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THE NORMATIVITY OF CORE LABOUR STANDARDS THROUGH THEIR INCLUSION IN LABOUR PROVISIONS IN ECONOMIC INSTRUMENTS: TOWARDS CORE LABOUR STANDARDS AS GENERAL PRINCIPLES OF LAW?

DISSERTATION

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Abstract

In 1998, Core Labour Standards have been elevated to the status of "fundamental principles and rights at work" by the International Labour Organization, on the justification that they are enshrined within the core values of the international labour law regime, which allow them to operate as functional and reconciliating principles. It seems by the recent overwhelming practice, that they possess an unexpected force of social attraction in shaping the current legal order. With these considerations in mind, this research investigates the normative status of Core Labour Standards. After examining the way they came into being, their incorporation into treaties and agreements, and the ways in which they be can subsumed under the tradition sources of international law, we will conclude that Core Labour Standards operate as general principles of international law, arising from an social and cultural value of the international society.

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Introduction

Recent years are characterized by a greater and more systematic inclusion of Core Labour Standards in Free Trade Agreements, Bilateral investment Treaties and other related economic instruments. These standards were labelled as the "fundamental principles" by the 1998 International Labour Organization (ILO) "Declaration on Fundamental Principles and Rights at Work", which aimed at reconciling the respect for labour standards with the ongoing globalization process. Since then, it seems that the question of labour has become inextricably linked with economic issues and is now substantially interfering with these matters. For example, in March 2010, the Minister-President of the Flemish regional government declared they would not pursue the ratification of the BIT agreement that Belgian and Luxemburg had signed with Colombia because of the serious violations of Labour Standards in Colombia and the impact of the ILO's Decent work campaign in Belgium.[1] Moreover, the Norwegian Government also had to abandon its project for a Norwegian Model BIT because of important civil protest triggered by the perceived unbalanced content not sufficiently acknowledging the need for a fairer globalization.[2] Finally, the recent Report of UN Special Rapporteur on the right to food, Olivier De Schutter, highlights the guiding principles for ensuring that States "will not make demands or concessions that will make it more difficult for them, or for the other party or parties, to comply with their human rights obligations. "[3] In this respect, it recalls that States are responsible to respect, *promote and realize*.

The quickly evolving features of the normative practice surrounding these core labour standards (hereafter CLS), as well as the rapid developments taking place in the linkage of trade to labour. Indeed, within two years of time (2010-2012), four cases have been brought under U.S. FTA and reviewed positively by the USTR, whereas hardly any had been accepted before. Moreover, the current U.S. Administration is negotiating a "Trans-Pacific

[1] Marc Maes, "Belgian regional governments suspend ratification of colombia BIT ", in *EU Investment Agreements in the Lisbon Treaty Era: A Reader*, (2011), 13. Available online at: http://www.s2bnetwork.org/fileadmin/dateien/downloads/eu_investment_reader.pdf

[2] Marc Maes, "Civil society protests prevent norway from joining the bIts race", in *EU Investment Agreements in the Lisbon Treaty Era: A Reader*, 43.

[3] "Guiding principles on human rights impact assessments of trade and investment agreements", Report of the Special Rapporteur on the right to food, Olivier De Schutter, Human Rights Council Nineteenth session, A/HRC/19/59/Add.5.

Partnership" including nine more countries to be soon submitted to similar labour requirements[4].

There is an undeniable acceleration of the process of including labour standards in economic agreements. Although this trend would also require a comprehensive assessment of their potential impact on overall core labour rights compliance, more importantly it raises the question of the influence of this trend on the normative status of CLS. Indeed, CLS have been identified and expressed in the 1998 ILO "Declaration on Fundamental principles and Rights at work" (hereafter, The 1998 Declaration), an instrument of promotional nature, which can be categorized as "soft law".[5] Based on this acknowledgment, the underlying question is what has been the impact of this increasing practice of including these provisions in binding economic instruments on the normative process undergone by core labour standards and what does is it infer on the current legal status of CLS.

Indeed, the ongoing debate on the effectiveness of the ILO Declaration, following the highly critical article by Philip Alston[6], has not addressed the question of the normativity of core labour standards and the process triggered by the 1998 ILO Declaration. This silence has given the impulse for undertaking this research. Indeed, whereas it is undeniable that recent years have witnessed a great doctrinal interest in the constantly growing inclusions of labour provisions in economic agreements, and whereas the 1998 Declaration has given rise to substantial criticism,[7] studies have remained intriguingly silent on the quest of the normative significance of this process and of the legal status of the principles inherent to labour provisions in economic instruments ("Core Labour Standards" or "Internationally recognized workers' rights"). Another concern was that the linkage between trade and CLS might not adequately respond to the now soundly established awareness in civil societies that economic development through increasing trade and investment can affect negatively the workers' rights. Indeed, civil societies have been calling for a better and fairer regulation of

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[4] Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, the U.S. and Vietnam.

[5] Isabelle Duplessis, "Soft international labour law: The preferred method of regulation in a decentralized society" in Jean-Claude Javillier (eds), *Governance, International Law & Corporate Social Responsibility*, (Geneva: International Labour Organization, 2008): 23.

[6] Principally for excessively relying on principles rather than rights, for fostering a system, which invokes effectively undefined principles that would be apparently delinked from any corresponding standards in the ILO Conventions, and for relying on voluntarist approach to implementation through a soft promotional shell. See, Philip Alston, "Core Labour Standard and the transformation of the international Labour Rights Regime", *EJIL* Vol. 15 No. 3 (2004): 457-421. For critics of Philip Alston, *See* Francis Maupain, "Revitalization not retreat: the real potential of the 1998 ILO Declaration of the Universal protection of workers rights", EJIL Vol. 16 No. 3, (2005): 439–465;

[7] Philip Alston, "Core Labour Standard and the transformation of the international Labour Rights Regime", 457.

globalization. This trend is best demonstrated by the inclusion of labour provisions in economic agreements, and the ongoing efforts to regulate the activities of economic actors, such as multinational corporations, to avoid damages on the environment and to protect human rights abroad.[8]

Moreover, the mutually nourishing relation of this trend with the 1998 Declaration and the attempted creation of a hierarchy of universal international labour norms that would be applicable to all ILO members, further formulated the question of the normative process undertaken by the rise of the concept of core labour standards and their current legal status under international law. In this respect, the proliferation of labour provisions in various trade arrangements, involving a growing number of States may also have constituted an important leverage towards the realization of the ILO objectives.[9] In this respect, we find it is essential to examine what has been the impact of this increasing practice on the normative process undergone by core labour standards.

