**Labour Standard Enforcement through**

**Economic Treaties**

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# Abstract

Recent economic treaties contain references to labour standards with increasing specificity and stringent enforcement mechanisms. However, despite evidence for continuing massive violations of workers’ rights, forced and child labour, these mechanisms are very seldom used. This article focuses on enforcement in respect of gross and continuing violations of so-called peremptory standards i.e. those generally recognised as norms from which no derogation is permitted (cogent law or *ius cogens*). It looks at a number of new trade and investment agreements, and conditional tariff preferences. Goods and services produced in violation of clearly peremptory standards not only raise the question of importer involvement. These violations may also cause trade distortions against which importers may take countermeasures, sometimes explicitly in cooperation with non-state stakeholders. Sanctions may consist, for instance, in suspensions of tariff concessions or outright import bans in response to labour standard violations creating trade and investment conditions.

A possible barrier against sanctions are the non-discrimination rules enshrined in all economic treaties which seem to overprotect policy space and hence to also prevent, for instance, countermeasures against social dumping. This is particularly true for the rules framework of the World Trade Organization (WTO) which has no social clauses, but also for economic treaties with few stringent commitments, and a dearth of case law. Adjudicators in litigation cases would then have to decide whether *ius cogens* does take precedence over WTO and other economic treaty rules. Even though this has never occurred, this article argues that when trade measures are taken against violations of cogent law, they will withstand legal challenges better than would appear from looking at comparable WTO cases involving public morals. At the same time, producers respecting these international bottom lines for employment policies can defend their treaty-enshrined market access rights against unilateral standard setting and protectionism in disguise.

It is too early to contend that economic treaty implementation has become more holistic by adding social and environmental dumping to the list of trade distortions subject to trade remedies. Nonetheless, this article concludes that some peremptory labour standards have become easier to enforce. International Economic Treaty Law still protects against non-trade distorting sanctions. But the new venues described here can limit the race to the bottom, and contribute to sustainable employment even in countries needing ‘more’ rather than ‘better’ jobs.

**Keywords**: trade, investment, employment, labour standards, regional trade agreements, ILO, WTO

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# Introduction

References to international labour standards have become a standard feature in economic treaties, namely in trade (RTA) and investment agreements (IIA).[[1]](#footnote-1) Many labour standards referred to are explicitly or implicitly those laid down in the conventions of the *International Labour Organization* (ILO), in particular in the *Declaration on Fundamental Principles and Rights at Work* (1998). The oldest ILO Conventions date back to the 1930s, since 1948 the texts elaborated at the *United Nations Organization* (UN) have been the pinnacle of human rights law. Labour standards and related rules are also found in human rights and in economic treaties, codices, guidelines and various *corporate social responsibility* (CSR) and international governance schemes, including private standards established especially at the end of the global value chain.

The new attempt at locating trade-relevant labour standards shows that we need to look not only at national and international sources of law and practice. Trade distortions as the relevant common element in this article can arise from various social norms, beyond labour standards. For example, slavery, or child labour are basically human rights notions with normative content for both public and private standards.

Globalisation does not stop at borders, factory gates, vegetable farms, Olympic stadiums and night clubs. Recent episodes of human trafficking and ‘sea slaves’ constitute equity issues for international governance. So too do the abuse of migrant workers and refugees, and (often female) farm workers, and the collapse of factories run by lawless suppliers of garments or computer parts. Clearly, what can be called sub-standard production of goods and services matters not only for consumer behaviour, public opinion and politicians. It also points to unsolved regulatory issues (‘socio-dumping’) and employment policies at the boundary between ‘any’ and ‘good’ jobs. This article is about the economic implications of these issues as a matter for economic treaties.

Are international trade and investment agreements part of the problem (by encouraging a ‘race to the bottom’) or can they contribute to improvements especially at the bottom end of the scale of human dignity? It could be argued that the direct interaction of labour standards and trade is limited to export-oriented and import-substituting economic activities. However, this article shows that the relation between national employment policies and trade and investment rules also matters for industries without direct trade exposure.

The research hypothesis here is that peremptory labour standards, albeit ill-defined, are an issue of public morals where no government can accept or condone continuous violations of certain labour standards, especially for its exports and even in its unregulated and informal economic sectors. Such violations might then become challengeable, or they could be counteracted under the new international economic agreements paying more than lip service to human rights and social and environmental norms. A positive finding would corroborate the hypothesis that general international law principles can build a bridge between international labour and trade rules.[[2]](#footnote-2) It could also redraw the line between legitimate social protection and protectionism under the disguise of (self-defined) public morals. Such a finding could also apply to importing and investor home state countries. Their assessment of ‘socio-dumping’ – or even their obligation to counteract *ius cogens* violations – would then be based on more objective criteria than self-defined criteria and calculations of dumping margins. This in turn would provide adjudicators with an objective benchmark ensuring effective market access under trade agreements for those goods and services which are produced compatibly with peremptory labour standards. As a result, social and trade policies integrating the necessary *nec minus* bottom line of ius cogens would gain higher legitimacy on both sides of the border.

The research question therefore is whether those peremptory standards might be determined as being the benchmark below which work must be prohibited regardless of available alternatives for the individuals concerned and whether they distort competition in a way that is illegal under relevant trade rules (social dumping).[[3]](#footnote-3) All governments could consider this as a both mandatory and useful bottom line above which goods and services could be traded securely. Enforcing *ius cogens* with all available (‘hard’ and ‘soft’) international instruments would then appear as a non-protectionist and trade-, competition- and investment-friendly way of ensuring sustainable (if not ‘better’) employment. This would apply especially in developing countries where ‘more’ (but not ‘any’) jobs are a legitimate top priority, including in the informal sector. Overall acceptance of such a demarche would provide legitimacy to countermeasures against ‘socio-dumping’ – and ensure and protect market access for goods, services and investments above the *ius cogens* benchmark. Moreover, adjudicators could assess the legality of countermeasures such as import bans on this ‘*nec minus*’ basis, safely grounded in general international law.

The paper addresses these issues from an *international economic law* (IEL) perspective. The research question is ambitious in itself, because the rules and the standards evolve in a zone with fuzzy borders, political and electoral activism, economic interests and wishful thinking, not to mention a lack of academic stringency and consensus even within the legal doctrine. Another discrepancy appears at the national level: in many cases the official minimum standards and wages are way above the real bottom lines where no remunerated work is possible even by labourers without the slightest bargaining power or assets other than their lives and health.

The paper first reviews the main *ius cogens* definitions and the legal consequences of violations (Section 2). In Section 3 we look at enforceability in general under international economic treaties. Various enforcement scenarios and cases under WTO, RTA and IIA are discussed in Sections 4 and 5. Section 6 shows that enforcement is easier but also more problematic in the manifold, unilaterally granted tariff preferences and investment promotion schemes. Instead, non-reciprocal tariff preferences for certain developing countries can be withdrawn in case of labour standard violations, mostly without legal challenge possibilities for beneficiary countries. Section 7 concludes with a forecast of future developments in a globalising economy.

The ILO’s self-contained standard-setting system, complete with monitoring and different enforcement mechanisms, is not directly addressed in this article. Sub-Section 3a describes the important support role by ILO and international labour standards (ILS) in various enforcement mechanisms established under economic treaties as well as for preference conditionalities. It should also be acknowledged that implementing WTO objectives is an area where Francis Maupain, a leading labour expert, sees a major future relevance for the ILO.[[4]](#footnote-4)

The methodology used is mainly legal text analysis, with references to academic and to secondary sources and empirical findings in recent economic and political science literature. Cases presented include governmental countermeasures and litigation, and unilateral action taken by non-governmental organisations (NGO), processors, retailers and other national and international stakeholders.

# *Ius cogens*: the difficult search for peremptory labour standards

Defining *ius cogens* is easier said than done. While in *public international law* (PIL) the notion of cogent law was enshrined without ambiguity back in 1969, an agreed list of peremptory norms is still lacking. Moreover, state views differ, case law is rare, and the legal scholarship is divided. As shown in this and the next two sections there is hardly a commonly accepted and recognised benchmark for peremptory labour standards relevant for trade. Clearly, this is not an ideal starting point for purposes of enforcement under trade agreements.

## Human rights vs *ius cogens*

The list of international human rights instruments potentially related to trade seems to be unlimited. Their fundament is the so-called *International Bill of Human Rights* consisting of three UN treaties: the *Universal Declaration of Human Rights* (UDHR 1948[[5]](#footnote-5)), the *International Covenant on Economic, Social and Cultural Rights* (CESCR 1966[[6]](#footnote-6)) and the *International Covenant on Civil and Political Rights* (ICCPR 1966[[7]](#footnote-7)). But there is much more, even for social standards alone.

The University of Minnesota’s Human Rights Center has developed a comprehensive *Human Rights Library* by listing all international treaties in different groups. Most of these groups contain work- and labour-related texts: The International Bill of Human Rights; Self-Determination; Prevention of Discrimination on the Basis of Race, Religion or Belief, and Protection of Minorities; Women's Human Rights; Slavery and Slavery-Like Practices; Trafficking and Human Rights; Rights of Prisoners and Detainees; Protection From Torture, Ill-Treatment, and Disappearance; Rights of the Child; Freedom of Association; Employment and Forced Labour; Education; Economic Rights, Privacy and Peace; Indigenous Rights; Environment and Sustainable Development; Persons with Disabilities and Older Persons; Political Rights, Freedom of Information, and Right to Culture; Refugees and Asylum; Nationality, Statelessness, and Rights of Non-Citizens.[[8]](#footnote-8)

The question here is which norms in which human rights treaties concerning labour and employment can claim *ius cogens* status. For instance, it would seem obvious to consider forced labour as a *ius cogens* violation of the most basic human right to self-determination (Art. 1 CESCR). Reality, sadly, tells a different story, even for slavery as the perhaps most blatant labour-related human rights violation. Box 1 describes the most important international prohibitions of slavery.

Box 1 Slavery Violates *Ius Cogens* – Now What?

Article 8 ICCPR unambiguously proscribes slavery, servitudes and forced or compulsory labour, except under certain well-described conditions like prison labour and military service. Article 4 UDHR is even more absolute: ‘No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.’ In 2001 this absolute prohibition of slavery was reconfirmed by the UN Economic and Social Council (ECOSOC).

The *International Court of Justice* (ICJ) held that the right to be free from enslavement is so fundamental that ‘all nations have standing to bring offending states before the Court of Justice’.[[9]](#footnote-9)

These and all other public international law (PIL) sources express the idea that slavery is the most despicable violation of all human rights in the field of labour. In addition it appears that less than clear definitions and borders make even mandatory prohibitions difficult to enforce at the national level. Even the ECOSOC had to recognise that ‘between 1815 and 1957 some 300 international agreements were implemented to suppress slavery. None has been totally effective.’[[10]](#footnote-10) As a matter of fact, the relevant treaty obligations do not automatically confer a non-negotiable legal status to international norms.

Despite this universal ban and an international forum open to deal with violation claims, slavery, forced labour and analogous practices still occur in many countries. Even though their right to do so is not in doubt, governments rarely complain in the competent international forum, the ICJ, against such practices in other states. And no WTO Member has ever complained against prison labour abroad competing with its own producers.

Under these circumstances can we call *cogent law* a prohibited yet frequent form of ‘employment’? As will be seen in the next sub-section, there is no generally recognised *ius cogens* list in respect of work and labour. Especially generally formulated human rights, even with constitutional guarantees in many countries, cannot be considered as peremptory norms.

For instance, the UDHR enshrines the *Right to Work* in Article 23: ‘Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.’ However, this human right to work and to employment can hardly be considered as an enforceable, let alone peremptory, labour standard. Similarly, the CESCR commits governments to ensure just and favourable conditions of work (Art. 7), the right to form trade unions (Art. 8), and to improve industrial hygiene (Art. 12(2) lit b). But despite their importance, and their prominent place in the Bill of Human Rights, these obligations cannot be said to have *eo ipso* gained *ius cogens* status.

Legal doctrine has repeatedly discussed the question of where to draw the line for peremptory labour norms (Sub-section c). Before considering that it is useful to recall the consequences, in legal terms, for specific cases of violations (Sub-section b).

## *Ius cogens* in the Vienna Convention on the Law of Treaties

The legal consequences of undercutting the *nec minus* line of *ius cogens* are made radically clear by two provisions in the *Vienna Convention on the Law of Treaties* (VCLT).[[11]](#footnote-11)

A treaty is *void* if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. (Art. 53)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes *void and terminates*. (Art. 63)

A ‘void’ treaty could have implications for states, but also for producers, processors, traders, retailers and consumers to which RTA, IIA and WTO rules indirectly apply.

1. For RTA, a ‘void’ treaty clause means that in case of a peremptory PIL violation, it cannot protect the offending state against a countermeasure by another state e.g. the withdrawal of a treaty right such as a tariff concession. Other parties could indeed ignore their treaty obligations and restrict market access to goods and services respecting *ius cogens*. Host states (e.g. successor governments trying to fight corruption) would not be bound by commitments of their predecessors allowing for such violations by foreign investors, and no compensation would be due for expropriation taken as a countermeasure against socio-dumping. This will be further discussed in Section 5.
2. For IIA, this VCLT text arguably also applies to contracts between host states and investors from a home state with a BIT. Indeed, especially for foreign investors negotiating government commitments below this red line, the consequences are manifold. A ‘void’ treaty would allow parties to not accept *ius cogens* violations by another party or by their investors, manufacturers and services operators. In particular, governments could counteract such practices without being bound by their obligations under such treaties. Even home states could, and should, deny legal protection they might have promised to their investors under a BIT with a government violating *ius cogens*.
3. For WTO as the supreme protector of non-discrimination and enforceable market access rights, such countermeasures, even against third parties, might find a justification, or even be called for, by these VCLT provisions. Examples of WTO countermeasures and RTA sanctions will be discussed in Section 4.

Still, the important question remains: which norms must be considered peremptory? The Vienna Convention is silent here. It only requires that these norms must be part of ‘general international law’ and have been ‘accepted and recognized by the international community of States as a whole.’ This is not the same as a condition of unanimous consent. In other words, certain resolutions adopted by large majorities in the General Assembly of the United Nations (UNGA), in the ECOSOC, ICJ or in the ILO, might also satisfy the VCLT criteria and hence supply a legal basis for countermeasures. In addition, Article 63 makes it clear that even an emerging ‘new peremptory norm’ could cause a treaty to become void - retroactively! Nevertheless, the condition of a general recognition can be difficult to ascertain.

