did not suggest that the development need itself should be a 'driver' of economic development, but merely authorizes "preference granting countries to respond positively to the needs."[263] In another passage the Appellate Body notes that: "[in] the context of a GSP scheme, the particular need at issue must, by its nature, be such that it can be effectively addressed *through tariff preferences*."[264] This confirms that there does not need to be a causal link between the 'need' and economic development, but between the tariff preference and the development need. The range of development needs is thus much broader than 'undertakings, processes, inputs, objectives or policies' that enable states to achieve economic development.[265]

The AB's assertion that the overall purpose of the Enabling Clause to foster 'economic development' does therefore not prejudice the types of development *needs* that may be addressed through tariff differentiation. For this purpose, recourse may be sought to more holistic conceptualizations, such as sustainable development, which is said to consist of three "interdependent and mutually reinforcing pillars": economic development, social development and environmental protection.[266] Arguably, ILO conventions themselves could also be used to determine the existence of a development need, as the AB recognizes *in dicta* that "multilateral instruments adopted by international organizations" could perform this role.[267]

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262 Suyash Paliwal, 'Strengthening the Link in Linkage: Defining "Development Needs" in WTO Law' (2012) 27 American University International Law Review 37, 89.

263 WTO, *European Communities: Conditions for the grating of tariff preferences to developing countries – Report of the Appellate Body* (7 April 2004) WT/DS246/AB/R, para 162 (international quotation marks omitted).

264 Ibid, para 164 (emphasis added).

265 Indeed, the AB did not rebut a remark by the Panel that recognized "different types of development needs, whether they are caused by drug production and trafficking, or by poverty, natural disasters, political turmoil, poor education, the spread of epidemics, the magnitude of the population, or by other problems." WTO, *European Communities: Conditions for the grating of tariff preferences to developing countries – Report of the Panel* (1 December 2003) WT/DS246/R, para 7.103.

266 United Nations, 'Johannesburg Declaration on Sustainable Development' (4 September 2002) UN Doc A/CONF.199/20, 1. See also: Brynn O'Brien and Ruben Zandvliet, 'Defining Development in WTO Law: The Legality and Parameters of Labour Rights Conditionality in the Generalised System of Preferences' (Society of International Economic Law Working Paper No 2012/30, 2012) 18-19.

267 WTO, *European Communities: Conditions for the grating of tariff preferences to developing countries – Report of the Appellate Body* (7 April 2004) WT/DS246/AB/R, para 163.

Three months after the AB report in *EC–Tariff Preferences* the European Commission published a communication on the future of the EU's GSP.[268] The communication noted that "[d]evelopment is now measured in terms of the environment, improved social conditions, anti-corruption measures, governance and so on."[269] The subsequent sections will explore in more detail how the labour conditions of the US and EU GSP schemes operate.

3.5.3 Labour conditionality in the United States' GSP

The United States adopted its first GSP legislation in 1976. In 1984 Congress included labour standards in the list of designation criteria. It was provided that GSP status could be withheld if the beneficiary country "has not taken or is not taking steps to afford internationally recognised worker rights to workers in the country (including any designated zone in that country)."[270] The term 'internationally recognized worker rights' included: (1) the right of association, (2) the right to organize and bargain collectively, (3) a prohibition on the use of any form of forced or compulsory labour, (4) a minimum age for the employment of children, and (5) acceptable conditions of work with respect to minimum wages, hours of work, and occupational health and safety.[271] A provision concerning non-discrimination was not included, as this would jeopardize amicable trade relations with the oil-producing countries and Israel, as a non-discrimination clause could have led to petitions concerning treatment of women and Palestinian workers, respectively.[272]

Aside from the substantive labour provision, the 1984 Trade and Tariff Act obliged the President to "submit an annual report to the Congress on the status of internationally recognized worker rights within each beneficiary developing country."[273] It did not explicitly provide for *ex ante* reviews of labour legislation in prospective beneficiary countries. Such reviews were carried out in the context of the Caribbean Basin Initiative (CBI), a region-specific preference programme adopted a year earlier. The designation criteria included "the degree to which workers in such country are afforded reasonable workplace conditions and enjoy the right to organize and bargain collective-

268 Commission of the European Communities, 'Developing countries, international trade and sustainable development: the function of the Community's generalised system of preferences (GSP)' (7 July 2004) COM(2004) 461 final.

269 Ibid 3.

270 Section 503(b) Trade and Tariff Act of 1984, Public Law 98-573, 98th Congress (98 Stat 3019).

271 Section 503(a) Trade and Tariff Act of 1984, Public Law 98-573, 98th Congress (98 Stat 3019).

272 Lance Compa and Jeffrey Vogt, 'Labor Rights in the Generalized System of Preferences: A 20-Year Review' (2001) 22 Comparative Labour Law & Policy Journal 199, 203.

273 Section 506 Trade and Tariff Act of 1984, Public Law 98-573, 98th Congress (98 Stat 3023).

ly."[274] The phrase 'reasonable workplace conditions' is the precursor of 'acceptable conditions of work with respect to minimum wages, hours of work, and occupational health and safety' which later featured in tariff legislation and free trade agreements. Notably, the House of Representatives rejected a proposal to require full harmonization of occupational health and safety laws with US standards.[275] The limited number of states that were eligible for CBI benefits made it possible to conduct a comprehensive *ex ante* review and, if necessary, negotiations to overcome discrepancies between domestic labour legislation and the CBI standard. Subsequently designation letters were drafted in which the eligible states listed their intended reforms. These vary considerably, ranging from a Haitian promise to use a weekly radio show to inform workers about their rights, to commitments by the Dominican Republic that government inspectors will oversee the weighing of sugar cane, which determined piece wages.[276] On some issues, the ILO was called upon to provide technical assistance.[277]

In addition to the CBI, the US introduced region-specific programmes for the Andean region (1991-2013) and the African continent (2000-present).[278] The 1984 GSP social clause has been amended once, after the adoption of the ILO's Worst Forms of Child Labour Convention (No 182).[279] The prohibition on the worst forms of child labour was included in the definition of internationally recognised worker rights, and a separate section was added that makes a country ineligible when it does not implement its commitments to eliminate the worst forms of child labour. Non-discrimination has not been included in the US definition, despite its status as a fundamental labour right.

Active engagement of US trade unions and NGOs is the cornerstone in the enforcement of US GSP legislation.[280] The US Trade Representative regularly receives NGO and trade union submissions alleging non-compliance of a beneficiary state with the labour conditionalities.[281] After a petition for review is accepted the USTR conducts an investigation and holds public hearings.

274 Section 212(c)(8) Caribbean Basin Economic Recovery Act of 1983, Public Law 98-67, 98th Congress, (97 Stat 387).

275 Steve Charnovitz, 'Caribbean Basin Initiative: Setting labor standards' (1984) Monthly Labor Review 54, 55.

276 Ibid.

277 Ibid.

278 The former expired in 2013, after the US negotiated FTAs with Peru and Columbia, and Bolivia and Ecuador became ineligible.

279 Section 412, Trade and Development Act of 2000, Public Law 106-200, 106th Congress, (114 Stat 298).

280 Regulations of the U.S. Trade Representative Pertaining to Eligibility of Articles and Countries for the Generalized System of Preference Program, 15 C.F.R. § 2007 et seq (2002).

281 The USTR may also conduct *proprio motu* reviews but it has rarely done so. In October 2017, it announced that it would conduct such reviews for all GSP beneficiaries on a triennial basis.

Revoking GSP status is a discretionary power of the President.[282] This way, the President retains the flexibility to maintain GSP status for countries that violated the labour clause if this would serve larger economic or geopolitical interests.[283] Nonetheless, more than one hundred reviews have been conducted and multiple states have lost GSP status due to non-compliance with the labour clause.[284] Review procedures often take years. The suspension of Bangladesh' GSP benefits in June 2013 followed only two months after the Rana Plaza industrial accident, but was based on a petition filed in June 2007 by the AFL-CIO, the largest American trade union federation. The scope of this petition was much broader than structural integrity of garment factories.[285] During the lengthy review procedures the US may indicate desired changes to a beneficiaries' domestic labour standards, and set a timeframe for implementation. The United States never responded to the *EC–Tariff Preferences* report. Its inconsistent application and lack of transparency about the standards by which it determines (non-)compliance make it's scheme vulnerable to a legal challenge before the WTO Dispute Settlement Mechanism. That said, having a GSP is voluntary, which means that a legal challenge on the substantive aspects of the US' GSP may well lead to its abrogation.[286]

3.5.4 Labour conditionality in the European Union's GSP

Whereas the labour conditionality in the US GSP remained largely unchanged since its introduction in 1984, the European Union has renewed its regulations various times.[287] It first introduced labour conditions in 1994. It was provided that preferential entitlements could be temporarily withdrawn due to "practice

282 *International Labor Rights Education & Research Fund v Bush*, 752 F. Supp. 495 (D.D.C. 1990) 497-499 "Given this apparent total lack of standards, coupled with the discretion preserved by the terms of the GSP statute itself and implicit in the President's special and separate authority in the areas of foreign policy there is obviously no statutory direction which provides any basis for the Court to act. The Court cannot interfere with the President's discretionary judgment because there is no law to apply." The Court further classified GSP labour conditionality as an "unstructured area of foreign policy."

283 Lance Compa and Jeffrey Vogt, 'Labor Rights in the Generalized System of Preferences: A 20-Year Review' (2001) 22 Comparative Labour Law & Policy Journal 199, 203.

284 Romania (1987), Nicaragua (1987), Paraguay (1987), Chile (1987), Myanmar (1989), Central African Republic (1989), Liberia (1990), Sudan (1991), Syria (1992), Mauretania (1993), Maledives (1995), Pakistan (1996), Belarus (2000), Bangladesh (2013) and Swaziland (2015).

285 AFL-CIO, 'Petition to remove Bangladesh from the list of the eligible beneficiary developing countries pursuant to 19 USC 2462(d) of the Generalized System of Preferences (GSP)' (22 June 2007).

286 International Corporate Accountability Roundtable, 'Tools of Trade: The Use of U.S. Generalized System of Preferences to Promote Labor Rights for All' (31 January 2018) 11-13.

287 Anthony Cole, 'Labor Standards and the Generalized System of Preferences: The European Labor Incentives' (2003) 25, 193-196 for an overview of legislative developments before the *EC–Tariff Preferences* case.

of any form of forced labour as defined in the Geneva Conventions of 25 September 1926 and 7 September 1956 and International Labour Organization Conventions Nos. 29 and 105 [or] export of goods made by prison labour."[288] The Regulation also anticipated the introduction of a special incentive arrangement for labour standards in 1998. Beneficiaries of this arrangement would be granted additional tariff cuts on top of the regular GSP. In order to qualify, states did not have to become a party to ILO conventions, but they should nonetheless:

> provide proof that they have adopted and actually apply domestic legal provisions incorporating the substance of the standards laid down in International Labour Organization Conventions Nos 87 and 98 concerning freedom of association and protection of the right to organize and the application of the principles of the right to organize and to bargain collectively and Convention No 138 concerning minimum age for admission to employment.[289]

Simultaneously with the labour arrangement the EU also introduced an environmental programme. These programmes complemented an already existing special incentive arrangement for countries that faced a drug trafficking problem.

The 1994 Regulation was still open with regard to the "intensity of the special incentive arrangements ... and the modalities for implementing them."[290] Eventually the European Communities opted for a sector-specific approach. When, for example, it would find violations of trade union rights in a country's textile industry but not in its electronics sector, it could adjust the GSP benefits accordingly.

When the Regulation was renewed in 2001, the labour arrangement was extended to the eight fundamental ILO conventions.[291] Although ratification was still not mandatory, developing countries would have to incorporate the substance of the conventions in their domestic legislation and ensure enforcement in order to be eligible. The grounds for temporary withdrawal of the preferential arrangements were also broadened. Whereas under the 1994 and 1998 Regulations preferences could only be withdrawn in the case of slavery,

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288 Art 9 Council Regulation (EC) 3281/94 applying a four-year scheme of generalized tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries (GSP Regulation 1995-1998) [1994] OJ L 348/1.

289 Art 7 Council Regulation (EC) 3281/94 applying a four-year scheme of generalized tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries (GSP Regulation 1995-1998) [1994] OJ L 348/1.

290 Art 7.3 Council Regulation (EC) 3281/94 applying a four-year scheme of generalized tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries (GSP Regulation 1995-1998) [1994] OJ L 348/1.

291 Art 14 Council Regulation (EC) 2501/2001 applying a scheme of generalized tariff preferences for the period from 1 January 2002 to 31 December 2004 (GSP Regulation 2002-2004) [2001] OJ L346/1.

forced labour and prison labour, it was added that this could also result from "serious and systematic violation of the freedom of association, the right to collective bargaining or the principle of non-discrimination in respect of employment and occupation, or use of child labour, as defined in the relevant ILO Conventions".[292] This also applied to the newly established the Everything But Arms (EBA) arrangement, which eliminated all quota and duties for the least developed countries,[293] except for arms and armaments. The 2001 Regulation thus required all states that enjoy GSP and EBA benefits to respect the fundamental labour standards. But whereas access to the special labour regime was conditioned upon a high threshold – namely the "effective application" of these standards which would be assessed *ex ante* – other states would be monitored on possible "serious and systemic violations." In addition to this material expansion, the 2001 Regulation explicitly noted that in its evaluation of GSP beneficiaries, the European Commission would rely *inter alia* on "[the] available assessments, comments, decisions, recommendations and conclusions of the various supervisory bodies of the ILO, including in particular Article 33 procedures".[294]

The special incentive arrangements were abandoned in 2005 for two reasons. First, the labour and environmental arrangements were not successful. No country was admitted to the latter. Both Moldova and the Russia applied for the labour arrangement, but only Moldova was accepted as of 2001. Second, the drug trafficking arrangement had been successfully challenged by India in the *EC–Tariff Preferences* dispute. Rather than bringing the procedural aspects of the special arrangements in compliance with the Appellate Body report, the European Commission replaced them with a new "special incentive arrangement for sustainable development and good governance," commonly known as GSP+[295] Until today, the European system of tariff preferences consists of three programs: (1) GSP for developing countries, (2) GSP+ for 'vulnerable' countries and (3) the EBA for the least developed countries.

This GSP+ programme is open to vulnerable countries that have ratified and "effectively applied" twenty-seven treaties relating to human rights, labour standards, environmental issues and good governance.[296] Vulnerability is determined by three criteria: (1) it has not been classified by the World Bank

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292 Art 26.1b Council Regulation (EC) 2501/2001 applying a scheme of generalized tariff preferences for the period from 1 January 2002 to 31 December 2004 (GSP Regulation 2002-2004) [2001] OJ L346/1.

293 While the term 'developing country' lacks a legal definition, the status of 'least developed country' is determined by the United Nations' Committee for Development Policy.

294 Preamble Recital 19 Council Regulation (EC) 2501/2001 applying a scheme of generalized tariff preferences for the period from 1 January 2002 to 31 December 2004 (GSP Regulation 2002-2004) [2001] OJ L346/1.

295 Council Regulation (EC) 980/2005 applying a scheme of generalised tariff preferences (GSP Regulation 2006-2008) [2005] OJ L169/1.

296 This included the eight core ILO Conventions, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

as high income during three consecutive years, (2) it has a lack of economic diversification, and (3) the share of GSP-covered imports to the EU represents less than 1% of the EU's total GSP imports.[297] According to the EU Regulation's preamble:

> developing countries which ... are vulnerable while assuming special burdens and responsibilities due to the ratification and effective implementation of core international conventions on human and labour rights, environmental protection and good governance should benefit from additional tariff preferences. These preferences are designed to promote further economic growth and thereby to respond positively to the need for sustainable development.[298]

The list of treaties that had to be implemented consisted *inter alia* of the eight fundamental ILO conventions and the main international human rights instruments. To qualify for GSP+ these treaties must be "ratified and effectively implemented" and the beneficiary country must give "an undertaking to maintain the ratification of the conventions and their implementing legislation and measures and ... accepts regular monitoring and review of its implementation record in accordance with the implementation provisions of the conventions".[299] Although beneficiaries of the regular GSP and EBA arrangements did not have to ratify the listed treaties, "serious and systemic violations of principles laid down in the conventions (including the eight fundamental ILO conventions, RZ) on the basis of the conclusions of the relevant monitoring bodies"[300] and "export of goods made by prison labour"[301] could lead to the temporal withdrawal of benefits.

The 2009 Regulation contained only minor changes to the GSP+ arrangement and the general provisions on temporary withdrawal of GSP benefits.[302] Whereas previous regulations would automatically expire after two years, the 2012 EU Regulation (which went into effect in January 2014) renewed its GSP legislation indefinitely.[303] The labour-related conditions for regular GSP and

297 Art 9.3 Council Regulation (EC) 980/2005 applying a scheme of generalised tariff preferences (GSP Regulation 2006-2008) [2005] OJ L169/1. This included for example

298 Preamble Recital 7 Council Regulation (EC) 980/2005 applying a scheme of generalised tariff preferences (GSP Regulation 2006-2008) [2005] OJ L169/1.

299 Art 9.1(a) and 9.1(d) Council Regulation (EC) 980/2005 applying a scheme of generalised tariff preferences (GSP Regulation 2006-2008) [2005] OJ L169/1.

300 Art 16.1(a) Council Regulation (EC) 980/2005 applying a scheme of generalised tariff preferences (GSP Regulation 2006-2008) [2005] OJ L169/1.

301 Art 16.1(b) Council Regulation (EC) 980/2005 applying a scheme of generalised tariff preferences (GSP Regulation 2006-2008) [2005] OJ L169/1.

302 Council Regulation (EC) 732/2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007 (GSP Regulation 2009-2011) [2008] OJ L 211/1.

303 Council Regulation (EU) 978/2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (GSP Regulation 2012) [2012] OJ L 303/1.

EBA beneficiaries remained the same; there is no *ex ante* assessment but benefits may be suspended in the case of serious and systemic violations, or when it exports prison labour goods.[304] For GSP+ beneficiaries the assessment procedure was significantly expanded. In addition to the requirement that a country must be economically vulnerable,[305] the Regulation contains five elements that have to be fulfilled in relation to the twenty-seven labour, human rights, environmental and good governance conventions.[306] Beneficiary countries (1) must ratify all conventions and no "serious failure" concerning the "effective implementation" may be identified in "the most recent available conclusions of the monitoring bodies under those conventions," (2) may not formulate reservations when these are expressly prohibited or incompatible with the convention's object and purpose, (3) must provide "a binding undertaking to maintain ratification of the relevant conventions and to ensure the effective implementation thereof," (4) must accept "without reservation the reporting requirements imposed by each convention and gives a binding undertaking to accept regular monitoring and review of its implementation record in accordance with the provisions of the relevant conventions," and (5) must give "a binding undertaking to participate in and cooperate with" the monitoring activities of the European Commission.[307]

Although the EU appears to equate compliance with ILO conventions and compliance with its GSP labour conditions, it has been argued that:

> the EU's granting of GSP+ incentives is less clearly consistent with a reading of the ILO committees' reports. The system has been successful in ensuring the full ratification of the eight fundamental labour standards among the beneficiary countries, as exemplified by the case of El Salvador. However, several countries have received GSP+ trade preferences despite being seriously criticized by the authoritative ILO committees for their *implementation* of the relevant conventions.[308]

According to Vogt this has not changed with the adoption of the 2012 Regulation. He firstly argues that "the European Commission has an institutional

304 Art 19.1 Council Regulation (EU) 978/2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (GSP Regulation 2012) [2012] OJ L 303/1.

305 Art 9.1(a) Council Regulation (EU) 978/2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (GSP Regulation 2012) [2012] OJ L 303/1.

306 See for the full list Annex VIII, Council Regulation (EU) 978/2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (GSP Regulation 2012) [2012] OJ L 303/1.

307 Art 9.1(b-f) Council Regulation (EU) 978/2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (GSP Regulation 2012) [2012] OJ L 303/1.

308 Jan Orbie and Lisa Tortell, 'The New GSP+ Beneficiaries: Ticking the Box or Truly Consistent with ILO Findings' (2009) 14 European Foreign Affairs Review 663, 679.

predisposition favouring social dialogue and cooperative mechanisms over enforcement actions."[309] GSP preferences have been suspended on only three occasions, two of which (Myanmar, 1997-2013 and Belarus, 2007-present) were related to labour rights.

In principle, the alignment of the European GSP with the legal framework of the ILO is laudable for its aim to achieve normative coherence. Scholars affiliated with the ILO continue to stress that the ILO is the "competent body" to deal with labour standards, and linkages, if acceptable at all, should therefore align with the ILO system.[310] The United States' use of the term "internationally recognized worker rights" led to the accusation that it uses "the rhetoric but not the substance" of the ILO.[311] Alston further argued that "the legislation 'mirrors' the issues dealt with in the principal ILO human rights conventions without specifically endorsing the actual formulations used therein."[312] In the case of Myanmar, however, the European Commission did not await the ILO investigations. Furthermore, Vogt has argued that the EU's characterization and appreciation of the ILO supervisory procedures is problematic.[313] The central concern is that the EU's understanding of when a country fails to comply with its ILO obligations is too narrow. In a Commission document, it is noted that the term "serious failure," which serves as the threshold to determine whether preferences should be suspended, is derived from the ILO.[314] In a footnote, the Commission then states that:

> for the purposes of GSP, a serious failure to effectively implement ILO conventions occurs when the Committee of Application of Standards, in the context of the yearly meetings of the International Labour Conference, notes the existence of a serious failure to implement a convention and introduces a "special paragraph" to that effect in its Report.[315]

However, as the European Commission acknowledged elsewhere, the selection of the cases that reach the Committee on the Application of Standards (CAS)

309 Jeffrey Vogt, 'A Little Less Conversation: The EU and the (Non) Application of Labour Conditionality in the Generalized System of Preferences (GSP)' (2015) 31 The International Journal of Comparative Labour Law and Industrial Relations 285, 286.

310 Rafael Peels and Marialaura Fino, 'Pushed out the Door, Back in through the Window: The Role of the ILO in EU and US Trade Agreements in Facilitating the Decent Work Agenda' (2015) 6 Global Labour Journal 189, 189.

311 Philip Alston, 'Labor Rights Provisions in US Trade Law: "Aggressive Unilateralism"?' (1993) 15 Human Rights Quarterly 1, 2.

312 Ibid 7 (internal reference omitted).

313 Jeffrey Vogt, 'A Little Less Conversation: The EU and the (Non) Application of Labour Conditionality in the Generalized System of Preferences (GSP)' (2015) 31 The International Journal of Comparative Labour Law and Industrial Relations 285, 292.

314 European Commission, 'The EU Special Incentive Arrangement for Sustainable Development and Good Governance ('GSP+') covering the period 2014-2015' (28 January 2016) SWD (2016) 8 final, 3.

315 Ibid.

is done "through negotiations between social partners."[316] In 2012 the CAS did not consider any cases after discussions between employers' organizations and trade unions broke down over a dispute about the right to strike. The European Union's approach thus ignores most of the work done by the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on Freedom of Association (CFA). Their findings are included in the biannual review of GSP+ recipients' compliance with the twenty-seven conventions, but play no role in determining whether GSP+ status should be withdrawn. Instead, these reports are merely descriptive and reiterate recent CEARC comments on GSP+ countries, as well as information from civil society and other sources that the European Commission considers relevant.[317]

However, the narrow focus of the European Commission attests to the fact that it is difficult to distil information from the ILO supervisory bodies in a way that enables it to flesh out the meaning of "effective implementation." The ILO's CEACR itself only uses this term to frame its expectations, but it does not give a definite assessment. There is a discord between the working methods of the ILO's supervisory bodies which are, to a large degree, based on suasion and progressive implementation, and the use of these bodies pronouncements in a more punitive context, i.e. whether or not to revoke GSP preferences.

In some cases, the benevolent attitude of the European Union contrasts sharply not only with the ILO but also with other the approach of the United States. In December 2013, the European Commission decided that Guatemala met the eligibility criteria of the GSP+ arrangement and could thus be admitted.[318] Meanwhile, however, the United States was pursuing an arbitral claim against the country for failure to comply with the labour clause in the free trade agreement between the United States and several Central-American countries. Although the arbitration concerned Guatemala's failure to comply with its own domestic labour legislation, the United States has used reports from the ILO Committee of Experts to substantiate its claims. It cited, for example, the 2014 report's passage on violence against trade unionists, in which: "The Committee again ... notes with deep concern that the allegations are extremely serious and include numerous murders (58 murders have been examined so far by the CFA since 2004) and acts of violence against trade union leaders and members, in a climate of persistent impunity."[319] In the 2016

316 Ibid 11.

317 Article 14 Council Regulation (EU) 978/2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (GSP Regulation 2012) [2012] OJ L 303/1.

318 Commission Delegated Regulation (EU) 182/2014 amending Annex III to Regulation (EU) No. 978/2012 of the European Parliament and of the Council applying a scheme of generalized tariff preferences [2013] OJ L 57/1.

319 *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Rebuttal Submission of the United States (16 March 2015) para 14, fn 11.

biannual review by the European Commission's, it is also recognized that there are severe problems with freedom of association in Guatemala. It concludes that:

> several shortcomings need to be urgently addressed, including the need for further action to combat violence and impunity, in order to ensure that adopted plans and roadmaps translate into solid results. Guatemala should also effectively implement legal reforms and improve the coverage and functioning of collective bargaining and address anti-union discrimination.[320]

However, these shortcomings were not enough for the European Commission to conclude that Guatemala failed to "effectively implement" the ILO Conventions on freedom of association and collective bargaining. This is not the first example of divergence between the EU and US in the application of their GSP programmes.[321] So far, the EU has not withdrawn GSP preferences on the basis of the 2012 Regulation.

3.6 Concluding remarks

When, some thirty years after the establishment of the ILO, states began to negotiate an International Trade Organization, there was broad support for the inclusion of an obligation to maintain fair labour standards. However, with the decay of the Havana Charter, the lack of success in amending the GATT and WTO with a 'fair labour standards clause', and the growing perception that the ILO could not effectively persuade states to ratify and implement international labour standards, attention turned to the interpretation of the rules of international trade law. Could derogations from existing labour standards by trade partners be characterised as a form of 'social dumping'? Is it possible to ban products made under conditions of forced labour? And can granting trade benefits to developing countries be used to demand ratification of certain ILO conventions?

Resorting to the interpretation of GATT provisions that do not provide an explicit framework to realize 'fair labour standards' means that the justifications for these linkages have to be adapted to this system. The legality of labour-related trade measures hinges on the interpretation of provisions in

320 European Commission, 'The EU Special Incentive Arrangement for Sustainable Development and Good Governance ('GSP+') covering the period 2014-2015' (28 January 2016) SWD (2016) 8 final, 162-163.

321 See Chapter 1 on the difference between the response from the European Union and the United States in the aftermath of the Rana Plaza disaster.

the GATT on the protection of public morals, national security,[322] the protection of negotiated market access concessions, and the understanding of the term 'development' in the Enabling Clause. Except for the latter, these are inward-looking rationales. As such, they aim to protect workers or consumers in importing states with high labour standards rather than improving the lot of sweatshop workers in exporting states. This is not to say that consumers cannot be genuinely concerned about sweatshop labour, or that their interest should be ignored in international trade law, only that currently the WTO legal framework cannot accommodate possible trade-offs between the interests of consumers and child workers, for example.

Both international labour law and trade-labour linkages (whether through unilateral measures or labour obligations in PTIAs) are based on the premise that free trade enables the circumvention of protective labour law, and that states may be inclined not to improve domestic labour standards, or even to deregulate labour, in order to remain competitive. This poses a problem for (importing) higher-standard countries that may be inclined to apply domestic trade measures in order to offset the economic effects of this behaviour, or to induce the (exporting) low-standard country to adopt more stringent labour legislation. Except for GSP conditionalities, the multilateral trade regime imposes significant constraints on the regulatory possibilities of importing states when they are concerned with another state's labour standards. The next chapter will examine whether international investment law imposes constraints on the ability of states to realize higher labour standards within its own jurisdiction.

322 Whether labour-related trade measures can be justified on this ground was not discussed in this chapter, but this is discussed *inter alia* in: Sarah Cleveland, 'Human Rights Sanctions and International Trade: A Theory of Compatibility, (2002) 5 Journal of International Economic Law 133, 181-186.

4 International Investment Law and Labour

4.1 INTRODUCTION

International investment law constitutes the second main pillar of international economic law. There are important differences with the trade regime. International trade law provides a legal framework that governs inter-state flows of goods and services based on the macro-economy theory of comparative advantage. Private actors – importing and exporting companies – are undoubtedly affected by the regime, but are not part of it. International investment agreements (IIAs), however, are agreed between states, but intend protect the private interests of investors – most often corporations – from one state party when they make investments in the territory of the other state. These investors are granted subjective rights which are enforceable vis-à-vis their host state via investor-state dispute settlement (ISDS).

Because of the differences between the two legal regimes, the legal debate on the interaction between international investment law and labour standards is in many ways the mirror image of the previous chapter. In multilateral trade law, the central question is to what extent states may use tariff or non-tariff instruments to address low labour standards in other jurisdictions. Such measures could deter states from lowering their levels of protection. Admittedly, decisions to deregulate could be motivated by a desire to gain a trade advantage but also in order to lure foreign investors. In international investment law, however, the core concern is not deregulation but regulation. Rights that are granted to foreign investors through an IIA potentially restrict the ability of host states to adopt labour laws. Indeed, it has been argued that: "the terms of international investment agreements may constrain states from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so."[1] When this occurs, investment agreements become 'golden straightjackets': states accept restrictions on their

[1] Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding principles on business and human rights: implementing the United Nations 'Protect, respect and remedy' framework'' (21 March 2011) (A/HRC/17/31) 12.

legislative sovereignty for the purpose of attracting inward investment and fostering economic growth.[2]

International investment law not only has a different function, but also a different form compared to multilateral trade law. Whereas the trade regime operates on the basis of a legal framework with 164 member states and is the result of a handful of 'constitutional moments', international investment law is highly decentralised. According to the World Investment Report 2018, there are 3322 IIAs, most of which are bilateral investment treaties (BITs).[3] The international law on foreign investment is often characterized by its "organic emergence"[4] and developed through "bumps and bruises."[5] Although it is recognised that in addition to treaty-based international investment law, custom also provides a source of law in this field, the analysis below will not elaborate further upon its scope. Instead, this chapter will draw from a range of IIAs as well as the rich body of case law emanating from investor-state dispute settlement (ISDS), which only tend to apply "rules of customary international law in order to complete the provisions of an applicable BIT."[6]

This chapter consists of four parts. Part 4.2 provides an introduction to the various linkages between international investment law and labour. Part 4.3 gives an overview of the structure of international investment law and explores whether investor rights could constrain states when adopting or enforcing labour standards. Part 4.4 turns to the legislative and interpretative strategies to increase host states' regulatory autonomy. Part 4.5 contains an analysis of provisions that address the conduct of investors.

2 Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 Modern Law Review 598, 622, citing an op-ed by W. Greider, 'Investment rules are the obstacle' *Financial Times* (London, 26 November 2003).

3 UNCTAD, 'World Investment Report 2018: Investment and New Industrial Policies' (United Nations 2018) 89.

4 Joost Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge Viñuales (eds), The Foundations of International Investment Law (Oxford University Press 2014) 15.

5 Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521, 1536.

6 Florian Grisel, 'Sources of investment law' in Zachary Douglas, Joost Pauwelyn and Jorge Viñuales (eds), The Foundations of International Investment Law (Oxford University Press 2014) 221.

4.2 INTRODUCTION TO INVESTMENT-LABOUR LINKAGE

4.2.1 Introduction

The purpose of this part is to establish in what ways labour standards interact with international investment law. Section 4.2.2 looks at the deregulation of labour in order to attract foreign direct investment (FDI). Section 4.2.3 introduces the notion that IIAs may restrict the ability of host states to regulate labour, as foreign investors may perceive such regulations to be in violation of the treaty-based rights protecting their investments. Section 4.2.4 zooms in on the role of the investor, as IIAs are by no means conceptually bound to endow investors with rights whilst ignoring their responsibilities.

4.2.2 The deregulation of labour

A major assumption underlying the expansion of IIAs is that they would lead to an increase of inward FDI, as investors would be availed of any doubts they might have had regarding the domestic legal system in the potential host state.[7] As the 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment put it: "a greater flow of foreign direct investment brings substantial benefits to bear on the world economy and on the economies of developing countries in particular." [8]That same report also emphasises that "labor

7 Andrew Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 Virginia Journal of International Law 639, 688. According to Pauwelyn: "countries keep signing BITs and FTAs – albeit with continual adaptations – partly because they perceive them to be in their interest, partly because of network effects and path dependency." Joost Pauwelyn, 'Rational Design or Accidental Evolution? The Emergence of International Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge Viñuales (eds), The Foundations of International Investment Law (Oxford University Press 2014) 12, 40-41; for empirical research on the effect of BITs on FDI inflows, see: Jeswald Salacuse and Nicholas Sullivan, 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 Harvard International Law Journal 67, 111 concluding that "BITs have a particularly strong effect on encouraging FDI in developing countries. In short, the grand bargain between developing and developed countries that underlies BITs, the bargain of investment promotion in return for investment protection, seems to have been achieved." But cf. Jason Webb Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence' (2010) 51 Virginia Journal of International Law 397, 434, who argues that: "While BITs are routinely described as important tools for attracting FDI, and while certain empirical studies claim to have isolated huge causal impacts, my own examination suggests that, at best, BITs spur investment only irregularly, inconsistently, and with generally unassuming impact."

8 Susan Franck, 'Managing expectations: beyond formal adjudication' in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy* (Cambridge University Press 2013) 376-379. But mode of entry was recognized as early as 1974: "Depending on the purpose and method of entry of the multinational corporations into the host

market flexibility ... is recognized as an important element in a positive investment environment."[9] Indeed, to become attractive to inward-FDI, states not only removed existing barriers but also created certain incentives. In a report from 2003, the UN High Commissioner for Human Rights noted that:

> In the past, there has been concern that Governments have lowered environmental and human rights standards – including labour standards, freedom of expression and freedom of association – to attract investment. The phenomenon, known as the "race-to-the-bottom", has arisen specifically in the context of Economic Processing Zones (EPZ). While there is little direct evidence to support such "race-to-the-bottom" arguments, the International Labour Organization (ILO) acknowledges that, as a result of investment, downward pressure on labour and environmental standards exists and it is difficult to judge the extent to which foreign investment is inhibiting the socially optimal raising of standards.[10]

This echoes the coordination problem that was at the heart of the foundation of the ILO: in the absence of international legal rules states will encroach upon each other's levels of social protection. Although scholars have argued that foreign investors actually favour high labour standards, they also make the empirical observation that states deregulate nonetheless. According to Howse, Langille and Burda: "We do see jurisdictions compete for foreign investment, engaging in what seems a mugs game of transferring public resources (incentives, tax breaks, loans, etc.) to private firms in order to attract location of factories etc. And there are clear examples of lowering or violating labour rights in such attempts."[11] Indeed, many complaints that reach the ILO Committee on Freedom of Association deal with alleged violations of trade union rights in countries' export sectors.[12] Deregulation of labour in order to attract FDI is not exclusively done by developing countries. For example, in 2010 New Zealand passed the so-called 'Hobbit labour laws' after pressure from American

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country and the type of technology used, the impact on the level of employment varies." ECOSOC, 'The Impact of Multinational Corporations on Development and on International Relations: Report of the Group of Eminent Persons to Study the Role of Multinational Corporations on Development and on International Relations' (24 May 1974) UN DOC. E/5500/Add.1 Part 1, 13 ILM 800 (1974), 850.

9 World Bank Group, 'Guidelines for the Treatment of Foreign Direct Investment' (Legal Framework for the Treatment of Foreign Investment: Volume II: Guidelines, 1992) 35, 39.

10 OHCHR, 'Human rights, trade and investment' E/CN.4/Sub.2/2003/9 (2 July 2003) para 13.

11 Robert Howse and Brian Langille with Julien Burda, 'The World Trade Organization and Labour Rights: Man Bites Dog' in Virginia Leary and Daniel Warner (eds) *Social Issues, Globalisation and International Institutions: Labour Rights and the EU, ILO, OECD and WTO* (Martinus Nijhoff Publishers 2006) 172.

12 OECD, 'Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade (1996) 98.

production companies to hire film industry workers as independent contractors instead of employees.[13]

Various scholars have argued that these examples are merely anecdotal, and that low labour standards do not attract more FDI. In fact, "low labor rights may be a hindrance, rather than an attraction, for foreign investors."[14] A possible explanation is that the costs of (high) labour standards are offset by externalities that create a conducive trade or investment climate.[15] For example, the right to freedom of association and collective bargaining contribute to political and social stability, and the eradication of child labour and occupational discrimination positively affects a country's human capital.[16] High labour standards may even be a source of comparative advantage to attract foreign investors, and "anchor" domestic companies to their home state.[17]

Rational or not, an OECD study found that "some governments in non-OECD countries have restricted labour rights (especially in export processing zones) *in the belief* that so doing would help attract inward FDI from both OECD and non-OECD investors."[18] Many contemporary IIAs address this problem. The EU-Canada Comprehensive Economic and Trade Agreement (CETA), for example, provides that "a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour law and standards, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory."[19]

These treaty provisions are inter-state obligations, prohibiting changes in domestic labour legislation if intended to lure foreign investors. As such, they are not at the heart of the debate about the relationship between international investment law and labour. The remainder of this chapter will be devoted to

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13 CBC News, 'New Zealand passes Hobbit labour law' *CBC News Website* (30 October 2010) <http://www.cbc.ca/news/arts/film/story/2010/10/30/hobbit-nz-labour.html> accessed 24 June 2018.

14 Dani Rodrik, 'Labor Rights in International Trade: Do They Matter and What Do We Do about Them?' in Robert Lawrence, Dani Rodrik and John Whalley (eds), *Emerging Agenda for Global Trade: High Stakes for Developing Countries* (Johns Hopkins Press for the Overseas Development Council 1996) 35.

15 David Kucera, 'Core labour standards and foreign direct investment' (2002) 141 International Labour Review 31, 63; Simon Deakin, 'The Contribution of Labour Law to Economic and Human Development' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) 173-4.

16 David Kucera, 'Core labour standards and foreign direct investment' (2002) 141 International Labour Review 31, 37.

17 One study that focused on outward-FDI finds that high levels of employment protection may actually "anchor" companies to a home State. Gerda Dewit, Holger Gorg and Catia Montagna, 'Should I Stay or Should I Go? Foreign Direct Investment, Employment Protection and Domestic Anchorage' (2009) 145 Review of World Economics 93.

18 OECD, 'Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade (1996) 123 (emphasis added).

19 Art 23.4.2 CETA.

the law governing the relationship between host states and foreign investors. Non-derogation clauses will be discussed in chapter 5.

4.2.3 The regulation of labour

The main concern in international investment law is whether states that want to regulate labour could be confronted with claims by foreign investors. Over the last twenty years, states have been confronted with claims that challenged *bona fide* measures that aimed to advance social or environmental policies. Examples include challenges against landfill permits,[20] transboundary movement of hazardous waste,[21] the ban of certain gasoline additives,[22] the withdrawal of water and sewage concessions,[23] anti-tobacco legislation,[24] the phase-out of nuclear energy[25] and bank-bailouts and sovereign debt restructuring in the aftermath of the 2008 global financial crisis.[26] Some cases are deemed 'regulatory disputes' as they concerned "ordinary governmental regulatory activities" while others dealt with measures that targeted specific investors.[27]

The question is whether investment protection standards unduly restrict a host state's 'right to regulate'. Treaties limit the freedom of their state parties, but always on the basis of consent. However, the concern here is that investor protections are drafted in such a broad manner that they may be interpreted in ways not foreseen by the parties. The possibility that labour legislation could be challenged by foreign investors was first raised in 1959. According to Gardner:

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20 *Metalclad Corporation v The United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, 40 ILM 36 (2001).

21 *S.D. Meyers, Inc. v Government of Canada*, UNCITRAL Arbitration (NAFTA), First Partial Award, 13 November 2000.

22 *Methanex Corporation v United States of America*, Final Award, 3 August 2005, 44 ILM 1345 (2005).

23 *Azurix Corp. v The Argentine Republic*, ICSID Case No ARB/01/12, Award, 14 July 2006.

24 *Philip Morris Asia Ltd (Hong Kong) v Commonwealth of Australia*, PCA Case No 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015.

25 *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12 (pending).

26 *Ping An Life Insurance Co of China v United Kingdom of Belgium*, ICSID Case No ARB/12/29, Award, 30 April 2015.

27 Julie Maupin, 'Differentiating Among International Investment Disputes' in Zachary Douglas, Joost Pauwelyn and Jorge Vinuales (eds), *The Foundations of International Investment Law: Bringing Theory Into Practice* (Oxford University Press 2014) 490. However, the latter author distinguishes between "*extraordinary* crisis disputes" and "*ordinary* regulatory disputes" (empasis added). The term 'regulatory disputes' is also used by Van Harten, see: Gus van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007) 4.

> Property rights can be effectively destroyed in many ways short of an actual confiscation or expropriation – they can be taken indirectly by exchange controls, export and import regulation, taxation, labor legislation, limitations on the ownership and control of enterprises, price controls, even by runaway inflation. Indeed, the prospect of these indirect takings provides much more of a deterrent to private foreign investment in underdeveloped countries than the prospect of a direct taking *via* confiscation or expropriation.[28]

Similarly, Sohn and Baxter considered in their commentary on the 1961 Draft Convention on the International Responsibility of States for Injuries to Aliens (1961 Harvard Draft) that: "The measures which a State might employ for this purpose (i.e. indirect expropriation, RZ) are of infinite variety. [...] It may, through its labor legislation and labor courts, designedly set the wages of local employees of the enterprise at a prohibitively high level."[29] Another example is provided in the commentary to the 1967 OECD Draft Convention on the Protection of Foreign Property, which mentioned "prohibition of dismissal of staff" amongst the issues that could give rise to an indirect expropriation claim.[30]

Over the years, there have been various labour-related investment disputes. To date, however, no arbitral tribunal has granted compensation to a foreign investor because the host state breached its treaty commitments through labour-related acts or omissions. The feasibility of such claims continues to be raised in academic debate, however.[31] Also amongst trade unions and NGOs there is a fear that investor claims could be brought in response to collective

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28 Richard Gardner, 'International Measures for the Promotion and Protection of Foreign Investment' (1959) 53 *American Society of International Law Proceedings* 255, 262. This comment was made in reference to the Abs-Shawcross Draft Convention of 1959, which article on expropriation recognized the concept of indirect expropriation but omitted a reference to public interest as a constitutive element of lawful expropriations. See: Georg Schwarzenberger, 'The Abs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary' (1960) 9 Journal of Public Law 147, 155-156.

29 Louis Sohn and Richard Baxter, 'Responsibility of States for Injuries to the Economic Interest of Aliens' (1961) 55 American Journal of International Law 545, 559.

30 OECD, 'Draft Convention on the Protection of Foreign Property' (1967), Notes and Comments to Article 3, 19.

31 See e.g. Joachim Karl, 'International Investment Arbitration: A Threat to State Sovereignty?' in Wenhua Shan, Penelope Simons and Dalvinder Singh (eds), *Redefining Sovereignty in International Economic Law* (Hart Publishing 2008) 231; Samrat Ganguly, 'The Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health' (1999) 38 Columbia Journal of Transnational Law 113, 132; Thomas Wälde and Abba Kolo, 'Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law' (2001) 50 International and Comparative Law Quarterly 811, 813; Kathleen Claussen, 'The use of arbitration to decide international labour issues' in Adelle Blackett and Anne Trebilcock (eds) *Research Handbook on Transnational Labour Law* (Edward Elgar Publishing 2015) 401.

bargaining rights, constraints on the use of casual labour, or the failure to end industrial disputes or strikes.[32]

A derivative concern is the possibility that states will refrain from implementing such legislation in the first place, as they fear that investors will resort to arbitration which could have monetary repercussions.[33] This effect is known as 'regulatory chill'. Simply refraining from adopting new legislation may be the easy way out, especially in the absence of (strong) countervailing power such as trade unions. Regulatory chill is difficult to observe. Whether it exists is an empirical question, but requires "counterfactual evidence about the regulations that would have existed in the absence of the purported chilling."[34] Co^te´ found that "there are some findings which raise the possibility of influence by IIA ISDS cases on the regulatory development process or trends in regulation, [but] there is no consistent observable evidence to suggest the possibility of regulatory chill."[35] To give one example from practice, a 2012 memo by the New Zealand Associate Minister of Health notes that: "Regardless of the strength of the arguments that plain packaging is defensible in ... trade and investment agreements, the risk that a WTO dispute settlement case or investment arbitration would be brought against New Zealand is reasonably high."[36] But examination of the political process does usually not reveal which arguments were conclusive for the non-adoption of new legislation.

The regulatory chill hypothesis is also approached from a legal positivist point of view. Scholars thus debate to what extent the structure of international investment law contributes to the fear of regulatory chill. As noted by Schill, "what one can observe is a convergence, not a divergence, in structure, scope, and content of existing investment treaties."[37] In the context of environmental

32 Bill Rosenberg, 'Labour Rights and Investment Agreements' (Power Point Presentation, 2 March 2012), on file with the author; Roeline Knottnerus and others, 'Socializing losses, privatizing gains: How Dutch investment treaties harm the public interest' (SOMO Briefing Paper 2015) 4; Hugh Robertson, 'TTIP: US/EU Trade Talks Need to Raise, Not Lower, Safety Standards' (8 May 2014); Markus Krajewski, 'Modalities for investment protection and Investor-State Dispute Settlement (ISDS) in TTIP from a trade union perspective' (Friedriech Ebert Stiftung 2014), despite the title of the paper it must be noted that the author is a law professor and the paper does not indicate any affiliation with a trade union.

33 Kyla Tienhaara, 'Regulatory chill and the threat of arbitration: A view from political science' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 606.

34 Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2015) 115.

35 Christine Côte, 'A Chilling Effect? The impact of international investment agreements on national regulatory autonomy in the areas of health, safety and the environment' (PhD Thesis London School of Economics 2014) 187.

36 Office of the Associate Minister of Health, 'Plain packaging of tobacco products' (undated) <https://www.health.govt.nz/system/files/documents/pages/03cabinet-paper-28-march.pdf> accessed 24 June 2018.

37 Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009) 11.

measures, he argues that "investment treaties *should not* lead to a chill on environmental regulation nor obstruct measures that are introduced in an attempt to mitigate climate change."[38] Some scholars note that tribunals have a variety of legal techniques at their disposal to take account of public interest concerns and international obligations outside of the investment framework to safeguard the policy space of host states,[39] while others point to the "lack of determinacy and coherence in treaty arbitration" which, they argue, causes legitimate fear amongst host states that their regulations will be challenged.[40] Roberts, for example, has argued that investment case-law "frequently resembles a house of cards built largely by reference to other tribunal awards and academic opinions, with little consideration of the views and practices of states in general or the treaty parties in particular."[41]

There have been different responses to accusations that "IIAs grant rights without responsibilities."[42] Broadly speaking, these can be divided into three categories. Firstly, it is argued that different interpretative strategies may warrant different outcomes, and that arbitral tribunals have, for example, erroneously held that the object and purpose of IIAs is to protect investors, rather than to contribute to economic development. Secondly, new IIAs often include language that attests to a more holistic object and purpose They mention that states have a 'right to regulate' or create carve-outs in specific protection standards. Thirdly, new mechanisms are being developed to replace the system of *ad hoc* system of investor-state dispute settlement in order to create a more coherent and balanced jurisprudence.[43] As the first two elements are directly concerned with the question whether IIAs constrain host states in the development of their domestic labour legislation, they will be explored further in sections 4.3 and 4.4.

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38 Stephan Schill, 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?' (2007) 24 Journal of International Arbitration 469, 477.

39 See e.g. James Harrison, 'The case for investigative legal pluralism in international economic law linkage debates: a strategy for enhancing the value of international legal discourse' (2014) 2 London Review of International Law 115, 124, who distinguishes between the hierarchical strategy, displacement strategy and the interpretative strategy.

40 Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521, 1586. Also: Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration* (Cambridge University Press 2015) 3, who in turn refers to various studies of arbitral practice in relation to the fair and equitable treatment standard.

41 Anthea Roberts, 'Power and Persuation in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 American Journal of International Law 179.

42 Jarrod Hepburn and Vuyelwa Kuuya, "Corporate Social Responsibility and Investment Treaties," in Marie-Claire Cordonier Segger, Markus Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Wolters Kluwer 2011) 607.

43 Rob Howse, 'Designing a Multilateral Investment Court: Issues and Options' (2017) 36 Yearbook of European Law 209, 215-6.

4.2.4 The regulation of investors

In addition to concerns about deregulation and regulation of labour standards, IIAs increasingly address the responsibilities of investors. Since the Second World War, various attempts have been made to draft 'codes' and 'guidelines' that elaborate on the responsibilities of multinational corporations. It was an essential part of the developing countries' efforts to establish a New International Economic Order (NIEO). As one historic account of international investment law argues, the *de jure* reciprocity of treaties was often a sham. Rules on the protection of foreign-owned property applied in a way that "became inextricably linked with colonialism, oppressive protection of commercial interests, and military intervention."[44] One particular element of inequality was that international investment law provided no avenue for host states to "address damages suffered at the hands of foreign investors."[45]

In 1974, at the height of the NIEO movement,[46] the UN Economic and Social Council (ECOSOC) established a Centre and an intergovernmental Commission on Transnational Corporations.[47] The Commission would, *inter alia*, lay the groundwork for a code of conduct and specific or general 'agreements'. The word 'treaty' was not used. A Draft Code of Conduct on Transnational Corporations was eventually published in 1984.[48] In the meantime, however, the Organization for Economic Cooperation and Development (OECD) had developed the OECD Guidelines for Multinational Enterprises (OECD Guidelines). They were originally adopted in 1976 as a "preemptive strike" by the developed OECD members to avoid more stringent international regulation of MNEs.[49] The OECD Guidelines were annexed to the Declaration on International

44 Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013) 21.

45 Ibid 32.

46 Political support for the position of the developing countries was reflected in a number of UN General Assembly resolutions during the 1960s and 1970s. In 1974, however, the UN General Assembly adopted the two main resolutions that outlined a broad agenda for global economic reforms: the 'Declaration on the Establishment of a New International Economic Order' and the 'Charter of Economic Rights and Duties of States'. UNGA Res 3201 (S-VI) (1 May 1974) 'Declaration on the Establishment of a New International Economic Order' UN Doc A/Res/VI/3201); UNGA Res 3281 (XXIX) (12 December 1974) 'Charter of Economic Rights and Duties of States' UN Doc A/Res/XXIV/3281. See generally, Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997) 82-118.

47 ECOSOC Res 1913 (5 December 1974) E/RES/1913 (LVII).

48 UN Code of Conduct on Transnational Corporations, 23 ILM 626 (1984).

49 Bob Hepple, 'A Race to the Top: International Investment Guidelines and Corporate Codes of Conduct' (1999) 20 Comparative Labor Law & Policy Journal 347, 353. In the literature, it has been considered whether the OECD Guidelines create binding obligations for OECD Member States. Article 5(a) of the OECD Convention provides that the organization may "take decisions which […] shall be binding on all the Members." On this basis, Robinson argued that the establishment and proper administration of National Contact Points is thus

Investment and Multilateral Enterprises (1976 IIME Declaration).[50] The core of the 1976 IIME Declaration was to guarantee National Treatment to MNEs from other OECD member states. As a *quid pro quo* for the expansion of investors' rights, the OECD member states "jointly recommend to multinational enterprises operating in their territories the observance of the Guidelines as set forth in the Annex."[51] While the motivations behind the project may have been somewhat skewed, the OECD Guidelines have arguably evolved into the most important CSR instrument promulgated by an international organization.[52] The OECD Guidelines especially stand out for its dispute resolution mechanism. Every adhering state has a so-called National Contact Point (NCP), which handles 'specific instances', which is the term used for allegations of non-compliance.[53]

Since 1976 the OECD Guidelines have been revised a number of times. Under the auspices of the ILO and the UN a number of other initiatives and guidelines were developed, of which the ILO's 1977 Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy and the 2011 UN Guiding Principles on Business and Human Rights (UN Guiding Principles) are the most important.[54] None of these instruments intended to create a legally binding framework for corporations. Instead, they have inspired corporate codes of conduct, multistakeholder initiatives and International Framework Agreements, which are agreements between MNEs and trade unions. Compliance with labour standards constitutes an important part of these

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an international obligation. See: Scott Robinson, 'International Obligations, State Responsibility and Judicial Review Under the OECD Guidelines for Multinational Enterprises Regime' (2014) 30 Utrecht Journal of International and European Law 68.

50 OECD, 'Declaration on International Investment and Multinational Enterprises' (21 June 1976) 15 ILM 967 (1976), Guidelines from 969. The 2011 Guidelines use the term "part of" to describe the relationship with the IIME.

51 OECD Declaration (1976) 968.

52 See in general about the development of CSR norms by international organizations: Peter Muchlinski, 'Human rights, social responsibility and the regulation of international business: The development of international standards by intergovernmental organisations' (2003) 3 Non-State Actors and International Law 123 (2003). For the interrelationship between the ILO Tripartite Declaration and the OECD Guidelines, see: Virginia Leary, 'Nonbinding Accords in the Field of Labour' (1997) 29 Studies in Transnational Legal Policy 247, 255-256.

53 OECD, 'OECD Guidelines for Multinational Enterprises, 2011 edition' (adopted 25 May 2011) 68.

54 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 17 ILM 422 (1978); Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding principles on business and human rights: implementing the United Nations 'Protect, respect and remedy' framework'' (21 March 2011) (A/HRC/17/31). Both the ILO MNE Declaration and the UNGPs are referenced in the OECD Guidelines.

instruments, which are often grouped under the heading of corporate social responsibility (CSR).[55]

When the OECD embarked on the development of a Multilateral Agreement on Investment (MAI), it again intended to Annex the OECD Guidelines. After the publication of the 1998 draft, however, negotiations were discontinued.[56] Nonetheless, several years after the failure of the MAI, references to CSR and international instruments in this area started to emerge in IIAs. Some of these explicitly mention labour standards, whilst others contain more general language. Section 4.5 will explore these provisions in depth.

4.3 INVESTMENT PROTECTION STANDARDS IN RELATION TO LABOUR REGULATION

4.3.1 Introduction

This part introduces the basic structure of international investment law, and discusses how this influences the feasibility of labour-related claims. While the scope and content of IIAs have converged over the years, there remains a degree of variation in the substantive rights that are contained in these IIAs.[57] It would be difficult to conceive of the variety of labour-related acts and omissions that could give rise to an ISDS claim. The purpose of this part is therefore to provide a basic analysis of investment protection standards. Sections 4.3.2 to 4.3.5 discuss the protection against direct and indirect expropriation, fair and equitable treatment, full protection and security and non-discrimination (most favoured nation treatment and national treatment).

55 Ruben Zandvliet and Paul van der Heijden, 'The rapproachement of ILO standards and CSR mechanisms: towards a positive understaning of the 'privatization' of international labour standards' in Axel Marx, Jan Wouters, Glenn Rayp and Laura Beke (eds), *Global Governance of Labor Rights: Assessing the Effectiveness of Transnational Public and Private Policy Initiatives* (Edward Elgar Publishing 2016) 176-177.

56 For critical perspectives on the labour-related aspects of the MAI, see Lance Compa, 'The Multilateral Agreement on Investment and International Labor Rights: A Failed Connection' (1998) 31 Cornell International Law Journal 683; Nico Schrijver, 'A Multilateral Investment Agreement from a North-South Perspective' in Eva Nieuwenhuys and Marcel Brus (eds), *Multilateral Regulation of Investment* (Kluwer Law International 2001)29-33.

57 Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521, 1530.

4.3.2 Direct and indirect expropriation

4.3.2.1 Background of the norm

The expropriation of property has been a long-standing concern of international law.[58] Expropriation is only allowed under certain conditions. Article 13 of the 2004 Canadian Model BIT is an example of a typical treaty provision:

> Neither Party shall nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation ... , except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on prompt, adequate and effective compensation.

Historically the term expropriation referred to the direct taking of property through its legal title. While there are still examples of such 'direct expropriations', focus has shifted to situations in which there is no "physical invasion of the property" but instead an "erosion of rights associated with ownership by state interferences."[59] Through this notion of 'indirect expropriations' a wider range of host states actions is potentially covered.[60] A finding of this kind would require the host state to provide compensation to the investor, but does not nullify the regulation as such.