In order to ascertain the current normative status of CLS, we will first undertake a study on the CLS *per se*, has they have been fostered and issued by the ILO. Further, we will examine whether the inclusion of labour provisions in legally binding agreements such as FTAs and BITs has strengthened the normative substance and legal status of these core labour standards. In this respect, examining this dynamic of linking labour to trade will require analysing various labour provisions to establish whether, taking into account the content of the provisions, the way they are drafted and how they can be enforced, the inclusion of these clauses can be expected to have a positive impact on the compliance to core labour standards in signatory countries and strengthen the normativity of these standards. Consequently, one of the scopes of this paper will also be to examine how the dynamics of the trade-labour linkage is taking part of the wider normative process of core labour standards. Our analysis will then continue to ascertain the legal status of CLS through the other existing categories of sources of international law, namely customary norms and general principles recognized by civilized nations. Finally, our findings will require questioning the capacity of the existing and accepted law making processes to grasp the evolving normative status of CLS and to argue

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[8] *See* Recent Amnesty Campaign on Social corporate Responsibility. This has been translated in Corporate Social Responsibility movements and in an outcry for inclusion of Labour rights and Human rights in the trade and investment framework.

[9] Eric Gravel, Tony Kohiyama and Katerina Tsotroudi, "The role of international labour standards in rebalancing globalization: A legal perspective on the role of international labour standards in rebalancing globalization", *Research Conference on Key Lessons from the Crisis and Way Forward*, (Geneva: ILO,16th -17th February 2011):10.

that the international legal system has reached the necessary completeness and maturity to produce its own normative proposals.

PART 1: Considerations on the ILO Declaration: codifying Core labour standards.

Ever since the adoption of the ILO Declaration in 1998, which has crystallized the concept of core labour standards, international actors have been constantly referring to this instrument and its standards in a variety of contexts. Forged out of existing provisions of the ILO Conventions and constitution, the 1998 Declaration constitutes a new kind of legal tool of a promotional nature, which legal status differs fundamentally from the international labour Conventions and announces the changes taking place in the ILO normative system.

Through the Declaration, the International Labour Conference (ILC) "declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions".[10] Those four fundamental rights, referred to as core labour standards, are (1) the freedom of association and the effective recognition of the right to collective bargaining, (2) the elimination of forced or compulsory labour, (3) the abolition of child labour and (4) the elimination of discrimination in respect of employment and occupation.[11] Additionally, the 1998 Declaration also provides for a promotional follow-up by setting up an annual review of the efforts made in accordance with the Declaration by Members which have not yet ratified all the fundamental Conventions and an annual report of fundamental principles and rights at work providing the elements on compliance to core labour standards and allowing to set the future priorities.

[10] ILO 1998 "Declaration on Fundamental Principles and Rights at Work and its Follow-up", *Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010).*
[11] *Ibid.*

1. Origins of CLS

The origins of CLS are deeply rooted within the ILO and its almost centenary practice of codifying international labour standards. Indeed, with the exception of the prohibition of forced labour, the content of CLS was already integrated within the ILO constitution and the Philadelphia declaration, even though they were chaotically mentioned, under different formulation and not labelled as fundamental principles.[12] Furthermore, even in the case of forced labour, it can be easily argued that it is inherent in the constitutional statement that "labour is not a commodity".[13] However, the content of these CLS has been extensively determined later in the existing ILO conventions that are binding upon the Members who have ratified it.[14] This process of extracting these standards from the fundamental norms contained in its International conventions and more broadly, international labour law in general, was justified by their status of enabling rights and of core principles guiding the activities of the Organization. The Declaration does not, however, bind its members to the fundamental conventions that enounce these rights, but rather attempts to "constitutionalize"[15] these concrete rights into more abstract proposition.

By adopting the Declaration, the ILC has sought to establish a minimal universal social basis to these core labour rules and to encourage efforts by the ILO's Member States to respect a set of core values that lie at the heart of its mandate, within the context of growing globalization.[16&17] Indeed, motivation for adopting this Declaration, was triggered following impulse of then-ILO Director-General Michel Hansenne, based on the finding that "an unbridled liberalization of trade[18] can work against the social objectives of the ILO".[19] These

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[12] Isabelle Duplessis, "Soft international labour law", 61. *See* also ILO constitution. Welfare of children mentioned in the Preambule and Annex art. III (h); Freedom of association mentioned in the Preambule and Art. I(b); Equality mentioned in the Preambule, and at Annex Art. II(a)

[13] *Ibid.,* 61-62. See also ILO Constitution, Annex, Art. 1(a).

[14] The ILO has identified eight fundamental Conventions, with specifically define the content of, respectively, (1) the freedom of association and the effective recognition of the right to collective bargaining (Conv. 87 and 98) (2) the elimination of forced or compulsory labour (Conv. 29 and 105), (3) the abolition of child labour (Conv. 100 and 111) and (4) the elimination of discrimination in respect of employment and occupation (Conv. 138 and 182).

[15] By "constitutionalize", we mean a process of extracting fundamental values and norms from the legal order and elevating them to a higher hierarchical standard, as it is done in domestic constitutions.

[16] The Preamble refers to growing economic interdependence, the need for economic and social policy to be mutually reinforcing components to create broad-based sustainable development, the importance of job creation, and the special attention that should be devoted to the problems of persons with special social needs.

[17] Francis Maupain, "Revitalization not retreat", 464.

[18] He also called for the ILO to take part to the debate held within the WTO on the linkage between trade and labour standards.

[19] ILO document, *Defending values, promoting change. Social justice in a global economy: An ILO agenda,* Report of the Director-General, International Labour Conference, 81st Session, (ILO: Geneva, 1994): 58.

efforts also aimed at restating the legitimacy of the action of the ILO in the 21st Century in addressing the acknowledged challenges of globalization on workers' rights.

These efforts came about to distinguish, amidst the corpus of international labour law, those fundamental principles that lay down the essential goals of labour and social policy and that embody the means by which achieve these social goals.[20] A consensus emerged for the identification of core labour standards and the *de facto* and *de jure* setting of a normative hierarchy within the sphere of International Labour Law, thus announcing a revolutionary transformation.[21] Indeed, this evolution has been seen by some as an attempt to "constitutionalize" a determinate set of labour standards, which all members should respect by the mere fact of their membership. Whereas the Declaration is of promotional nature, this process of "constitutionalization" obviously cannot be viewed innocently.