Despite attempts dating back to 1958, the *International Law Commission* (ILC), an organ of the United Nations (UN), is yet to establish a closed list of cogent law norms. In its *Articles on State Responsibility*, adopted in 2001 but still to be endorsed by the UN General Assembly, it underlines the ‘international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law’ (Art. 40). It also specifies that ‘States shall cooperate to bring to an end through lawful means any serious breach’ (Art. 41).[[12]](#footnote-12) In his third report on State responsibility, then Special Rapporteur James Crawford had to admit that for countermeasures as the most controversial issue in this draft text no progress had been achieved.[[13]](#footnote-13)

This impasse continues despite numerous limitations on the use of countermeasures by injured states.[[14]](#footnote-14) In 2015 the ILC decided to include *ius cogens* (again) in its work programme.[[15]](#footnote-15)

On the side of the judiciary, the ILC noted that the ICJ had taken very few decisions in respect of allegations of *ius cogens* violations by specific State practices.[[16]](#footnote-16) The main reason is that such violations will hardly find a court if the court’s jurisdiction depends on party consensus. For instance, the ICJ found that aggression from Uganda and Rwanda in Congo violated the prohibition of genocide which ‘assuredly’ was a peremptory norm; but it insisted that its jurisdiction was ‘always based on the consent of the parties’ and not automatically established for any disputes relating to compliance with *ius cogens*.[[17]](#footnote-17) Similarly, various investment dispute rulings in the *Inter-American Court of Human Rights* recognise the rights of indigenous communities.[[18]](#footnote-18) But references to ILO standards in that court, or for that matter in the *African Charter on Human and Peoples’ Rights*, do not concern trade and investment countermeasures for violations of labour standards, other than withdrawals of unilateral trade preferences.[[19]](#footnote-19) The same goes for labour relations under the *European Court of Human Rights* (ECHR).[[20]](#footnote-20)

A related question is whether investor and trader home states are in any way responsible for the behaviour of their companies outside their jurisdictions? Are they obliged to act against *ius cogens* violations by their operators abroad, for instance by refusing investment guarantees, risk insurance, subsidies and other means of support? Here too, a vast debate and the numerous codes of conduct and recommendations by international organisations and private standard-setters have not led to a common understanding in this threshold issue. We will revert to this question in Section 3d.

As will be shown in this analysis, there is a need for caution against activism and wishful thinking. As indicated above, general or customary international law clearly identifies slavery as a violation of *ius cogens*. But there is no generally agreed list of peremptory standards which would condone or compel anti-slavery countermeasures. To anticipate with one example, even the frequently referred to *ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, adopted in 1999, may not automatically serve as a recognised benchmark for settling violation complaints under a trade agreement. The same could be argued for a general demonstration of widespread forms of forced labour, or of the health of working children.

The next sub-section shows the wide-ranging views within the international legal scholarship. In short, legal opinions, PIL sources, and different categories of human rights differ so much here that even a limited bottom up list can hardly find recognition by the ‘international community of States as a whole’.

## The legal doctrine

Does the scholarship agree that at least the most fundamental labour standards can be considered as *ius cogens*? As already pointed out, the wide academic debate about *ius cogens* starts with the definition under a human rights perspective. A large definition would be based on the above-mentioned International Bill of Human Rights (UDHR, CESCR and ICCPR). The question here is whether this can include some, or all, core labour standards under an IEL perspective.[[21]](#footnote-21) The answer to this question matters, because according to VCLT these norms would gain precedence over trade and investment rights enshrined in RTA, IIA and WTO.

Trade lawyers have tried in different ways to bring peremptory labour standards into the fold of multilateral trade disciplines.

Christine Kaufmann places the narrative under a human rights and IEL perspective starting in 1967, when the UN *Economic and Social Council* (ECOSOC) passed Resolution 1235, drawing the line at gross and systematic violations of human rights. This bottom-up approach further developed to define some human rights as being so basic or essential that they must be considered universal (*erga omnes*) obligations or even *ius cogens* proper. Such core labour rights would hence apply to any human activity in the workplace. They would be binding at least for all ratifying ILO members, and in view of the large number of ILO Member States, come close to being universal, PIL-based obligations for all States.[[22]](#footnote-22)

Ernst-Ulrich Petersmann considers that the wide and growing body of UN-enshrined human rights should not only give ‘constitutional’ rights to citizens, but that such rights should even ‘trump’ those of states parties to these agreements:

Due to their progressive transformation into international *ius cogens*, the fragmented, treaty-based UN human rights guarantees gradually evolve into constitutional restraints limiting the powers also of international organizations.[[23]](#footnote-23)

Labour rights are included in Petersmann’s list. He sees no inherent conflict between human rights and economic treaties; following the theories on justice and economics developed by Dworkin and Rawls he argues that the protection of constitutional civic rights and consumer welfare is threatened by power abuse by governments and corporations. For this reason, ‘multilevel judicial protection’ has been ‘accepted by citizens, national courts, and parliaments as legitimate’.[[24]](#footnote-24) Such a protection would be implemented by ‘countervailing rights’ of democratic institutions challenging intergovernmental power politics.[[25]](#footnote-25) He also agrees with trade-critical non-governmental organisations (NGO) that market and governance failures may justify interventions outside national borders.[[26]](#footnote-26) Criticism of Petersmann’s views has sometimes been violent.[[27]](#footnote-27) What matters here, however, are the differences within the academic community on which human rights might be enforceable in economic treaties, and how.

Anthony Cassimatis also looks at the trade rules from a human rights angle and affirms the right of countries to take various human rights-related measures with a trade impact. This entitlement approach, not unlike that of other human rights advocates, finds sufficient legal grounds in the general exceptions clause of Article XX GATT. His extensive survey of such rights and under a variety of scenarios leads him to conclude that ‘States enjoy a wide discretion to restrict trade for a range of purposes including concerns over the violation of human rights in other States.’ Peremptory human rights norms are relevant for the interpretation of the WTO Agreements. As indicated in Article 41 of the above-mentioned Articles of State Responsibility (ILC), serious breaches of such norms entail an international responsibility to preserve the coherence of the international legal system, including at the WTO. Subject only to the efficacy requirement (demanding that trade measures be conducive to the lifting of human rights violations), Cassimatis considers that this obligation extends to all WTO adjudicators:

Indeed, the chapeau to Article XX and the “nexus” requirement identified by the Appellate Body in the *Shrimp Turtle Case* have the potential, in conjunction with the concept of human rights obligations owed *erga omnes* and the existence of universal jurisdiction in relation to crimes under international law, to offer justification of human rights related trade measures in a manner that avoids protectionist or other abuse of Article XX.[[28]](#footnote-28)

Thomas Cottier shows that WTO enforcement mechanisms have been established to prevent economic protectionism under the guise of legitimate policy goals. He argues that the use of countermeasures, for instance by import bans or by specific requirements relating to process and production methods (PPMs), might be legitimate for violations of general PIL by exporting states, but that there can be no obligation to actually combat suchviolations:

*jus cogens* is not accompanied by strong enforcement mechanisms. Paradoxically, no specific instruments are in place in general public international law providing for measures and sanctions in response to violations of *jus cogens*. The commitment to *jus cogens* largely remains an empty shell. The prohibition of use of force – forming part of *jus cogens* itself – essentially limits instruments to retorsion and economic countermeasures. It is understood that States are entitled to act, but are not obliged to respond to violations of peremptory norms – they are not obliged to act. No cases before the International Court of Justice (ICJ) or arbitral tribunals were brought for the very purpose of enforcing peremptory norms. They were merely taken into account to the context of disputes relating to *jus dispositivum* or domestic law.[[29]](#footnote-29)

Norman Paech establishes a ranking of human rights from soft law to *ius cogens*, based on Article 53 VCLT and on the relevant provisions in the CESCR. He affirms that ‘the assumption today is that the category of fundamental human rights having the character of *ius cogens* includes the core labour standards enumerated by the International Labour Conference on June 18, 1998, in Art. 2 of its declaration on fundamental rights at work.’ This includes ‘the prohibition of forced and child labour; the freedom to associate, form trade unions, and negotiate collectively; equal pay for men and women; and the abolition of discrimination at the workplace.’[[30]](#footnote-30) Based on this assumption, Paech claims that the WTO fails to address the problem because ‘[a]ll the disasters of poverty, underdevelopment, unemployment, exploitation, state bankruptcies, wars, and refugee migrations will, consequently, have to be meekly accepted as largely inevitable collateral damage, as the price of freedom and progress under the motto *per aspera ad astra*.’[[31]](#footnote-31) For these reasons Paech contends that

the satisfaction of elementary human needs, meaning the provision of food, water, and medical care, should be added to the body of ius cogens. It results from the indisputably cogent right to life, which becomes meaningless if minimum standards for the provision of these goods are not assured. The fact that it is difficult to give a positive definition of such minimum standards and the obligation to provide these services does not affect their binding force in any way.[[32]](#footnote-32)

However, in Paech’s view not all human rights can find a safe haven under *ius cogens*. In the debate on what he calls the (above-described) ‘Petersmann controversy’ he argues that the ‘judicial constitutionalization’ under European law of intergovernmental treaty regimes cannot include ‘economic liberties, from property via non-discrimination to competition’ let alone that economic rights and liberties can become *ius cogens*.[[33]](#footnote-33)

Discussing an apparently obvious example, Franziska Humbert finds in her thesis that the prohibition of child labour is an international norm accepted and recognised by the international community.[[34]](#footnote-34) Citing numerous scholars and other sources she considers that it is regarded as peremptory by a majority of states. Slavery-like employment conditions ‘at too young an age and likely to hinder a child's education and development’ infringe their non-derogable rights and should thus form part of the *ius cogens* body of rules.[[35]](#footnote-35) Consequently Humbert posits a social clause for the implementation of the international prohibition of child labour, under a (to be developed) WTO-ILO enforcement regime also ‘addressing the fear of protectionism’.[[36]](#footnote-36)

Sarah Joseph approaches the question of a labour rights clause in the WTO from a resolute development and human rights perspective. She would prefer an explicit clause negotiated by the WTO membership to the already available judicial pathway of the ‘public morals’ exception in Article XX:a GATT. Recognising the problems for developing countries arising out of various regional, bilateral and unilateral labour standard impositions, she pleads for a multilateral clause whereby labour rights would be strengthened by their inclusion in the WTO framework. Her ‘model of cooperation’ would include a moratorium on sanctions, subject to authorisation as an explicit last resort, a consultative process involving the ILO, and technical cooperation.[[37]](#footnote-37)

A more restrictive approach, at least in respect of WTO compatibility of countermeasures, is proposed by Jeroen Denkers. In his doctoral thesis he convincingly shows that not all core labour standards of the ILO – or the labour norms contained in various UN treaties – can serve as an agreed bottom line below which inter-governmental treaties or investment agreements are void. He points out that prohibitions against slavery and slave trade, genocide, and racial discrimination such as apartheid have been recognised by the ILC as potential norms *iuris cogentis*. But the ILC also holds that even where the parties have stipulated that no derogation from that provision is to be permitted, another treaty which conflicted with that provision would not automatically be void. Hence it is ‘not exclusively the non-derogability criterion that leads to jus cogens status in international law’. Consequently, Denkers argues that a violation of such norms would not be sufficient to justify *eo ipso* under WTO law import bans as countermeasures in response to labour rights violations: States are entitled under PIL to impose countermeasures against another State only in cases of *large scale violations of clearly peremptory labour standards*.[[38]](#footnote-38)

Denkers then proceeds to examine which core labour standards could acquire *ius cogens* status – including for States which have neither ratified a labour convention nor are parties to an economic treaty listing such ILS. He considers that the four basic principles enshrined in the aforementioned ILO Declaration of 1998 on *Fundamental Principles and Rights at Work* qualify as general international law. Nonetheless, his detailed analysis of these four principles leads him to conclude that the status of *ius cogens* under the VCLT definition could only be established in conjunction with additional criteria, such as the number of ratifications and the relation with other international treaties containing *ius cogens*. Hence his findings for these ILO principles are more nuanced:

1. The first principle (freedom of association and the right to collective bargaining) is rightly considered part of customary international law. But since it does not recognise the right to strike – unlike the UN Convention (CESCR) – it has not acquired the status of *ius cogens*.
2. The second principle (prohibition of forced or compulsory labour) is a peremptory standard but only for ‘those forms of forced labour that coincide with traditional forms of slavery’ – despite the fact that it is still a widespread practice in many countries – because of the strength and universality of corresponding UN rules prohibiting derogations even in times of war or national emergencies.
3. As for the third principle (prohibition of child labour), none of the relevant international standards (UN and ILO) formally prohibits derogations. Nonetheless, Denkers concludes that ‘those forms of child labour that coincide with slavery are of course of a peremptory nature.’
4. Only the fourth principle (non-discrimination in respect of employment and occupation) is considered as fully peremptory, even though the relevant norms do not explicitly proscribe non-derogability. Denkers argues that his last finding is also in line with the views of both the ILC and the ICJ.

