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Trade, investment and labour: interactions in international law

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6 Conclusions

6.1 INTRODUCTION

International labour law and economic globalization have always been closely related. When the laws of economics – e.g. comparative advantage and the division of labour – could freely work, states' efforts to improve the protection of workers would be hampered. Vice versa, if workers could not be protected because this would cause a competitive disadvantage, states could be inclined to restrict free trade. International labour law resolves this dilemma. Although today the field of law is often perceived as a sub-area of human rights, especially when focusing on the 'fundamental labour rights', it was originally seen as an area of international economic law that was not concerned with trade or investment, but with labour. Workers in states that were not part of the international economic system may have been subjected to harsh labour conditions, but there was no need to extent the benefits of international labour law to them.

Today, international labour law is no longer considered to be part of international economic law.Instead, economic globalization is facilitated by a vast amount of bilateral, regional and multilateral treaties that focus – broadly speaking – on the liberalization of trade and the protection of foreign investment. Therefore, questions concerning the interactions between these legal regimes arise. This thesis has sought to conceptualize the dynamics in two ways: international trade and investment agreements may *constrain* domestic and international labour law, or they may *support* domestic and international labour law.

This concluding chapter consists of five parts. The research question of this thesis – how do international trade and investment agreements constrain and support domestic and international labour law? – is answered in parts 6.2 and 6.3. Subsequently, part 6.4 examines economic perspectives on the linkage between labour standards and trade and investment law in light of this study. Part 6.5 comments on a main thread in the debate, namely the question whether labour provisions in international trade and investment law intend to foster 'fair competition' or 'fundamental rights'. Part 6.6 contains a final outlook for labour standards in trade and investment agreements.

6.2 CONSTRAINING AND SUPPORTING DOMESTIC LABOUR(-RELATED) LAW

International trade and investment law affect both the law that regulates labour standards within a country's own jurisdiction, as well as that country's ability to take certain trade measures in response to low(ered) labour standards elsewhere. Although the latter should be classified as domestic trade law or labour-related trade measures instead of domestic labour law, the two are closely related. This section contains the conclusions of this thesis in both areas.

Before the Second World War there was no universal rule guaranteeing most favoured nation (MFN) treatment. This meant that states could discriminate between countries depending on their level of labour regulation. If a state limited the workweek to forty hours but its trade partners did not follow suit, it was free to impose higher tariffs on goods originating from these countries in order to offset the economic burden of the new labour law. In 1948, the GATT imposed legal constraints on labour-related trade-measures. This thesis has examined the extent of these constraints, as well as the role of the Technical Barriers to Trade (TBT) Agreement that was adopted in 1994 as part of the WTO Agreements. The founding fathers of the GATT did not intend to prohibit labour-related trade measures as a means to safeguard fair labour standards without providing an alternative. Indeed, Article 7 of the Havana Charter would have created a treaty-based mechanism that obliged states to "take whatever action may be appropriate and feasible to eliminate [unfair labour] conditions within its territory." After the failure of the Havana Charter, even modest attempts to establish a working group which would discuss whether the GATT should be amended with such a clause were defeated. As such, the WTO Agreements provide no explicit guidance on two questions, which have been discussed extensively in chapter 3: (1) are low labour standards or derogations from labour standards actionable under the GATT, and (2) to what extent do the GATT and TBT Agreement constrain states to take unilateral trade restrictive measures in response to low labour standards or derogations from labour standards?

With regard to the first question, it can be concluded that there is no support for the proposition that low labour standards can breach the GATT regimes on dumping and subsidies. This follows from both a textual analysis of Articles VI and XVI and in the case of the 'social dumping' analogy also from the *travaux préparatoires*. The argument that derogations from labour standards could give rise to a so-called 'non-violation complaint' under Article XXIII GATT is more persuasive. This article provides a cause of action when "any benefit ... is being nullified or impaired" as the result of a measure which itself does not conflict with the GATT. Derogations from labour standards could have such an effect. However, since the accession negotiations of Japan in the early 1950s, no state has even attempted to bring a labour-related NVC. It would have to satisfy a rather high threshold – the measure could not have been anticipated, and it nullifies or impairs benefits – in order to obtain non-binding recom-

mendations from the Appellate Body. NVC complaints thus remain a theoretical possibility rather than a practical avenue which states are likely to pursue.

With regard to the question whether states are allowed to take unilateral trade measures in response to low labour standards elsewhere, the analysis in chapter 3 showed that they can, although the justification for such measures needs to be somewhat creative. Mandatory labelling requirements – such as a 'verified child labour free' label – could be justified under Article 2.2 TBT Agreement as they prevent 'deceptive practices'. Also with regard to measures that are to be assessed under the GATT, such as import bans, a consumer-oriented justification is most likely to succeed. Whether a t-shirt produced by children can be considered a 'like product' compared to t-shirts produced under decent labour conditions is determined on the basis of various criteria, including 'consumer taste and preferences'. The threshold is rather high, however, and it is most likely that the WTO Appellate Body would consider the two kinds of t-shirts 'like products'. That means that the measure is in breach of the GATT, unless it can be justified under one of the general exceptions listed in Article XX. As a consequence of the Appellate Body (AB) report in the *EC–Seal Products* case, it is possible to take trade-restrictive measures in response to process and production methods (PPMs) in an exporting state, as long as these measures are 'necessary to protect morals' in the importing state. Again, the locus is the consumer, whose moral standards may be harmed when they are – knowingly or unknowingly – confronted with goods produced in sweatshops.

The problem with the public morals exception of Article XX(a) GATT is twofold. First, the AB's definition of 'public morals' is so broad that its scope is by no means restricted to the fundamental labour rights, or even to internationally accepted labour standards. In theory, importing states could argue that the concept of 'living wages' is an issue of public morality in order to justify trade restrictive measures that are otherwise inconsistent with the GATT. The more creative states become, the more important the *chapeau* of Article XX will be to prevent paragraph (a) from turning into a *carte blanche* for trade restrictions. The second problem with Article XX(a) is that the consumer-oriented justification is inward-looking. This means that trade measures against child labour or forced labour products could be justified, irrespective of the effect of these measures in the exporting state. Evidence that children would switch to more hazardous forms of work as a result of the measure is irrelevant to the legal analysis under the public morals exception of the GATT. If an importing state would argue that its trade measure is not intended to protect consumers but to protect these child workers, it is unlikely that the measure will be accepted by the Appellate Body as the aim of the measure is extraterritorial.

Chapter 4 examined the relationship between international investment law and labour. It asked whether international investment agreements (IIAs) constrain the ability of host states to regulate their domestic labour market. IIAs

grant subjective rights to foreign investors, which may be invoked in response to labour-related acts and omissions by the host state. This has indeed happened in a handful of cases. Based on the structure of international investment law and an analysis of the case law, however, it can be concluded that IIAs do not constrain domestic labour law. Nonetheless, states have begun to assert their 'right to regulate'. These provisions are not necessary, as it can be assumed that states never intended to limit their sovereign powers to set labour standards. The sole exception is when states have made explicit commitments to the investor, for example in the form of a contractual stabilization clause stipulating that new (labour) legislation does not apply to the investor. Furthermore, right to regulate provisions themselves are not without problems. When more treaties will contain explicit carve-outs, right to regulate clauses and general exceptions, it will become increasingly difficult to sustain the argument that these provisions are not necessary. Does a bilateral investment treaty without a right to regulate provision accept a broader scope of liability under the fair and equitable treatment standard, for example? This is not the case at the moment, but it could be a matter of time before this argument is raised before an arbitral tribunal.