4.3.2.2 Taxonomy of treaty interpretation

The threshold for indirect expropriations has been commented upon by a number of tribunals. This has not led to the development of a coherent theory or framework. Bonnitcha submits that case-law on indirect expropriation can be divided into three "structures of inquiry": (1) the effects structure, (2) the exception structure, and (3) the balancing structure.[61] The effects structure is embedded in many IIAs. Article 6.2 of the French Model BIT, for example,

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58 For an historic overview of the controversies and the development of the norm, see Wil Verwey and Nico Schrijver, 'The taking of foreign property under international law: a new legal perspective?' (1984) 15 Netherlands Yearbook of International Law 3.

59 UNCTAD, 'Taking of Property' (UNCTAD Series on Issues in International Investment Agreements, 2000) 20. The concept of indirect expropriations is not new, however, but was recognized in the case-law of the Permanent Court of International Justice. See: *Norwegian Shipowners' Claims (Norway v United States of America)* (13 October 1922) I RIAA 307; *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v Polish Republic)* (Judgment) PCIJ Rep Series A No 7 (25 August 1925) 3.

60 In a report that was published in 1972 the US Department of State listed a few instances of expropriations resulting from labour disputes: US Department of State Report on Nationalization, Expropriation, and other takings of U.S. and Certain Foreign Property since 1960 (1972) 11 ILM 84.

61 Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2015) 243.

provides that: "Neither Contracting Party shall take any measures of expropriation or nationalization or any other measures having the effect of dispossession, direct or indirect, of nationals or companies of the other Contracting Party of their investments." The multilateral Energy Charter Treaty also defines indirect expropriations as "measures having effect equivalent to nationalization or expropriation"[62]

The effects structure has been applied in a number of cases. In *Metalclad v Mexico*, the Tribunal had to consider an Ecological Decree which declared an ecological reserve in the area in which the claimant had been granted permission to construct a landfill for hazardous waste. The Tribunal found that it "need not decide or consider the motivation or intent of the adoption of the Ecological Decree."[63] The *Pope & Talbot* tribunal also followed this approach, but adds that interference must have a "substantial" impact on the investment to qualify as expropriatory.[64]

Some treaties contain explicit exceptions that exclude measures that fall within certain 'policy domains' from being classified as an indirect expropriation. The COMESA Investment Agreement provides that:

> Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article.[65]

Exception clauses in indirect expropriation clauses are not common, however.[66] Importantly, the provision claims that the exception is already 'consistent' with customary international law. An explicit carve-out in the text of the agreement should thus not be necessary. Indeed, in *Methanex v United States*, the tribunal held in relation to Article 1110, which contains no such carve-out, that:

> as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to ... refrain from such regulation.[67]

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62 Art 13.1 Energy Charter Treaty.

63 *Metalclad Corporation v The United Mexican States* (2000) 40 ILM 36 (2001) para 111.

64 *Pope & Talbot v Canada*, UNCITRAL Arbitration (NAFTA), Interim Award, 26 June 2000, para 102.

65 Art 20.8 COMESA Investment Agreement.

66 Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2015) 256.

67 *Methanex Corporation v United States of America*, UNCITRAL Arbitration (NAFTA), Final Award, 3 August 2005, 44 ILM 1345 (2005) pt. IV, chp D, para 7.

The *Methanex* decision has been followed in subsequent cases, confirming that measures "commonly accepted as within the police powers of States" are protected by customary international law.[68] Under the exceptions structure of inquiry, it is thus necessary to determine (1) whether a measure is within a state's police powers, and if so, (2) whether an exception applies, such as bad faith, discrimination, undue process or breach of specific commitments.[69]

Notably, while the American Law Institute's *Third Restatement of the Foreign Relations Law of the United States* also embraces a broad police powers exception,[70] US investment agreements typically note that: "*Except in rare circumstances*, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[71] It is unclear whether 'rare circumstances' refers to bad faith, discrimination, undue process and breach of specific commitments, or whether a disproportionate impact could also fulfil this requirement.

Indeed, some tribunals have followed a balancing approach that looked at "both the effects and the characteristics of a measure in determining whether it constitutes indirect expropriation."[72] The tribunal in *LG&E v Argentina*, for example, found that:

> it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed.[73]

Crucial to a finding of proportionality is that "the greater the limitation on a right or interest, the more compelling the social need or public objective should be."[74] What yardsticks tribunals could or should use to determine how 'compelling' a certain need is unclear. Furthermore, the question arises

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68 *Saluka v Czech Republic*, UNCITRAL Arbitration, Partial Award, 17 March 2006, para 262.

69 Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2015) 257; Jorge Viñuales, 'Sovereignty in Foreign Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge Viñuales (eds), *The Foundations of International Investment Law* (Oxford University Press 2014) 343

70 American Law Institute, 'Third Restatement of the Foreign Relations Law of the United States' (1987) Section 712 g.

71 Annex 10B, Panama-US FTA (emphasis added).

72 Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2015) 260.

73 *LG&E v Argentina*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006, para 195.

74 Caroline Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investment Treaty Arbitration' (2012) 15 Journal of International Economic Law 223, 226-227.

whether states could be obliged to consider alternative measures with a less intrusive impact on the investment.

4.3.2.3 Police powers, legitimate public welfare objectives, and labour

The co-existence of different methods to determine indirect expropriation precludes a categorical statement that labour-related measures can never be deemed expropriatory. The 'exceptions approach', which excludes certain domains of governmental policy from the scope of indirect expropriations is most likely to bar such claims. There is broad support for the notion that customary international law shields any claims of indirect expropriation that are within the police powers of states. Attempts to identify certain 'legitimate public welfare objectives' should therefore not be interpreted as introducing a new standard, but as more explicit guidance on the scope of a state's police powers. It is merely a legislative response to the inconsistent application of expropriation norms.[75]

Notably, however, carve-outs rarely go beyond the standard list of health, safety and the environment. Labour or social regulation is not mentioned in any of the clauses that aim to refine the expropriation standard, although it was reportedly discussed in this context during the MAI negotiations,[76] and trade unions are advocating for its explicit recognition as a legitimate public policy objective.[77] This is not necessary, however. The domains listed in IIAs are examples, and do not represent a limitative list.[78] Rather, the standard

75 Jasper Krommendijk and John Morijn, ''Proportional' by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 434-5.

76 Edward Graham, 'Regulatory Takings, Supernational Treatment, and the Multilateral Agreement on Investment: Issues Raised by Nongovernmental Organizations' (1998) 31 Cornell Journal of International Law 599, 611, noting that: "MAI negotiators recognized some of the problems associated with the regulatory taking provision under the MAI draft. At meetings held in early 1998, negotiators expressed views that MAI signatory governments were "not meant to be required to pay compensation for losses which an investor or investment may incur through regulation, revenue raising, and other measures of general application taken by governments, and that laws establishing taxation measures, environmental or labour standards, or intellectual property regimes, are not intended to constitute expropriation for the purposes of the MAI." (Internal citation from personal correspondence of Mr. Pierre Poret, Principal Administrator of Directorate for Fiscal, Financial and Enterprise Affairs of the OECD to the author of the article.)

77 European Trade Union Confederation, 'Resolution on EU Investment Policy' (Brussels, 5-6 March 2013).

78 Jasper Krommendijk and John Morijn, ''Proportional' by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 435.

list combines the issues that were already included in the 1961 Harvard Draft (e.g. public order, health, morality)[79] with ones that have emerged from arbitral practice (environmental measures). If investors had been more assertive in claiming compensation for damages arising from labour regulation, the issue may have been included in subsequent IIAs as well.

Indeed, despite the early warnings during the 1950s and 1960s, there have been no cases in which investors came close to advancing a successful indirect expropriation claim originating from the introduction of labour or social security legislation. While there are examples of domestic cases in which the retroactive application of a social security arrangement was considered expropriatory,[80] no such cases have been brought before international arbitral tribunals. Cases that are nonetheless relevant to determine whether this would be possible are scarce. *Foresti v South Africa*, which was brought pursuant to the BITs between Italy and South-Africa and between the Belgo-Luxembourg Economic Union and South-Africa, concerned the legality of the latter's 'Black Economic Empowerment' (BEE) legislation, which included certain affirmative employment actions.[81] The BEE programme concerned a broad set of measures that aimed to improve the position of Historically Disadvantaged South-Africans (HDSA). This included targets for 40 per cent HDSA participation in management and 10 per cent for women in mining, to be reached within five years.[82] While the investor included the management quota in its head of claim, the case mainly concerned the mandatory transfer of ownership rights to HDSAs.[83] The proceedings were eventually discontinued as the parties reached agreement on the mitigation of some BBE measures unrelated to affirmative employment action, so that these issues were never discussed on the merits.[84] A second example is *Svenska Management Gruppen AB v Sweden* before the European Commission on Human Rights. In this case, which was relied upon by South-Africa in *Foresti*, the Commission found that an expropriation claim concerning the increase of social security contributions was manifestly unfounded and did not engage in a detailed examination whether Article 1 of the First Protocol to the ECHR was breached.[85]

79 Art 10.5 Draft convention on the international responsibility of States for injuries to aliens, prepared by the Harvard Law School (1961), cited in: International Law Commission, 'First report on State responsibility by Mr. Roberto Ago, Special Rapporteur – Review of Previous work on codification of the topic of the international responsibility of States,' A/CN.4/217 and Corr.1 and Add.1 (1969) 142.

80 See e.g. the US Supreme Court case of *Eastern Enterprises v APFEL*, 524 U.S. 498 (1998).

81 *Foresti v South Africa*, ICSID Case No ARB(AF)/07/01, Award, 4 August 2012.

82 Luke Eric Peterson, 'South Africa's Bilateral Investment Treaties: Implications for Development and Human Rights' Friedrich Ebert Stiftung, Occasional Papers No. 26 (November 2006) 27.

83 *Foresti v South Africa*, ICSID Case No ARB(AF)/07/01, Award, 4 August 2012, para 79

84 *Foresti v South Africa*, ICSID Case No ARB(AF)/07/01, Award, 4 August 2012, paras 79-82.

85 *Svenska Management Gruppen AB v Sweden* App No 11036/84 (EComHR, 2 December 1985).

Provided that a tribunal would not follow the sole effects or balancing doctrines, a labour-related indirect expropriation claim could only succeed when the tribunal determines that labour regulation is not a legitimate public welfare objective. This is unlikely to succeed. At its core, labour regulation is no different from healthcare or environmental-related measures. Arguably, the character of labour regulation makes it even more unlikely it will be challenged by investors. Governmental measures in the environmental or public health domain, for example, are often more specific compared to the regulation of labour. This includes the withdrawal of permits based on environmental reasons, or the prohibition of certain chemicals that are considered a threat to public health.[86]

4.3.3 Fair and equitable treatment

4.3.3.1 Background of the norm

Having determined that labour regulation is unlikely to be challenged as a form of indirect expropriation, the question arises whether the fair and equitable treatment (FET) standards provides an alternative ground for an aggrieved investor. The FET standard aims to provide investors with a consistent, transparent, stable and predictable business environment.[87] Indeed, Dolzer and Schreuer note that various ICSID tribunals "have interpreted the concept of indirect expropriation narrowly and have preferred to find a violation of the standard of fair and equitable treatment."[88] Indeed, the FET standard is the most frequently invoked standard in investor-state arbitration. Its wording tends to be succinct. The 1991 BIT between the Netherlands and the Czech Republic, for example, holds that:

86 Kulick has considered an alternative scenario in which a mining company, with tacit approval of the government, forces the local population to work at its mine. After a change in government, the managing personnel is prosecuted and the mining license is withdrawn without compensation due to the company's forced labour practices. While these enforcement measures are 'labour-related' they do not touch upon the core of labour regulation. They may thus be assessed differently from labour regulation as such. For example, if a tribunal would consider whether the enforcement measure was proportional it may which to consider alternative measures to effectively enforce the country's forced labour legislation and determine that the withdrawal of a permit is not strictly necessary. When a host state would change a material labour norm, however, an inquiry into alternative means is less likely. Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge University Press 2014) 54-55.

87 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 160

88 Ibid 101.

> Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.

In its attempt to interpret the meaning of this provision, the *Saluka v Czech Republic* tribunal noted that the FET standard "can only be defined by terms of almost equal vagueness."[89] Indeed, its lack of precision means that it has the potential to accommodate a much broader range of claims than other IIA standards. For this reason, some authors regard its lack of precision "a virtue rather than a shortcoming."[90]

From the perspective of investors this certainly holds true. According to UNCTAD, the FET standard is "the most relied upon and successful basis for a treaty claim."[91] Arguably the most far-reaching assertion of the scope of the FET standard has been made by the *Tecmed* tribunal, which interpreted the FET standard in the 1995 Spain-Mexico BIT.[92] It held *in dicta* that:

> The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.[93]

This overly broad expectation has not been repeated in other cases. The tribunal in *Saluka* gave a more accurate description of when an investor could successfully invoke the FET standard:

> A foreign investor whose interests are protected under the Treaty is entitled to expect that the [host state] will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (*i.e.* unrelated to some rational policy), or discriminatory (*i.e.* based on unjustifiable distinctions).[94]

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89 *Saluka v Czech Republic*, UNCITRAL Arbitration, Partial Award, 17 March 2006, para 297.

90 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 133.

91 UNCTAD, 'Latest Developments in Investor-State Dispute Settlement: IIA Monitor No. 1' (2009) UNCTAD/WEB/DIAE/IA/2009/6/Rev1, 8.

92 Art 4.1 of that agreement provided that: "Each Contracting Party will guarantee in its territory fair and equitable treatment, according to International Law, for the investments made by investors of the other Contracting Party." While it did not mention "unreasonable or discriminatory" like the Netherlands-Czech Republic BIT, this minor difference does not explain the discord between the interpretation of the FET standard in *Saluka* and *Techmed*.

93 *Técnicas Medioambientales Techmed, SA v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, 43 ILM 133 (2004), para 154.

94 *Saluka v Czech Republic*, UNCITRAL Arbitration, Partial Award, 17 March 2006, para 309.

Tribunals thus confirm that under normal circumstances, the host state has an "undeniable right and privilege to exercise its sovereign legislative power."[95] This is not impaired by investors' subjective expectations.[96] Therefore, legitimate expectations have to be based on contractual commitments, specific representations, or situations in which the state acts "unfairly, unreasonably or inequitably in the exercise of its legislative power."[97] Acts in bad faith could clearly give rise to FET claims. But when the state acts in good faith, and conforms with its contractual commitments, the 'legitimacy' of the expectation has to be recognizable by a third-party. This is in line with the 1926 *Neer* award which holds that *bona fide* measures can only be characterized as arbitrary, and thus contrary to investors' legitimate expectations, when the measure is recognized as such "by any reasonable and impartial man"[98] Also the 1989 *ELSI* judgment of the ICJ adopted this line of argument, where it considered that the conduct of the host state must "[shock], or at least surprises, a sense of juridical propriety."[99]

A consistent interpretation of the FET standard has not yet developed. To the contrary, in the *AWG v Argentina* case, the dissenting arbitrator noted that "the standard of fair and equitable treatment has been interpreted so broadly that it results in arbitral tribunals imposing upon the Parties obligations that do not arise in any way from the terms that the Parties themselves used to define their commitments."[100] In *Saluka v Czech Republic*, the majority criticized previous tribunals' interpretations of the FET standard, noting that "if their terms were to be taken too literally, they would impose upon host states' obligations which would be inappropriate and unrealistic."[101]

More specificity on the scope of the FET standard could be provided by including detailed provisions in the treaty itself, or by bodies that may issue interpretations after the treaty has been concluded. Examples of the latter include the 'Joint Committee' that are established in CETA,[102] and the trilateral 'Free Trade Commission' that may resolve issues on the interpretation or

95 *Parkerings-Compagniet AS v Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007, para 332; *Saluka v Czech Republic*, UNCITRAL Arbitration, Partial Award, 17 March 2006, para 305; *S.D. Myers Inc v Canada*, UNCITRAL Arbitration (NAFTA), First Partial Award, 13 November 2000) para 263.

96 *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010, para 209. *Saluka v Czech Republic*, UNCITRAL Arbitration, Partial Award, 17 March 2006, para 304.

97 *Parkerings-Compagniet AS v Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007, para 332.

98 *LFH Neer and Pauline Neer (USA v United Mexican States)* (1926) 4 UNRIAA 60, para 60.

99 *Case Concerning Elettronica Sicula S.p.A (ELSI) (United States of America v Italy)* (Judgment) [1989] ICJ Rep 15, para 128.

100 *AWG Group Ltd. v Argentine Republic*, UNCITRAL Arbitration, Separate Opinion of Arbitrator Pedro Nikken, 30 July 2010, para 27.

101 *Saluka v Czech Republic*, UNCITRAL Arbitration, Partial Award, 17 March 2006, para 304.

102 Art 8.31 and 26.1 CETA.

application of NAFTA.[103] These are political bodies, whose pronouncements on the interpretation of their respective agreements are binding. NAFTA's Free Trade Commission has used this competence ones, when it stated that the FET standard does "not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[104]

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Canada-EU Trade Agreement (CETA) include a more detailed FET standard than the ones found in most IIAs. The former emphasizes that it does not create any obligations beyond what is required by customary international law. It subsequently provides more detailed guidance on what, according to the parties, may and may not qualify as a breach of the customary FET standard. The FET standard in CETA takes a different approach. It does not refer to customary international law, but contains a closed list of non-acceptable acts. This includes denial or justice, fundamental breach of due process, manifest arbitrariness, targeted discrimination and abusive treatment. Notably, it states that: "a Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated."[105] The FET standard in CETA is more likely to reduce the interpretative discretion of tribunals than its CPTPP counterpart.[106] However, the boundary between 'legitimate' and 'illegitimate' expectations remains in flux.

From a review of the FET standard's jurisprudence, it can be concluded that the adoption of new labour legislation *as such* is unlikely to give rise to a FET claim. At the same time, however, it cannot be concluded that (enforcement of) labour law could never lead to such a claim. If, for example, an investor has received explicit guarantees that the government will not raise the minimum wage in its sector for the next five years, or if the labour inspectorate conducts extensive and burdensome inspections while ignoring competitors without an apparent reason, labour-related FET claims would be possible. The former scenario is more challenging than the latter. Accepting certain legitimate expectations concerning the regulation of labour or wages as a ground for a FET claim may effectively limit the application of substantive norms, while discriminatory or coercive enforcement of labour regulation could be resolved without impairing the norm that is being enforced. In a similar

103 Art 2001 NAFTA.

104 NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter Eleven Provisions' (31 July 2001).

105 Art 8.10(4) CETA.

106 Caroline Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP (2016) 19 Journal of International Economic Law 27, 36.

vein, Bonnitcha argues that: "Under the other elements of the FET standard (e.g. lack of due process, bad faith, coercion and harassment, RZ[107]), liability turns primarily on the characteristics of governmental conduct, not the extent of interference with the investor's interests."[108] The breaking of the promise is what matters, not the substance of it. For the purpose of the present study, the doctrine of legitimate expectations thus warrants some further examination.

4.3.3.2 Legitimate expectations and labour

Protection under the FET standard on the basis of legitimate expectations has been invoked once in relation to labour. The dispute that gave rise to *Paushok v Mongolia* arose when Mongolia adopted legislation that imposed a maximum of 10 per cent foreign workers in the mining sector, and a 'Foreign Workers Fee' of ten times the salary of every foreign employee above this threshold.[109] The arbitral tribunal concluded that the contested legislation did not violate Mongolia's obligations under the Russian-Mongolian BIT, stating that "it is not unheard of that States impose restrictions on the hiring of foreign workers; such restrictions can take various forms. By themselves, such restrictions, including a total ban on foreign workers, do not automatically constitute a breach of a BIT."[110] Importantly, 'not unheard of' is a rather low threshold when making a comparative assessment whether certain regulations are being applied by host states.

Furthermore, the claimant advanced no additional evidence of specific representations to support its expectation. Tribunals have considered different grounds for expectations, including specific rights that investors have acquired under domestic law, specific representations given to the investor, general stability of the host state's legal framework, and expectations based on the investor's business plan, provided that it was known by the host state.[111] In the labour context, there are two types of specific representations that can be considered systemic: (1) export processing zones in which (enforcement of) labour regulation is different than outside the zone, and (2) stabilization

107 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 145-160.

108 Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2015) 168

109 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia*, UNCITRAL Arbitration, Award on Jurisdiction and Liability, 28 April 2011, paras 109, 353-353

110 Ibid, para 364.

111 Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2015) 167-194. Other authors apply different categorizations. Potestà, for example, distinguishes between contractual arrangements, informal representations, and the general regulatory framework. Michele Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28 ICSID Review 88.

clauses in investor-state contracts. Both have led to investor claims. In *Goetz v Burundi* the claimant had established an investment in a Burundian 'free-zone' and thus benefited, according to the award, from certain tax, customs, exchange control and labour incentives.[112] The tribunal upheld the claim after which the parties agreed on an amicable settlement which *inter alia* reinstated free zone tax privileges for the company. With regard to labour, however, the agreement states that the general labour code applies to the company.[113]

Stabilization clauses are arguably the most important mechanisms to limit states' "right to enact, modify or cancel a law at its own discretion."[114] Given the widespread practice of these clauses, they may have a bigger impact than treaty-based protection standards. Stabilization clauses are not found in investment treaties, but in contractual arrangements between investors and host states. These contracts are used to allocate the costs, benefits, rights and obligations between the parties, but may also serve as a tool for broader "political risk management."[115] The tribunal in *Total v Argentina* defined stabilization clauses as:

> clauses, which are inserted in state contracts concluded between foreign investors and host states with the intended effect of freezing a specific host State's legal framework at a certain date, such that the adoption of any changes in the legal regulatory framework of the investment concerned (even by law of general application and without any discriminatory intent by the host State) would be illegal.[116]

The risks that investor seek to mitigate are broad. According to Wälde and N'Di, taxes and export restrictions are most important, followed by labour

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112 *Antoine Goetz et consorts c République du Burundi*, Award, CIRDI ARB/95/3, 10 February 1999 (in French) ICSID Review-Foreign Investment Law Journal 457, 459 For an English translation, see: James Crawford and Karen Lee (eds) *ICSID Reports Vol 6* (Cambridge University Press 2004) 3.

113 Ibid 524.

114 *Parkerings-Compagniet AS v Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007, para 332.

115 Thomas Wälde and George N'Di, 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation' (1996) 31 Texas International Law Journal 215, 217.

116 *Total S.A. v Argentine Republic*, ICSID Case No ARB/04/01, 27 December 2010, para 101. Andrea Shemberg, 'Investment Agreements and Human Rights: The Effects of Stabilization Clauses' (Working Paper No. 42, March 2008) at page 4 defines them as "contractual clauses in private contracts between investors and host states that address the issue of changes in law in the host state during the life of the project."; cf. the definition given by the Iran-United States Claims Tribunal in *Amoco International Finance v Iran*, 15 Iran-US CTR 189, 239 (1987) which held that stabilization clauses "contract language which freezes the provisions of a national system of law chosen as the law of the contract as to the date of the contract in order to prevent the application of the contract of any future alterations of this system."

regulation – to the extent that this influences employment cost – environmental and safety standards, accounting rules and certain performance requirements.[117] Stabilization clauses cover changes in host state legislation in the broadest sense, including novel interpretations by domestic courts or the legislative implementation of treaties.[118]

Broadly speaking stabilization clauses may provide that laws adopted after the investment is made (1) do not apply to the investment, or (2) require compensation to be paid to the investor. The former thus freezes the applicable law, while the latter aims to preserve the economic equilibrium.[119] When the host state considers the burden of offsetting the investor too high, however, economic equilibrium clauses may have the same effect as freezing clauses. As long as host states are not financially constrained to introduce new labour laws, economic equilibrium clauses are to be preferred over freezing clauses. However, the financial implications of some types of labour legislation, and hence the amount of damages that could be claimed, will be hard to calculate. There may be a time-lapse between the enactment of new legislation and the financial impact. For example, permitting collective bargaining in EPZs will not automatically lead to an alteration of bargaining power between trade unions and employer organizations. Membership of unions may be low or non-existent in these facilities, or the state may continue to maintain a ban on strikes, which deprives the union of an important tool.

There is great variety in the scope of stabilization clauses. So far there has only been one empirical study, which examined 75 contracts with non-OECD countries and 13 with OECD countries which were signed between 1999 and 2009. Although this is a small sample and the author does not provide an estimation of the total number of such contracts, there is a clear divide between the two regarding the scope of stabilization clauses. OECD countries do not tend to include freezing clauses. A majority does offer investors the possibility to claim compensation, but this is often subjected to certain conditions. In contrast, 59% of the contracts from non-OECD states included explicit exemptions from future social legislation or the possibility to claim compensation for all new legislation. A further 27% contained economic equilibrium clauses

117 Thomas Wälde and George N'Di, 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation' (1996) 31 Texas International Law Journal 215, 220, 230.

118 One author has compared stabilization clauses with the principle of *rebus sic stantibus* in public international law, and the application of this principle in the context of WTO non-violation complaints, see: Jeffrey Waincymer, 'Balancing Property Rights and Human Rights in Expropriation' in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 286.

119 Andrea Shemberg, 'Investment Agreements and Human Rights: The Effects of Stabilization Clauses' (Working Paper No. 42, March 2008) 5-9.

that allowed investors to claim compensation for compliance with new social legislation.[120]

The domestic law of the host state may explicitly mandate the government to enter into investment contracts containing stabilization clauses.[121] In some countries stabilization is even provided for in domestic law rather than investment contracts. For example, the Investment Stability Law of Panama reads: "The law provides for a 10 year stability as of registration of the investment that a legal, tax, customs, municipal and labour rules will remain identical to those in force at the time of registration."[122] Other states have explicitly exempted labour or social security legislation from the scope of stabilization, or provide a limitative enumeration of possible areas of stabilization which does not include labour laws.[123]

Investor-state contracts are usually confidential. In 2003, British Petroleum (BP) published its investment contracts regarding two cross-border pipeline projects after heavy pressure from NGOs. The agreements with Turkey and Georgia provide good examples of how labour concerns may be dealt with. The agreement with Turkey contains an economic equilibrium clause, which specifically mentions health and safety legislation as issues that would have to be compensated for.[124] It also stipulates that:

> Subject to requirement that no Project Participant shall be required to follow any employment practices or standards that (i) exceed those international labor standards or practices which are customary in international Petroleum transportation projects or (ii) are contrary to the goal of promoting an efficient and motivated workforce, all employment programmes and practices applicable to citizens of the State working on the Project in the Territory, including hours of work, leave, remuneration, fringe benefits and occupational health and safety standards, shall

120 Ibid 17.

121 Abdullah Al Faruque, 'Relationship between Investment Contracts and Human Rights: A Developing Countries' Perspective' in Sharif Bhuiyan, Philippe Sands and Nico Schrijver (eds), *International Law and Developing Countries: Essays in Honour of Kamal Hossein* (Brill Nijhoff 2014) 232; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 83.

122 Law No. 54 (22 July 1998) quoted in Munir Maniruzzaman, 'National Laws Providing for Stability of International Investment Contracts: A Comparative Perspective' (2007) 8 The Journal of World Investment & Trade 233, 235. Note that this exemption applies to both domestic and foreign investors.

123 In the literature, Colombia and Russia are mentioned as examples of the former, Venezuela of the latter, see Munir Maniruzzaman, 'National Laws Providing for Stability of International Investment Contracts: A Comparative Perspective' (2007) 8 The Journal of World Investment & Trade 233, 240, fn 30; Abdullah Al Faruque, 'Relationship between Investment Contracts and Human Rights: A Developing Countries' Perspective' in Sharif Bhuiyan, Philippe Sands and Nico Schrijver (eds), *International Law and Developing Countries: Essays in Honour of Kamal Hossein* (Brill Nijhoff 2014) 242-243.

124 Art 7.2(xi) Host Government Agreement Between and Among the Government of the Republic of Turkey and the MEP Participants, Appendix 2, Intergovernmental Agreement (18 November 1999.

> not be less beneficial than is provided by the Turkish labor legislation generally applicable to its citizenry.[125]

In other words: Turkish workers who work on the project enjoy the same benefits as their countrymen in other sectors of the economy, unless this protection exceeds international labour standards (a term which is not substantiated or defined), the norms that are customary in international petroleum projects or when these benefits are contrary to the promotion of an efficient and motivated work force. This gives the investor three vaguely formulated and minimalistic grounds to afford lower labour protection. The provision goes much further than mere stabilization as it does not prevent the application of new standards but provides leeway to deviate from existing ones.

Another noteworthy example is the economic equilibrium clause in the agreement between Georgia and a number of oil companies. It provides that "the state authorities shall take all actions available to them to restore the Economic Equilibrium ... if and to the extent [it] is disrupted or negatively affected, directly or indirectly, as a result of any change ... in Georgian Law," but exempts legislation "with respect to cultural heritage, health, safety, the environment and ... employment/labour relations ... to the extent such Georgian Laws do not impose ... legal terms or conditions more onerous than those generally observed by the member states of the European Union." However, it then specifies that with regard to labour, exemption from stabilization "shall only apply after the later of (i) 1 January 2016, and (ii) the date the state becomes an Official EU Candidate".[126] Apart from being an optimistic statement on the prospects of EU membership for Georgia, the clause is particularly noteworthy for two reasons. First, it singles out labour as area of apparently greater concern than cultural heritage, health, safety and the environment. Second, it demonstrates that investors may also protect themselves against foreseeable future events, instead of merely seeking to use stabilization to prevent arbitrary, discriminatory or unforeseeable changes in host state legislation.[127]

The publication of BP's contracts incurred heavy criticism. In response, BP unilaterally adopted a 'Human Right Undertaking' (HRU) for both projects.[128] The HRU set out conditions under which it will not seek compensation for (1)

125Art 19.2 Turkey-MEP Agreement.

126 Art 7.2(x) Host Government Agreement Between and Among the Government of Georgia and State Oil Company of the Azerbaijan Republic, BP Exploration (Azerbaijan) Limited, TotalFinaElf E&P Caucasian GAS SA, LUKAgip N.V., Statoil Azerbaijan a.s., Naftiran Intertrade Co. (Nico) Limited, Turkish Petroleum Overseas Company Limited (17 April 2002).

127 Andrea Shemberg, 'Investment Agreements and Human Rights: The Effects of Stabilization Clauses' (Working Paper No. 42, March 2008) 27.

128 Art 2(a) The Baku-Tbilisi-Ceyhan Pipeline Company, 'BTC Human Rights Undertaking' (22 September 2003).

changes in the legal framework of the host state that are the result of its obligations under international law or (2) claims by private parties that successfully sought remedy in relation to the human rights impact of the investment. This is subject to two main limitations. First, the HRU refers to host state regulation that is "reasonably required by international labor and human rights treaties to which the relevant Host Government is a party [sic] from time to time."[129] How reasonable requirements should be distinguished from unreasonable ones is unclear.[130] Second, changes in host state regulation will not be challenged provided that "such domestic law is no more stringent than the highest of European Union standards ... World Bank Group standards ... and standards under applicable international labor and human rights treaties." This provision leaves much room for interpretation as well.

The HRU remains one of the few, if not the only declaration by which an investor unilaterally limited the scope of a contractual agreement to the benefit of the host state. The conclusion by Shemberg that "in a number of cases the stabilization clauses are in fact drafted in a way that may allow the investor to avoid compliance with, or seek compensation for compliance with, laws designed to promote environmental, social, or human rights goals" is therefore still a relevant concern.[131] Indeed, there are two reported cases in which an investor challenged host state labour legislation on the basis of contractual obligations: *Centerra v Kyrgyz Republic* and *Veolia Propreté v Egypt*. Whereas the treaty-based arbitrations *Paushok v Mongolia* and *Foresti v South Africa* both concerned hiring requirements, these contract-based arbitrations alleged a breach of the stabilization clause through the increase of minimum wages. The former case was brought by Canadian company Centerra in 2006, which operates one of the largest gold mines in the Kyrgyz Republic. Subsequent to the conclusion of a concession contract, the Kyrgyz government amended its labour legislation regarding the payment of high altitude premiums to workers, raising Centerra's annual labour costs by $6 million. The case was later settled, and the documents remain confidential.[132]

The second case arose from a dispute between the French utility company Veolia and the Egyptian city of Alexandria, concerning a waste-management

129 Emphasis added.

130 It could be argued that under such wording only arbitrary and discriminatory legislation is covered by the stabilization clause, Abdullah Al Faruque, 'Relationship between Investment Contracts and Human Rights: A Developing Countries' Perspective' in Sharif Bhuiyan, Philippe Sands and Nico Schrijver (eds), *International Law and Developing Countries: Essays in Honour of Kamal Hossein* (Brill Nijhoff 2014) 246.

131 Andrea Shemberg, 'Investment Agreements and Human Rights: The Effects of Stabilization Clauses' (Working Paper No. 42, March 2008) 37.

132 'Kumtor Mine Resumes Operations' (News Release by Centerra Gold, 22 December 2006) <https://s3.amazonaws.com/centerragold/news/July2018/GF2XnG0Jn5RXgUp8dY9t.pdf> Accessed 24 June 2018.

contract.[133] Part of Veolia's claim relates to a minimum wage issue.[134] An Egyptian court reportedly ordered the enforcement of the minimum wage in relation to the investor, which appears to violate a contractual stabilization clause.[135] Even in the absence of any details, the case has led to questions in the European Parliament alleging Veolia of "totally disregarding workers' rights and trying to destroy a crucial social asset".[136] Furthermore, it has become the focal point for trade unions and NGOs in their opposition to the further expansion of international investment law.[137] In May 2018 the tribunal allegedly ruled in favour of Egypt, although no documents from the case have been released into the public domain.[138]

Without disclosure of the investment contract and the dispute settlement proceedings it is difficult to assess whether *Centerra* and *Veolia* had particularly protective contractual stipulations, or whether stabilization in general creates an obstacle for the effective implementation of new labour laws. As part of his mandate as UN Special Representative for Business and Human Rights, John Ruggie published a set of ten 'Principles for Responsible Contracts' that aim to balance "necessary investor protection against arbitrary and discriminatory changes in law" with the host state's "*bona fide* efforts to meet its human rights obligations."[139] He proposes, *inter alia*, human rights assessments before the investment is made, specific human rights exemptions in stabilization

133 *Veolia Propreté v Arab Republic of Egypt*, ICSID Case No ARB/12/15, Award, 25 May 2018 (not disclosed).

134 Luke Eric Peterson, 'French company, Veolia, launches claim against Egypt over terminated waste contract and labor wage stabilization promises' (Investment Arbitration Reporter, 27 June 2012).

135 Heba Hazzaa and Silke Noa Kumpf, 'Egypt's Ban on Public Interest Litigation in Government Contracts: A Case Study of 'Judicial Chill'' (2015) 51 Stanford Journal of International Law 147, 158.

136 European Parliament, 'Parliamentary Questions of 12 December 2013 – Marc Tarabella (S&D) and Jean Louis Cottigny (S&D)' (14 August 2014) OJ C 268.

137 See e.g. Communications Workers of America, 'The Impact of Investor State Dispute Settlement Provisions in Trade Agreements' (May 2014); UNCTAD, 'Statement of Ms. Carolin Vollmann, International Trade Union Confederation' (World Investment Forum 2014: Investing in Sustainable Development, 16 October 2014) <http://unctad-worldinvestmentforum.org/wp-content/uploads/2014/10/Vollmann.pdf> accessed 24 June 2018; European Trade Union Confederation, 'Resolution on EU Investment Policy' (Brussels, 5-6 March 2013).

138 Damien Charlotin, 'Egyptian official confirms victory in Veolia case at ICSID, as company remains silent' (IA Reporter, 30 May 2018) <https://www.iareporter.com/articles/egyptian-official-confirms-victory-in-veolia-case-at-icsid-as-company-remains-silent/> accessed 16 September 2018.

139 Human Rights Council, 'Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators' (25 May 2011) A/HRC/17/31/Add.3, para 38.

clauses and disclosure of contracts.[140] It should be kept in mind, however, that the decision to do so ultimately lies with the state. The limitation of a state's right to regulate through the conclusion of investor-state contracts is in itself an expression of legislative sovereignty. That said, it would be possible that by including stabilization clauses in investor-state contracts, the host state violates international law, because it is unable to fulfil its obligations under, for example, ILO conventions.[141]

4.3.3.3 Expectations based on violations of international labour standards

Factors like normal business risk, regulatory patterns and the socioeconomic conditions of the host state all influence whether an investor's expectations are indeed protected under the FET standard.[142] Another factor that may be of influence is whether the expected (in)action of the host state was in accordance with domestic or international law. Case-law and scholarly opinion are split on whether investors may *legitimately* expect the host state to perform *illegal* conduct.[143] Indeed in *MTD v Chile*, the investors could derive legitimate

140 As in his other reports, Ruggie did not clarify the exact scope of human rights applicable to business, but held that: "Human rights refers to internationally recognized human rights – understood, *at a minimum*, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work." ibid 5 fn 2.

141 The bargaining strategies of investors is addressed in the OECD Guidelines for Multinational Enterprises, which establish non-binding standards of conduct. It provides that enterprises should: "Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues." OECD, 'OECD Guidelines for Multinational Enterprises, 2011 edition' (adopted 25 May 2011) 19. This provision has given rise to a number of cases before the OECD's complaints mechanism, including six simultaneously filed complaints against the oil companies that were involved in the BTC pipeline project. Although the use of stabilization clauses was not dismissed, the report of the United Kingdom's National Contact Point, which handles alleged violations of the OECD Guidelines, implied that freezing clauses are to be viewed as an *ipso facto* breach of the Guidelines. OECD, 'UK National Contact Point – Revised Statement, Specific Instance: BTC Pipeline'(22 February 2011) para 26.

142 Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2015) 175, 182.

143 Potestà invokes *ADF v United States* in arguing in favour of the proposition that illegal conduct cannot be legitimately expected, Michele Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28 ICSID Review 88, 120. Snodgrass invokes the *MTD v Chile* case, and argues "that the compliance or non-compliance with municipal law of an administrative act that gave rise to expectations should not be determinative of the degree of protection, if any, those expectations will receive in international law." Elizabeth Snodgrass, 'Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle' (2006) 21 ICSID Review 1, 40.

expectations from the host state's approval of a project, although it was clear that the project contravened domestic policies and legislation.[144]

It does not follow that this argument can be extended to situations in which the host state's actions that give rise to the investor's expectations are governed by international law. For example, in 2006 the Prime Minister of Bahrain issued a decision which listed the oil and gas sector as an essential service in which strikes were prohibited.[145] This is contrary to the jurisprudence of the ILO's Committee on Freedom of Association. The CFA defines 'essential services' as "services whose interruption would endanger the life, personal safety or health of the whole or part of the population." [146]It has specifically held that the petroleum sector does not fall under this definition. [147]The International Confederation of Arab Trade Unions thus raised a complaint, which led the CFA to "[request] the Government to take the necessary measures to amend section 21 of the Trade Union Law so as to limit the definition of essential services to essential services in the strict sense of the term."[148]

Can a foreign investor in the oil & gas industry rely on the Prime Minister's decision to argue that it had a legitimate expectation that it would not face strike action, so that its facilities could operate without disruption? If this is accepted, bringing domestic law in line with its obligations under international labour law would constitute an *ipso facto* violation of another norm of public international law, i.e. the FET standard in the investment treaty between Bahrain

144 *MTD Equity Sdn. Bhd. And MTD Chile SA v Republic of Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004, para 166. Snodgrass argues that this is supported by the rule that states "may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Art 27 VCLT, the rule was considered a generally accepted principle already by the PCIJ, see: *Treatment of Polish Nationals and other Persons or Polish Origin or Speech in the Danzig Territory* (Advisory Opinion) PCIJ Rep Series A/B No 44 (4 February 1932) 24. The validity of this argument is doubtful. Art 27 VCLT is the corollary of Article 26, which contains the general principle of *pacta sunt servanda*. It assumes that the international obligation is clear, and that a state may not use internal law as an "escape clause." See: Annemie Schaus, 'Article 27 – Convention of 1969' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary – Vol. I* (Oxford University Press 2011) 689-690. In the scenario at hand, there is no inherent conflict between domestic law and international law. Instead, the act of observing an otherwise compliant domestic law triggers the violation of a broad and indeterminate international standard. This dynamic relationship is not foreseen in Article 27 VCLT.

145 See e.g.: Yannick Radi, 'The Tripartite Dimension of Conflicts of Interest: Workers, Foreign Investors and Host States in the Energy Sector' in: Eric de Brabandere and Tarcisio Gazzini (eds) *Foreign Investment in the Energy Sector: Balancing Private and Public Interests* (Brill Nijhoff 2014) 224-225.

146 International Labour Organization, 'Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO' (5th edn, International Labour Office 2006) para 583.

147 Ibid, para 586.

148 *Bahrain (Case No 2552)* (22 February 2007) Report of the Committee on Freedom of Association No 349 (Vol XCI 2008 Series B No 1) para 339. The CFA has closed the case after the government announced an amendment to its Trade Union Law.

and the home state of the foreign investor. There is a clear difference between representations that contradict domestic law and those that contradict international law. States are free to amend their domestic law as they please. Representations by officials that the law will be changed, not enforced, or otherwise altered can in fact be put into practice. When this does not happen, one could argue that a legitimate expectation has been violated. If, on the other hand, the representation made is contrary to a norm of public international law, the investor should act more diligently. Unless the host state makes a concomitant representation that it will withdraw from the treaty with which the primary representation is at odds, the investor cannot derive a legitimate expectation.

Although some treaties have begun to narrow the FET standard, this element of legitimate expectations is not addressed. There is one notable example, however, which was included in the Draft United Nations Code of Conduct on Transnational Corporations. The document, which has never been formally adopted, provides that fair and equitable treatment should be consistent with domestic as well as international law.[149] Adopting similar language in new IIAs could help to provide a clear answer on the question raised in this section.

4.3.3.4 Violations of labour standards as a breach of the FET standard

A different type of labour-related FET claim was advanced in *UPS v Canada*. In this case, which was brought under Chapter 11 of NAFTA, the claimant pursued several arguments concerning unfair competition between UPS Canada and Canada Post, a state-owned enterprise, which allegedly violated the FET standard contained in Article 1105 NAFTA. One of the claims concerned an exemption in Canada's labour legislation to the effect that rural postal workers were not allowed to join a union and bargain collectively. UPS thus argued that: "Canada's failure to respect core labour standards for Canada Post's workers violates Canada's Article 1105 obligation. The resulting effects create unfairly low wages to be paid by Canada Post which it uses to compete against UPS Canada."[150] The memorial of UPS contains an analysis of five pages listing Canada's obligations under ILO Convention 87, including jurisprudence of the Committee on Freedom of Association, as well as the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights.[151] Eventually the Tribunal dismissed the claim as "UPS has demonstrated no sufficient interest" to justify its pursuit, "nor any substantive ground which

149 Commission on Transnational Corporations, 'Report on the Special Session: Official Records of the Economic and Social Council, 1983, Supplement No. 7' (7-18 March and 9-21 May 1983) UN Doc E/1983/17/Rev. 1, Annex II, para 48.

150 *United Parcel Service of Amercia Inc. v Government of Canada*, UNCITRAL Arbitration (NAFTA), Investor's Memorial (Merits Phase), 23 March 2005, para 647.

151 The memorial also discusses the 1998 ILO Declaration and the Universal Declaration of Human Rights, but fails to acknowledge that these instruments are not legally binding.

could begin to show a breach of the minimum standard reflected in Article 1105."[152]

The claimant in *Allard v Barbados* pursued a similar argument in relation to environmental protection. Mr. Allard had invested US$35 million in an eco-tourism project in a protected nature sanctuary. According to the claimant, both the Convention on Wetlands of International Importance and the UN Convention on Biological Diversity applied to the site. Subsequent to the investment, the host state adopted a new 'National Physical Development Plan' which revoked certain protective buffers. Allard argued that the actions of the host state damaged the environment and *ipso facto* his investment. The tribunal disagreed on the environmental claims, making the legal consequences moot.[153]

While these types of claims are somewhat counterintuitive, it could well be the case that other investors will advance similar claims. For example, companies that are subjected to NGO scrutiny over labour conditions benefit from strong enforcement actions by their host states. Insufficient action could eventually damage the company brand. But as this type of claim is premised on economic damage to the investor, these 'level-playing field cases' are by no means a substitute for the regular mechanisms by which states can be held accountable for non-compliance with international obligations.

4.3.4 Full protection and security

Another protection standard that has given rise to concern is the obligation to provide the investor with full protection and security (FPS). The standard often features in the same treaty provision as the FET standard. Language is typically very succinct, providing that "each Contracting Party shall accord to such investments full security and protection"[154] or that "each Party shall accord to covered investments treatment in accordance with customary international law, including ... full protection and security."[155]

Analysis of the FPS standard focuses on three elements: against whom, and against what actions should the host state protect the investor, and what measures must it take to fulfil its obligation?[156] Because workers are one of the main groups that investors may need to be protected against, the FPS standard has a more straightforward connection to labour than other invest-

152 *United Parcel Service of Amercia Inc. v Government of Canada*, UNCITRAL Arbitration (NAFTA), Award on the Merits, 24 May 2007, para 187.

153 *Peter A. Allard v The Government of Barbados*, UNCITRAL Arbitration (NAFTA), PCA Case No 2012-06, Award, 27 June 2016, paras 139 and 166.

154 Art 3.1 Bahrain-Netherlands BIT.

155 Art 5.1 United States-Rwanda BIT.

156 Jeswald Salacuse, *The Law of Investment Treaties* (2nd edn, Oxford University Press 2015) 231.

ment protection standards. The standard does not infringe upon domestic labour legislation or other measures that are intended to protect the rights of workers, however. In various disputes, claimants have argued a breach of the FPS standard in the context of strikes or other forms of labour unrest. While such circumstances could indeed lead to a breach of the FPS standard, issues like the legality of strikes should be considered separately from possible security issues, as this does not fall under the jurisdiction of an investment tribunal. Indeed, both the ICJ and investment tribunals have been careful not to pass judgement on the underlying labour disputes in FPS cases.

The 1989 *ELSI* judgment by a chamber of the International Court of Justice, for example, concerned the closure of an Italian factory owned by Raytheon, an American company. The dismissal of workers led to strikes, and eventually the occupation of the factory premises. The Mayor of Palermo did not end the occupation, but instead requisitioned the plant and the company assets for a period of six months. The ICJ sided with Italy, noting that:

> The reference in Article V [of the 1948 Treaty of Friendship, Commerce and Navigation between Italy and the United States] to the provision of "constant protection and security" cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed. The dismissal of some 800 workers could not reasonably be expected to pass without some protest. Indeed, the management of ELSI seems to have been very much aware that the closure of the plant and dismissal of the workforce could not be expected to pass without disturbance.[157]

There have been a number of similar claims in investor-state arbitrations. In *Noble Ventures v Romania*, the privatization of a steel mill and its subsequent acquisition by an American investor led to trade union demonstrations and strikes.[158] The award is not clear on the precise nature of the strike, nor the activities that occurred during the labour unrest. The claimant consistently referred to "unlawful strikes" without an indication whether courts had indeed intervened. Apart from this, the allegations concern occupation of the company's premises, theft of files and cash accounts, sabotage of facilities and equipment and confinement and physical assault of managers.[159] The tribunal firstly noted that the claims were similar to those in the *ELSI* case decided by the International Court of Justice. As the ICJ dismissed the claims made by the United States in that case, and it did not see how the actions of Romania in the case at hand were more harmful than the facts in the *ELSI* case, it held that no breach of the protection standard could be found.[160]

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157 *Case Concerning Elettronica Sicula S.p.A (ELSI) (United States of America v Italy)* (Judgment) [1989] ICJ Rep 15, para 108.

158 *Noble Ventures v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005.

159 Ibid, para 17.

160 Ibid.

Also in *Tecmed v Mexico* and *Plama v Bulgaria*, the investor claimed that the host state should have taken measures to prevent "adverse social demonstrations"[161] and "worker riots"[162] because they threatened the economic viability of the investment. Both tribunals dismissed the claims. While in *Techmed* the main problem was a lack of factual evidence, the *Plama* tribunal considered the evidence submitted by the parties "in virtually all respects contradictory."[163] Importantly, the investors at no point claimed that their respective host states had an obligation to prevent strikes as such.

4.3.5 Non-discrimination

IIAs typically include two types of non-discrimination provisions: the obligation not to discriminate vis-à-vis other foreign investors, known as most favoured nation treatment (MFN) and the obligation not to discriminate vis-à-vis domestic investors, known as national treatment (NT). The wording of IIAs is rather homogeneous compared to other protection standards. Treatment of foreign investors should not be "less favourable" than what is accorded to own or third-party investors. Some treaties, including most US ones, add a qualification, namely that comparisons can only be made when investors are "in like situations" or "in like circumstances".[164]

Nonetheless, as with the other IIA-standards that were discussed above, the case-law on non-discrimination shows "substantial levels of inconsistency in the interpretation of the meaning and function of key concepts underlying the application of this standard."[165] There are four areas of contention: (1) the scope of the comparison, (2) the definition of a differentiation, (3) justifications for differentiation, and (4) the relevance of intent or effect.[166] The latter two are especially relevant for the purpose of the present study. Dolzer and

161 *Técnicas Medioambientales Techmed, SA v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, 43 ILM 133 (2004) para 175.

162 *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award, 27 August 2008, para 236.

163 Ibid, para 248.

164 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 198. Van Harten raises the point that labour issues may play a role in the determination of likeness. He specifically asks whether a domestic investor that "has a better record of employing disadvantaged minorities" are "in like circumstances" with foreign investors that do not have a similar track record. If they are not, the host State may treat the companies differently, for example by providing grants to the former company. Gus van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007) 84.

165 Federico Ortino, 'Non-discriminatory Treatment in Investment Disputes' in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 363-364.

166 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 199-204

Schreuer argue that "[although] most investment treaties do not explicitly say so, it is widely accepted that differentiations are justifiable if rational grounds are shown."[167] In the *S.D. Myers* case, for example, the tribunal considered that "[t]he assessment of "like circumstances" must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest."[168] Under this reasoning, host states could impose more stringent labour legislation or increase labour inspections for sectors that experience particular problems. An example could be an increase in minimum wage levels for mine workers due to the dangerous nature of the occupation. Consequently, foreign investors in the mining sector could not claim a violation of the NT standard simply because the minimum wage in the agricultural sector, in which predominantly local companies are active, is not raised.[169]

Arguably, when it is accepted that there are certain public interest justifications that allow for a differentiation, discriminatory intent would still lead to a breach of the NT standard. This point is explicitly included in the 2007 Model BIT of Norway, which states that:

> a measure applied by a government in pursuance of legitimate policy objectives of public interest such as the protection of public health, human rights, labour rights, safety and the environment, although having a different effect on an investment or investor of another Party, is not inconsistent with national treatment and most favoured nation treatment when justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investment.[170]

Other IIAs include more specific carve-outs. There are a number of IIA that exempt affirmative (employment) action, labour mobility, social welfare arrangements and domestic hiring requirements from the scope of the MFN and NT obligation. The 1998 South Africa-Czech Republic BIT, which is not in force, thus notes that:

> The provisions of paragraph 1 and 2 of this Article shall not be construed so as to oblige one Party to extend to the investors of the other the benefit of any treatment preference or privilege which may be extended by the former Party by virtue of ... any law or other measure the purpose of which is to promote the achievement

167 Ibid 202.

168 *S.D. Myers Inc v Canada*, UNCITRAL Arbitration (NAFTA), First Partial Award, 13 November 2000, para 250.

169 In this example, it is assumed that the sector in which the foreign and local companies operate is immaterial. This follows from the *Occidental v Ecuador* case, see: *Occidental Exploration and Production Co. v Ecuador*, LCIA Case No UN 3467, Award, 1 July 2004, para 173. This is not uncontroversial, however, see e.g. *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1 Award, 16 December 2002, para 171.

170 Art 3 Norway Model BIT 2007, at 5, fn1. This Model BIT has never been used in practice.

> of equality in its territory, or designed to protect or advance persons, or categories of persons, previously disadvantaged by unfair discrimination.[171]

Other carve-outs are concerned with either the NT or the MFN obligation. An example of the former can be found in the BIT between Canada and the Philippines, in which Canada "reserves the right to make and maintain exceptions [with regard to] social services (i.e. public law enforcement; correctional services; income security or insurance; social security or insurance; social welfare; public education; public training; health and child care)."[172] This provision can also be found in the BIT between Canada and Venezuela. In addition, it is stipulated that: "Venezuela may require that up to 90 percent of manual labourers and 90 percent of non-manual labourers employed by an enterprise in its territory be nationals of Venezuela provided that the requirement does not materially impair the ability of the investor to exercise control over its investment."[173] Following the *Paushok* arbitration, however, such exemptions do not seem to be necessary as states are generally free to impose labour-related performance requirements.[174]

With regard to MNF treatment specifically, Singapore has concluded a number of agreements between 1985 and 2003 that exempt from the MFN obligation: "the benefit of any treatment, preference or privilege resulting from … any arrangement with a third state or states in the same geographical region designed to promote regional cooperation in the economic, social, labor, industrial or monetary fields within the framework of specific projects."[175] This may be particularly relevant in the case of labour migration. Regional liberalization of high-skilled labour migration is set to become an integral part of the ASEAN Economic Community. This may lead to *de facto* discrimination between investors from ASEAN member states, which will have more opportunities to post workers in Singapore compared to investors whose labour force will predominantly not have the nationality of an ASEAN member state.

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171 Art 3.3 Agreement between the Czech Republic and the Republic of South Africa for the Promotion and Reciprocal Protection of Investment (14 December 1998). Notably, the BITs which formed the basis for the claim in the *Foresti* case did not contain a similar provision.

172 Section 1(a) Annex of the Agreement between the Government of Canada and the Government of the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments (1 November 1996).

173 Article 11(d)(iii) Annex of the Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (28 January 1998).

174 Only few IIAs explicitly prohibit employment performance requirements, see: UNCTAD, 'World Investment Report 2003: FDI Policies for Development: National and International Perspectives' (United Nations 2003) 119-123.

175 Art 5.1(b) Agreement Between the Government of the People's Republic of China and the Government of the Republic of Singapore on the Promotion and Protection of Investments (7 February 1986), similar provisions can be found in Singapore's BITs with Uzbekistan, Egypt, Mauritius, Cambodia, Hungary, Mongolia, Pakistan and Vietnam.

4.4 STRATEGIES TO INCREASE HOST STATES' REGULATORY AUTONOMY

4.4.1 Introduction

Labour-related investment disputes are rare and, when advanced, mostly unsuccessful. Except when the host state has provided pre-existing commitments to the contrary, it is highly unlikely that (enforcement of) labour legislation could be classified as a breach of an IIA.[176] Nonetheless, this part will consider strategies aimed at increasing host states' regulatory autonomy or 'policy space'. While these do not (necessarily) originate from specific human rights or labour-related concerns, they do influence the broad spectrum of 'public welfare measures' and can play a role in the assessment of labour-related investment disputes. There are four ways through which regulatory autonomy could be regained: (1) exiting the system,[177] (2) constructing procedural barriers for claimants,[178] (3) adaptation of the content of IIAs, and (4) refining the means of interpretation. This part will focus on the latter two. Section 4.4.2 discusses a broad range of legislative strategies that states have adopted. Section 4.4.3 then discusses interpretative strategies, which has been the main focus of legal scholarship.

Arguably, there are two explanations for the increase of exceptions in IIAs. First, they respond to the perception that the imprecise language of IIAs – both the substantive rights and the (preambular) provisions from which tribunals deduce an IIA's object and purpose – has enabled investors to bring claims against measures which states had never considered to fall under the scope of their investment obligations. Notably, this is not supported by statistics, as in fact host states prevail in the majority of investment cases.[179] This is not to say that concerns are unwarranted, as (the threat of) arbitration in itself could dissuade countries to postpone or forego certain policies. One of the

176 Given the variety of fact-patterns that may lead an investor to claim compensation against labour measures by the host state and the few cases that have so far been brought, one should be cautious to construct an inductive argument that only pre-existing commitments could lead to a successful outcome for the investor.

177 For example, by terminating IIS, denouncing the ICSID Convention, and failure to comply with awards. See Caroline Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP' (2016) 19 Journal of International Economic Law 27, 28.

178 Susan Franck has classified such approaches as the 'legislative attempt' to overcome the legitimacy crisis in international investment law, as opposed to the 'barrier building approach' that proposes procedural barriers to investor claims. Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521, 1587-1588.