A scarcity of case law and a still unclear relationship between customary and treaty law are the main reasons why actual countermeasures are far from being safe from legal challenges. For many scholars even a restrictive *ius cogens* definition such as the one proposed by Denkers does not guarantee the outcome of a trade dispute. Thomas Cottier refers to Peter Van den Bossche when he points out that such countermeasures may amount to ‘excessive recourse due to extraterritorial application of domestic law and domestic perceptions of fairness and justice’.[[39]](#footnote-39) Together with Krista Nadakavukaren Schefer he nevertheless sees a justification for certain countermeasures, emphasising that ‘to protect the citizens of another state from the actions of their territorial government could be permitted on the theory that a state is only fully sovereign if it upholds the rights of its citizens’.[[40]](#footnote-40)

Even more controversial is the idea of an obligation to intervene against *ius cogens* violations. As a minimum, considerations of proportionality and a correlation between the intervention and the intended effect of ending the violations would seem to be necessary. But Lorand Bartels correctly notes that the ‘mutual supportiveness’ of trade and social protection is ambiguous at best.[[41]](#footnote-41) Thomas Cottier also posits coherence, equal treatment, consistency and sovereignty in the conduct of foreign policy in accordance with preferences and alliances in the pursuit of realpolitik and interests.[[42]](#footnote-42)

For many scholars there is no inherent conflict between trade rules and human rights. Petersmann sees a solution in the ‘pragmatic responses’ found in cases like access to medicines and conflict diamonds.[[43]](#footnote-43) Gabrielle Marceau recognises that there is ‘no perfect coherence between the human rights and WTO systems of law and jurisdiction’ but sees a ‘strong presumption’ that the prohibition of *ius cogens* violations will ‘lead to an interpretation of WTO law which avoids such a violation’.[[44]](#footnote-44) She consequently pleads for a good faith interpretation of WTO rules and a ‘harmonious reading’ of PIL (human rights) and IEL (WTO norms), arguing that WTO as a single undertaking comprising a well-balanced set of rights and obligations can solve such problems.[[45]](#footnote-45) For Joost Pauwelyn, WTO is a kind of *lex generalis* which therefore, for non-trade issues, can be ‘trumped before a WTO panel by non-WTO rules.’[[46]](#footnote-46)

Today, the applicability in principle of relevant PIL in WTO dispute settlement, based on Article 31(3) VCLT, is recognised by the legal doctrine as a whole. Andres Blüthner shows that this also applies to the *ILO Declaration on the Fundamental Principles and Rights at Work*.[[47]](#footnote-47) Accordingly, WTO adjudicators defer to substantive PIL for their interpretation of WTO rules, even though there still is no case law where this has actually happened. As noted by Isabelle Van Damme back in 2009, in the only WTO dispute settlement case discussing Article 31(3)(c) VCLT, the Panel in *EC – Biotech* recognised that treaties and general principles of law could constitute ‘rules of international law’: rejecting a defence brought by the United States, it ruled that it did have the discretion to consider such rules as ‘context’ to determine the ‘ordinary meaning’ under Article 31(1).[[48]](#footnote-48)

Whether general international law (even as enshrined in ILS) will ever take precedence over trade rules, in case of clearly conflicting rules, is another question. As shown in the next two sections actual cases of labour standard violations brought before a trade court are still extremely rare. This author considers that even though so far no adjudicator has had to rule on this key issue, this does not mean such conflicts will not arise in the future, or that *ius cogens* can easily trump WTO Law. Rather, the automaticity and enforceability of WTO rulings is likely to bring more ‘societal choice’ cases to the multilateral trade organisation, even where the collateral trade impact is small. As shown in the seals case in Box 5, an important and so far unanswered question would then be whether the general rule actually obliges a State to take the WTO-incompatible countermeasure at issue.

At this stage it seems reasonable to conclude that certain labour standards are indeed peremptory, despite the lack of an agreed definition and delimitation, the discordant views of academia, and the virtual absence of case law in the ICJ, ILO and WTO. As will be shown later, trade-distorting violations of cogent law stand the best chance of legally justifying countermeasures under economic treaties.

The key question now is how cogent law can be enforced under economic treaties. Section 3 shows that this is difficult even for clear violations of ILO core labour standards. The WTO-compatibility of sanctions against *ius cogens* violations, analysed in Section 4, is even more difficult to establish based on present non-discrimination rules (*de lege lata*). As shown in Section 5, it is somewhat easier to predict the outcome of the new challenges under other economic treaties (RTA and IIA) against countermeasures taken by importing states in respect of products and services allegedly produced in violation of peremptory labour standards. However, the politically and legally easiest bridge between PIL and IEL – albeit with a clear connotation of unilateral coercion – remains enforcement through meaningful tariff preferences, or rather a well-founded and credible threat of their withdrawal (Section 6).

# Enforceability of *ius cogens* under economic treaties

As shown above, trade and investment treaties are subject to the VCLT provisions in respect of *ius cogens*. This means that these treaties cannot protect peremptory law violations by a contracting party’s complaint against countermeasures. Article 63 states that such a treaty ‘becomes void and terminates’ i.e. that it cannot serve as admissible defence in a judicial proceeding.

Similarly, a host government should not sign an investment contract with a foreign investor in which it pledges not to increase minimum wages or introduce freedom of association. If such a ‘regulatory freeze’ commitment infringes *ius cogens* it would be void under the VCLT. A government’s contract with such clauses would then forego protection in a complaint by another government (or a successor government) lodged under an IIA.

On the other hand, in the absence of an explicit commitment to labour standard improvements in economic treaties and investment contracts, governments have no legal obligation to improve labour standards beyond *ius cogens*. Poor countries where the clear priority is for ‘more’ rather than for ‘better’ jobs would thus be protected against countermeasures by other States, as long as their labour standards and practices respect *ius cogens*.

So much for the theory. For the crucial issue of enforcement, attention naturally first turns to the ILO and its own experience in this respect. Hence this section first examines the contribution by the ILO norm framework to enforcement efforts under the relevant provisions in economic treaties (a). It then describes the references and use of labour standards in some of the more recent treaties (b). This in turn raises the question of a norms hierarchy and impact (c) and the role and responsibilities of private actors, including under the relevant international guidelines, in negotiating, implementing and litigating labour standard commitments in economic treaties (d).

## ILO’s contribution to enforcement efforts under economic treaties

The first ILO conventions belonging to what today are called core labour standards date from 1935. The ILO has several specific elaborate mechanisms for reviewing and improving adherence to labour standards laid down in its conventions. The most powerful provision is Article 33 of the ILO Constitution allowing the *International Labour Conference* as its supreme body to secure compliance with the recommendations of its *Commission of Inquiry*, or with a decision of the ICJ.

Recourse to Article 31 has happened only once, on 14 June 2000. In the Myanmar forced labour case described in Box 6, the Labour Conference endorsed the actions recommended by the Governing Body, inviting its tripartite members to

take appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labour referred to by the Commission of Inquiry, and to contribute as far as possible to the implementation of its recommendations;[[49]](#footnote-49)

The ILO is not a court, and the sensitive nature of labour law does not allow it to formally authorise trade restrictions as sanctions for labour standard violations. The well-established ILO tripartite monitoring and implementation mechanisms, such as the *Representation Procedure* under Articles 24 and 25 of the ILO Constitution, are well-known. The question here is about their role, use, and impact in economic treaties, especially in cases of *ius cogens* violations.

Many economic treaties equate labour standards with relevant ILO law, laid down in the *Fundamental Principles and Rights at Work* (1998), or with the ILO *Declaration on Social Justice for a Fair Globalisation* (2008). As shown by the absence of case law, this is probably not sufficient. As already underlined, not all ILO Conventions can be considered peremptory under the VCLT. Moreover, what would an adjudicator in a trade dispute find for violation claims where not all parties to an economic treaty have ratified the relevant ILO norms? This is actually the case for the USA which has only ratified two out of eight core conventions (on the abolition of forced labour and on the elimination of worst forms of child labour).

The argument has been made that even standards not universally recognised may acquire the character of customary international law. This means that the US could be obligated by these standards, unless it formally refuses their validity in the manner of a so-called ‘persistent objector’. In order to defend its countermeasures the US government might actually have to argue they constitute PIL and hence apply to the interpretation of the labour clauses in its RTA.[[50]](#footnote-50)

The more recent treaties concluded by the US and the EU contain very specific references to peremptory labour standards such as the prohibition of slavery or of the worst forms of child labour, discussed in Section 5. As for their ILS nexus, three problems are noteworthy here.

1. For enforcement under the treaty provisions in respect of consultation and dispute settlement the first problem, as shown above, arises where ILS adherence is limited to the commitment to apply one’s own national legislation. Such commitments are often ill-defined and subject to changes. This in turn might preclude a consensual or an adjudicated assessment of ILS conformity. This is where a treaty-independent ILO assessment might be useful inasmuch as it could serve as a PIL guideline for an RTA or WTO adjudicator. Box 6 shows how a binding ILO decision might have helped the US defence in the Myanmar case. Since the case was dropped, the question remains open whether the relevant WTO rules justify excluding developed country companies from public procurement contracts in the United States on the grounds of massive labour and human rights violations in Myanmar.
2. A second difficulty, in cases of *ius cogens* violation claims in the absence of an ILO assessment, would be the above-discussed lack of a generally recognised *nec minus* line defining non-derogable rights to any or all labour standards referenced in an economic treaty. RTA and WTO adjudicators may be neither qualified nor enabled to read and apply PIL ‘in order to determine the ordinary meaning’ under Article 31 VCLT. As discussed in Box 9 for Guatemala the first ever RTA dispute on collective bargaining found this problem particularly difficult to solve.
3. Thirdly, the economic, trade and investment impact even of *ius cogens* violations may differ between categories of rights, and between countries. This matters because most economic treaties offer dispute settlement only for trade or investment-relevant violation claims. Sanctions under economic treaty law must be useful for the enforcement of treaty rules and the avoidance of trade distortions. This may not always be the case for, say, children working on cocoa or banana exporting family farms.

Despite such uncertainties, and like for the above-described human rights cases, ILO norms regularly appear in international dispute settlement procedures. However, WTO proceedings have consistently avoided rulings on the relevance of a particular international standard. As shown in Section 4a the Appellate Body considered it did not have to look at ILO, UNESCO and OIE norms invoked in respect of ethnic minorities, cultural diversity and animal welfare (EU legislation for trade in seals products, see Box 5). It appears that stronger legal bases than simple invocations of ILO Law are required for trade sanctions in the form of countermeasures to be found compatible with WTO law. Interestingly, the only WTO legal base for import bans based on forced labour has never been invoked in formal litigation (Art. XX(e) GATT ‘relating to the products of prison labour’). Michael Hahn shows that ‘national security’ concerns of a GATT Contracting Party amount to a virtual *carte blanche* in terms of trade restrictions.[[51]](#footnote-51)

At any rate, the burden of proof remains with the party contending rules violation. Hence the crucial issue of socio-dumping evidence appears as a Herculean task for policy-makers, litigants, and academics. Except in some very few cases, constitutional constraints prevent the ILO from defining the line of cogent law and issuing opinions on ILS violation claims. This in turn makes it difficult if not impossible for adjudicators in trade and investment disputes to read and correctly apply the relevant standards in order to determine whether a specific countermeasure is directed clearly and exclusively at a cogent law violation, and thus able to lead to its removal.

The remainder of his section addresses the relationship and functioning of peremptory labour standards (generally recognised as such). It first deals with the legal meaning of the opposition to the inclusion of labour standards in trade agreements (b). Two other issues are the types of labour standards likely to have an economic impact (c) and the role and responsibilities of non-governmental actors in trade and investment decisions (d). On that basis, the following two sections will then look at the compatibility of *ius cogens* enforcement efforts with WTO rules (Section 4) and under other economic treaties (Section 5).

## The role and use of labour standards in economic treaties

Opposition to the inclusion of labour standards in multilateral trade agreements is not new. It used to be motivated mainly by claims for policy space in a sensitive area combining labour and trade, and by the fear of opening the door to protectionism and unilateralism.

Hopes for more international regulatory governance were thwarted when ILO Director General Michel Hansenne was ‘uninvited’ from addressing the First Ministerial Conference of the WTO in 1996.[[52]](#footnote-52) The Ministerial Declaration then adopted in Singapore nonetheless stated that

We renew our *commitment to the observance of internationally recognized core labour standards*. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. *We reject the use of labour standards for protectionist purposes*, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.[[53]](#footnote-53)

Since then the Secretariats of WTO and ILO have implemented a number of joint research projects. For instance, in an enquiry into the effect of globalisation on employment in the informal sector they noted that trade reforms can harm formal labour markets in developing economies, but that successful economic exchange helps to strengthen formal labour markets.[[54]](#footnote-54) In their foreword to another research publication Directors General Lamy and Somavia affirmed that ‘[t]here are also good reasons to believe that globalization is compatible with welfare states and that they may be mutually reinforcing.’[[55]](#footnote-55) Both publications call for more coordination between labour and trade policy reforms in order to achieve a successful transition to a competitive economy with decent working conditions.

Yet no social clause has found its way into a WTO agreement, and as of today there has been no case of a WTO-based labour standard enforcement challenge. Public and scholarly attention has thus turned to the increasingly stringent references to labour standards and enforcement mechanisms in various RTA and IIA, over and beyond the usually meek preamble language.[[56]](#footnote-56) This will be addressed in Section 4.

Two criteria are of particular significance when looking at economic treaties as an enforcement tool for peremptory labour provisions – regardless of the intrinsic importance in terms of human rights allocated to each of them, and the legal effects of such norms under the Vienna Convention: the economic impact of trade rules infringements, and the trade and investment distortions resulting from *ius cogens* violations. This is so despite the fact that under PIL, violations of peremptory law make international treaties ‘void’ regardless of their economic impact. Legal doctrine generally agrees that the above-described VCLT provisions neither oblige States to take countermeasures, nor would they *eo ipso* protect such measures. In any case, enforcement under economic treaties has to follow the litigation rules and procedures laid down in those agreements. Sections 4 and 5 will show that both WTO and RTA rules put the burden of proof of trade distortions on the complainant.

## Does economic impact matter?

To some extent, all standards and policies have a potential impact on the competitive position of a country’s assets and exports. As will be shown below, they thus fall under the scope of treaty provisions aimed at preventing trade distortions and certain forms of dumping.

This paper cannot discuss the employment impact of economic treaties, nor the quality of the jobs created or exported as a result of these agreements. A teleological difficulty for our question whether they allow for peremptory labour standards enforcement lies in the fact that unacknowledged priority differences of treaty partners may lead to divergent interpretations of such standards. For instance, one government may conclude such agreements because it wants ‘more’ employment – perhaps even ‘any’ jobs – while another considers that freer trade automatically brings ‘better’ work. Hence it is a difficult proposition to use such references as a legal yardstick for enforcement. A natural tension seems to exist between the assumption that the overall welfare-enhancing role of globalisation and trade liberalisation, and its impact on competition, may come at the expense of the workforce as the weakest link in the global value chain: consumers would then benefit from price decreases as a result of ‘good’ jobs at home transformed into ‘bad’ jobs abroad. Should economic treaties really arbitrate between the welfare-unleashing economic liberties of the operators and the prevention of ‘socio-dumping’ on the importing country, and of the ‘race to the bottom’ for both importers and exporters?