Although international trade and investment agreements do not significantly constrain states' freedom to adopt and enforce domestic labour legislation, states may be inclined to lower their standards because they hope to increase exports or attract more foreign direct investment. Similarly, they may maintain current labour standards because they fear that improving them would deteriorate their competitive position. These dynamics are not new. Indeed, the original purpose of ILO was precisely to overcome this coordination problem. At the time, the fields of international trade and investment law were in their infancy compared to international labour law. As the former grew more mature – for example through mandatory dispute settlement mechanisms that could result in 'hard' remedies such as suspension of tariff benefits and monetary assessments – the call to also address the labour coordination problem in international economic law became louder. Forty-six years after the Havana Charter, the North American Free Trade Agreement (NAFTA) was the first economic agreement to include binding labour provisions. Since NAFTA this number has rapidly proliferated. Labour provisions in preferential trade and investment agreements (PTIAs) and IIAs address four issues: (1) derogations from existing labour standards, (2) improvements of labour standards (3) domestic governance, and (4) the conduct of investors. These provisions intend to 'support' states' domestic labour legislation. Due to the latter's close connection to international investment law it has been analysed in chapter 4, while the other types formed the subject-matter of chapter 5.

While non-derogation clauses are generally regarded to be the most important type of provision, the *US–Guatemala* arbitration has cast doubt on their efficacy. The aspect that has proved to be particularly problematic is the evidential burden to determine sustained or recurring non-enforcement and

to demonstrate an economic effect. Both are especially relevant in the context of enforcement derogations as opposed to legislative derogations. It has been argued that the economic effects criterion was the real "Achilles Heel" of the case.[1] The threshold that the panel established to determine whether the 'in a manner affecting trade' criterion was satisfied consists of three elements: (1) were the companies in question exporting or competing with imports from one of the CAFTA-DR markets, (2) the effects of the failures to effectively enforce on these companies, and (3) the "competitive advantage" created by these effects.[2]

The last two elements do not follow from the text of CAFTA-DR and are unnecessarily burdensome. More fundamentally, the question should be raised whether economic benchmarks should be included in PTIAs at all. International labour law as such is based on the premise that changing domestic labour law has economic effects. This is also the reason why labour standards are included in economic agreements, and freedom of speech or the right to a fair trial are not. Article 7 of the Havana Charter merely contained the observation "that unfair labour conditions, particularly in production for export, create difficulties in international trade" which was why states were obliged to "take whatever action may be appropriate and feasible to eliminate such conditions within its territory." Arguably, in case of a dispute the responding state could have argued that the labour issue was purely domestic and had no effect on international trade whatsoever. But under current PTIAs, the applicant has to satisfy a high standard of proof. The *US–Guatemala* dispute has reinvigorated the debate over the necessity of economic effects requirements. Compa *et al* have argued that PTIAs should include language stating that the non-derogation obligation applies to scenario's "involving employers and workers in a firm or sector involved in trade" or that the economic benchmark should be abandoned altogether.[3] The latter would "make the labor chapter a human rights chapter" according to the authors.[4] This is not the case, however, as long as states do not include human rights issues unrelated to labour in their trade agreements. Nevertheless, their argument that a (strict) economic benchmark is superfluous is persuasive.

Improvement clauses require an even more comprehensive overhaul. They are phrased in hortatory language, and even some US' PTIAs preclude the

1 Lance Compa, Jeffrey Vogt, Eric Gottwald, 'Wrong Turn for Workers' Rights: The U.S.-Guatemala CAFTA Labor Arbitration Ruling – and What to do About it?' (International Labor Rights Forum, 2018) 11.

2 *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Final Report of the Panel (14 June 2017) para 449.

3 Lance Compa, Jeffrey Vogt, Eric Gottwald, 'Wrong Turn for Workers' Rights: The U.S.-Guatemala CAFTA Labor Arbitration Ruling – and What to do About it?' (International Labor Rights Forum, 2018) 30-31.

4 Ibid 31.

possibility of arbitral proceedings.[5] 'Reaffirming' existing commitments has little added value, and obfuscates the fact that improvement clauses can play an important role. Chapter 5 has therefore suggested that weakly drafted improvement 'obligations' focused on a narrow subset of labour rights could be transformed to broad *pacta de negotiando* or *contrahendo* provisions in order to stimulate meaningful negotiations between states on their legislative agendas. This would blur the dichotomy between the 'legal' side of trade-labour linkages – in the form of binding treaty obligations – and flanking measures such as pre-ratification action plans and technical assistance programmes. Inspiration may be drawn from the European Union's 'Open Method of Coordination' (OMC), the governance process which is the "dominant instrument in the integration of European social policies."[6]

With regard to provisions addressing domestic governance issues and the regulation of investors the same conclusion can be drawn: they are potentially very useful but do not receive the attention that they deserve. The former should be explicitly linked to the ILO's 'Governance Conventions' on labour inspections, employment policy and tripartism. The latter are broader in scope, and fulfil a number of different roles. Especially the practice of some African agreements to impose binding labour obligations on investors is worth exploring further as this is a novelty in international law.

Whereas this thesis has elaborated extensively on what *is* regulated by labour clauses in PTIAs and IIAs, it is just as important to consider what is not. In the analysis of the link between labour and the multilateral trade regime, the analysis focuses on the interpretation of GATT and TBT provisions and highlighted the constraints posed by the concepts such 'likeness' (Art. I and III GATT and 2 TBT), 'normal value' (Art. VI), 'subsidy' (Art. XVI), 'benefits' (Art. XXIII), and 'necessity' (Art. XX), as well as the difficulties of invoking general exception clauses for measures that have an extraterritorial effect. PTIAs and IIAs do not touch on any of these issues, except for a few (model) treaties that include a slightly different general exceptions clause. PTIAs are therefore of limited use when arguing that t-shirts made by children are not 'like' t-shirts made by adults, for example. More fundamentally, the fact that PTIAs do not create *lex specialis* on these issues attests to the practical irrelevance of these arguments, especially when the agreement contains labour obligations.[7]

5 Cf the quoted passage from the 1921 ILC above: the economic coordination problem is thus addressed by 'hard' and enforceable obligations, whereas clauses that address social injustice independently of the notion of economic competition are aspirational.

6 Beryl ter Haar, 'Open Method of Coordination: An analysis of its meaning for the development of a social Europe' (PhD thesis, Leiden University 2012) 147.