2. Legal status of the Declaration and CLS: creating a soft shell for a normative content?

The ILO Declaration is a non-binding instrument that can be subsumed under the doctrinal category of "soft law".[22] Whereas there is no accepted definition of "soft law", it is understood as referring to an international instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behaviour,[23] but which is not binding. Indeed, "soft Law" is opposed to "hard law", understood as international law created through procedures identified by States as the appropriate and uncontroversial means to create legally-binding obligations.[24] Therefore, because they are contained in a soft *instrumentum*, the legal status of core labour standards remains undefined. In order to be able to determine the legal status of CLS, despite their "soft" *instrumentum*, it is necessary to briefly examine the process through which they came to being.

The choice of a "soft law" instrument was motivated by a series of reasons and considerations which shed further light in the process of codifying CLS. First, the choice of a promotional instrument was the result of turbulent negotiations and lively resistances by states

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[20] Francis Maupain, "Revitalization not retreat", 440.
[21] Philip Alston, "Core Labour Standards" and the transformation of the international Labour Rights Regime", 457.
[22] Isabelle Duplessis, "La declaration de l'OIT relative aux droits fondamentaux au travail: Une nouvelle forme de regulation efficace?", *Relations Industrielles/Industrial relations*, vol. 59, No. 1 (2004): 55.
[23] Dinah Shelton, "Soft Law", *Public Law and Legal Theory working Paper No. 322*, (2008): 3.
[24] *Ibid.,* 2.

to the adoption of "hard law" format.[25] Moreover, this choice is further motivated by structural and institutional features of the ILO, as it was clear from previous experiences that amending the constitution would not be feasible, due to burdensome and high threshold amendment procedures.[26] In this respect, the Declaration allowed the ILO to define its priorities through a "formal and solemn instrument suitable for *rare* occasions when principles of lasting importance are being enunciated".[27] Institutionally speaking, the Declaration is the expression of the views and commitments shared by the ILO and its members within the ILC, the ILO's universal organ. In this respect, even though the Declaration does not modify the constitution nor does it formally interpret it[28], it nevertheless entails legal consequences with regards to the Organization and its members.[29] Moreover, the choice of "soft law" was motivated by a pragmatic assessment of the action of the ILO. Whereas the organization usually defines its standards in Conventions that are binding upon members when ratified, ratification is a time consuming process that does not have a universal reach. By issuing a Declaration and requiring its members to comply, the dilemma is resolved. Moreover, obviously ratification doesn't necessarily entail compliance, especially since the ILO hardly has any means or sanctions for enforcing its labour standards. As Langille pointed it out, the enforcement system of the ILO is rather a soft law system, based on moral persuasion and, in more serious cases, public shaming.[30] In this respect, the soft law nature of the ILO Declaration does not really undermine the likelihood that CLS are effectively enforcement, in comparison with the provisions in the conventions. Finally, through the Declaration, the ILO aimed to address the need to strengthen theses enabling rights, through smarter, more adequate and more effective instruments, contemporary "change inducing processes".[31]

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[25] Isabelle Duplessis, "La declaration de l'OIT relative aux droits fondamentaux au travail", 61

[26] Art. 36, ILO Constitution: '[a]mendments to this Constitution which are adopted by the Conference by a majority of two-thirds of the votes cast by the delegates present shall take effect when ratified or accepted by two-thirds of the Members of the Organization including five of the ten Members which are represented on the Governing Body as Members of chief industrial importance in accordance with the provisions of paragraph 3 of article 7 of this Constitution'.

[27] Francis Maupain, "New Foundation or New Façade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalization", EJIL vol. 20, No. 3 (2009): 831.

[28] According to Art. X, the interpretation of the Constitution is the exclusive prerogative of the International Court of Justice.

[29] Francis Maupain, "New Foundation or New Façade?", 832.

[30] Brian Langille, "Core Labour Rights-The True Story (Reply to Alston)", *EJIL* Vol. 16 No. 3, (2005): 413.

[31] *Ibid.,* 414.

Whereas these trends are consistent with the recent practice related to "soft law" mechanisms,[32] and whereas "soft commitments" have proven sometimes to be as effective as legally binding commitments,[33] it does not however resolve the question of the legal status of its content, generally accepted as a promotional and devoid of binding effect.

The attempts to elevate CLS to higher standards through reference to the "constitutionalization" of a set of labour standards would imply that these principles have an enhanced normative status, which is however not supported by their *instrumentum*. However, despite the declared intention not to create an instrument legally binding, the ILO sends out a strong signal when declaring that all its Members, from the very fact of their membership, have the obligation to respect and promote core CLS. By doing so, the "soft" instrument provides for highly normative content through the use of the terminology "Declares" and "have an obligation", signaling a strong intention to bind its members and making a normative statement, as it requires its Members to adopt a certain conduct in the relation to core labour standards. The existence of a follow-up to the Declaration, operating as a supervisory mechanism, further blurs the distinction between "hard law" and "soft law", as these mechanisms are usually found in legally binding treaties.

Yet, the mention in the 1998 Declaration that "labour standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition, the comparative advantage of any country should in no way be called into question (…)" [34] seriously undermined the possible effectiveness of the recognition of fundamental labour principles. Indeed, the introduction of such a waiver, which was a significant concession that allowed the adoption of the Declaration, was however an obstacle to the recognition of the universality of CLS. In this respect, the ILO 2008 "Declaration on Social Justice for a fairer Globalization" removes the ambiguities by stating 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.[35] This statement, read aside to the *chapeau* of the paragraph referring to fundamental rights 'as both rights and "enabling

[32] Dinah Shelton, "International Law and "Relative Normativity*",* in Malcom D. Evans, (eds) "International Law", (Oxford: Oxford University Press, 2003): 167.
[33] Dinah Shelton, "Soft Law", 2.
[34] ILO 1998 Declaration, para 5.
[35] Francis Maupain, "New Foundation or New Façade?", 836.

conditions" that are necessary for the full realization of all of the strategic objectives',[36] further strengthens the fundamental character of CLS as guiding principles in international labour law.

Finally, we should stress that when the Declaration requires its Members to respect, promote and realize CLS regardless of whether they have ratified the respective Conventions, and when it sets up a follow up mechanism, it relies on the precedent established in 1951, that created a Committee on Freedom of Association. Indeed, that mechanism already provided that all members of the ILO, whether they had ratified or not the relevant conventions could be the subject of a "complaint" for the non-respect of freedom of association and collective bargaining principles.[37] Moreover, the use of this controversial procedure to support CLS is further justified by the presence of the essence of CLS in the constitution.