Similar questions arise when specific cases of human rights violations come into the purview of economic treaties. For example, rape and torture are absolutely prohibited under *ius cogens,* and they find no free trade advocates or a PIL base anywhere. Yet they might have a lesser impact on labour and trade conditions than forced labour or child labour. The numerous prohibitions of child labour may indicate the existence of *ius cogens*. But the ILO repeatedly recalls that child labour and forced labour remain important issues both at the national level and for trade.[[57]](#footnote-57) In the year 2012, over 120 million children from 5 to 14 years old were forced to work in developing countries, accounting for approximately 10 percent of the children in this age group.[[58]](#footnote-58) The economic dimension of this global human tragedy was emphasised in a recent World Bank study, adding that ‘beyond its direct effects on the children concerned, child labor may result in negative externalities’.[[59]](#footnote-59) The ILO also submitted proposals for remedies to the G20.[[60]](#footnote-60) And the respected British organisation *Human Rights Watch* says that child labour in mining is ‘especially hazardous and it is believed that about 1 million children still work in this sector, many alongside their families or informal groups in unregulated, artisanal and small-scale mines’.[[61]](#footnote-61)

Then again, while child labour, where it becomes known, never fails to provoke virulent consumer reactions, situation-specific reasons and human rights considerations might argue against easy judgments. Child labour may be seen as an alternative preferable to child prostitution. Children working under precarious conditions in mines are more likely to be considered as a violation of *ius cogens* with a trade impact than agricultural (family) child labour.[[62]](#footnote-62) Agricultural bonded labour in India might play a lesser role in trade distortions than coerced factory workers in China, or football sewing and cigarette rolling by Pakistani boys. Similarly, a requirement of *ius cogens* actually violating trade rules might look different for ‘sea slaves’ and for ‘sex slaves’. Here again, reports on mistreatments of agricultural migrant workers e.g. in Italy might warrant a differentiated analysis.[[63]](#footnote-63) Lorenzo Cotula also points out the particular case of investment contracts whereby land and natural resources previously conferring (collective) benefits to rural people are allocated to agricultural production or extractive industries together with promises of (individual) job opportunities, often in precarious and seasonal conditions.[[64]](#footnote-64) Another potential candidate (because of its migration dimension) for *ius cogens* might be the precariousness of domestic labour.[[65]](#footnote-65) Clearly, the notion of ‘precarious’ work would require detailedanalysis in order to determine whether a specific human rights violation constitutes both *ius cogens* and economic treaty rules violations (together justifying trade measures).

## Role of non-state actors

The economic treaties referred to in this study are concluded between states. Private actors are not parties to these agreements, but their rights and obligations are no longer strictly limited to their performance at the national level. The subject of this sub-section is the emerging seat of different non-state actors at the intergovernmental table for labour standards in those treaties: consultative rights, interaction with government authorities, international stakeholder cooperation, or even the right to initiate judiciary proceedings.

Do private actors have more than implicit obligations in relation to labour rights? Jernej Černič analyses the relevant intergovernmental texts under the UN *Guiding Principles* on the corporate obligations to respect, protect and fulfil fundamental human rights, endorsed by the UN Human Rights Council in June 2011 (*Ruggie Framework*).[[66]](#footnote-66) He notes that the legal documents so far agreed do not create new international law obligations for states or businesses, and can only indirectly regulate the conduct of corporations. While all businesses are required to comply with all applicable laws, only national normative frameworks offer effective remedies for victims of corporate human rights violations. Černič nonetheless considers that corporations do have ‘normative obligations in relation to fundamental human rights, around which there possibly appears to exist a value consensus across different cultures and societies around the world.’[[67]](#footnote-67) The iterative role of the *Guiding Principles* in the example of South Africa is described below in Box 3.

Thomas Cottier posits that ‘it is conceivable that the disciplines of jus cogens could be extended to MNCs. This entails a major shift in international law, but could amount to an important tool for enforcing not only jus cogens, but also other standards binding upon corporations operating abroad. Responsibilities will be increasingly defined in a triangle of home states, host states and MNCs.’[[68]](#footnote-68)

Richard Locke studies the interventions of private actors at various stages along the labour supply chain.[[69]](#footnote-69) He describes labour standards promotion as a combination of traditional factory monitoring with capacity building in various multi-stakeholder initiatives. In the USA these are primarily the *Workplace Code of Conduct* of the *Fair Labor Association*[[70]](#footnote-70) and the *SA8000® standard for decent work* developed by *Social Accountability International*.[[71]](#footnote-71) With the example of Nike, the world’s largest athletic footwear and apparel producer, Locke shows positive results as well as shortcomings, especially in the upstream segments of the global value chain. He considers that the capacity-building efforts of global brands, of different NGO and of the ILO did improve technical and managerial skills at the factory level. Nonetheless, only limited or even negative results were obtained in terms of wages, working hours, and ‘enabling rights’. On the fundamental issue of cooperation or non-cooperation between the two systems, he finds that Mexican and Czech suppliers to the US electronics producer Hewlett Packard achieved better results through interaction between private and public regulatory systems (and, in Mexico, partial private substitution of ineffective public regulation). Hence he calls for complementing and reinforcing private compliance efforts with governmental regulation. He considers the Cambodian experiment described in Box 13 as a case of ‘regulatory renaissance’: innovative experiments associating all stakeholders, including the ILO, led to a successful enforcement of labour laws and employment standards in participating factories producing for reputation-conscious global buyers. Similarly, for the Guadalajara electronics cluster on Mexican labour law, Locke sees that the strict reliance on the grievance procedure developed under the ‘accord’ among all participants ensures more labour-friendly practices than could be achieved with legal challenges. But he also notes that extension to other markets like Japan has proven more difficult.

Labour standards also receive acknowledgement, and support from private actors, through codes of conduct agreed at the intergovernmental level. The leading intergovernmental standard setter is the *Organisation for Economic Co-operation and Development* (OECD), working in cooperation with businesses, trade unions and NGO.

1. In 2011, OECD member states committed to upgrading their (still non-binding) *Guidelines for Multinational Enterprises* adopted in 1976, in cooperation with their business sectors. In 2014 all 34 OECD countries adhered to the new Guidelines with an improved process for complaints and mediation. So did 12 non-OECD countries, namely Argentina, Brazil, Colombia, Costa Rica, Egypt, Jordan, Latvia, Lithuania, Morocco, Peru, Romania, and Tunisia. The *Guidelines* establish that firms and their supply chains should respect human rights in every country in which they operate. Companies should have appropriate due diligence processes in place for issues such as paying decent wages, combating bribe solicitation and extortion, and the promotion of sustainable consumption.[[72]](#footnote-72) The annual report on implementation for 2014 provides examples of successful mediated outcomes under the specific instance facility, voluntary peer reviews of national programmes, and the development of further multi-stakeholder guidance for the exercise of due diligence in a number of sectors.
2. The *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risks Areas*[[73]](#footnote-73) is another transparency tool for mining industries, for instance in the Great Lakes Region with some of the worst forms of child labour. In 2016 the OECD reported that conflict financing in tin, tantalum and tungsten mine operations had been reduced, and that market access and working conditions had improved for an estimated 70 000 artisanal miners in the Democratic Republic of the Congo and Rwanda, supporting approximately 350 000 dependants.
3. The *Guidelines* and the *National Contact Points* have established working relationships with the ILO, the *International Organisation for Standardization* (ISO), the World Bank, the UN Working Group on Business and Human Rights, the UN Global Compact, the UN Finance Initiative, the Global Reporting Initiative, the International Coordinating Committee of Human Rights Institutions, the National Institution for the Protection and Promotion of Human Rights, and the Global Reporting Initiative. Three stakeholder representatives supporting the Guidelines are accredited in the OECD: the *Business and Industry Advisory Committee* (BIAC), the *Trade Union Advisory Committee* (TUAC) and *OECD Watch*, an international network of more than 80 civil society organisations (CSO).[[74]](#footnote-74)
4. For agriculture, OECD and FAO (2016) developed guidelines for *Responsible Agricultural Supply Chains*, including the relevant ILS. The objective of this ‘guidance’ is to help enterprises mitigate their ‘adverse impacts and to contribute to sustainable development.’[[75]](#footnote-75)

A recent study by two Swiss NGO found that of the 14 multinational enterprises consulted, only a few have begun to develop new policies to implement the UN *Guiding Principles*. Especially in the commodities sector where human rights violations are particularly common, only a small minority of corporations have a transparent human rights policy; non-binding responsibilities are largely ignored. The study concludes that transparency and a level playing field can be guaranteed throughout the supply chain only by making the principle of due diligence globally and legally binding. Consequently, a *Responsible Business Initiative* aiming at a constitutional amendment to make these CSR principles mandatory was submitted in 2016 by Bread for All, Swiss Catholic Lenten Fund and 75 other Swiss NGO.[[76]](#footnote-76) So far, however, the Swiss government is not prepared to accept new obligations for the overseas behaviour of Swiss business.[[77]](#footnote-77)

There are many examples of labour and farmer rights advocate interaction with businesses and governments. In West Africa, the *Fair Labor Association* criticised Nestlé’s performance in respect of child labor in its cocoa supply chain (Child Labor Remediation and Monitoring System in Côte d’Ivoire and Ghana).[[78]](#footnote-78) Oxfam highlighted the precarious working conditions of garment workers in Myanmar since the reopening of that country to foreign investment and trade.[[79]](#footnote-79) The Association of World Council of Churches related Development Organisations in Europe (APRODEV) reported widespread cases of land grab in Cambodia, linking them to the EU preferences for sugar imports from LDC.[[80]](#footnote-80) All three examples garnered considerable governmental and intergovernmental support even though the stakeholders were all private, not least because of the enforcement possibilities existing under various investment agreements and trade preferences.

More recently John Ruggie, the former Special Representative of the UN Secretary-General for Business and Human Rights, responded to a request by the Fédération Internationale de Football Association (FIFA) to recommendations on how to embed respect for human rights across everything FIFA does. In his report presented on 14 April 2016, he made 25 recommendations for FIFA and its corporate sponsors and their supply chains. Of particular concern in this respect were migrant workers in situations of bonded labour, human trafficking and endemic discrimination and sexual violence against women.[[81]](#footnote-81)

Another question is whether firms benefitting from host state-condoned *ius cogens* violations could be the object of complaints under a trade or a bilateral investment agreement prohibiting such practices. Companies (and their home governments) failing in their *due diligence* obligations could be held responsible, for example, where roads are built by forced labour, or for small farmer evictions as part of a host state’s investment incentive.[[82]](#footnote-82) As pointed out by Anne Peters, under the Human Rights Covenants ‘states are obliged to take positive action as opposed to mere abstention. This includes the enactment of ‘extraterritorial’ legislation. This includes human rights due diligence requirements.’[[83]](#footnote-83) And Guy Davidov discusses the liability of ‘lead companies’ for the ‘indirect’ employees of their upstream suppliers.[[84]](#footnote-84)

Clearly, public opinion and consumer attitudes can play an important role, albeit not always with an exact correlation to the degree of labour law violations. Each case may shape the sectors and priorities for retailers, consumers, and for governmental action, but it is neither a guide for the determination of *ius cogens* nor an indication of actual trade impact. Stakeholder action may have a bigger impact when the case for trade and investment restrictions is particularly strong due to blatant *ius cogens* violations (Box 2).

Box 2 Outcasting and Nudging with the Help of International Law

When the ‘community of States’ faces a challenge by an outsider violating *ius cogens*, it often acts in response to public opinion. ‘Blood diamonds’ come to mind as a way in which movies have named and shamed consumer behaviour. This is also the only example where the WTO actually took a decision to allow for countermeasures against human rights violations which otherwise might have infringed WTO non-discrimination rules (‘Kimberley Waiver’; Box 4).

However, in the absence of explicit recommendations or authorisations by international organisations like the ILO to respond to *ius cogens* violations (as in Box 6), what are the possibilities to take measures by way of ‘joint ventures’ between governments and civil society?

As a bridge between different legal systems, and different schools of legal thinking, Hathaway and Shapiro (2011) review various forms of *outcasting* – a widely practised enforcement possibility also showing when and how international law matters.[[85]](#footnote-85) Another perspective is offered by so-called *nudging* actions whereby governments, in collaboration or without a ‘Coalition of the Willing’, try to induce and improve labour standard adherence all along the supply chain.

Not to be underestimated are the manifold *private standards* and actions taken, for enforcement purposes, by different stakeholders especially at the end of the supply chain (Sub-section 3c). Their role and use of economic treaty provisions, in many instances, can best be described as ‘iterative’ in the sense that both the executive and the legislative branches of government require private sector and NGO support for RTA and IIA negotiations, ratification – and enforcement (cf. Box 3 for South Africa, and Box 7 for Peru).

Core ILS apply to a wide number of national employment policies. Many such policies are relevant for international trade. For instance, standards against slavery address issues such as forced labour, serfdom, debt bondage, migrant workers, women and children trafficking, forced prostitution, sexual slavery and sex tourism, mail-order brides, incest, trafficking in human organs and, of course, various aspects of child labour.[[86]](#footnote-86) Assuming that different policies and practices may have a smaller or bigger impact on trade and foreign investment, the question would again be whether such differences would matter for enforcement under economic treaties. A generally valid answer may not be possible even for *ius cogens* violations such as the prohibition of rape or maternity protection. As already indicated, family farm child labour (even when hired by another farmer) may be denying the right to and the benefit of education but without significantly distorting trade to an economically meaningful extent. However, proof of trade distortions through such practices would be required to justify countermeasures under an economic treaty.

Box 3 International Public and Private Stakeholder Cooperation (South Africa)

One example of international multi-stakeholder cooperation, with support even from academia, is based on the *Guiding Principles on Business and Human Rights* endorsed by the UN Human Rights Council in 2011.[[87]](#footnote-87) This is a global standard against adverse impacts on human rights linked to business activity. The main institution putting the *Guiding Principles* into practice is the *United Nations Forum on Business and Human Rights* held annually in Geneva.[[88]](#footnote-88) Prominently discussed between business leaders, civil society representatives and governments are effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted by labour law violations in their countries. Regional meetings are also held, with presentations by trade unions and community organisations on the situation in their countries.

The *African Regional Forum on Business and Human Rights* (16-18 September 2014, Addis Ababa) heard the *Bench Mark Foundation*, a South African church NGO working in the area of CSR and monitoring corporate performance against an international measuring instrument, the Principles for Global Corporate Responsibility.[[89]](#footnote-89) In 2012 the Foundation established the *Bench Marks Centre for Corporate Social Responsibility* at the Potchefstroom Campus of North West University in order to monitor CSR standards throughout the Southern African Development Community (SADC). Chairperson Bishop Jo Seoka called for a ‘social licence’ for mining companies, recourse to justice for relocated communities, and compensation for water pollution and health impairments caused by mining activities.

# Legality of countermeasures under WTO rules

Basically, three types of countermeasures against alleged *ius cogens* violations have been taken, or envisaged, by various countries: *import restrictions* (lit.a), *government procurement* limitations (lit.b), and *subsidy constraints/incentives* (lit.c).

Before looking at such countermeasures under the relevant WTO rules it should be pointed out that our analysis can hardly be conclusive as to the chances, in the event of legal challenges, of their being seen as compatible with WTO obligations. As a matter of fact no case involving labour standard violations has ever been ruled on in the WTO.