179 Armand de Mestral, 'When Does the Exception Become the Rule? Conserving Regulatory Space under CETA' (2015) 18 Journal of International Economic Law 641, 652 on the experience of Canada with NAFTA investment disputes. Out of 31 cases brought by American investors, Canada lost only 4 on which one was, according to Mestral "questionable in law."

most salient examples has been the postponement of tobacco plain packaging legislation by New Zealand to await the outcome of the various legal challenges – under both international investment and trade law – to similar measures taken by Australia.[180] Second, the scope of PTIAs is expanding. This is especially true for the so-called 'mega regionals'. They cover regulatory cooperation, free movement of people, competition policy, state enterprises and rules on trade in services that go far beyond the scope of the GATS. As agreement broaden, their "extensive new provisions are accompanied by an unprecedented number of exceptions."[181]

4.4.2 Legislative strategies

4.4.2.1 The object and purpose of IIAs

The construction of the object and purpose of a treaty is important in three ways: (1) it defines the obligations of the parties, including the phase prior to ratification,[182] (2) it determines the acceptability of reservations to, and modifications and suspensions of treaties,[183] and (3) it assists in the interpretation of the substantive provisions of the treaty.[184] The principal interest of this section is the interpretative function. The rules on treaty interpretation are laid down in Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT), which reflect customary international law.[185] Article 31 contains the general rule of treaty interpretation. It provides that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." There is no hierarchical order between the textual, contextual and teleological element.[186] As most IIAs do not include textual references to labour standards, the latter two elements are of particular importance.[187]

180 'Minister defends plain packaging' (*Radio New Zealand*, 10 February 2014) <http://www.radionz.co.nz/news/national/235694/minister-defends-plain-packaging> accessed 24 June 2018.

181 Armand de Mestral, 'When Does the Exception Become the Rule? Conserving Regulatory Space under CETA' (2015) 18 Journal of International Economic Law 641, 642.

182 Art 18, VCLT. Please note that treaties are not always subject to the VCLT.

183 Arts 19, 41 and 58 VCLT.

184 Arts 31 and 33 VCLT.

185 *Case Concerning Kasikili/Sedudu Island (Botswana v Namibia)* (Judgment) [1999] ICJ Rep 1045, 1059.

186 Michael Waibel, 'Demystifying the Art of Interpretation' (2001) 22 European Journal of International Law 571, 575; Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge University Press 2014) 263-264.

187 Cf. Valentina Vadi, *Cultural Heritage in International Investment Law and Arbitration* (Cambridge University Press 2014) 263-264.

A treaty's preamble, in which the parties express the motives that have led to the conclusion of the treaty and the results that they expect from it, forms a starting point for the identification of the object and purpose.[188] However, the objectives of a treaty should be distinguished from the assumptions on which it is based.[189] This may limit the value of preambular statements in which parties, for example, note that they are: "Committed to achieving these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognised labour standards."[190] In general, preambles are insufficient to discern a treaty's object and purpose. Indeed, the picture that emerges from the practice of investment tribunals is diverse. An empirical study of ninety-eight ICSID decisions found that in forty-eight instances the tribunal explicitly used the object and purpose to interpret the agreement. In thirty-one decisions, however, the source of the object and purpose was not identified. The seventeen other tribunals relied upon the preamble, substantive provisions, the title of the treaty, and the *travaux préparatoires*, but also to 'external' sources including literature, case law and the preamble of the ICSID Convention.[191]

The diverse approaches to the identification of the object and purpose of IIAs does not mean that the outcomes of these inquiries are equally diverse. Rather, two different outcomes can be distinguished: one that conceptualizes investment law as a means to protect investors, and one that conceptualizes investment law as a means to foster the (economic) development of states.[192]

A number of tribunals have thus constructed the object and purpose in a narrow sense.[193] This has implications for the interpretation of the substantive protections offered to investors. In *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* the tribunal concluded that:

> The object and purpose of the BIT supports an effective interpretation of [the BIT provision]. The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended "to create and maintain favourable

188 Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 428; Richard Gardiner, *Treaty Interpretation* (Oxford University Press 2008) 196-197.

189 Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press 2005) 83-84.

190 Preamble, Austria-Tajikistan BIT.

191 Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19 European Journal of International Law 301, 322-324.

192 This represents, what Radi calls, "the schizophrenia of the objectives of the international investment system." Yannick Radi, 'Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox' (2012) 37 North Carolina Journal of International Law & Commercial Regulation 1107, 1138.

193 See e.g. *MTD Equity Sdn. Bhd. And MTD Chile SA v Republic of Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004, 104, this arbitration was based on the BIT between Chile and Malaysia, and also referred to "la prosperidad económica" instead of some notion of (economic) development.

> conditions for investments by investors of one Contracting Party in the territory of the other". It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.[194]

The other elements of the preamble, which *inter alia* stated that the promotion and protection had "the aim to foster the economic prosperity of both states," were not taken into consideration.[195]

The *Lemire* case is an example in which a tribunal has constructed a more holistic object and purpose, which affected the interpretation of the substantive standards in a way that was more deferential to the host state. It stated that:

> The main purpose of the BIT is thus the stimulation of foreign investment and of the accompanying flow of capital. But this main purpose is not sought in the abstract; it is inserted in a wider context, the economic development for both signatory countries. Economic development is an objective which must benefit all, primarily national citizens and national companies, and secondarily foreign investors. Thus, the object and purpose of the Treaty is not to protect foreign investments per se, but as an aid to the development of the domestic economy. And local development requires that the preferential treatment of foreigners be balanced against the legitimate right of Ukraine to pass legislation and adopt measures for the protection of what as a sovereign it perceives to be its public interest.[196]

The *Lemire* arbitration was based on the BIT between the United States and Ukraine. Its preamble referred to 'economic development' instead of 'economic prosperity' and further noted that: "the development of economic and business ties can contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights." Overall, however, the language of the BITs underlying both cases does not explain the radically different construction of the object and purpose.

The approach taken by the arbitrators in *Lemire* is supported in legal scholarship. Waibel points to the indeterminacy of investment protection standards, which causes some arbitral tribunals to embrace a narrowly constructed object and purpose and consequently interpret the substantive obliga-

194 *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para 116. See also: *Siemens A.G. v the Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004, para 81; *Azurix Corp. v The Argentine Republic*, ICSID Case No ARB/01/12, Award, 14 July 2006, para 307.

195 Philippines-Switzerland BIT 2.

196 *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability, 21 January 2010, paras 272-273. See also: *Saluka v Czech Republic*, UNCITRAL Arbitration, Partial Award, 17 March 2006, para 300.

tions in favour of the investor.[197] Schill argues that (preambular) treaty language should not be relied upon too much in the construction of the object and purpose of a treaty, as the "general purpose of international investment law (i.e. to foster economic development) should also reflect in the conceptualization of every substantive standard of treatment ... as a guiding principle for structuring the relations between states and foreign investors."[198]

Nonetheless, states have begun to draft more holistic language in their IIAs' preambles. The 2012 US-Korea FTA, which also includes an investment chapter, states that both parties:

> [desire] to strengthen the development and enforcement of labor and environmental laws and policies, promote basic workers' rights and sustainable development, and implement this Agreement in a manner consistent with environmental protection and conservation.

Given the support for trade-labour linkage from the US and various EU countries this reference may not come as a surprise. Importantly, however, the inclusion of such language in investment agreements has gained much broader attraction. Various Asian countries, including China, India and Japan, have ratified trade and investment that refer to the enhancement of social benefits, improving living standards, environmental protection, sustainable development and the right to regulate.[199] Similar references are found in agreement between developing states that are not geographically proximate.[200]

Not only is the number of IIAs that include preambular references to social or environmental concerns growing, the language that is used has also undergone significant change. The assumption that increased inward FDI automatically leads to improvements of labour standards is no longer widely propagated, most importantly by the United States. The 1994 US Model BIT noted that the parties "[recognize] that the development of economic and

197 Michael Waibel, 'International Investment Law and Treaty Interpretation' in Rainer Hoffman and Chirstian Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration* (Nomos 2011) 40.

198 Stephan Schill, 'International Investment Law as International Development Law' in Andrea Björklund (ed), *Yearbook on International Investment Law and Policy 2012-2013* (Oxford University Press 2014) 349-350. See also: Franklin Berman, 'Evolution or Revolution?' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 668.

199 Comprehensive Economic Agreement Between the Government of Malaysia and the Government of the Republic of India (1 July 2011); Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore (1 August 2005); Comprehensive Economic Partnership Agreement Between Japan and the Republic of India (1 August 2011); Comprehensive Economic Partnership Agreement between India and South-Korea (1 January 2010); Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People's Republic of China (15 August 2009).

200 See e.g. Republic of China-Panama FTA.

business ties can promote respect for internationally recognized worker rights."[201] The updated 2012 Model takes a more cautious approach and states that the parties "[desire] to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights."[202] Unlike the 1994 Model, the language in the 2012 Model expresses a normative 'desire' to avoid the substantive provisions being interpreted in a way that impedes the realization of labour standards.

The effect of these developments should not be overstated. Various IIAs still refer to labour standards as the desired or expected result of economic cooperation rather than something that could conflict with investor protection standards. Most IIAs do not mention the issue at all. Furthermore, in *CMS v The Republic of Argentina* the tribunal constructed the object and purpose of the BIT between the United States and Argentina narrowly, although it is identical to the US-Ukraine BIT which formed the basis for the *Lemire* arbitration. Whereas in *Lemire* the tribunal had stated that the object and purpose of the treaty was "to aid the development of the domestic economy," the *CMS* tribunal held that:

> The Treaty Preamble makes it clear, however, that one principal objective of the protection envisaged is that fair and equitable treatment is desirable "to maintain a stable framework for investments and maximum effective use of economic resources."[203]

The divergence between the two tribunals highlights the risk of inconsistent arbitral decisions and points to the fact that more holistic and development-oriented preambular language does not automatically translate into a larger degree of deference to the host state.

4.4.2.2 General right to regulate provisions

The second mechanism is the use of 'right to regulate provisions' that are applicable to the treaty as a whole. The importance of general clauses has been attested to in the *Lemire* arbitration, in which the tribunal considered that carve-outs for specific standards cannot be extended to others.[204] The dissenting arbitrator noted that the limitation of the right to national treatment could

201 Preamble US Model BIT 1994.

202 Preamble US Model BIT 2012.

203 *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No ARB/01/8 CMS, Award, 12 May 2005, para 274.

204 *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Award, 28 March 2011, paras 46-47; Lise Johnson and Lisa Sachs, 'Trends in International Investment Agreements, 2011-2012: A Review of Trends and New Approaches' in Andrea Björklund (ed), *Yearbook of International Investment Law and Policy 2012/2013* (Oxford University Press 2014) 232-233.

be extended to the right to fair and equitable treatment. He argued that at the time of drafting the state parties had not foreseen that the FET standard could have implications for the interest that the parties intended to protect, and the NT limitation could thus be applied *a fortiori*.[205] But given the majority opinion, the better strategy from the perspective of host states is to include provisions that apply to the IIA as a whole.

A good example of a right to regulate provision that aims to safeguard the regulatory autonomy of the host state can be found in the BIT between the Belgian Luxembourg Economic Union (BLEU) and Oman. It provides in Article 5.1: "Recognising the right of each Contracting Party to establish its own domestic labour standards, and to adopt or modify accordingly its labour legislation." Article 23.3 of CETA, which has not yet entered into force, does make a reference to *international* labour standards. It holds that:

> Recognising the right of each Party to set its labour priorities, to establish its levels of labour protection and to adopt or modify its laws and policies accordingly in a manner consistent with its international labour commitments, including those in this Chapter, each Party shall seek to ensure those laws and policies provide for and encourage high levels of labour protection and shall strive to continue to improve such laws and policies with the goal of providing high levels of labour protection.

Notably, the treaty's investment chapter contains a separate right to regulate provision, in which Canada and the EU "reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity."[206]

The frequent use of the word 'reaffirm' in right to regulate provisions implies that they do not alter obligations towards foreign investors.[207] Absent rules of international law to the contrary, a state's legislative sovereignty (their 'right to regulate') is unrestricted. The restrictions that are imposed by international law have different characters. They originate from the customary principle of non-intervention, *ius cogens* obligations, and treaty obligations to which the state itself has consented. The rights granted to foreign investors

205 *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Dissenting Opinion of Arbitrator Dr. Jürgen Voss, 16 July 2013, para 338.

206 Art 8.9(1) CETA.

207 Art 2.1 European Commission, 'Draft Text TTIP – Investments' (2015) <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> accessed 24 June 2018, emphasis added). The 2015 proposal by the European Union for the TTIP investment chapter appears to be more stringent, where it holds 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."

under IIAs, falling in the latter category, undoubtedly limit the state's legislative powers. But how do these restrictions relate to 'right to regulate' provisions, which appear to deny such limitations?

Arguably, these provisions do not negate the effect of investor rights with respect to host state actions in certain policy areas, but merely mandate a lower degree of scrutiny, i.e. the standard of review that arbitral tribunals apply when examining claims. To suggest that investor rights do not apply when a host state measure falls within a certain policy area that is 'carved-out' could have far-reaching consequences. Taken to the extreme, it would mean that host states could, for example, impose higher minimum wages on foreign-owned companies than on domestic ones. Albeit discriminatory, minimum wage legislation clearly falls within the labour domain and is thus exempted from the scope of the IIA. Indeed, in the area of environmental measures scholars have argued that many cases "involve acts of protectionism or mistreatment of unwary foreign investors ... camouflaged in the much more palatable clothes of sacred environmental causes."[208]

If the purpose of right to regulate provisions is to fully exempt certain areas from scrutiny, states could have adopted more precise language. Right to regulate provisions thus do not give host states a *carte blanche* with regard to measures that fall within certain policy areas. On the other hand, however, it cannot be presumed that they are without any legal effect, as it is a general principle of international law that "that no word or provision may be treated as or rendered superfluous."[209] Their relevance should therefore be sought in the degree of deference that arbitral tribunals should grant host states and the standard of review they apply when assessing whether host states' actions have violated investor rights.

4.4.2.3 General exception clauses

A final mechanism that is used in IIAs to restrict the scope of investment protection is the inclusion of general exception clauses.[210] These differ from specific carve-outs and general right to regulate provisions in two ways. Firstly, general exception clauses are interpreted narrowly.[211] Secondly, whereas a claimant has to satisfy the burden of proof of carve-outs and right to regulate

208 Thomas Wälde and Abba Kolo, 'Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law' (2001) 50 International and Comparative Law Quarterly 811, 820.

209 Edward Gordon, 'The World Court and the Interpretation of Constitutive Treaties' (1965) 59 American Journal of International Law 794, 814.

210 Some general exception clauses do not cover expropriation, e.g. the Energy Charter Treaty and the Agreement on Free Trade and Economic Partnership Between Japan and the Swiss Confederation (1 September 2009).

211 Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 424-430.

exceptions, the invocation of exceptions clauses is the responsibility of a respondent.

Most exception clauses resemble Article XX GATT. The 2004 Canadian Model BIT, for example, starts with a *chapeau* that prevents the application of the general exceptions clause when measures are (1) "applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors," and (2) when they constitute "a disguised restriction on international trade or investment."[212] The list of policy areas includes (1) the protection of "human, animal or plant life or health," (2) "compliance with laws and regulations that are not inconsistent with the provisions of [the BIT]," and (3) "the conservation of living or non-living exhaustible natural resources." It furthermore includes a range of acceptable measures for prudential and national security reasons, which are not subjected to the *chapeau*.[213]

Whereas most general exception clauses, like their WTO counterparts, require that measures must be 'necessary' to fulfil the stated objective, some IIAs have taken a different approach. The COMESA Investment Agreement only requires measures to be "designed and applied"[214] for their stated purpose and the Colombia Model BIT exempts challenges against environmental measures that are "proportional to the objective sought."[215] Importantly, there is no exception for the protection of public morals.[216] This is true for a substantial number of general exception clauses in IIAs. Furthermore, while some refer to prison labour, no general exception clause includes a broader labour reference. This may be changing, however. The initial draft of the 2015 Model BIT of India, which like Colombia is a capital-importing state, held that: "Nothing in this Treaty precludes the Host State from taking actions or measures of general applicability which it considers necessary with respect to the following, including: ... (vi) improving working conditions."[217] For no apparent reason this provision was not included in the final version. The final Model BIT does include a public morals exception, however. In chapter 3 it was argued that the public morals exception in Article XX(a) GATT can be used to justify labour-related measures that would otherwise be inconsistent with the GATT. This is caused by the fact that the standard is highly deferential to different conceptions of morality. The definition developed by the WTO Panel in the first case that concerned the public morality exception, which held that "the term public morals denotes standards of right and wrong conduct by or on

212 Art 10 Canada Model BIT 2004.
213 Measures in the former category should be "reasonable".
214 Art 22 COMESA Investment Agreement.
215 Art VIII Colombia Model BIT 2008.
216 All Canadian BITs that were concluded after 1994 contain a general exception clause along these lines.
217 Art 16 India Model BIT 2015.

behalf of a community or nation,"[218] has been consistently applied in later case law. In investment law the public morals exception would be used to justify domestic labour regulation instead of trade measures in response to low labour standards in another state with the purpose to force this state to adhere to higher standards or to shield its domestic market from these goods to avoid moral complicity. But given the fact that the term has been interpreted so broadly, there is no reason to assume that the public morals exception could not be used in this context.[219] Arguably, domestic labour law may be more readily accepted as *necessary* to protect public morals than trade restrictions that protect the moral conscience of consumers.[220]

The use of general exception clauses as a strategy to 'rebalance' investment law has met with some criticism. While some authors have questioned their usefulness,[221] others have gone further and argue that general exception clauses may provide less instead of more policy space. The reason for this is that investor rights are to be balanced against the societal purpose of the disputed measure to determine whether there is an infringement. In this 'build-in' balancing mechanism, which is the first phase of assessing whether a particular measure breaches the protection standards, "there are no limited or closed lists of topics covered by the exception, no necessity requirements and no *chapeau* to constrain the interpreter."[222] It is thus doubtful whether

218 WTO, *United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services* – Report of the Panel (10 November 2004) WT/DS285/R, para 6.465 (internal quotation omitted).

219 Cf. William Burke-White and Andreas von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48 Virginia Journal of International Law 364, who argue that the case-law of the EctHR, the ECJ and the WTO may be taken into account when interpreting the term public morality in investment law.

220 The 2018 consultation draft of the Netherlands Model BIT also mentions public morals and labour separately, although not in a general exception clause but in a right to regulate provision delimiting the scope of the agreement. Art 2.2 states that: "The provisions of this Agreement shall not affect the right of the Contracting Parties to regulate within their territories necessary to achieve legitimate policy objectives such as the protection of public health, safety, environment, public morals, labor rights, animal welfare, social or consumer protection or for prudential financial reasons."

221 Barton Legum and Ioana Petculescu, 'GATT Article XX and international investment law' Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy* (Cambridge University Press 2013) 340-362.

222 Céline Lévesque, 'GATT Article XX exceptions in IIAs: a potentially risky policy' in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy* (Cambridge University Press 2013) 366. See also on general exception clauses in international investment law: Andrew Newcombe, 'General Exceptions in International Investment Agreements' in Marie-Claire Cordonier Segger, Markus Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 365-370; Nicholas DiMascio and Joost Pauwelyn, 'Nondisrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' (2008) 102 American Journal of International Law 48, 82-83; Susan Spears, 'Making way for the public interest in international investment agreements' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and*

a general exceptions clause has any added value for host states. There have been no cases in which a measure that constituted a breach of the substantive protection standards was nonetheless upheld under the general exceptions clause. There is no clear objection against them either, as long as the inclusion of a general exceptions clause does not affect the initial assessment whether a state acted within its sovereign right to regulate.[223] But as this would run counter the very purpose of general exception clauses, which is too enlarge domestic policy space instead of shrinking it, it is unlikely that this risk will materialize.[224]

4.4.2.4 The effect of inter-state labour obligations on investor protection standards

An increasing number of IIAs include labour provisions that oblige the state parties to effectively enforce domestic legislation, refrain from legislative derogations, and make a continuous effort to improve those standards. This is a response to the risk that states provide labour-related incentives to attract or retain foreign investment. As these clauses do not expressly address the relationship between investors and host states they are not discussed in this chapter. However, recent case-law in the area of environmental regulation makes clear that inter-state obligations of this kind may affect the interpretation of investor protection standards.

In the *Adel A Hamadi Al Tamimi v Oman* case, a US national brought a claim after his company that operated a limestone quarry was fined for certain violations of Oman's environmental legislation, which ultimately led to the termination of the project and criminal charges against Mr. Al Tamini. Oman's conduct, he argued, violated his rights under the investment chapter of the US-Oman FTA relating to indirect expropriation, the minimum standard of treatment and national treatment. When determining the state's conduct under the latter two standards, the tribunal referred to the environmental chapter in the US-Oman FTA, which: "although it does not fall directly within the Tribunal's jurisdiction, provides further relevant context in which the provisions of [the investment chapter] must be interpreted."[225] The tribunal subsequently argues that:

Arbitration (Cambridge University Press 2011) 287. On the concept of necessity in international investment law, see for example: August Reinisch, 'Necessity in Investment Arbitration,' (2010) 41 Netherlands Yearbook of International Law 137.

223 Suzanne Spears, 'Making way for the public interest in international investment agreements' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 287.

224 Suzanne Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13 Journal of International Economic Law 1037, 1064.

225 *Adel A Hamadi Al Tamimi and the Sultanate of Oman*, Award, ICSID Case No ARB/11/33, Award, 3 November 2015, para 388

> The very existence of [the environmental chapter] exemplifies the importance attached by the US and Oman to the enforcement of their respective environmental laws. It is clear that the State Parties intended to reserve a significant margin of discretion to themselves in the application and enforcement of their respective environmental laws – indeed, Article 17.2.1 compels each State to ensure the effective enforcement of environmental laws.[226]

Based on the notion that the US-Oman FTA embraced a "forceful defence of environmental regulation and protection," the tribunal noted that the standard for a breach of the minimum standard of treatment pertains to "a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all states under customary international law" and "requires a failure, wilful or otherwise egregious, to protect a foreign investor's basic rights and expectations."[227] This resembled the award in *SD Myers v Canada*, in which the tribunal had noted that the North American Agreement on Environmental Cooperation (NAAEC) as well as the 1992 Rio Declaration on Environment and Development, the principles of which were "affirmed" in the NAAEC, was part of the "legal context" of the investment protection standards and thus relevant to their interpretation.[228]

There are no conceptual arguments why the reasoning in the *SD Myers v Canada* and the *Al Tamini v Oman* cases cannot be extended to the labour

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226 Ibid, para 389. Article 17.2.1 reads: "(a) Neither Party shall fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement. (b) The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priority. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources."

227 Ibid, para 390. The investment chapter in the US-Oman FTA provides in Article 10.2 that: "In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency." The tribunal did not refer to this clause, in line with the proposition that there is indeed no such inconsistency. However, had it not used the environmental provisions to construct a high threshold for a violation of the minimum standard of treatment, it could have argued that a restriction on the government's ability to regulate in environmental concerns would be inconsistent with its obligation under the Article 17.1 of the environmental chapter to "ensure that [environmental] laws and policies provide for and encourage high levels of environmental protection and shall strive to continue to improve those laws and policies." Arguably, the outcome of this approach would have been the same.

228 *S.D. Myers Inc v Canada*, UNCITRAL Arbitration (NAFTA), First Partial Award, 13 November 2000, para 247 (on the NAAEC) and paras 201-202 (on the application of the Vienna Convention on the Law of Treaties).

context.[229] Labour provisions in IIAs that establish obligations between the state parties are part of the agreement and have to be taken into consideration when interpreting the provisions that regulate the relationship between those parties and foreign investors. Like in *Al Tamini v Oman*, they do not provide a general exception on which the host state can rely, but influence the material scope of the investment protection standards.

The number of "new generation IIAs" that include references to non-investment policies in their preambles, substantive provisions or general interpretative provisions or general exception clauses remains relatively small.[230] References that, either directly or indirectly, affirm the host state's right to regulate labour are even scarcer.[231] This raises the question whether the conclusions in *Lemire* that carve-outs for specific standards cannot be extended to other standards could have broader ramifications. The maxim *expressio unius est exclusio alterius* suggests that the absence of references to labour in general interpretative provisions and general exception clauses means that states did not intend to assert a broader right to regulate in this specific area.[232] This argument is especially relevant when a state has previously concluded IIAs or has a Model BIT which contains specific language on the right to regulate, but this is not included in subsequent IIAs. Ultimately, however, it is a basic principle of international law that restrictions on the sovereign rights of a state are the exception and have to be interpreted narrowly. It would be wrong to suggest that right to regulate provisions and general exception clauses are necessary to preserve policy space.

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229 Notably, the investment chapter of the US-Oman FTA provides in Article 10.10 that: "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns." The tribunal in *Al Tamini v Oman* referred to this clause on several occasions in conjunction with the environmental chapter. There is no similar clause with regard to labour, which could invoke the question whether the *Al Tamini v Oman* award has any relevance in the context of labour regulation. However, the tribunal paid substantially more attention to the legal significance of the environmental chapter than to Article 10.10. As has been pointed out in the literature, provisions which require *prima facie* consistency with investment protection standards "legally useless." See Howard Mann, 'International Investment Agreements, Business and Human Rights: Key Issues and Opportunities (International Institute for Sustainable Development 2008) 19.

230 See e.g. Suzanne Spears, 'Making way for the public interest in international investment agreements' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 275.

231 Indirect labour references includes references to sustainable development or public morals which may be interpreted in a way that covers labour standards.

232 '"[E]xpress mention excludes other items[.]" Ian Brownlie, *Principles of Public International Law* (Oxford University Press 2003) 604.

4.4.3 Interpretative issues

4.4.3.1 Standard of review and deference

The legislative strategies discussed above all seek to create more policy space for states vis-à-vis foreign investors. They do so at a general level; not connected to one specific protection standard. Apart from inconsistent application of protection standards by tribunals, states' efforts to include right to regulate exceptions and general exception clauses in their IIAs can be explained by the lack of a coherent framework or approach to determine the method and standard of review. While not always treated separately, "[m]ethods of review are techniques used to determine the permissibility of interference with the primary norm, whereas standards of review refer to the intensity with which the method of review is applied."[233]

The standard of review falls on a continuum bounded by total reliance on the primary decision-maker and *de novo* review by the arbitral tribunal.[234] Often, adjudicators will grant the primary decision-maker some degree of deference, or margin of appreciation, so that its "conduct is exempt from fully fledged review."[235] In other words: the degree of deference determines the standard of review that a tribunal applies. This, in turn, influences the likelihood that a particular measure may be upheld.

According to Schill: "arbitral jurisprudence is not settled on how to conceptualize deference, on the level of deference to accord when reviewing different types of host state conduct, and on the factors that should influence the standard of review."[236] Indeed, tribunals do not tend to explain why they do, or why they do not provide deference to the host state. Some tribunals appear to perceive deference as a "strategic approach,"[237] for example by emphasising the necessity of maintaining "both governmental and public faith in the integrity of the process of arbitration."[238] Differences in institutional

233 Caroline Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration' (2013) 4 Journal of International Dispute Settlement 197, 199 fn 8.

234 Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge University Press 2015) 29-30.

235 Stephan Schill, 'Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review' (2012) 3 Journal of International Dispute Settlement 577, 582.

236 Ibid 585.

237 Caroline Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration' (2013) 4 Journal of International Dispute Settlement 197, 202

238 *Glamis Gold, Ltd. v United States of America*, UNCITRAL Arbitration (NAFTA), Award, 8 June 2009, 48 ILM 1039, para 8.

competence and expertise are also invoked as reasons why tribunals should refrain from 'second-guessing' governmental measures.[239]

It is impossible to categorize the standard of review continuum. Some treaties do guide the adjudicator towards a particular standard of review. Henckels notes that Article 1 of the 1st Protocol to the European Convention on Human Rights stipulates that the right to property "shall not ... in any way impair the right of a State to enforce such laws *as it deems necessary* to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."[240] The italicised wording indicates the large degree of deference to the host state. However, many treaties, including IIAs, do not contain similar wording.[241] The degree of scrutiny that a tribunal applies could certainly be influenced by differences in the wording of IIAs. Preambles that indicate an IIA is intended to foster sustainable development rather than economic integration, or right to regulate provisions, can steer adjudicators to a more deferential approach when they are called upon to determine whether interferes by host states with legally protected rights of investors are permissible.

Henckels further argues that "the degree of international harmonization or consensus with respect to the subject matter of the measure" influences the degree of deference.[242] In some legal regimes, the existence of international consensus limits states in their ability to adopt certain measures that go beyond the level of protection afforded in the international standard. This is true, for example, in the WTO regime on Sanitary and Phytosanitary Measures.[243] Also in the European Court of Human Rights' case-law, the more consensus on the specific right at issue, the narrower the state's margin of appreciation.[244] Importantly, however, ECtHR cases involve a claim that a human right is being violated, and a broad margin of appreciation would prevent the ECtHR from finding such a violation. In the scenarios that are discussed in this chapter the situation is reverse: the host state defends a measure taken to improve labour standards, and a broad margin of appreciation could prevent an investor from successfully claiming damages. In other words: a broad margin

239 Caroline Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration' (2013) 4 Journal of International Dispute Settlement 197, 210-213. See for example: *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/9, Award, 5 September 2008, para 233, fn 351.

240 Emphasis added.

241 Notable exceptions are provisions concerning essential security interests.

242 Caroline Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration' (2013) 4 Journal of International Dispute Settlement 197, 199.

243 Benn McGrady, *Trade and Public Health: The WTO, Tobacco, Alcohol, and Diet* (Cambridge University Press 2011) 182.

244 Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law' (2006) 16 *The* European Journal of International Law 907, 927.

of appreciation at the ECtHR would work against a labour standards claim, while a broad margin of appreciation at an investment tribunal would protect labour standards.

When a host state measure is taken with the purpose of implementing an international convention, it is thus expected that a tribunal provides a large degree of deference.[245] This applies irrespective of the investment protection standard at issue. The next session will examine to what extent international labour law could be invoked in the interpretation of specific investment treaty provisions.

4.4.3.2 Systemic integration of international law

Most of the analysis so far has focused on the question to what extent international investment law limits states in the regulation of labour. It has not considered the role of *international* labour law. Does it make a difference whether states implement measures at their own discretion, or whether these measures are based on, or prescribed by, international obligations? Tribunals have long held that investment treaties do not constitute self-contained legal regimes. Instead, they have to be "envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature."[246] Another tribunal held that "resort to authorities stemming from the field of human rights ... is a legitimate method of treaty interpretation."[247]

There are many ways in which international investment law interacts with other fields of public international law. Both claimants and defendants have pursued arguments that investment protection standards should be interpreted in light of non-IIA sources. The present analysis is restricted to the question whether international obligations in the area of human rights and labour rights influence the interpretation of investment protection standards in a way that is beneficial to host states.

Host states have defended their contested measures by reference to international obligations on several occasions. In *Suez and Vivendi v Argentina*, the

245 Cf. Weiner who argues that "International conventional and customary law, in addition to state practice, will shed light on the legitimacy of regulatory purposes. For example, the widespread adherence of states to International Labor Organization treaties demonstrates general acceptance of the notion of workers' rights, which in turn suggests that regulatory measures aimed at protecting employee and worker safety and guaranteeing suitable working conditions are unlikely to constitute indirect expropriations." Allen Weiner, 'Indirect Expropriations: The Need for a Taxonomy of "Legitimate" Regulatory Purposes' (2003) 5 International Law FORUM du Droit International 166, 174.

246 *Asian Agricultural Products LtD (AAPL) v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, para 21.

247 *Tulip Real Estate and Development Netherlands B.V. v Republic of Turkey*, ICSID Case No ARB/11/28, Decision on Annulment, 30 December 2015, para 92.

respondent argued that its conduct – Argentina refused to renegotiate a concession for water distribution and waste water treatment services after the country implemented certain economic measures that significantly affected the investment – was justified as a necessary measure to safeguard the right to water. Indeed, "[since] human rights law provides a rationale for the crisis measures, (the respondent and the *amici curiae*) argue that [the] Tribunal should consider that rationale in interpreting and applying the provisions of the BITs in question."[248] The tribunal disagreed. It held that:

> Argentina is subject to both international obligations, i.e. human rights and treaty obligation, and must respect both of them equally. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive. Thus, ... Argentina could have respected both types of obligations.[249]

Arbitrators that are asked to adjudicate whether a state has fulfilled its obligations under an IIA have no jurisdiction to determine whether it complied with its obligations under a particular human rights convention. However, when interpreting an investment obligation, it is, unless the parties provide otherwise, bound to follow the rules on treaty interpretation that are found in Articles 31-33 of the Vienna Convention on the Law of Treaties. These rules are widely considered to reflect customary international law.[250] Article 31.3(c) requires treaty interpreters to take into account "any relevant rules of international law applicable in the relations between the parties." The article thus allows for the "systemic integration" of public international law,[251] which is "aimed at limiting normative conflicts and at coordinating parallel treaty obligations."[252] Various authors have expressed confidence in Article 31.3(c) VCLT as a mechanism through which "harmonious interpretation of investment and human rights instruments" can be realized.[253]

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248 *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010, para 267.

249 Ibid, para 262.

250 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177, para 112.

251 International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission' (13 April 2006) UN Doc A/CN.4/L.682, as corrected (11 August 2006) UN Doc A/CN.4/L.682/Corr.1, 206.

252 Hervé Ascensio, 'Article 31 of the Vienna Convention on the Law of Treaties and International Investment Law' (2016) 31 ICSID Review 366, 383.

253 Jan Wouters and Nicolas Hachez, 'When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights be Ensured' (2009) 3 Human Rights & International Legal Discourse 301, 334. In earlier scholarship, however, its added value to treaty interpretation had been doubted, see e.g. Hugh Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989 Part Three' (1991) 62 British Yearbook of International Law 1, 58.

The application of Article 31.3(c) VCLT is not straightforward, however. Several questions are open for debate, for example whether the external source that is being used for the interpretation of the norm over which the tribunal has jurisdiction needs to be ratified by the disputing parties, or by all parties to the treaty that forms the basis for the dispute. In the context of the WTO, a panel has held that all WTO member states must be parties to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity for the latter instrument to be considered "international law applicable between the parties".[254] This issue is less relevant in the investment law context, as most arbitrations are based on bilateral agreements. The likelihood that two parties to a BIT are also party to a particular ILO convention is much higher than the likelihood of overlapping membership between two multilateral treaties. Nonetheless, difficulties in the wording of Article 31.3(c)VCLT have not withheld the European Court of Human Rights to make use of its "international normative environment" in a rather creative fashion.[255] This applies in particular to the ECtHR's relationship to ILO law, which will be discussed in chapter 5.

Furthermore, Article 31.3(c) VCLT refers to 'relevant' rules of public international law. International investment law and international labour law are two profoundly distinct areas of international law. How 'relevant' can the latter be to the interpretation of the former? To examine the ways in which international labour law may influence the interpretation of international investment law, one needs to look at both sets of norms in more detail. ILO conventions contain different types of substantive provisions. Broadly speaking, one could distinguish between:

1. Obligations with a large degree of discretion in their implementation. For example, Article 2 of Convention 111 concerning Discrimination in Respect of Employment and Occupation requires states "to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof."
2. Obligations with a clear basic requirement, although with some discretion on their further implementation. For example, Article 1.1 of Convention 131 concerning Minimum Wage Fixing requires states to "establish a system of minimum wages which covers all groups of wage earners whose terms of employment are such that coverage would be appropriate."

254 WTO, *European Communities: Measures Affecting the Approval and Marketing of Biotech Products – Reports of the Panel* (29 September 2006) WT/DS291/R and WT/DS292/R and WT/DS293/R, para 7.68.

255 Jean-Marc Sorel and Valérie Boré Eveno, 'Article 31 – Convention of 1969' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary – Vol. I* (Oxford University Press, 2011) 828.

3. Subjective rights for individuals or groups, which would have direct effect in countries with a monist legal system. For example, Article 2 of Convention 87 concerning Freedom of Association and Protection of the Right to Organise provides that "Workers and employers, without distinction whatsoever, shall have the right to establish and ... to join organisations of their own choosing without previous authorisation."

Contributions that comment upon the use of Article 31.3(c) VCLT in relation to international investment law do not always distinguish between the types of norms, or elements of norms, that could be interpreted by taking into account external sources of international law. Most often, the analysis focuses on protection standards as such; i.e. the question whether international labour law can be taken into account when interpreting 'the FET standard', or 'the obligation to provide national treatment'. In reality, however, a fact-pattern and the concomitant legal questions are more specific. In *Parkerings-Compagniet v Lithuania*, for example, the host state's ratification of the UNESCO World Heritage Convention, and the protected status of the historic centre of Vilnius under this convention, resulted in the finding that investors operating inside and outside this area were not "in like circumstances".[256] In other words: an external international legal instrument was used to interpret only an *element* of the NT and MFN obligation, albeit an important one.

It is also possible that international labour law is used to aid the interpretation of IIA provisions other than the material obligations. For example, the question could arise whether the term "law enforcement" in an IIA also encompasses labour inspectorates. ILO Convention 81 states that the function of a labour inspection system is "to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work."[257] This argues against a narrow interpretation of law enforcement as being merely related to security and criminal activity. Similarly, Article 31.3(c) VCLT could be used to determine what "legitimate policy objectives" in right to regulate provisions are.[258]

The interpretative questions arising from IIAs which ILO conventions could help resolve are diverse. Arguably, a "basic situation of incompatibility"[259] is unlikely to arise. The presumption in favour of coherence is well-established

256 *Parkerings-Compagniet AS v Lithuania*, ICSID Case No ARB/05/8, Award, 11 September 2007, para 396

257 Art 3.1(a) ILO Convention 81.

258 Art 8.9 CETA.

259 This term was used by the International Law Commission in its report on fragmentation in international law, see: International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission' (13 April 2006) UN Doc A/CN.4/L.682, as corrected (11 August 2006) UN Doc A/CN.4/L.682/Corr.1, para 24.

in international law.[260] When a contested measure is taken to implement a treaty-obligation, but the treaty itself grants a certain degree of discretion, a tribunal would likely find that alternative measures were available and that states *could* have respected both types of obligations. Tribunals may grant a larger degree of deference to the host state when a measure is taken with the aim to implement an international labour convention, but the presumption of coherence could also steer it towards an inquiry into whether other measures would have been possible. In any case the two obligations will not be deemed incompatible. When a claim concerns subjective labour rights such an inquiry may be impossible. Part of a state's obligations in the area of freedom of association is to refrain from taking certain actions, like prohibiting strikes in non-essential sectors. In this situation, there may be no room to examine whether an alternative course of action for the state may have been available. But this does not mean that the two obligations – non-interference in industrial action and providing security and protection for the investor – are necessarily incompatible.

Theoretically, it would be possible that a host state which is under an ILO-obligation to refrain from interfering with industrial action, later concludes an IIA containing a specific obligation to 'protect investors from industrial action'. Assuming the two provisions cannot be interpreted in a way that allows the fulfilment of both, both the *lex specialis* rule and the *lex posterior* rules do not provide a solution, as the application of the IIA would lead to a modification of the ILO obligations. This is incompatible with the *erga omnes partes* character of ILO obligations. Also in the *travaux préparatoires* of Article 30 of the Vienna Convention on the Law of Treaties, which is concerned with the application of successive treaties relating to the same subject matter, international labour conventions were recognized as 'interdependent obligations' as they "are only meaningful in the context of the corresponding obligations of every other party, so that the violation of its obligations by one party prejudices the treaty regime applicable between them all and not merely the relations between the defaulting State and the other parties."[261] The International Law Commission thus held that: "If the conclusion or application of the [later] treaty constitutes an infringement of the rights of parties to another treaty, all the normal consequences of the breach of a treaty follow with respect to that other treaty."[262] The conclusion of an IIA that conflicts

260 See Vid Prislan, 'Non-investment obligations in investment treaty arbitration: towards a greater role for states?' in Freya Baetens (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press 2013) 473-475.

261 Yearbook of the International Law Commission 1966, Vol II, Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly (United Nations 1967) 216, fn 117.

262 Ibid 217.

with an earlier ILO obligation thus constitutes a breach of the ILO obligation, and should not be applied.[263]

4.5 PROVISIONS ADDRESSING THE CONDUCT OF INVESTORS

4.5.1 Introduction

This part concerns provisions that address the conduct of business enterprises. Although this could be perceived as a 'legislative strategy' it is different from the ones described above, as they do not address investor rights in relation to the conduct of the host state but the host and home states' rights in relation to the investor's conduct.[264] Section 4.5.2 introduces the various types of CSR clauses that have emerged in IIAs. Section 4.5.3 examines their functions. Section 4.5.4 discusses the possibility of binding obligations for corporations under international (investment) law.

263 Fitzmaurice, in his role as Special Rapporteur for the International Law Commission on the law of treaties, argued that later treaties which directly conflict with earlier multilateral treaties embodying indivisible obligations the later conflicting treaty should as a whole be considered invalid. His successor, Sir Humphrey Waldock, shifted the debate from validity to responsibility. In this situation, the later treaty would not be invalid, but would invoke international responsibility. For an overview of the different perspectives of the Special Rapporteurs, see Alexander Orakhelashvili, 'Article 30 – Convention of 1969' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary – Vol. I* (Oxford University Press 2011) 769-771.

264 The EU-Korea FTA contains a CSR provision which is not related to investment but to trade. Art 13.6.2 provides that "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." This provision does not affect trade rules, however, and its effect in practice is unclear. Bartels notes that: "In theory, clauses of this type could have a stronger effect, and permit the EU to regulate in favour of imports of products and services that are produced by corporations that comply with CSR principles. This would ordinarily be prohibited on the grounds that it is not possible to discriminate between products solely on the basis of how a product or service is produced (so-called unincorporated product and production methods). But the situation would be different if the exporting country recognised the legitimacy of regulatory distinctions between products according to whether they are produced according to CSR standards." Lorand Bartels, 'The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements' (Directorate-General for External Policies, EXPO/B/DROI/2012-09, February 2014) para 56.

4.5.2 Types of CSR clauses

The 2008 EU-CARIFORUM Economic Partnership Agreement was the first to include a CSR clause. It stipulates that:

> (...) the Parties agree to cooperate, including by facilitating support, in the following areas: (...)(d) enforcement of adherence to national legislation and work regulation, including training and capacity building initiatives of labour inspectors, and promoting corporate social responsibility through public information and reporting.[265]

The CSR provision was included in the chapter on 'social aspects.' The EPA's investment chapter also included a provision that addressed the behaviour of investors more directly. This second article imposes an obligation on the state parties to take necessary measures, including legislation, to make sure *inter alia* that investors act in accordance with the fundamental labour norms. However, Article 72 provides that this should be done "within their own respective territories." Consequently, the responsibility of the home state vis-à-vis the conduct of their enterprises abroad does not go further than to 'promote' public information and reporting.

A typical example of a contemporary CSR provision can be found in the investment chapter of the 2013 FTA between Canada and Panama. Article 9.17 provides that:

> Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as those statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.[266]

Similar provisions are included in Canada's FTAs with Honduras,[267] Korea,[268] as well as several of its BITs.[269] The term 'statements of principle' is not clarified. It would most likely cover the OECD Guidelines, the ILO MNE Declaration and the UN Guiding Principles. Other CSR provisions are less ambiguous. The 2012 BIT between Austria and Tajikistan explicitly states in

265 Art 196 EU-CARIFORUM EPA.
266 Art 9.17 Canada-Panama FTA.
267 Art 10.16 Canada Honduras FTA.
268 Art 8.16 Canada-Korea FTA.
269 Art 15.3 Canada-Mali BIT; Art 15.2 Canada-Cameroon BIT; Art 16 Canada-Nigeria BIT; Art 16 Canada-Serbia BIT; Art 16 Canada-Senegal BIT adds: "Such enterprises are encouraged to make investments whose impacts contribute to the resolution of social problems and preserve the environment"; Article 16, Canada-Benin-BIT speaks of "their practices and internal policies."

the preamble that the parties: "[express] their belief that responsible corporate behaviour, as incorporated in the OECD Guidelines for Multinational Enterprises, can contribute to mutual confidence between enterprises and host countries" and that they "[take] note of the principles of the UN Global Compact."[270] Although the agreement does contain a labour non-derogation provision, the issue of CSR was not mentioned in the substantive obligations. Compared to the Canada-Panama FTA, these provisions may appear to be more concrete. However, their inclusion in preambles rather than in substantive provisions shows that these references are merely symbolic and do not intend to create any binding obligation.

Other PTIAs do include references to international CSR instruments in their substantive provisions. The 2013 BIT between the Netherlands the United Arab Emirates, which has not yet entered into force, holds that: "Each Contracting Party shall promote as far as possible and in accordance with their domestic laws the application of the OECD Guidelines for Multinational Enterprises to the extent that is not contrary to their domestic laws."[271] For the Netherlands, the BIT's CSR provision does not seem to add additional obligations beyond its existing commitments as an OECD member state. This is different for the UAE. Various norms contained in the OECD Guidelines do conflict with its domestic labour legislation. A 2012 report by the International Trade Union Confederation (ITUC) argued that there are severe inconsistencies between UAE labour law and the fundamental ILO conventions.[272] As the OECD Guidelines "echo all four fundamental principles and rights at work which are contained in the ILO's 1998 Declaration,"[273] inconsistencies between domestic law and ILO standards automatically mean that the application of the OECD Guidelines on those issues would be contrary to domestic laws. For example, UAE's labour legislation prohibits the free formation of trade unions,[274] while the OECD Guidelines hold that enterprises should "(r)espect the right of workers employed by the multinational enterprise to establish or join trade unions and representative organisations of their own choosing."[275]

In addition to substantive labour norms, the OECD Guidelines also address investors' bargaining strategies, as enterprises should "refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory

270 Preamble Austria-Tajikistan BIT.
271 Art 2.3 Netherlands-UAE BIT.
272 International Trade Union Confederation, 'Internationally Recognised Core Labour Standards in the United Arab Emirates' (Geneva, 27 and 29 March 2012) <http://www.ituc-csi.org/IMG/pdf/final-_tpr_uae.pdf> accessed 24 June 2018.
273 OECD, 'OECD Guidelines for Multinational Enterprises, 2011 edition' (adopted 25 May 2011) 38.
274 International Trade Union Confederation, 'Internationally Recognised Core Labour Standards in the United Arab Emirates' (Geneva, 27 and 29 March 2012) 2.
275 OECD, 'OECD Guidelines for Multinational Enterprises, 2011 edition' (adopted 25 May 2011) 35.

framework related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues."[276] This provision has given rise to a number of cases before the OECD Guidelines' complaints mechanism, including six simultaneously filed complaints against the oil companies that were involved in the BTC pipeline project. Although the use of stabilization clauses was not dismissed, the report of the United Kingdom's National Contact Point, which handled the alleged violation of the OECD Guidelines in this case, implied that freezing clauses are to be viewed as an *ipso facto* breach of the Guidelines.[277] Consequently, express references to the OECD Guidelines could therefore curtail the practice of stabilization clauses.

However, the current way the provision in the Netherlands-UAE BIT is phrased is problematic. References to instruments like the OECD Guidelines should not be without prejudice to domestic law if they are intended to have any impact. Also the European Union includes ample references to international CSR instruments in ways that does not signify any legal obligation. The 2018 EU-Singapore FTA, which has not yet entered into force, provides that:

> 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 *that it has agreed or acceded to*, 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.[278]

Similar clauses are included in the 2014 Association Agreements between the EU and Georgia, Moldova and Ukraine, which were all signed on the same date, as well as the agreement with Colombia, Peru and Ecuador. The general premise is that the parties should 'encourage' and 'promote' CSR. The EU-Moldova Agreement notes that "The Parties *shall* promote corporate social responsibility and accountability and encourage responsible business practices (…)."[279] It mentions the OECD Guidelines, the UN Global Compact and the ILO Tripartite Declaration as "relevant internationally recognized principles and guidelines."[280] The Agreement contains an enumeration of the types

276 Ibid 19.
277 OECD, 'UK National Contact Point – Revised Statement, Specific Instance: BTC Pipeline' (22 February 2011) para 26.
278 Art 13.11(4) EU Singapore FTA (emphasis added).
279 Art 35 EU-Moldova AA (emphasis added).
280 Arts 35 and 367(e) EU-Moldova AA.

of actions that the parties may take to fulfil their obligations.[281] The EU-Ukraine Association Agreement also refers to the relevant OECD, UN and ILO instruments.[282] Of the three Association Agreement, only the one with Georgia anticipates inter-state action in the field of CSR, as "the Parties agree to promote corporate social responsibility, including through exchange of information and best practices."[283] The CSR clauses Association Agreement with Georgia not only contains a reference to the OECD Guidelines,[284] but also includes a broadly formulated statement concerning the ILO's Decent Work Agenda that mentions CSR as one of the means towards its realization.[285]

4.5.3 Functions of CSR clauses

4.5.3.1 Inter-state dialogue and cooperation

Although the number of CSR clauses in IIAs and PTIAs is on the rise, the commitments contained herein are typically not very demanding. They could be characterised as 'double soft-law' as states "are required to *remind* or *encourage* investors to adopt *voluntary* standards."[286] This does not mean that CSR clauses are redundant. Arguably, there are three possible functions.

Firstly, the most straightforward role of CSR clauses is to stress the importance of the issue and create a basis for inter-state dialogue. The United States and Canada have concluded agreements with similar language as the EU-Georgia Agreement. The 'Labor Cooperation and Capacity Building Mechanism' that is established under the US-Peru FTA is *inter alia* tasked with "dissemination of information and promotion of best labor practices, including corporate social responsibility, that enhance competitiveness and worker welfare."[287] Likewise, the FTA between Canada and Peru establishes a 'Committee on investment,' which "should work to promote cooperation and facilitate joint initiatives, which may address issues such as corporate social

281 Art 375(g) EU-Moldova AA.
282 Art 422 EU-Ukraine AA.
283 Art 231(e) EU-Georgia AA.
284 Arts 231(e) and 352 EU-Georgia AA.
285 Art 348 EU-Georgia AA. Generally, Peels et al. note that, "the majority of these CSR instruments often include references to the same labour instruments that are referred to in the labour provisions, for example the ILO 1998 Declaration on Fundamental Principles and Rights at Work, the ILO Fundamental Conventions, and other instruments." Rafael Peels, Elizabeth Echeverria, Jonas Aissi and Anselm Schenider, 'Corporate social responsibility in international trade and investment agreements: implications for states, businesses, and workers' (ILO Research Paper No 13, April 2016) 1.
286 Vid Prislan and Ruben Zandvliet, 'Labor Provisions in International Investment Agreements: Prospects for Sustainable Development' in Andrea Bjorklund (ed) *Yearbook on International Investment Law and Policy 2012-2013* (Oxford University Press 2014) 387.
287 Annex 17.6(2)(o) US-Peru FTA.

responsibility and investment facilitation."[288] A report by the United Nation Environment Programme (UNEP) has argued that: "Although this Committee does not hold enforcement powers to ensure companies include CSR standards in their practices or mandate reporting requirements, it could increase the likelihood that CSR will remain on the agenda in investment discussions between the countries."[289] This could for example lead to states joining certain CSR initiatives, such as the OECD Guidelines.

4.5.3.2 Host-state regulation of investors

Secondly, CSR clauses could function as a stimulus for unilateral CSR-regulation by the state parties to an agreement. Home states increasingly exercise prescriptive jurisdiction in a way that affects business operations beyond their borders, for example by adopting legislation to incentivize CSR or by providing ways to enforce CSR-commitments made by MNEs themselves.[290] This trend invokes the question whether states are allowed to do so. When the jurisdictional basis for extraterritorial legislation is absent, unclear or contested, a CSR clause in a PTIA could provide for (a clarification of) this legal basis. As Bartels argues in the context of EU agreements, an:

> effect of CSR clauses is to block any objection to the EU's regulation of the activities of EU corporations in the partner country. In principle, the EU is permitted by ordinary principles of public international law to regulate its nationals, including corporations. However, even if lawful, such extraterritorial regulation may create tensions with the other country in certain circumstances. For example, a requirement that EU corporations report on their investment activities in other countries might conflict with confidentiality rules in those countries.[291]

The UN Guiding Principles give an adequate projection of the current state of international law where it is mentioned that: "At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or their jurisdiction. Nor are they generally prohibited from doing so, provided there

288 Art 817 Canada-Peru FTA.

289 United Nations Environment Programme, 'Corporate Social Responsibility and Regional Trade and Investment Agreements' (2011) 26.

290 The normative question whether home States should adopt complementary CSR regulations is a different matter, see Janet Dine, *Companies, International Trade and Human Rights* (Cambridge University Press 2010) 228-231.

291 Lorand Bartels, 'The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements' (Directorate-General for External Policies, EXPO/B/DROI/2012-09, February 2014) para 57.

is a recognized jurisdictional basis."[292] The debate on whether there is such a jurisdictional basis has its origins in the *S.S. Lotus* case before the Permanent Court of International Justice (PCIJ), in which the Court held that:

> Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.[293]

In contemporary international law this principle is contested.[294] However, the definition of extraterritorial legislation has also become increasingly nuanced. According to Crawford: "[W]hat amounts to extraterritorial jurisdiction is to some extent a matter of appreciation."[295] CSR regulation that intended to influence the operations of MNEs operating abroad has thus been characterised as "domestic measures with extraterritorial implications"[296] or "parent-based methods of extraterritorial jurisdiction" which are used to confer "subtler regulatory pressures" regarding MNEs foreign activities.[297] The American Law Institute's 1987 Third Restatement on Foreign Relations Law holds that: "A state may not ordinarily regulate activities of corporations organized under the laws of a foreign state on the basis that they are owned or controlled by nationals of the regulating state. However … it may not be unreasonable for a state to exercise jurisdiction for limited purposes with respect to activities of affiliate foreign entities."[298] This includes, for example, the disclosure of information for the purpose of accounting, informing shareholders and taxation. Indeed, in both the European Union and the United

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292 Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding principles on business and human rights: implementing the United Nations 'Protect, respect and remedy' framework'' (21 March 2011) (A/HRC/17/31) 7.

293 *The Case of the S.S. "Lotus"* (*France v Turkey*) (Merits) PCIJ Rep Series A No 10 (7 September 1927), 19.

294 See Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press 2008) 20 who argues that the Lotus-principle has been replaced by a customary rule of international law stating the opposite, namely that absent a permissive rule states cannot exercise jurisdiction in such cases.

295 James Crawford, *Brownlie's Principles of Public International Law 8th edition* (Oxford University Press 2012) 457.

296 Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding principles on business and human rights: implementing the United Nations 'Protect, respect and remedy' framework'' (21 March 2011) (A/HRC/17/31) 7.

297 Jennifer Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press 2003) 105, 134.

298 American Law Institute, 'Restatement of the Law, Third, Foreign Relations' (1987) para 213.

States, mandatory disclosure of CSR information originates in more comprehensive financial legislation: the EU Accounts Modernization Directive and the US Dodd-Frank Act, respectively.[299]

To date, no state has asserted that CSR clauses can be used for the purpose of clarifying the jurisdictional basis of CSR regulation. Indeed, there are good arguments to argue that general public international law provides such a basis already. Three UN treaty bodies have adopted statements that indicate that human rights conventions may even *oblige* states to regulate their MNEs operating abroad.[300] Still, the treaty bodies do not resolve the question how such regulation relates to the sovereignty of host states.[301] CSR provisions in preferential trade and investment agreements provide the host state with an opportunity to expressly consent to the involvement, or to the limits thereof, of the home state in regulating the conduct of MNEs in their territory. Objections against the exercise of extraterritorial CSR regulation are often political rather than legal.[302] Legal limitations are hard to define. Enneking notes that:

299 Art 42(f) Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 ... on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings [2003] OJ L 178; Sec 1502 Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 111th Congress (124 Stat 1376).

300 Human Rights Committee, 'Concluding observations on the sixth periodic report of Germany, adopted by the Committee at its 106th session (15 October–2 November 2012)' (12 November 2012) CCPR/C/DEU/CO/6, para 16 (emphasis added); Committee on the Rights of the Child, 'General Comment No 16 – On State obligations regarding the impact of business on children's rights' (7 February 2013) CRC/C/GC/16, para 43-46 (emphasis added); Committee on Economic, Social and Cultural Rights, 'General Comment No 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (10 August 2017) E/C.12/GC/24, paras 25-37. See also the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Heidelberg 2013).