7 Art 23.6 of the draft USMCA provides that "each Party shall prohibit, through measures it considers appropriate, the importation of goods into its territory from other sources produced in whole or in part by forced or compulsory labor, including forced or compulsory child labor." However, it then clarifies that "nothing in this Article authorizes a Party to

Prominent scholars such a Dani Rodrik still advocate that states should have more space to unilaterally adopt countermeasures in response to 'social dumping' instead of going through a dispute settlement process in which the burden of proof to establish a breach of the PTIA is on the importing state, and the aim of the procedure is primarily to remedy the non-compliance instead of compensating workers in the importing states who have suffered a harm.[8] Similar concerns are raised in the context of the Generalized System of Preferences (GSP), as an increasing number of states that used to be beneficiaries of the US' and EU's GSP schemes and thus had to comply with the unilaterally imposed labour conditionalities have now signed trade agreements containing reciprocal labour obligations.[9] Although there is definitely room for improvement in PTIA labour clauses, the shift from a power-based to a rules-based enforcement system should in principle be supported.[10]

6.3 INTERACTIONS BETWEEN INTERNATIONAL TRADE, INVESTMENT AND LABOUR LAW

With the emergence of the human rights conventions in the 1950s and labour clauses in trade and investment agreements in the 1990s, there are now three main sources of international labour law. This invokes questions about the interactions between these international legal systems. The terms 'constrain' and 'support' are less relevant in this context than they are in relation to domestic labour(-related) law. This section will address (1) interactions between legal norms, (2) the broader role of the ILO and international labour standards in the context of trade and investment agreements, (3) the different roles of trade unions in the governance structures of international labour law and PTIA-based labour mechanisms.

Chapters 3, 4 and 5 all analyzed whether, and if so how, international labour law could play a role in the interpretation of international trade and investment law. As was noted in the previous section, the argument that the public morals exception of Article XX(a) GATT can be used to justify trade measures in response to *international* labour standards should be rejected, as the Appellate Body allows states broad discretion to determine their own moral

take measures that would be inconsistent with its obligations under other provisions of this Agreement, the WTO Agreement, or other international trade agreements."

8 Dani Rodrik, *Straight Talk on Trade: Ideas for a Sane World Economy* (Princeton University Press 2018) 234.

9 Gerda van Roozendaal, 'The Diffusion of Labour Standards: The Case of the US and Guatemala' (2015) 3 Politics and Governance 18, 23 who documented trade union criticism on the different sanctions and the normative benchmarks.

10 Patrick Abel, 'Comparative Conclusions on Arbitral Dispute Settlement in Trade-Labour Matters Under US FTAs,' in Henner Gött (ed) *Labour Standards in International Economic Law* (Springer 2018) 157.

standards. However, in multilateral trade law, the legal framework of the ILO plays a role in the interpretation of the *chapeau* of Article XX and in relation to the Generalized System of Preferences. The *chapeau* holds that even when a measure is 'necessary to protect public morals' it cannot be accepted when it constitutes 'arbitrary or unjustifiable discrimination'. That requires an assessment whether labour conditions in a country targeted by a trade measure are different from countries that are not targeted. The most obvious way to make an objective assessment is to rely on the ratification of ILO conventions and findings of the ILO supervisory bodies.

The relevance of labour standards for the GSP is twofold. Under the GSP, WTO member states are allowed to impose lower (or no) tariffs on imports from developing countries. Both the European Union and the United States restrict access to their GSP schemes on the basis of compliance with certain labour conditions. By doing so, they not only distinguish between developed and developing WTO members, but within the latter category also between compliant and non-compliant ones. This is allowed when the tariff cuts are justified by the existence of a 'development need' in the beneficiary country. The legal framework of the ILO plays two roles in this regard. First, ILO conventions can be used to determine whether tariff differentiation responds to a 'development need', given the recognition of the Appellate Body that "multilateral instruments adopted by international organizations" could perform this role.[11] Following this argument, compliance with international labour standards is a development need. Second, when it is accepted that compliance with international labour standards is a legitimate development need, the question arises how non-compliance is determined. In other words: when is a state allowed to revoke tariff preferences because of non-compliance with the labour conditionalities? The United States has been criticized for inconsistent application of its GSP, and a lack of transparency on the standards that are used to determine non-compliance.[12] The European Union relies on findings of non-compliance by the ILO's Committee on the Application of Standards, which only considers a very limited number of cases each year. Both the US and the EU could therefore make better use of the ILO to make the application of their GSP labour conditionalities more objective, for example by relying more explicitly on the jurisprudence of the CFA and the Committee of Experts.

Chapter 4 took a different perspective, namely the reliance on international labour standards as an 'interpretative strategy' to safeguard the policy space of host states. It is often stated that the 'systemic integration of public international law' through the application of Article 31.3(c) VCLT can result in the

11 WTO, *European Communities: Conditions for the grating of tariff preferences to developing countries – Report of the Appellate Body* (7 April 2004) WT/DS246/AB/R, para 163.

12 International Corporate Accountability Roundtable, 'Tools of Trade: The Use of U.S. Generalized System of Preferences to Promote Labor Rights for All' (31 January 2018) 9, 20-22.

"harmonious interpretation of investment and human rights instruments."[13] However, it cannot be concluded that when contested labour measures are based on, or prescribed by, international conventions they are immune from, or better protected against, challenges by foreign investors. When measures are applied in a discriminatory fashion, or when the state has provided certain (contractual) commitments, it is immaterial whether the state is bound by certain ILO obligations. There is one exception, which is that the existence of ILO conventions can restrict investors' *legitimate* expectations that its host state would not alter its legal framework. Under normal circumstances – i.e. in the absence of discrimination and explicit guarantees – international labour law should not be necessary to justify domestic labour regulation. Arguing otherwise implies that the sovereign right to adopt labour regulations is indeed restricted by IIAs, which is not the case. Like 'right to regulate' provisions, the Article 31.3(c) VCLT argument is thus largely redundant.

Article 31.3(c) VCLT does have an important role to play with regard to the interpretation of PTIA labour provisions. Although legal commentaries tend to support a narrow interpretation of this article, the arbitral panel in *US–Guatemala* used it to emphasise the importance of the (non-binding) 1998 Declaration and the jurisprudence of the ILO's supervisory bodies. Petitions by NGOs and trade unions, the US Department of Labor and the European Court of Justice have all used or expressed support for using the ILO's normative framework in the interpretation of PTIA labour provisions. Also in the pre-ratification phase, the United States assesses to what extent their future trade partners comply with ILO standards, and uses its leverage to induce improvements. The European Union's practice in this phase is much weaker. While the substantive labour provisions in their trade agreements closely align with ILO standards, it does not visibly use its leverage in the pre-ratification phase to assess their trade partner's compliance with ILO standards and demand improvements.