Another caveat for this discussion is the use made in Appellate Body (AB) rulings of views in the legal doctrine. Sondre Torp Helmersen recently observed that the AB made frequent (albeit selective) references to academic discussions of general international law. At the same time, the AB ‘seems to use a rather timid approach when referring to scholarship.’ AB references to scholarly discussions of WTO Law had become less frequent, unlike in international investment tribunals.[[90]](#footnote-90)

## Import bans and product requirements

The most likely countermeasures are *import bans* aiming directly at products or services obtained through, say, forced labour. While withdrawals of trade preferences have been used repeatedly, or at least threatened, actual trade prohibitions for such cases are rare. The legal difficulty, under WTO law, is the so-called ‘like product’ doctrine prohibiting discrimination not between different products but according to different methods used in production and processing. The only way to justify such import bans is by invoking one of the exceptions foreseen in GATT Article XX, such as public morals, the protection of workers’ life, and health or prison labour.[[91]](#footnote-91)

Altogether four cases have dealt with such exceptions. The US argued that online gambling was against its public morals; using the same argument China tried to justify import restrictions of audio-visual products from the USA.[[92]](#footnote-92) The EU claimed that it could discriminate between seal products obtained by its ethnic minority, the Inuit, and other seal hunters in Canada and Norway (Box 5). Most recently, Colombia argued that its import duty increases for textiles were necessary to combat money laundering. The interpretation by WTO panels and the Appellate Body of the relevant provisions was in all cases very restrictive, and in all these cases the adjudicators found in favour of the complainant, basically because of the ‘more than necessary’ trade restriction these measures entailed. As already pointed out above, the WTO explicitly allowed import bans based on human rights violations in only one extreme case, shown in Box 4.

Box 4 Import Bans for Conflict Diamonds

In order to implement the import ban adopted in the Kimberley Process (KP) several WTO Members demanded a WTO waiver allowing them to prevent imports of so-called ‘blood diamonds’. Without such a waiver other countries might have invoked their WTO rights against what they saw as ‘political’ import bans by some of their trading partners. What was at issue?

The so-called *Kimberley Process Certification Scheme* (KPCS) mandates participating countries to set up a system of internal controls excluding ‘conflict diamonds’ from being traded, and not to accept non-certified diamonds regardless of origin. Since the establishment of the scheme in 2003, trade in diamonds between participants is permitted only on the basis of authentic KP ‘conflict-free' certificates.[[93]](#footnote-93)

From a WTO rules perspective such conditional import bans infringe market access rights for suppliers of non-certified diamonds from WTO member countries. Legal challenges under GATT-Articles I (MFN) and III (NT) would require an adjudicator to decide whether the PIL provisions motivating import bans warrant a departure from these obligations. The legal base for the defense arguing an obligation under the KPCS would be Articles 31, 53 and 63 of the above-discussed Vienna Convention. Academic literature, on this point, seems to agree that the chances for a defendant would be rather good.[[94]](#footnote-94) In order to clarify this particular case the WTO General Council adopted the so-called ‘Kimberley Waiver’ under Article IX of the WTO Agreement, authorising WTO Members to restrict their imports to certified diamonds, in compliance with the KPCS.[[95]](#footnote-95) On 11 December 2012 the General Council extended the waiver until 31 December 2018.[[96]](#footnote-96) Zimbabwe joined the consensus even though it had repeatedly expressed concerns that ‘trade in diamonds in Zimbabwe continued to be hampered by unilateral coercive measures imposed by the United States’.[[97]](#footnote-97) In fact, even though the incriminated US measure taken by the Office of Foreign Assets Control (OFAC) was not directly KP-related, Zimbabwe could have opposed the extension of the WTO Waiver in order to solve the problems it had in obtaining certificates for its diamond exports in particular to the US.

In other cases the WTO membership simply turned a blind eye to the question of WTO-compatibility, such as of trade measures authorised or mandated by the world’s highest intergovernmental body. For example, world security threats have been countered with trade sanctions, such as in the case of Colonel Gadhafi’s Libya where these were based on UN Security Council resolutions condemning ‘the gross and systematic violation of human rights’ in the Libyan Arab Jamahiriya. The same goes for many import and export bans against North Korea under Kim Jong Un. Neither of these countries is a WTO Member and hence could not complain under the WTO dispute settlement provisions.

Article XXI GATT says a country has the right to take ‘any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.’ This was a sufficient legal base for all trade measures, for instance when UN sanctions were decided against South Africa under apartheid. That decision had mandated not only an arms embargo, but also a travel ban, an asset freeze and other trade-relevant measures.[[98]](#footnote-98) Sanctions were then taken without a formal GATT decision to allow such exceptions to its non-discrimination rules.

Box 5 (EU) Seals vs Human and Animal Rights

In 2009 and 2010 the EU (under the ‘EU Seal Regime’) prohibited importation and marketing of seal products, except for hunts conducted for marine resource management purposes and for hunts conducted by Inuit or indigenous communities (‘IC exception’). This IC exception was an advantage only granted to its own seal products originating in Greenland, in violation of Art. I GATT (MFN). The EU tried to justify this refusal to import ‘like products’ originating in Canada and Norway by invoking the public morals exception in Art. XX(a) GATT. In its defence the EU referred (i) to the *UN Declaration on the Rights of Indigenous Peoples* which affirms indigenous peoples' right to self-determination (Articles 3 and 4) and their control over resources, (ii) to the ILO Convention 169 concerning *Indigenous and Tribal Peoples in Independent Countries* with an almost identical relevant wording, and (iii) to the *Guiding Principles for Animal Welfare* adopted in 2004 by the *Office International des Epizooties* (OIE).

The WTO adjudicators largely upheld the Union’s defence on animal welfare grounds.[[99]](#footnote-99) They also confirmed the right of the EU under Article XX(a) GATT to take measures ‘necessary to protect public morals’. But they ruled that the EU had failed to ensure that its regulations were ‘not applied in a manner that would constitute arbitrary or unjustified discrimination where the same conditions prevail’ as stipulated in the so-called chapeau to Article XX. In their findings, none of the three PIL provisions is even mentioned – arguably because the EU had not claimed that its import ban was mandatory under PIL.[[100]](#footnote-100) In the EU’s view international instruments were ‘evidence’ but not ‘instruments setting out legal obligations that would conflict with the WTO agreements.’ The Appellate Body found that the EU’s criteria for differentiating commercial hunts from those by indigenous communities were ambiguous. It confirmed the notion that ‘the subject matter of a technical regulation may consist of a process or production method that is related to product characteristics’, but rejected the proposition that trade restrictions, in principle, can operate on the basis of factors independent of the particular quality of the product itself.[[101]](#footnote-101)

## Public procurement restrictions

For *public procurement restrictions* non-discrimination rules apply similar to those in GATT and GATS, for those states which are parties to the WTO Agreement on Public Procurement.

Again, there is no case law, for instance in respect of non-eligibility to public biddings of products and services from companies operating in a country practising forced labour. Only in one government procurement case have ‘consultations’ been held over labour standards violations (Box 6). This is the only case so far involving peremptory labour standards violations brought to the WTO.

Box 6 Myanmar Sanctions in the WTO

Alleging serious human rights violations in Myanmar, the US State of Massachusetts prohibited government procurement contracts to companies doing business in or with that country.

The case was brought to the WTO by the European Commission, ignoring European parliamentary resolutions and trade union calls for the imposition of economic sanctions by the EU against Myanmar. In the ‘consultations’ under the *Dispute Settlement Understanding* the EU claimed that this law violated non-discrimination obligations under the WTO Agreement on Government Procurement. When these consultations did not lead to an amicable settlement the *Dispute Settlement Body* (DSB) on 21 October 1998 established a panel to examine these complaints.

Myanmar was not a party in that case, but it is a founding member of the WTO. At the Second WTO Ministerial Conference in Geneva (18 and 20 May 1998) Major General Kyaw Than, Minister for Commerce, had expressed the view that the WTO had no mandate to enforce core labour standards, through trade sanctions, nor call into question the comparative advantage of low-wage countries, and that labour standards should not interfere with globalisation of free trade nor become bargaining chips for protectionist forces.[[102]](#footnote-102)

The relation between WTO law and human rights under PIL raised in this case might have found an answer for the significance of *ius cogens* for the interpretation of WTO rules. But after a US federal court struck down the Massachusetts state law on constitutional grounds, the case was suspended *sine die*.

Academic scholars were thus left to debate the various issues involved – not least the ‘extraterritoriality’ of a measure prohibiting trade not only for Myanmar products but with any company doing business with that country (whose human rights violations were not disputed by the complainants). According to Denkers the (US) countermeasure was inappropriate because it was not a sanction against the (non-contested) *ius cogens* violations but against companies operating legally under the regulations both in their home (EU, Japan) and host states (Myanmar). He also points out that a right to derogate from WTO non-discrimination obligations may not automatically imply an obligation to do so with any type of countermeasures. For Maupain the isolation in which the US acted on this decision, and the opportunity it created for India and China ‘to expand bilateral trade and solidify their relationship with the regime then in power’, may explain the ‘marginal impact’ it had on the prevalence of forced labour in Myanmar.[[103]](#footnote-103) Pauwelyn finds that this is a case where panels could and should apply non-WTO rules and accept a WTO-inconsistent measure ‘*specifically* imposed or permitted’ by a decision subject to the ILO dispute settlement mechanism: even if other States were not ‘*obliged* to impose a trade embargo on Myanmar […] who is the WTO to question the validity of ILO decisions?’[[104]](#footnote-104)

This non-ruling also allowed the WTO Secretariat to insist that WTO rules did not prevent countermeasures against human rights violations. Then Director General Pascal Lamy affirmed that ‘contrary to what used to be conventional wisdom, trade and human rights go hand in hand, although progress still needs to be made to ensure better coherence between principles and realities;’ he also claimed that WTO case law had clarified that ‘WTO agreements [were] not to be interpreted in ‘clinical isolation’ from international law’.[[105]](#footnote-105)

For such a case, when the respondent invokes Article 33 of the ILO Constitution (to secure compliance with recommendations), it will take a brave WTO adjudicator to decide which trade restrictions are ‘necessary’ and hence WTO-compatible under GATT-Article XX (and/or Art. XXI). This provision was used for the first time since the establishment of the ILO in 1919. The *International Labour Conference* recommended that governments, employers and workers ‘in the case of Myanmar take appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labour’. It was adopted by 257 votes in favour, 41 against, and with 31 abstentions, to be implemented ‘unless the Myanmar authorities promptly take concrete action’.[[106]](#footnote-106)

The question here is whether a resolution by the ILO’s supreme body can be considered as ‘a norm accepted and recognized by the international community of States as a whole’ (Art. 53 VCLT). Apart from the above-described sanctions in the US, no other trade measures based on this ILO decision appear to have been taken. Interestingly though, the US Congress referred precisely to this resolution when it enacted the *Burmese Freedom and Democracy Act 2003* restricting trade with Myanmar.[[107]](#footnote-107)

Largely unnoticed by international trade lawyers, and apparently unchallenged by countries and suppliers concerned, the US government continues to apply government procurement restrictions motivated by labour rights violations.[[108]](#footnote-108) It regularly publishes a list of goods identified by their country of origin, which the three Departments involved ‘have a reasonable basis to believe might have been mined, produced, or manufactured by forced or indentured child labor’. Suppliers of such products ‘must certify that they have made a good faith effort to determine whether forced or indentured child labor was used to produce the items supplied’.[[109]](#footnote-109)

Furthermore, on 2 and 9 May 2016 the Customs and Border Protection (CBP) agency announced increased investigations by a new Trade Enforcement Task Force in order to prevent goods made with forced labour from being imported to the US. Enforcement can include measures such as seizures of the shipment, as well as civil or criminal penalties. Insufficient quantities to meet consumer demand from other sources will no longer be accepted as a reason for non-enforcement. Annual reports to Congress will allow for public monitoring, and any person ‘who has reason to believe’ products are made with forced labour may petition CBP without having to show a demonstrated interest in the items being imported.[[110]](#footnote-110) While such measures may effectively enhance CSR, their WTO-compatibility remains unclear, especially in the absence of any reference to ILS or *ius cogens*.

## Subsidies and regulatory freezes

All governments try to increase employment through various investment incentives including subsidies, credits, tax rebates and tax holidays, export processing zones and infrastructure support. In contracts with foreign investors, developing countries may also undertake to not increase environmental and social standards for a number of years. Such ‘regulatory freezes’ are regularly criticised by civil society representatives and academics, but are nonetheless frequent, especially in so-called ‘weak states’ with few alternative options. The question here would be whether a *ius cogens* violation condoned in a contract with a foreign investor would be illegal under IEL. More precisely, would an investment treaty condoning contracts with regulatory freezes be ‘void’ under international law as per Articles 53 and 63 VCLT? What about a government commitment to, say, evacuate local farmers, or nomads, if need be by force, from land acquired by a foreign investor? Allegations of collusion between foreign investors and host governments – even in the context of a World Bank project – are regularly made, namely by the *Oakland Institute* based in California.[[111]](#footnote-111) In the absence of case law and while a detailed analysis of this question has to remain outside this article, the argument would nevertheless seem plausible that investor home states in such circumstances could not protect their investors under an IIA with the host state.[[112]](#footnote-112)

Box 7 describes such a case where the US initiated the first steps preceding formal dispute settlement under its RTA with Peru enquiring whether that country had offered such regulatory freezes to foreign investors (including to US companies!).

Box 7 Peru – Combating Regulatory Freeze

For a number of years, Peru’s environmental and social regulation and practices have been regularly criticised by different US government agencies, trade unions and NGO. Various reports describe cases of workers’ rights violations, exploitative child labour in mines and in agriculture, and forced labour.[[113]](#footnote-113) In 2014 the US Department of Labor confirmed that ‘Peru made a significant advancement in efforts to eliminate the worst forms of child labor.’ But it also reported that ‘children in Peru continue to engage in child labor, including in agriculture, and in the worst forms of child labor, including in commercial sexual exploitation. Peruvian law does not fully comply with international standards to protect children engaged in night work and hazardous work.’ On 14 October 2014 the RTA parties again ‘reaffirmed their commitment to continue cooperating in order to guarantee full implementation of the Labor Chapter' and that ‘convening a public session is an important mechanism to promote transparency and exchange information with the public’. In August 2015, the Office of the U.S. Trade Representative (USTR) announced that it was evaluating a potential case against Peru’s environmental law changes. It claimed that new Peruvian legislation offered to waive or to freeze social and environmental constraints for new investors. This led the US to ‘enquire’ in a high-level visit to Lima whether such a ‘regulatory freeze’ might contravene social and environmental provisions in the *Peru-US* *Trade Promotion Agreement* which had entered into force in February 2009 (PTPA).