301 According to the CESCR: "States Parties should also take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant." Committee on Economic, Social and Cultural Rights, 'Statement on the obligations of State Parties regarding the corporate sector and economic, social and cultural rights' (20 May 2011) E/C.12/2011/1, para 5 The 2017 General Comment of the CESCR also does not provide an answer. The line of argument is very purposive. It notes that "Extraterritorial obligations arise when a State party *may influence* situations located outside its territory, consistent with the limits imposed by international law" and that "State parties must ensure that they do not obstruct another State from complying with its obligations under the Covenant." Committee on Economic, Social and Cultural Rights, 'General Comment No 24: State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (10 August 2017) E/C.12/GC/24, paras 28-29.

302 Peter Muchlinski, *Multinational Enterprises and the Law* (2nd edn, Oxford University Press 2007) 116.

> Examples of such limitations are the requirement that assertions of extraterritorial jurisdiction over actors and/or activities abroad should be reasonable; the international prohibition on states to intervene directly or indirectly in the domestic affairs of other states, especially through methods of coercion; the absence of any genuine link between the state exercising extraterritorial jurisdiction and the actor or activity it seeks to regulate; as well as the exercise of extraterritorial jurisdiction in contravention of WTO rules or fundamental norms of public international law.[303]

Whether home state regulation conflicts with the sovereignty of host states thus depends to a large extent on the type of regulation. An obligation to report on companies' approach towards trade union rights and collective bargaining abroad is different from an obligation to negotiate collective agreements. In some host states, the latter would clearly conflict with domestic legislation.[304] With regard to reporting and due diligence obligations, this problem does not exist.

4.5.3.3 Balancing investor rights and obligations

A third role of CSR clauses is their potential effect on the balance of investor rights and obligations. Firstly, they could affect the interpretation of investment protection standards. In this sense, CSR clauses may have the same effect as improvement clauses, which has been discussed above in relation to the *Al Tamini v Oman* arbitration. Importantly, the draft MAI, which 'associated' the investment treaty to the OECD Guidelines on Multinational Enterprises, contained the disclaimer that this connection "shall not bear on the interpretation or application of the Agreement, including for the purpose of dispute settlement; nor change [the Guidelines'] non-binding character."[305] Other agreements do not contain such wording.

Secondly, CSR clauses may determine under what circumstances investors are barred from invoking IIA protection, or prove a basis for counterclaims. The former is a jurisdiction issue, while the latter could be raised during the merits of a case. IIAs typically protect only those investments that have been made "in compliance with" the host state's laws and regulations.[306] The remark of the Tribunal in *Phoenix v Czech Republic*, that "nobody would suggest

303 Liesbeth Enneking, *Foreign Direct Liability and Beyond: Exploring the role of tort law in promoting international corporate social responsibility and accountability* (Eleven International Publishing 2012) 470.

304 Until 1957, US courts gave extraterritorial effect to the 1938 Fair Labor Standards Act, which included minimum standards on a range of issues, including child labour and equal pay. In 1957, however, US Congress adopted an amendment that barred the extraterritorial application. See: James Zimmerman, 'International dimensions of US fair employment laws: Protection or interference,' (1992) 131 International Labour Review 217, 221.

305 Art X, para 1(4) OECD, 'The Multilateral Agreement on Investment: Draft Consolidated Text' (22 April 1998) DAFFE/MAI(98)7/REV1, 95.

306 IIAs use a number of different phrases.

that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or *in support of slavery* or trafficking of human organs"[307] could arguably be extended to the four fundamental labour rights.[308] So far, no tribunal has declined jurisdiction because the investment was made in violation of host state labour rights.

Thirdly, non-compliance with host state legislation that concern the management of the investment – as opposed to the establishment – is to be considered in the merits phase.[309] Investor misconduct may be taken into account when determining a breach of the protection standards,[310] or provide a basis for counterclaims by the host state. In the *Urbaser v Argentina* award, the tribunal considered a human rights counterclaim by the host state. It alleged that the investor's actions had an adverse effect on the human right to water. Although the claim failed, the tribunal's reasoning has opened rather than closed the door for future host state counterclaims. It dismissed the investor's assertion that IIAs do not impose obligations on investors in the first place.[311] Subsequently, the tribunal elaborated on the corporate responsibility to respect human rights. It stated that:

> international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation.[312]

This does not mean that there is currently a general obligation to act in accordance with human rights law. It thus concluded that:

> The focus must be ... on contextualizing a corporation's specific activities as they relate to the human right at issue in order to determine whether any international law obligations attach to the non-State individual.[313]

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307 *Phoenix Action Ltd. v The Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009, para 78
(emphasis added).

308 Vid Prislan and Ruben Zandvliet, 'Labor Provisions in International Investment Agreements: Prospects for Sustainable Development' in Andrea Bjorklund (ed) *Yearbook on International Investment Law and Policy 2012-2013* (Oxford University Press 2014) 406-407.

309 *Oostergetel v Slovak* Republic, UNCITRAL, Decision on Jurisdiction, 30 April 2010, para 176.

310 Peter Muchlinski, ''Caveat investor'? The relevance of the conduct of the investor under the fair and equitable treatment standard' (2006) 55 International and Comparative Law Quarterly 527, 536-556.

311 *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergop v The Argentine Republic*, ICSID Case No ARB/07/26, Award, 8 December 2016, paras 1134-1155.

312 Ibid, para 1195 (internal reference omitted).

313 Ibid.

The main reason why the counterclaim in *Urbaser v Argentina* failed was that "the enforcement of the human right to water represents an obligation to perform" which is an obligation for the state and not for individual corporations.[314] Other human rights, however, which do not have to be actively fulfilled but depend on non-interference could arguably provide a basis for counterclaims.[315] Applying this framework to international labour law, it is possible to come up with a large number of fact-patterns in which an investor's failure to abstain from interfering constitutes a human rights violation, such as the hiring of workers to break a strike.[316] Furthermore, some IIAs now include articles on "post-establishment obligations" with references to both national and international labour standards.[317] Also contracts between the host state and a foreign investor may be used as a tool to specify requirements in the area of labour or human rights law.[318]

Returning to the question of whether tribunals can consider counterclaims that arise from violations of international labour standards, including CSR clauses in IIAs may have two effects. First, the question of jurisdiction over

314 Ibid, para 1210.

315 Ibid.

316 International Labour Organization, 'Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO' (5th edn, International Labour Office 2006) para 632. In practice, most fact-patterns will involve more sophisticated tactics to avoid burdensome labour regulations. The award in *Saint-Gobain Performance Plastics Europe v Bolivarian Republic of Venezuela*, for example, explains the company's attitude towards trade unions in the lead-up to severe labour unrest. Under Venezuelan labour law, employees had the right to establish a union if the number of employees of the company exceeded 25. The investor thus set up a new subsidiary, instead of using an existing one, in order to keep the number of permanent employees at 24, which was supplemented by temporary workers. Furthermore, on multiple occasions the company hired a labour outsourcing company to re-hire its previous employees under less generous benefits and little job security. *Saint-Gobain Performance Plastics Europe v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, paras. 198-210. The subsequent labour unrest led to a union taking over the factory, well before the government formally expropriated it. The dispute was concerned with the question whether damages had to be calculated from the worker take-over or the formal expropriation. The tribunal sided with the claimant, and did not consider the investor's creative application of domestic labour law which allegedly contributed to the labour unrest in the first place.

317 Art 18 Morocco-Nigeria BIT.

318 Lorenzo Cotula and Kyla Tienhaara, 'Reconfiguring investment contracts to promote sustainable development' in Karl Sauvant (ed), *Yearbook on International Investment Law & Policy 2011-2012* (Oxford University Press 2013) 295-296. The 2011 Model Mining Development Agreement (MMDA) of the International Bar Association provides example of how labour standards can be integrated into concession agreements. The MMDA is rather deferential to the host state's domestic labour law, and only requires compliance with those ILO Conventions that have been ratified by the host state. Exceptions are made with regard to child labour, forced labour and occupational discrimination. While the MMDA is sector specific, its part on employment, labour standards and health and safety can be readily used in other contracts as well. Model Mine Development Agreement: A Template for Negotiation and Drafting (4 April 2011).

such claims would have been more straightforward than in the *Urbaser* case, where the BIT between Spain and Argentina lacked such a provision. Second, it could help "contextualizing a corporation's specific activities as they relate to the human right at issue." For this last purpose, the traditional 'double soft-law' provisions may not be useful. However, some IIAs now explicitly refer to a corporate obligation to respect human rights.

4.5.4 Towards binding obligations for business enterprises

For a long time, companies have not been subjected to direct obligations under international law.[319] However, the idea had been entertained for decades. An ILO report from 1943 concerning commodity control agreements stated that:

> Compliance with the local social legislation *and with certain international requirements* could appropriately be made a condition of the assignment to individual producers or shares of the export quota allotted to the country concerned. Such a device would tend to eliminate the undercutting of standards within each of the countries participating in the control scheme.[320]

And in 1978, European Commissioner Vredeling expressed the EC's desire for a *quid pro quo* with companies benefitting from economic agreements as follows:

> the Commission is of the opinion that aid to investors in countries in development should be conditioned. The companies enjoying aid, should perform according to norms of good behaviour. This is also a matter familiar to the I.L.O., which could, amongst others, be worked out in the [Lomé convention].[321]

Despite the absence of provisions to this effect, there are no conceptual difficulties in international law to impose obligations upon corporations without the intermediate layer of transformation into domestic law. Indeed, criminal responsibility for legal persons has been debated during the negotiations which eventually led to the Rome Statute, establishing the International Criminal

319 See e.g. Eric de Brabandere, 'Human Rights and Transnational Corporations: The Limits of Direct Corporate Responsibility' (2010) 4 Human Rights and International Legal Discourse 66.

320 International Labour Organization, 'Intergovernmental commodity control agreements' (Montreal 1943) xxxi.

321 Speech by Vice-President H. Vredeling to the International Labour Organization, Geneva (15 June 1978) <http://aei.pitt.edu/11204/1/11204.pdf> accessed 24 June 2018.

Court.[322] The ongoing work of the "open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights" that was established by the Human Rights Council in 2014 to consider a new legally binding instrument,[323] has reinvigorated the debate on direct corporate obligations, although there are various other forms a 'business and human rights treaty' could take.[324] The European Parliament has adopted multiple statements in which it supports investor obligations to be included in future agreements.[325]

Three agreements from the African continent already contain binding obligations. The 2008 Community Rules on Investment by the Economic Community of West African States (ECOWAS), which is the only one in force, contains a full chapter laying down obligations for investors. The Rules provide *inter alia* that investors, once established in the host state:

> *shall* uphold human rights in the workplace and the community in which they are located. Investors shall not undertake or cause to be undertaken, acts that breach such human rights. Investors shall not manage or operate the investments in a manner that circumvents human rights obligations, labour standards as well as regional environmental and social obligations, to which the host State and/or home State are Parties[326]

and furthermore, that

> [i]nvestors and investments shall act in accordance with fundamental labour standards as stipulated in the ILO Declaration on Fundamental Principles and Rights of Work, 1998.[327]

322 Desislava Stoitchkova, *Towards Corporate Liability in International Criminal Law* (Intersentia 2010) 108-112, 173-174. On some more recent developments, see: Joana Kyriakakis, 'Corporations before International Criminal Courts: Implications for the International Criminal Justice Project' (2017) 30 Leiden Journal of International Law 221.

323 Human Rights Council, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' (14 July 2014) A/HRC/RES/26/9.

324 Olivier de Schutter, 'Towards a New Treaty on Business and Human Rights' (2015) 1 Business and Human Rights Journal 41. In July 2018, the first draft was published, which is available on <https://www.business-humanrights.org/en/binding-treaty> accessed 18 November 2018.

325 European Parliament, 'Resolution of 6 April 2011 on the future European international investment policy' (2010/2203(INI)); European Parliament, 'Resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)' (2014/2228(INI)).

326 Arti 14.2 ECOWAS Community Rules on Investment (emphasis added).

327 Art 14.4 ECOWAS Community Rules on Investment.

The 2016 BIT between Morocco and Nigeria (an ECOWAS member state) includes similar provisions.[328] This is also true for the 2012 Model BIT of the Southern African Development Community (SADC), which holds that:

> 15.1. Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the human rights by others in the Host State, including by public authorities or during civil strife.
>
> 15.2. Investors and their investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998.
>
> 15.3. Investors and their investments shall not [establish,] manage or operate Investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher.[329]

Most problematic about the ECOWAS and SADC models is that they demand compliance by corporate entities with treaty law that is meant to apply between states, or in case of the 1998 Declaration, with a document that has no binding effect whatsoever. States bear the responsibility to transpose international obligations into domestic legislation which then becomes binding on that state's nationals, including corporations. This process is important as it concretizes treaty provisions that are vague or deliberately open-ended, and require further interpretation. For example, the ILO Discrimination Convention No 111 gives much leeway to states when they "declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof."[330] Other Conventions are better suited for direct application, in particular those conventions that grant subjective rights to workers.[331]

The problem of the ECOWAS and SADC models is circumvented in the 2005 'Model International Agreement on Investment for Sustainable Development', which was drafted by three scholars under the auspices of the International

328 Art 18 and 24, 2016 Morocco-Nigeria BIT.
329 Ar 15, 2012 Model BIT of the Southern African Development Community.
330 Art 2 ILO Convention 111.
331 Ruben Zandvliet and Paul van der Heijden, 'The rapproachement of ILO standards and CSR mechanisms: towards a positive understaning of the 'privatization' of international labour standards' in Axel Marx, Jan Wouters, Glenn Rayp and Laura Beke (eds), *Global Governance of Labor Rights: Assessing the Effectiveness of Transnational Public and Private Policy Initiatives* (Edward Elgar Publishing 2016) 188.

Institute for Sustainable Development (IISD), a Canadian NGO.[332] The CSR provision directly addresses investors, but relies on CSR frameworks instead of treaty law. Article 16 thus provides that:

> *Corporate social responsibility*
> A) In addition to the obligation to comply with all applicable laws and regulations of the host state and the obligations in this Agreement, and in accordance with the size, capacities and nature of an investment, and taking into account the development plans and priorities of the host state, the Millennium Development Goals and the indicative list of key responsibilities provided in Annex F, investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the host state and local community through high levels of socially responsible practices.
> B) Investors should apply the ILO Tripartite Declaration on Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises, as well as specific or sectoral standards of responsible practice where these exist.
> C) Where standards of corporate social responsibility increase, investors should strive to apply and achieve the higher level standards.

However, the IISD model is not without problems either. It relies too heavily on external instruments that may become outdated. The Millennium Development Goals, for example, have been succeeded by the Sustainable Development Goals.[333] The OECD Guidelines are updated from time to time. And the clause excludes CSR frameworks that are developed at a later date. Had the IISD drafted its model after 2011, it would likely have included a reference to the UNGPs.

Despite the long-standing relationship between international economic law and corporate social responsibility, CSR provisions in PTIAs are still "in an embryonic state."[334] Compared to other types of labour clauses that are included in PTIAs, there is more diversity in the language of CSR provisions and they lack a clear purpose. Current CSR provisions are not drafted in order to create or clarify the jurisdictional basis for extraterritorial legislation of home states over their multinational enterprises. Conceptual questions are eschewed, most importantly in the attempts to make ILO obligations directly binding upon investors.

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332 Howard Mann, Konrad von Moltke, Luke Eric Peterson and Aaron Cosbey, 'IISD Model International Agreement on Investment for Sustainable Development' (April 2005).

333 UNGA Res 70/1 (21 October 2005) 'Transforming our world: the 2030 Agenda for Sustainable Development' UN Doc A/RES/70/1.

334 Rafael Peels, Elizabeth Echeverria, Jonas Aissi and Anselm Schenider, 'Corporate social responsibility in international trade and investment agreements: implications for states, businesses, and workers' (ILO Research Paper No. 13 April 2016) 8.

4.6 Concluding remarks

While multilateral trade law may constrain states in implementing certain trade measures in response to violations of labour standards abroad, international investment law is solely concerned with states' domestic labour markets. International investment law does not prohibit states to adopt labour laws, and arbitrators cannot order their repeal. Rather, the system consists of liability rules which allow foreign investors to claim damages.[335] The fear that investors could claim damages arising from labour-related measures by the host state has led to various legislative and interpretative responses. However, the principle embodied in the 1927 *Lotus* case before the Permanent Court of International Justice still holds true today: states "should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty."[336] Right to regulate provisions merely reaffirm the state's sovereignty and should not be seen as solutions to a problem.

Investors have attempted to claim compensation for various labour-related measures taken by their host state. These concerned affirmative employment actions, increase in social security payments by the employer, restrictions on foreign workers, revocation of 'free zone' status including the labour exemptions, failure of the host state to protect the investor against violent acts during an industrial dispute, wage increases for specific categories of workers and minimum wage increase. None of these cases has led to a finding of an arbitral tribunal that the host state indeed violated the terms of an investment agreement, and in none of these cases was this decision reached by relying on a right to regulate provision or the legal framework of the ILO via Article 31.3(c) VCLT.

Including right to regulate clauses in IIAs merely puts the spotlight on treaties that lack one. This applies *mutatis mutandis* to clarifications of treaties' object and purpose in preambles and general exception clauses. It is therefore important for the debate to be reoriented back to the meaning and scope of 'indirect expropriations or 'fair and equitable treatment'. This will not immediately reassure trade unions that are IIAs do not pose a threat, or discourage investors who see arbitration as an opportunity to litigate against burdensome measures by the host state. But in the long-term it has more potential to clarify the interactions between investment law and labour standards than resorting to legislative strategies and interpretative techniques. This is different for treaty

335 Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2015) 114. See generally on the consequences of violations of investment treaties: Jeswald Salacuse, *The Law of Investment Treaties* (2nd edn, Oxford University Press 2015) 436-451.

336 *The Case of the S.S. "Lotus"* (*France v Turkey*) (Merits) PCIJ Rep Series A No 10 (7 September 1927) 3.

provisions addressing the conduct of foreign investors. Express assertions of the home state's extraterritorial right to regulate and direct corporate obligations under international law have the greatest potential in this regard, although a multilateral approach is to be preferred for the sake of legal coherence.

5 Preferential Trade and Investment Agreements and Labour

5.1 INTRODUCTION

After attempts to establish the International Trade Organization failed, it took forty-six years before a trade agreement was concluded which contained binding labour provisions.[1] Since the entry into force of the North American Agreement on Labour Cooperation (NAALC) their number has rapidly proliferated. As the World Trade Organization's Doha Round of negotiations, which started in 2001, has still not be concluded, states diverted their attention to preferential agreements.[2] Today, the majority of newly concluded preferential trade and investment agreements (PTIAs) – which is the umbrella term used in this chapter – includes labour obligations.[3]

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1 However, various international commodity agreements that were concluded in the 1950s to the 1970s included labour provisions. Article 54 of the International Natural Rubber Agreement, for example, reads: "Members declare that they will endeavour to maintain labour standards designed to improve the levels of living of labour in their respective natural rubber sectors." A legal note prepared by the UNCTAD Secretariat notes that: "(...) the fair labour standards clause in international commodity agreements does not create any binding obligations on the part of the parties to the agreements. Its quality is no more than declaratory." UNCTAD, 'Legal Implications of the New International Economic Order' UN Doc A/CN.9/193 (1980), in Yearbook of the United Nations Commission on International Trade Law – Volume XI (1980) 136. Nonetheless, the debate on the desirability of these clauses resembles the contemporary debate on trade-labour linkages. See: Ulrich Kullman, ''Fair Labour Standards' in International Commodity Agreements' (1980) 14 Journal of World Trade Law 527 for a critical perspective on labour provisions, and: Philip Alston, 'Commodity Agreements – As Though People Don't Matter' (1981) 15 Journal of World Trade Law 455 for a reply to Kullmann. The labour provisions in the commodity agreements were drafted in general and weak language, but were not excluded from the complaints and dispute mechanisms, see: B.S. Chimni, *International Commodity Agreements: A Legal Study* (Croom Helm 1987) 119-124 for an assessment of the enforceability of labour provisions in commodity agreements.

2 Deviating from the multilateral non-discrimination rules through customs unions or free trade agreements is permitted under art XXIV GATT.

3 This study uses different acronyms to describe the various trade and investment agreements that are being discussed. When referring to a specific agreement, it will adhere to the terminology used by the State Parties. The United States uses the term 'Free Trade Agreement' (FTA), even when this agreement includes an investment chapter. The European Union has a range of different types, including Association Agreements (AAs) and Economic Partnership Agreements (EPAs). When reference is made to agreements in general, the generic term Preferential Trade and Investment Agreements (PTIAs) is used.

The diversity of labour provisions in trade and investment agreements provides an interesting 'policy laboratory' to observe how states perceive the constraints and opportunities concerning the regulation of domestic labour standards that emanate from these agreements. Although the inclusion of labour provisions in trade and investment agreements is becoming a global phenomenon, this chapter focuses heavily on examples from the United States and the European Union. This is caused by the number of US and EU agreements that include labour clauses, their development over time, and the differences between the US and the EU implementation and dispute settlement mechanisms.

These dispute settlement procedures will be discussed in detail in part 5.6. However, as the analysis of the substantive labour provisions in the preceding parts draws from a large number cases, a few basic terms need to be introduced. The NAALC procedure consists of four steps: (1) review of a petition alleging non-compliance by the National Administrative Office (NAO) of one of the parties, (2) ministerial consultations, (3) an Evaluation Committee of Experts (ECE), and (4) arbitration. Most cases ended with an NAO report, which is essentially a review by one of the parties' labour ministries. There are no ECE reports or arbitral awards under the NAALC. In subsequent US FTAs this procedure was simplified. The US Department of Labor has issued so-called 'public reports of review' in six cases. Only the petition alleging non-compliance of Guatemala with the free trade agreement between the United States, five Central American countries and the Dominican Republic (CAFTA-DR) was eventually reviewed by an arbitral panel.

This chapter consists of six parts. The first three contain a detailed analysis of the various types of labour provisions: concerning derogations from existing labour standards (part 5.2), improvements of labour standards (part 5.3) and domestic governance issues (part 5.4). Subsequently, part 5.5 looks at labour rights as a possible essential element of free trade agreements, which is specific to the EU context. Part 5.6 looks at the delimitation of labour provisions through federal clauses. Part 5.7 is concerned with the implementation and enforcement of labour provisions and the differences between the US and EU approaches. Lastly, part 5.8 examines labour provisions in trade and investment agreements in relation to the legal framework of the ILO.

5.2 Provisions addressing derogation from labour standards

5.2.1 Introduction

This part is concerned with the most common and most demanding type of labour provision, namely the prohibition to derogate from existing labour standards. Section 5.2.2 provides an overview of the types and functions of these clauses. Section 5.2.3 discusses the effect of the economic benchmarks

that are commonly found in non-derogation provisions. Section 5.2.4 looks at some specific characteristics of enforcement clauses.

5.2.2 The types and functions of non-derogation clauses

The main type of labour provision that can be found in PTIAs aims to ensure compliance with the level of domestic labour standards in effect at the time of the treaty's ratification. States can derogate from existing labour law in two ways: (1) by failing to enforce its legislation, and (2) by changing it. In the former scenario, the state's legislative framework will remain intact. In other words: non-enforcement hinges on the violation of domestic labour law by an employer, which the state then fails to correct. The second category captures changes in the existing normative framework.[4]

Legislative derogations and enforcement derogations are addressed through different types of provisions. Provisions that oblige states to enforce domestic legislation have a longer history than those that prohibit states to abrogate their labour standards. In line with the strong emphasis on the legislative sovereignty of the signatory states to the 1994 North American Agreement on Labor Cooperation (NAALC), its non-derogation clause was limited to non-enforcement. Article 3.1 stipulates that: "Each Party shall promote compliance with and effectively enforce its labor law through appropriate government action." In subsequent agreements, the scope of labour provisions expanded towards prohibitions of legislative derogations and obligations to improve a state's domestic labour law. An example of a provision that refers to both types of derogations can be found in Article 36 of the free trade agreement between the EFTA states and Bosnia and Herzegovina. It provides that:

> *Upholding Levels of Protection in the Application and Enforcement of Laws, Regulations or Standards*
>
> 1. A Party shall not fail to effectively enforce its environmental and labour laws, regulations or standards in a manner affecting trade or investment between the Parties.
> 2. Subject to Article 35, a Party shall not:
>
> (a) weaken or reduce the levels of environmental or labour protection provided by its laws, regulations or standards with the sole intention to encourage investment from another Party or to seek or to enhance a competitive trade advantage of producers or service providers operating in its territory; or

4 Please note that trade and investment agreements themselves use the term 'derogation' only in relation to this type. In this study, however, the term is understood in a broader sense, to describe any instances of "[l]essening or restriction of the authority, strength, or power of a law, right, or obligation," whether this is caused by non-enforcement or modification of those norms. This is the definition of derogations used by the Oxford Dictionary of Law (5th edn, 2003).

> (b) waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws, regulations or standards in order to encourage investment from another Party or to seek or to enhance a competitive trade advantage of producers or service providers operating in its territory.

In addition to the amendment/enforcement distinction, there is a second element that determines the scope of non-derogation clauses. While some non-derogation clauses contain a general prohibition, in the sense that the amendment or the non-enforcement of all areas of labour law constitutes a breach, others are restriction to a subset of labour standards. The former type can be found in the EFTA-Bosnia FTA, which does not contain a definition or delimitation of "labour laws, regulations and standards." The lack of a definition is not unproblematic. It is unclear, for example, whether social security legislation could be considered as part of "labour laws, regulations and standards" for the purpose of these agreements. The same would arguably apply to health care legislation that requires employers to contribute to their employees' health care insurance. In other words: there is a grey area of issues may be considered part of 'labour law' in some states but not in others.

Other PTIAs limit the standards from which to assess derogations to a particular subset. The material scope of the NAALC's non-enforcement provision, for example, was limited to domestic labour standards in eleven areas.[5] Some provisions that limit the scope of applicable laws refer to an international benchmark. The BITs between the Belgian-Luxembourg Economic Union and the United Arab Emirates and Panama, for example, define "labour legislation" as "legislation (...) or provisions thereof, that are directly related to the international Labour Conventions that each Contracting Party has ratified.[6] The United States' FTAs also refer to the ILO, albeit to the 1998 Declaration instead of ratified conventions. The articles covering legislative derogations are restricted to the four fundamental labour standards. Only derogations "implementing" the fundamental labour norms fall under the scope of the provision.

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5 For the purpose of the NAALC, 'labour law' was defined as: "... laws and regulations, or provisions thereof, that are directly related to: (1) Freedom of association and protection of the right to organize, (2) The right to bargain collectively, (3) The right to strike, (4) Prohibition of forced labour, (5) Labour protections for children and young persons, (6) Minimum employment standards, such as minimum wages and overtime pay, covering wage earners, including those not covered by collective agreements, (7) Elimination of employment discrimination on the basis of grounds such as race, religion, age, sex, or other grounds as determined by each Party's domestic laws, (8) Equal pay for men and women, (9) Prevention of occupational injuries and illnesses, (10) Compensation in cases of occupational injuries and illnesses, (11) Protection of migrant workers." Annex 1 clarifies that the list of eleven areas of labour law 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. They 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."

6 Art 1.6 BLEU-UAE BIT.

The enforcement obligations cover the same list, but add "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."[7] For the purpose of the enforcement obligation, the non-enforcement as such does not have to be inconsistent with the international benchmark, although it will be in most situations.

EU agreements take a similar, but more ambiguous approach. Article 12.12 of the EU-Singapore FTA, for example, contains a rather straightforward non-derogation clause. It reads:

> *Upholding Levels of Protection*
> 1. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental and labour laws, in a manner affecting trade or investment between the Parties.
> 2. A Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties.

However, the introductory provisions of the chapter recognize that a party has a right "to establish its own levels of environmental and labour protection, and to adopt or modify accordingly its relevant laws and policies, consistent with the principles of internationally recognised standards or agreements, to which it is a party."[8] Read together, the EU-Singapore FTA does not seem to prohibit legislative derogations as long as the state remains compliant with ILO norms. Arguably, the 'right to regulate' provision does not affect the scope of the second paragraph. Non-enforcement of labour legislation will therefore always lead to a breach of 12.12.2, even if this would not constitute a breach of international labour law. The only relevant thresholds are whether the non-enforcement was sustained or recurring, and whether it affected trade or investment.

5.2.3 The economic benchmark

Most non-derogation provisions require that the derogations had, or were intended to have, an effect on trade or investment flows.[9] There are thus four

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7 See e.g. Art 17.8 US-Colombia FTA.

8 Art 12.2 EU-Singapore FTA.

9 Although most PTIAs do not define 'trade' it should be understood to encompass both trade in goods as well as services. Some PTIAs do explicitly mention trade in services. See e.g. Art 36.2 EFTA-Bosnia FTA, which is quoted above. Another definition of trade, which includes services, can be found in Article 49 NAALC. Here, the term "trade-related" is defined as being: related to a situation involving workplaces, firms, companies or sectors that produce goods or provide services: 1. traded between the territories of the Parties; or 2. that compete, in the territory of the Party whose labor law was the subject of minister-

possible quadrants: (1) effect on trade, (2) effect on investments, (3) intent to impact trade, (4) intent to impact investments.[10] PTIAs show great variety in this regard, and often include combinations. As non-enforcement and non-amendment clauses are often addressed separately, they may have different economic benchmarks. The main dichotomy, however, runs between effect and intent. The EU-Canada Comprehensive Trade and Economic Agreement (CETA), for example, requires economic intent. It provides that:

> *Article 4: Upholding levels of protection*
> 1. The Parties recognise that it is inappropriate to encourage trade or investment by lowering the levels of protection embodied in domestic labour law and standards.
> 2. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour law, as an encouragement for trade or the establishment, acquisition, expansion or retention of an investment or an investor in its territory.

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ial consultations under Art 22, with goods or services produced or provided by persons of another Party.

10 As can be seen in the EFTA-Bosnia FTA, trade and investment may be treated jointly or separately. In this particular example, it is noteworthy that labour-related investment incentives are prohibited while the treaty itself does not contain further provisions on the protection or liberalization of FDI. Within the broad category of investment treaties, restrictions on investment incentives are usually found in IIA that aim to liberalize investment, as opposed to the 'admission control model IIAs' which only offer post-establishment protection. Vid Prislan and Ruben Zandvliet, 'Labor Provisions in International Investment Agreements: Prospects for Sustainable Development' in Andrea Bjorklund (ed), *Yearbook on International Investment Law and Policy* 2012-2013 (Oxford University Press 2014) 378-379. As a rule, non-derogation clauses in BITs do not mention trade. Conversely, some non-derogation clauses in free trade agreements only prohibit non-enforcement when this affects trade between the parties and do not address non-enforcement as an investment incentive, although these agreements do contain investment chapters, see for example Art 18.2.1(a), US-Australia FTA. However, Art 18.2.2 does prohibit legislative derogations as a means to encourage investment. Please note that investment-related incentives may have an effect on international trade. Especially in developing States, FDI is often export-oriented, which means that investment incentives *ipso facto* impact trade flows. See Kevin Banks, 'The Impact of Globalization on Labour Standards: a Second Look at the Evidence' in John Craig and Michael Lynk (eds), *Globalization and the Future of Labour Law* (Cambridge University Press 2006) 90. A final element of labour provisions that explicitly address investment incentives is that these often provide that the non-derogation obligation is also applicable vis-à-vis investors from third parties. In other words: if state A and state B enter into a PTIA containing such a clause, they may not derogate from existing labour standards to attract each other's companies, but also companies from third states. A typical example can be found in the Japan-Myanmar BIT, which reads in Art 25 that: Each Contracting Party shall refrain from encouraging investment by investors of the other Contracting Party by relaxing its health, safety or environmental measures or by lowering its labour standards. To this effect each Contracting Party should not waive or otherwise derogate from such measures or standards as an encouragement for the establishment, acquisition or expansion in its Area of investments by investors of the other Contracting Party *and of a non-Contracting Party*. (Emphasis added).

> 3. A Party shall not fail to effectively enforce its labour law, through a sustained or recurring course of action or inaction, as an encouragement for trade or investment.

In previous PTIAs, the European Union and Canada had also adopted an intent-based economic benchmark.[11] Establishing intent requires an inquiry into legislative history, public debate or other evidence that a government undertook particular acts or omissions in order to influence trade or investment.[12] Arguably, intent will be difficult to prove in the context of non-enforcement, which leaves a less visible paper trail than derogations through legislative procedures. Once intent is established, however, there is no further need to examine the effect of the acts or omissions. In other words: the encouragement of investment by the European Union or Canada does not have to be successful to be in violation of Article 4. Conversely, under economic effect criteria the intent of the measure is immaterial.

The trade effect criterion is most commonly used in PTIAs. The NAALC did not yet require an effect, but merely a relation with trade. It serves as an admissibility criterion for a complaint to be examined by an independent 'Evaluation Committee of Experts,' which forms an intermediate step between political consultations and arbitration. For a case to reach the ECE it had to be "trade-related." The term is defined as being:

> related to a situation involving workplaces, firms, companies or sectors that produce goods or provide services: 1. traded between the territories of the Parties; or 2. that compete, in the territory of the Party whose labor law was the subject of ministerial consultations under Article 22, with goods or services produced or provided by persons of another Party.[13]

The various NAALC submissions that pre-empt this point are rather succinct. In the *H-2B* case for example, it was merely stated that "many of the work-authorized immigrant workers who are ineligible for assistance from legal services offices that receive any ... funding work for firms, companies or sectors

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11 See e.g. art 277 EU-Colombia-Peru FTA and art 2 Canada-Honduras Agreement on Labour Cooperation.

12 Howse and Regan argue with regard to the difficulties with proving intent: "Smoking guns do not always prove the existence of a crime... . Not every statement by a government official of a desire to 'protect' some local interest reveals an intention to protect locals at the ex of foreign competitors (which is 'protectionism'). Furthermore, a statement by a single legislator or official may not reflect the intentions of his colleagues. Nor is a measure protectionist just because producers who would benefit from it are among those who support it. In sum, we should neither insist on explicit evidence of bad subjective intent, nor overreact to any and every bare suggestion of such an intent that an open and robust political process may throw up." Robert Howse and Donald Regan, 'The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy' (2000) 11 European Journal of International Law 249, 265-266.

13 Art 49 NAALC.

that produce goods traded between the territories of the Parties or that compete with goods produced or provided by persons of another Party."[14] As no NAALC case ever moved beyond the stage of political consultations it is not clear whether such a summary argument suffices to make a claim admissible. The same applies to the Canadian Agreements on Labour Cooperation which apply the same procedure and terminology.[15]

Current US FTAs contain a higher threshold than the one in the NAALC.[16] Article 16.2.1(a) of CAFTA-DR, for example, provides that: "A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement."[17] Unlike in the NAALC, it is no longer an admissibility criterion but a material element of the obligation. Four aspects of this provision require clarification: (1) whether the clause is restricted to derogations in exporting sectors, (2) the geographical distribution of trade effects, (3) the character of the obligation and the issue of standing, and (4) the standard of proof.

5.2.3.1 Derogations in exporting sectors

Various authors who have denounced the idea of trade-labour linkage have argued that labour provisions would only apply to export sectors, and therefore could not have a meaningful impact on labour conditions in the country as a whole. This is indeed true for the PPM-based trade measures that were discussed in chapter 3. When a state bans the importation of goods produced by children, these children may be set to produce for the domestic market instead. But in the context of labour clauses in PTIAs this is not necessarily the case. Article 7.1 of the Havana Charter did refer to the notion that "unfair labour conditions, *particularly* in production for export, create difficulties in international trade, and, accordingly, each member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory" (emphasis added). CAFTA-DR does not contain similar language. Rather,

14 H-2-B, Public Communication (13 April 2015) 10.

15 See e.g. arts 21 and 26 Canada-Chile Agreement on Labour Cooperation.

16 *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Final Report of the Panel (14 June 2017) para 186, fn 126.

17 Although this does not refer to the intent of the acts or omissions, Guatemala stated otherwise in its submissions for the CAFTA-DR arbitration. It relied solely on the Shorter Oxford English Dictionary, which defines 'manner' as "[t]he way in which something is done or happens; a method of action; a mode of procedure." Shorter Oxford English Dictionary on Historical Principles (6th edn, Oxford University Press 2007) 1698, cited in: *In the Matter of Guatemala – Issues relating to the obligations under Article 16.2.1(a) of CAFTA-DR*, Initial Written Submission of Guatemala (2 February 2015) para 136. This argument is not persuasive. The definition that is provided does not require deliberate action. Instead, 'manner' can be defined as 'the way in which something happens,' which indicates causality rather than intent.

its preamble stipulates that the parties intend to: "Protect, enhance, and enforce basic workers' rights and strengthen their cooperation on labor matters." Article 1.2, furthermore, adds that the objective of the agreement is to "promote conditions of fair competition in the free trade area."[18] The arbitral panel in *US–Guatemala* thus supported the contention of the United States that the non-derogation clause may not only be used to address derogations in relation to companies which "export or participated in export activities with CAFTA-DR Parties" but also when companies "[compete] with imports from CAFTA-DR Parties within the Guatemalan economy."[19] This interpretation is relevant for other agreements that contain a trade effect criterion that is not specified.

5.2.3.2 Geographical distribution of trade effects

Multilateral trade agreements pose an additional interpretative issue with regard to the geographical distribution of trade effects. US FTAs prohibit enforcement derogations that affect trade and/or investment "between the Parties." As CAFTA-DR is an agreement between seven states, Guatemala argued that derogations are only prohibited if they affect trade between all state parties.[20] The more parties to the agreement, the more difficult it would become to prove that non-enforcement by one party 'affected trade'. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which is currently under negotiation, would then only prohibits derogations that affect trade between eleven states: if only one remains unaffected a derogation would not be actionable. This would make the provision a dead letter. The panel in *US–Guatemala* decided on the basis of a textual interpretation that 'between the parties' refers not only to the "entire set of Parties jointly" but also "severally and individually."[21] The phrase thus only excludes derogations that have no trade effect, or a trade effect on non-party states only.

5.2.3.3 Character of the obligation and legal standing

The geographical distribution of the trade effect is related to the character of the obligation and the issue of standing. If non-derogation clauses in multilateral trade agreements prohibit conduct that affects trade between two

18 Article 1.2(c) CAFTA-DR.

19 *In the Matter of Guatemala – Issues relating to the obligations under Article 16.2.1(a) of CAFTA-DR*, Initial Written Submission of the United States (3 November 2014) para 106. *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Final Report of the Panel (14 June 2017) para 174.

20 *In the Matter of Guatemala – Issues relating to the obligations under Article 16.2.1(a) of CAFTA-DR*, Initial Written Submission of Guatemala (2 February 2015) para 138.

21 *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Final Report of the Panel (14 June 2017) para 203.

parties, do states that are not economically affected have standing to address violations? Under the general rules on the invocation of responsibility this would not be the case. Article 42(b) ARSIWA provides that for obligations that are owed to a group of states, responsibility may be invoked by a state that is "specially affected" or when the breach "is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation."

These requirements can be altered for specific treaty regimes. As Tams notes, states can: "provide, in unequivocal terms, that all states can respond against treaty breaches irrespective of individual injury."[22] Indeed, the CAFTA-DR provisions on dispute settlement provide that consultations, which is the first step in the dispute settlement process, may be commenced by "any Party ... with respect to any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement."[23] This aligns with the character of obligations in international labour law, which Tams lists amongst the areas of law in which states have a recognized "general legal interest ... in seeing [compliance with treaties] observed"[24] as well as international trade law. Under the WTO dispute settlement mechanism, complaining states do not have to demonstrate an economic injury in order to have standing.[25] According to Gazzini: "If a dispute concerns obligations to which members have attached the consequences typical of indivisible obligations ... adjudicating bodies do not need to assess the actual or potential adverse effects of the respondent's conduct upon the claimant's economic interests."[26]

Indeed, this was not what the arbitral panel in *US–Guatemala* did. It explained the effect requirement from the perspective of the advantage for employers in the respondent state that engaged in trade between all or some of the parties to the agreement instead of the dispute.[27] No attempt was made to localize the *disadvantage* in order to question whether the claim was admissible. Some US claims were related to the coffee and palm oil sectors in which there are no, or an insignificant number of US producers. Arguably, the US thus challenged practices which benefit US consumers without hurting domestic producers. The decision to pursue a claim against practices from which it

22 Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005) 71.

23 Article 20.4(1) CAFTA-DR.

24 Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005) 72-73.

25 See e.g. WTO, *European Communities: Regime for the Importation, Sale and Distribution of Bananas – Report of the Appellate Body* (9 September 1997) WT/DS27/AB/R, paras 132-136; Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005) 121 and 126.

26 Tarcisio Gazzini, 'The Legal Nature of WTO Obligations and the Consequences of their Violation' (2006) 17 The European Journal of International Law 723, 737.

27 *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Final Report of the Panel (14 June 2017) para 174.

benefits also calls into question the often-heard contention that labour provisions serve a protectionist purpose. Rather, the United States was challenging the very practices from which it benefited economically. The absence of a material injury criterion in PTIAs thus means that labour provisions should be considered as "legally protected rights" rather than "economic interests."[28]

5.2.3.4 Standard of proof

Given the nature of the obligation, however, claimants do need to make an economic argument to demonstrate a violation. But what is the standard of proof? The main assumption underlying economic effect criteria is that derogations reduce labour costs for companies.[29] As noted above, the analysis focuses on the employer or employers which were allegedly non-compliant with domestic labour law, and where the state has failed to take sufficient action.

The parties in *US–Guatemala* presented two radically different interpretations with regard to the standard of proof. Guatemala argued that only factual evidence on changes in prices or trade flows could satisfy the effect criterion.[30] The United States drew upon WTO case-law, in particular the notion that for a breach of Article III:4 GATT and Article I:1 GATS, which also use the term 'affect', one needs to demonstrate a modification of the 'conditions of competition'.[31] According to the United States: "No actual trade effect need be shown, but rather a demonstration that the course of action or inaction has a "bearing upon" or "influences," the conditions of competition."[32] Consequently, it did not submit any factual evidence. Rather, it submitted evidence on the trade relationships between the two countries and on the ways in which

28 Tarcisio Gazzini, 'The Legal Nature of WTO Obligations and the Consequences of their Violation' (2006) 17 The European Journal of International Law 723, 736-737.

29 This contrasts with economic studies that argue that derogations are unlikely to influence the comparative advantage of States and therefore, there is no need for social clauses or international labour law as such. The reason companies do not adhere to labour standards is to produce cheaper, this is not necessarily the reason that the government fails to inspect, but it enables companies to affect trade this way, see *In the Matter of Guatemala – Issues relating to the obligations under Article 16.2.1(a) of CAFTA-DR*, Initial Written Submission of the United States (3 November 2014) para 189, where the US argues that "through a sustained and recurring failure to effectively enforce these laws, Guatemala enables these enterprises to benefit from reduced labor costs." The Panel agreed with the proposition that labour laws may affect labour costs, see *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Final Report of the Panel (14 June 2017) para 172.

30 *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Final Report of the Panel (14 June 2017) para 165.

31 Ibid, para 181-182.

32 *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Rebuttal Submission of the United States (16 March 2015) para 60.

the said companies "engaged in trade within the CAFTA-DR markets."[33] Combined with the assumption that non-compliance with labour laws provides a cost-advantage, Guatemala's failure to enforce its laws affected trade.[34] It made no attempt to quantify the effects.

Although the panel did not fully adopt Guatemala's argument that causal evidence is required to satisfy the standard of proof, it did hold that "[w]hether any given failure to effectively enforce labor laws affects conditions of competition by creating a competitive advantage is *a question of fact*."[35] Evidence on "competitive advantage may be inferred on the basis of likely consequences"[36] and evidence does not require "a particular degree of precision" on the "extent of the advantage."[37] But claimants do need to "[identify] the effects of a failure to enforce" and demonstrate that "these effects are sufficient to confer some competitive advantage on such an enterprise or such enterprises."[38]

Notably, the panel distinguished the NAALC's phrase "in a manner that is trade-related" with the CAFTA-DR requirement "affecting trade" to argue that the threshold under the latter agreement required some evidence of that effect.[39] Indeed, there are less ambiguous alternatives than "affecting trade". Section 301 of the US Trade Act, for example, allows the US President to take trade measures against states that violate certain labour standards when this "*burdens* or restricts United States commerce."[40] As the US did not argue this point, the panel did not look at this provision or other possible wording that would have supported the United States' argument. The interpretation of the arbitral panel in *US–Guatemala* on the standard of proof may limit the prospects for future cases as factual evidence may not always be readily available.[41] Notably, however, the 2018 draft text of the United States-Mexico-Canada

33 *In the Matter of Guatemala – Issues relating to the obligations under Article 16.2.1(a) of CAFTA-DR*, Initial Written Submission of the United States (3 November 2014) paras 105-107.
34 Ibid, para 107.
35 *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Final Report of the Panel (14 June 2017) para 192 (emphasis added).
36 Ibid, para 194.
37 Ibid, para 195.
38 Ibid, para 196.
39 Ibid, para 168, fn 126.
40 19 USC §2411.
41 Eventually, only one of the cases on which the US submission was built constituted a failure to effectively enforce in a manner affecting trade. This was remarkable, as also in this case the United States did not submit factual evidence of a trade effect. However, the panel noted that: "In the particular circumstances of this case, we are prepared to conclude even in the absence of additional evidence regarding its impact, that Guatemala's failure to effectively enforce the law necessarily conferred some competitive advantage on Avandia, by effectively removing the risk that Avandia's employees would organize or bargain collectively for a substantial period of time." *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Final Report of the Panel (14 June 2017) para 487.

Agreement (USMCA) that will succeed NAFTA contains a footnote that clarifies the applicable standard. It holds that:

> For greater certainty, a "course of action or inaction" is "in a manner affecting trade or investment between the Parties" where the course involves: (1) a person or industry that produces goods or provides services traded between the Parties or has investment in the territory of the Party that has failed to comply with this obligation; or (2) a person or industry that produces goods or provides services that compete in the territory of a Party with goods or services of another Party.[42]

While not abandoning the trade effect criterion altogether, this clarification significantly lowers the standard of proof. For all three parties, USMCA was the first trade agreement that was negotiated after the publication of the *US–Guatemala* report. Their rebuke of the arbitral tribunal's strict interpretation of the trade effect criterion may well affect the interpretation of previous agreements that lack a similar footnote.

5.2.4 Specific characteristics of enforcement obligations

5.2.4.1 'Effective' enforcement of non-compliance with domestic labour law

Except for public sector workers, labour law concerns the relationship between private employers and employees. Assessments of non-enforcement thus start with a determination of labour law violations at that level.[43] The conduct of private employers cannot be attributed to the state. Arguing otherwise would run counter to the rules of state responsibility.[44] Equally, the occurrence of violations does not necessarily mean that the state failed to effectively enforce its labour laws. Violations of domestic labour law are omnipresent in most states, developed and developing ones alike. Even in countries with relatively well-equipped labour inspectorates, enforcement resources are scarce and not all violations can be fully remedied. It would be too burdensome to

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42 The footnote applies to four different provisions that include an effect criterion: Arts 23.3 (alignment with the 1998 Declaration), 23.4 (legislative derogations), 23.5 (enforcement derogations, and 23.7 (violence against workers).

43 In 1934, Delevingne wrote in the context of the discussions about the enforcement of ILO conventions: "It would seem superfluous to point out the importance of this question of enforcement in the case of conventions the fulfilment of which is not, as in the case of the ordinary type of international agreement, a matter of government action alone, but depends on the degree to which the laws adopted to give effect to the conventions are observed by the private individuals on whom they impose obligations." Malcolm Delevingne, 'The Pre-War History of International Labor Legislation' in James Shotwell (ed) *The Origins of the International Labor Organization* (Columbia University Press 1934) 45.

44 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, Vol II, Part Two (2001) 38.

argue that every private violation that goes unnoticed or unprosecuted can lead to a determination of ineffective enforcement by the state. As a result, non-enforcement clauses have to find a middle ground in which states are provided with a measure of leniency and discretion in the enforcement of their labour legislation while making sure that the treaty obligations are not rendered meaningless.

The NAALC equated effectiveness with 'reasonable' and *bona fide* decision making by the state parties. It noted that:

> For purposes of this Agreement: A Party has not failed to "effectively enforce ..." ... where the action or inaction by agencies or officials of that Party: 1. reflects a reasonable exercise of the agency's or the official's discretion with respect to investigatory, prosecutorial, regulatory or compliance matters; or 2. results from *bona fide* decisions to allocate resources to enforcement in respect of other labor matters determined to have higher priorities.[45]

Unreasonable or *mala fide* acts and omissions do not have to be systemic in order to fall under the scope of the agreement.[46] Various cases that have been brought under the NAALC are thus concerned with labour rights violations (in the supply chain) of a single company. This is reflected in their names, such as the *McDonald's*, the *General Electric* and the *Sprint* cases. The petitions by trade unions or NGOs who brought these cases also reflect their objective to "censure" particular companies and to improve labour conditions at the factories concerned.[47] When the US NAO recommended ministerial consultations in the *Echlin* case, which concerned violations of freedom of association, two petitioning trade unions released a press statement entitled "U.S. NAFTA Panel Cites U.S. Firm for Violence Against Workers in Mexico" in which it called the decision "an indictment of Echlin, the Mexican government and the largest of the official unions in Mexico," and "a victory for workers in all three NAFTA countries."[48]

The petitioners assumed or expected that a successful NAALC complaint would lead to the reinstatement of workers who had been fired for trade union activities. The fact that this did not come true reflected heavily upon the NAALC.[49] But it is not a mechanism of restorative justice which applies

45 Art 49 NAALC (emphasis omitted).

46 Notably, the Revised notice of establishment and procedural guidelines of the US National Administrative Office require submissions to "address and explain whether (...) the matters complained of appear to demonstrate a pattern of non-enforcement of labor law by the other party." This is not a criterion for admissibility, however. US Department of Labor, 'North American Agreement on Labor Cooperation: A Guide' (October 2005) <https://www.dol.gov/ilab/trade/agreements/naalcgd.htm> accessed 24 June 2018.

47 Robert Finbow, *The limits of regionalism: NAFTA's labour accord* (Ashgate 2006) 78.

48 UE, Teamsters Press Release, 'U.S. NAFTA Panel Cites U.S. Firm for Violence Against Workers in Mexico' (3 August 1998), cited in ibid 104-105.

49 Ibid 79.

between employers and workers. This is true for labour provisions in general. While they are undoubtedly implicated, employers and workers do not hold any rights or obligations under non-derogation, improvement or labour governance provisions in PTIAs.

Nonetheless, the terms of the NAALC's non-enforcement clause do allow cases that involve a single company. This has an effect on the procedures followed by the NAO's. Petitioners submitted worker affidavits to substantiate their claims and companies were given an opportunity to present their views on the matter.[50] Their willingness to engage with the NAO's has been piecemeal, however, and business organizations lamented the focus on corporate practices instead of state parties' law enforcement.[51] But an assessment whether a state has effectively enforced its labour laws does require a preliminary determination that there had indeed been violations that required enforcement action in the first place.

The US NAO's Rules of Procedure do not provide for mechanisms to involve employers and workers. Nonetheless, in most cases the NAOs held public hearings. In cases concerning Mexico these hearings were held in the United States, often close to the Mexican border. At these occasions workers provided public testimony. Companies, on the other hand, were granted the right to keep documents and inspection reports confidential as the NAO applied the exemptions provided for in the US Freedom of Information Act regarding 'trade secrets' and 'commercial and financial information'.[52] Site visits provided further information on corporate practices. These were conducted by US government agencies on Mexican territory. Article 42 NAALC provides that: "Nothing in this Agreement shall be construed to empower a Party's authorities to undertake labor law enforcement activities in the territory of another Party." This affirms the general prohibition in international law against the exercise of enforcement jurisdiction on foreign territory. Although the NAO reports are silent on the involvement of the Mexican authorities, it can thus be assumed Mexico consented to the site visits.[53]

The NAALC model was abandoned with the US-Jordan FTA in 2001. Article 6 of that agreements holds that: "A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties."[54] The emphasis on *bona*

50 Ibid 103.
51 Ibid 87.
52 Ibid 126.
53 Art 42 NAALC is included in later US FTAs as well. So far petitions have been brought against Guatemala (2008), Bahrain (2011), the Dominican Republic (2011), Honduras (2012), and Peru (2010 and 2015). The United States has not conducted on-site inspections in any of these cases.
54 Art 6.4(a) US-Jordan FTA.

fide allocation of resources was nonetheless maintained.[55] The definition of *effective* enforcement was also addressed by the panel in the *US–Guatemala* report. CAFTA-DR contains similar language as the US-Jordan FTA. The panel noted that effectiveness needs to be established on a case-by-case basis. It recognized the discretion of states. The United States was not required, however, to make a *prima facie* case on why the decisions by Guatemala were unreasonable or *mala fide*. Rather, the panel sought to identify certain propositions that could be tested on a case-by-case basis which indicate whether the right "level of compliance" was reached.[56] It noted that:

> we consider that the phrase "*not fail to effectively enforce*" in Article 16.2.1(a) imposes an obligation to compel compliance with labor laws (or, more precisely, not neglect to compel or be unsuccessful in compelling such compliance) in a manner that is sufficiently certain to achieve compliance that it may reasonably be expected that employers will generally comply with those laws, and employers may reasonably expect that other employers will comply with them as well.[57]

The panel considered that paragraph 16.2.1(b) provides a possible justification for a violation of paragraph (a), rather than a provision that should be used as context for the interpretation of the scope of paragraph (a).[58] This means that the burden of proof is on the respondent state to demonstrate that it reasonably exercised its discretion, or that its decisions on allocation of resources were *bona fide*.

The 2009 US-Peru FTA was the first to limit the enforcement discretion of the parties. It provides that:

> A decision a Party makes on the distribution of enforcement resources shall not be a reason for not complying with the provisions of this Chapter. Each Party retains the right to the reasonable exercise of discretion and to *bona fide* decisions with regard to the allocation of resources between labor enforcement activities among the fundamental labor rights enumerated in Article 17.2.1, provided the

55 The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources. Art 6.4(b) US-Jordan FTA.

56 *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Final Report of the Panel (14 June 2017) para 132.

57 Ibid, para 139.

58 Ibid, para 208.

> exercise of such discretion and such decisions are not inconsistent with the obligations of this Chapter.[59]

The requirement that enforcement decisions may not be inconsistent with the substantive obligations under the labour provision renders this provision meaningless. Notably, the provision only concerns the distribution of enforcement resources. The size of those resources is not addressed. Whereas ILO conventions typically include a degree of flexibility to accommodate states that face budgetary constraints, this is not the case in PTIA labour provisions. The absence of clarifications concerning the relationship between the non-enforcement obligation and the amount of money that states spend on labour enforcement implies that they cannot dispose of their obligations due to budget constraints.

5.2.4.2 Composite acts

After the NAALC all US FTAs contained a threshold criterion that non-enforcement was only actionable when it constituted "a sustained or recurring course of action or inaction."[60] The same applies to most European FTAs, although there are a few exceptions.[61] Also for other states practice is mixed.[62] The panel in *US–Guatemala* held that the phrase requires a demonstration of "a line of connected, repeated or prolonged behavior by an enforcement institution or institutions. The connection constituting such a line of behavior is manifest in sufficient similarity of behavior over time or place to indicate that the similarity is not random."[63]

The Articles on the Responsibility of States for Internationally Wrongful Acts characterizes such obligations as composite acts. Article 15 provides that:

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59 Art 17.3.1(b) US-Peru. In the footnote, it continues to state that: "For greater certainty, a Party retains the right to exercise reasonable enforcement discretion and to make *bona fide* decisions regarding the allocation of enforcement resources with respect to labor laws other than those relating to fundamental rights enumerated in Article 17.2.1." Art 17.2.1 lists the fundamental labour rights as enumerated in the 1998 Declaration.

60 Importantly, this does not apply to legislative derogations.

61 This criterion was included in the agreements with Singapore, South Korea, Ukraine, Moldova, Georgia, the Southern African Development Community and Canada, but not in the agreements with Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama (the 2012 EU-Central America FTA) and with the CARIFORUM countries.

62 For example, it was not included in the 2013 EFTA-Bosnia FTA, but it was part of the 2014 Korea- Australia FTA.

63 *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Final Report of the Panel (14 June 2017) para 152.