The flexible application of Article 31.3(c) VCLT that the *US–Guatemala* panel adhered to is aligned with the practice of the regional human rights courts and the international human rights committees, as well as the International Court of Justice. The *Demir* judgment of the European Court of Human Rights is arguably the most prominent example of a case in which the quest for coherence of international law trumped a narrow and formalistic interpretation of the VCLT. The *US–Guatemala* case given sufficient reason to believe that PTIA labour clauses will also not be interpreted 'in clinical isolation' of international labour law. The normative role of the ILO is thus threefold: it helps states to assess the baseline of respect for international labour standards when entering into trade negotiations, it provides a focal point for improvements in pre-

13 Jan Wouters and Nicolas Hachez, 'When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights be Ensured' (2009) 3 Human Rights & International Legal Discourse 301, 334.

ratification action plans, and it assists in the interpretation of the PTIA's labour obligations.

With regard to the use of ILO materials as *factual* evidence in PTIA-based labour disputes, the *US–Guatemala* case paints another picture. The United States submitted a number of reports from *inter alia* the ILO Committee of Experts, the UN High Commissioner for Human Rights, and the UN Special Rapporteur on the Right to Food. However, the panel did not take this information into account. It stated that:

> while we have reviewed the UN and ILO reports cited by the United States and are aware of the observations they make about Guatemala's enforcement of its labor law in general, we understand the United States claims to be addressed to particular acts and omissions at particular workplaces rather than the system-wide conduct covered by those reports. Accordingly, our findings are addressed to the subject-matter of the U.S. claims as pled in this proceeding.[14]

If the United States would have made a broader case which did not focus on specific companies:

> the Panel would have required additional information concerning the methodologies and sources of information underlying those reports. This would not have been out of any particular concern regarding those methods, but rather to ensure the completeness of any factual record upon which the Panel might draw conclusions.[15]

Whilst for the purpose of interpreting PTIA labour clauses the jurisprudence of the ILO was thus easily accepted, its value as evidence of fact was not taken for granted. From the above, it follows that the centralized and coherent legal framework of the ILO is of great importance to the interpretation of PTIA labour provisions. In addition, there are various other ways in which the ILO, as an international organization with almost a century of experience, a membership of 187 states and numerous field-offices contributes to the implementation of PTIA-labour mechanisms. The 'Better Factories Cambodia' programme that was established in the wake of the US-Cambodia Textiles Agreement has been the most prominent, albeit short-lived example.

However, they are fundamentally different when it comes to the role of the 'social partners' in their respective governance structures. Chapter 2 noted that the importance of tripartism for the ILO and its legal framework can hardly be overstated. Trade unions and employer organizations are involved in all aspects of work of the ILO, including the final vote over new instruments, and the supervision of compliance with, and the interpretation of, adopted con-

14 *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Final Report of the Panel (14 June 2017) para 514.

15 Ibid, para 270.

ventions. This stands in stark contrast with the involvement of trade unions and employer organizations in international economic law. Within multilateral trade law, unions, NGOs and employer organizations play no formal role. Over the years, the WTO has allowed some room for the participation of civil society. Since 1998 the Appellate Body accepts *amicus curiae* briefs, although "procedures for the acceptance of *amicus curiae* briefs have swung back and forth."[16] Other avenues for the judicial and non-judicial participation of NGOs and trade unions have largely been ignored.[17]

Due to the fragmented nature of international investment law, there is no central organization like the WTO in which civil society actors could raise their voice. Here, participation as nondisputing parties in investor-state arbitration is the only formal role that they may assume. The *USP v Canada* arbitration was one of the first instances in which *amicus curiae* briefs were accepted.[18] The case concerned Canada's alleged failure to provide fair and equitable treatment to USP because Canada's labour legislation did not allow rural postal workers, who were employed by USP' competitor Canada Post, to join a union and bargain collectively. In one of the *amicus* briefs by the Canadian Union of Postal workers and the NGO Council of Canadians, the petitioners argued that the investor-state dispute settlement (ISDS) was not the proper forum to redress violations of international labour law. The argument was not primarily based on the idea that the arbitral tribunal lacked the necessary expertise, but because "those most directly affected by such violations have no right to seek redress under these investment rules, nor even to be accorded party standing in such proceedings."[19] According to the petitioners, allowing USP' claim would create "an asymmetrical enforcement regime" as investors that were harmed by non-compliance with an ILO rule could seek damages via the ISDS route, whilst this was not possible for affected workers.[20] The arbitral tribunal in *USP v Canada* did not make reference to the *amicus* briefs. Some IIAs now provide explicit guidance on the question whether *amicus* briefs may be allowed. Furthermore, the 2006 ICSID Rules of Arbitration hold that nondisputing parties are allowed to make written submissions when this would *inter alia* "assist the Tribunal in the determination of a factual or legal issue related

16 Bernard Hoekman and Michel Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (3rd edn, Oxford University Press 2009) 650-652.

17 Nicola Jägers, 'Mainstreaming Human Rights in International Economic Organisations: Improving Judicial Access for NGOs to the World Trade Organization' (2006) 24 Netherlands Quarterly of Human Rights 229, 245-266.

18 Vid Prislan and Ruben Zandvliet, 'Labor Provisions in International Investment Agreements: Prospects for Sustainable Development' in Andrea Bjorklund (ed) *Yearbook on International Investment Law and Policy 2012-2013* (Oxford University Press 2014) 407-411.

19 *United Parcel Service of Amercia Inc. v Government of Canada*, UNCITRAL Arbitration (NAFTA), Amicus curiae submissions by the Canadian Union of Postal Workers and the Council of Canadians, 20 October 2005, para 29.

20 Ibid, para 33.

to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties."[21]

Also in PTIA labour disputes, NGOs and trade unions may seek to join proceedings as *amici curiae*.[22] In the *US–Guatemala* case, twelve NGOs and unions from both countries submitted their views.[23] The submissions were of limited use to the panel, as most "tended to focus on the institutional, economic, social, and political context of the present dispute. Such views, while informative, were not directly relevant to the particular issues of legal interpretation that the Panel was required to decide."[24] Furthermore, none of the submissions addressed "the relevant factual issues ... of specific instances of alleged failures by responsible authorities to enforce labor laws at particular worksites."[25] Unlike ISDS cases, PTIA labour disputes normally arise as the result of an NGO or trade union petition. Also in the subsequent proceedings, the petitioners may maintain a close relationship with the applicant state in order to further substantiate the claims and collect evidence. However, states have full discretion to submit a dispute for consultations, and later arbitration (in the case of US agreements) or evaluation by an expert panel (in the case of EU agreements). In EU trade agreements, civil society parties also convene in domestic and transnational fora to "conduct dialogue."[26] Political scientists see the "empowerment of civil society" as one of the ways in which trade agreements may lead to improvement of labour standards.[27] It is difficult, however, to grasp the concrete benefits of this new form of social dialogue, which is unrelated to collective bargaining or other forms of negotiations.[28]

There are different ways to further empower trade unions and NGOs at the international level. For example, CSR clauses could be expanded to focus on International Framework Agreements, which can be defined as "bi- or multilateral agreements between multinationals on the one hand and global

21 Rule 37.2(a) ICSID Rules of Procedure for Arbitration Proceedings.

22 This right is granted under the Rules of Procedure of the specific trade agreement, and like the ICSID Rules allows submissions on issues of law or fact.