3. Understanding the strategy behind the ILO Declaration and the codification of CLS: Legitimatizing CLS

The fundamental importance of CLS is justified on the basis of their inherent capacity of enabling other workers' rights contained in the international labour regime. This is not to say that other rights are relegated to a second class, but rather, that what may appear at first as an arbitrary emphasis, is simply the recognition of the "special significance" of a core of labour standards, necessary for establishing a basis for the fulfilment of the general corpus of international labour law.[38] In this respect, we find similarities to the ongoing evolutions in the field of human rights.

Interestingly, the Declaration recalls that Members have freely joined the ILO and have by doing so endorsed the principles and rights of its constitution, thus granting the ILO with the mandate, even though it is not explicitly phrased, to issue this Declaration which ultimately imposed obligations to members independently from any ratification. Moreover, it stresses that "all Members have endorsed the principles and rights set out in its Constitution (…) and have undertaken to work towards attaining the overall objectives of the Organization to the best of their resources and fully in line with their specific circumstances". The Declaration also recalls "that these principles and rights have been expressed and developed

[36] *Ibid.*
[37] *Ibid*., 841
[38] Francis Maupain, "Revitalization not retreat", 447.

in the form of specific rights and obligations in Conventions recognized as fundamental both inside and outside the Organization."[39] As this wording implicitly refers to both the necessary elements for ascertaining custom, namely, practice and *opinio juris*, it is likely that the ILO is paving the way for the recognition of core labour standards are part of customary law.

Furthermore, contributing to making this Declaration acceptable, the ILO recalls it obligations to assist its members in the discharge of their obligations.[40] Moreover, it should be noted that the Declaration was the object of negotiations and that its outcome represents the minimum common denominator among Member States. No State voted against the adoption of the Declaration.[41] Furthermore, it is useful to recall that the ILO's introspection in the search of its founding principles was legitimized and motivated by the failed attempts of industrialized States to include certain labour standards in the multilateral framework of the WTO. More importantly, despite the failure of including trade-labour linkage in the multilateral trade agenda, embodied in the 1996 Singapore Ministerial Declaration[42], the inclusion of labour provisions in trade instruments has been hardly prevented, as those states that called for their inclusion in the WTO framework have pursued bilateral and regional paths.

4. From labour rights to human rights: Benefiting from their "special status" and universality?

Simultaneously to the building of a labour rights hierarchy, and consistently with this trend, the ILO has started to address labour rights as human rights.[43] In doing so, it operates a

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[39] ILO 1998 declaration, para 1.

[40] The ILO Declaration **(3) "**Recognizes the obligation on the Organization to assist its Members, in response to their established and expressed needs, in order to attain these objectives by making full use of its constitutional, operational and budgetary resources, including, by the mobilization of external resources and support, as well as by encouraging other international organizations with which the ILO has established relations, pursuant to article 12 of its Constitution, to support these efforts:
(a) by offering technical cooperation and advisory services to promote the ratification and implementation of the fundamental Conventions;
(b) by assisting those Members not yet in a position to ratify some or all of these Conventions in their efforts to respect, to promote and to realize the principles concerning fundamental rights which are the subject of these Conventions; and
(c) by helping the Members in their efforts to create a climate for economic and social development."

[41] The vote was 273 for, and zero against, with 43 abstentions.

[42] *Singapore WTO Ministerial 1996*: Ministerial Declaration, WT/MIN(96)/DEC**,** adopted on 13 December 1996.

[43] See e.g. George P. Politakis, "Protecting Labour Rights as Human Rights: Present and Future of International Supervision"**,** *Proceedings of the International Colloquium on the 80th Anniversary of the ILO Committee of*

shift of paradigm, as labour rights, which have usually been viewed as strongly related to the level of economic development and thus not absolute, are moving from this relative status of social right towards a recognition of an absolute and universal core. Moreover, the concept of human rights is heavily linked with the idea of universality and the recognition of "equal and inalienable rights of all members of the human family »[44], as « a common standard of achievement for all peoples and all nations ».

The attempt to translate "labour rights" into "human rights" can also be ascertained through the Declaration's requirement has the Members have an obligation "to respect, to promote and to realize"[45] Core labour standards. This process has widened the possibilities for strengthening the normativity of CLS. Indeed, human rights benefit the sympathy of a large proportion of international law scholars, who argue restlessly on their established normative foundation or try to ascertain their universal nature and *erga omnes* effect. For instance, the legal category of *jus cogens* expressing the peremptory norms recognized by the international legal order, contains a majority of human rights and has been used by international practitioners to strengthen the human rights regime.[46] Moreover, these developments also relate to the establishment of a core of labour rights, since the existence of a core of human rights benefiting from an acknowledged customary nature is well established. By shifting the paradigm and viewing labour rights as human rights, the former could benefit from the latter's influence and established normative status. Along with the concept of human rights, comes the set of arguments and mechanisms aimed at providing them with the necessary legal arguments to expand their status and enhance their compliance.

Along with the concept of rights, also follows closely behind their potential universality. Universality implies the possibility of bringing a normative proposition to a higher - or the highest - legal status, considerably enhancing their potential influence in shaping international policies and practices. Indeed, the extraction of core labour standards takes it source in the search for defining the constituting values of the ILO, with the attempt to strengthen its means of action in a context of a globalizing economic system[47], and incidentally, its legitimacy and relevance in the 21st century. Moreover, the quest for universality would also allow a more

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*Experts on the Application of Conventions and Recommendation*s, Geneva, (24-25 November 2006); See also "Introduction: Labour Rights, Human Rights", International Labour Review, Vol. 137 (1998), No. 2.

[44] Preamble, UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: http://www.unhcr.org/refworld/docid/3ae6b3712c.html. See also art. 1 and 2.

[45] ILO 1998 Declaration, para 2.

[46] *Ibid.*

[47] Isabelle Duplessis, "La declaration de l'OIT relative aux droits fondamentaux au travail", 60.

coherent and mutually enforcing approach with other international institutions, as the latter should then refrain from issuing obligations that would place their Members in contradiction with their previous obligations arising of other international organizations.[48]

5. Conclusion

Then, what is the legal status of core labour standards? Whereas their *instrumentum* does not allow us to ascertain their legally binding status, it should be pointed out that "soft law" norms can hardened through their incorporation into subsequent treaties, or through becoming of customary nature as a consequence of state practice.[49] Moreover, non-binding norms are often the precursors of treaties, which can sometimes set the necessary practice for the recognition of a customary norm.[50] In turn, treaties are the first element for determining state practice, in the exercise of ascertaining custom or evidence of the existence of general principles of law. Recalling that the ILO Declaration and the consequent formulation of CLS has been designed specifically to regulate globalization, occurring principally through trade and investment[51], it is thus relevant to examine the role that economic instruments have been taking in promoting these standards and whether they have influenced their normative status. The following section will thus examine how core labour standards have been integrated and whether this practice can help us define their legal status.