Article 15
Breach consisting of a composite act
1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

The qualification of a composite act is often used to distinguish between graver forms of internationally wrongful acts. The International Law Commission mentions genocide, apartheid and "systemic acts of discrimination prohibited by trade agreements" as examples.[64] But genocide is an act composed of individual acts that separately may also be internationally wrongful.[65] In the case of enforcement obligations, only the composite act is considered wrongful while individual instances of non-enforcement are not. Another important difference with genocide is the latter's *mens rea* requirement. In its initial written submission, Guatemala use the genocide example to argue that intent is a necessary requirement of composite acts in general. It posited that: "Accordingly, for a complaining Party to succeed in any claim under Article 16.2.1(a) of the CAFTA-DR, it must be established that the defending Party engaged in a series of deliberate actions or inactions with a demonstrable intent: in this case, the intent of affecting trade between the Parties."[66] This is not persuasive. The intent requirement must be part of the definition of the wrongful act itself, in this case Article II of the Genocide Convention, and does not follow from Article 15 ARSIWA. Article 16.2 of CAFTA-DR merely requires an economic effect and not a deliberate policy not to enforce labour legislation.

The arbitral panel in *US–Guatemala* did not mention the fact that an intent requirement was absent in Article 16.2.1(a), but dismissed Guatemala's argument on the basis that paragraph (b) includes two grounds which may justify conduct that would otherwise be contrary to paragraph (a). Reading an intent requirement in paragraph (a) would make paragraph (b) redundant.[67]

64 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, Vol II, Part Two (2001) 63.
65 Ibid.
66 *In the Matter of Guatemala – Issues relating to the obligations under Article 16.2.1(a) of CAFTA-DR*, Initial Written Submission of Guatemala (2 February 2015) para 164.
67 *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Final Report of the Panel (14 June 2017) para 151.

5.2.4.3 Scope of enforcement obligations in monist legal systems

Provisions like Article 3 NAALC oblige states to effectively enforce "its labor law." There are no concomitant obligations that explicitly oblige the effective enforcement of international commitments. Many states, however, have a monist legal system in which domestic law and international law are part of the same legal order. Consequently, obligations emanating from international labour law fall under the scope of enforcement obligations in PTIAs.

Under the Mexican Constitution for example, treaties are part of "the Supreme Law of the whole Union."[68] Furthermore, the Federal Labor Law provides that "the respective laws and treaties ... shall apply to labor relations in all matters that benefit workers, as of the their valid date."[69] The 1996 *Maxi-Switch* petition against Mexico under the NAALC was the first to advance the argument that non-compliance with international labour conventions constituted an *ipso facto* violation of Article 3.1 NAALC.[70] As the issues were resolved before the NAO held its hearing the argument was not considered.

Since *Maxi-Switch* many petitions and NAO reviews have referred to international obligations in ILO or human rights conventions.[71] In most cases,

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68 Quoted in: Maxi-Switch, Public Communication (11 October 1996) 7-8.

69 Ibid.

70 Maxi-Switch, Public Communication (11 October 1996) 7.

71 Of the ILO conventions, the Freedom of Association and Protection of the Right to Organise Convention No 87 is cited most often. See: Rural Mail Couriers, Public Communication (2 December 1998) 18-20; Sony Corporation, Public Communication (16 August 1994) 3, 12-13, 17-21; Labor Law Reform, Public Communication (17 February 2005) 4, 9, 15, 17; North Carolina Public Employees, Public Communication (17 October 2006) 17-28; General Electric, Public Communication (14 February 1994) 10-12; Maxi-Switch, Public Communication (11 October 1996) 2, 9, 21-22; Sindicato Mexicano de Electricsitas, Public Communication (14 November 2011) 38-46; Hidalgo, Public Communication (14 October 2005) 22; Puebla, US Public Communication (28 September 2003) 14; SUTSP, Public Communication (13 January 1996) 4, 8, 17-19. Other ILO Conventions that have been referred to in petitions or NAO reviews include the Forced Labour Convention No 29, Hidalgo, US NAO Review (31 August 2007) 36) the Protection of Wages Convention No 95 (Hidalgo, US NAO Review (31 August 2007) 44), the Abolition of Forced Labour Convention No 105 Hidalgo, US NAO Review (31 August 2007) 36, the Discrimination (Employment and Occupation) Convention No 111 (Gender Discrimination, Public Communication (15 May 1997) 17-18; Hidalgo, US NAO Review (31 August 2007) 49, the Minimum Wage Fixing Convention No 131 (Hidalgo, US NAO Review (31 August 2007) 44, Puebla, US Public Communication (28 September 2003)) 14-15), the Workers' Representatives Convention No 135 (Han Young, Public Communication (28 October 1997) 21; Hidalgo, US NAO Review (31 August 2007) 22; Maxi-Switch, Public Communication (11 October 1996) 12-13, 22-23), Labour Administration Convention No 150 (Coahuila, Public Communication (2006) 24; Puebla, Canada NAO Review (12 April 2005) 4-15), the Occupational Health and Safety Convention No 155 Puebla, US NAO Review (3 August 2004) 68; Puebla, Canada NAO Review (12 April 2005) 4-15; Hidalgo, US NAO Review (31 August 2007) 53; Auto Trim/Customs Trim, Public Communication (30 June 2000) 9, 54, 71, 73, 75; Itapsa, US Public Communication (15 December 1997) 48), the Occupational Health Services Convention No 161 (Puebla, US NAO Review (3 August 2004) 68; Puebla, Canada NAO Review (12 April 2005) 4-15; Auto Trim/Customs

however, it was not explicitly argued that the violation of the cited obligations constituted a breach of Article 3 NAALC. Some references were even erroneous, as the cited conventions were not ratified for example.[72] Equally irrelevant

Trim, Public Communication (30 June 2000) 9, 54, 67, 71-75; Itapsa, US Public Communication (15 December 1997) 48), the Safety and Health in Construction Convention No 167 (Puebla, US NAO Review (3 August 2004) 68; Hidalgo, US NAO Review (31 August 2007) 53), the Chemicals Convention No 170 (Puebla, US NAO Review (3 August 2004) 68; Puebla, Canada NAO Review (12 April 2005) 4-15; General Electric, Public Communication (14 February 1994) 10-11; Hidalgo, US NAO Review (31 August 2007) 48, 53; Auto Trim/ Customs Trim, Public Communication (30 June 2000) 10, 54, 66-67, 69-74; Itapsa, US Public Communication (15 December 1997) 49), the Worst Forms of Child Labour Convention No 182 (Hidalgo, US NAO Review (31 August 2007) 40). References to other treaties include the International Covenant on Civil and Political Rights (Coahuila, Public Communication (9 November 2006) 24; General Electric, Public Communication (14 February 1994) 10; Itapsa, US Public Communication (15 December 1997) 35; Itapsa, Canada Public Communication (6 April 1998) 39, 43; Sindicato Mexicano de Electricsitas, Public Communication (14 November 2011) 42; Puebla, US Public Communication (28 September 2003) 16; Gender Discrimination, Public Communication (15 May 1997) 16, 33 and 36; North Carolina Public Employees, Public Communication (17 October 2006) 7, the International Covenant on Economic, Social and Cultural Rights (Coahuila, Public Communication (9 November 2006) 23; North Carolina Public Employees, Public Communication (17 October 2006) 7; General Electric, Public Communication (14 February 1994) 10; Itapsa, Canada Public Communication (6 April 1998) 39, 43; Itapsa, US Public Communication (15 December 1997) 35; Higaldo, NAO Review (31 August 2007) 18; Sindicato Mexicano de Electricsitas, Public Communication (14 November 2011) 42; Auto Trim/Customs Trim, Public Communication (30 June 2000) 10-11, 54), the Convention on the Elimination of All Forms of Discrimination against Women (Gender Discrimination, Public Communication (15 May 1997) 16-17, 31-35; Hidalgo, Public Communication (14 October 2005) 19), the Convention on the Rights or the Child (Hidalgo, Public Communication (14 October 2005) 14), the American Convention on Human Rights (Coahuila, Public Communication (9 November 2006) 23, North Carolina, Public Employees Public Communication (17 October 2006) 7, 16-17; Itapsa, Canada Public Communication (6 April 1998) 39, 43; Gender Discrimination, Public Communication (15 May 1997) 17, 33, 36; Sindicato Mexicano de Electricsitas, Public Communication (14 November 2011) 42; Hidalgo, Public Communication (14 October 2005) 18, Puebla, US Public Communication (28 September 2003)) 15), including its Additional Protocol in the area of Economic Social and Cultural Rights (Coahuila, Public Communication (9 November 2006) 23; Hidalgo, Public Communication (14 October 2005) 18, 23; Auto Trim/Customs Trim, Public Communication (30 June 2000) 11, 54; Puebla, US Public Communication (28 September 2003) 15), the Inter-American Democratic Charter (North Carolina Public Employees, Public Communication (17 October 2006) 7) and the Convention on International Civil Aviation (TAESA, Public Communication (10 November 1999) 13.

72 In the *Solec* case concerning the alleged failure of the United States to enforce its labour laws at a manufacturer of solar panels based in California, the petitioners pursued an argument on the basis of ILO Convention 87. The Mexican NAO rightfully ignored the point, as the petitioners erroneously stated that the United States had ratified Convention 87 in 1946, and cited various paragraphs of the CFA's Digest of Decisions as articles from "the Human Rights Convention" (Solec, Public Communication (9 April 1998) 26). Remarkably, petitioners and NAOs have also invoked Conventions that the ILO has labelled as being 'outdated' or having 'interim status' (These are the Right of Association (Agriculture) Convention No 11, the Minimum Age (Sea) Convention No 58 and the Minimum Age (Underground Work) Convention No 123 in Hidalgo, Public Communication (14 October 2005) 15, 22; and the Workmen's Compensation (Accidents) Convention No 17 and the

are references to the membership of international organisations,[73] and non-binding instruments like the Universal Declaration of Human Rights.[74]

Workmen's Compensation (Occupational Diseases) Convention No 42 in Auto Trim/Customs Trim, NAO Review (6 April 2001) para 2.2.2. This flexible approach towards invoking international legal commitments is also visible in other respects. Many complaints dealt with trade union rights. Of the two fundamental Conventions in this field, Mexico has ratified No 87 but not No 98. Nonetheless, various petitions also argued a breach of the latter convention. Some petitions erroneously state that Mexico had ratified it (Maxi-Switch, Public Communication (11 October 1996) 2; TAESA, Public Communication (10 November 1999) 10), while others argued that the Convention "is binding upon Mexico as a member of the ILO" (Sony Corporation, Public Communication (16 August 1994) 3, 12-13 17-21; Rural Mail Couriers, Public Communication (2 December 1998) 18; Han Young, Public Communication (28 October 1997) at 6) or simply ignored the non-ratification (General Electric, Public Communication (14 February 1994) 10; Sindicato Mexicano de Electricsitas, Public Communication (14 November 2011) 46-47). The latter also occurred with respect to a number of other ILO Conventions, some of which were both regarded outdated by the ILO and had never been ratified by Mexico (The ILO Minimum Age (Trimmers and Stokers) Convention No 15 in Hidalgo, Public Communication (14 October 2005) 15; the Maternity Protection Convention No 103 and the Termination of Employment Convention No 158 in Gender Discrimination, Public Communication (15 May 1997) 34; and the Labour Relations (Public Service) Convention No 151 in North Carolina, Public Employees Public Communication (17 October 2006) 19-26).

73 In two cases, the membership argument hinged upon the 1998 Declaration on Fundamental Principles and Rights at Work (North Carolina, Public Employees Public Communication (17 October 2006) 17; Itapsa, US NAO Review (31 July 1998, revised 21 August 1998) 20). Membership arguments were also used in the *Auto Trim/Customs Trim* case, which dealt with a range of occupational safety and health issues. In this case, the petitioners noted that: "Mexico is a signatory to the Constitutions of the World Health Organization (WHO) and the Pan American Health Organization (PAHO) which obligate member countries to promote the physical and mental wellbeing of their citizens. These constitutions establish measures that countries must take to combat disease, lengthen life, and promote physical and mental health." (Auto Trim/Customs Trim, Public Communication (30 June 2000) 20, internal references omitted).

74 Petitioners have invoked a number of non-binding instruments, of which the Universal Declaration of Human Rights has been the most popular one (General Electric, Public Communication (14 February 1994) 10; Itapsa, Canada Public Communication (6 April 1998) 39, 43; Sindicato Mexicano de Electricsitas, Public Communication (14 November 2011) 42, Auto Trim/Customs Trim, Public Communication (30 June 2000) 11, 54). No NAO report has questioned the validity of arguments based on the UDHR. To the contrary, the Canadian NAO in the *Itapsa* case erroneously noted that Mexico was indeed "a signatory" to the Universal Declaration: Itapsa, Canada NAO Review Part I (11 December 1998) 19. One petition invoked the American Declaration of the Rights and Duties of Man, a regional and equally non-binding predecessor of the UDHR (Auto Trim/Customs Trim, Public Communication (30 June 2000) 54). In light of the invocation of the UDHR, non-ratified conventions and membership-arguments, it is somewhat remarkable that ILO Recommendations have only been referred to in two cases (ILO Maternity Protection Recommendation No 95 in Gender Discrimination, Public Communication (15 May 1997) 34; and the Occupational Safety and Health Recommendation No 164 in Itapsa, US NAO Review (31 July 1998, revised 21 August 1998) 56). In a petition under the US-Bahrain FTA, the AFL-CIO relies upon various statements by the ILO Director-General who called the declaration of a state of emergency "a serious setback to civil liberties, including the rights to legitimate trade union activity." US-Bahrain, Public Submission Public Communication to the OTLA under

In a few cases, however, the argument that non-compliance with international labour conventions constitutes an *ipso facto* violation of the enforcement obligation was at the hearth of the matter. In the *SUTSP* case against Mexico, petitioners argued that the denial of registration of a trade union at a federal ministry was inconsistent with the ILO Freedom of Association and Protection of the Right to Organise Convention No 87. However, the denial was arguably in conformity with the Mexican 'Law of Federal Employees'.[75] Consequently, it was unclear whether the international or domestic legislation was "the labor law" that should be effectively enforced under Article 3.1 NAALC. The United States' NAO noted in its review that:

> There are conflicting opinions among legal scholars on the position of international treaties and federal laws within the hierarchy of Mexican law. One school of thought is that international treaties are superior to federal law, provided that the treaty was ratified in accordance with Mexico's constitutional requirements. This is the prevailing view. Another view places federal law above treaties. A third view is that international treaties and federal law appear to enjoy equal status within the Mexican legal hierarchy.[76]

The NAO did not consider which of these views was correct under Mexican constitutional law but recommended that the issue should be tabled for consultations at the ministerial level. The subsequent Ministerial Declaration did not take a position either, but decided that the NAOs would organize a conference on the matter. The conference did not result in the adoption of a formal decision on how to assess similar arguments in future cases. The focus on hierarchy obfuscates the fact that the US NAO tacitly accepted the argument that for jurisdictions with a monist system ratified ILO conventions are relevant when determining whether that country complies with an enforcement obligation. This acceptance is confirmed by later cases of the US NAO, for example in *Han Young* (1998),[77] *TAESA* (2000),[78] and *Puebla* (2004).

Importantly, the US NAO not only examined the text of ILO Convention 87, but also the pronouncements of the ILO Committee of Experts and the Committee on Freedom of Association. Interpretation of conventions by the organisation's supervisory bodies was not a contested issue at the time, so Article 37 of the ILO Constitution, which has been invoked by the employers group within the ILO to argue that only the ICJ or an *ad hoc* tribunal may interpret conven-

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Chapter 15 of the US-Bahrain FTA, 'Concerning the Failure of the Government of Bahrain to Comply with its Commitments under Article 15.1 of the US-Bahrain FTA' (21 April 2011) 6.

75 SUTSP, Public Communication (13 January 1996) 14.

76 SUTSP, NAO Review (27 January 1997) 22, internal references omitted.

77 Han Young, NAO Review (28 April 1998) 12-13, 20-22.

78 TAESA, NAO Review (7 July 2000) 18.

tions, has never been discussed by the NAO. In the *Han Young* case, the NAO motivates their reliance on the work of the ILO supervisory bodies as follows:

> Explanations as to the scope and meaning of provisions of ILO Conventions are found in the reports of the Committee of Experts on the Application of Conventions and Recommendations ... . These reports provide a basis by which to measure conformance with ILO conventions by the parties and also provide a body of expert information and opinion on major issues of industrial relations that are raised and reviewed at the international level.[79]

Also in the *Puebla* case the US NAO engaged in a detailed analysis of the scope of international legal obligations and the question whether these had been effectively enforced by the respondent state. The case concerned *inter alia* a rejected registration of a Mexican trade union. The workers were not informed about the apparent deficiencies in their application, and were not given an opportunity to correct the errors. For several reasons, the NAO was unable to determine the appropriate standard under Mexican law.[80] It thus examined the matter under ILO Convention 87. The NAO noted that:

> In light of this lack of clarity, as well as the view of the ILO that union registration processes requiring more than merely administrative formality are not within the letter of ILO Convention 87, which Mexico has ratified, further consultations on how the Government of Mexico addresses this matter would be beneficial.[81]

The "view of the ILO" refers to a report by the ILO Committee on Freedom of Association, that had considered the same case two years earlier.[82] Also in the *SUTSP* case the petitioners and the NAO used the work of the ILO Committee on Freedom of Association. The CFA had examined the case just seven months before it was submitted to the NAO.[83] Furthermore, from 1989 onwards the CEACR had regularly found that the legislation upon which Mexico had denied to register the trade union was inconsistent with Convention No 87. The reports of both committees were cited extensively by the petitioners. Similarly, a petition under the CAFTA-DR free trade agreement against Honduras

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79 Han Young, NAO Review (28 April 1998) 20; similarly, the Rural Mail Couriers, Public Communication (2 December 1998) 19 states: "Reports of the ILO Committee on Freedom of Association (CFA), which examines complaints submitted against member states alleging non conformity with ILO principles, offers an excellent source of international law that can be used to interpret the scope of the principles Canada is committed to promote under the NAALC."

80 Puebla, US NAO Review (3 August 2004) 84.

81 Ibid.

82 Ibid 33.

83 *Mexico (Case No 1844)* (31 May 1995) Report of the Committee on Freedom of Association No 300 (Vol LXXVIII 1995 Series B No 3). Note that the CFA case was submitted by a trade union, NAO case by Human Rights Watch/Americas, The International Labor Rights Fund, and the National Association of Democratic Lawyers.

also relied upon on an earlier CFA case against Honduras in order to establish a violation of the enforcement obligation.[84] This case concerned ILO's Right to Organise and Collective Bargaining Convention No 98, which, the petitioners argued, is "incorporated directly into [Honduras'] legal regime."[85]

Conventions 87 and 98 establish a number of subjective rights to enable the free association of workers and employers, which are considered to be self-executing in a number of states.[86] Other ILO conventions are more indeterminate, however. While these conventions also fall under the scope of enforcement obligations in monist jurisdictions, it is difficult to determine the specific rule that ought to be enforced. In the 1997 *Gender Discrimination* case under the NAALC, the question was whether the widespread practice in the Mexican *maquiladora* sector to subject prospective and current female employees to pregnancy testing constituted a violation of Mexico's obligations under ILO Convention No 111.[87] This convention does not contain a subjective right for workers not be de discriminated against, but obliges parties "to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof."[88]

The definition of discrimination thus determines the ends of these national action plans, but the means would be up to the government to decide. Through its supervisory role, however, the CEARC has further substantiated the obligation. For the *Gender Discrimination* case, two elements were particularly important. First, it had determined that access to employment was covered by the convention. Mexico had argued that whilst pregnancy tests for employees were unlawful, nothing in its domestic law prohibited this practice for prospective employees. Second, the CEACR had adopted a broad understanding of gender discrimination, which included "discrimination based on family status, pregnancy and confinement."[89] The NAO then continued to state that:

84 *Honduras (Case No 1568)* (19 December 1990) Report of the Committee on Freedom of Association No 281 (Vol LXXV 1992 Series B No 1) para 383.

85 US-Honduras, Public Submission (26 March 2012) 26-7.

86 Virginia Leary, *International Labour Conventions and National Law: The Effectiveness of the Automatic Incorporation of Treaties in National Legal Systems* (Martinus Nijhoff Publishers 1982) 107-109.

87 Maquiladoras are manufacturing facilities that employ low-skilled labour to produce goods for exportation.

88 Art 2 ILO Convention 111.

89 Gender Discrimination, NAO Review (12 January 1998) 20. The original quote reads: "Sex-based discrimination also includes that based on marital status or, more specifically, family situation (especially in relation to responsibility for dependent persons), as well as pregnancy and confinement." International Labour Conference (83rd Session) Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4B) Special Survey on Equality in Employment and Occupation in respect of Convention No 111 (Geneva 1996) para 37.

> Although the ILO Committee of Experts has considered discrimination on the basis of pregnancy to come within the definition of gender discrimination, it has yet to specifically address whether pregnancy screening is a prohibited practice under the terms of Convention 111. However, the Committee's comments in 1995 on Colombia indicate that it approves of measures taken against this practice. Though the submitters refer to ILO Convention 111 in the submission, as well as CEDAW, the NAO was unable to find any applicable international jurisprudence that specifically defines pregnancy screening to be a prohibited practice under either agreement.[90]

The praise for countries that prohibited pregnancy screening rather than denoting an explicit international prohibition is evidentially caused by the indeterminate wording of the main obligation contained in Convention No 111 and the method of ILO supervision. Indeed, the practice of pregnancy testing had occasionally been addressed by the Committee, but it never explicitly denounced it as a violation of the convention.[91] Consequently, while Convention No 111 had to be effectively enforced pursuant to Article 3 NAALC, the NAO was unable to ascertain the precise legal norms that required to be enforced.[92]

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90 Gender Discrimination, NAO Review (12 January 1998) 20, internal reference omitted).

91 However, this could have been deduced from its 1991 report, in which it noted that: "The Committee recalls the allegations of the (United Central Workers' Organisation) concerning practices which are discriminatory on grounds of sex: negative pregnancy test before employing a woman, lower wages of women in percentage terms and absence of protection against sexual harassment." See: International Labour Conference (78th Session) Information and Reports on the Application of Conventions and Recommendations, Report III (Part 3) Summary of Reports (Geneva 1991) 367. Furthermore, the CEACR had forcefully denounced practices in Brazil, whereby: "numerous employers, with impunity, require women seeking employment or wishing to keep their jobs to furnish certificates attesting to their sterilization. The Committee observes that this requirement constitutes discrimination under the terms of the Convention, to the extent that it is imposed on individuals of a particular sex who must furnish proof of their sterility in order to be employed. It trusts that the Government will take all appropriate steps to put an end to these practices." International Labour Conference (80th Session) Information and Reports on the Application of Conventions and Recommendations, Report III (Part 3) Summary of Reports (Geneva 1993) 321-322. However, the effects of sterilization are more severe than pregnancy testing, as it prevents pregnancies.

92 Notably, the 2018 draft United States-Mexico-Canada Agreement contains a more elaborate clause on sex-based discrimination in the workplace which arguably covers the issue of pregnancy screening. Art 23.9 holds that: "The Parties recognize the goal of eliminating sex-based discrimination in employment and occupation, and support the goal of promoting equality of women in the workplace. Accordingly, each Party shall implement policies that protect workers against employment discrimination on the basis of sex, including with regard to pregnancy, sexual harassment, sexual orientation, gender identity, and caregiving responsibilities, provide job-protected leave for birth or adoption of a child and care of family members, and protect against wage discrimination."

5.3 Provisions addressing the improvement of labour standards

5.3.1 Introduction

This part concerns the second type of labour provisions found in PTIAs: those that require improvements of existing domestic standards. Section 5.3.2 discusses the types and functions of these provisions. Sections 5.3.3 and 5.3.4 then examine their legal character and the question whether they are justiciable.

5.3.2 Types and functions of improvement clauses

Improvement clauses have a clear rationale. As noted above, non-derogation clauses provide no incentive for countries to improve their labour legislation.[93] Indeed, they may even impede it, as every improvement of domestic standards 'locks-in' a new threshold for non-derogation clauses in PTIAs. If one perceives the function of labour clauses in PTIAs to be economic – such as the Bagwell-Staiger theory discussed in chapter 2 – the lack of focus on improvements is unproblematic. But without concomitant commitments to adopt higher labour standards, states have a clear incentive not to do so. This is particularly important for states that have relatively low standards.[94]

'Improvement clauses' is not a uniform category, however. While non-derogation clauses are rather succinct and phrased in language that is undisputedly binding upon state parties, improvement clauses tend to be broad and hortatory. They may refer to a broad range of objectives or benchmarks. This is especially true for EU FTAs. CETA, for example, contains four separate paragraphs addressing the improvement of labour standards.[95] The first mentions improvements to achieve "high levels of labour protection" without providing a particular point of reference. The latter three mention the obligations as "members of the International Labour Organization ... and the commitments under the ILO Declaration on Fundamental Principles and Rights at Work," the "objectives included" in the Decent Work Agenda, the 2008 ILO Declaration on Social Justice for a Fair Globalisation, and other international commitments and the ratification of "fundamental ILO Conventions if they have not yet done so." The precession and legal relevance of these commitments varies significantly.

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93 Lance Compa, 'The Multilateral Agreement on Investment and International Labor Rights: A Failed Connection' (1998) 31 Cornell International Law Journal 683, 689.

94 According to a 2012 ILO study: "Commitments to strive to improve domestic standards (...) would (...) mostly be relevant for low income – rather than middle income – countries that are members of [a regional trade agreement]." Christian Häberli, Marion Jansen and José-Antonio Monteiro, 'Regional Trade Agreements and domestic labour market regulation' (International Labour Office Employment Working Paper No. 120, 2012) 32.

95 Arts 23.1.2, 23.3.1, 23.3.2 and 23.3.4 CETA.

Except for the NAALC,[96] US FTAs also refer to the 1998 Declaration as a specific point of reference for the improvement of domestic standards. In addition, these FTAs contain a list of "internationally recognized labor rights" which partly overlap with the 1998 Declaration.[97] Article 16 if the 2009 US-Oman FTA provides that:

> 1. The Parties reaffirm their obligations as members of the International Labor Organization ("ILO") and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998)* ("ILO Declaration"). Each Party shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in Article 16.7 are recognized and protected by its law.
> 2. Recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws, each Party shall strive to ensure that its laws provide for labor standards consistent with the internationally recognized labor rights set forth in Article 16.7 and shall strive to improve those standards in that light.[98]

Improvement clauses are further included in major trade agreements of the EFTA states, Australia and Canada. The 2015 Canada-Korea FTA, for example, resembles the US-Oman FTA. Unlike CETA, which required continuous improvements of labour standards without a 'ceiling', the Canada-Korea FTA obliged the state parties to "ensure that its labour law embodies and provides protection for the principles concerning the [four fundamental labour standards]."[99] The 2013 EFTA-Costa Rica-Panama FTA also refers to the fundamental labour standards, but appears to be more ambitious. The parties' labour legislation should be *consistent* with the four fundamental labour rights, but this is complemented by a general commitment to "strive to improve" levels of protection.[100] Another element that stands out is the flexibility that states have, in order to progressively implement reforms. Taking into account a state's development status adds an additional layer of complexity. Politically, however, the notion of progressive realization could make it more acceptable for states to agree on enforceable improvement clauses.

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96 Art 2 "each Party shall ensure that its labor laws and regulations provide for high labor standards (…) and shall continue to strive to improve those standards in that light."

97 It excludes the occupational discrimination but includes "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health." See e.g. Art 16.7 US-Oman FTA.

98 Internal footnote omitted.

99 Art 18.2 Canada-Korea FTA. However, the same article: "Affirming full respect for each Party's Constitution and labour law and recognising the right of each Party to establish its own labour standards in its territory, adopt or modify accordingly its labour law, and set its priorities in the execution of its labour policies."

100 Art 9.3(2) EFTA-Costa Rica-Panama FTA.

The most concrete improvement clause can be found in Article 269.3 of the Peru-EU Agreement, which provides that:

> Each Party commits to the promotion and effective implementation in its laws and practice and in its whole territory of internationally recognised core labour standards as contained in the fundamental Conventions of the International Labour Organisation.

A similar provision can be found in Article 286.2 of the 2012 EU-Central America FTA. The FTA between the EFTA states and Bosnia also provides a concrete 'improvement objective' but with a focus on ratification instead of implementation:

> The Parties recall the obligations deriving from membership of the ILO to effectively implementing the ILO Conventions which they have ratified and to 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.[101]

Full compliance with, or the ratification of, ILO conventions is a more clearly circumscribed objective than merely the 'improvement' of domestic standards toward compliance with the 1998 Declaration or the IRLR, as these two concepts are not defined, neither in PTIAs nor by the ILO.

Arguably, failure to implement ILO Conventions that a state has ratified would constitute a violation of an improvement clause. For example, the refusal by El Salvador to eliminate the discretion its government has in appointing employer and worker representatives in various advisory bodies, which the CEACR has labelled "contrary" to Convention 87, could be perceived as a breach of its obligation to fulfil the improvement obligation in Article 285.2 of the EU-Central America FTA in good faith.[102] In the absence of such proxies, however improvement clauses are indeterminate.

Before turning to a further analysis of existing improvement clauses, the 1999 US-Cambodia Textiles Agreement should be mentioned as an a-typical example of an improvement clause. Under the agreement, which is no longer in force, the United States granted Cambodia import quotas for certain textile products. Under Article 10, the Government of Cambodia would "support the implementation of a program to improve working conditions in the textile and apparel sector, including internationally recognized core labor rights, through the application of Cambodian labor law."

If the US deemed the implementation successful, it could raise its quotas by 14 percent. Subsequent to the agreement, a labour rights programme was

101 Art 37.3 EFTA-Bosnia FTA.

102 International Labour Conference (105th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A) Application of International Labour Standards 2016 (I) (Geneva 2016) 62.

set up by the ILO, in accordance with the Cambodian government, employer organizations and trade unions. It received financial support from a range of different actors, including the US Department of Labor and the US Agency for International Development. The ILO developed a unique and sophisticated monitoring system, and reports of the factory inspections were made publically available. On the basis of the ILO's recommendations the US increased its quotas several times. The 'Better Factories Cambodia' programme is deemed one of the most successful projects in the ILO's history, and the most successful mechanism of trade-labor linkage in terms of actual improvement of the situation of workers.

Agreements like this are no longer possible under WTO rules. At the time, trade in textiles was regulated under the WTO's Multi Fiber Arrangement, which permitted the use of quotas for the importation of textile products. Since the Arrangement expired on 1 January 2005 trade in textiles and garments is governed by the normal GATT rules, which prohibit the use of quantitative restrictions in Article XI, the Cambodia Agreement thus expired on the same date.

5.3.3 The legal character of improvement clauses

Taking a step back, one may argue whether improvement clauses can be considered legally binding, or whether they are merely purposive statements. Due to the variation in the wording it is impossible to draw general conclusions.[103] The question how legally binding provisions should be distinguished from mere political statements has been raised in other fields of international law as well. In the context of the 2015 Paris Agreement under the UN Framework Convention on Climate Change, Bodansky notes that:

103 Sometimes variation even exists between different parts of the same treaty. The BIT between the 2009 BLEU and Colombia, which has not yet entered into force, provides that: "The Contracting Parties recognize that co-operation between them provides enhanced opportunities to improve labour standards." Article VIII (2) BLEU-Colombia BIT. Although part of the BIT's substantive provisions, it is clear that this does not create a binding obligation. However, the same agreement is more demanding when it comes to international standards. Referring to the fundamental labour rights, which are listed in the Article I, it notes that: "The Contracting Parties recognize (...) that each Contracting Party *shall endeavour to ensure* that the principles set forth in paragraph 6 of Article I be recognized and maintained by its national legislation (...)." Article VIII(1)(b) BLEU-Colombia BIT (emphasis added). A similar distinction, between the fundamental and regular ILO Conventions, is also present in the FTA between the European Union and six Central American States. The agreement provides that: "The Parties reaffirm their commitment to effectively implement in their laws and practice the fundamental ILO Conventions contained in the ILO Declaration of Fundamental Principles and Rights at Work of 1998 (...)," and furthermore that they "will exchange information on their respective situation and advancements as regards the ratification of the other ILO Conventions." Article 286.2 and 286.3 EU-Central America FTA. Only the latter element appears to contain a binding obligation.

> Treaties often contain a mix of different types of provisions: obligations, recommendations, factual observations, statements of the parties' opinion, and so forth. The particular character of a provision is usually determined by the choice of verb: for example, 'shall' generally denotes that a provision in a treaty creates a legal obligation, 'should' (and to a lesser degree, 'encourage') that the provision is a recommendation, 'may' that it creates a license or permission, and various non-normative verbs (such as 'will', 'are to', 'acknowledge', and 'recognize') that the provision is a statement by the parties about their goals, values, expectations, or collective opinions.[104]

Arguably, the phrase "shall strive to ensure" is placed somewhere between "shall" and "should", indicating a weak obligation of conduct. Apart from their use in labour and environment provisions in PTIAs, the phrase is seldom used in international law. Article 24 of the Convention on the Rights of the Child provides that:

> States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

The use of the phrase "shall strive to ensure" reflects the intention of the drafters that this right is to be implemented as financial resources allow.[105] It thus resembles the approach of the International Covenant on Economic, Social and Cultural Rights, which puts the notion of progressive implementation at the heart of state obligations.[106]

In their conceptual framework of 'legalization', Abbot *et al* examine three dimensions: obligation, precision, and delegation. Regarding the former, they note that the level of obligation can be plotted on a line from an "expressly nonlegal norm" to a rule of *jus cogens*.[107] The authors take the ICESCR as an example of "formally binding commitments [that] are hortatory, creating at best weak legal obligations" due to the fact that the obligations have to be realized progressively.[108] *A fortiori,* most improvement clauses thus do create binding obligations, albeit of a different character than non-derogation clauses.[109]

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104 Daniel Bodansky, 'The Legal Character of the Paris Agreement' (2016) 25 Review of European Community & International Environmental Law 142, 145 (internal reference omitted).

105 John Tobin, *The Right to Health in International Law* (Oxford University Press 2011) 170.

106 See section 2.3.4.3.

107 Kenneth Abbot et al, 'The Concept of Legalization' (2000) 54 International Organization 401, 404.

108 Ibid 412.

109 There may be expectations, such as Art VIII (2) BLEU-Colombia BIT, which provides that: "The Contracting Parties recognize that co-operation between them provides enhanced opportunities to improve labour standards."

5.3.4 Justiciability of improvement obligations and options for reform

Alleged violations of improvement clauses have been brought forward in complaints under the NAALC and under two later US FTAs. None of these cases has reached the arbitral stage. The NAALC's idiosyncratic dispute settlement system makes this nearly impossible in relation to all claims. In CAFTA-DR and the US-Bahrain FTA, the improvement clause was exempted from the regular dispute settlement procedures, so that claims can only lead to political negotiations. Nonetheless, the cases that have been submitted are instructive about the types of expectations that emanate from improvement clauses.[110]

In 2005, American, Canadian and Mexican trade unions submitted a petition to the US NAO concerning a legislative proposal that the Mexican government had brought before parliament. According to the petitioners, the law would restrict the rights of unions to organize and bargain collectively. Because it concerned a legislative change, it fell outside the scope of the NAALC's non-derogation clause. Instead it was argued that it breached Article 2, which states that "each Party shall ensure that its labor laws and regulations provide for high labor standards (…) and shall continue to strive to improve those standards in that light." According to the trade union's petition, Mexico violated this obligation by "the very act of submitting [the legislation] to its Congress."[111]

Although the submission was declined for review, the petition in the *Labour Law Reform* case is illustrative of the type of issue that may arise under improvement obligations. Like all international obligations, improvement clauses have to be applied and observed in good faith. As such, it is "the duty of the parties to the treaty not only to observe the letter of the law, but also to abstain from acts which would inevitably affect their ability to perform the treaty."[112] No matter how vaguely an improvement obligation is phrased, the obligation not to take regressive measures is the most obvious part of the legal obligations that states assume under an improvement clause. Part of the submissions in the *Labour Law Reform* case concerned certain registration requirements of trade unions, which the Mexican Supreme Court had already found inconsistent with the existing Federal Labour Law.[113] In most situations, however, it will

110 Many FTAs exempt improvement provisions from the regular dispute settlement procedures. However, as Bodanksy correctly argues: "the concept of legally binding character is distinct from that of enforcement. Enforcement typically involves the application of sanctions to induce compliance. As with justiciability, enforcement is not a necessary condition for an instrument or norm to be legally binding." Daniel Bodansky, 'The Legal Character of the Paris Agreement' (2016) 25 Review of European Community & International Environmental Law 142, 143

111 Labor Law Reform, Public Communication (17 February 2005) 2.

112 International Law Commission, 'Remarks of Special Rapporteur Sir Humphrey Waldock, Summary record of the 727th meeting' (Extract from the Yearbook of the International Law Commission 1964 Vol I) para 70.

113 Labor Law Reform, Public Communication (17 February 2005) 5.

be left to the adjudicating body under the relevant PTIA – such as an NAO or an arbitral panel – to make such determinations.

The vagueness in the wording of improvement obligations could be resolved in the drafting process. One way of doing so is to create *pacta de contrahendo* or *pacta de negotiando* in which unilateral efforts to improve labour standards are replaced by a bilateral process of continuous discussions in order to reach future agreements. While the former requires a specific outcome, the *pacta de negotiando* is a binding commitment to enter into negotiations without a hard obligation to reach a final result. In the Nuclear Weapons Advisory Opinion the International Court of Justice was asked to assess a *pactum de contrahendo*. Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons provided that:

> "Each of the Parties to the Treaty *undertakes to pursue* negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control." (Emphasis added).

The ICJ held that this article contains "an obligation to achieve a precise result – nuclear disarmament in all its aspects – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith."[114] Currently, the fulfilment of improvement clauses hinges on unilateral action instead of bilateral negotiations. When transformed into a *pacta de negotiando* or *pacta de contrahendo* type of obligation, compliance would still have to be determined on a case-by-case basis.[115] But it is more feasible to determine good faith in negotiations between states than in unilateral legislative processes.

The ICJ and arbitral tribunals have interpreted good faith in inter-state relations in a number of cases, and it is the subject of a vast body of legal literature.[116] In his assessment of the 1993 'Declaration of Principles on Interim Self-Government Arrangements', Antonio Cassese noted that: "remarkably, the Declaration in providing for the entering into of negotiations, does not take the consequential and obvious step of setting up international mechanisms for inducing a recalcitrant Party to negotiate, or to endeavour to reach agreement."[117] Many PTIAs take an opposite approach: while creating institutional mechanisms within which states could continuously discuss labour issues, they do not yet create *pacta de negotiando* or *pacta de contrahendo* that

114 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 99.

115 Hisashi Owada, 'Pactum de contrahendo, pactum de negotiando' in Rüdiger Wolfrum (ed) Max Planck Encyclopedia of Public International Law (online ed, Oxford University Press 2008) para 45.

116 Antonio Cassese, 'The Israel-PLO Agreement and Self-Determination' (1993) 4 European Journal of International Law 564, 567.

117 Ibid 568.

raise political cooperation to the status of a legal obligation. Replacing unilateral improvement obligations by clauses similar to Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, for example, would provide a feasible solution to the problem of indeterminacy, and elevates the importance of continuous bilateral or multilateral negotiations.

Even if improvement clauses do not create obligations between the state parties to an agreement, they are not necessarily without legal effect. As was attested to in *Al Tamini v Oman*, an investor-state arbitration on the basis of the US-Oman FTA, which was discussed in chapter 4, the inclusion of provisions elsewhere in the agreement stating that the parties should regulate in a specific area raises the threshold for investors to successfully argue that regulation is this area violated investment-protection standards. Although this case concerned environmental regulation, the same reasoning can be applied to the agreement's labour chapter: it would be inconsistent for an investment tribunal to grant damages when a state raises the minimum wage while that state promised it improve its labour standards in an agreement with the claimant's home state.

5.4 Provisions addressing domestic governance issues

A third type of obligation that can be observed in labour provisions are obligations concerning what may be called 'domestic labour governance'. These types of obligations should be distinguished from institutional arrangements that are established in order to monitor the implementation of the substantive obligations, such as cabinet-level councils or civil society fora. As a rule, domestic governance obligations are only included in comprehensive economic agreements and not in BITs. While there is some diversity in the specific requirements per trade agreement, governance obligations can be separated into two categories.

First, governance provisions may contain requirements to enable individuals to seek remedies for violations of their labour rights. Article 4.1 of the NAALC, for example, provides that:

> 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 labor tribunals for the enforcement of the Party's labor law.

Similar provisions are included in later US and Canadian FTAs. Economic agreements of the EU and the EFTA states do not include domestic governance provisions of any kind, except for CETA. In CETA, it is included as a corollary of the obligation to uphold levels of protection.[118]

118 Arts 23.5 and 23.6 CETA.

In conjunction with the obligation to provide access to judicial procedures, FTAs list certain procedural guarantees. These due process rights include that proceedings should be open to the public, there should not be unreasonable charges or delays and final decisions should contain a motivated reasoning. Furthermore, parties to labour procedures should have the necessary means to enforce their rights, "such as orders, fines, penalties, or temporary workplace closures."[119] Provisions relating to domestic enforcement procedures refer to 'persons' or 'parties'. It is unclear whether trade unions have any procedural rights to enforce labour legislation on behalf of workers.

The second area of labour governance that is addressed in labour provisions relates to public information and awareness. These provisions have in practice played a minor role. Article 6.1 of the Canada-Peru Agreement on Labour Cooperation holds that:

> Each Party shall ensure that its labour law, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Party to become acquainted with them.

It furthermore commits the parties to increase public awareness through the publication of information on legislation and compliance procedures and education of the general public.[120] CETA is the only agreement that establishes a procedure to involve non-state actors in public debate concerning the adoption of new labour legislation.[121] No distinction is made between the social partners and other non-state actors. Indeed, there is currently no trade or investment agreement in force that mentions the role of trade unions in domestic labour governance.

In addition to a lack of references to tripartism, which forms the cornerstone of the ILO, labour governance clauses do not refer to the legal framework of the ILO. This is remarkable, as four ILO conventions that regulate certain aspects of domestic labour governance have been designated as 'priority' conventions: the Labour Inspection Convention No 81, the Employment Policy Convention No 122, the Labour Inspection (Agriculture) Convention No 129 and the Tripartite Consultation (International Labour Standards) Convention No 144. These are complemented by various other instruments on tripartism, inspections, labour administration, statistics and employment policy. The priority Conventions are subjected to the same supervisory procedure as the eight fundamental Conventions, which means that states have to report on their implementation every two years instead of the regular five-year cycle. The comments of the CEACR have further clarified and refined the obligations

119 Art 16.3.6 CAFTA-DR.
120 Art 6.3 Canada-Peru Agreement on Labour Cooperation.
121 Art 6.1 CETA.

under these instruments. However, no PTIA governance clause makes a reference to the ILO's governance conventions.

Various NAALC submissions were concerned with governance issues. The 1998 McDonald's case concerned the closure of a McDonald's restaurant in St-Hubert, Canada, following an attempt to unionize.[122] The petitioners conceded that legislation in Quebec allowed these types of closures. As such they could not rely on the NAALC's non-enforcement clause. Instead, it was alleged that Canada failed to provide for "high labor standards" under Article 2 NAALC, and furthermore that the lack of a remedy for the individual workers who lost employment as a result to the closing violated Article 4.2 NAALC. This article provides that: "Each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under: 1. its labor law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers, and 2. collective agreements can be enforced."

Despite some discussion whether petitions on the basis of Articles 2 and 4 were admissible, the NAO decided to hear the case.[123] However, the petitioners eventually reached an agreement with the government of Quebec and the NAO never published its findings.

The 2001 New York State case concerned an alleged breach of Article 5 NAALC, which ensures certain procedural guarantees that "administrative, quasi-judicial, judicial and labor tribunal proceedings" have to comply with.[124] The petition relied on a combination of Articles 3 (non-enforcement) and 5 (procedural guarantees). To the extent that non-enforcement is caused by procedural deficiencies these two can go hand in hand. According to the petition: "The procedural guarantees outlined in Article 5, such as due process, are a central element of each signatory nation's constitutional and statutory law and warrant the greatest possible NAO oversight."[125] Although the Mexican NAO engaged in a lengthy analysis, the case was not submitted for Ministerial Consultations.[126]

The US and Canadian NAOs were more assertive in their assessment of Articles 4 and 5 in a case that concerned labour rights violations at garment factories in the Mexican state Puebla.[127] According to the petition, a trade union was hampered in such a way that it could not file an appeal against denial of its registration. The US NAO thus explicitly questioned whether Mexico

122 Robert Finbow, *The limits of regionalism: NAFTA's labour accord* (Ashgate 2006) 111-116.
123 Ibid 115.
124 Ibid157-160.
125 NY State, Public Communication (24 October 2001) 30.
126 NY State, NAO Review (8 November 2002) 33.
127 Robert Finbow, *The limits of regionalism: NAFTA's labour accord* (Ashgate 2006) 184-188 for a full description of the case. Other NAALC cases involving claims regarding unfair procedures before labour tribunals include: Maxi-Switch (1996); Han Young (1997); Gender Discrimination (15 May 1997); and Itapsa (1997).

was in compliance with Article 5.4, which provides that: "Each Party shall ensure that tribunals that conduct or review such proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter." In the same vain, the Canadian NAO concluded that "the overall pattern of events raises concerns about whether Mexico is in conformity with NAALC obligations ... to ensure that administrative proceedings for the enforcement of labour laws are not unnecessarily complicated and do not entail unwarranted delays (Article 5.1(d))."[128] With respect to Article 5.4 it was held that "it is uncertain that the current provisions of the (Mexican labour law) can ensure that the (Local Conciliation and Arbitration Board) is impartial and independent and does not have any substantial interest in the outcome of proceedings as required by Article 5.4 of the NAALC."[129] In similar opaque but critical language, the NAO expressed concern "whether Mexico is meeting its obligations ... under NAALC Article 4.2 to ensure that persons with a legally recognized interest have recourse to procedures by which they can enforce their rights under a collective contract."[130] The Joint Declaration of the Ministerial Consultations, which were held between all three NAFTA states, focused solely on the activities that would be taken in order to "resolve the issues raised in the public communications"[131] without commenting on the merits of the allegations.

5.5 Labour rights as 'essential elements' of EU external agreements

The external agreements of the European Union contain so-called 'essential elements clauses'. These clauses allow for the suspension of treaty obligations in case of severe human rights violations by one of the parties. As their scope is not clearly circumscribed, they may be applicable in cases of severe labour rights violations.

In 1975, the European Union (then European Economic Community) and seventy-one African, Caribbean and Pacific (ACP) states signed the Lomé Convention, their first preferential agreement regulating trade and aid issues. Soon after the agreement entered into force, grave human rights violations in some ACP states invoked a debate on the desirability to continue trade relations with such states, or whether the agreement should provide for a (temporary) suspension clause.[132] The first explicit references to human rights

128 Puebla, Canada NAO Review (12 April 2005) 5-4.
129 Ibid 5-5.
130 Ibid 5-7.
131 Ministerial Consultations Joint Declaration, 'Resolving Issues Raised in: US NAO Public Communication US 2003-01 and Canadian NAO Public Communication CAN 2003-1' (Puebla Ministerial Consultations) (24 April 2008) 1.
132 Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press 2005) 7-31.

were included in the 1989 Lomé IV Convention.[133] Since the 1990, all EU external agreements include clauses that list human rights amongst the 'essential elements' of the treaty.[134]

A typical example can be found in Article 1 of the EU-Colombia-Peru Agreement. It provides that: "Respect for democratic principles and fundamental human rights, as laid down in the Universal Declaration of Human Rights, and for the principle of the rule of law, underpins the internal and international policies of the Parties. Respect for these principles constitutes an *essential element* of this Agreement" (emphasis added). Article 8.3 provides that when a party breaches the essential elements clause, the other party "may immediately adopt appropriate measures in accordance with international law". The terminology of essential elements clauses is thus aligned with Article 60.3(b) of the VCLT, which allows the termination or suspension in whole or in part of a treaty in case of a "violation of a provision essential to the accomplishment of the object or purpose of the treaty." Suspension may involve any of the obligations in the treaty, including those related to trade and investment.[135]Importantly, however, this is without prejudice to other international obligations, for example under the WTO Agreements.

The wording of essential elements clauses differs per agreement. The 1993 agreement with India refers to "respect for human rights and democratic principles" but omits a reference to any benchmark.[136] In the 2010 EU-Korea FTA, the essential elements clause not only refers to the UDHR but also to "other relevant international human rights instruments."[137] The word 'relevant' is not explained. Bartels has argued that it "is a very desirable additional phrase, as it has a much broader scope and is also 'future-proof' insofar as it incorporates any later human rights treaties that may be concluded between the parties

133 Karin Arts, 'Integrating Human Rights into Development Cooperation: The Case of the Lomé Convention' (PhD Thesis Vrije Universiteit Amsterdam 2000) 196-200.

134 Lore Van den Putte, Jan Orbie, Fabienne Bossuyt and Ferdi De Ville, 'Social Norms in EU Bilateral Trade Agreements: A Comparative Overview' in Tamara Takács, Andrea Ott and Angelos Dimopoulos (eds) *Linking trade and non-commercial interests: the EU as a global role model?* (CLEER Working Papers 2013/2014) 38; and European Commission, 'Promoting Core Labour Standards and improving social governance in the context of globalisation' (18 July 2001) COM (2001) 416, 12.

135 Lorand Bartels, 'The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements, Directorate-General for External Policies' (EXPO/B/DROI/2012-09, February 2014) para 30. See Bruno Simma and Christian Tams, 'Article 60 – Convention of 1969' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary – Vol. II* (Oxford University Press 2011) 1373-5 on the question whether suspension has to be proportionate to the breach, which is an issue that is debated in the literature.

136 Art 1 EC-India CA.

137 Art 1 EU-Korea FTA.

and other changes in a party's obligations".[138] Lastly, the agreements with member states of the Council of Europe refer to the "Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe, the Charter of Paris for a New Europe of 1990, and other relevant human rights instruments, among them the UN Universal Declaration of Human Rights and the European Convention on Human Rights".[139]

According to the European Commission, "[an essential elements] clause encompasses also core labour standards as set out in the eight core ILO Conventions."[140] Various scholars have supported the idea that the essential elements clause can be applied in response to violations of labour rights.[141] Indeed, all four documents that are referred to in these clauses touch upon labour concerns. The Helsinki Final Act and the Charter of Paris are both concerned with migrant labour while the ECHR codifies the right not to be subjected to forced labour or and occupational discrimination and the right to freedom of association, including the right to strike. The Universal Declaration contains a mixture of economic, social and civil labour rights. These even go further than the four core labour standards that, according to the European Commission, are covered by essential elements clauses. The relevant articles of the UDHR provide as follows:

> *Article 23*
> (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

138 Lorand Bartels, 'The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements' (Directorate-General for External Policies, EXPO/B/DROI/2012-09, February 2014) para 17.

139 Art 2 EU-Ukraine AA.

140 Johanne Døhlie Saltnes, 'The EU's Human Rights Policy: Unpacking the literature on the EU's implementation of aid conditionality' (ARENA Working Paper No 2, March 2013) 8. European Commission, 'The European Union's Role in Promoting Human Rights and Democratisation in Third Countries' (8 May 2001) COM(2001) 252 final, 12, see also: Lore Van den Putte, Jan Orbie, Fabienne Bossuyt and Ferdi De Ville, 'Social Norms in EU Bilateral Trade Agreements: A Comparative Overview' in Tamara Takács, Andrea Ott and Angelos Dimopoulos (eds) *Linking trade and non-commercial interests: the EU as a global role model?* (CLEER Working Papers 2013/2014) 39, who see this assertion confirmed in their interviews with EU officials.

141 Lorand Bartels, 'The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements' (Directorate-General for External Policies, EXPO/B/DROI/2012-09, February 2014) para 13; Lore Van den Putte, Jan Orbie, Fabienne Bossuyt and Ferdi De Ville, 'Social Norms in EU Bilateral Trade Agreements: A Comparative Overview' in Tamara Takács, Andrea Ott and Angelos Dimopoulos (eds) *Linking trade and non-commercial interests: the EU as a global role model?* (CLEER Working Papers 2013/2014) 39 refer in this context to the general debate on the relationship between labour rights and human rights. See e.g.: Judy Fudge, 'The New Discourse of Labour Rights: from Social to Fundamental Rights?' (2007) 29 *Comparative Labor Law and Policy Journal* 29; Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 European Labour Law Journal 151.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.
(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24
Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Some elements of these provisions give rise to significant interpretative problems. As Hepple notes in relation to this Article 23: "even in the restricted sense of a right to social assistance a universal right to work does not exist. It is still a 'noble lie' – a well-meant promise that seems to be incapable of fulfilment."[142] Article 24 is equally complicated. Like the right to work, its status as human right has been questioned in the literature.[143] The right to rest and leisure is codified in Article 7 of the ICESCR and various ILO instruments. As one commentary to the ICESCR notes: "In the CESCR's monitoring of states, and in the relevant ILO instruments, the focus has been principally on hours or work and holiday, and less on independent requirements of rest and leisure."[144] While these instruments provide a minimum core, notions of reasonable working hours, and consequently also their legislative codifications, "are responses to the prevailing patterns of, or aspirations as to, work, family and social life (...)."[145] Other labour rights contained in the UDHR, such as the right to equal pay for equal work and trade union rights, are not contested conceptually, although recourse to other human or labour rights instruments would be necessary to define the precise obligations under the essential elements clause. Furthermore, it needs to satisfy the high threshold of being deemed 'essential'.

So far the European Union has never dealt with interpretative problems in the field of labour. 'Appropriate measures' have been taken on more than twenty occasions, but only in relation to *coups d'état*, flawed elections and severe violations of human rights or the rule of law.[146] According to Saltnes,

142 Bob Hepple, 'Foreword' in Virginia Mantouvalou (ed) *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing 2005) vii (internal reference omitted).
143 Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press 1998) 226.
144 Ben Saul, David Kinley and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (Oxford University Press 2014) 473.
145 Ibid.
146 Johanne Døhlie Saltnes, 'The EU's Human Rights Policy: Unpacking the literature on the EU's implementation of aid conditionality' (ARENA Working Paper No 2, March 2013) 7.

this pattern depicts a minimalist conception of democracy, focusing on clear–cut breaches".[147] On a number of other identified instances of *coups d'état* and flawed elections the European Union did not invoke the essential elements clause in order to pressure the partner state.[148] Indeed, the termination or suspension of a treaty as a consequence of a material breach is a right, not an obligation.

Despite its propensity to respond only to "clear–cut breaches" that are less problematic "to judge in terms of 'cut-off points' for reaction,"[149] it should be noted that the European Commission has in the past attributed the same role to essential elements clauses as it currently does in relation to sustainable development chapters in PTIA. In 2001, the Commission wrote:

> the EU's insistence on including essential elements clauses is not intended to signify a negative or punitive approach. They are meant to promote dialogue and positive measures, such as joint support for democracy and human rights, the accession, ratification and implementation of international human rights instruments where this is lacking, as well as the prevention of crises through the establishment of a consistent and long-term relationship.[150]

Arguably, however, self-standing labour provisions or those embedded in sustainable development chapters are better suited for this task than essential elements clauses. This is not only due to the latter's limited scope and the difficulty of concretizing the references to the Universal Declaration of Human Rights, but also to the lack of permanent monitoring and cooperation mechanisms.

5.6 DELIMITATIONS OF LABOUR PROVISIONS THROUGH FEDERAL CLAUSES

In some agreements, the scope of labour provisions is expressly limited though the insertion of a 'federal clause'. Through a federal clause, a state can limit the scope of obligations under a treaty to the federal level and exempt sub-federal entities.[151] As Corten notes: "the 'federal clause' does internationalize

147 Ibid 8.
148 Ibid 9.
149 Ibid 8.
150 European Commission, 'The European Union's Role in Promoting Human Rights and Democratisation in Third Countries' (8 May 2001) COM(2001) 252 final, 9.
151 See for examples of federal clauses in international law, including the GATT 1948: Henry Burmester, 'Federal Clauses: An Australian Perspective' (1985) 34 International and Comparative Law Quarterly 522, 522-528. The fact that in many states labour is regulated at different levels of government has always been an issue of concern for the ILO. The organisation's Constitution contains an elaborate procedure for the implementation of conventions that touch upon the competences of sub-federal entities. Article 19.7(b) ILO Constitution. On

the constitutional difficulties of a federal State."[152] US FTAs thus provide that for the United States, "statutes and regulations" is limited to "acts of Congress or regulations promulgated pursuant to an act of Congress that are enforceable by action of the federal government."[153] Without such a provision the labour clause would have applied to derogations from, or failures to improve, labour standards by sub-federal entities as well, as from an international law perspective, states are unitary entities and treaty obligations do not apply differently between different branches of levels of government. This is expressly reflected in Article 4(1) ARSIWA.[154]

Of the US FTAs, only the NAALC applies to sub-federal entities.[155] It does not contain a federal clause and stipulates in Article 18 that: "Each Party may convene a governmental committee, which may comprise or include representatives of federal and state or provincial governments, to advise it on the implementation and further elaboration of this Agreement." The Canadian *McDonald's* case and two of the US cases brought under the NAALC concerned non-enforcement labour legislation at the state level. In the *DeCoster Egg* case, it was argued that Mexican workers at the DeCoster company in Maine had been severely mistreated. The *New York State* case concerned failures to enforce legislation concerning workers' compensation and occupational safety and health.[156] In the context of the latter case, Finbow notes that "New York (the state, RZ), not a party to NAALC, could not be forced to change the content of laws through the petition process."[157] Nonetheless, if New York State does not comply with the outcome of the petition process the United States incurs international responsibility.[158]

Canada and Mexico also have federal systems of government. While the NAALC does not include a general federal clause, it creates a special regime for Canada according to which the agreement only applies to federal labour legislation and to provinces that have consented to its jurisdiction.[159] Sub-

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the history of this provision see: Robert B Looper, ''Federal State' Clauses in Multilateral Instruments' (1955-1956) 32 British Yearbook of International Law 162, 164-186.