23 All *amicus* briefs are published in one document: <https://ustr.gov/sites/default/files/enforcement/DS/Submissions%20of%20NonGovernmental%20Entities.pdf> accessed 24 June 2018. Another submission was refused because the NGO was not based in a CAFTA-DR state.

24 *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Final Report of the Panel (14 June 2017) para 108.

25 Ibid, para 234.

26 Art 22.5(1) CETA.

27 Jan Orbie and Gerda van Roozendaal, 'Labour Standards and Trade: In Search of Impact and Alternative Instruments' (2017) 5 Politics and Governance 1, 3. The petition that led to the arbitration between the United States and Guatemala, which was submitted by civil society actors from both countries, provides a good example.

28 In general, see: Lore van den Putte, 'Involving Civil Society in Social Clauses and the Decent Work Agenda' (2015) 6 Global Labour Journal 221; Lore van den Putte, 'Involving Stakeholders in Trade Agreements' in International Labour Organization (ed) *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements* (Geneva 2017) 44-48.

trade unions on the other, sometimes accompanied by national trade unions and/or works councils, in order to stimulate global social dialogue and promote the core labour standards of the ILO."[29] There are also more radical ideas to grant civil society actors an independent cause of action to claim a breach of a PTIA labour provision.[30] Analogies with investor-state arbitration in this regard are not applicable, as investors are granted subjective rights under IIAs. This is not the case for trade unions under PTIAs. Rather, proposals for reform can draw from the ILO supervisory system, in which trade unions and employer organisations can submit a case irrespective of individual injury or injury of their home state. Importantly, allowing trade unions to pass over their home state when alleging breach of a PTIA provision would restrict states' discretion to dismiss petitions for (geo)political reasons.

6.4 EVALUATING ECONOMIC PERSPECTIVES IN LIGHT OF LEGAL PRACTICE

As was pointed out in the introductory chapter, the economic rationale of both international labour law and economic law means that economists have a profound interest in both legal domains. Economic research is often used to make normative claims about the desirability and implications of labour-related trade measures and labour provisions in trade and investment agreements. This section will reflect upon these economic perspectives in light of the findings of this study.

Broadly speaking, there are two sets of interrelated questions. The first is concerned with the question how domestic legal systems for the regulation of wages and labour conditions develop, and what the effects of transnational and international regulatory interventions are. The proposition that economic development logically precedes the improvement of labour standards has implications for both international trade and labour law. In the trade domain, it aligns with the idea that international law should facilitate a 'pure' form of economic competition on the basis of comparative advantage. As economists Hoekman and Kostecki note:

> Economic theory suggests that countries should pursue liberal trade policies and exchange goods and services on the basis of their comparative advantage. In practice, however, most nations actively intervene in international trade... . The

29 M. Antonia García-Muñoz Alhambra, Beryl ter Haar and Attila Kun, 'Soft on the Inside, Hard on the Outside: An Analysis of the Legal Nature of New Forms of International Labour Law, (2011) 27 The International Journal of Comparative Labour Law and Industrial Relations 337, 339.

30 Ronald Brown, 'Promoting labour rights in the global economy: Could the United States' new model trade and investment frameworks advance international labour standards in Bangladesh' (2016) 155 International Labour Review 383, 398.

> processes and disciplines of the GATT helped governments to liberalize trade and to resist pressures for protection.[31]

The idea that economic growth will spur the improvement of labour standards is made explicit in the BIT between the Netherlands and the Dominican Republic, which notes that "the development of economic and business ties *will* promote internationally accepted labour standards."[32] This is the mirror image of the pre-World War II notion that international labour law was meant to facilitate economic globalization. More importantly, the argument of Hoekman and Kostecki provides a basis for opposition against both international labour law and the various types of legal interventions that have been discussed in this study. They argue that "[u]sing trade remedies to enforce labour standards would worsen the problems at which they are aimed (by forcing workers in targeted countries into informal or illegal activities)",[33] while Henderson states that "[i]mposing common international standards, despite the fact that circumstances may be widely different across countries, restricts the scope for mutually beneficial trade and investment flows. It is liable to hold back the development of poor countries through the suppression of employment opportunities within them."[34]

Similar arguments are made in the context of the regulation of multinational enterprises (MNEs). Hufbauer and Mitrokostas warn that the enforcement of human rights norms against MNEs on the basis of the Alien Tort Statute, "could devastate global trade and investment."[35] Zerk takes a more cautious approach but also points out that "any home state initiative directed at the CSR performance of multinationals abroad which has the potential to alter patterns of outward investment could still undermine the development objectives of some poorer host states."[36] Importantly, most comments assume a certain type of labour clause. Imposing common international standards is radically different from obliging states to enforce their own legislation, how-

31 Bernard Hoekman and Michel Kostecki, The Political Economy of the World Trading System: WTO and Beyond (3rd edn, Oxford University Press 2009) 7.

32 Preamble Netherlands-Dominican Republic BIT (emphasis added).

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

34 David Henderson, *Misguided Virtue: False Notions of Corporate Social Responsibility* (Institute of Economic Affairs, Hobart Papers 2001) 17.

35 Gary Clyde Hufbauer and Nicholas K. Mitrokostas, 'International Implications of the Alien Tort Statute' (2004) 7 Journal of International Economic Law 245.

36 Jennifer Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press 2003) 308. In general, however, she observes a "general lack of opposition of developing host states to international CSR-related activities" because most CSR regulation does not affect host states' comparative advantage. In fact, there may also be concerns on the part of the home state that regulation of 'their' MNEs will put them at a competitive disadvantage vis-à-vis foreign ones.

ever, which means that these statements are only informative about a particular – and often theoretical – legal mechanism.

The second set of questions is concerned with the effects of different levels of labour standards on trade and investment flows, and whether states' decisions on labour market regulation are affected by economic integration. This debate aligns with the original purpose of the ILO: if state A introduces more protective labour rights, will companies 'exit' its jurisdiction and move to state B (investment effect) and/or will this benefit companies in state B to increase their exports towards state A (trade effect).