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[48] *Ibid.,* 69.
[49] Dinah Shelton, "Soft Law", 1-2.
[50] *Ibid.,* 2.
[51] "Bilateral trade and investment agreements are the gateway through which globalization passes on its way to redefining the economic landscape of a country. These agreements often set in motion a process of restructuring that shakes up the existing foundations of an economy". See "Human Rights-Proofing" Globalization-UN right to food expert, [26 January 2012] Geneva, available at: http://www.srfood.org/index.php/en/component/content/article/2034-human-rights-proofing-globalization-un-right-to-food-expert

PART 2: EXAMINING THE LEGAL SUBSTANCE AND IMPACT OF LABOUR PROVISIONS IN ECONOMIC INSTRUMENTS

1. Labour provisions in FTAs, GSP and BITs: soft law?

In order to assess the contribution of labour provisions in economic agreements to the normative status of CLS, an analysis of the substance of undertakings under these clauses should be assessed in order to determine their normativity.

One may find surprising to question the legal status of labour provisions in FTAs and BITs, as there is no arguing against the fact that their *instrumentum* is a legally binding treaty. Nevertheless, from the standpoint of the theory of law-ascertainment, both the *instrumentum* and the *negotium* can serve to define whether a norm is a legal rule.[52] This notwithstanding, the theory of sources of international law has primarily ascertained the legal nature of a rule through the qualification of the container rather than the content[53] and, therefore, the *negotium* is mostly deprived of any law-ascertainment effect.

However, it is recognized that "soft law" can also define weak or undefined provisions in a binding treaty, and is thus related to the content of the obligation.[54] For the scope of the study of the potential effectiveness of a treaty provision, the examination of the content and the normativity of a specific provision is justified by the concern of habilitating the latter to have the impact it was designed for and which justify its inclusion in a legally binding instrument. Reminding our introductory premise that civil societies are calling upon their respective governments to regulate the negative impacts of trade globalization, the translation of these requests into "soft" content normative propositions could elude this effective regulation by watering down their apparent attempts to raise the compliance to CLS. Therefore, it is only legitimate that we examine the ways in which CLS have been integrated into international economic instruments and whether these inclusions can be expected to reach their apparent objectives. In this respect, a coherent pattern of assessment is to analyse the

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[52] Jean D'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules*, (Oxford : Oxford University Press, 2011) : 175.
[53] *Ibid.*
[54] Dinah Shelton, "International Law and Relative Normativity", 168.

extent to which a regime has the capacity to, and actually does, exercise a verifiable impact on the achievements by its members of the apparent obligations channelled by this regime.[55] The question is therefore whether the inclusion of labour provisions in economic instruments have the capacity to promote core labour standards, and if it actually does?

We argue that this capacity exists when (1) the labour provision effectively refers to core labour standards, (2) the drafting of the clauses implies the creation of a binding obligation for the Parties and (3) the enforcement mechanisms are existing and can be effective. In our view, those elements are important in shaping the normative content as they will ultimately determine whether a provision can be considered as "hard law", or whether the content of the obligation is loosely defined and shaped by its drafters to have the lesser effects possible. This examination is further justified in order to determine the normativity of core labour standards. Indeed, whereas core labour standards have been issued in a "soft" *instrumentum*, their normative status would be completely eluded if their subsequent inclusion in treaties is made through "soft content". Therefore, for the scope of this study, the normativity of labour provisions included in FTAs, GSPs and BITs will be analysed through the following criteria:

(1) Examination of the content of the clause and what appear to the obligations of the parties (reference to rights or principles/international law or/and national law/Whether the Parties make explicit reference to the four Core labour standards/undertake to uphold the ILO Declaration on fundamental principles and rights and to monitor their applications/ do not cite the ILO.);

(2) Drafting of the clause (Analysis of the wording of the *negotium*: indication that the clause was meant to be binding upon parties and whether the content is drafted to infer precise obligations or whether the nature of the clause is strictly promotional.)[56]

(3) Enforceability of the obligations/clause (are labour provisions identically enforceable as the rest of the treaty dealing with commercial matters/are there any sanctions/The existence of dispute settlement procedures or sanctions: analysis of what matters are subject to dispute

[55] Francis Maupain, "Revitalization not retreat", 442.

[56] The analysis of the drafting namely, examining whether the terminology implies the creation of a specific obligation, will determine principally whether the obligation was meant as legally binding and is to be linked with the possibility of enforcement through dispute settlement mechanisms or subject to sanction. Indeed, when the analysis of the wording cannot lead to the conclusion that a provision creates binding obligations, because drafted in a large and general manner, it is likely that any existing enforcement will be weak or ineffective.

resolution and whether the dispute resolution is likely to promote compliance to the labour obligations arising from the FTA).[57]

The analysis of the normativity of labour provisions within the following economic treaties will allow us to determine whether and to what extent such labour provisions instruments have a legally binding content that can or has potential to be enforced. In turn, an assessment that these provisions create specific legal obligations will to the acknowledgment of a substantial practice, contributing to the latter discussion on the normative status of CLS.

2. Review of labour within FTA, GSP and BIT clauses

In this chapter, we shall examine the content of various economic agreements and Generalized Systems of Preferences (GSP) provisions linking labour to trade and requesting the party to comply with certain labour rights related obligation.[58] This examination, in turn, will lead us to conclude on the degree of normativity designed for these clauses and lead us to establish whether this trend is part of a greater pattern and strategy of international law making with regards to core labour standards.

A. US Free Trade Agreements and GSP

The introduction of these provisions has taken different forms, as well as various degrees of normative substance and enforcement mechanisms. Starting with the initial premise that labour clauses are included in FTAs in order to promote, at least to a minimum degree, the compliance to international labour standards, then the clauses should be analyzed in the light of the potential ability of the provisions to reach that objective.