152 "Nevertheless, the 'federal clause' does internationalize the constitutional difficulties of a federal State." Syméon Karagiannis, 'Article 29 Convention of 1969' in Oliver Corten and Pierre Klein (eds) *The Vienna Conventions on the Law of Treaties: A Commentary – Volume I* (Oxford University Press 2011) 747.

153 Art 16.8 CAFTA-DR.

154 James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 123-124.

155 The NAALC contains an Annex specifying the territorial scope of the agreement, which includes the customs territory, the fifty states, the District of Columbia and Puerto Rico, including 'foreign trade zones'.

156 The *Washington Apples* case also concerned the actions of a US State, Washington Apples, Mexican NAO Review (August 1999).

157 Robert Finbow, *The limits of regionalism: NAFTA's labour accord* (Ashgate 2006) 159.

158 See e.g. *LaGrand Case (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466, para 125.

159 Annex 46 NAALC.

sequent to the conclusion of the NAALC, Canada thus drafted an 'Intergovernmental Agreement' which the Provinces and Territories could sign up to.[160] It provides in Article 2 that "The signatory governments to this Agreement shall enjoy the rights of the NAALC and shall be bound by its obligations in accordance with their respective jurisdictions." Not all Provinces have signed the Intergovernmental Agreement, which limits the potential impact of the NAALC in Canada.[161] All subsequent FTAs by the United States limit the scope of the labour provision to federal labour legislation, while Canada has continued the NAALC model. The Canada-Peru Agreement on Labour Cooperation, for example, provides that Canada shall provide a declaration in which it lists the provinces for which actions Canada may be held responsible. For this purpose, it has adopted a second Intergovernmental Agreement, which covers post-NAALC agreements.[162]

The European Union has not made similar arrangements. The EU is not a federal state, but has elaborate rules on the division of competences between the Union and its member states. Notably, while the common commercial policy falls under the EU's exclusive competence, social policy is a matter of shared competence between the EU and the member states.[163] Internally, there is no difference between the legislative procedures in both domains.[164] This is different for the ratification of treaties. When a treaty solely affects the common commercial policy, ratification by the member states is not necessary. When it affects issues within the domain of social policy, ratification by all member states is required before a treaty may enter into force. The question thus arises whether the EU perceives labour provisions in trade agreements as a matter of economic or social policy.

In its 2017 Opinion on the EU-Singapore FTA, the European Court of Justice (ECJ) took the former position. By doing so it departed from the Opinion of Advocate-General (AG) Sharpston, who argued that the treaty's labour provisions affect the labour legislation of the member states. The reasoning of the Court and the AG is relevant beyond the question of the appropriate ratification procedure. In its submissions to the AG, the European Commission had argued that the chapter on Trade and Sustainable Development "does

160 Canada, 'North American Agreement on Labour Cooperation – Canadian Intergovernmental Agreement' <https://www.canada.ca/en/employment-social-development/services/labour-relations/provincial-territorial/north-american-agreement.html#s12> accessed 24 June 2018.

161 Robert Finbow, *The limits of regionalism: NAFTA's labour accord* (Ashgate 2006) 167, notes that at the time only the Canadian provinces of Quebec, Alberta, Prince Edward Island and Manitoba have signed the agreement.

162 Canada, 'Canadian Intergovernmental Agreement Regarding the Implementation of International Labour Cooperation Agreements' < https://www.canada.ca/en/employment-social-development/services/labour-relations/provincial-territorial/intergovernmental-agreement.html> accessed 24 June 2018.

163 Arts 3.1(e), 4.2(b), 151-161 and 206-207 TFEU.

164 Art 153 TFEU provides that in the domain of social policy the 'ordinary legislative procedure' is applicable.

not aim to create new *substantive* obligations concerning labour and environmental protection, but merely reaffirms certain existing international commitments."[165] Furthermore, the FTAs improvement clause was not "sufficiently prescriptive" according to the Commission.[166] The AG disagreed. She distinguished between the FTA's non-derogation clause and its improvement clause. The former, she noted, has "a direct and immediate link with the regulation of trade" as it aims to "prevent a Party affecting trade or investment by waiving or otherwise derogating from its ... labour laws."[167] Consequently, the derogation clause should be considered an element of the common commercial policy. However, the AG concluded that the part of the chapter in which the parties express their commitment to implement the fundamental labour standards, "essentially seek[s] to achieve in the European Union and Singapore minimum standards of (respectively) labour protection, *in isolation* from their possible effects on trade."[168]

The Court disagreed with this latter finding. It held that the agreement does not intend to harmonize labour standards and that each member state maintains the right "to adopt or modify accordingly their relevant laws and policies, consistent with their international commitments in those fields."[169] In other words: as long as a state remains within the boundaries of the ILO conventions to which they are already a party, they may increase or decrease their levels of labour protection as they wish. The Court did not evaluate the implications of the obligation to enforce legislation irrespective of international commitments, or the possibility that an EU member state would denounce an ILO convention. The broader takeaway from the ECJ's Opinion, however, is that the European Commission was keen to emphasise that the agreement did not contain new obligations or that certain provisions were not sufficiently prescriptive. Vague language that stays within the boundaries of existing ILO commitments may ease the ratification process and prevent intra-EU competence discussions, but it also limits the potential of labour clauses.

165 Case C-2/15 *Conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore* [2016] ECLI:EU:C:2016:992, Opinion of AG Sharpston, para 471 (emphasis added).

166 Ibid, para 496.

167 Ibid, para 489.

168 Ibid, para 491.

169 Case C-2/15 *Conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore* [2017] ECLI:EU:C:2017:376, para 165.

5.7 Implementation and enforcement of labour provisions

5.7.1 Introduction

This part will examine the implementation and dispute settlement mechanisms in PTIAs. Section 5.7.2 and section 5.7.3 look at pre-ratification and post-ratification efforts, respectively. Section 5.7.4 turns to dispute settlement procedures, with a specific focus on the differences between the approaches of the United States and the European Union.

5.7.2 Pre-ratification impact assessments and conditionalities

The pre-ratification phase provides the first opportunity for 'high-standard' countries to assess whether they are satisfied with the level of labour standards of their future trade partners. Sometimes states alter their domestic labour legislation or enforcement capacity in anticipation of a new trade or investment agreement. This has not been systematically investigated, however. Methodologically, demonstrating causality is difficult. While Hafner-Burton attributes the changes in Chilean labour law that were made during the negotiations on a US-Chile FTA to the trade deal,[170] the ILO argued that "the main driving force in this regard may have been domestic pressure."[171] These two factors are not necessarily distinct. As Huberman's study on the early years on trade-labour linkage shows, the adoption of more protective labour legislation in 'low-standard' countries was often a condition to gain domestic support for expanding international economic cooperation.[172]

'High-standard' and 'low-standard' are relative terms. The United States, which itself has been criticized regularly for failing to comply with international standards on freedom of association is typically considered a 'high-standard' country that uses its trade leverage to induce improvements in trade union rights in Bahrain, Morocco and Oman.[173] Changes in domestic labour law resulting from the conclusion of free trade agreements have also been documented in relation to the trade agreements with and Peru, Colombia and

170 Emilie Hafner-Burton, *Forced to be good. Why trade agreements boost human rights* (Cornell University Press 2009).

171 International Labour Organization, *Social Dimensions of Free Trade Agreements* (International Institute for Labour Studies, revised edn, Geneva 2015) 36.

172 Michael Huberman, *Odd Couple: International Trade and Labor Standards in History* (Yale University Press 2012) 2.

173 Melani Cammet and Marsha Pripstein Posusney, 'Labor standards and labor market flexibility in the Middle East: Free trade and freer unions?' (2010) 45 Studies in Comparative International Development 250, 263. Note that Morocco has ratified ILO Convention 98 but the United States has not.

Panama.[174] In all these cases the United States had publically demanded improvements as a precondition to ratification.[175] In the context of the TPP, the United States negotiated three 'Labor Consistency Plans' with Brunei, Malaysia and Vietnam, before withdrawing from the agreement. The plans outline concrete proposals for the amendment of domestic labour legislation in a range of areas.[176] From the perspective of international labour law, the most noteworthy element is included in the Vietnam Action Plan, which states that the country "shall ensure that its law allows for rights-based strikes, consistent with ILO guidance."[177] Also the draft USMCA contains an Annex with detailed requirements on freedom of association and collective bargaining that Mexico has to implement before the agreement will enter into force.[178]

The strong focus on labour issues during the pre-ratification stage is embedded in US domestic trade legislation. The 2002 Trade Act requires the President to submit three labour reports to Congress in relation to all signed FTAs: (1) a labour rights report, (2) a child labour report and (3) an employment impact review. The former has a broad scope, and describes a trading partner's legal and administrative framework concerning all labour standards that are included in the FTA. There is some overlap with the child labour reports, which have to describe "the extent to which the country or countries that are parties to the agreement have in effect laws governing exploitative child labor."[179] The actual reports differ per trading partner. While some are rather cursory and are solely focused on the legal framework, including relevant international obligations, others also describe concrete efforts to eliminate child labour.[180]

The issues that should be addressed in the report are limited to the four fundamental labour standards, as well as the requirement to uphold acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. Although compliance with obligations under ILO conventions is not required under US FTAs, in the labour rights reports the United States draws extensively from the work of the ILO supervisory bodies, both with regard to factual determinations and normative assessments. The most salient issues find their way into the reports. With regard to Panama,

174 International Labour Organization, *Social Dimensions of Free Trade Agreements* (International Institute for Labour Studies, revised edn, Geneva 2015) 37.

175 Ibid 37.

176 Brunei Darussalam-United States Labour Consistency Plan (4 February 2016); Malaysia-United States Labour Consistency Plan (4 February 2016); United States-Viet Nam Plan for the Enhancement of Trade and Labour Relations (4 February 2016).

177 United States-Viet Nam Plan for the Enhancement of Trade and Labour Relations (4 February 2016) 3.

178 Annex 23-A USMCA.

179 US Secretary of Labor, 'Laws Governing Exploitative Child Labor Report – Chile' (8 July 2003) <http://www.dol.gov/ilab/reports/pdf/HR2738ChileChildLabor.pdf> accessed 24 June 2018.

180 Although they contain some references to the labour chapters in the respective FTAs, the employment reports are not relevant for this study.

which in 2010 had the "largest flag of registration" of the world fleet,[181] various concerns were raised regarding the protection of maritime workers. Meanwhile, the Colombia report focused predominantly on violence against trade unionists. To accommodate the concerns of the United States, Colombia agreed on a comprehensive action plan which included *inter alia* the creation of a specialized Labour Ministry, reform of the criminal code in order to penalize certain anti-union activities and the introduction of restrictions on temporary service agencies.[182] The pre-ratification phase of the US-Colombia FTA shows the added value of addressing labour concerns in this phase. The failure to protect trade unions could be classified as a failure to enforce domestic labour legislation. However, to constitute a violation of the US-Colombia FTA, the acts or omissions would have to affect trade or investment between the parties, which may not be the case. Furthermore, certain elements of the action plan go beyond the material scope of the labour provision, by addressing issues that are not covered by the 1998 Declaration or the IRLR.

For the European Union, the nature of the pre-ratification phase is less political. Although it may well be the case that labour concerns are raised during the negotiations, in its external communications the EU is more concerned with scoping the potential impact of new agreements in a neutral, non-political manner. Instead of conducting separate reports on the expected impact of new trade agreements, the EU publishes integrated 'Sustainability Impact Assessments (SIA).' Unlike the US reports, which are drafted by the involved government agencies themselves, the European Union studies are conducted by specialized consultants on the basis of a methodology handbook. SIAs assess the economic, human rights, social and environmental effects and outline the pursued consultation efforts with civil society stakeholders. With regard to labour, the SIAs discuss both labour regulation and labour market issues. Like its US counterpart, the EU-Andean SIA also notes the existence of severe problems concerning freedom of association in Colombia. The level of the discussion varies significantly, however. The EU SIA lists some statistics concerning violence against trade unionists and its effect on the exercise of the right to strike, and then notes that "[the] government has made labour rights an increasing priority, with funds to protect trade union officials growing from US$ 1.7 million to US$ 34 million in 2007."[183] The document contains only one reference to the ILO. With regard to the requirement in Ecuadorian law that to establish a trade union support from at least thirty workers is necessary,

181 UNCTAD, 'Review of Maritime Transport' (United Nations 2010) 42.
182 Colombian Action Plan Related to Labor Rights (7 April 2011).
183 Development Solutions et al, 'EU-Andean Trade Sustainability Impact Assessment' (October 2009) 53.

it is noted that this is "a policy criticised by the ILO"[184] without a further reference, analysis or specific recommendations.[185]

The EU's methodology handbook has been updated in April 2016. It is meant to ensure consistency between different SIAs. However, as Newitt and Gibbons argued with regard to the 2006 version, it "provides little guidance on how to assess decent work and employment impacts either quantitatively or qualitatively."[186] Even with more comprehensive or better indicators, however, the SIAs are expected to be drafted "in a transparent and rational manner and base their findings on scientific evidence."[187] The 2016 version allows more space for a legal instead of a quantitative analysis. However, according to the 2016 handbook, the human rights assessment: "is not intended to pass judgement on the actual human rights situation in a country ... but rather to bring to the attention of negotiators the potential impacts of the trade measures under negotiation and thus to support sound policymaking."[188] The scope of the assessment is rather broad.[189] This means that the potential impacts of new trade agreements on specific issues like social security or dismissal legislation, for example, are not considered.

This approach is fundamentally different from the normative assessments that the United States conducts. It is also inconsistent with the inclusion of

184 Ibid 53.

185 The policy recommendations in the EU-Andean SIA suggest two 'flanking measures' concerning labour. First, it recommends the inclusion of a: "Trade and Sustainable Development chapter (which) could include a reference to the requirement that both parties commit to the effective implementation of core ILO labour standards and other basic decent work components". Development Solutions et al, 'EU-Andean Trade Sustainability Impact Assessment' (October 2009) 125. Second, it recommends the Andean countries to tailor its social protection programs in a way that protects "vulnerable populations that will be affected by transition and adjustment costs." Development Solutions et al, 'EU-Andean Trade Sustainability Impact Assessment' (October 2009) 128. The first recommendation is not novel, as the 2008 EU-CARIFORUM already put labour under the realm of sustainable development. It should furthermore be noted that unlike the general recommendation on social protection, the SIA did not contain further thoughts on what improvements could be achieved during the pre-ratification phase.

186 Ergon Associates, 'Trade and Labour: Making effective use of trade sustainability impact assessments and monitoring mechanisms – Report to DG Employment, European Commission' (September 2011) 6.

187 European Commission, 'Handbook for Trade Sustainability Impact Assessments' (March 2006) 8.

188 Ibid 21.

189 "In conducting the social impact analysis, the interaction between the potential trade agreement and the effective implementation of ILO conventions on core labour standards and the promotion of the ILO *Decent Work Agenda* should also be considered, taking into account the proportionality principle, in the EU as well as in the trade partners, under consideration. Other conventions from ILO and UN bodies should also be taken into consideration, where relevant." European Commission, 'Handbook for Trade Sustainability Impact Assessments' (2nd edn, April 2016) 20.

labour provisions as such, which expect the parties to uphold a certain level of labour standards. This implies that an *ex ante* assessment is made that provides a benchmark to later determine whether states have derogated, upheld or improved domestic labour standards. Also, the pre-ratification phase is particularly suitable to address existing inconsistencies or labour-related concerns that go beyond the confines of labour provisions, but the EU does not grasp this potential.

5.7.3 Post-ratification implementation and monitoring

After the entry into force of an agreement the implementation of the labour provisions enters a new phase. Also here, the means through which the United States and the European Union pursue the implementation of their labour clauses differ. Figures 5.1 and 5.2 provide a schematic overview of the institutional set-up of the US-Colombia and EU-Korea FTAs, respectively, which are exemplary of current US and EU agreements. Although not all US and EU agreements are similar, these are relatively recent FTAs that are representative of the two different approaches. The grey areas represent involvement by non-state actors, while the white areas concern the intergovernmental cooperation mechanisms.

Figure 5.1: Institutional mechanisms in the US-Colombia FTA

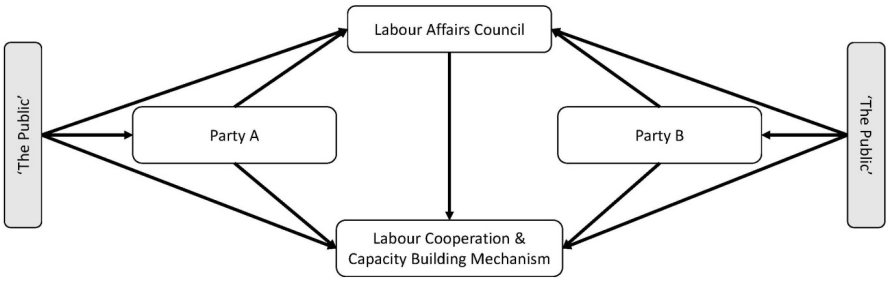

Figure 5.2: Institutional mechanisms in the EU-Korea FTA

What firstly stands out is that the European Union institutionalizes the involvement of civil society, while the US-Colombia FTA creates two intergovernmental mechanisms. The 'Labour Affairs Council' in the US model, consisting of cabinet-level officials or their representatives, is the main body tasked with the implementation of the labour chapter. It is tasked with overseeing the functioning of the 'Labour Cooperation and Capacity Building Mechanism', the drafting of guidelines of public submissions and the preparation of reports.[190] The Labour Cooperation Mechanism is responsible for policy coordination of the practical cooperation and capacity building activities that are developed under the realm of the FTA. Non-state actors have the opportunity to engage with both institutions, but can also choose to submit communications concerning implementation of the labour chapter to one of the parties. The latter resembles the well-established practise under the Generalized System of Preferences and the US Trade Act, by which civil society petitions may trigger an inquiry into the possible repeal of trade benefits.

The institutionalized involvement of civil society actors in EU trade agreements does not mean that the EU is better positioned to consider the ideas and concerns of non-state actors. Due to the level of institutionalization the EU has to exclude certain actors. Article 13.12.5 of the EU-Korea FTA notes that the Domestic Advisory Groups should be comprised of "independent representative organisations of civil society in a balanced representation of environment, labour and business organisations as well as other relevant stakeholders." This model embeds the European way of interaction with stakeholders in trade agreements with countries where this is not self-evident. Civil society actors may not be independent from governments, or governments may not be willing to engage with civil society, making the involvement of civil society groups

190 Art 17.5 US-Colombia FTA.

in the monitoring of the trade agreement look better on paper than it is in practice.[191]

In the Domestic Advisory Groups there is no place on the table for all interested actors. The provision of the EU-Korea agreement also reveals a second issue, namely the integral discussion of all aspects related to sustainable development. Orbie *et al*, who conducted qualitative empirical research on the EU civil society mechanisms, argue that:

> While it is hard to oppose the concept of sustainable development as such, the combining of labour and environmental issues under the heading of sustainable development is a negative development in terms of human rights for not only does it distract attention from the fact that labour rights are part of the universally agreed body of human rights but it serves at the same time to gloss over the inherent distinction between labour rights and environmental issues. It would make more sense if labour interests (i.e. both trade unions and employer organisations) and environmental interests were to meet separately. This would allow workers' interests to be more clearly and coherently voiced than is currently the case.[192]

Except for the studies by Orbie *et al* there are currently no empirical studies on the political cooperation mechanisms. This is also true for the operation of the Labour Cooperation Mechanism, which constitutes the second prong of the US post-ratification strategy. Annex 17.6 to the US-Colombia FTA lists possible issues for cooperation, as well as the means available to the parties to carry out activities. Importantly, the issues go beyond the material scope of the FTA's labour obligations and include *inter alia* migrant workers, social assistance, technology exchanges, labour statistics and specific attention for small, medium and micro-size enterprises. These issues are not limitative.[193] With regard to the means through which the identified priorities are given practical effect, the agreements refer *inter alia* to technical assistance programs, study visits, joint conferences and exchange of information systems. While the Labour Cooperation Mechanism serves as a forum for discussion and coordination, the various activities are carried out by the parties themselves. In practice, this means that the US Department of Labor funds programmes aimed at the improvement of labour standards in the partner state, which may be carried out in cooperation with the International Labour Organization.

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191 Franz Ebert, 'Labour provisions in EU trade agreements: what potential for channeling labour standards-related capacity building? (2016) 155 International Labour Review 407.

192 Lore Van den Putte, Jan Orbie, Fabienne Bossuyt, Deborah Martens and Ferdi De Ville, 'What social face of the new EU trade agreements? Beyond the 'soft' approach' (ETUI Policy Brief No 13, 2015) 2.

193 On the basis of the US-Morocco FTA, for example, the State parties have identified enterprise restructuring as a specific area of attention. US Trade Representative, 'United States Employment Impact Review of the U.S.-Morocco Free Trade Agreement' (July 2004) 39.

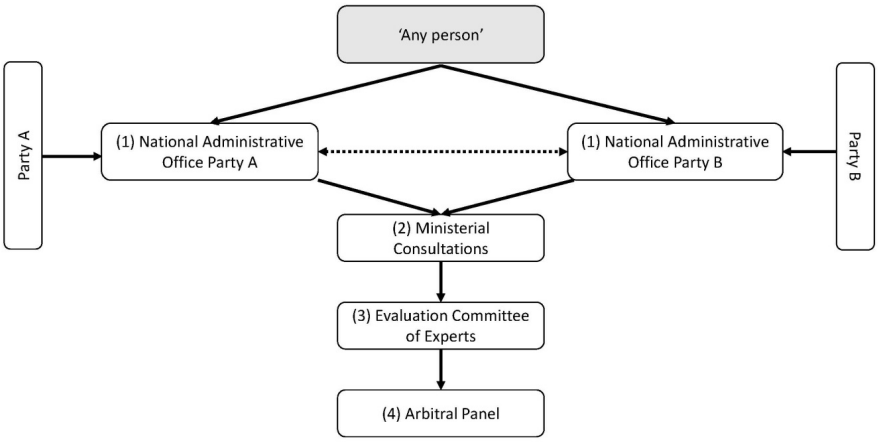
The Canada-Colombia FTA adds a third approach to post-ratification monitoring. In 2010, two years after the FTA was signed, the parties concluded the 'Agreement Concerning Annual Reports on Human Rights and Free Trade Between Canada and the Republic of Colombia.' Article 1.1. contains an obligation on both states to publish an annual report: "on the effect of the measures taken under the Free Trade Agreement between Canada and the Republic of Colombia on human rights in the territories of both Canada and the Republic of Colombia." The Canadian reports contain both an analysis of trade union and employer views, as well as an outline of the actions taken in the context of the technical assistance programme between the two states. States thus adopt different models of post-ratification cooperation. So far, there have been no studies on the effects of the different approaches. Given the lack of disputes under PTIA labour provisions, a better understanding of pre- and post-ratification dynamics could play an important role in determining their impact.

5.7.4 Dispute settlement

5.7.4.1 Dispute settlement under the NAALC

The NAALC was the first FTA to include binding labour obligations as well as a special procedure to assess alleged violations thereof. Persons may submit a petition to the National Administrative Office in one of the state parties. The NAO review is primarily concerned with establishing a *prima facie* case that could be recommended for Ministerial Consultations. Most of the submissions brought under the NAALC eventually reached this phase. The outcomes of these consultations were generally disappointing to the petitioners. Rather than calling for legislative changes, increased enforcement capacity or urging the companies involved to reinstate workers and improve their practices, most Ministerial Consultations resulted in studies and workshops. This has more resemblance to the non-judicial implementation and monitoring mechanisms than to the first phase of a judicial process. None of the cases reached the third and fourth stages of NAALC dispute settlement: consideration by an Evaluation Committee of Experts (ECE) and arbitration. The full procedure is visualized in figure 5.3.

Figure 5.3: Dispute settlement procedure North American Agreement on Labor Co-operation



The four stages constitute a trap, in which each subsequent phase excludes some of the labour issues that the previous one could assess. Table 1 lists the eleven substantive areas that are regulated by the NAALC in relation to the four procedural stages. The more constricted role of the ECE and the arbitral procedure is also reflected in additional admissibility criteria. Importantly, after the ECE has delivered its report, it is the Ministerial Council that has to decide by a two-third majority whether the dispute proceeds to arbitration.[194] In other words: the NAALC state that is not party to the dispute has to decide whether it will side with the complaining or the responding party. The arbitral panel is expected to include recommendations, which provide the basis for a "mutually satisfactory action plan."[195] When no action plan is agreed upon, or the respondent state fails to implement it, the panel may impose a "monetary enforcement assessment"[196] Resource constraints of the respondent state may be taken into account when determining the amount.[197] Non-payment could lead to the suspension of benefits, which should be aimed at the same sector or sectors that the complaint was concerned with.[198]

194 Art 29.1 NAALC.
195 Art 38 NAALC.
196 Art 39 NAALC.
197 Annex 39 NAALC.
198 Art 41 and Annex 41B NAALC.

Table 5.1: NAALC labour principles and stages of dispute settlement

NAO / Ministerial Consultations	Evaluation Committee of Experts (ECE)	Arbitral Panel
No additional admissibility requirements	1. Trade-related 2. Covered by mutually recognized labour laws	1. Requirements ECE 2. Persistent pattern of failure to effectively enforce
1) Freedom of association and the right to organize	-	-
2) The right to bargain collectively	-	-
3) The right to strike	-	-
4) Prohibition of forced labour	+	-
5) Elimination of employment discrimination	+	-
6) Equal pay for women and men	+	-
7) Compensation in case of occupational injuries and health	+	-
8) Protection of migrant workers	+	-
9) Minimum employment standards	+	+/- (Only minimum wages)
10) Labour protections for children and young persons	+	+
11) Prevention of occupational injuries and illness	+	+

Source: Tamara Kay, 'Labor Transnationalism and Global Governance: The Impact of NATFA on Transnational Labor Relationships in North America' (2005) 111 American Journal of Sociology 715, 750. The + indicates that complaints on a particular labour law issue can reach the ECE or arbitral phase.

One of the most striking features is the almost unfettered access to submit petitions. The NAALC makes no mention of a nationality requirement. The Rules of Procedure of the US National Administrative Office (NAO) provide that "Any person may file a submission with the Office regarding labor law matters arising in the territory of another Party." Mexican trade unions can, for

example, submit a complaint before the US NAO alleging a violation of the NAALC by the Mexican government. 'Person' is defined as "one or more individuals, non-governmental organizations, labor organizations, partnerships, associations, corporations, or legal representatives." In turn it is recognized that 'labor organization' may include "international organizations or federations." The vast majority of cases have indeed been initiated by trade unions and NGOs, often jointly in transnational coalitions.[199]

Various scholars have commented on the success, or lack thereof, of the NAALC.[200] These assessments depend on the various purposes that are ascribed to the agreement.[201] The NAALC has been subjected to comparative analysis with the European Union's social model,[202] and for its effects on cross-border cooperation of trade unions.[203] With regard to the substantive obligations, it has already been noted that the material scope of the NAALC covers more areas of labour law than most PTIAs. In conjunction, the submission of a petition to a NAO does not depend on an alleged economic intent of effect. However, the ECE and arbitral phases are only open to assess non-enforcement of a subset of labour norms when various additional admissibility criteria are fulfilled. These limitations, as well as the fact that no case has ever reached these phases, have somewhat detracted from the relatively open first phase. Despite the fact that so far over twenty cases have been submitted, which is more than double the number of petitions under other US FTAs combined, attention from trade unions and NGOs has shifted towards these later

199 One NAALC petition was jointly submitted by a business association and a company, see: Robert Finbow, *The limits of regionalism: NAFTA's labour accord* (Ashgate 2006) 179. Indeed, labour legislation is not merely focused on the protection of workers' rights. Companies may also benefit from the enforcement of labour legislation. This can also be observed at the ILO Committee on Freedom of Association, where employer organizations from Venezuela have addressed restrictions on their right to participate in certain tripartite fora. *Venezuela (Case No 2254)* Committee on Freedom of Association (17 March 2003).

200 See e.g.: Lance Compa, *NAFTA and the NAALC: twenty years of North American trade-labour linkage* (Wolters Kluwer Law & Business 2015); Robert Finbow, *The limits of regionalism: NAFTA's labour accord* (Ashgate 2006); Ana Piquer, 'The North American Agreement on Labour Cooperation: An Effective Compromise between Harmonization of Labor Rights and Regulatory Competition?' in Olivier De Schutter (ed), *Transnational Corporations and Human Rights* (Hart Publishing 2006) 184. Parbudyal Singh and Roy Adams, 'Neither a Gen not a Scam: The Progress of the North American Agreement on Labor Cooperation' (2001) 26 Labor Studies Journal 12.

201 David Lopez, 'Dispute Resolution Under NAFTA: Lessons from the Early Experience' (1997) 32 Texas International Law Journal 163, 200.

202 Paul Teague, 'Standard-setting for Labour in Regional Trading Blocs: the EU and NAFTA Compared' (2002) 22 Journal of Public Policy 325.

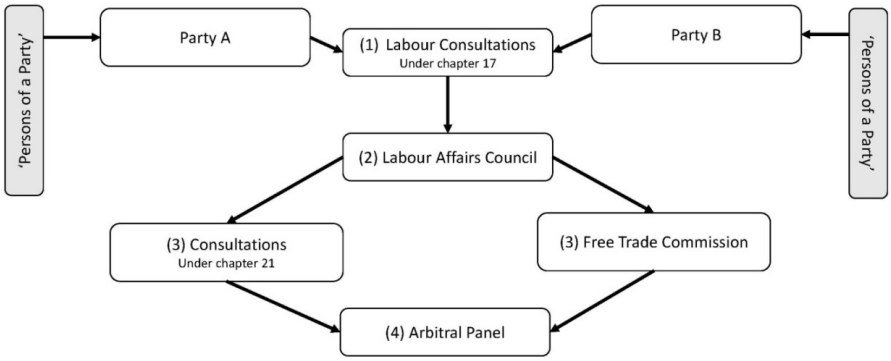
203 Tamara Kay, 'Labor Transnationalism and Global Governance: The Impact of NATFA on Transnational Labor Relationships in North America' (2005) 111 American Journal of Sociology 715, 750; Marley Weiss, 'Two Steps Forward, One Step Back – Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond' (2003) 37 University of San Francisco Law Review 689, 753.

agreements precisely because there are greater prospects for arbitral procedures and 'hard' economic sanctions.

5.7.4.2 Dispute settlement in subsequent US and EU agreements

The NAALC model has not been replicated since. From the US-Jordan FTA onwards, the labour provisions in all US trade agreements are subject to same dispute settlement procedure that applies to the other parts of the agreement. Similar to the post-ratification implementation mechanisms, there is some variation between the various agreements. This section will use the US-Colombia FTA to discuss the procedure, which consists of four phases.

Figure 5.4: Dispute settlement procedure US-Colombia FTA



The former two are provided for in the labour chapter itself. Article 17.7 establishes that: "A Party may request cooperative labor consultations with another Party regarding any matter arising under this Chapter." During these consultations, the parties "may seek advice or assistance from any person or body they deem appropriate in order to fully examine the matter." For disputes concerning the labour chapter, the ILO would be an obvious candidate.[204] If the initial consultations do not resolve the matter, either party may request that the Labour Affairs Council be convened. The Council "shall endeavour to resolve the matter, including, where appropriate, by consulting outside experts and having recourse to such procedures as good offices, conciliation

204 The US-Cambodia Textiles Agreement had made clear that explicit references to the ILO are not necessary *per se* in order to establish a cooperative relationship.

and mediation."[205] From the initial request, the parties have sixty days to resolve the matter through these means.

Thereafter, the complaining party may invoke the dispute settlement chapter. It may again request consultations, this time under the more formalized requirements of Article 21.4, or request a meeting of the Free Trade Commission. Like the Labour Affairs Council, the Free Trade Commission consists of cabinet-level representatives. Whichever option the complaining party thus chooses, it will essentially be a replication of phase one or two. If extended consultations of the Free Trade Commission also fail to resolve the dispute, the complaining party may request the establishment of an arbitral panel. Figure 5.4 visualizes the procedure in full.

The exemption of labour provisions in EU agreements from the regular dispute settlement procedures is one of the main differences with the United States.[206] The EU-Korea FTA does create a separate procedure to discuss contentious issues.[207] The relevant provisions, however, are drafted in a way that avoids notions such as 'complaint', 'breach' or 'violation'. Instead, Article 13.14 notes that: "A Party may request consultations with the other Party regarding any matter of mutual interest arising under this Chapter". Although the agreement expressly provides that this may be triggered by a communication from a Domestic Advisory Group, parties are free to establish systems that allow petitions from society at large. In CETA this became formalized, as the agreement states that parties "shall be open to receive and give due consideration to submissions from the public."[208] There is no nationality requirement.

The ILO is explicitly mentioned as an organization that could be resorted to for advice in the consultation process. It is provided that:

> The Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter. The Parties shall ensure that the resolution reflects the activities of the ILO or relevant multilateral environmental organisations or bodies so as to promote greater cooperation and coherence between the work of the Parties and these organisations. Where relevant, subject to the agreement of the Parties, they can seek advice of these organisations or bodies.[209]

205 Art 17.7.5 US-Colombia FTA.

206 The labour clause in the Cotonou Agreement is not exempted from dispute settlement. However, the content of the clause is such that it can be deemed merely promotional. See: Samantha Velluti, 'The Promotion and Integration of Human Rights in EU External Trade Relations' (2016) 32 Utrecht Journal of International and European Law 41, 56.

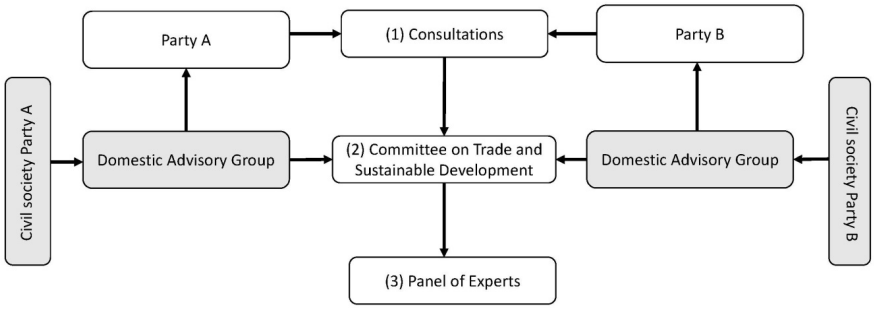
207 The EU-Korea FTA does not contain a provision similar to Art 6.2 of the Agreement on Labour Between the EFTA States and Honk Kong, China, which contains an explicit prohibition to "refer any difference arising from this Agreement to any third party or international tribunal for settlement."

208 Art 23.8.5 CETA.

209 Art 13.14(2) EU-Korea FTA.

If governmental consultations cannot resolve the matter a Party may request that the Committee on Trade and Sustainable Development be convened. Eventually, "the matter" may be brought before a Panel of Experts. The Panel may receive information and advice from the parties, the Domestic Advisory Groups and relevant international organizations. Upon publication of the report by the Panel, "the Parties shall make their best efforts to accommodate [its] advice or recommendations".[210] No remedies may be provided, unlike in the case of breaches of other chapters, which are heard by arbitral tribunals. So far, no cases have been submitted for review by the Committee or the Panel of Experts, although the European Parliament has on one occasion 'urged' the Commission to hold formal consultations with Korea of freedom of association.[211] The procedure is visualized in figure 5.5.

Figure 5.5: Dispute settlement procedure EU-Korea FTA



US FTAs do not grant individuals a direct right to petition the Labour Affairs Council or the Free Trade Commission. Instead, individuals submit petitions to a state party. So far petitions have been brought against Guatemala (2008), Bahrain (2011), the Dominican Republic (2011), Honduras (2012), Peru (2010 and 2015) and Colombia (2017) based on their respective trade agreements with the United States. Many of the petitions are brought by coalitions of NGOs and trade unions from both the (potential) applicant as well as the (potential) respondent state. The petition against Guatemala, which eventually led to arbitral proceedings, was co-sponsored by six Guatemalan trade unions.[212]

210 Art 13.15(2) EU-Korea FTA.

211 European Parliament, 'Report on the implementation of the Free Trade Agreement between the European Union and the Republic of Korea' (10 April 2017) 2015/2059(INI) para 5.

212 The petition process should not be considered a form of diplomatic protection, in which a state invokes the responsibility of another state for injury caused to a natural or legal

The *US–Guatemala* case is the only instance in which a state has resorted to arbitration in order to enforce a labour provision in a free trade agreement.[213]

The course of the *US–Guatemala* case shows that the procedures and time-limits can be applied in a flexible manner. The US Department of Labor received the trade union submission in April 2008 and published its report in January 2009.[214] It found significant shortcomings in the enforcement of Guatemala labour legislation. As the government cooperated, the Office of Trade and Labor Affairs did not recommend instituting consultations pursuant to Article 16.6 CAFTA-DR, but continued to monitor the implementation of its recommendations. After actions by Guatemala were deemed insufficient, the United States requested formal consultations in July 2010. Talks were suspended one year later, and the US requested the establishment of an arbitral tribunal in August 2011. This prompted Guatemala to sign a comprehensive enforcement plan in April 2013, after which the US suspended its request indefinitely. In September 2014, the US reinstated its request, and filed its initial written submissions two months later. The decision was published in June 2017, more than nine years after the initial complaint. While the total length of the procedure could be indicative of an ineffective and excessively long trajectory to improve the enforcement of domestic labour law in Guatemala, a closer look at the various steps undertaken shows two things. Firstly, that the threat of arbitration may be leveraged to prompt a political agreement. Secondly, and related, the fact that the United States has not rushed towards an arbitral procedure and a possible monetary penalty is a further indication that reproaches of 'protectionist intent' are unwarranted.

The dispute settlement procedures in US FTAs have largely remained the same since the agreement with Jordan. This is not true for the sanctions that are provided for. The US-Jordan FTA is rather succinct on this point, and holds that upon receipt of a Panel report the Joint Committee "shall endeavour to resolve the dispute."[215] If the Committee fails in this task, "the affected Party shall be entitled to take any appropriate and commensurate measure."[216] From the 2005 US-Australia FTA onwards the dispute settlement provisions

person that is its national. In fact, no PTIA provides that only nationals of one of the parties have an interest in the observance of the labour clause, and thus a right to submit petitions. Furthermore, no PTIA labour-provision contains any notion of individual injury, although in practice this could be established. However, recognition of individual injury would confirm the fear that these provisions are a protectionist tool that can be applied to protect domestic workers or uncompetitive industries.

213 In addition to the relative novelty of PTIA labour clauses, inter-state procedures under labour or human rights instruments, such as the ILO complaints procedure and the inter-state procedure under Article 33 of the European Convention on Human Rights, are rarely used.

214 US Department of Labor, 'Public Report of Review of Office of Trade and Labor Affairs – U.S. Submission 2008-01 (Guatemala)' (16 January 2009).

215 Art 17.2(a) US-Jordan FTA.

216 Art 17.2(b) US-Jordan FTA.

were significantly expanded.[217] It created a special regime with regard to disputes arising from the labour and environmental chapters.[218] When an arbitral panel concludes that a party has breached its obligation to enforce domestic labour legislation, and the parties are subsequently unable to agree on, and implement a resolution, the Panel may impose a monetary assessment of damages.[219] It is capped at $15 million annually, adjusted for inflation. Most importantly, the aim of the monetary assessment is restorative rather than punitive as it is to be paid into a special fund "for appropriate labour or environmental initiatives, including efforts to improve or enhance labour or environmental law enforcement, as the case may be, in the territory of the Party complained against, consistent with its law."[220]

There is some discrepancy, however, between the restorative purpose of the fund and the method by which the monetary assessment is determined. As the fund purports to focus on remedying the labour rights situation in the respondent state, one would expect the monetary assessment to be based on the scope of the problem. This is not the case. The FTA indicates which factors shall be taken into account. This includes "the pervasiveness and duration of the Party's failure to effectively enforce the relevant law" and "the level of enforcement that could reasonably be expected of the Party given its resource constraints", both of which do align with the purpose of the fund. However, the arbitral tribunal shall also take into account "the bilateral trade effects of the Party's failure to effectively enforce the relevant law."[221] US FTAs that are ratified after 2007 provide that if the parties do not reach agreement on a resolution or compensation, the complaining party is allowed to suspend benefits of equivalent effect to the violation in the sector that the claim was concerned with.[222] Trade unions applauded this development, as the cap of $15 million was perceived to be inadequate. However, from a conceptual point of view the calculation of benefits of equivalent effect in the context of labour rights violations feeds the perception that labour provisions are economically motivated. Furthermore, it remains unclear how the precise amount of damages should be determined.

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217 This was first FTA to be negotiated under the Trade Act of 2002, Public Law 107-210, 107th Congress (116 Stat 933). The legislation did contain stronger negotiating objectives on labour matters, but did not explicitly state US negotiation objectives with regard to the enforcement of labour clauses.

218 Art 21.12 US-Australia FTA.

219 However, if the respondent State fails to pay the monetary assessment the complaining State "may take other appropriate steps to collect the assessment or otherwise secure compliance," including suspension of benefits, Art 20.17(5) CAFTA-DR.

220 Art 21.12(4) US-Australia FTA. The fund is administered by a joint governmental committee.

221 Art 21.12.2(a) US-Australia FTA.

222 Art 21.16 US-Peru FTA.

5.8 Relationship between ILO standards and PTIA labour provisions

5.8.1 Introduction

Like any norm of international law, labour standards found in preferential trade and investment agreements will need to be interpreted when applied in a specific situation. The main question that arises in this context is the relationship between PTIA labour provisions and ILO standards: to what extent are the latter relevant for the interpretation of the former? Section 5.8.2 examines the risk of fragmentation caused by a multiplicity of labour norms. Section 5.8.3 looks at the systemic integration of international law and the VCLT framework. Sections 5.8.4 and 5.8.5 assess to what extent that legal framework is applied in practice, both in the context of PTIA labour provisions and the case-law of the European Court of Human Rights.

5.8.2 Multiplicity of labour norms and the risk of fragmentation

Incoherence between ILO standards and labour clauses in economic agreements is not a new concern. In 1947, during the negotiations over the Havana Charter for an International Trade Organization, the Turkish delegate "felt that fair labour standards should not be defined or dealt with in the Charter but should be left to international conventions under the ILO. Overlapping and duplication should be avoided."[223] It was thus explicitly provided that "in all matters relating to labour standards ... [the International Trade Organization] shall consult and co-operate with the International Labour Organisation."[224] The same problem was recognized in relation to international human rights law. Wilfred Jenks, who held various positions within the ILO including that of Director-General, wrote as early as 1953 about the overlap between the (detailed) international labour code and the (more ambiguous) drafts of the ICCPR and ICESCR. Jenks argued that: "The difficulty of avoiding inconsistencies and conflict between statements of general principle which cannot, by their very nature, contain the qualifications and exceptions necessary to make them workable in practice and the detailed instruments on the subject which embody such reservations and exceptions is considerable."[225] With the rise of labour

223 United Nations Conference on Trade and Employment (8 December 1947) E/CONF.2/C.1/SR.6, 3.

224 Article 7.3 Havana Charter.

225 Wilfred Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 British Yearbook of International Law 401, 409-410.

provisions in trade and investment agreement this point has only gained in relevance.[226]

Within the broader debate on fragmentation of international law, the term 'coherence' may refer to different juxtapositions. The previous chapter concluded that it is unlikely that international investment law conflicts with international labour standards: a "basic situation of situation of incompatibility" in the words of the International Law Commission.[227] In these situations, the fulfilment of one rule leads to a violation of another rule. This problem can occur between legal orders (external coherence) and within legal orders (internal coherence).[228] Despite warnings from trade unions, NGOs and some scholars, it was concluded that it is unlikely that situations arise in which international labour law and international investment law are truly incompatible.

The challenge that PTIA labour provisions pose is not that they could be trumped by other norms of international law, but rather whether a coherent interpretation with the existing body of international labour law can be assured. While many PTIAs recognize the existence of, and connection with, a pre-existing body of law,[229] they rarely provide clarity on whether, and

226 The shift towards rules-based labour mechanisms in international economic law, as opposed to allowing unilateral trade restrictions, is also beneficial to the legitimacy of the ILO. As former ILO Director-General Hansenne stated, "our supervisory machinery could suffer if the conclusions that result from it are used in a context of coercion." International Labour Conference (81st Session) Report of the Director-General: Defending Values, Promoting Change (Geneva 1994) 58-59. This point is not relevant in the context of PTIAs, however, but applies to unilateral trade restrictions.

227 International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission' (13 April 2006) UN Doc A/CN.4/L.682, as corrected (11 August 2006) UN Doc A/CN.4/L.682/Corr.1, para 24.

228 Frank Hendrickx and Pieter Pecinovky, 'EU economic governance and labour rights: diversity and coherence in the EU, the Council of Europe and ILO instruments' in Axel Marx and others (eds), *Global Governance of Labor Rights: Assessing the Effectiveness of Transnational Public and Private Policy Initiatives* (Edward Elgar Publishing 2016) 119. An example of an internal coherence issue are the judgements by the Court of Justice of the European Union (CJEU) in *Viking* and *Laval*, in which the CJEU restricted the right to freedom of association as it interfered with the freedom of establishment and the free movement of services, respectively.

229 For example, the preamble of the US-Colombia FTA provides that the Parties *inter alia* intend to: "Protect, enhance, and enforce basic workers' rights, strengthen their cooperation on labor matters, and build on their respective international commitments on labor matters." The European Union's draft texts for the TTIP negotiations take a different approach. The four fundamental labour rights are dealt with in separate articles, which stress the importance of the ILO legal framework. For example, Article 5.1 provides that: The Parties underline their commitment to protecting the freedom of association and the right to collective bargaining, and recognise the importance of international rules and agreements in this area, such as ILO Conventions 87 and 98, the UN Universal Declaration of Human Rights of 1948, the UN International Covenants on Civil and Political Rights and on Economic Social and Cultural Rights of 1966. European Commission, 'Trade and Sustainable

if so which, ILO norms can be taken into account when interpreting non-derogation or improvement clauses. To the contrary, rather than clearly 'appropriating' ILO norms for the interpretation of non-derogation and improvement clauses, these clauses seem to be drafted in a way that makes their normative content even more indeterminate, when referring to the 1998 Declaration or the concept of 'internationally recognized labour rights' (IRLR).

PTIA labour provisions interact with the legal framework of the ILO in four ways. First, the scope of both non-derogation and improvement clauses is typically limited to a subset of ILO conventions, the 1998 Declaration or the IRLR. This invokes interpretative questions about the scope of the legal obligation. For example, are states obliged not to derogate from obligations concerning the right to strike when the non-derogation clause covers freedom of association and collective bargaining, but does not explicitly mention the right to strike? The ILO's supervisory bodies certainly think so,[230] but should this convince an arbitral tribunal established under a free trade agreement? The draft USMCA contains a footnote stating that the right to strike is indeed 'linked to' freedom of association.[231] But this is just one interpretative issue that could arise, and tribunals would need to determine whether such footnotes are mere clarifications or that without these explicit references, the right to strike would not be protected.

Second, states may contest whether a legislative *change* is to be characterized as a *derogation*. Treaties often use broad and binary terms, referring to "relaxing"[232] or "derogating" in derogation clauses and to "improvements" in treaty provisions that aim to attain a certain level of labour standards.[233]

Development' (2015) <http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153923.pdf> accessed 24 June 2018.

230 International Labour Organization, 'Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO' (5th edn, International Labour Office 2006) para 520.

231 Art 23.3 fn 5 USMCA.

232 The 2001 US-Jordan FTA holds that "The Parties recognize that it is inappropriate to encourage trade by *relaxing* domestic labor laws." Art 6.2 US-Jordan FTA (emphasis added). The word "relax" is also used in various BITs of the Belgium-Luxembourg Economic Union. Article 21 of the Japan-Colombia BIT also uses the phrase "relaxing its laws."

233 Similarly, Compa argues that: "'High road' versus 'low road is a common distinction in international labor rights discourse, at least among labor rights advocates. The former generally refers to employment policies promoting workers' education and training, high skills, high wages, high productivity, strong unions, universal social insurance, high labor standards, effective enforcement of labor laws, and other characteristics of a thriving industrial democracy with growth in workers' living standards. The latter generally implies violations of workers' rights, restrictions on union organizing and collective bargaining, deliberate suppression of wages below levels that workers' productivity should afford them, widespread sweatshop conditions that may include child labor, exclusion of large groups of workers (often women and minorities) from the formal labor market, and other features of a labor market that fail to serve workers but may sustain the enrichment of owners and investors. Lance Compa, 'The Multilateral Agreement on Investment and International Labor Rights: A Failed Connection' (1998) 31 Cornell International Law Journal 683, 684 at fn 2.

In practice, there is not always a clear dichotomy. For example, there may be trade-offs between individual rights and collective interests. So-called 'closed shops' are "agreements between one or more employers and one or more workers' organisations, according to which an individual can only be employed or retain her job upon condition of membership to a specific union."[234] This enables trade unions to bargain more effectively, as they are backed by the full workforce. However, from the perspective of individual workers, freedom of association also encompasses the freedom not to associate with other workers.[235] The prohibition of closed shops would thus 'weaken or reduce labour protection' from the perspective of trade unions, but it is compliant with international human rights law.

Third, the level of detail of non-derogation clauses may be contested. Assuming that the right to freedom of association and collective bargaining falls under the scope of a PTIA labour clause and that the measure satisfies the economic benchmark, would a state that repeals "dissuasive sanctions against acts of anti-union discrimination" breach the non-derogation clause?[236] And what about a state that obliges trade union members to vote in ballots,[237] or a state that prohibits trade union leaders from receiving remuneration?[238] These acts are all condemned by the ILO Committee on Freedom of Association. The most recent Digest of Decisions and Principles contains 1125 paragraphs, while the CEACR's most recent report, which is published annually, is 641 pages long. Sometimes the CFA or the CEACR will have examined the exact same case that forms the subject-matter of a PTIA-based complaint. In most cases, however, one could only rely on a general rule and apply that to the case at hand.

Fourth, can 'observations' of the CEACR and statements of the CFA 'urging' a state to do something – e.g. adopting a new law, increasing its enforcement capacity – lead to an *ipso facto* breach of an improvement clause if the state does not take action? In 2008, for example, the Autonomous Confederation of Peruvian Workers (CATP) filed a complaint with the CFA, which stated *inter alia* that the Peruvian Collective Labour Relations Act gives the Ministry of Labour the authority to declare strikes illegal. According to the union it does so in 90 per cent of the cases.[239] The ILO Digest on Freedom of Association, which catalogues the most important decisions of the CFA, notes that: "Re-

234 Virginia Mantouvalou, 'Is There a Human Right Not to Be a Union Member? Labour Rights under the European Convention on Human Rights' in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010) 440.

235 *Sorensen and Rasmussen v Denmark* App nos 52562/99 and 52620/99 (ECtHR, 11 January 2006).

236 International Labour Organization, 'Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO' (5th edn, International Labour Office 2006) para 822.

237 Ibid, para 427.

238 Ibid, para 458.

239 *Peru (Case No 2697)* (17 December 2008) Report of the Committee on Freedom of Association No 357 (Vol XCIII 2010 Series B No 2) para 957.

sponsibility for declaring a strike illegal should not lie with the government, but with an independent body which has the confidence of the parties involved."[240] Accordingly, the CFA lamented the Peruvian legislation and held that "while taking note that ... a draft general labour act is being processed which repeals the Collective Labour Relations Act, the Committee, like the Committee of Experts, expects that the act that is adopted will comply fully with the principles of freedom of association."[241] Article 269.3 of the EU-Peru FTA provides that:

> Each Party commits to the promotion and effective implementation in its laws and practice and in its whole territory of internationally recognised core labour standards as contained in the fundamental Conventions of the International Labour Organisation (hereinafter referred to as the "ILO"): (a) the freedom of association and the effective recognition of the right to collective bargaining ...

Arguably, if Peru would not give effect to the comment of the CFA, it does not fulfil its commitment to effectively implement ILO Conventions No 87 and 98. But is Peru also in breach of its obligation under its free trade agreement with the United States? Unlike its EU counterpart, it frames the obligation in reference to the 1998 Declaration instead of ILO conventions. Article 17.2(1) holds that:

> Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights (e.g. freedom of association and the effective recognition of the right to collective bargaining), as stated in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)* (ILO Declaration).

Subsequently, it prohibits derogations from "statutes or regulations implementing paragraph 1 ... where the waiver or derogation would be *inconsistent* with a fundamental right set out in that paragraph."[242] Notably, the article contains a footnote, which applies to both the non-amendment and the improvement part, stating that: "The obligations set out in Article 17.2, as they relate to the ILO, refer only to the ILO Declaration."

The improvement and derogation clause in the US-Peru FTA point to an issue that is relevant for the interpretation of many PTIAs, namely the question whether the role of the ILO legal framework in the interpretation of PTIA labour clauses is different when these contain references to ILO conventions, or refer-

240 International Labour Organization, 'Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO' (5th edn, International Labour Office 2006) para 628.

241 *Peru (Case No 2697)* Report in which the committee requests to be kept informed of development No 357 (June 2010) para 984.

242 Art 17.2.2 US-Peru FTA (emphasis added).

ences to the 1998 Declaration or the IRLR. Importantly, the fact that the 1998 Declaration *as such* is not binding is immaterial, as it is 'incorporated by reference' in a legally binding treaty provisions it has to be given legal meaning through interpretation.[243]

5.8.3 Systemic integration of international law

Like the relationship between investment protection standards and international labour law, Article 31.3(c) VCLT provides a framework to determine whether ILO standards can be taken into account when interpreting PTIA labour provisions. The application of the VCLT rules is not an automatism. Indeed, the relationship between PTIA labour provisions and ILO standards illustrates some of the difficulties that are at the heart of the scholarly debate on how Article 31.3(c) VCLT enables the construction of "systemic relationships"[244] between different sources of international legal obligations.[245]

Paragraph (c) is deemed to serve the purpose of confirmation rather than assertion of a legal rule.[246] Therefore, a first step would be to consider whether a teleological interpretation of labour provisions would preclude further inquiry under paragraph (c). This could be the case if the object and purpose of the PTIA would warrant an interpretation of its labour provisions that makes it redundant to take into account the ILO's normative context.[247] Traditionally the object and purpose of trade and investment agreements may have been casted solely in economic terms. This is no longer the case. Indeed, many PTIAs include the proposition that there is a need for coherence. They

243 See Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford University Press 2005) 90-92 on a similar issue, namely the references to *inter alia* the Universal Declaration of Human Rights is the essential elements clauses of the EU's international agreements.

244 International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission' (13 April 2006) UN Doc A/CN.4/L.682, as corrected (11 August 2006) UN Doc A/CN.4/L.682/Corr.1, para 423.

245 Preferential trade and investment agreements often provide guidance on the interpretation of its provisions as well. Art 29.17 of CETA, for example, confirms the relevance of the VCLT but adds that: "The arbitration panel shall also take into account relevant interpretations in reports of Panels and the Appellate Body adopted by the WTO Dispute Settlement Body." The corresponding provision of CAFTA-DR notes that: "The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law." The list of objectives does not address labour specifically, but mentions the "[promotion of] conditions of fair competition."

