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Trade, investment and labour: interactions in international law

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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,

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

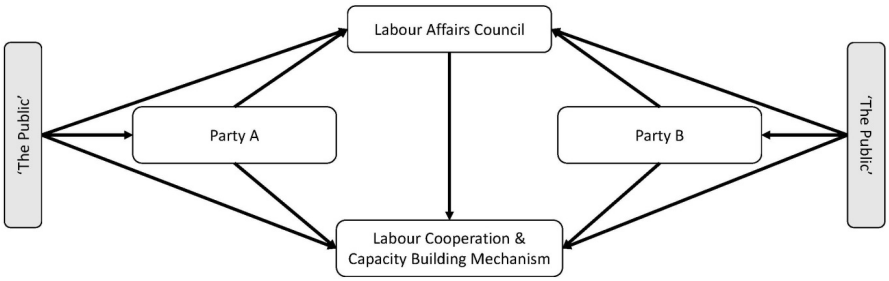

Figure 5.2: Institutional mechanisms in the EU-Korea FTA

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.

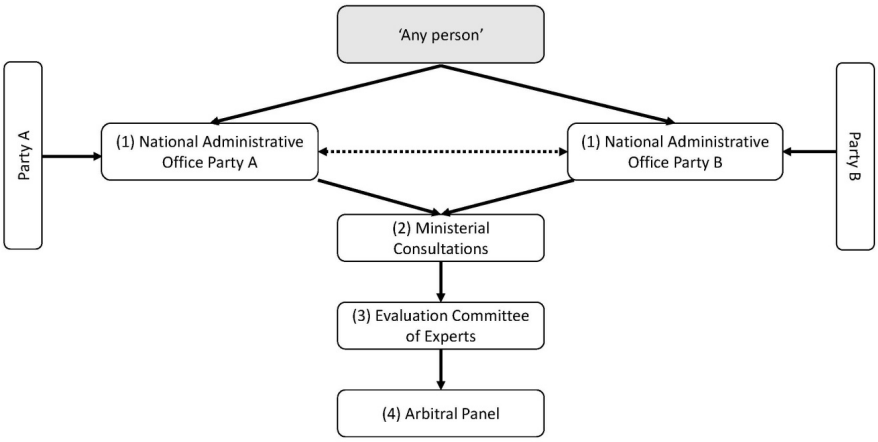
The Canada-Colombia FTA adds a third approach to post-ratification monitoring. In 2010, two years after the FTA was signed, the parties concluded the 'Agreement Concerning Annual Reports on Human Rights and Free Trade Between Canada and the Republic of Colombia.' Article 1.1. contains an obligation on 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.

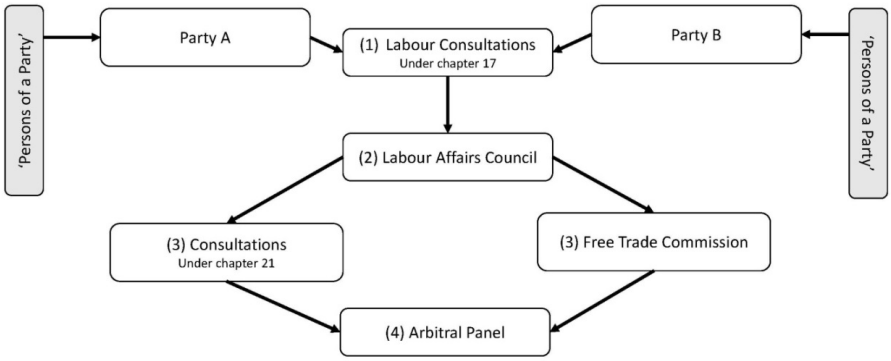
203 Tamara Kay, 'Labor Transnationalism and Global Governance: The Impact of NATFA on Transnational Labor Relationships in North America' (2005) 111 American Journal of Sociology 715, 750; Marley Weiss, 'Two Steps Forward, One Step Back – Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, 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.

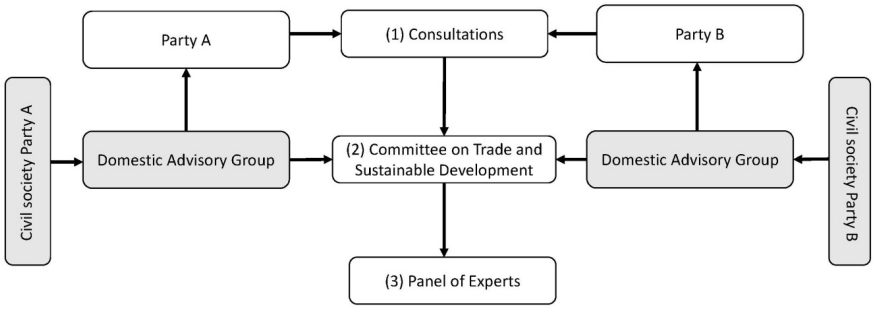
207 The EU-Korea FTA does not contain a provision similar to Art 6.2 of the Agreement on Labour Between the EFTA States and Honk Kong, China, which contains an explicit prohibition to "refer any difference arising from this Agreement to any third party or international tribunal for settlement."

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

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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.