[57] At this point, it should be specified that the absence of enforcement as such is of course not a condition for determining the normative character of the provision. However, enforcement is being stated an essential condition for empowering labour rights conditionality to the potential of enhancing distributional fairness in the world economy. Examining the enforcement mechanisms will also help us determine what strength Parties have been willing to give to these labour clauses, and what is the likelihood that they are effectively used by international actors to enforce labour laws and standards.

[58] For the purpose of this study and despite their differences in nature we will analyze Free Trade Agreements as well as Generalized System of Preference[58]. In our view, both are major trade instruments linking Trade to labour and therefore the potential impact of their labour provisions should be identically considered.

1. US Free Trade Agreements

Since the inclusion of the first labour clause and the bilateral trade preference programs conditioning trade advantages upon compliance to labour rights requirements in 1984, U.S. practice in linking trade to labour has gone a long way. The US Trade Act of 2002[59] now requires the introduction of labour provisions in trade treaties. Therefore, all US FTAs must contain at least a reference to labour rights. Moreover, the US Administration is also required to satisfy detailed consultation and notification requirements before a treaty can be ratified. Pursuant to section 2102(c) of the Act, the President of the United States is also required to prepare reports to the Congress in relation to the conclusion of any new FTA.[60] Within the United States trade policy, labour standards are henceforth inevitable.

In this section, we will examine four categories of labour provisions contained in major US Trade Agreements, that have been chosen either because they represent a signification evolution in the inclusion of labour provisions in FTA and have set the standards for subsequent practice, either because they represent the dominant model at a given time.[61] The categories from which labour provisions will be analysed are the following: (i) *U.S.-Cambodia Bilateral textile Agreement Model, (ii) U.S.-Jordan Free Trade Agreement Model, (iii) DR-CAFTA and similar agreements, (iv) May 10th Templates and the up coming Transpacific partnership.*

a. Content of the clauses and obligations arising from the FTAs?

In this section, we shall identify the various undertakings under the examined FTAs. In this respect we will analyze whether the parties undertake to respect their domestic labour laws and/or international labour standards and whether other labour related obligations can be identified. Analysing the content of the provision will not only entail defining the legal rights and principles that are made reference to and but also the expectations stemming from the parties to the treaty in terms of compliance to international Core labour Standards.

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[59] Public Law 107-210

[60] U.S. Department of Labor, Labor-Related Reports for U.S. Free Trade Agreements, available at : http://www.dol.gov/ilab/media/reports/usfta/

[61] It should be noted that the classification is also consistent with the chronological evolution of FTAs. This is primarily because subsequent FTAs templates have undergone some substantial changes in trying into account of the major criticisms formulated against the formers and evolve into more complex and coherent approaches.

i. U.S.-Cambodia Bilateral textile Agreement

The *U.S.-Cambodia Bilateral textile Agreement* is often described as having been a successful improvement in compliance with domestic labour legislation and international labour standards.[62] Signed in 1999 and further extended until 2005, the treaty included a system of positive incentives, as the import quotas could be raised if Cambodia upheld its commitments to improve domestic compliance with national legislation and International labour standards.[63] The success of this method can be assessed through the steady increase of import quotas throughout the years.[64]

The agreement states that "Cambodia shall support the implementation of a program to improve working conditions in the textile and apparel sector, including internationally recognized core labour standards, through the application of Cambodian labor law." Whereas the labour provision does not contain any direct reference to the ILO or its Declaration, "internationally core labour standards" are integrated and are required to be complied with. Contrarily to some of the future templates, the agreement requires sets specific obligations with regards to internationally recognized workers' rights[65] and that they be integrated into domestic legislation.

In this respect, the potential impact of core labour standards on domestic legislation and practice is high.

ii. U.S.-Jordan FTA

The *U.S.-Jordan FTA* (2001) constitutes the next attempt of the United States to bring its commercial partners into compliance with labour standards it deems necessary. The main feature of the labour provision, located directly in the body of the text, requires that each country enforce its domestic labour laws.[66]

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[62] Nevertheless, it should be underlined that it is limited to a specific highly protected industry and its application to other kind of trade agreements is challenged. See Arestoff-Izzo, Florence, Bazillier, Rémi, Duc, Cindy and Granger-Sarrazin, Clotilde, "The Use, Scope and Effectiveness of labour and Social provisions and Sustainable Development Aspects in Bilateral and Regional Free trade Agreements", *Report for the European Commission*, (15 September 2008): 67.

[63] *Ibid*., 43.

[64] 9% per year during the first three years, and then agreement, 12% in 2002 and 2003 and 18% in 2004, Ibid., 67.

[65] Say that they are the same as core labour standards, just that they correspond to the US vocabulary.

[66] Art. 6 (4) (a) "A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement". The preamble also contains reference to labor issues, indicating that the Parties desire "to promote higher labor standards by building on their respective international commitments and strengthening

Paragraph 1, 2 and 3 states that Parties *shall strive* to bring their laws into accordance with labour principles and the internationally recognized workers' rights, to ensure not to waive or otherwise derogate from, or offer to waive or otherwise derogate from labour laws as an encouragement for trade with the other Party, and to ensure that domestic laws provide for labour standards consistent with the internationally recognized labour rights and to improve those standards. Instead, paragraph 4 states that parties *shall not fail* to enforce its labour laws, thus using a vocabulary that implies an obligation of result and a binding obligation.

Whereas the provision reaffirms the Parties' "obligations as members of the International Labour Organization and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up" and sets the beginning of the use of the Declaration as a set of minimum core labour standards, it does not require that the parties integrate core labour standards in their national legislation.

However, with regards to the obligation to enforce domestic laws, the Agreement defines "labour laws", as " statutes and regulations, or provisions thereof, that are directly related to the following internationally recognized workers rights (IRWR): (a) the right of association; (b) the right to organize and bargain collectively; (c) a prohibition on the use of any form of forced or compulsory labour; (d) a minimum age for the employment of children; and (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health".[67] With regards to CLS implementation, we note that, while three core labour standards have been included in this provision as "IRWR", the elimination of discrimination in respect of employment and occupation has been omitted, although it will be included in provisions of later models. In this respect, the use of the more limited notion of "IRWR" instead of CLS consequently means that these treaties cannot support the normative hardening of the whole concept of CLS, but merely its first three principles.