246 Jean-Marc Sorel and Valérie Boré Eveno, 'Article 31 – Convention of 1969' in Oliver Corten and Pierre Klein (eds) *The Vienna Conventions on the Law of Treaties: A Commentary – Volume I* (Oxford University Press 2011) 826.

247 Ibid 828.

recognize the existence of, and connection with, a pre-existing body of law. For example, the preamble of the US-Colombia FTA provides that the parties *inter alia* intend to: "Protect, enhance, and enforce basic workers' rights, strengthen their cooperation on labor matters, and *build on* their respective international commitments on labor matters" (emphasis added). The European Union's draft texts for the TTIP negotiations take a different approach. The four fundamental labour rights are dealt with in separate articles, which stress the importance of the ILO legal framework. For example, Article 5(1) provides that:

> The Parties underline their commitment to protecting the freedom of association and the right to collective bargaining, and recognise the importance of international rules and agreements in this area, such as ILO Conventions 87 and 98, the UN Universal Declaration of Human Rights of 1948, the UN International Covenants on Civil and Political Rights and on Economic Social and Cultural Rights of 1966.[248]

There is thus no reason why a teleological interpretation of PTIAs would prevent recourse to ILO norms. This leads to the question *which* ILO norms may be taken into account. Paragraph (c) contains two elements that need to be examined further in order to answer this question. First, what are 'relevant rules of public international law'? And second, when are these rules 'applicable between the parties'. The latter has proven to be especially problematic. In the *EC–Biotech* dispute, for example, the WTO Panel refused to take the Cartagena Protocol into account as not all WTO members had not ratified it.[249] Villiger in his commentary to the VCLT also supports the view that 'applicable' means 'ratified by all parties to the treaty that needs to be interpreted'.[250] This poses a particularly high threshold for multilateral agreements.

Other authors have advanced the argument that ratification is not necessary. McLachlan, for example, takes a broader perspective and distinguishes four possibilities. These are, when applied to the PTIA-ILO relationship: (1) all parties to the PTIA need to be parties to the ILO convention used to interpret it, (2) all parties to the dispute need to be parties to the ILO convention, (3) the rule in the ILO convention is a rule of customary international law, or (4) all parties to the PTIA implicitly accept or tolerate the rules contained in the ILO conventions.[251] He acquired the fourth option from the work of Pauwelyn,

248 European Commission, 'Trade and Sustainable Development' (2015) <http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153923.pdf> accessed 24 June 2018.

249 WTO, *European Communities: Measures Affecting the Marketing and Approval of Biotech Products – Reports of the Panel* (29 September 2006) WT/DS291/R, WT/DS292/R, WT/DS293/R, para 7.75.

250 Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 433.

251 Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention' (2005) 54 International and Comparative Law Quarterly 279, 314-315.

and observes that it has been applied in some WTO Appellate Body decisions. Pauwelyn speaks of implicit acceptance or toleration when "the rule can reasonably be said to express the common intentions or understanding of all members as to what the particular WTO term means."[252] Also Griffith in his dissenting opinion in the Mox Plant arbitration perceives non-ratified instruments relevant as they may have "relevant normative and evidentiary value."[253] With respect to the interpretative difficulties caused by the references to 1998 Declaration and the IRLR, the notion of 'implicit acceptance' is particularly appealing.

The notion that PTIA labour provisions which only refer to the 1998 Declaration or the IRLR should nonetheless be interpreted in light of ILO law also finds support in the other element of Article 31.3(c), which refers to the *relevant* rules of public international law. Indeed, it would be difficult to sustain an argument that ILO norms are not relevant.[254] More problematic is the second prong, namely what is meant by 'rules of international law'. Are only ILO conventions covered, or also the recommendations and the interpretative work of its supervisory bodies? The International Law Commission in its report on the fragmentation of international law aligns the term at a minimum with the sources of international law that are found in Article 38.1(a)-(c) of the ICJ Statute.[255] It does not explicitly consider whether the subsidiary sources of international law – judicial decisions and legal doctrine – found in paragraph (d) of that article are covered. Other sources of international law that are not

252 Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press 2003) 257-63 supports this approach in the case of the WTO Covered Agreements. Bruno Simma and Theodore Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in Christina Binder et al (eds) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 697-698 reiterate this point in the context of the 'harmonization' of human rights and investment law.

253 Permanent Court of Arbitration, *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention: Ireland v United Kingdom-Final Award* (2 July 2003) (2003) 42 ILM 1118 (dissenting opinion Griffith para 10.)

254 Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 433.

255 International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission' (13 April 2006) UN Doc A/CN.4/L.682, as corrected (11 August 2006) UN Doc A/CN.4/L.682/Corr.1, para 426(b) "The formulation refers to rules of international law in general. The words cover all the sources of international law, including custom, general principles, and, where applicable, other treaties." See also Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers 2009) 433 who argues that it includes all the sources found in Article 38(1) ICJ Statute.

included in Article 38 – unilateral declarations and binding decisions of international organizations – are mentioned neither.[256]

As the relevant ILO conventions themselves are also rather succinct, they can only play a significant role in the interpretation of PTIA labour provisions if dispute settlement bodies can rely on the full 'acquis' of the conventions, i.e. the relevant recommendations and the jurisprudence of the CEACR and CFA. But these do not seem to fit within the confinements of Article 31.3(c)VCLT. While the article thus carries the promise of 'integrating' ILO standards and PTIA labour provisions, two problems remain: (1) can an ILO convention been taken into account when it is not ratified by one of the PTIA state parties, and (2) should the acquis of ILO conventions be ignored or not?

Applying the theoretical framework of Article 31.3(c)VCLT to the question that was raised does not provide a univocal answer. Although Orakhelashvili argues that "the rules on treaty interpretation are fixed rules and do not permit the interpreter a free choice among interpretative methods,"[257] Peat and Windsor observe "a myopic focus on the rules of treaty interpretation in Articles 31-33 of the VCLT."[258] PTIAs themselves can provide more clarity, but they rarely do so. CETA is one example, as it provides that the Panel of Experts – which is the last step in the dispute settlement procedure – "should seek information from the ILO, including any pertinent available interpretative guidance, findings or decisions adopted by the ILO."[259] The EU-Singapore FTA contains a similar but more concise provision.[260] Also absent such provisions, however, interpreters of 'non-ILO labour standards' tend to take the full acquis of ILO standards into account.

5.8.4 Early practice in PTIA labour disputes

The analysis above on the application of enforcement obligations in monist jurisdictions highlighted the plethora of references to ILO standards and other international instruments in petitions and NAO reviews. These references did not intend to interpret a PTIA norm, but argued that because a state failed to effectively enforce an ILO obligation it *ipso facto* failed to oblige by the PTIA

256 Nonetheless, this narrow reading of the term has not prevented the European Court of Human Rights to consider UN Security Council resolutions under Article 31.3(c) in *Loizidou v Turkey* App no 15318/89 (ECtHR, 18 December 1996), paras 42-44.

257 Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 309.

258 Daniel Peat and Matthew Windsor, 'Playing the Game of Interpretation: On Meaning and Metaphor in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds) *Interpretation in International Law* (Oxford University Press 2015) 4.

259 Art 23.10.9 CETA.

260 Art 12.17.7 EU-Singapore FTA.

norm. Furthermore, most of the arguments were brought by unions and NGOs, and the quality of the reasoning varied widely.

These cases can be distinguished from the petition against Bahrain, that was submitted by the AFL-CIO in 2011 under the US-Bahrain FTA. The case concerned the country's alleged failure to "strive to ensure" that it "recognizes and protects" the 1998 Declaration's principles in its domestic laws.[261] In its review, the US Government frequently cites the ILO's Committee on Freedom of Association, which had been monitoring the situation in Bahrain since 2011, when one Bahraini and two international trade unions submitted a CFA complaint based on partially overlapping facts concerning the suppression of union activities in the wake of the Arab spring.[262] As Bahrain did not give effect to the findings of the CFA, the US Government concluded that: "the Government of Bahrain has not remedied shortcomings in its legal framework governing freedom of association, either by enacting reforms recommended by the ILO Committee on Freedom of Association or otherwise".[263] It requested formal consultations in May 2013, [264] which according to the website of the US Department of Labor are still ongoing.[265]

Also in a more recent report concerning a petition against Colombia, the US Government 'recommends' the Government of Colombia to implement recommendations made by the CEACR.[266] Notably, both the US and the Canadian Rules of Procedure that are used to determine the admissibility of petitions note that it is taken into account whether "the matter or a related matter is pending before an international body."[267] But whereas for international and regional human rights bodies this would typically bar admissibility, the existence of parallel procedures at the ILO only seems to provide more comfort to take on a case.[268]

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261 Art 15.1.1 US-Bahrain FTA.

262 *Bahrain (Case No 2882)* (16 June 2011) Report of the Committee on Freedom of Association No 364) (Vol XCV Series B No 2).

263 US Department of Labor, 'Public report of Review of U.S. Submission 2011-01 (Bahrain)' (20 December 2012) iii.

264 Letter from the US Trade Representative and the Acting US Secretary of Labor to the Government of Bahrain, 'Request for consultations under the US-Bahrain FTA' (6 May 2013).

265 Submissions under the Labor Provisions of Free Trade Agreements <https://www.dol.gov/agencies/ilab/our-work/trade/fta-submissions> accessed 24 June 2018.

266 US Department of Labor, 'Public Report of Review of Office of Trade and Labor Affairs – U.S. Submission 2016-02 (Colombia)' (11 January 2017) 6, 27, 35.

267 Section G 2(g), US Procedural Guidelines, 71 FR 76691 (21 December 2006); the Canadian NAO requires to be informed about about "any proceedings before international bodies", Art 3(ii) Guidelines for Public Communications to the Canadian National Administrative Office under Labour Cooperation Agreements or Chapters <https://www.canada.ca/en/employment-social-development/services/labour-relations/international/agreements/guidelines.html> accessed 24 June 2018.

268 The question whether a pending complaint before the ILO Committee on Freedom of Association should be considered a parallel international procedure has been answered differently at the Human Rights Committee and the European Court of Human Rights.

In addition to statements from the US government that indicate a substantial reliance on the ILO, one court and one tribunal have commented upon the role of ILO standards for the interpretation of PTIA labour provisions. Perhaps unsurprisingly given the specific language in the EU-Singapore FTA, the ECJ in its Opinion remarked that because the improvement provision refers to ILO standards, this provision is "a matter covered by the interpretation, mediation and dispute settlement mechanisms that are in force for those international agreements."[269]

More interesting is the report of the tribunal in *US–Guatemala*, as this concerned a dispute over an agreement that contains no direct references to ILO conventions or the organization's supervisory mechanisms. However, after explicitly mentioning the importance of Article 31.3(c)VCLT, the arbitral panel states that:

> All CAFTA-DR Parties are members of the ILO. By virtue of their membership in that Organization, they are bound by an obligation enunciated in the ILO's Declaration on Fundamental Principles and Rights at Work and grounded in the ILO Constitution to "respect, promote and realize… principles concerning… fundamental rights, namely… (a) freedom of association and the effective recognition of the right to collective bargaining." The interpretation by the relevant committees of the ILO of such principles reflects a clear understanding that retaliatory dismissals are serious violations that can be expected to thwart freedom of association and the rights to organize and bargain collectively. It also recognizes that protecting such internationally recognized rights by law requires prohibition and prompt and effective redress of such dismissals.[270]

In this case, the tribunal cites the 'Digest of Decisions' of the ILO Committee on Freedom of Association. As it uses the word 'committees' in plural, it can be expected that it would give equal weight to the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and *ad hoc* Commissions of Inquiry. While CAFTA-DR's non-enforcement provision only requires a determination that the statutes or regulations which are allegedly

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The former characterized the CFA procedure as a 'study' and added that "although such studies might refer to or draw on information concerning individuals, cannot be seen as being the same matter as the examination of individual cases within the meaning of article 5, paragraph 2 (a), of the Optional Protocol." *Baboeram et al. v Suriname* (1983) 2 Selected Decisions of the Human Rights Committee 172, para 9.1. The ECtHR and its predecessor took the opposite approach and sees the CFA as a complains mechanism. *Cereceda Martin v Spain* App no 16358/90 16358/90 (EComHR, 12 October 1992) 73 DR 120, 134-135, dismissing a complaint because the CFA had already examined an application "concerning substantially the same subject matter"; *Fédération hellénique des syndicats des employés du secteur bancaire v Greece* App no 72808/10 (ECtHR, 6 December 2011) para 36.

269 Case C-2/15 *Conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore* [2017] ECLI:EU:C:2017:376, para 154.

270 *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Final Report of the Panel (14 June 2017) para 427.

not enforced fall within the scope on the 'internationally recognized labour rights', the panel goes one step further and indicates that the substantive work of the ILO committees is taken into account to determine the obligations under PTIA labour clauses. This finding is remarkably consistent with the practice of international and regional human rights bodies.

5.8.5 Lessons from the integration of human rights and labour law

International judicial and quasi-judicial human rights bodies provide a vast source of practice on the use of ILO standards.[271] Traditionally, there was a divide between the use of ILO standards in the context of civil and political rights, and economic and social rights. Committees that supervise compliance with socio-economic rights treaties, such as the Committee on Economic, Social and Cultural Rights and the European Committee of Social Rights, have always maintained close ties with the ILO. In its review of state parties' reports, the CESCR has asked questions about the compatibility of domestic legislation with ILO standards, rather than framing it purely as an issue of compliance with the ICESCR.[272] It has also reiterated recommendations of the ILO,[273] relied on ILO definitions,[274] and clarified that states may (with respect to some ICESCR provisions) refer to the reports that were submitted to the ILO instead of providing detailed information.[275] In its concluding observations, the CESCR has consistently urged states to ratify ILO conventions,[276] and relied on them in the interpretation of ICESCR provisions.[277]

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271 On the use of ILO standards, including the pronouncements of the supervisory bodies, see e.g.: Constance Thomas, Martin Oelz and Xavier Beaudonnet, 'The use of international labour law in domestic courts: Theory, recent jurisprudence, and practical implications' in Jean-Claude Javillier, Bernard Gernigon and Georges Politakis (eds) *Les normes internationales du travail : un patrimoine pour l'avenir : me´langes en l'honneur de Nicolas Valticos* (International Labour Office 2004) and Eric Gravel and Quentin Delpech, 'International labour standards: Recent developments in complementarity between the international and national supervisory systems' (2008) 147 International Labour Review 403.

272 Committee on Economic, Social and Cultural Rights, 'Report on the Third Session' (6-24 February 1989) E/1989/22/E/C.12/1989/5, para 108.

273 Committee on Economic, Social and Cultural Rights, 'Report on the Fifth Session' (26 November-14 December 1991) E/1991/23/E/C.12/1990/8, 56.

274 See for example: Committee on Economic, Social and Cultural Rights, 'General Comment No 23: The Right to Just and Favourable Conditions of Work' (27 April 2016) E/C.12/GC/23, 3, 6 on definitions of remuneration and minimum wages.

275 Committee on Economic, Social and Cultural Rights, 'Report on the Fifth Session' (26 November-14 December 1991) E/1991/23/E/C.12/1990/8, 90.

276 For example: Committee on Economic, Social and Cultural Rights, 'Concluding observations of the Committee on Economic, Social and Cultural Rights: Guatemala' (12 December 2003) E/C.12/1/Add.93, para 31.

277 Committee on Economic, Social and Cultural Rights, 'General Comment No 19: The right to social security (art. 9)' (4 February 2008) E/C.12/GC/19.

This is different for the HRC and the ECtHR.[278] Their respective conventions, the ICCPR and the ECHR, contain two labour-related human rights: the right to freedom of association and the right not to be subjected to forced or compulsory labour. In addition, both conventions prohibit discriminatory treatment but are silent on its application in the context of employment. Mantouvalou notes that:

> in a line of cases that were decided in the 1970s, 1980s and 1990s, looking at trade union rights, the Court repeatedly ruled that when a right can be classified as social and is protected in the ESC or in instruments of the ILO, it ought to be excluded from the ECHR.[279]

Before 2008 the ECtHR had never examined ILO conventions or the work of its supervisory bodies for the interpretation of the right to freedom of association enshrined in the European Convention.[280] In *Demir and Baykara v Turkey* the Court reversed its position. In this case the Turkish Supreme Court had denied municipal civil servants the right to negotiate a collective agreement with their employer.[281] Although the ILO Convention on the Right to Organize and Collective Bargaining states in Article 6 that it "does not deal with the position of public servants engaged in the administration of the State", the ILO's CEACR has held that this does not mean that all public servants are excluded from protection under the Convention.[282] The CFA's Digest of Decisions provides the more detailed rule that: "Local public service employees should be able effectively to establish organizations of their own choosing, and these organizations should enjoy the full right to further and defend the interests of the

278 The Inter-American Court of Human Rights has also drawn extensively on the work of the ILO. Compared to the HRC and the ECtHR, however, the IACHR has not radically reversed its position in a way the other two institutions did. See further: Franz Ebert and Martin Oelz, 'Bridging the gap between labour rights and human rights: The role of ILO law in regional human rights courts' (IILS Discussion Paper DP/212/2012) 8-12.

279 Virginia Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 Human Rights Law Review 529, 532. This was different with regard to forced labour, which is explicitly mentioned in the ECHR. In cases dealing with forced labour the ECtHR has relied on ILO Conventions and the work of the CEASR since 1983. *Van der Mussele v Belgium* App no 8919/80 (ECtHR, 23 November 1983), paras 32, 35.

280 Franz Ebert and Martin Oelz, 'Bridging the gap between labour rights and human rights: The role of ILO law in regional human rights courts' (IILS Discussion Paper DP/212/2012) 9-10. The Court had used the ILO Forced Labour Convention in various earlier cases concerning Article 4 ECHR.

281 *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008).

282 International Labour Conference (81st Session) Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4B) Freedom of Association and Collective Bargaining (Geneva 1994) para 200.

workers whom they represent."[283] On the basis of these interpretations of ILO Convention 98, as well as various other international human rights documents, the ECtHR found a violation of the right to freedom of association.

In its reasoning, the Court firstly noted that it had applied Article 31.3(c) VCLT in previous cases in order to take into account "any relevant rules of international law applicable in the relations between the parties."[284] It reiterates a wide range of cases in which the sources relied upon were either not ratified by the respondent state, or "intrinsically non-binding".[285] The latter included resolutions and recommendations from the organs of the Council of Europe. With regard to the use of non-ratified treaties, the Court considered this to be acceptable as long as "the relevant international instruments denote a continuous evolution in the norms and principles applied in international law".[286]

The novel element of the *Demir* judgment concerned the Court's departure from the conceptual separation between civil and political rights on the one hand, and socio-economic rights on the other. This enabled the Court to take an "integrated approach" towards the interpretation of the ECHR.[287] Ebert and Oelz have argued "the chances of success of a complaint filed ... are likely to increase where the plaintiffs make references to ILO instruments and jurisprudence in their submissions and argue in favour of an interpretation ... in light of the relevant international labour law instruments."[288] Forowicz concludes that: "The ECtHR's willingness to refer to external sources is often conditioned by the similarities that exist between the ECHR and other inter-

283 International Labour Organization, 'Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO' (5th edn, International Labour Office 2006) para 230.

284 *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008) paras 61 and 67.

285 Ibid, para 74-86.

286 Ibid, para 86.

287 Virginia Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 Human Rights Law Review 529. Before, the scope of the ECHR was expressly limited by reference to the existence of a separate system of economic and social rights. According to Scott: "A ceiling effect is created when an institution (for example, one of the UN human rights treaty bodies) refers to human rights commitments found in a legal instrument other than its own as a reason to limit the meaning, and thus the scope of protection, given to a right in that institution's own instrument." Craig Scott, 'Reaching Beyond (Without Abandoning) the Category of ''Economic, Social and ?Cultural Rights''' (1999) 21 Human Rights Quarterly 633, 638-39.

288 Franz Ebert and Martin Oelz, 'Bridging the gap between labour rights and human rights: The role of ILO law in regional human rights courts' (IILS Discussion Paper DP/212/2012) 13.

national instruments .... Being unable to find guidance within their own jurisdiction, they turned to documents which most resembled the ECHR."[289]

The International Court of Justice has acted similarly deferential towards treaties' 'primary' interpreters. In the *Diallo* case, the court needed to ascertain the applicability of two provisions in the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR). The Court relied extensively on the Human Rights Committee and the African Commission on Human and Peoples' Rights, and motivated this as follows:

> Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.[290]

Hence, even without a reference to Article 31.3(c) VCLT or a discussion of what can be considered "rules of international law," the court simply took account of the work of the committees. This point was not challenged in any of the separate opinions. Similar to the ILO supervisory bodies, the Human Rights Committee does not have an explicit mandate to interpret the ICCPR, but nonetheless does so through its concluding observations, assessments of individual complaints and general comments.[291] The ICJ primarily based its conclusion on the exercise of its own 'judicial function' and did not discuss the possible lack of interpretative authority of the HRC. Instead, it emphasized the need for coherence in international law.

5.9 Concluding remarks

Chapters 3 and 4 focused on different types of constraints imposed by multilateral trade law and international investment agreements, respectively. At the heart of this chapter were the labour provisions in preferential trade and investment treaties that aim to protect existing levels of labour standards and

289 Magdalena Forowicz, 'Factors influencing the reception of international law in the ECtHR's case law: an overview' in Mads Andenas and Eirik Bjorge (eds) *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015) 201.

290 *Affaire Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Judgment) [2010] ICJ Rep 582, para 66.

291 Unlike the ILO supervisory bodies, however, the ICCPR does not mention an alternative institution that does have this power. As the ICJ has never interpreted ILO Conventions, it has not elaborated upon this difference.

induce improvements. While the former is primarily achieved though the inclusion of clear and – in the case of the United States – enforceable provisions, the goal to improve standards is realized through a combination of (hortatory) treaty language, pre-ratification conditionalities and post-ratification mechanisms for dialogue and technical cooperation. Since the NAALC was adopted in 1994, the number of PTIAs that contain such clauses has proliferated rapidly. Consequently, many states now have binding international labour obligations emanating from a source other than ILO or human rights treaties. The focus of this chapter on two models – the US model of enforceable idiosyncratic standards and the EU model of non-enforceable provisions that are closely aligned with the ILO vocabulary – does not do justice to all treaties that are currently in force, but served the purpose of exposing some of the main debates behind PTIA labour provisions.

The adoption of the 1998 Declaration has had a catalyzing effect on the inclusion of labour clauses in trade and investment agreements. This is somewhat ironic, as its drafting history was closely connected to the failure to include a labour clause in the WTO Agreements. De Wet thus called the 1998 Declaration "a feasible substitute" for a WTO labour clause.[292] Kenner has argued that the cessation of attempts at the WTO represented a "decoupling on trade and labour issues by repackaging 'core' labour standards as fundamental rights to fit within the emerging global human rights agenda."[293] Paradoxically however, this initial decoupling has enabled rather than constrained efforts to include labour clauses in PTIAs. The human rights frame and the consensus on a subset of four 'fundamental' norms makes a labour clause that is based on the 1998 Declaration less controversial than a purely economically motivated, open-ended concept like 'social dumping'.

Nonetheless, the rationale behind PTIA labour clauses is economic. The arbitration between the United States and Guatemala has demonstrated that in order to prove non-compliance with a non-derogation provision, the burden of proof on the claimant to demonstrate an economic effect is rather high. This had been underestimated by the United States, and may prove to be a significant hurdle for future cases. The European Union may perceive the outcome of the *US–Guatemala* arbitration as a vindication of its model, which relies on multi-stakeholder dialogue and moral suasion.[294] There have been no studies that evaluate the (relative) effectiveness of US and EU approaches. Such questions also fall outside the scope of this study. From a conceptual perspective,

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292 Erika de Wet, 'Governance through Promotion and Persuasion: The 1998 ILO Declaration on Fundamental Principles and Rights at Work' (2008) 9 German Law Journal 1429, 1436.

293 Jeffrey Kenner, 'Economic Partnership Agreements: Enhancing the Labour Dimension of Global Governance?' in Bart van Vooren, Steven Blockmans and Jan Wouters (eds) *The EU's Role in Global Governance* (Oxford University Press 2013) 308-309.

294 Comment made by Joost Pauwelyn in a seminar on the *US–Guatemala* case by ICTSD on 19 September 2017 <https://www.ictsd.org/themes/trade-law/events/talking-disputes-the-guatemala-us-labour-enforcement-dispute-under-cafta> accessed 24 June 2018.

US treaties have received more criticism as they rely upon indeterminate concepts like 'internationally recognized labour rights' whereas the European Union adhered more formally to ILO standards. Although the United States lost its first labour case, the analysis of the panel does show that there is no risk that US PTIAs create a more indeterminate system of international labour law. The legal framework of the ILO is taken into account when assessing a trade partner's labour legislation prior to ratification, the US Department of Labor refers to ILO norms when its evaluates petitions, and the arbitral tribunal in *US–Guatemala* has expressly noted the importance of the jurisprudence of the ILO's supervisory bodies. There is therefore not to be expected that at the normative level, PTIA labour clauses create a parallel system of international labour law. Rather, they perform a useful role in international economic governance as they provide additional safeguards to prevent trade and investment liberalization from encroaching upon states' labour legislation.

6 Conclusions

6.1 INTRODUCTION

International labour law and economic globalization have always been closely related. When the laws of economics – e.g. comparative advantage and the division of labour – could freely work, states' efforts to improve the protection of workers would be hampered. Vice versa, if workers could not be protected because this would cause a competitive disadvantage, states could be inclined to restrict free trade. International labour law resolves this dilemma. Although today the field of law is often perceived as a sub-area of human rights, especially when focusing on the 'fundamental labour rights', it was originally seen as an area of international economic law that was not concerned with trade or investment, but with labour. Workers in states that were not part of the international economic system may have been subjected to harsh labour conditions, but there was no need to extent the benefits of international labour law to them.

Today, international labour law is no longer considered to be part of international economic law.Instead, economic globalization is facilitated by a vast amount of bilateral, regional and multilateral treaties that focus – broadly speaking – on the liberalization of trade and the protection of foreign investment. Therefore, questions concerning the interactions between these legal regimes arise. This thesis has sought to conceptualize the dynamics in two ways: international trade and investment agreements may *constrain* domestic and international labour law, or they may *support* domestic and international labour law.

This concluding chapter consists of five parts. The research question of this thesis – how do international trade and investment agreements constrain and support domestic and international labour law? – is answered in parts 6.2 and 6.3. Subsequently, part 6.4 examines economic perspectives on the linkage between labour standards and trade and investment law in light of this study. Part 6.5 comments on a main thread in the debate, namely the question whether labour provisions in international trade and investment law intend to foster 'fair competition' or 'fundamental rights'. Part 6.6 contains a final outlook for labour standards in trade and investment agreements.

6.2 CONSTRAINING AND SUPPORTING DOMESTIC LABOUR(-RELATED) LAW

International trade and investment law affect both the law that regulates labour standards within a country's own jurisdiction, as well as that country's ability to take certain trade measures in response to low(ered) labour standards elsewhere. Although the latter should be classified as domestic trade law or labour-related trade measures instead of domestic labour law, the two are closely related. This section contains the conclusions of this thesis in both areas.

Before the Second World War there was no universal rule guaranteeing most favoured nation (MFN) treatment. This meant that states could discriminate between countries depending on their level of labour regulation. If a state limited the workweek to forty hours but its trade partners did not follow suit, it was free to impose higher tariffs on goods originating from these countries in order to offset the economic burden of the new labour law. In 1948, the GATT imposed legal constraints on labour-related trade-measures. This thesis has examined the extent of these constraints, as well as the role of the Technical Barriers to Trade (TBT) Agreement that was adopted in 1994 as part of the WTO Agreements. The founding fathers of the GATT did not intend to prohibit labour-related trade measures as a means to safeguard fair labour standards without providing an alternative. Indeed, Article 7 of the Havana Charter would have created a treaty-based mechanism that obliged states to "take whatever action may be appropriate and feasible to eliminate [unfair labour] conditions within its territory." After the failure of the Havana Charter, even modest attempts to establish a working group which would discuss whether the GATT should be amended with such a clause were defeated. As such, the WTO Agreements provide no explicit guidance on two questions, which have been discussed extensively in chapter 3: (1) are low labour standards or derogations from labour standards actionable under the GATT, and (2) to what extent do the GATT and TBT Agreement constrain states to take unilateral trade restrictive measures in response to low labour standards or derogations from labour standards?

With regard to the first question, it can be concluded that there is no support for the proposition that low labour standards can breach the GATT regimes on dumping and subsidies. This follows from both a textual analysis of Articles VI and XVI and in the case of the 'social dumping' analogy also from the *travaux préparatoires*. The argument that derogations from labour standards could give rise to a so-called 'non-violation complaint' under Article XXIII GATT is more persuasive. This article provides a cause of action when "any benefit ... is being nullified or impaired" as the result of a measure which itself does not conflict with the GATT. Derogations from labour standards could have such an effect. However, since the accession negotiations of Japan in the early 1950s, no state has even attempted to bring a labour-related NVC. It would have to satisfy a rather high threshold – the measure could not have been anticipated, and it nullifies or impairs benefits – in order to obtain non-binding recom-

mendations from the Appellate Body. NVC complaints thus remain a theoretical possibility rather than a practical avenue which states are likely to pursue.

With regard to the question whether states are allowed to take unilateral trade measures in response to low labour standards elsewhere, the analysis in chapter 3 showed that they can, although the justification for such measures needs to be somewhat creative. Mandatory labelling requirements – such as a 'verified child labour free' label – could be justified under Article 2.2 TBT Agreement as they prevent 'deceptive practices'. Also with regard to measures that are to be assessed under the GATT, such as import bans, a consumer-oriented justification is most likely to succeed. Whether a t-shirt produced by children can be considered a 'like product' compared to t-shirts produced under decent labour conditions is determined on the basis of various criteria, including 'consumer taste and preferences'. The threshold is rather high, however, and it is most likely that the WTO Appellate Body would consider the two kinds of t-shirts 'like products'. That means that the measure is in breach of the GATT, unless it can be justified under one of the general exceptions listed in Article XX. As a consequence of the Appellate Body (AB) report in the *EC–Seal Products* case, it is possible to take trade-restrictive measures in response to process and production methods (PPMs) in an exporting state, as long as these measures are 'necessary to protect morals' in the importing state. Again, the locus is the consumer, whose moral standards may be harmed when they are – knowingly or unknowingly – confronted with goods produced in sweatshops.

The problem with the public morals exception of Article XX(a) GATT is twofold. First, the AB's definition of 'public morals' is so broad that its scope is by no means restricted to the fundamental labour rights, or even to internationally accepted labour standards. In theory, importing states could argue that the concept of 'living wages' is an issue of public morality in order to justify trade restrictive measures that are otherwise inconsistent with the GATT. The more creative states become, the more important the *chapeau* of Article XX will be to prevent paragraph (a) from turning into a *carte blanche* for trade restrictions. The second problem with Article XX(a) is that the consumer-oriented justification is inward-looking. This means that trade measures against child labour or forced labour products could be justified, irrespective of the effect of these measures in the exporting state. Evidence that children would switch to more hazardous forms of work as a result of the measure is irrelevant to the legal analysis under the public morals exception of the GATT. If an importing state would argue that its trade measure is not intended to protect consumers but to protect these child workers, it is unlikely that the measure will be accepted by the Appellate Body as the aim of the measure is extraterritorial.

Chapter 4 examined the relationship between international investment law and labour. It asked whether international investment agreements (IIAs) constrain the ability of host states to regulate their domestic labour market. IIAs

grant subjective rights to foreign investors, which may be invoked in response to labour-related acts and omissions by the host state. This has indeed happened in a handful of cases. Based on the structure of international investment law and an analysis of the case law, however, it can be concluded that IIAs do not constrain domestic labour law. Nonetheless, states have begun to assert their 'right to regulate'. These provisions are not necessary, as it can be assumed that states never intended to limit their sovereign powers to set labour standards. The sole exception is when states have made explicit commitments to the investor, for example in the form of a contractual stabilization clause stipulating that new (labour) legislation does not apply to the investor. Furthermore, right to regulate provisions themselves are not without problems. When more treaties will contain explicit carve-outs, right to regulate clauses and general exceptions, it will become increasingly difficult to sustain the argument that these provisions are not necessary. Does a bilateral investment treaty without a right to regulate provision accept a broader scope of liability under the fair and equitable treatment standard, for example? This is not the case at the moment, but it could be a matter of time before this argument is raised before an arbitral tribunal.

Although international trade and investment agreements do not significantly constrain states' freedom to adopt and enforce domestic labour legislation, states may be inclined to lower their standards because they hope to increase exports or attract more foreign direct investment. Similarly, they may maintain current labour standards because they fear that improving them would deteriorate their competitive position. These dynamics are not new. Indeed, the original purpose of ILO was precisely to overcome this coordination problem. At the time, the fields of international trade and investment law were in their infancy compared to international labour law. As the former grew more mature – for example through mandatory dispute settlement mechanisms that could result in 'hard' remedies such as suspension of tariff benefits and monetary assessments – the call to also address the labour coordination problem in international economic law became louder. Forty-six years after the Havana Charter, the North American Free Trade Agreement (NAFTA) was the first economic agreement to include binding labour provisions. Since NAFTA this number has rapidly proliferated. Labour provisions in preferential trade and investment agreements (PTIAs) and IIAs address four issues: (1) derogations from existing labour standards, (2) improvements of labour standards (3) domestic governance, and (4) the conduct of investors. These provisions intend to 'support' states' domestic labour legislation. Due to the latter's close connection to international investment law it has been analysed in chapter 4, while the other types formed the subject-matter of chapter 5.

While non-derogation clauses are generally regarded to be the most important type of provision, the *US–Guatemala* arbitration has cast doubt on their efficacy. The aspect that has proved to be particularly problematic is the evidential burden to determine sustained or recurring non-enforcement and

to demonstrate an economic effect. Both are especially relevant in the context of enforcement derogations as opposed to legislative derogations. It has been argued that the economic effects criterion was the real "Achilles Heel" of the case.[1] The threshold that the panel established to determine whether the 'in a manner affecting trade' criterion was satisfied consists of three elements: (1) were the companies in question exporting or competing with imports from one of the CAFTA-DR markets, (2) the effects of the failures to effectively enforce on these companies, and (3) the "competitive advantage" created by these effects.[2]

The last two elements do not follow from the text of CAFTA-DR and are unnecessarily burdensome. More fundamentally, the question should be raised whether economic benchmarks should be included in PTIAs at all. International labour law as such is based on the premise that changing domestic labour law has economic effects. This is also the reason why labour standards are included in economic agreements, and freedom of speech or the right to a fair trial are not. Article 7 of the Havana Charter merely contained the observation "that unfair labour conditions, particularly in production for export, create difficulties in international trade" which was why states were obliged to "take whatever action may be appropriate and feasible to eliminate such conditions within its territory." Arguably, in case of a dispute the responding state could have argued that the labour issue was purely domestic and had no effect on international trade whatsoever. But under current PTIAs, the applicant has to satisfy a high standard of proof. The *US–Guatemala* dispute has reinvigorated the debate over the necessity of economic effects requirements. Compa *et al* have argued that PTIAs should include language stating that the non-derogation obligation applies to scenario's "involving employers and workers in a firm or sector involved in trade" or that the economic benchmark should be abandoned altogether.[3] The latter would "make the labor chapter a human rights chapter" according to the authors.[4] This is not the case, however, as long as states do not include human rights issues unrelated to labour in their trade agreements. Nevertheless, their argument that a (strict) economic benchmark is superfluous is persuasive.

Improvement clauses require an even more comprehensive overhaul. They are phrased in hortatory language, and even some US' PTIAs preclude the

1 Lance Compa, Jeffrey Vogt, Eric Gottwald, 'Wrong Turn for Workers' Rights: The U.S.-Guatemala CAFTA Labor Arbitration Ruling – and What to do About it?' (International Labor Rights Forum, 2018) 11.

2 *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Final Report of the Panel (14 June 2017) para 449.

3 Lance Compa, Jeffrey Vogt, Eric Gottwald, 'Wrong Turn for Workers' Rights: The U.S.-Guatemala CAFTA Labor Arbitration Ruling – and What to do About it?' (International Labor Rights Forum, 2018) 30-31.

4 Ibid 31.

possibility of arbitral proceedings.[5] 'Reaffirming' existing commitments has little added value, and obfuscates the fact that improvement clauses can play an important role. Chapter 5 has therefore suggested that weakly drafted improvement 'obligations' focused on a narrow subset of labour rights could be transformed to broad *pacta de negotiando* or *contrahendo* provisions in order to stimulate meaningful negotiations between states on their legislative agendas. This would blur the dichotomy between the 'legal' side of trade-labour linkages – in the form of binding treaty obligations – and flanking measures such as pre-ratification action plans and technical assistance programmes. Inspiration may be drawn from the European Union's 'Open Method of Coordination' (OMC), the governance process which is the "dominant instrument in the integration of European social policies."[6]

With regard to provisions addressing domestic governance issues and the regulation of investors the same conclusion can be drawn: they are potentially very useful but do not receive the attention that they deserve. The former should be explicitly linked to the ILO's 'Governance Conventions' on labour inspections, employment policy and tripartism. The latter are broader in scope, and fulfil a number of different roles. Especially the practice of some African agreements to impose binding labour obligations on investors is worth exploring further as this is a novelty in international law.

Whereas this thesis has elaborated extensively on what *is* regulated by labour clauses in PTIAs and IIAs, it is just as important to consider what is not. In the analysis of the link between labour and the multilateral trade regime, the analysis focuses on the interpretation of GATT and TBT provisions and highlighted the constraints posed by the concepts such 'likeness' (Art. I and III GATT and 2 TBT), 'normal value' (Art. VI), 'subsidy' (Art. XVI), 'benefits' (Art. XXIII), and 'necessity' (Art. XX), as well as the difficulties of invoking general exception clauses for measures that have an extraterritorial effect. PTIAs and IIAs do not touch on any of these issues, except for a few (model) treaties that include a slightly different general exceptions clause. PTIAs are therefore of limited use when arguing that t-shirts made by children are not 'like' t-shirts made by adults, for example. More fundamentally, the fact that PTIAs do not create *lex specialis* on these issues attests to the practical irrelevance of these arguments, especially when the agreement contains labour obligations.[7]

5 Cf the quoted passage from the 1921 ILC above: the economic coordination problem is thus addressed by 'hard' and enforceable obligations, whereas clauses that address social injustice independently of the notion of economic competition are aspirational.

6 Beryl ter Haar, 'Open Method of Coordination: An analysis of its meaning for the development of a social Europe' (PhD thesis, Leiden University 2012) 147.

7 Art 23.6 of the draft USMCA provides that "each Party shall prohibit, through measures it considers appropriate, the importation of goods into its territory from other sources produced in whole or in part by forced or compulsory labor, including forced or compulsory child labor." However, it then clarifies that "nothing in this Article authorizes a Party to

Prominent scholars such a Dani Rodrik still advocate that states should have more space to unilaterally adopt countermeasures in response to 'social dumping' instead of going through a dispute settlement process in which the burden of proof to establish a breach of the PTIA is on the importing state, and the aim of the procedure is primarily to remedy the non-compliance instead of compensating workers in the importing states who have suffered a harm.[8] Similar concerns are raised in the context of the Generalized System of Preferences (GSP), as an increasing number of states that used to be beneficiaries of the US' and EU's GSP schemes and thus had to comply with the unilaterally imposed labour conditionalities have now signed trade agreements containing reciprocal labour obligations.[9] Although there is definitely room for improvement in PTIA labour clauses, the shift from a power-based to a rules-based enforcement system should in principle be supported.[10]

6.3 INTERACTIONS BETWEEN INTERNATIONAL TRADE, INVESTMENT AND LABOUR LAW

With the emergence of the human rights conventions in the 1950s and labour clauses in trade and investment agreements in the 1990s, there are now three main sources of international labour law. This invokes questions about the interactions between these international legal systems. The terms 'constrain' and 'support' are less relevant in this context than they are in relation to domestic labour(-related) law. This section will address (1) interactions between legal norms, (2) the broader role of the ILO and international labour standards in the context of trade and investment agreements, (3) the different roles of trade unions in the governance structures of international labour law and PTIA-based labour mechanisms.

Chapters 3, 4 and 5 all analyzed whether, and if so how, international labour law could play a role in the interpretation of international trade and investment law. As was noted in the previous section, the argument that the public morals exception of Article XX(a) GATT can be used to justify trade measures in response to *international* labour standards should be rejected, as the Appellate Body allows states broad discretion to determine their own moral

take measures that would be inconsistent with its obligations under other provisions of this Agreement, the WTO Agreement, or other international trade agreements."

8 Dani Rodrik, *Straight Talk on Trade: Ideas for a Sane World Economy* (Princeton University Press 2018) 234.

9 Gerda van Roozendaal, 'The Diffusion of Labour Standards: The Case of the US and Guatemala' (2015) 3 Politics and Governance 18, 23 who documented trade union criticism on the different sanctions and the normative benchmarks.

10 Patrick Abel, 'Comparative Conclusions on Arbitral Dispute Settlement in Trade-Labour Matters Under US FTAs,' in Henner Gött (ed) *Labour Standards in International Economic Law* (Springer 2018) 157.

standards. However, in multilateral trade law, the legal framework of the ILO plays a role in the interpretation of the *chapeau* of Article XX and in relation to the Generalized System of Preferences. The *chapeau* holds that even when a measure is 'necessary to protect public morals' it cannot be accepted when it constitutes 'arbitrary or unjustifiable discrimination'. That requires an assessment whether labour conditions in a country targeted by a trade measure are different from countries that are not targeted. The most obvious way to make an objective assessment is to rely on the ratification of ILO conventions and findings of the ILO supervisory bodies.

The relevance of labour standards for the GSP is twofold. Under the GSP, WTO member states are allowed to impose lower (or no) tariffs on imports from developing countries. Both the European Union and the United States restrict access to their GSP schemes on the basis of compliance with certain labour conditions. By doing so, they not only distinguish between developed and developing WTO members, but within the latter category also between compliant and non-compliant ones. This is allowed when the tariff cuts are justified by the existence of a 'development need' in the beneficiary country. The legal framework of the ILO plays two roles in this regard. First, ILO conventions can be used to determine whether tariff differentiation responds to a 'development need', given the recognition of the Appellate Body that "multilateral instruments adopted by international organizations" could perform this role.[11] Following this argument, compliance with international labour standards is a development need. Second, when it is accepted that compliance with international labour standards is a legitimate development need, the question arises how non-compliance is determined. In other words: when is a state allowed to revoke tariff preferences because of non-compliance with the labour conditionalities? The United States has been criticized for inconsistent application of its GSP, and a lack of transparency on the standards that are used to determine non-compliance.[12] The European Union relies on findings of non-compliance by the ILO's Committee on the Application of Standards, which only considers a very limited number of cases each year. Both the US and the EU could therefore make better use of the ILO to make the application of their GSP labour conditionalities more objective, for example by relying more explicitly on the jurisprudence of the CFA and the Committee of Experts.

Chapter 4 took a different perspective, namely the reliance on international labour standards as an 'interpretative strategy' to safeguard the policy space of host states. It is often stated that the 'systemic integration of public international law' through the application of Article 31.3(c) VCLT can result in the

11 WTO, *European Communities: Conditions for the grating of tariff preferences to developing countries – Report of the Appellate Body* (7 April 2004) WT/DS246/AB/R, para 163.

12 International Corporate Accountability Roundtable, 'Tools of Trade: The Use of U.S. Generalized System of Preferences to Promote Labor Rights for All' (31 January 2018) 9, 20-22.

"harmonious interpretation of investment and human rights instruments."[13] However, it cannot be concluded that when contested labour measures are based on, or prescribed by, international conventions they are immune from, or better protected against, challenges by foreign investors. When measures are applied in a discriminatory fashion, or when the state has provided certain (contractual) commitments, it is immaterial whether the state is bound by certain ILO obligations. There is one exception, which is that the existence of ILO conventions can restrict investors' *legitimate* expectations that its host state would not alter its legal framework. Under normal circumstances – i.e. in the absence of discrimination and explicit guarantees – international labour law should not be necessary to justify domestic labour regulation. Arguing otherwise implies that the sovereign right to adopt labour regulations is indeed restricted by IIAs, which is not the case. Like 'right to regulate' provisions, the Article 31.3(c) VCLT argument is thus largely redundant.

Article 31.3(c) VCLT does have an important role to play with regard to the interpretation of PTIA labour provisions. Although legal commentaries tend to support a narrow interpretation of this article, the arbitral panel in *US–Guatemala* used it to emphasise the importance of the (non-binding) 1998 Declaration and the jurisprudence of the ILO's supervisory bodies. Petitions by NGOs and trade unions, the US Department of Labor and the European Court of Justice have all used or expressed support for using the ILO's normative framework in the interpretation of PTIA labour provisions. Also in the pre-ratification phase, the United States assesses to what extent their future trade partners comply with ILO standards, and uses its leverage to induce improvements. The European Union's practice in this phase is much weaker. While the substantive labour provisions in their trade agreements closely align with ILO standards, it does not visibly use its leverage in the pre-ratification phase to assess their trade partner's compliance with ILO standards and demand improvements.

The flexible application of Article 31.3(c) VCLT that the *US–Guatemala* panel adhered to is aligned with the practice of the regional human rights courts and the international human rights committees, as well as the International Court of Justice. The *Demir* judgment of the European Court of Human Rights is arguably the most prominent example of a case in which the quest for coherence of international law trumped a narrow and formalistic interpretation of the VCLT. The *US–Guatemala* case given sufficient reason to believe that PTIA labour clauses will also not be interpreted 'in clinical isolation' of international labour law. The normative role of the ILO is thus threefold: it helps states to assess the baseline of respect for international labour standards when entering into trade negotiations, it provides a focal point for improvements in pre-

13 Jan Wouters and Nicolas Hachez, 'When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights be Ensured' (2009) 3 Human Rights & International Legal Discourse 301, 334.

ratification action plans, and it assists in the interpretation of the PTIA's labour obligations.

With regard to the use of ILO materials as *factual* evidence in PTIA-based labour disputes, the *US–Guatemala* case paints another picture. The United States submitted a number of reports from *inter alia* the ILO Committee of Experts, the UN High Commissioner for Human Rights, and the UN Special Rapporteur on the Right to Food. However, the panel did not take this information into account. It stated that:

> while we have reviewed the UN and ILO reports cited by the United States and are aware of the observations they make about Guatemala's enforcement of its labor law in general, we understand the United States claims to be addressed to particular acts and omissions at particular workplaces rather than the system-wide conduct covered by those reports. Accordingly, our findings are addressed to the subject-matter of the U.S. claims as pled in this proceeding.[14]

If the United States would have made a broader case which did not focus on specific companies:

> the Panel would have required additional information concerning the methodologies and sources of information underlying those reports. This would not have been out of any particular concern regarding those methods, but rather to ensure the completeness of any factual record upon which the Panel might draw conclusions.[15]

Whilst for the purpose of interpreting PTIA labour clauses the jurisprudence of the ILO was thus easily accepted, its value as evidence of fact was not taken for granted. From the above, it follows that the centralized and coherent legal framework of the ILO is of great importance to the interpretation of PTIA labour provisions. In addition, there are various other ways in which the ILO, as an international organization with almost a century of experience, a membership of 187 states and numerous field-offices contributes to the implementation of PTIA-labour mechanisms. The 'Better Factories Cambodia' programme that was established in the wake of the US-Cambodia Textiles Agreement has been the most prominent, albeit short-lived example.

However, they are fundamentally different when it comes to the role of the 'social partners' in their respective governance structures. Chapter 2 noted that the importance of tripartism for the ILO and its legal framework can hardly be overstated. Trade unions and employer organizations are involved in all aspects of work of the ILO, including the final vote over new instruments, and the supervision of compliance with, and the interpretation of, adopted con-

14 *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Final Report of the Panel (14 June 2017) para 514.

15 Ibid, para 270.

ventions. This stands in stark contrast with the involvement of trade unions and employer organizations in international economic law. Within multilateral trade law, unions, NGOs and employer organizations play no formal role. Over the years, the WTO has allowed some room for the participation of civil society. Since 1998 the Appellate Body accepts *amicus curiae* briefs, although "procedures for the acceptance of *amicus curiae* briefs have swung back and forth."[16] Other avenues for the judicial and non-judicial participation of NGOs and trade unions have largely been ignored.[17]

Due to the fragmented nature of international investment law, there is no central organization like the WTO in which civil society actors could raise their voice. Here, participation as nondisputing parties in investor-state arbitration is the only formal role that they may assume. The *USP v Canada* arbitration was one of the first instances in which *amicus curiae* briefs were accepted.[18] The case concerned Canada's alleged failure to provide fair and equitable treatment to USP because Canada's labour legislation did not allow rural postal workers, who were employed by USP' competitor Canada Post, to join a union and bargain collectively. In one of the *amicus* briefs by the Canadian Union of Postal workers and the NGO Council of Canadians, the petitioners argued that the investor-state dispute settlement (ISDS) was not the proper forum to redress violations of international labour law. The argument was not primarily based on the idea that the arbitral tribunal lacked the necessary expertise, but because "those most directly affected by such violations have no right to seek redress under these investment rules, nor even to be accorded party standing in such proceedings."[19] According to the petitioners, allowing USP' claim would create "an asymmetrical enforcement regime" as investors that were harmed by non-compliance with an ILO rule could seek damages via the ISDS route, whilst this was not possible for affected workers.[20] The arbitral tribunal in *USP v Canada* did not make reference to the *amicus* briefs. Some IIAs now provide explicit guidance on the question whether *amicus* briefs may be allowed. Furthermore, the 2006 ICSID Rules of Arbitration hold that nondisputing parties are allowed to make written submissions when this would *inter alia* "assist the Tribunal in the determination of a factual or legal issue related

16 Bernard Hoekman and Michel Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (3rd edn, Oxford University Press 2009) 650-652.

17 Nicola Jägers, 'Mainstreaming Human Rights in International Economic Organisations: Improving Judicial Access for NGOs to the World Trade Organization' (2006) 24 Netherlands Quarterly of Human Rights 229, 245-266.

18 Vid Prislan and Ruben Zandvliet, 'Labor Provisions in International Investment Agreements: Prospects for Sustainable Development' in Andrea Bjorklund (ed) *Yearbook on International Investment Law and Policy 2012-2013* (Oxford University Press 2014) 407-411.

19 *United Parcel Service of Amercia Inc. v Government of Canada*, UNCITRAL Arbitration (NAFTA), Amicus curiae submissions by the Canadian Union of Postal Workers and the Council of Canadians, 20 October 2005, para 29.

20 Ibid, para 33.

to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties."[21]

Also in PTIA labour disputes, NGOs and trade unions may seek to join proceedings as *amici curiae*.[22] In the *US–Guatemala* case, twelve NGOs and unions from both countries submitted their views.[23] The submissions were of limited use to the panel, as most "tended to focus on the institutional, economic, social, and political context of the present dispute. Such views, while informative, were not directly relevant to the particular issues of legal interpretation that the Panel was required to decide."[24] Furthermore, none of the submissions addressed "the relevant factual issues ... of specific instances of alleged failures by responsible authorities to enforce labor laws at particular worksites."[25] Unlike ISDS cases, PTIA labour disputes normally arise as the result of an NGO or trade union petition. Also in the subsequent proceedings, the petitioners may maintain a close relationship with the applicant state in order to further substantiate the claims and collect evidence. However, states have full discretion to submit a dispute for consultations, and later arbitration (in the case of US agreements) or evaluation by an expert panel (in the case of EU agreements). In EU trade agreements, civil society parties also convene in domestic and transnational fora to "conduct dialogue."[26] Political scientists see the "empowerment of civil society" as one of the ways in which trade agreements may lead to improvement of labour standards.[27] It is difficult, however, to grasp the concrete benefits of this new form of social dialogue, which is unrelated to collective bargaining or other forms of negotiations.[28]

There are different ways to further empower trade unions and NGOs at the international level. For example, CSR clauses could be expanded to focus on International Framework Agreements, which can be defined as "bi- or multilateral agreements between multinationals on the one hand and global

21 Rule 37.2(a) ICSID Rules of Procedure for Arbitration Proceedings.

22 This right is granted under the Rules of Procedure of the specific trade agreement, and like the ICSID Rules allows submissions on issues of law or fact.

23 All *amicus* briefs are published in one document: <https://ustr.gov/sites/default/files/enforcement/DS/Submissions%20of%20NonGovernmental%20Entities.pdf> accessed 24 June 2018. Another submission was refused because the NGO was not based in a CAFTA-DR state.

24 *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Final Report of the Panel (14 June 2017) para 108.

25 Ibid, para 234.

26 Art 22.5(1) CETA.

27 Jan Orbie and Gerda van Roozendaal, 'Labour Standards and Trade: In Search of Impact and Alternative Instruments' (2017) 5 Politics and Governance 1, 3. The petition that led to the arbitration between the United States and Guatemala, which was submitted by civil society actors from both countries, provides a good example.

28 In general, see: Lore van den Putte, 'Involving Civil Society in Social Clauses and the Decent Work Agenda' (2015) 6 Global Labour Journal 221; Lore van den Putte, 'Involving Stakeholders in Trade Agreements' in International Labour Organization (ed) *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements* (Geneva 2017) 44-48.

trade unions on the other, sometimes accompanied by national trade unions and/or works councils, in order to stimulate global social dialogue and promote the core labour standards of the ILO."[29] There are also more radical ideas to grant civil society actors an independent cause of action to claim a breach of a PTIA labour provision.[30] Analogies with investor-state arbitration in this regard are not applicable, as investors are granted subjective rights under IIAs. This is not the case for trade unions under PTIAs. Rather, proposals for reform can draw from the ILO supervisory system, in which trade unions and employer organisations can submit a case irrespective of individual injury or injury of their home state. Importantly, allowing trade unions to pass over their home state when alleging breach of a PTIA provision would restrict states' discretion to dismiss petitions for (geo)political reasons.

6.4 EVALUATING ECONOMIC PERSPECTIVES IN LIGHT OF LEGAL PRACTICE

As was pointed out in the introductory chapter, the economic rationale of both international labour law and economic law means that economists have a profound interest in both legal domains. Economic research is often used to make normative claims about the desirability and implications of labour-related trade measures and labour provisions in trade and investment agreements. This section will reflect upon these economic perspectives in light of the findings of this study.

Broadly speaking, there are two sets of interrelated questions. The first is concerned with the question how domestic legal systems for the regulation of wages and labour conditions develop, and what the effects of transnational and international regulatory interventions are. The proposition that economic development logically precedes the improvement of labour standards has implications for both international trade and labour law. In the trade domain, it aligns with the idea that international law should facilitate a 'pure' form of economic competition on the basis of comparative advantage. As economists Hoekman and Kostecki note:

> Economic theory suggests that countries should pursue liberal trade policies and exchange goods and services on the basis of their comparative advantage. In practice, however, most nations actively intervene in international trade... . The

29 M. Antonia García-Muñoz Alhambra, Beryl ter Haar and Attila Kun, 'Soft on the Inside, Hard on the Outside: An Analysis of the Legal Nature of New Forms of International Labour Law, (2011) 27 The International Journal of Comparative Labour Law and Industrial Relations 337, 339.

30 Ronald Brown, 'Promoting labour rights in the global economy: Could the United States' new model trade and investment frameworks advance international labour standards in Bangladesh' (2016) 155 International Labour Review 383, 398.

> processes and disciplines of the GATT helped governments to liberalize trade and to resist pressures for protection.[31]

The idea that economic growth will spur the improvement of labour standards is made explicit in the BIT between the Netherlands and the Dominican Republic, which notes that "the development of economic and business ties *will* promote internationally accepted labour standards."[32] This is the mirror image of the pre-World War II notion that international labour law was meant to facilitate economic globalization. More importantly, the argument of Hoekman and Kostecki provides a basis for opposition against both international labour law and the various types of legal interventions that have been discussed in this study. They argue that "[u]sing trade remedies to enforce labour standards would worsen the problems at which they are aimed (by forcing workers in targeted countries into informal or illegal activities)",[33] while Henderson states that "[i]mposing common international standards, despite the fact that circumstances may be widely different across countries, restricts the scope for mutually beneficial trade and investment flows. It is liable to hold back the development of poor countries through the suppression of employment opportunities within them."[34]

Similar arguments are made in the context of the regulation of multinational enterprises (MNEs). Hufbauer and Mitrokostas warn that the enforcement of human rights norms against MNEs on the basis of the Alien Tort Statute, "could devastate global trade and investment."[35] Zerk takes a more cautious approach but also points out that "any home state initiative directed at the CSR performance of multinationals abroad which has the potential to alter patterns of outward investment could still undermine the development objectives of some poorer host states."[36] Importantly, most comments assume a certain type of labour clause. Imposing common international standards is radically different from obliging states to enforce their own legislation, how-

31 Bernard Hoekman and Michel Kostecki, The Political Economy of the World Trading System: WTO and Beyond (3rd edn, Oxford University Press 2009) 7.