In its Public Report under the PTPA dated January 2016, the US Department of Labor renewed its claim that the government of Peru ‘has failed to meet its PTPA commitment to […] the right of freedom of association and the effective recognition of the right to collective bargaining’. It also referred to claims by US and Peruvian labour advocates of violations of PTPA-Articles 17.2.1(a) (freedom of association) and 17.3.1(a) (enforcement of labor laws). However, in December 2016 the DOL under the outgoing Obama administration decided to extend by six months its review of Peru's progress in meeting labour commitments, to 18 June 2017.[[114]](#footnote-114) Labor Secretary-designate Andy Puzder declared that he would keep the pressure on Peru (and Guatemala, and Colombia) to meet labour standard obligations under their FTA with the USA.[[115]](#footnote-115)

The PTPA contains a separate Labor Chapter with a *Labor Cooperation and Capacity Building Mechanism* supervised by a *Labor Affairs Council*. Litigation provisions foresee that ‘to establish a violation under the TPA a Party must demonstrate that the other Party has failed to comply with its terms in a manner affecting bilateral trade or investment. The Chapter further provides that ‘neither Party will waive or otherwise derogate from the statutes and regulations that implement this obligation nor fail to effectively enforce its labor laws in a manner affecting trade or investment between the Parties’. An arbitral panel finding a violation can authorise trade or monetary sanctions.

It is this author’s view that, regardless of its likelihood during the Trump administration, a complaint under the RTA dispute settlement provisions against the trade and investment distortions resulting from such a regulatory freeze might be successful. Besides, the labour provisions in the TPPA – if it is ratified – are likely to bring new momentum in the matter for Peru as well, not least because other TPPA countries like Vietnam, Malaysia and Brunei Darussalam had to commit to higher labour standards for their exports to the USA (Box 11).

As for litigation in a WTO procedure where a respondent invokes WTO non-discrimination rules, *ius cogens* violations would also have a good chance of success. This would actually amount to a conflict between general international law and WTO law. A WTO adjudicator might then accept trade sanctions by overruling WTO Law based on Articles 53 and 63 of the Vienna Convention which abrogates treaty law in a situation of a clear *ius cogens* violations.

We now turn to the role of economic treaties in enforcing peremptory labour standards as a means to avoid trade and investment distortions. We especially look at the enforcement efforts in the two largest markets for goods and services.

# Enforcement under trade and investment agreements

The ever more frequent, and more constraining, references to labour standards in economic treaties would seem to literally invite litigation in cases of countermeasures alleging rules violations. Empirical evidence, however, does not confirm this assumption.

The above-quoted survey found that the numerous provisions in RTA and IIA had substantial limitations and conditions in respect of enforcement possibilities.[[116]](#footnote-116) Most agreements did not foresee normal litigation procedures, or only in separate chapters and as a matter of last resort. Treaties between developed countries made no references to labour standards. At that time both the US and the EU, and to an even greater extent their (developing country) treaty partners, did not consider RTA and IIA as a forum for solving such issues – not even for cases of *ius cogens* violations. In more recent economic treaties, however, the situation has changed. The next two sub-sections describe the policies and actions taken by the two main drivers of labour standard enforcement, the EU (a) and the US (b). Viet Nam as the only country having recently subscribed to stringent labour clauses with both the EU and the US is described in Sub-section c.

## Enforcement by the EU

The EU has never actually applied sanctions based on one of its RTA or IIA. Nor has it ever forfeited the right to take such sanctions. However, before such last-resort procedures are initiated, all its economic treaties foresee various cooperation and consultation mechanisms operating in parallel or within the treaty framework.

As part of its regional integration and development policies the EU follows a path which Jan Wouters has called ‘global governance through trade’.[[117]](#footnote-117) Labour clauses were included in all its RTA as of 1995, ‘by way of co-operation, entailing where necessary, financial and technical assistance’. The objectives of these clauses are to respect certain international obligations, not to reduce the levels of protection, and to raise such levels, but not for protectionist purposes.[[118]](#footnote-118) No scholarly or other reports point to cases of formal litigation being used in non-preferential economic treaties as an avenue for enforcing labour standards or avoiding a ‘race to the bottom’. For instance, while the *EC – CARIFORUM* agreement does not exclude recourse to dispute settlement, clear preference is given to consultation and monitoring between the parties or, possibly, a new Committee of Experts (Art. 195.5). A conflict on social aspects may only be referred to formal dispute settlement if the consultation procedures fail to produce a mutually acceptable solution after nine months (Art. 204.6). In such cases the complaint can go straight to mediation (Art. 205) or arbitration (Art. 206ss). The new FTA with Viet Nam reinforces these mechanisms (Box 11).

So far the only trade sanction applied by the EU in cases of human rights violations has consisted in preference suspensions.[[119]](#footnote-119) This will be described in Section 6. All these sanctions applied to countries without an RTA with the EU, such as Belarus and Myanmar (Box 6). The same goes for trade-related labour standard protection measures with a coercive character, as in Bangladesh and Cambodia.

The example of Myanmar also shows the difficulties to move in par with other countries possibly competing with European traders and investors where serious governance issues remain, including labour rights violations.[[120]](#footnote-120) The Delegation of the European Union in Yangon acknowledges ‘Myanmar's progress towards eradication of forced labour’. After a *Sustainability Impact Assessment* (SIA) on a bilateral *Investment Protection Agreement* which would provide all EU investors with a level playing field in that country, the *Joint EU Development Partners’ Transitional Strategy for Myanmar* (2014-16) dated 1 June 2016 confirmed the EU's ‘interest in strengthening its relationship with Myanmar and its commitment to support the transition following the November 2015 election’.[[121]](#footnote-121)

## Enforcement by the US

The initial RTA of the US had no references to international labour standards, merely a commitment to apply one’s own labour laws. The *North-American Free Trade Agreement* (NAFTA) has a side agreement, namely the *North American Agreement on Labor Cooperation* (NAALC) foreseeing special (and ‘softer’) dispute settlement procedures. Regarding enforcement, Article 42 NAALC preserves party autonomy in that ‘[n]othing in this Agreement shall be construed to empower a Party's authorities to undertake labor law enforcement activities in the territory of another Party.’ Moreover, the functioning of trade sanctions is result-oriented: any suspension of benefits must be no greater than the amount sufficient to collect the ‘monetary enforcement assessment’ imposed under Article 39.4 by an arbitral panel. All ‘monetary enforcement assessments’ (which can in any case be no greater than 0.007 percent of total trade in goods between the Parties) would be reinvested in technical co-operation activities.[[122]](#footnote-122)

More recent treaties foresee enhanced consultations, and similar litigation and enforcement procedures. So far, however, none of the cases initiated has been concluded with a final ruling. And no case has involved labour standards where the complainant claimed *ius cogens* violations.

During the Obama administration the United States pursued a more forceful, multipronged strategy. It applied and monitored its own, often multiple non-trade concerns. Periodic reports highlight situations and practices in dozens of countries, often in collaboration with US trade unions and civil rights activists which in turn interact with NGO and labour advocates in those countries.

On the side of the government three agencies are involved.

1. The *Bureau of International Labor Affairs* in the *Department of Labor* (DOL) contributes its findings to RTA negotiations, and also conducts *Employment Impact Reviews* for specific RTA, with a reference to international standards. With evidence of child labour in diamond mines (but unrelated to the ‘conflict diamonds’ described in Box 4), Zimbabwe was put on the *List of Goods Produced by Child Labor or Forced Labor*.[[123]](#footnote-123) According to DOL the primary purposes of this list of goods and their source countries are to raise public awareness about the incidence of child labor and forced labor in the production of goods in the countries listed, and to promote efforts to eliminate such practices.[[124]](#footnote-124) This list presently reports 353 cases in 74 countries.[[125]](#footnote-125) After field research it lifted the ban for diamonds from Zimbabwe – together with tobacco from Kazakhstan, and charcoal from Namibia. Consultations in cooperation with foreign governments, industry groups, colleagues from other government agencies, and other stakeholders continued e.g. for salt from Cambodia.[[126]](#footnote-126)
2. The *Department of* State systematically reports forced labour cases such as child and bonded labour, sex trafficking, involuntary domestic servitude and sea slaves. It considers that ‘when a person uses force or physical threats, psychological coercion, abuse of the legal process, deception, or other coercive means to compel someone to work […] person’s prior consent to work for an employer is legally irrelevant’.[[127]](#footnote-127)
3. The *USTR’s* *Office of Labor Affairs* negotiates tailor-made labour provisions in RTA, including commitments to respect fundamental labour rights, to effectively enforce labour laws, to provide domestic procedural guarantees, and to promote public awareness; it also establishes consultation and dispute settlement mechanisms.[[128]](#footnote-128)

Direct US labour standard action based on its RTA/IIA provisions and procedures takes place in combination with non-state actors both in the USA and in the concerned countries. A prominent example is the above-described campaign against regulatory freeze in Peru (Box 7). This new form of policy interaction, including business groups and media, can also be observed in South-East Asia (Box 8), Guatemala (Box 9) and Honduras (Box 10). When they are placed on a timeline, one cannot fail to note the increasing stringency of the labour provisions contained in the underlying US treaties. The strongest wording is in the (signed but not US-ratified) TPPA which has three labour side letters between the USA and, respectively, Brunei Darussalam, Malaysia and Viet Nam (Box 11 in Sub-section c).

Box 8 Sea Slaves

Reports on ‘undocumented’ labourers from Bangladesh, Cambodia, Myanmar and the Philippines tell a horrifying story of beatings, extortion and even murder of foreign workers. US government sources produced evidence of forced labour on ships (‘sea slaves’) and in factories.[[129]](#footnote-129) The case of Thailand was repeatedly highlighted by Human Rights Watch.[[130]](#footnote-130) The New York Times shows how the Singapore-based employment agency Step Up recruited Filipino and other workers ‘tricked and indebted at land, abused or abandoned at sea’.[[131]](#footnote-131) The *Financial Times* reports on ship operators and prawn peeling factories in Thailand using both child and forced labour.[[132]](#footnote-132)

The ensuing social media storm and a complaint under Californian Law prohibiting forced labour in supply trade brought the US Company Costco Wholesale to shift its wholesale purchases from the Thai food conglomerate Charoen Pokphand Foods (CPF) to suppliers in India and Indonesia. As a result, Thailand’s market share in US shrimp imports reportedly fell from 32% in 2011 to 11.4% in 2014.[[133]](#footnote-133)

The Swiss food giant Nestlé received similar advocate and media attention for its seafood production in Thailand. Eventually, in 2014, it commissioned a report by the US-based charity Vérité.[[134]](#footnote-134) Based on the findings of this report Nestlé had to admit the existence of such forced labour in its own upstream operations, and committed to excluding the concerned suppliers from its list. In November 2016 it reported on the implementation of its *Responsible Sourcing of Seafood-Thailand* Action plan 2015-2016 ‘with the support of our partners’ and the US/Thai not-for-profit Issara Institute.[[135]](#footnote-135)

The situation apparently improved at the end of 2015 when the *Financial Times* reported that ‘Thai Slave Ships’ were on the retreat, after raids by Thai (and Malaysian) authorities in ‘slave camps’ along the coast. However, the same article also reported that the former top anti-trafficking investigator in Thailand had sought political asylum in Australia, claiming that human trafficking continued with the connivance of top military and police officers.[[136]](#footnote-136)

In the DOL 2015 Report Malaysia was removed from the blacklist of countries that fail to combat human trafficking. Human rights advocates in Washington and Kuala Lumpur criticised this as a move to facilitate congressional approval of the TPPA.[[137]](#footnote-137)

It is perhaps noteworthy that public attention and policy action seldom appear to be based on a scientific and systematic assessment of such cases. Under these circumstances it is of course difficult to assess the correlation between such practices and their economic impact, nationally and by way of trade. A case against, say, Thai or Malaysian labour standards would be even more difficult under an RTA if it turned out that such practices are legal under the national legislation of these countries.

Box 9 Guatemala – Domestic Law Enforcement

The beginning of the first formal dispute in relation to labour protection clauses under an RTA concluded by the US dates back to 30 July 2010.

The *Dominican Republic – Central America – United States Free Trade Agreement* (CAFTA-DR) requires that ‘a Party shall not fail to effectively enforce its labor laws […] in a manner affecting trade between the Parties’. The US Trade Representative (Ron Kirk) and the Secretary of Labor (Hilda Solis) formally initiated consultations arguing that Guatemala had breached its obligations under this agreement by failing to effectively enforce its own labour laws, through a sustained and recurring course of inaction concerning the right of association, the right to organize and to bargain collectively, and acceptable conditions of work. They also signalled grave concerns about labour-related violence, and initiated labour consultations between their respective Ministries of Labour. These consultations led to a request for the establishment of an Arbitral Panel (9 August 2011) as well as to an 18-point Enforcement Plan (26 April 2013).

In order to allow for the implementation of the Enforcement Plan, work of the Arbitral Panel was suspended for 34 months (in three intervals) for further consultations between the parties. On 18 September 2014, while acknowledging the important legal reforms adopted by the government of Guatemala, then US Trade Representative Michael Froman announced that the US was again proceeding with the labour enforcement case against Guatemala, claiming a lack of effective implementation and concrete improvements such as sanctions for employers violating labour laws. Based on two written submissions by each party and eight NGO, a public hearing of the Arbitral Panel took place on 2 June 2015 which was broadcast via live webstream by the Guatemalan Ministry of Economy. A further delay occurred with the resignation of a panel member in November 2015. On 27 September 2016 the re-composed panel under the CAFTA-DR issued its confidential, initial report.

On 14 June 2017, nine years after the inception of this case, the final ruling in this complex case was issued by the Arbitral Panel.[[138]](#footnote-138) It recognized that the US had proven that on ‘eight worksites and with respect to 74 workers Guatemala failed to effectively enforce its labor laws by failing to secure compliance with court orders’. However, these violations of Guatemala’s labour legislation did not constitute, in the view of the Panel majority, ‘sufficient failures to adequately conduct labor inspections to constitute a course of action or inaction.’ (para 594) In other words, in order to constitute a breach of the labour clause in this RTA, it is not only necessary to establish the ‘course of action or inaction’ in a particular case, but also to prove that these violations represented a significant trade distortion justifying trade sanctions and preference withdrawals.

