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Trade, investment and labour: interactions in international law

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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.