Regulatory competition is facilitated by international trade and investment law. When state A and B are both members of the WTO, state A cannot increase import tariffs vis-à-vis state B to offset the latter's competitive advantage. One could argue whether it is undesirable that state B gains a competitive advantage in this situation, and if so whether international law should provide a solution. This scenario represents the situation when the ILO was founded. Nowadays labour standards are at a much higher level than they were in 1919. The risk is therefore not that states do not accept the economic trade-offs when improving labour regulation, but that they are incentivised to derogate from existing standards. Langille argues that:

> Game theorists and economists have long recognized that the obvious solution to the sorts of collective action problems lie in creating ... binding and enforceable obligations upon all players not to "defect," that is not to enter the race to the bottom [...] in the first place. ... The answer to this international labor law regulatory competition – that is, the competitive bidding down of standards in order to attract new investment or to retain existing investment – is to create international agreements or treaties, which are "binding" and "enforceable," and which prevent a race to the bottom from starting in the first place.[37]

From this perspective, he evaluates the legal and institutional framework of the ILO and reaches the conclusion that it is unfit for purpose.[38] However, not everything is lost, as he notes that: "One of the most refreshing developments in the debate in the last decade is that it has taken an empirical turn with surprising results... . The key finding is that there is no evidence of a race to the bottom."[39] Citing a number of economic studies, he reaches the conclusion that enforceable legal obligations are not necessary. Instead the ILO should focus its attention on: "knowledge, technical assistance, money, expertise, incentives, "promotion," benchmarking, learning, coordination through the provision of both "off the rack" and "bespoke" coordination points

37 Brian Langille, 'What is International Labor Law for?' (2009) 3 Law & Ethics of Human Rights 47, 61.
38 Ibid 63-65.
39 Ibid 70.

for best practices in the solution of specific collective action problems".[40] This applies *mutatis mutandis* to the linkage of labour standards to economic agreements. "The endless debate about whether the ILO has no teeth, and whether it should visit the WTO dentist for dental implants to remedy this deficiency, can now be largely viewed as unhelpful," according to Langille.[41]

International labour standards are thus confronted with two claims: they do not solve a problem and they may have perverse effects. How should these propositions be viewed in light of the preceding chapters? Although Langille correctly points out that there is no evidence that states are engaged in a competitive and continuous process of bidding down labour standards, this does not mean that there is no regulatory competition between jurisdictions. Whether through stabilization clauses, export processing zones, or other types of incentives, states do derogate from existing labour standards in response to the forces of economic globalization. Importantly, to justify a normative instrument that addresses these derogations, one does not need to assess the scale on which this takes place. In the debate on labour provisions in economic law, the race to the bottom hypothesis has no role to play.[42] This is confirmed by the wording of labour provisions in PTIAs. An individual instance of non-enforcement could trigger a breach when there is a sustained course of (in)action and when there is a trade effect. It is immaterial how large that trade effect is and whether the importing state feels compelled to take corresponding deregulatory measures – thus engaging in a 'race'. PTIA labour standards are primarily intended to prevent that states have to bear the consequences of labour deregulation in other jurisdictions, not to prevent systemic phenomena like the race to the bottom.

This also affects the second critique, namely that domestic labour standards develop endogenously and that 'interventions' disturb this process and could roll back economic development. Proposals to amend the GATT with a labour clause were fiercely opposed by developing countries that sought to protect their 'legitimate comparative advantage' against these acts of 'disguised protectionism'. The term 'social clause' was thus perceived as a euphemism, helping workers in developed economies at the expense of the poor. The only form of accepted trade-labour linkage at the multilateral level are the US and EU Generalized Systems of Preferences, as they offset the costs of adopting higher labour standards through tariff reductions. How can this deep divide between developed and developing economies be squared with the fact that nowadays it has become normal to include elaborate labour provisions in economic agreements?

40 Ibid 78.
41 Ibid 79.
42 Vid Prislan and Ruben Zandvliet, 'Labor Provisions in International Investment Agreements: Prospects for Sustainable Development' in Andrea Bjorklund (ed) *Yearbook on International Investment Law and Policy 2012-2013* (Oxford University Press 2014) 363

Commentators that oppose trade-labour and investment-labour linkages often assume that they will either (1) impose a new common standard which is higher than developing countries currently have in place, or that (2) developed states could determine when to take measures in response to 'social dumping' without having to satisfy a particular benchmark. However, this is not what current labour clauses in PTIAs do. Non-derogation clauses restrict states' right to deregulate from whatever level of labour standards they themselves have adopted. Improvement clauses are hortatory and their breach – if possible to determine – can in most cases not lead to economic countermeasures.

The proliferation of labour provisions in PTIAs provides an important opportunity to answer a new set of questions that examines the distributive implications of non-derogation provisions. This should lead a to more nuanced understanding than the broad 'social dumping' *versus* 'legitimate comparative advantage' dichotomy allowed. For example, should provisions prohibiting legislative derogations allow for flexibility, given the fact that both the CESCR and the ILO supervisory bodies not do always ban regressive measures in times of economic downturn? And if an arbitral tribunal finds a breach, should this lead to a monetary assessment that is used to enhance labour law enforcement in the respondent state (the CAFTA-DR model), or should the applicant be allowed to suspend trade benefits (the current US model)?

While this study has focused on the legal interactions between economic law and labour law, the trade-labour relationship is much broader. In fact, one could argue that "trade policy *is* labour policy, if only because of the truism that decisions in the trade regime affect labour outcomes."[43] As Blackett notes: "it is the nature of the [trade] bargain that determines employment levels, wage inequality and other employment patterns."[44] Whether developing countries are allowed to subsidize infant industries to generate more income from the secondary sector, for example, may have nothing to do with labour law but everything with labour. While – depending on their set-up – labour provisions may indeed have trade-diverting affects, the level of opposition is remarkable when compared to the lack of interest in other aspects of international trade law that negatively affect the position of developing countries.[45]

Economic scholarship should be treated with caution when drawing normative conclusions. Apart from the methodological difficulties of measuring

43 Andrew Lang, 'Reflecting on 'Linkage': Cognitive and Institutional Change in The International Trading System' (2007) 70 Modern Law Review 523, 545.

44 Adelle Blackett, 'Trade liberalization, labour law and development: A contextualization' in Tzehainesh Teklè (ed) *Labour Law and Worker Protection in Developing Countries* (Hart Publishing 2010) 102.

45 Sonia Rolland, 'Development at the WTO' (Oxford University Press 2012) 243 who argues that there is "little questioning of institutional and systemic issues alongside the substantive trade commitments."

labour standards, the economic discipline is not "a value-free and positive science."[46] Biermans notes that market institutions and boundaries "can in fact be altered and shaped according to one's preferences" which means that they are "by default a subject of moral reflection."[47] The debate over the moral implications of economic globalization should be continuous as both economic realities and normative preferences evolve. This is not self-evident, as there are many proponents of the constitutionalization of international economic law. As Petersmann notes: "liberal trade policy would not fare well if every new generation of officials were permitted to rethink the case for free trade."[48]

6.5 NAVIGATING BETWEEN FAIR COMPETITION AND FUNDAMENTAL RIGHTS

Like international labour law itself, labour provisions in PTIAs and IIAs navigate between an inward-looking and an outward-looking rationale. There is no clear answer to the question whose, or what interests, these provisions intend to protect. Broadly speaking, non-derogation clauses aim to safeguard "conditions of fair competition"[49] while improvement clauses are meant to "protect, enhance, and enforce basic workers' rights."[50] In US FTAs the two are lopsided in favour of the more concrete and enforceable non-derogation clauses. The arbitral panel in *US–Guatemala* noted in this regard that: "Addressing failures to effectively enforce labor laws that are not in a manner affecting trade, while perhaps desirable for other reasons, presumably would do little if anything to promote conditions of fair competition in the free trade area."[51] Attempts in US Congress to abolish the economic effect criterion have been unsuccessful,[52] although the 2018 draft United States-Mexico-Canada Agreement significantly lowers the standard of proof.