Especially US democratic lawmakers, and trade unionists, reacted violently to this ruling. But, as an interesting postscript, US Labor Secretary Alexander Acosta commented, three months later, that Guatemala ‘deserves credit’ for how it has reacted to its win in this case. He acknowledged that the Ministry of Labor did not ‘tout the decision, they didn’t go out and say 'look we can do this again' but ‘reaffirmed its commitment to the creation of decent work and compliance with the law and will continue to enforce international labor agreements.’[[139]](#footnote-139)

Judicial action in RTA to enforce agreed labour standards remains a last-resort measure, so far initiated only by the USA, and only against Guatemala. Even so, the readiness of the ‘winning’ respondent to further improve working conditions in respect of ILO Conventions and national regulations and practice, may be seen as an acknowledgement that market access security can be an additional incentive to observe *ius cogens*. In addition, the new forms of interaction of stakeholders and between different institutions and treaties, while still involving unilateral standard-setting, appear to be more promising methods of enforcement than the hitherto segmented instruments and institutional incoherences.

Box 10 Honduras – Child Labour

For Honduras, the above-mentioned DOL Report counts 153,536 working children aged 5 to 14 (7.8% of the population), mostly in agricultural cash crops. An unquantified number are reportedly victims of some of the worst forms of child labour as per Article 3(a)—(c) of ILO Convention 182.[[140]](#footnote-140) In 2014, the DOL reported that Honduras had made a ‘moderate advancement’ in efforts to eliminate the worst forms of child labor.[[141]](#footnote-141)

The CAFTA-DR, the same RTA as with Guatemala (Box 9) refers to ILO Convention 182 in Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) and establishes a *Labor Cooperation and Capacity Building Mechanism*. The objectives and the activities foreseen under this mechanism also provide opportunities for public participation; they are to ‘take into account each Party’s economy, culture, and legal system’. (Art.16.5.2c)

In February 2015 the DOL decided to hold off on recommending ‘cooperative labor consultations’ under CAFTA-DR Article 16.6 – in reality a euphemism designating the first step toward dispute settlement – because of the Honduran government’s decision to cooperate with the US through an informal procedure.

It is obviously too early to determine the impact these cases may have on labour standards relevant for international trade and investment. Besides, even in treaties where formal dispute settlement procedures, and sanctions, are available for such violation claims, the relevant provisions are often less stringent than under a WTO procedure.[[142]](#footnote-142)

## Viet Nam: Enforcement under both EU and US treaties

Economic treaties with stringent labour clauses and specific enforcement mechanisms are still rare. Yet, given the insistence on such clauses especially by the legislative powers in the USA and the EU, it is only a question of time before developing countries may find it advantageous to reconfirm their ILS commitments in their trade and investment agreements with both trade hegemons. Put positively, this may result in more national and global policy coherence. As of today, only one country has engaged in what might become a ‘race to the top’: Box 11 describes Viet Nam’s commitments undertaken almost simultaneously, in late 2015, in its RTA with, respectively, the USA (as a side letter to the TPPA) and the EU (bilateral FTA).

Vietnamese textile and garments, as well as some Vietnamese agricultural products, still face relatively high import duties both in the USA and in the EU, even after Viet Nam’s accession to the WTO in 2008. As a latecomer, Viet Nam had to, and did, agree to wide-reaching trade liberalisation measures. In exchange, it was guaranteed access to its main export markets, but only at MFN rates. Reducing the peak tariffs limiting its exports remained on the government’s agenda in both its negotiations for the TPPA and with the EU (EVFTA). Besides demanding numerous other non-tariff concessions from Viet Nam, both the US and the EU from the beginning of the negotiations made very clear that stringent labour clauses would have to be part of any ambitious (‘deep’) trade and investment agreement. Both negotiations were officially concluded in 2016, and both contain social and environmental provisions.

Box 11 Viet Nam’s Labour Commitments in its Treaties with the USA and the EU

**Viet Nam - USA**

In a number of ‘side-letters’ to the TPPA, the US negotiated so-called *Labor Consistency Plans* with Brunei, Malaysia, and Vietnam. The increased stringency of these side-letters differs from NAFTA’s labour chapter as well as from EU treaties.

The letter between US Trade Representative Michael Froman and Vietnam’s Trade and Industry Minister Vu Huy Hoang explicitly refers to the 1998 *ILO Declaration on the Fundamental Principles and Rights at Work*. It specifies that workers will obtain the right to form and join independent trade unions. Under the consistency plan Viet Nam has five years, after the TPPA enters into force, to implement the crucial commitment to allow trade unions independent of the Vietnam General Confederation of Labor (VGCL) linked to the ruling Communist Party to register with the labour ministry.[[143]](#footnote-143) This ‘cross-affiliation’ commitment is to allow independent local unions at specific factories in the same sector to affiliate with each other, as well as to form a broader national federation with unions from other sectors. After these five years the US government will assess, for a period of two years, whether Viet Nam has complied with its obligations on cross-affiliation. A US determination of non-compliance would stop further tariff reductions, for instance for some types of apparel and footwear, but also for canned tuna, brooms, glass and china. Viet Nam would have the right to object to such a determination through the dispute settlement procedures under the TPPA. Hence, if this determination is confirmed, Viet Nam would lose the benefit of the remaining tariff reductions, but maintain its by then attained preferential market access to the US market.

This non-retroactivity of any future market access suspensions secures the market access conditions as contained in the tariff schedules, and hence the investment climate. It also protects (US) investments in the concerned industries in Viet Nam. Furthermore, a later re-assessment (and finding) of compliance would restore the original tariff phase-out schedule. Finally, competing suppliers in other TPPA countries (with or without labour ‘side letters’) and other beneficiaries of tariff preferences in Central America and Africa may well see this as an incentive to engage in a ‘race to the top’ in order to secure their own exports to the USA.

**Viet Nam - EU**

The text of the new EU-Vietnam free trade agreement (EVFTA) was published on 1 February 2016.[[144]](#footnote-144) Throughout 2017 this agreement was still subject to legal review, preventing rapid ratification.[[145]](#footnote-145)

Besides far-reaching tariff and non-tariff reductions, EVFTA also represents a new step in terms of labour clause stringency in EU treaties, especially in the agreed implementation procedures. According to the European Commission it provides ‘a new model for trade policy with developing countries’ and will ‘ensure the respect of workers' rights’, with a separate chapter on Trade and Sustainable Development fully subject to the dispute settlement procedures under that treaty.[[146]](#footnote-146)

The Parties ‘underline the benefits of cooperating on trade-related labour and environmental issues as part of the global approach to trade and sustainable development’ (Art. 1/3). In the operative paragraphs the Parties further commit to the ILO principles concerning the fundamental rights at work enumerated in the Decent Work Agenda of the ILO’s 2008 *Declaration on Social Justice for a Fair Globalisation*. Each Party will also take into account UN, OECD and ILO guidelines which they have endorsed or supported. The EVFTA parties further commit ‘not to derogate from and to effectively enforce domestic labour and environmental laws to attract trade and investment – in other words refrain from social and environmental dumping’. The Parties also recognise that

the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for protectionist trade purposes. (Art.3/6)

Footnote 1 further specifies that the agreement does not only cover the ILO core labour standards:

‘When labour is referred to in this chapter, it includes the issues under the Decent Work Agenda, as expressed in the ILO 2008 Declaration on Social Justice for a Fair Globalisation.’

A specialised Committee on Trade and Sustainable Development will supervise the implementation of these commitments. Domestic advisory groups, consisting of independent representative organisations, including among others employers’ and workers’ organisations, may submit their views or recommendations on the implementation of this chapter to a joint forum of the Parties (Art.15/4). Disagreements are to be solved through government consultations (Art.16) and expert panels which can seek information and advice from the ILO; based on their recommendations the Parties will consider appropriate actions or measures to be implemented (Art.17).

If they are ratified, the treaties signed by Vietnam with the US and/or the EU will introduce a new generation of RTA/IIA, with labour clause references of unprecedented stringency and intertwined with important, reciprocal market access guarantees and complete with regular dispute settlement procedures. The labour consistency plans in the TPPA would provide the US with a powerful leverage to suspend tariff reductions during implementation.[[147]](#footnote-147)

For Vietnam’s new treaties, all labour standard commitments are subject to formal dispute settlement. For the first time, the EU can now add a ‘stick’ to the manifold ‘carrots’ in its economic treaties with developing countries. Whether and how these sticks are used remains to be seen. For Vietnam, the implementation and administration of two formally and substantially different agreements, with references to different ILS, looks like a considerable challenge.

On the other side, the *US – Colombia Labour Action Plan* in the Colombia – US FTA already foresees staged treaty implementation commitments. This implies a similar political link; trade unions can also file petitions. (On 15 July 2016 the DOL accepted a petition filed by Colombian trade unions and the AFL-CIO claiming non-compliance by the Colombian government with the Colombia-US FTA.[[148]](#footnote-148)) Nonetheless, Viet Nam’s commitments under the TPPA reach beyond this scheme by subjecting the last two tariff reduction steps to an examination of compliance with Viet Nam’s labour commitment. This being so, a TPPA extension to Columbia might also see more stringent obligations for export-oriented Colombian industries.

Before Section 7 concludes on the relative effectiveness of labour clause enforcement through economic treaties, Section 6 briefly evokes the labour provisions and procedures foreseen under the classic, non-reciprocal (‘preferential’) trade agreements and preference schemes.

# Enforcement with tariff preference withdrawals

The legal situation of preferential schemes differs considerably from the RTA and IIA discussed in the previous section. This also matters in respect of labour standards enforcement. However, a subject of contention is whether the unilateral nature of preferences, as opposed to mutually agreed, scheduled concessions in RTA and the WTO, is making *ius cogens* enforcement easier.

Actually, the WTO-legal base for developing country preferences (‘*Enabling Clause*’ adopted in 1979 at the end of the Tokyo Round[[149]](#footnote-149)) does not allow for conditionalities and discriminating trade restrictions such as those discussed in this article. Moreover, there is no reference to investments. However, the argument made here is that preference suspensions can be justifiable under PIL, similarly to import bans, as a countermeasure against countries practising or condoning *ius cogens* violations. In other words, a benefit suspension for human rights violations e.g. in the EU’s preference scheme would only be compatible with the relevant WTO non-discrimination provisions when motivated by clear *ius cogens* violations by the preference beneficiary.

This being so, despite relatively clear WTO rules, preferences have a long history of sometimes arbitrary criteria, both for their granting and for suspension or withdrawal (graduation).[[150]](#footnote-150) Yet, the suspension of preferential market access can have important trade implications. While often being touted as an efficient and effective reward for human rights observance and good governance, preference donor practice is far from being coherent. As pointed out by Beke and Hachez, the EU suspended its GSP treatment for Belarus and Sri Lanka, but not for other cases of human rights violations such as in Pakistan.[[151]](#footnote-151) The WTO-compatibility of the EU’s so-called ‘GSP Plus’ scheme (additional EU tariff reductions subject to the observation of human and labour rights, environment and good governance by the beneficiary country) has been debated but has never resulted in a negative ruling.[[152]](#footnote-152) Bruce Wardhaugh considers it a good way of promoting human rights through trade promotion tools, but agrees nevertheless that without a waiver it would not stand up to WTO non-discrimination rules.[[153]](#footnote-153)

The last two examples, from Bangladesh (Box 12) and Cambodia (Box 13) show that conditional preferences can promote minimum labour standards where the preferences confer important economic advantages (vis-à-vis competitors from non-beneficiaries (here: Viet Nam) in important economic sectors (here: garments) – but only up to a point and as one tool in a set of supportive measures, including a strong political commitment to governance improvements in the beneficiary country. To secure the full benefits of market access in exchange for such improvements, the governments concerned might then prefer treaty law to conditional preferences.

Box 12 Bangladesh – Enforcement through Conditional Preferences

The ‘Rana Plaza Disaster’ refers to the collapse, on 24 April 2013, of an eight-storey commercial buildingwith 5,000 textile and garment workers near Dhaka, killing 1,129 mostly female workers insufficiently protected by low and unenforced building and labour standards.

Joining the immediate, massive local protests against what turned out to be a blatant standards violation by suppliers to Europe and America, the US and the European Commission threatened to suspend or withdraw their preference schemes. The EU then entered a site inspection agreement for garment manufactures with the government and with the ILO.[[154]](#footnote-154)

The *Bangladesh Sustainability Compact* associating the EU, USA, Canada and ILO with factory level inspections and certification is being monitored annually by the European Commission. These reports note both ‘tangible’ improvements and ‘priorities for further work to improve the situation of Bangladeshi textile workers’.[[155]](#footnote-155)

However, despite these positive assessments made in the framework of a multi-stakeholder review process, civil unrest in Bangladesh continues, including over workers’ rights and Rana Plaza. Some of the complaints also involve *ius cogens*. Ayush Khanna from *LaborVoices*, an NGO trying to guide workers to the best jobs and global brands to the best suppliers notes a ‘lack of responsiveness to this tragedy’, three years after Rana Plaza.[[156]](#footnote-156)

Yet, neither the USA nor the EU seem to have reiterated intentions to suspend trade preferences, even though the economic importance of these preferences remains considerable. It may well become existential when Viet Nam and other competitive producers gain improved market access to the USA and the EU for their textiles, garments and shoes under the new treaties described in Section 5 and Box 11.

Cambodia is yet another case of conditional preferences with a similar attempt at collaborative ILS enforcement efforts with ILO monitoring. For reasons outside the purview of this article, the results in terms of labour clause effectiveness are even less convincing (Box 13).

Box 13 Cambodia – Difficult Enforcement of *ius cogens*

The ILO’s *Better Work and Better Factories Cambodia* program (BCF) was introduced in 2005. Like for Bangladesh, the cooperation of the Cambodian authorities under the BCF is heavily motivated by the US (and EU) market access preferences for its garment industry. For the EU these preferences are available conditionally under its ‘Everything But Arms’ initiative granting duty-free quota-free market access for LDC products, while for the USA the preferences are granted under its GSP, not under the bilateral IIA which merely foresees in its Preamble that the parties recognise

the importance of providing adequate and effective protection and enforcement of worker rights *in accordance with each nation's own labor laws* and each Party's commitment to the observance of internationally recognized core labor standards as expressed in the declarations of the WTO Ministerial Conferences.[[157]](#footnote-157)

Both the EU and the US preferences can be withdrawn anytime and without compensation or the possibility of a legal challenge. This explains the Cambodian government’s decision to grant export licenses only to companies participating in the BCF. For the time being, the US government has not taken such action, even though in 2015 it noted that

Enforcement of many aspects of the labor code is poor, and many labor disputes involve workers simply demanding conditions to which they are legally entitled. Poor enforcement is due to a lack of capacity, corruption and a lack of political will on the part of the government.[[158]](#footnote-158)

In respect of the WTO-compatibility of preference withdrawals Sub-section 4c has shown whether and which countermeasures might withstand an (admittedly improbable) legal challenge at the WTO. The same differentiation would seem to apply in a case brought to the WTO by the exporting country losing preferential access. For instance, selective trade preferences for narcotic drug substitution products in the GSP schemes of importing countries have been found compatible with the EU’s WTO obligations, but only after the WTO Appellate Body made it clear that such preferences had to be granted in support of all comparable drug substitution programmes in developing countries.[[159]](#footnote-159)

Disregarding political realities and from a strictly legal point of view, this article argues that only focused and coherent countermeasures against clear cases of peremptory labour (or environmental) standard violations may be upheld against the WTO non-discrimination obligations applying to trade preferences.