Notwithstanding that the undertaken obligation requires to enforce domestic labour laws in their aspects relating to CLS, the respect of which would arise from their probable ILO

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their cooperation on labor matters;" and wish "to promote effective enforcement of their respective environmental and labor law;"

[67] "Internationally recognized worker rights" are also primarily defined under the Trade Act to include: a) the right of association; b) the right to organize and bargain collectively; c) a prohibition on the use of any form of forced or compulsory labor; d) a minimum age for the employment of children; and e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. In 2000, beneficiary countries were further required to implement their commitments "to eliminate the worst forms of child labor" in order to remain eligible. See 19 U.S.C. 2467(4) and 19 USC 2462(b)(2)(H).

Membership and ratified conventions, the provision does not however guarantee that the domestic legislation has effectively or at all implemented core labour standards in its laws.

Therefore, the impact of such a provision on enhancing compliance with CLS, in absence of an obligation to integrate core labour standards in domestic legislation remains hypothetical, since the parties do not undertake any specific obligation to enforce CLS.

iii. DR-CAFTA model and similar agreements

Along with the development of the *CAFTA-DR* (Dominican Republic-Central America Free Trade Agreement) *model* and similar agreements[68] negotiated from 2004 to 2006[69] came the first relatively successful attempts of enforcement, illustrated by the ongoing dispute settlement opposing the United States against Guatemala (see case studies, *infra*). The labour provisions of FTA negotiated since 2004, such as the CAFTA-DR, contain four general commitments, similar to those under U.S.-Jordan FTA, with variable levels of legal substance and enforceability[70].

Chapter 16 of the CAFTA Agreement is dedicated to labour issues and to enforcement and monitoring mechanisms. Art. 16 (8)[71] defines "labor laws" as "a Party's statutes or regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights. With regards to labour principles and the internationally recognized

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[68] The U.S- Singapore Agreement (2003) also demonstrates Growing attention to labour standards, as the related chapter in the FTA spreads on more than three pages, compared to one page in the Jordan FTA. The FTA also includes an annex specifying the requirements of the U.S.-Singapore Labor Cooperation Mechanism. The U.S-Singapore Agreement also paved the way to subsequent FTAs and serves as a reference point.

[69] Six agreements were signed between 2004 and 2006 - with Singapore, Chile, Australia, Morocco, CAFTA-DR (Central America: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the Dominican Republic), and Bahrain.

[70] In the CAFTA-DR, the commitments read as followed: (1) Parties "reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)* (ILO Declaration)" and to "strive to ensure that such labor principles and the internationally recognized labor rights set forth in Article 16.8 are recognized and protected by its law;" (2) "strive to ensure that its laws provide for labor standards consistent with the internationally recognized labor rights … and shall strive to improve those standards in that light;" (3)"not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement "; (4)"strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights … as an encouragement for trade with another Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory."

[71] "Labour laws" are defined at art. 16 (8) as a "Party's statutes or regulations, or provisions thereof, that are directly related to the following internationally recognized labour rights" listed as follows : (a) the right of association, (b) the right to organize and bargain collectively, (c) a prohibition on the use of any form of forced or compulsory labour, (d) a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour, and (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

labour rights, the treaty provides that the parties "*shall strive*" to recognize and protect the principles set in art. 16 (8) in their labour laws, while "recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws".

According to Art. 16 (2) of the U.S.-CAFTA DR, the parties are required (1) not to fail to enforce "labour laws" (as defined in art. 16 (8)) through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement."[72]

Additionally, when entering into CAFTA-DR, each country "pledges" (2) "to strive to ensure" that both ILO core labour principles and internationally recognized worker rights are recognized and protected by domestic law (art. 16.1); (3) to strive to "not waive or to otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights referred to in Article 16.8 as an encouragement for trade with another Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory"(art. 16.2.2) ; and (5) to establish mechanisms for cooperative activities and labour-related trade capacity building with the other countries (annex 16.5).[73]

Thus, reference to core labour standards and the ILO is clearly provided. However, similarly as in the US-Jordan FTA, the parties are not required to integrate CLS within their domestic laws, but merely should enforce their laws no matter how weak they may be.

iv. "May 10th Templates" and Expected evolution for Trans-Pacific Partnerships (TPP)

In the line of the gradual evolution of FTAs' features, a *New Trade Policy for America* was tailored to respond to the ongoing search for a labour-trade responsible compromise and was announced by the Bush Administration on May 10th 2007.

The labour provision of the U.S.-Peru Promotion Agreement, which embodies the features of the May 10th template evolution[74], requires that the parties "adopt and maintain in

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[72] CAFTA-DR, Chapter 16, at. 1, available at http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file320_3936.pdf

[73] Mary Jane Bolle, *DR-CAFTA Labor Rights Issues*, (CRS Report for Congress: June 2005). 2. Available at : http://www.policyarchive.org/handle/10207/bitstreams/4142.pdf

[74] See also Colombia, Panama, and South Korea TPAs.

(their) statutes and regulations, and practices thereunder, the following rights, as stated in the ILO Declaration (…)".[75] The use of clarified language and greater coherence demonstrates that the drafting has been wary to precisely define the labour obligations and to provide for a fully enforceable commitment to integrate CLS within national legislation. Read along the obligation to enforce domestic legislation, the drafting of a legally binding obligation with respect to integrating CLS in municipal laws is an important step in promoting the compliance of CLS.

With regards to our question on normativity, the labour provisions have undergone substantial changes which finally support our view that CLS have been undergone a hardening process through their incorporation treaty provisions.

The US Administration is currently negotiating an ambitious Trans-Pacific Partnership Trade Regional Agreement (TPP).[76] This far reaching agreement, that will bind Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore and Vietnam and is also likely to influence the future FTA models of those states. The outcome of the new model is expected to rely on the content and the wording U.S-Peru Promotion Agreement, which contains all the features of the May 10th Templates.[77] Moreover, it is alleged that the TPP clarifies that national laws must be applied in export processing zones as well as establishing model procedures for filing labor complaints.[78] A coalition of trade unions in the TPP countries has presented a labour chapter proposal that builds upon the US-Peru agreement that contains should promote an even more coherent approach to CLS. In this respect, the proposal establishes provisions that require a minimum requirement of adopting and maintaining CLS in domestic laws, and requiring giving full effect to relevant ILO Conventions.[79]

We can conclude that whereas there are still some inconsistencies, the content of labour provisions has increasingly developed and has gained greater coherence. It now refers specifically to CLS as well as to the ILO Declaration, abandoning the terminology of "internationally recognized workers' rights" and requiring that they are integrated within domestic legislations. In this respect, the direct reference to CLS and the Declaration in

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[75] U.S.-Peru Promotion Agreements, Chapter 17: Labour, Art. 17.2 (1), (1st February 2009), available online at: http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text

[76] Ian Fergusson and Bruce Vaughn, "The Trans-Pacific Partnership Agreement"Congressional Research Service (December 2011): 1-21.