However, the strong focus on economic competitiveness in the legal texts of US trade agreements goes hand in hand with technical assistance pro-

46 Maarten Biermans, 'Decency and the Market: The ILO's Decent Work Agenda as a Moral Market Boundary' (PhD Thesis University of Amsterdam 2012) 41-53.

47 Ibid 52.

48 Ernst-Ulrich Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (Fribourg University Press 1991), at xxi, quoted in Danny Nicol, *The Constitutional Protection of Capitalism* (2010) 80.

49 Art 1.2.1(c) CAFTA-DR.

50 Preamble CAFTA-DR.

51 *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Final Report of the Panel (14 June 2017) para 171 (internal quotation marks omitted).

52 See the Trade Reform, Accountability, Development, and Employment Act of 2009, S. 2821, 111th Congress (text of 1 December 2009, not entered into force), Section 4 (b)(1)(d): "provide that failures to meet the labor requirements of the agreement, regardless of the effect that failure has on trade, shall be subject to the dispute resolution and enforcement mechanisms and penalties of the agreement."

grammes to improve (the enforcement of) labour standards elsewhere. The European Union, on the other hand, has been careful not to create an impression that it intends to call their trade partner's comparative advantage into question, and stresses that labour standards should not be used for protectionist trade purposes. Explicit language to that end is included, [53]and adversarial dispute settlement and countermeasures are not provided for. Campling *et al* thus argue that:

> In terms of the ideological disposition that drives the EU's inclusion of labour standards in trade agreements, the EU's approach is often characterized as being based on an attempt to ensure that working conditions worldwide are gradually enhanced and improved; what one might term *a universalist human rights rationale*.[54]

However, research on the political motives of groups in the European Parliament shows that most of them "want to see social norms included so that European producers are not disadvantaged by non-European producers with lower labour standards. Their main motivation stems thus from concern about European employment."[55]

On a closer look, the dichotomy between non-derogation clauses and improvement clauses is not that strong. Indeed, the fundamental rights rationale has permeated both. The scope of US' non-derogation provisions is limited to the 'internationally recognized labour rights' (IRLR) which covers the same norms as the ILO's 1998 Declaration of Fundamental Principles and Rights at Work,[56] but adds "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health." This delimitation is not consistent with an inward-looking purpose of non-derogation clauses. Why are derogations from other labour standards which have an economic effect not actionable? In fact, why should modification or non-enforcement of legal norms be used as the threshold to determine unfairness? For no apparent reason, domestic differentiation and depression of wages and labour conditions relative to productivity – which were at the heart of the debate in the late 1940s and early 1950 – gave way to a legal benchmark that adheres

53 Art 13.2(2) EU-Korea.

54 Liam Campling et al, 'Can labour provisions work beyond the border? Evaluating the effects of EU free trade agreements' (2016) 155 International Labour Review 357, 364 (internal reference omitted, emphasis added).

55 See e.g. Lore Van den Putte, 'Divided we stand: the European Parliament's position on social trade in the post-Lisbon era' in Axel Marx and others (eds), *Global Governance of Labour Rights: Assessing the Effectiveness of Transnational Public and Private Initiatives* (Edward Elgar Publishing 2015) 78.

56 These are: (1) freedom of association and the effective recognition of the right to collective bargaining, (2) the elimination of all forms of forced or compulsory labour, (3) the effective abolition of child labour, and (4) the elimination of discrimination in respect of employment and occupation.

to ILO conventions, the IRLR or the 1998 Declaration on Fundamental Rights and Principles at Work.

The dual purpose of PTIA labour clauses aligns with the fact that throughout the history of the ILO, there has never been a single, coherent theory of international labour law. This is unproblematic. However, one needs to be cautious that the two conceptual underpinnings of trade-labour linkage – fair competition and fundamental rights – do not blur debates on (1) the practical application and effect of labour provisions, and (2) *de lege ferenda* suggestions how they can be improved. Now that PTIA labour provisions are becoming more mature, the body of research that comments on their effects is steadily growing.[57] In a study of South Korea's trade agreements, a country which the ITUC considers to be the one of "the worst countries in the world to work in,"[58] Van Roozendaal concludes that "no relative improvement has taken place, leading to a situation in which the labour provisions serve, from the point of view of stimulating improvements, only a symbolic purpose."[59] The study was based on the premise that labour clauses are intended to improve standards. Evidence that this does not happen in practice may call into question the efficacy of improvement clauses. Non-derogation clauses, however, are intended to *maintain* labour standards. Whether they contribute to this goal can only be determined on the basis of counterfactual evidence: if the non-derogation provision would have been absent, would the state have (further) downgraded its labour standards?

More fundamentally, it is unclear why the scope of PTIA labour provisions should be restricted to the sub-set of fundamental labour rights, as is the case in many agreements. The argument that references to the IRLR or 1998 Declaration as "a set of values with universalist appeal" have provided greater legitimacy to the trade-labour link is often rehearsed.[60] Without it, the polarized debate over 'social dumping' versus 'legitimate comparative advantage' may have prevented the inclusion of labour clauses in the first place. As Mantouvalou notes, "some labour rights are stringent normative entitlements, and this should be reflected in law."[61] One of the main fallacies of the 'linkage'

57 On methodological difficulties, see: Ergon Associates, 'Trade and Labour: Making effective use of trade sustainability impact assessments and monitoring mechanisms – Report to DG Employment, European Commission' (September 2011).

58 Quoted in: Gerda van Roozendaal, 'Where Symbolism Prospers: An Analysis of the Impact on Enabling Rights of Labour Standards Provisions in Trade Agreements with South Korea' (2017) 5 Politics and Governance 19, 24

59 Ibid 27.

60 Liam Campling et al note that: "By utilizing ILO core labour standards as the values it promotes, the EU seeks to counter criticism that it is promoting its own social agenda, and instead appears to embrace a set of values with universalist appeal Liam Campling et al, 'Can labour provisions work beyond the border? Evaluating the effects of EU free trade agreements' (2016) 155 International Labour Review 357, 365.

61 Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 European Labour Law Journal 151, 172

debate, however, is that they should thus also be reflected in international economic law. In fact, it can be argued that the IRLR and the 1998 Declaration have led to a stifling consensus which does not further the purpose of labour provisions in trade and investment agreements. Why should agreements like CETA and TTIP 'affirm' their obligations to abolish child labour and forced labour, but not the ILO Termination of Employment Convention (No 158) or the Convention concerning the Protection of Workers' Claims (No 173) which may be more relevant when liberalizing trade between developed economies? Also amongst the developing countries, the ratification level of the child labour conventions is already high. However, child labour may still occur because minimum wages are absent or too low to sustain a family. In the case of Indonesia, for example, NGOs thus advocate for the ratification of the ILO Minimum Wage Fixing Convention (No 131), the various conventions on agricultural labour and the Optional Protocol to the ICESCR.[62] If the United States or the European Union were to negotiate a PTIA with Indonesia, it would be a missed opportunity to solely focus on the labour standards that are covered by the IRLR and the 1998 Declaration, and not on conventions that may be addressing some of the root causes of child labour.