32 Preamble Netherlands-Dominican Republic BIT (emphasis added).

33 Bernard Hoekman and Michel Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (3rd edn, Oxford University Press 2009) 627.

34 David Henderson, *Misguided Virtue: False Notions of Corporate Social Responsibility* (Institute of Economic Affairs, Hobart Papers 2001) 17.

35 Gary Clyde Hufbauer and Nicholas K. Mitrokostas, 'International Implications of the Alien Tort Statute' (2004) 7 Journal of International Economic Law 245.

36 Jennifer Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press 2003) 308. In general, however, she observes a "general lack of opposition of developing host states to international CSR-related activities" because most CSR regulation does not affect host states' comparative advantage. In fact, there may also be concerns on the part of the home state that regulation of 'their' MNEs will put them at a competitive disadvantage vis-à-vis foreign ones.

ever, which means that these statements are only informative about a particular – and often theoretical – legal mechanism.

The second set of questions is concerned with the effects of different levels of labour standards on trade and investment flows, and whether states' decisions on labour market regulation are affected by economic integration. This debate aligns with the original purpose of the ILO: if state A introduces more protective labour rights, will companies 'exit' its jurisdiction and move to state B (investment effect) and/or will this benefit companies in state B to increase their exports towards state A (trade effect).

Regulatory competition is facilitated by international trade and investment law. When state A and B are both members of the WTO, state A cannot increase import tariffs vis-à-vis state B to offset the latter's competitive advantage. One could argue whether it is undesirable that state B gains a competitive advantage in this situation, and if so whether international law should provide a solution. This scenario represents the situation when the ILO was founded. Nowadays labour standards are at a much higher level than they were in 1919. The risk is therefore not that states do not accept the economic trade-offs when improving labour regulation, but that they are incentivised to derogate from existing standards. Langille argues that:

> Game theorists and economists have long recognized that the obvious solution to the sorts of collective action problems lie in creating ... binding and enforceable obligations upon all players not to "defect," that is not to enter the race to the bottom [...] in the first place. ... The answer to this international labor law regulatory competition – that is, the competitive bidding down of standards in order to attract new investment or to retain existing investment – is to create international agreements or treaties, which are "binding" and "enforceable," and which prevent a race to the bottom from starting in the first place.[37]

From this perspective, he evaluates the legal and institutional framework of the ILO and reaches the conclusion that it is unfit for purpose.[38] However, not everything is lost, as he notes that: "One of the most refreshing developments in the debate in the last decade is that it has taken an empirical turn with surprising results... . The key finding is that there is no evidence of a race to the bottom."[39] Citing a number of economic studies, he reaches the conclusion that enforceable legal obligations are not necessary. Instead the ILO should focus its attention on: "knowledge, technical assistance, money, expertise, incentives, "promotion," benchmarking, learning, coordination through the provision of both "off the rack" and "bespoke" coordination points

37 Brian Langille, 'What is International Labor Law for?' (2009) 3 Law & Ethics of Human Rights 47, 61.
38 Ibid 63-65.
39 Ibid 70.

for best practices in the solution of specific collective action problems".[40] This applies *mutatis mutandis* to the linkage of labour standards to economic agreements. "The endless debate about whether the ILO has no teeth, and whether it should visit the WTO dentist for dental implants to remedy this deficiency, can now be largely viewed as unhelpful," according to Langille.[41]

International labour standards are thus confronted with two claims: they do not solve a problem and they may have perverse effects. How should these propositions be viewed in light of the preceding chapters? Although Langille correctly points out that there is no evidence that states are engaged in a competitive and continuous process of bidding down labour standards, this does not mean that there is no regulatory competition between jurisdictions. Whether through stabilization clauses, export processing zones, or other types of incentives, states do derogate from existing labour standards in response to the forces of economic globalization. Importantly, to justify a normative instrument that addresses these derogations, one does not need to assess the scale on which this takes place. In the debate on labour provisions in economic law, the race to the bottom hypothesis has no role to play.[42] This is confirmed by the wording of labour provisions in PTIAs. An individual instance of non-enforcement could trigger a breach when there is a sustained course of (in)action and when there is a trade effect. It is immaterial how large that trade effect is and whether the importing state feels compelled to take corresponding deregulatory measures – thus engaging in a 'race'. PTIA labour standards are primarily intended to prevent that states have to bear the consequences of labour deregulation in other jurisdictions, not to prevent systemic phenomena like the race to the bottom.

This also affects the second critique, namely that domestic labour standards develop endogenously and that 'interventions' disturb this process and could roll back economic development. Proposals to amend the GATT with a labour clause were fiercely opposed by developing countries that sought to protect their 'legitimate comparative advantage' against these acts of 'disguised protectionism'. The term 'social clause' was thus perceived as a euphemism, helping workers in developed economies at the expense of the poor. The only form of accepted trade-labour linkage at the multilateral level are the US and EU Generalized Systems of Preferences, as they offset the costs of adopting higher labour standards through tariff reductions. How can this deep divide between developed and developing economies be squared with the fact that nowadays it has become normal to include elaborate labour provisions in economic agreements?

40 Ibid 78.
41 Ibid 79.
42 Vid Prislan and Ruben Zandvliet, 'Labor Provisions in International Investment Agreements: Prospects for Sustainable Development' in Andrea Bjorklund (ed) *Yearbook on International Investment Law and Policy 2012-2013* (Oxford University Press 2014) 363

Commentators that oppose trade-labour and investment-labour linkages often assume that they will either (1) impose a new common standard which is higher than developing countries currently have in place, or that (2) developed states could determine when to take measures in response to 'social dumping' without having to satisfy a particular benchmark. However, this is not what current labour clauses in PTIAs do. Non-derogation clauses restrict states' right to deregulate from whatever level of labour standards they themselves have adopted. Improvement clauses are hortatory and their breach – if possible to determine – can in most cases not lead to economic countermeasures.

The proliferation of labour provisions in PTIAs provides an important opportunity to answer a new set of questions that examines the distributive implications of non-derogation provisions. This should lead a to more nuanced understanding than the broad 'social dumping' *versus* 'legitimate comparative advantage' dichotomy allowed. For example, should provisions prohibiting legislative derogations allow for flexibility, given the fact that both the CESCR and the ILO supervisory bodies not do always ban regressive measures in times of economic downturn? And if an arbitral tribunal finds a breach, should this lead to a monetary assessment that is used to enhance labour law enforcement in the respondent state (the CAFTA-DR model), or should the applicant be allowed to suspend trade benefits (the current US model)?

While this study has focused on the legal interactions between economic law and labour law, the trade-labour relationship is much broader. In fact, one could argue that "trade policy *is* labour policy, if only because of the truism that decisions in the trade regime affect labour outcomes."[43] As Blackett notes: "it is the nature of the [trade] bargain that determines employment levels, wage inequality and other employment patterns."[44] Whether developing countries are allowed to subsidize infant industries to generate more income from the secondary sector, for example, may have nothing to do with labour law but everything with labour. While – depending on their set-up – labour provisions may indeed have trade-diverting affects, the level of opposition is remarkable when compared to the lack of interest in other aspects of international trade law that negatively affect the position of developing countries.[45]

Economic scholarship should be treated with caution when drawing normative conclusions. Apart from the methodological difficulties of measuring

43 Andrew Lang, 'Reflecting on 'Linkage': Cognitive and Institutional Change in The International Trading System' (2007) 70 Modern Law Review 523, 545.

44 Adelle Blackett, 'Trade liberalization, labour law and development: A contextualization' in Tzehainesh Teklè (ed) *Labour Law and Worker Protection in Developing Countries* (Hart Publishing 2010) 102.

45 Sonia Rolland, 'Development at the WTO' (Oxford University Press 2012) 243 who argues that there is "little questioning of institutional and systemic issues alongside the substantive trade commitments."

labour standards, the economic discipline is not "a value-free and positive science."[46] Biermans notes that market institutions and boundaries "can in fact be altered and shaped according to one's preferences" which means that they are "by default a subject of moral reflection."[47] The debate over the moral implications of economic globalization should be continuous as both economic realities and normative preferences evolve. This is not self-evident, as there are many proponents of the constitutionalization of international economic law. As Petersmann notes: "liberal trade policy would not fare well if every new generation of officials were permitted to rethink the case for free trade."[48]

6.5 Navigating between fair competition and fundamental rights

Like international labour law itself, labour provisions in PTIAs and IIAs navigate between an inward-looking and an outward-looking rationale. There is no clear answer to the question whose, or what interests, these provisions intend to protect. Broadly speaking, non-derogation clauses aim to safeguard "conditions of fair competition"[49] while improvement clauses are meant to "protect, enhance, and enforce basic workers' rights."[50] In US FTAs the two are lopsided in favour of the more concrete and enforceable non-derogation clauses. The arbitral panel in *US–Guatemala* noted in this regard that: "Addressing failures to effectively enforce labor laws that are not in a manner affecting trade, while perhaps desirable for other reasons, presumably would do little if anything to promote conditions of fair competition in the free trade area."[51] Attempts in US Congress to abolish the economic effect criterion have been unsuccessful,[52] although the 2018 draft United States-Mexico-Canada Agreement significantly lowers the standard of proof.

However, the strong focus on economic competitiveness in the legal texts of US trade agreements goes hand in hand with technical assistance pro-

46 Maarten Biermans, 'Decency and the Market: The ILO's Decent Work Agenda as a Moral Market Boundary' (PhD Thesis University of Amsterdam 2012) 41-53.

47 Ibid 52.

48 Ernst-Ulrich Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (Fribourg University Press 1991), at xxi, quoted in Danny Nicol, *The Constitutional Protection of Capitalism* (2010) 80.

49 Art 1.2.1(c) CAFTA-DR.

50 Preamble CAFTA-DR.

51 *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Final Report of the Panel (14 June 2017) para 171 (internal quotation marks omitted).

52 See the Trade Reform, Accountability, Development, and Employment Act of 2009, S. 2821, 111th Congress (text of 1 December 2009, not entered into force), Section 4 (b)(1)(d): "provide that failures to meet the labor requirements of the agreement, regardless of the effect that failure has on trade, shall be subject to the dispute resolution and enforcement mechanisms and penalties of the agreement."

grammes to improve (the enforcement of) labour standards elsewhere. The European Union, on the other hand, has been careful not to create an impression that it intends to call their trade partner's comparative advantage into question, and stresses that labour standards should not be used for protectionist trade purposes. Explicit language to that end is included, [53]and adversarial dispute settlement and countermeasures are not provided for. Campling *et al* thus argue that:

> In terms of the ideological disposition that drives the EU's inclusion of labour standards in trade agreements, the EU's approach is often characterized as being based on an attempt to ensure that working conditions worldwide are gradually enhanced and improved; what one might term *a universalist human rights rationale*.[54]

However, research on the political motives of groups in the European Parliament shows that most of them "want to see social norms included so that European producers are not disadvantaged by non-European producers with lower labour standards. Their main motivation stems thus from concern about European employment."[55]

On a closer look, the dichotomy between non-derogation clauses and improvement clauses is not that strong. Indeed, the fundamental rights rationale has permeated both. The scope of US' non-derogation provisions is limited to the 'internationally recognized labour rights' (IRLR) which covers the same norms as the ILO's 1998 Declaration of Fundamental Principles and Rights at Work,[56] but adds "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health." This delimitation is not consistent with an inward-looking purpose of non-derogation clauses. Why are derogations from other labour standards which have an economic effect not actionable? In fact, why should modification or non-enforcement of legal norms be used as the threshold to determine unfairness? For no apparent reason, domestic differentiation and depression of wages and labour conditions relative to productivity – which were at the heart of the debate in the late 1940s and early 1950 – gave way to a legal benchmark that adheres

53 Art 13.2(2) EU-Korea.

54 Liam Campling et al, 'Can labour provisions work beyond the border? Evaluating the effects of EU free trade agreements' (2016) 155 International Labour Review 357, 364 (internal reference omitted, emphasis added).

55 See e.g. Lore Van den Putte, 'Divided we stand: the European Parliament's position on social trade in the post-Lisbon era' in Axel Marx and others (eds), *Global Governance of Labour Rights: Assessing the Effectiveness of Transnational Public and Private Initiatives* (Edward Elgar Publishing 2015) 78.

56 These are: (1) freedom of association and the effective recognition of the right to collective bargaining, (2) the elimination of all forms of forced or compulsory labour, (3) the effective abolition of child labour, and (4) the elimination of discrimination in respect of employment and occupation.

to ILO conventions, the IRLR or the 1998 Declaration on Fundamental Rights and Principles at Work.

The dual purpose of PTIA labour clauses aligns with the fact that throughout the history of the ILO, there has never been a single, coherent theory of international labour law. This is unproblematic. However, one needs to be cautious that the two conceptual underpinnings of trade-labour linkage – fair competition and fundamental rights – do not blur debates on (1) the practical application and effect of labour provisions, and (2) *de lege ferenda* suggestions how they can be improved. Now that PTIA labour provisions are becoming more mature, the body of research that comments on their effects is steadily growing.[57] In a study of South Korea's trade agreements, a country which the ITUC considers to be the one of "the worst countries in the world to work in,"[58] Van Roozendaal concludes that "no relative improvement has taken place, leading to a situation in which the labour provisions serve, from the point of view of stimulating improvements, only a symbolic purpose."[59] The study was based on the premise that labour clauses are intended to improve standards. Evidence that this does not happen in practice may call into question the efficacy of improvement clauses. Non-derogation clauses, however, are intended to *maintain* labour standards. Whether they contribute to this goal can only be determined on the basis of counterfactual evidence: if the non-derogation provision would have been absent, would the state have (further) downgraded its labour standards?

More fundamentally, it is unclear why the scope of PTIA labour provisions should be restricted to the sub-set of fundamental labour rights, as is the case in many agreements. The argument that references to the IRLR or 1998 Declaration as "a set of values with universalist appeal" have provided greater legitimacy to the trade-labour link is often rehearsed.[60] Without it, the polarized debate over 'social dumping' versus 'legitimate comparative advantage' may have prevented the inclusion of labour clauses in the first place. As Mantouvalou notes, "some labour rights are stringent normative entitlements, and this should be reflected in law."[61] One of the main fallacies of the 'linkage'

57 On methodological difficulties, see: Ergon Associates, 'Trade and Labour: Making effective use of trade sustainability impact assessments and monitoring mechanisms – Report to DG Employment, European Commission' (September 2011).

58 Quoted in: Gerda van Roozendaal, 'Where Symbolism Prospers: An Analysis of the Impact on Enabling Rights of Labour Standards Provisions in Trade Agreements with South Korea' (2017) 5 Politics and Governance 19, 24

59 Ibid 27.

60 Liam Campling et al note that: "By utilizing ILO core labour standards as the values it promotes, the EU seeks to counter criticism that it is promoting its own social agenda, and instead appears to embrace a set of values with universalist appeal Liam Campling et al, 'Can labour provisions work beyond the border? Evaluating the effects of EU free trade agreements' (2016) 155 International Labour Review 357, 365.

61 Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 European Labour Law Journal 151, 172

debate, however, is that they should thus also be reflected in international economic law. In fact, it can be argued that the IRLR and the 1998 Declaration have led to a stifling consensus which does not further the purpose of labour provisions in trade and investment agreements. Why should agreements like CETA and TTIP 'affirm' their obligations to abolish child labour and forced labour, but not the ILO Termination of Employment Convention (No 158) or the Convention concerning the Protection of Workers' Claims (No 173) which may be more relevant when liberalizing trade between developed economies? Also amongst the developing countries, the ratification level of the child labour conventions is already high. However, child labour may still occur because minimum wages are absent or too low to sustain a family. In the case of Indonesia, for example, NGOs thus advocate for the ratification of the ILO Minimum Wage Fixing Convention (No 131), the various conventions on agricultural labour and the Optional Protocol to the ICESCR.[62] If the United States or the European Union were to negotiate a PTIA with Indonesia, it would be a missed opportunity to solely focus on the labour standards that are covered by the IRLR and the 1998 Declaration, and not on conventions that may be addressing some of the root causes of child labour.

Some labour provisions in EU agreements have been tailored towards specific labour problems. But this is mainly reflected in the cooperation mechanisms, and not in the substantive obligations.[63] The EU-Moldova Association Agreement, for example, focuses heavily on children's rights compared to other treaties. It provides that:

> The Parties agree to cooperate in ensuring the promotion of the rights of the child according to international laws and standards, in particular the United Nations Convention on the Rights of the Child of 1989, taking into account the priorities identified in the specific context of the Republic of Moldova, in particular for vulnerable groups.[64]

This provision was thus drafted on the basis of problems that predated the agreement and which would not necessarily worsen with the conclusion of the agreement. Whether a trade or investment agreement does increase particular risks is not always easy to determine. One of the cases that has been identified in this regard is the effect of trade liberalization between the United States and Jordan on the latter's textiles industry. The industry benefited greatly from the GSP programme and later the US-Jordan Free Trade Agreement, which entered into force in 2001. As Jordan lacked sufficient local labour, over

62 Amnesty International, 'The Great Palm Oil Scandal: Labour Abuses Behind the Big Brand Names' (London 2016) 94, 98, 123.

63 Rafael Peels and Marialaura Fino, 'Pushed out the Door, Back in through the Window: The Role of the ILO in EU and US Trade Agreements in Facilitating the Decent Work Agenda' (2015) 6 Global Labour Journal 189, 196.

64 Art 137 EU-Moldova Association Agreement.

43.000 migrant workers were employed in the fast-growing industry.[65] In 2006, the National Labor Committee published a report describing the extensive and severe labour abuse of migrant workers in Jordan's garment sector.[66] The report also included *verbatim* the labour provision in the US-Jordan FTA, but did not analyze whether Jordan breached its treaty obligations. Indeed, the FTA provision does not contain specific obligations concerning migrant workers. As the non-enforcement clause does not cover occupational discrimination, most of the abuses against migrant workers could not lead to an interstate complaint on the basis of the FTA. Whether other persistent violations such as wage theft by employers is covered would depend on the interpretation of "acceptable conditions with respect to minimum wages."[67]

The problems caused by the narrow focus on the IRLR and the 1998 Declaration may be resolved in various ways. One possibility is to agree on tailor-made labour provisions on the basis of an *ex ante* risk assessment. These assessments are already made to inform parliamentary debates or to draft pre-ratification action plans, but their results do not affect the treaty language. Given the longevity of economic agreements, it may be difficult to anticipate certain problems. The preferable option would therefore be to maintain the *legal* focus of non-derogation provisions, but without any limitations on the scope of material labour standards that states may not derogate from. Interpretative questions would surely arise, but these could be dealt with by the parties, arbitral tribunals or expert panels. It is also possible to add productivity and domestic differentiation as benchmarks for fair labour standards. This would acknowledge that 'fairness' in international economic relations does not have to be based on (international) legal standards. However, it would also depart significantly from current practice and may therefore not be a realistic option.[68]

65 Kevin Kolben, 'Dialogic Labor Regulation in the Global Supply Chain' (2015) 36 Michigan Journal of International Law 425, 452.

66 Charles Kernaghan, 'The National Labor Committee, U.S.-Jordan Free Trade Agreement Descends into Human Trafficking and Involuntary Servitude' (2006).

67 Art 6.6 US-Jordan FTA.

68 The only exception in this regard is the 'labour value content rule' in the draft USMCA. This rule holds that certain automobiles can only benefit from duty-free treatment if a minimum percentage of the material is produced by workers who earn at least $16/hour. For an early commentary on this innovative provision see: Franz Ebert and Pedro Villarreal, 'The Renegotiated "NAFTA": What Is In It For Labor Rights?' (EJIL: *Talk!*, 11 October 2018) <https://www.ejiltalk.org/the-renegotiated-nafta-what-is-in-it-for-labor-rights/#more-16548> accessed 21 November 2018.

6.6 OUTLOOK FOR LABOUR STANDARDS IN TRADE AND INVESTMENT AGREEMENTS

This thesis started with the dramatic collapse of the Rana Plaza building to illustrate that in today's global economy, sub-standard labour conditions in one country are everybody's concern. These events can serve as 'catalysts' for change.[69] Trade law certainly played its part, as is demonstrated by the US' and EU's use of GSP conditionality as a leverage tool.[70] But in the case of Guatemala, the long-awaited arbitral award turned out to be a disappointment for the trade unions and NGOs who put their faith in the CAFTA-DR labour clause. As Compa, Vogt and Gottwald argued, "the decision is clearly based on a narrow, trade-oriented analysis divorced from labor law practice."[71] This thesis has analysed the legal interactions between international trade and investment law and labour, and has drawn conclusions on how these fields of law could help to close 'governance gaps' in the international protection of labour standards.

The fragmented nature of international trade and investment law remains an important challenge. Without the impasse in the WTO's Doha Round, labour standards in international trade and investment agreements would not have developed as rapidly as they did. This has moved the debate beyond the dichotomy of 'social dumping' versus 'legitimate comparative advantage'. There is still much to explore with regard to the practical application of PTIA labour clauses, the effects of pre- and post-ratification efforts, and *de lege ferenda* proposals for other types of labour provisions.[72] In the longer run, however, a multilateral notion of 'fair labour standards' in the context of international economic law and a concomitant enforcement mechanism is preferable to a patchwork of bilateral and regional commitments. More coherence at the level of rights, obligations and procedures should be accompanied by an inclusive and tailor-made implementation strategy that recognizes differences between countries, sectors and types of labour rights impacts. Eventually, labour stand-

69 Paul van der Heijden and Ruben Zandvliet, 'Enforcement of Fundamental Labor Rights. The Network Approach: Closing the Governance Gaps in Low-Wage Manufacturing Industries' (The Hague Institute for Global Justice: Policy Brief No. 12, September 2014) 4 quoting ILO Deputy Director-General Houngbo.

70 International Corporate Accountability Roundtable, 'Tools of Trade: The Use of U.S. Generalized System of Preferences to Promote Labor Rights for All' (31 January 2018).

71 Lance Compa, Jeffrey Vogt, Eric Gottwald, 'Wrong Turn for Workers' Rights: The U.S.-Guatemala CAFTA Labor Arbitration Ruling – and What to do About it?' (International Labor Rights Forum, 2018) 4.

72 Kolben, for example, argues in favour of a "supply chain governance approach" which will shift "the current focus of labor chapters from broadly affecting *de jure* and *de facto* labor law through the use of sanctions or dialogue, towards context specific and coordinated private and public regulatory interventions that focus on improving labor rights and standards in key export industries." Kevin Kolben, 'A Supply Chain Approach to Trade and Labor Provisions' (2017) 5 Politics and Governance 60, 61.

ards in international economic law should not be seen as mere tools to discourage derogations or induce improvements of labour legislation in a handful of problematic states, but as an essential component of an international legal system that contributes to economic prosperity and social justice everywhere.

Samenvatting
(Dutch summary)

HANDEL, INVESTERINGEN EN ARBEID: INTERACTIES IN HET INTERNATIONAAL RECHT

Inleiding

Het instorten van het Rana Plaza gebouw in Bangladesh in 2013, waarbij 1134 textielarbeiders om het leven kwamen, is uitgegroeid tot hét symbool voor de soms mensonterende arbeidsomstandigheden in de huidige geglobaliseerde wereldeconomie. Dodelijke ongelukken, fabrieksbranden, geweld tegen vakbondsleiders, ongelijke behandeling van vrouwen en mannen op de werkvloer, kinderarbeid en dwangarbeid kwamen honderd jaar geleden ook voor. Alleen bestaat er tegenwoordig een omvangrijk juridisch bouwwerk dat internationale handel en investeringen faciliteert en beschermt, en dat Westerse (kleding)merken in staat stelt hun productie te laten plaatsvinden waar dat voor hen het meest optimaal is. Economische globalisering is geen natuurfenomeen, maar wordt mede mogelijk gemaakt door regels van internationaal publiekrecht, in het bijzonder die regels die de internationale economische betrekkingen tussen staten reguleren.

Juridische afspraken in handels- en investeringsverdragen beïnvloeden de regulering van arbeid. Zo mogen staten niet zonder meer de import van bepaalde goederen verbieden, zelfs niet wanneer deze geproduceerd zijn onder 'oneerlijke' arbeidsomstandigheden. Wel worden, in recente verdragen, staten verplicht hun nationale arbeidswetgeving effectief te handhaven, om te voorkomen dat zij een economisch voordeel kunnen behalen door middel van, bijvoorbeeld, het niet optreden tegen bedrijven die vakbondsleden ontslaan. De invloed van het internationaal recht op de regulering van arbeid gaat echter veel verder. Sinds de oprichting van de International Labour Organization (ILO) in 1919 zijn er bijna tweehonderd arbeidsrechtelijke verdragen gesloten: van afspraken over minimumlonen en arbeidsmigratie, tot inspecties en vakbondsrechten. Het internationaal arbeidsrecht is deels gebaseerd op dezelfde proposities als het internationaal economisch recht – namelijk dat internationale handel en investeringen gestimuleerd dienen te worden, en dat het internationaal recht hierin een faciliterende rol kan spelen. De ILO-verdragen zelf bevatten echter geen verwijzingen naar het handels- en investeringsregime. Sterker, de noodzaak van internationale coördinatie van arbeidsstandaarden wordt regelmatig in twijfel getrokken. Staten moeten zich eerst economisch ontwikke-

len, en het alternatief voor sweatshops is werkloosheid. Pleidooien voor handhaving van internationale arbeidsnormen zijn, zeker wanneer deze worden beschouwd als voorwaarde om deel te mogen nemen aan het internationaal economisch verkeer, niets meer dan 'vermomd protectionisme', zo luidt de kritiek.

De interactie tussen de internationaalrechtelijke regimes voor de regulering van handel, investeringen en arbeid is complex, en voortdurend in ontwikkeling. De centrale onderzoeksvraag van dit proefschrift luidt: hoe beperken of ondersteunen internationale handels- en investeringsverdragen de nationale en internationale regulering van arbeid? De termen 'beperken' en 'ondersteunen' worden gebruikt om aan te geven of handels- en investeringsverdragen de vrijheid van landen om bepaalde regelgeving aan te nemen verkleinen of vergroten. Ze hebben geen normatieve betekenis, in de zin dat 'beperken' slecht zou zijn en 'ondersteunen' goed. In veel gevallen gaat het om twee kanten van dezelfde medaille. Als een land de import van goederen gemaakt door kinderen zou mogen verbieden ondersteunt het internationaal recht het importerende land in zijn wens, maar beperkt het de beleidsvrijheid van het exporterende land. De vraag of dergelijke importverboden gewenst zijn is onderwerp van een levendig politiek en academisch debat, maar valt niet onder de reikwijdte van dit onderzoek.

Om de onderzoeksvraag te kunnen beantwoorden maakt dit proefschrift gebruik van een groot aantal bronnen binnen het internationaal arbeids-, handels- en investeringsrecht. Verdragen vormen verreweg de belangrijkste bron van internationaalrechtelijke normen binnen deze drie rechtsgebieden. Waar relevant wordt echter ook ingegaan op regels van internationaal gewoonterecht. De jurisprudentie van de verschillende entiteiten die toezicht houden op de naleving van internationaal arbeids-, handels- en investeringsrecht wordt niet beschouwd als een primaire bron van internationaal recht, maar is desalniettemin van groot belang voor de beantwoording van de onderzoeksvraag. 'Toezicht' is geen uniform begrip. De ILO beschikt over verschillende procedures maar slechts in een klein aantal gevallen wordt daadwerkelijk geoordeeld dat een staat zijn verdragsverplichtingen heeft geschonden. De geschillenbeslechtingsmechanismen in het internationaal handels- en investeringsrecht bieden die duidelijkheid wel.

Economische globalisering en de ontwikkeling van het internationaal arbeidsrecht

De relatie tussen handelsliberalisering en arbeidsrecht is zo oud als het arbeidsrecht zelf. In *The Wealth of Nations* (1776) omschreef Adam Smith de houder van het kapitaal als wereldburger. Wanneer het hem te heet onder de voeten wordt, bijvoorbeeld door belastingen of andere kosten, verplaatst hij zijn productiemiddelen naar elders. Of het nu ging om het introduceren van de zondagsrust of het afschaffen van kinderarbeid, de angst dat dit zou leiden tot een verslechtering van hun concurrentiepositie was voor veel landen een

belangrijk obstakel. Zo kwamen Schotse en Engelse wolfabrikanten in 1831 succesvol in opstand tegen de introductie van de elf-urige werkweek en een minimumleeftijd van negen jaar. De oplossing zou moeten worden gezocht in internationale afspraken. Daarbij werd naar vergelijkingen gezocht met de afschaffing van de slavernij. Als landen konden komen tot afspraken over slavernij en slavenhandel, dan toch zeker ook over kinderarbeid en nachtwerk door vrouwen? Utopieën over een wereldparlement met bijbehorend handhavingsapparaat waren niet van de lucht. Een betekenisvol systeem van internationaal arbeidsrecht zou immers alleen werken wanneer alle staten mee zouden doen.

Uiteindelijk werden voor de Eerste Wereldoorlog enkele tientallen bilaterale verdragen gesloten, vaak tussen buurlanden in West-Europa. Deze waren gericht op het in stand houden van vrijhandel in ruil voor betere bescherming van arbeidsmigranten. De afwezigheid van strengere, multilaterale verdragen bleek overigens geen absoluut obstakel voor de invoering van nationale sociale wetgeving. Het Kinderwetje van Van Houten uit 1874 zal fabriekseigenaren ongetwijfeld hebben benadeeld, maar het moreel imperatief achter de wetgeving en de toegenomen aandacht voor de schrijnende gevolgen van de Industriële Revolutie waren voldoende reden voor actie. De politieke macht van vakbonden nam in de 19e en begin 20ste eeuw toe, vooral in landen die zich het meest openstelden voor internationale handel.

De ontwikkeling van strengere arbeidswetgeving was dus al aardig op gang gekomen toen in 1919 de International Labour Organization werd opgericht via het Verdrag van Versailles. Toch benadrukte dit verdrag vooral de economische rationale van de ILO: 'The failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.' Niet de belangen of verworvenheden van individuele werknemers of vakbonden stonden centraal, maar de economische druk die staten ervoeren bij maatregelen voor het verbeteren van de positie van werknemers. Die economische druk kon twee mogelijke consequenties hebben: óf staten zouden afzien van sociale wetgeving, óf ze zouden handelsbarrières opwerpen om de negatieve effecten van sociale wetgeving te compenseren. Dat laatste zou de open wereldeconomie ernstige schade toebrengen. Een Amerikaanse onderhandelaar betrokken bij de oprichting omschreef de ILO daarom als 'een internationale economische organisatie die zich bezighoudt met arbeid'. Deze opvatting werd gedeeld door Karl Polanyi, die stelde dat het doel van de ILO was 'to equalize conditions of competition among the nations so that trade might be liberated without danger to standards of living'. Na de Tweede Wereldoorlog werden een aantal ILO-normen steeds vaker gekenmerkt als mensenrechten. Dit mondde in 1998 uit in de *Declaration on Fundamentel Principles and Rights at Work* (1998 Verklaring). Vrijheid van vereniging en collectief onderhandelen, non-discriminatie en vrijwaring van kinderarbeid en dwangarbeid werden hiermee verheven hiermee tot 'fundamentele' normen.

Ook binnen het toezichtmechanisme van de ILO stond de economische rol lang centraal. De economische beweegreden is het duidelijkst aanwezig in de meest vergaande klachtenprocedure van de organisatie, waarbij onderzoek wordt verricht door een Commission of Inquiry. Wanneer zij aanbevelingen doet, en deze worden niet opgevolgd door de lidstaat, dan heeft de International Labour Conference – het plenaire orgaan van de ILO waar overheden, werkgevers en werknemers zijn vertegenwoordigd – de mogelijkheid om aanbevelingen te doen aan de andere lidstaten voor maatregelen waarmee naleving kan worden bewerkstelligd. Deze zogenaamde 'artikel 33 procedure' – het enige handhavingsmiddel in het arsenaal van de ILO dat verder gaat dan *naming and shaming* – is de afgelopen honderd jaar slechts één keer toegepast. In 2000 nam de Conferentie na uitgebreid onderzoek door een Commission of Inquiry naar dwangarbeid in Myanmar een resolutie aan waarin de lidstaten werden opgeroepen tot "approprate measures to ensure [Myanmar] cannot take advantage of [international] relations to perpetuate or extend the system of forced or compulsory labour". De Verenigde Staten verboden hierop de import van goederen uit Myanmar, en rechtvaardigden dit besluit met een specifieke verwijzing naar de artikel 33-resolutie. Ook was voorzien in verplichte consultatie van de ILO Director-General in het geval de sancties weer zouden worden opgeheven.

Handelsbeperkingen in reactie op 'oneerlijke' arbeidsstandaarden in exporterende landen

De vooronderstelling dat coördinatie van arbeidswetgeving zou leiden tot unilaterale afbouw van handelsbarrières bleek ijdele hoop. Het einde van de Tweede Wereldoorlog vormde aanleiding voor meer internationale economische samenwerking. Naast het International Monetary Fund en de World Bank (1944) werd een poging gedaan om een International Trade Organization (ITO) op te richten. Het handvest van de ITO (1948) bevatte spelregels op het gebied van handel, investeringen, mededinging en arbeid. Artikel 7 bepaalde dat "oneerlijke arbeidsomstandigheden" een probleem vormen voor internationale handel en verplichte landen tot het nemen van "passende maatregelen". Nadere definities ontbraken. Wel was voorzien in samenwerking met de ILO mocht er een geschil over de toepassing van artikel 7 ontstaan.

Het verzet in de Amerikaanse Senaat tegen het ITO-handvest was echter groot, en de organisatie zou nooit worden opgericht. Het internationaal handelsrecht ontwikkelde zich verder onder auspiciën van de General Agreement on Tariffs and Trade (GATT); de goederenpilaar van de ITO die tijdelijk van aard zou zijn maar uiteindelijk van 1948 tot de oprichting van de World Trade Organization in 1995 van kracht zou blijven. Zowel de GATT als de WTO-verdragen bevatten geen verwijzingen naar arbeidsomstandigheden. De enige uitzondering is te vinden in artikel XX(e) dat beperkingen van handel in producten gemaakt in gevangenissen toestaat. Sinds 1948 zijn talloze pogingen onder-

nomen om de GATT en later de WTO-verdragen te amenderen. De Verenigde Staten en het Europees Parlement (de lidstaten waren verdeeld) stuitten echter op verzet van de steeds groter wordende groep ontwikkelingslanden. Op een Ministeriele Verklaring uit 1996 na hebben de GATT en WTO nooit een formele positie ingenomen over de relatie tussen handel en arbeidsomstandigheden. In die 'Singapore Verklaring' wordt gesteld dat de competentie over internationale arbeidsstandaarden bij de ILO ligt, en wordt het gebruik van arbeidsstandaarden voor protectionistische doeleinden verworpen, een formulering die twee jaar laten werd herhaald in de 1998 Verklaring van de ILO zelf.

Ondanks – of misschien vooral dankzij de politieke impasse – is er sinds 1948 een levendig debat onder juristen over de vraag of het internationaal handelsrecht zo kan worden geïnterpreteerd dat handelsbeperkingen vanwege lage(re) arbeidsstandaarden in het exporterende land zijn toegestaan. Dit is een fundamenteel andere discussie dan de vraag of het internationaal economisch recht 'oneerlijke' arbeidsomstandigheden zou moeten verbieden, zoals artikel 7 van het ITO-verdrag deed. In het geval van handelsbeperkingen is het één lidstaat die zonder tussenkomst van een onafhankelijke instantie kan besluiten dat de arbeidsomstandigheden in het exporterende land niet acceptabel zijn. Eventuele toetsing vindt pas achteraf plaats, mits het benadeelde land een zaak aanspant. Artikel 7 stelde daarentegen een multilaterale oplossing voor, in de vorm van een expliciete verdragsbepaling waarbij werd verwezen naar de ILO, en waarvoor eerst een geschillenbeslechtingsprocedure moest worden doorlopen voordat er economische tegenmaatregelen zouden kunnen worden getroffen.

Ook het juridisch kader om te evalueren of unilaterale importheffingen zijn toegestaan staat los van het internationaal arbeidsrecht. In theorie zou een verbod op de import van producten die met kinderarbeid tot stand zijn gebracht gerechtvaardigd kunnen worden op basis van artikel XX(a) GATT, dat lidstaten het recht geeft maatregelen te treffen die weliswaar strijdig zijn met de GATT, maar noodzakelijk voor de bescherming van publieke waarden. In de literatuur is regelmatig betoogd dat dit betekent dat handelsmaatregelen ter bescherming van mensenrechten kunnen worden gerechtvaardigd; mensenrechten hebben immers bij uitstek een morele grondslag. Deze redenering is onjuist. Het WTO-geschillenbeslechtingsmechanisme geeft lidstaten juist veel vrijheid om zelf invulling te geven aan het begrip publieke waarden Het concept van 'leefbaar loon' zou dus net zo goed als rechtvaardigingsgrond kunnen worden gebruikt als kinderarbeid. Er is echter een fundamenteler probleem met artikel XX(a). Kinderarbeid vindt plaats buiten de jurisdictie van het importerende land. Een poging hier een einde aan te maken door middel van handelsbeperkingen heeft derhalve een extraterritoriale doelstelling. Tot op heden heeft het WTO-geschillenbeslechtingsmechanisme een dergelijke doelstelling niet toegestaan. In een zaak tussen de Europese Unie enerzijds en Canada en Noorwegen anderzijds over een importverbod voor zeehondenproducten betoogde de EU dat het doel van de maatregel niet zozeer was om

een einde te maken aan de zeehondenjacht, maar het beschermen van consumenten in de EU. Daarmee had de maatregel geen extraterritoriale doelstelling, en kon deze worden gerechtvaardigd op grond van artikel XX(a). Dit betekent echter ook dat handelsmaatregelen kunnen worden gerechtvaardigd ongeacht het effect in het exporterende land. Wanneer een importverbod zou leiden tot een verschuiving van kinderarbeid naar gevaarlijker werk is dat irrelevant voor de juridische analyse onder artikel XX(a).

Het enige domein binnen het WTO-recht waar een sterke link bestaat tussen handelsliberalisering en arbeidsrecht is het zogenaamde 'Generalized System of Preferences' (GSP). Het GSP vormt een uitzondering op artikel I van de GATT: het verbod op ongelijke behandeling van WTO-lidstaten. Door middel van een GSP kunnen (ontwikkelde) WTO-leden preferentiële invoertarieven hanteren voor ontwikkelingslanden. Zowel de Europese Unie als de Verenigde Staten stellen als voorwaarde dat ontwikkelingslanden bepaalde arbeidsrechten dienen te beschermen. Over de vraag of dit is toegestaan bestaat discussie. Dit volgt uit een uitspraak van het geschillenbeslechtingsmechanisme van de WTO, waarin werd bepaald dat differentiatie tussen ontwikkelingslanden alleen is toegestaan wanneer er verschillende bestaan tussen de 'development needs' van deze landen. Dit proefschrift concludeert dat arbeidsrechtelijke voorwaarden niet strijdig zijn met dit uitgangspunt. Wanneer land A ILO-verdragen ratificeert en land B doet dit niet ontstaan er verschillen in de ontwikkelingsbehoeften. Door middel van preferentiële tarieven kunnen de Europese Unie en de Verenigde Staten land A tegemoetkomen in de kosten van implementatie of de stijging van loonkosten als gevolg van de ratificatie van het ILO-verdrag. Het GSP van zowel de EU als de VS schieten echter tekort op één belangrijk punt. De eis dat ILO-verdragen worden geratificeerd is niet genoeg, landen moeten deze ook daadwerkelijk implementeren. Maar hoe, en door wie, wordt bepaald dat een land hierin dit doet? Hoewel het toezichtmechanisme van de ILO hiervoor uitdrukkelijk is uitgerust wordt er niet (VS) of nauwelijks (EU) gebruik gemaakt van de rijke jurisprudentie van het Comité van experts en het Comité inzake vrijheid van vereniging.

De bescherming van buitenlandse investeerders in relatie tot het nationale arbeidsrecht in gastlanden

Het internationaal investeringsrecht is, naast het handelsrecht, een tweede belangrijke pijler van het internationaal economisch recht. Anders dan bij het handelsrecht worden subjectieve rechten toegekend aan private actoren. In het geval van een bilaterale investeringsbeschermingsovereenkomst kunnen investeerders met de nationaliteit van een van de verdragspartijen zich beroepen op een aantal beschermingsgronden wanneer zij investeren binnen de landsgrenzen van de andere verdragspartij. Wanneer een land een buitenlandse investeerder discrimineert, het eigendom onteigent, niet 'eerlijke en billijk' behandelt of onvoldoende bescherming biedt kan de investeerder een arbitrage-

zaak aanspannen tegen het gastland. De relatie tussen het internationaal investeringsrecht en de regulering van arbeid heeft tenminste drie facetten: (1) de investeerder kan een zaak aanspannen tegen het gastland, bijvoorbeeld omdat het aannemen van strengere arbeidswetgeving geclassificeerd kan worden als een indirecte onteigening, (2) het gastland kan het nationale arbeidsrecht versoepelen, om zo aantrekkelijker te worden voor buitenlandse investeringen, (3) investeringsverdragen zouden naast rechten voor investeerders ook verplichtingen kunnen bevatten, onder meer over arbeidsomstandigheden.

Eind jaren '50, toen de eerste moderne bilaterale investeringsverdragen werden gesloten, werd door verschillende juristen gesteld dat dergelijke verdragen landen zouden beperken in hun mogelijkheden arbeidswetgeving aan te nemen. Een analyse van verdragsbepalingen en de jurisprudentie leidt echter tot een andere conclusie. Alleen in het geval van expliciete toezeggingen aan een buitenlandse investeerder zou nieuwe arbeidswetgeving kunnen leiden tot schending van een verdrag. Met name de zogenaamde 'stabilisatieclausules' die soms worden opgenomen in specifieke overeenkomsten tussen een individuele investeerder en het gastland bieden reden tot zorg. Vanwege het vertrouwelijke karakter van deze contracten is het onmogelijk vast te stellen hoe vaak stabilisatieclausules worden overeengekomen, en hoe vaak dit in de praktijk leidt tot een uitzonderingspositie voor een buitenlandse investeerder.

Mede door een aantal arbitragezaken over gevoelige onderwerpen zoals afvalverwerking, luchtkwaliteit, energietransitie, tabaksontmoediging en de redding van banken tijdens de financiële crisis van 2008 worden beschermingsbepalingen in investeringsverdragen steeds meer afgebakend. Het meest in het oog springend zijn de zogenaamde 'right to regulate' bepalingen, waarin wordt gesteld dat landen het recht hebben om arbeidswetgeving aan te nemen. Dergelijke bepalingen zijn echter onnodig: ook onder verdragen die dit niet expliciet stellen hebben landen dit recht. Dit vloeit rechtstreeks voort uit het beginsel van soevereiniteit. De proliferatie van 'right to regulate' bepalingen kan echter leiden tot een strengere interpretatie van verdragen waarin een dergelijke bepaling ontbreekt.

Handels- en investeringsverdragen als bron van arbeidsrechtelijke verplichtingen

Naast het multilaterale WTO-raamwerk met 164 lidstaten hebben staten de mogelijkheid om binnen kleinere vrijhandelszones of douane-unies verdergaande handelsliberalisering na te streven. Omdat doorgaans ook afspraken over investeringsbescherming worden gemaakt wordt in dit proefschrift gesproken over preferentiële handels- en investeringsverdragen. Verdragen zoals CETA, de EU-Canada Comprehensive Economic and Trade Agreement, en TTIP, het Transatlantic Trade and Investment Partnership tussen de EU en de Verenigde Staten, zijn de afgelopen jaren in Nederland veelvuldig in het nieuws geweest.

In tegenstelling tot de WTO-verdragen worden in veel preferentiële handels- en investeringsverdragen bindende arbeidsnormen opgenomen. Sinds de inwerkingtreding van het North American Free Trade Agreement in 1994, dat de primeur had, neemt dit aantal snel toe. Vier typen bepalingen kunnen worden onderscheiden:

1. De (resultaats)verplichting het nationale arbeidsrecht niet te verslechteren door middel van wetswijzigingen of het niet handhaven van bestaande wetgeving
2. De (inspannings)verplichting het nationale arbeidsrecht te verbeteren
3. Procedurele waarborgen binnen het nationale arbeidsrecht
4. Stimulering van maatschappelijk verantwoord ondernemen

De verplichting het nationale arbeidsrecht in stand te houden is hiervan verreweg de belangrijkste. In tegenstelling tot andere bepalingen worden deze doorgaans geformuleerd als harde resultaatsverplichtingen. Kenmerkend voor de verplichting het arbeidsrecht in stand te houden is dat het feitelijke beschermingsniveau niet ter zake doet. Zo maakt het niet uit of een land zware arbeid door kinderen van twaalf jaar toestaat; zolang de arbeidsinspectie die grens maar controleert en overtredingen worden bestraft. Ook mag de wetgever de minimumleeftijd niet verder verlagen. Doorgaans is er alleen sprake van een schending van het handelsverdrag wanneer de verslechtering de intentie of het effect had de handel tussen de lidstaten te beïnvloeden. Met andere woorden: wanneer een handelspartner de minimumleeftijd voor zware arbeid verlaagd naar elf jaar maar niet kan worden aangetoond dat dit effect heeft gehad op de handel, bijvoorbeeld doordat textiel nu goedkoper kan worden geëxporteerd, dan is dit in overeenstemming met de verdragsverplichtingen.

Tot dusverre is er slechts één arbitrageprocedure geweest ten aanzien van de uitleg en toepassing van een arbeidsclausule uit een preferentieel handels- en investeringsverdrag. In 2017 deed een tribunaal uitspraak in een zaak tussen de Verenigde Staten en Guatemala. Guatemala zou de eigen wetgeving over onder meer vakbondsrechten niet effectief hebben gehandhaafd in een 'sustained or recurring course of action or inaction' en 'in a manner affecting trade between the Parties'. Dat laatste bleek het grootste struikelblok. Het lukte de Verenigde Staten niet om overtuigend bewijs te leveren dat de omissies van Guatemala een effect hadden op de handel tussen beide landen. De strikte interpretatie die het tribunaal gaf aan het economisch effect vereiste is in de literatuur stevig bekritiseerd. Volgens sommige auteurs is het punt dat vakbondsvrijheid tot de 'fundamentele' ILO-normen behoort volledig genegeerd. De vraag is echter of dat ligt aan het tribunaal. In de literatuur wordt regelmatig aangenomen dat arbeidsclausules in economische verdragen het arbeidsrecht in het land met het laagste beschermingsniveau op moeten krikken. Studies die vanuit dit perspectief de effectiviteit van de verdragen evalueren komen tot de conclusie dat er geen verbetering heeft plaatsgevonden. Echter,

het belangrijkste doel van deze clausules is het voorkomen van ondermijning van het nationale arbeidsrecht in het land met het hoogste beschermingsniveau, niet het verhogen van standaarden elders.

Het feit dat veel preferentiële handels- en investeringsverdragen verwijzen naar de *Declaration on Fundamental Principles and Rights at Work* zorgt voor verwarring. Het lijkt aantrekkelijk om te verwijzen naar de fundamentele arbeidsnormen. Maar daarmee wordt slechts een beperkt deel van het internationaal arbeidsrecht gedekt. Zo zijn er ILO-verdragen over arbeidsinspecties, uitzendarbeid en de beëindiging van arbeidsrelaties. Dergelijke onderwerpen kunnen veel relevanter zijn in de context van economische liberalisering tussen ontwikkelde landen dan het herbevestigen van bestaande afspraken over kinderarbeid. Daarnaast geldt dat hoe explicieter de arbeidsclausule, hoe statischer. Nog steeds neemt de ILO nieuwe regelgevende instrumenten aan. Zo streven de vakbonden naar een verdrag over ketenverantwoordelijkheid, een uiterst relevant onderwerp voor een socialer economisch recht. Wanneer een handelsakkoord precies aangeeft welke ILO-verdragen moeten worden geïmplementeerd kunnen latere ontwikkelingen binnen het internationaal arbeidsrecht alleen door middel van amendering een plek in het akkoord krijgen. Uniformiteit in arbeidsclausules zou dan ook geen doel moeten zijn, maatwerk is noodzakelijk.

De beperkte afdwingbaarheid van arbeidsclausules in handels- en investeringsverdragen is een punt van aandacht. In veel gevallen wordt de mogelijkheid van een arbitrageprocedure uitgesloten. Zelfs wanneer dit wel mogelijk is is de bereidwilligheid van staten om een procedure aan te spannen vaak gering. De mogelijkheid van een klachtrecht voor individuen, vakbonden of NGO's om arbeidsbepalingen in handelsakkoorden beter te kunnen handhaven is nooit serieus onderzocht. Naast verbeterde toegang tot het recht zou ook nagedacht moeten worden over de gewenste remedie. Onder het verdrag tussen de VS en Guatemala kan maximaal een boete van $15 miljoen worden opgelegd, te besteden aan de verbetering van (de handhaving van) het arbeidsrecht in het land dat de zaak verliest. Een vestzak-broekzak constructie, maar wel gericht op het probleem. Onder de meer recente verdragen van de Verenigde Staten kan schending van de arbeidsbepalingen leiden tot tegenmaatregelen, zoals het verhogen van importtarieven. Dit doet meer pijn, en is dus een sterkere aansporing tot naleving van de arbeidsclausule. Maar het treft ook bona fide bedrijven. Hoewel de inhoud van clausules per verdrag zouden moeten verschillen, is het goed om het sanctieregime te harmoniseren. De Europese Unie heeft in dit opzicht nog wat te leren van de Verenigde Staten. Hierbij verdient het meer recente en effectievere model van tegenmaatregelen steun.

Conclusies

Het internationaal arbeidsrecht is een product van economische globalisering. Gedurende de eerste vijfentwintig jaar van het bestaan van de ILO werd het gezien als een instrument dat twee vliegen in één klap sloeg: door internationale coördinatie van arbeidsnormen konden landen zonder 'oneerlijke' concurrentievoordelen handeldrijven. Na de Tweede Wereldoorlog werd die faciliterende rol overgenomen door het internationaal handel- en investeringsrecht. De interactie tussen deze rechtsgebieden stond in dit proefschrift centraal, waarbij de vraag werd gesteld: hoe beperken of ondersteunen internationale handels- en investeringsverdragen de nationale en internationale regulering van arbeid?

Wanneer het gaat om het effect op nationaal recht dient in de eerste plaats een onderscheid te worden gemaakt tussen nationaal arbeidsrecht en handelsmaatregelen in reactie op 'oneerlijke' arbeidsomstandigheden elders. Er kan worden geconcludeerd dat handels- en investeringsverdragen de regelgevende capaciteit van landen op het eerste terrein niet beperken. Dit is echter een juridische constatering, en staat los van de economische en empirische vraag of steeds verder gaande economische integratie – gefaciliteerd door een internationaalrechtelijk kader – staten aanzet tot versoepeling van het nationaal arbeidsrecht. Dit fenomeen wordt vaak beschreven als de 'race to the bottom'. In de economische literatuur is regelmatig betoogd dat dit fenomeen niet bestaat. Hieruit kan echter niet de normatieve conclusie worden getrokken dat internationale coördinatie van arbeidsstandaarden, door de ILO of door arbeidsrechtelijke bepalingen in economische verdragen, overbodig is. De instandhoudingsverplichting die sinds NAFTA onderdeel uitmaken van talloze handels- en investeringsakkoorden zijn niet bedoeld om een 'race to the bottom' te stoppen. Deze bepalingen beogen staten te beschermen tegen de economische gevolgen van verslechteringen in het nationale arbeidsrecht elders, ook wanneer het gaat om relatief geïsoleerde gevallen die geen systematische 'race' veroorzaken.

De mogelijkheden van staten om handelsmaatregelen te treffen in reactie op oneerlijke arbeidsstandaarden elders worden wel significant beperkt, met name door het WTO-recht. De enige manier om een importverbod van producten gemaakt door kinderen te rechtvaardigen, is door te beargumenteren dat dit de morele waarden van consumenten in het importerende land schaadt. Het argument dat een handelsmaatregel de overheid kan dwingen om strenger op te treden tegen kinderarbeid wordt, vanwege het extraterritoriale karakter van een dergelijke maatregel, gezien de jurisprudentie van het WTO-geschillenbeslechtingsorgaan waarschijnlijk niet geaccepteerd.

Het tweede element uit de onderzoeksvraag ziet op de interactie met het *internationaal* arbeidsrecht. Veel arbeidsclausules gebruiken de ILO-verdragen als ijkpunt. Handelsverdragen passen hiermee in een bredere trend, waarbij de ILO niet langer een monopolie heeft op de vorm en inhoud van het internationaal arbeidsrecht. De organisatie fungeert steeds meer als een normatieve

spin in een web van talloze 'harde' en 'softe' (quasi-)juridische instrumenten. Verwijzingen naar ILO-verdragen zijn alomtegenwoordig – van de jurisprudentie van het Europees Hof voor de Rechten van de Mens (EHRM) tot niet-bindende uitspraken van de Nationale Contactpunten die adviseren over de toepassing van de OESO-richtlijnen voor multinationale ondernemingen, en van Heinekens *Human Rights Policy* tot het *Accord on Fire and Building Safety in Bangladesh*. Maar is meer ook beter? Een zorg van juristen is dat proliferatie leidt tot fragmentatie, en daarmee tot ondermijning van de rechtszekerheid.

Uit dit proefschrift blijkt dat zorgen over fragmentatie ongegrond zijn. Wel is er zowel binnen het internationaal economisch recht als binnen het internationaal arbeidsrecht ruimte voor verdere toenadering.

Voor handels- en investeringsverdragen geldt dat het simpelweg verwijzen naar de *Declaration on Fundamental Principles and Rights at Work* onvoldoende is. Voorafgaand aan het sluiten van een verdrag kunnen bijvoorbeeld afspraken worden gemaakt over de implementatie van bepaalde ILO-normen. Zo stemde Maleisië tijdens de onderhandelingen voor het Trans-Pacific Partnership in met een omvangrijk 'Labor Consistency Plan' waarin aanpassingen van onder meer het stakingsrecht en verbeteringen van de positie van arbeidsmigranten werden aangekondigd. Wanneer een geschil ontstaat over de naleving van de arbeidsclausule in het handelsakkoord kan de ILO worden geconsulteerd, en mocht het komen tot een arbitrageprocedure dan bieden de ILO-verdragen en de jurisprudentie van de toezichtcomités aanknopingspunten bij de interpretatie van het handelsverdrag. De zaak tussen de Verenigde Staten en Guatemala toont aan dat dit in de praktijk ook gebeurt.

Op haar beurt kan de ILO zich meer openstellen voor het idee dat een groot deel van het normatieve kader voor de regulering van arbeid in de 21ste eeuw buiten haar muren wordt ontwikkeld. Hoewel dit op zichzelf niet onwenselijk is blijven multilaterale instituties van groot belang, bijvoorbeeld om invulling te geven aan een begrip van '(on)eerlijke arbeidsstandaarden' in de context van het internationaal economisch recht. De integratie van arbeidsnormen in handels- en investeringsverdragen is geen hulpmiddel om op te treden tegen een handvol staten, maar dient een belangrijk onderdeel zijn van een internationaalrechtelijk systeem dat bijdraagt aan economische welvaart en sociale rechtvaardigheid.

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Curriculum vitae

Ruben Zandvliet was born in 1986 in Venray, the Netherlands. In 2010, he obtained his LLM in public international law at Leiden University, graduating with *cum laude* honours. He subsequently obtained a second LLM degree at Columbia University in New York, where he was a James Kent Scholar.

During his studies in Leiden he worked as a policy officer for a Member of Parliament in the Netherlands, in the area of constitutional law, corporate law and corporate social responsibility. After graduating from Columbia in 2011, Ruben started his doctoral research in Leiden as a Meijers PhD Fellow. Between January and June 2015, he was a visiting scholar at the Lauterpacht Centre for International Law at the University of Cambridge.

In addition to his doctoral dissertation, Ruben has published a number of articles and book chapters on business and human rights and on the interactions between international economic law and labour. Since 2016 he is employed at ABN AMRO's Strategy & Sustainability department, focusing on the bank's human rights programme.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2017 and 2018

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