# Conclusions

Violations of basic workers’ rights still occur on a massive scale and in many countries. Many forms of forced labour not only violate peremptory labour norms and *ius cogens* but also distort trade and investment. This, not least, may come at the expense of operators and workers in other countries.

A new generation of economic treaties concluded by the USA and, albeit to a lesser degree by the EU, foresees consultations, litigation procedures and even sanctions aiming at the respect of social and environmental commitments in those treaties. There have been threats of import bans, or the actual initiation of litigation procedures. Coming from important markets, this may certainly have an impact on employment policies in exporting countries. However, with the exception of the recent dismissal of the US complaint in the Guatemala case described in Box 9, there has been no judicial ruling under any trade agreement in respect of labour standard violations. Sanctions even for peremptory labour standard violations have only been implemented through (threats of) preference suspensions or withdrawals in Bangladesh (Box 12 ) and Cambodia (Box 13). Both trade behemoths, the USA and the EU, still seem to consider ‘nudging’ as the preferred course of redress for labour standards violations, even where litigation procedures with the possibility of sanctions are available, on the condition that such violations also distort trade.

As for investments in extractive industries or in agriculture, human rights violations such as land grabbing or forced labour may actually be legal under an investment contract protected by an international investment treaty. At the same time, as cogent law violations they would be illegal under public international law. Even so, there seems to be no instance of home states being denied legal protection under such treaties for the internationally unlawful behaviour of their investors in other countries. The only exceptions on record for human rights considerations are refusals of export guarantees or of financial or infrastructure support in international development projects.

This article finds that despite the absence of labour-related trade conflicts, the measures and procedures foreseen in economic treaties for dealing with labour standard violation claims appear to show a new way for promoting fundamental workers’ rights without a race to the bottom, and without protectionism. The race to the bottom at times supposed to accompany globalisation and trade liberalisation can be stopped if *ius cogens* prevails as a *nec minus* bottom line for labour standards. For instance, the three labour-related side-letters in the TPPA (signed but not ratified in 2016) could improve workers’ rights, minimum standards, working conditions and wages, provided the treaty enters into force (Box 11). This possible race to the top (and protection against abusive claims of politicians and civil society) is encouraged by market access guaranteed in exchange for products and services respecting the labour clauses in those treaties. Together with a ‘neutral’ involvement of the ILO, multilaterally accepted and monitored standards would also allow for better and non-confrontational stakeholder interaction than standards self-defined by trade hegemons.

For foreign investments, the ‘regulatory freeze’ issues discussed in the Peruvian case (Box 7) may also find a new development-friendly solution thanks to the iterative implementation procedures involving governments and private actors including (here, Peruvian) trade unionists and CRS-minded US companies. A governmental commitment to disallow forced labour and child labour in legal and artisanal gold mining may prevent a race to the bottom due to investment liberalisation. This being so, the negative impact on labour standards of regulatory freeze clauses in investment contracts can only find a way forward if the investor home states contribute to *ius cogens* enforcement.

Peremptory, enforceable labour standards could thus find a new common enforcement basis in the more recent economic treaties, without the fear of free-riding by third countries benefiting from globalised trade without a bottom line.

The WTO lacks binding social clauses, and it protects (developing) countries against discriminatory practices in the guise of labour or environmental concerns. The legality of import bans as a tool to enforce labour standards has remained the subject of intense academic debates. But apart from the ‘Kimberley Waiver’ for so-called conflict diamonds there are no WTO decisions, negotiations, or case law shedding light on the legal situation of trade sanctions taken against ‘like’ products and services provided through *ius cogens* violations.

This paper posits that countermeasures by way of trade sanctions, despite violating non-discrimination rules, can withstand legal challenges in WTO disputes. According to the Vienna Convention on the Law of Treaties *ius cogens* violations would annul the protection against discrimination afforded under the relevant WTO rules. Provided the incriminated exporting country measure can be shown to be a clear case of cogent law violation, and a case of trade distortions, adjudicators would have to give preference to PIL and ILS over WTO rules.

As matters stand today, the WTO has never crossed a line by refusing PIL as a justification for countermeasures violating WTO law. True, *ius cogens* and peremptory labour standards have never been formally invoked as an obligation justifying trade and investment sanctions incompatible with basic WTO rules. It remains to be seen whether that bottom line will hold against complaints in a future case. The rulings in the four ‘public morals’ cases so far litigated at the WTO (import restrictions for audio-visuals in China, online gambling restrictions in the USA, import prohibitions for seals products in the EU, and textile tariffs combating money laundering in Colombia) are not really reassuring in this respect: despite Appellate Body affirmations that public morals were a legitimate ground for the measures at issue, and that WTO rulings should not be adopted in ‘clinical isolation’, the discriminatory nature of the measures at issue failed the ‘necessity test’ and/or another requirement under Article XX GATT in all these cases.

Perhaps it should be added here that with many tariffs disappearing under new RTA, the time may come rather sooner than later when compliance efforts by non-state actors will no longer be able to benefit from the leverage provided by treaty enforcement, including through suspension of concessions and trade preference withdrawals. Violations of peremptory labour standards would nevertheless continue to be exposed to countermeasures by importers. Also, investors benefitting from ‘regulatory freezes’ and other agreements with host states may have to forfeit treaty protection by their home states at least for *ius cogens* violations.

The WTO non-discrimination rules can still play an important role in labour-related conflict resolution. Overall, enforceable labour clauses in economic treaties (especially for access to important markets) can send powerful signals to suppliers abroad. Moreover, governments can convince their parliaments, operators and public opinion that such standards will be enforceable. At the same time exporting (developing) country governments can accept such autonomy limitations as a quid-pro-quo guarantee for market access for their products. This last point may very well play a role in the further developments of the labour and trade file: countries like Vietnam, having signed far-reaching international commitments on workers’ rights, may actually demand the same for competitors from other countries with standards below *ius cogens*. Another incentive for a race to the top – this time from exporters having done their social standard home work.

Recourse to trade sanctions as a way to protect ILS is still rare. Admittedly, such sanctions are hardly the best way to promote workers’ rights in another country. Nonetheless, this paper demonstrates that trade and investment measures counteracting *ius cogens* violations are likely to be found WTO-compatible. They might even be mandatory because of the obligation of all States having ratified the Vienna Convention to respect *ius cogens* in their treaties with other States.

In the absence of actual trade sanctions, *ius cogens* as a benchmark justifying such measures has not yet played a role for arbitrators asked to rule on discrimination complaints by concerned exporting countries. This might change if and when the new RTA ‘sticks’ are used by importing countries defending core labour conventions and their consumers and workers against social dumping.

The final caveat from this research is that it does not allow for a conclusion on the general legality of countermeasures in a litigation procedure in the WTO or another economic treaty. What this paper has shown is that one cannot consider as *ius cogens* any norm under an IEL provision or anything declared as such by scholars. In the absence of binding, international standards directing governments to take certain measures, discriminatory trade and investment restrictions by another state can always be challenged. However, in a dispute about an economic treaty provision, a direct, unequivocal response to clear *ius cogens* violations, through trade-distorting government-instigating or condoned measures, will definitely have the best chances for a finding of compliance. The question as to whether a less trade restrictive alternative would have been available will still be asked. But where general or customary international law and *ius cogens* prevail over trade law this ‘necessity test’ will not automatically lead to the rejection of the respondent’s PIL defence as in all four above-mentioned public morals cases in the WTO.

Mainly for political reasons, ‘non-distortion clauses’ in the form of prohibitions of *ius cogens* violations are still far from entering the WTO rules framework. This, however, might well become a moot point if they become an enforceable red line for trade with the world’s largest markets.

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# List of Acronyms and Abbreviations

|  |  |
| --- | --- |
| AB | Appellate Body (WTO) |
| AoA | Agreement on Agriculture (WTO) |
| BIT | Bilateral Investment Treaties |
| CSO | civil society organisations |
| CSR | corporate social responsibility |
| DOL | Department of Labor (USA) |
| EU / EC | European Union / European Commission |
| GATS | General Agreement on Trade in Services (WTO) |
| GATT | General Agreement on Tariffs and Trade 1994 (WTO) |
| GPA | Government Procurement Agreement (WTO) |
| CESCR / ICESCR | International Covenant on Economic, Social and Cultural Rights (UN *Social Compact* 1966/1976) |
| IBRD | World Bank |
| IIA | International Investment Agreements |
| IEL | international economic law |
| ILO | International Labour Organization |
| ILS | international labour standards |
| ISO | International Organization for Standardization |
| MFN | Most-Favoured Nation (non-discrimination between foreign products and service providers) |
| NGO | non-governmental organisations |
| NT | National Treatment (non-discrimination of foreign products and service providers) |
| OIE | Office International des Epizooties |
| PIL | public international law (including IEL and general or customary international law) |
| RTA | Regional Trade Agreements (also called PTA – Preferential Trade Agreements, FTA – Free Trade Agreements, or EPA – Economic Partnership Agreements) |
| TPPA | Trans-Pacific Partnership Agreement |
| TRIPS | Agreement on Trade-Related Aspects of Intellectual Property Rights (WTO) |
| UN | United Nations Organization |
| UNDHR | Universal Declaration of Human Rights (UN, 1947) |
| USA | United States of America |
| USTR | United States Trade Representative |
| VCLT | Vienna Convention on the Law of Treaties |
| WTO | World Trade Organization |

1. First Note on Terminology ‘RTA’ is used here for all *regional trade agreements* (even between non-adjacent countries), also called *free trade agreements* (FTA) or *preferential* *trade agreements* (PTA), provided they are to be notified to the WTO under Article XXIV of the GATT and/or Article V of the GATS. However, *unilateral tariff preferences* even when they are referred to in treaties are not PTA and will be addressed separately in Section 6 below. As for ‘IIA’, *international investment agreements* now come under a number of names and forms. New RTA, and the *economic partnership agreements* (EPA), systematically include investment chapters, gradually replacing the traditional *bilateral investment treaties* (BIT). [↑](#footnote-ref-1)
2. Second Note on Terminology In this article *public international law* (i.e. law primarily of and between states, and intergovernmental organisations) and *general international law* include not only *customary law* rules but also *conventional law* (i.e. treaty law). Discussing the arguments made by all renowned jurists and by the ICJ, the late Professor Tunkin showed that there is no need for a formal recognition of *customary law* for a treaty to become general international law, or that conventional norms need to be ‘converted’ into customary norms in order to become norms of general international law: Grigory Tunkin (1993), Is General International Law Customary Law Only? 4 *European Journal of International Law* 534-541 [↑](#footnote-ref-2)
3. ‘Social dumping’ (like ‘protectionism’) is an ill-defined notion; in this article it is used as a general term, without qualifying the merits or demerits of specific ‘socio-dumping’ claims. See Magdalena Bernaciak, Social dumping: political catchphrase or threat to labour standards? European Trade Union Institute Working Paper 2012.06. Available at: [http://ssrn.com/abstract=2208393](http://ssrn.com/abstract%3D2208393) [↑](#footnote-ref-3)
4. Francis Maupain (2013), The Future of the International Labour Organization in the Global Economy. Hart Publishers, Oxford [↑](#footnote-ref-4)
5. UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html>, last accessed 8 April 2016 [↑](#footnote-ref-5)
6. 993 UNTS 3 [↑](#footnote-ref-6)
7. 997 UNTS 171 [↑](#footnote-ref-7)
8. University of Minnesota <http://www1.umn.edu/humanrts/instree/ainstls1.htm> last accessed 18 January 2017. [↑](#footnote-ref-8)
9. Renee Colette Redman, The League of Nations and the Right to be Free from Enslavement: the First Human

Right to be Recognized as Customary International Law. 70 (1994) *Chicago-Kent Law Review* 759, 780 [↑](#footnote-ref-9)
10. Office of the United Nations High Commissioner for Human Rights, Abolishing Slavery and its Contemporary Forms. Report by David Weissbrodt and Anti-Slavery International, United Nations, New York and Geneva 2002, p.3 [↑](#footnote-ref-10)
11. Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331 (emphasis added). By 2014, 114 state parties had ratified the VCLT; a further 15 states have signed but have not ratified it. 66 UN member states have neither signed nor ratified the Convention. Some countries which have not ratified it, including the US, recognise at least parts of it as a restatement of *customary law* and binding upon them as such. [↑](#footnote-ref-11)
12. Report of the International Law Commission 2009. UN General Assembly, Sixty-fourth session, Supplement Document No. 10 (A/64/10) [↑](#footnote-ref-12)
13. James Crawford, Jacqueline Peel and Simon Olleson, The ILC’s Articles on Responsibility of States for

Internationally Wrongful Acts: Completion of the Second Reading. 12/5 (2001) *European Journal of International Law* 963-991 [↑](#footnote-ref-13)
14. For the reasons behind this drawn-out process see James Crawford (2002), State Responsibility: The General Part. Cambridge University Press [↑](#footnote-ref-14)
15. United Nations, International Law Commission, Report on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001), General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10 (A/56/10), available at <http://legal.un.org/ilc/> last visited on 21 April 2016 [↑](#footnote-ref-15)
16. UN General Assembly, Report of the International Law Commission 2014, with ample bibliographic references. General Assembly Official Records, Sixty-ninth session, Supplement No. 10 (A/69/10), p.106s [↑](#footnote-ref-16)
17. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p.6 [↑](#footnote-ref-17)
18. Christian Häberli and Fiona Smith (2014), Food Security and Agri-Foreign Direct Investment in Weak States: Finding the Governance Gap to Avoid “Land Grab”. *in* 77(2) *Modern Law Review* 189–222 [↑](#footnote-ref-18)
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21. On the disconnect with labour advocates see James A. Gross and Lance Compa (Eds), Human Rights in Labor and Employment Relations: International and Domestic Perspectives. Cornell University ILR School. DigitalCommons@ILR. First Edition (2009). [↑](#footnote-ref-21)
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