Some labour provisions in EU agreements have been tailored towards specific labour problems. But this is mainly reflected in the cooperation mechanisms, and not in the substantive obligations.[63] The EU-Moldova Association Agreement, for example, focuses heavily on children's rights compared to other treaties. It provides that:

> The Parties agree to cooperate in ensuring the promotion of the rights of the child according to international laws and standards, in particular the United Nations Convention on the Rights of the Child of 1989, taking into account the priorities identified in the specific context of the Republic of Moldova, in particular for vulnerable groups.[64]

This provision was thus drafted on the basis of problems that predated the agreement and which would not necessarily worsen with the conclusion of the agreement. Whether a trade or investment agreement does increase particular risks is not always easy to determine. One of the cases that has been identified in this regard is the effect of trade liberalization between the United States and Jordan on the latter's textiles industry. The industry benefited greatly from the GSP programme and later the US-Jordan Free Trade Agreement, which entered into force in 2001. As Jordan lacked sufficient local labour, over

62 Amnesty International, 'The Great Palm Oil Scandal: Labour Abuses Behind the Big Brand Names' (London 2016) 94, 98, 123.

63 Rafael Peels and Marialaura Fino, 'Pushed out the Door, Back in through the Window: The Role of the ILO in EU and US Trade Agreements in Facilitating the Decent Work Agenda' (2015) 6 Global Labour Journal 189, 196.

64 Art 137 EU-Moldova Association Agreement.

43.000 migrant workers were employed in the fast-growing industry.[65] In 2006, the National Labor Committee published a report describing the extensive and severe labour abuse of migrant workers in Jordan's garment sector.[66] The report also included *verbatim* the labour provision in the US-Jordan FTA, but did not analyze whether Jordan breached its treaty obligations. Indeed, the FTA provision does not contain specific obligations concerning migrant workers. As the non-enforcement clause does not cover occupational discrimination, most of the abuses against migrant workers could not lead to an interstate complaint on the basis of the FTA. Whether other persistent violations such as wage theft by employers is covered would depend on the interpretation of "acceptable conditions with respect to minimum wages."[67]

The problems caused by the narrow focus on the IRLR and the 1998 Declaration may be resolved in various ways. One possibility is to agree on tailor-made labour provisions on the basis of an *ex ante* risk assessment. These assessments are already made to inform parliamentary debates or to draft pre-ratification action plans, but their results do not affect the treaty language. Given the longevity of economic agreements, it may be difficult to anticipate certain problems. The preferable option would therefore be to maintain the *legal* focus of non-derogation provisions, but without any limitations on the scope of material labour standards that states may not derogate from. Interpretative questions would surely arise, but these could be dealt with by the parties, arbitral tribunals or expert panels. It is also possible to add productivity and domestic differentiation as benchmarks for fair labour standards. This would acknowledge that 'fairness' in international economic relations does not have to be based on (international) legal standards. However, it would also depart significantly from current practice and may therefore not be a realistic option.[68]

65 Kevin Kolben, 'Dialogic Labor Regulation in the Global Supply Chain' (2015) 36 Michigan Journal of International Law 425, 452.

66 Charles Kernaghan, 'The National Labor Committee, U.S.-Jordan Free Trade Agreement Descends into Human Trafficking and Involuntary Servitude' (2006).

67 Art 6.6 US-Jordan FTA.

68 The only exception in this regard is the 'labour value content rule' in the draft USMCA. This rule holds that certain automobiles can only benefit from duty-free treatment if a minimum percentage of the material is produced by workers who earn at least $16/hour. For an early commentary on this innovative provision see: Franz Ebert and Pedro Villarreal, 'The Renegotiated "NAFTA": What Is In It For Labor Rights?' (EJIL: *Talk!*, 11 October 2018) <https://www.ejiltalk.org/the-renegotiated-nafta-what-is-in-it-for-labor-rights/#more-16548> accessed 21 November 2018.

6.6 OUTLOOK FOR LABOUR STANDARDS IN TRADE AND INVESTMENT AGREEMENTS

This thesis started with the dramatic collapse of the Rana Plaza building to illustrate that in today's global economy, sub-standard labour conditions in one country are everybody's concern. These events can serve as 'catalysts' for change.[69] Trade law certainly played its part, as is demonstrated by the US' and EU's use of GSP conditionality as a leverage tool.[70] But in the case of Guatemala, the long-awaited arbitral award turned out to be a disappointment for the trade unions and NGOs who put their faith in the CAFTA-DR labour clause. As Compa, Vogt and Gottwald argued, "the decision is clearly based on a narrow, trade-oriented analysis divorced from labor law practice."[71] This thesis has analysed the legal interactions between international trade and investment law and labour, and has drawn conclusions on how these fields of law could help to close 'governance gaps' in the international protection of labour standards.

The fragmented nature of international trade and investment law remains an important challenge. Without the impasse in the WTO's Doha Round, labour standards in international trade and investment agreements would not have developed as rapidly as they did. This has moved the debate beyond the dichotomy of 'social dumping' versus 'legitimate comparative advantage'. There is still much to explore with regard to the practical application of PTIA labour clauses, the effects of pre- and post-ratification efforts, and *de lege ferenda* proposals for other types of labour provisions.[72] In the longer run, however, a multilateral notion of 'fair labour standards' in the context of international economic law and a concomitant enforcement mechanism is preferable to a patchwork of bilateral and regional commitments. More coherence at the level of rights, obligations and procedures should be accompanied by an inclusive and tailor-made implementation strategy that recognizes differences between countries, sectors and types of labour rights impacts. Eventually, labour stand-

69 Paul van der Heijden and Ruben Zandvliet, 'Enforcement of Fundamental Labor Rights. The Network Approach: Closing the Governance Gaps in Low-Wage Manufacturing Industries' (The Hague Institute for Global Justice: Policy Brief No. 12, September 2014) 4 quoting ILO Deputy Director-General Houngbo.

70 International Corporate Accountability Roundtable, 'Tools of Trade: The Use of U.S. Generalized System of Preferences to Promote Labor Rights for All' (31 January 2018).

71 Lance Compa, Jeffrey Vogt, Eric Gottwald, 'Wrong Turn for Workers' Rights: The U.S.-Guatemala CAFTA Labor Arbitration Ruling – and What to do About it?' (International Labor Rights Forum, 2018) 4.

72 Kolben, for example, argues in favour of a "supply chain governance approach" which will shift "the current focus of labor chapters from broadly affecting *de jure* and *de facto* labor law through the use of sanctions or dialogue, towards context specific and coordinated private and public regulatory interventions that focus on improving labor rights and standards in key export industries." Kevin Kolben, 'A Supply Chain Approach to Trade and Labor Provisions' (2017) 5 Politics and Governance 60, 61.

ards in international economic law should not be seen as mere tools to discourage derogations or induce improvements of labour legislation in a handful of problematic states, but as an essential component of an international legal system that contributes to economic prosperity and social justice everywhere.