[77] *Ibid.*

[78] See, Inside US Trade, *Business Wary Of U.S. TPP Labor Proposal On Substance And Politics*, Jan. 13, 2012.

[79] ITUC, *The Trans-Pacific Partnership Agreement: A New Model Labour and Dispute Resolution Chapter for the Asia-Pacific Region*, available online at: http://www.ituc-csi.org/trans-pacific-trade-negotiations.html

legally binding agreements gives a new "hard" support to these norms and provides them with a "hard" framework through which the "soft" standards take a conventional legal status. Moreover, reminding that the aim of the 1998 Declaration to more effectively regulate globalization, these conventional undertaking embody the fundamental principles of labour to shape international recognition and compliance to CLS.

b. Drafting Labour clauses: a predominant use of promotional language.

Recalling our previous comments on "soft *negotium*" within a binding *instrumentum*, the way labour provisions are drafted and the terms and verbs they use is decisive in order to determine whether the parties had the intention to create legally binding obligations. In the following section, we shall examine the drafting of US FTA labour provisions and determine what are in fact the substantial obligations.

i. U.S.-Cambodia Bilateral textile Agreement

The *U.S.-Cambodia Bilateral textile* Agreement uses affirmative terminology that imposes a clear obligation of result on the Cambodian authorities, therefore leaving no elbowroom for interpreting them as being of a purely promotional nature. Indeed, the FTA states that "Cambodia shall support the implementation of a program to improve working conditions in the textile and apparel sector, including internationally recognized core labor standards, through the application of Cambodian labor law." In terms of legal drafting, the wording "shall support" expressed a compulsory obligation, rather than an aspirational statement. Moreover, the existence of "a program" indicates that the parties have defined a course of action, which content is specified and determined, allowing thus a concrete verification and follow-up on the basis of the arising listed obligations. The obligations arising from this labour clause are thus precise enough to be qualified as legally defined and binding.

ii. US-Jordan FTA

Next, the U.S.-Jordan FTA uses a wording less constringent than in the previous model, requiring that the Parties "shall strive" for labour laws to reflect both "internationally recognized worker rights" as defined by the U.S. Trade Act of 1974, and "core labor

standards" as defined by the International Labor Organization.[80] According to the wording of the provision, through the use of "shall not fail to", only the obligation to enforce domestic labour laws imposes a legal undertaking to the parties, regardless of the extent to which these laws comply to CLS. The other paragraphs mentioning internationally recognized labour rights that would be required to be translated into domestic legislations and effectively implemented are introduced by the wording "shall strive to", which fails to define any specific obligation, the violation of which could be measurable and verifiable. Thus, the strategic choice of using *shall strive,* and subsequently *shall not fail,* implies that, except for the obligation to enforce domestic labour legislation, none of the other apparent undertakings are legally binding obligations, as they merely reaffirm statements phrased in purely aspirational terms, despite being stated as subject matter to enforcement under the dispute settlement provision.[81]

Consequently, under this interpretation, U.S.-Jordan FTA can be criticized, as was CAFTA-DR[82] a few years later, for its loose wording that fails to impose that a Party's labour laws comply with CLS, despite the fact that the dispute settlement procedure *per se* not procedurally prevent enforcement, as at applies to the whole provision.[83] Indeed, future FTA Models will leave out the possibility of enforcing the whole provisions by directly excluding the other obligations from enforcement under the Agreement. Leaving out obligations for domestic labour laws to comply with *internationally recognized labour standards* tantamounts to maintaining domestic legislation, which often did not conform to these standards prior ratification of the Agreement, short of any incentive to bring their laws into compliance with international standards.

iii. CAFTA-DR Model

The CAFTA-DR raised many critics for its unclear and non-binding phraseology. One issue relates to the requirement of CAFTA-DR signatories to "strive to ensure" that ILO

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[80] U.S-Jordan Free Trade Agreement, Art. 6 (1) "The Parties reaffirm their obligations as members of the International Labor Organization ("ILO") and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Parties shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in paragraph 6 are recognized and protected by domestic law".

[81] US-Jordan FTA, Art. 17.

[82] See Philip Alston, "Facing Up to the Complexities of the ILO's Core Labour Standards Agenda", *EJIL* Vol. 16 No. 3, (2005): 467–480 See also Mary Jane Bolle, *DR-CAFTA Labor Rights Issues*, 1-5; Philip Alston and James Heeman, "Shrinking the International Labour Code: an Unintended consequence of the 1998 ILO Declaratation on fundamental principles and rights at work?", International Law and Politics, Vol. 36:221, (2004): 222-264

[83] US-Jordan FTA, Art. 17.

labour provisions and internationally recognized worker rights are integrated and protected by domestic laws and regulations. Given that the provision fails to determine a course of action or a minimum core labour standards compliance threshold, it is again highly undetermined what kind of obligations arises out of such a commitment. If so, then again there is no requirement of conforming ones law to core labour standards, expect for obligations arising directly from ILO Membership or Conventions. Consequently, it is feared that the labour laws of these countries may be weak and not adequately enforced at the time of the entry into force of the treaty and the latter would only promote the enforcement of existing and potentially weak labour laws and standards.[84]

However, even though there may not be a legally binding obligation to integrate core labour standards within municipal law, it appears that these "labour laws" should nevertheless respect core labour rights as they have been extensively understood and interpreted by the ILO 1998 Declaration. Indeed, the petition submitted against Costa Rica recalls the "serious and repeated failures by the government of Costa Rica to effectively enforce its own labour laws", and it outlines ways in which the government is failing to meet its commitment to "respect, promote and realize" core workers' rights, as outlined in the ILO 1998 Declaration.[85] In this respect, paragraphs drafted in a non-binding way could still be viewed as creating obligations or at least an indication of how labour laws should be applied.

Another aspect raising concern is in fact the linkage between the obligation of non violation of labour laws in relation to the necessity of not "affecting trade between the Parties" (Art.16.2. 1 (a)). This article seems to set either a requirement of intention, either a presumption that all attempts to weaken the labour right protection would be considered as a undermining of free trade or investment protection. A statement from the former US Trade Representative (USTR) Barshefsky on March 20, 2001 reinforces the idea that the violation of labour rights should only be read alongside their potential effect on trade: "…*in the event that one FTA partner believes another is avoiding enforcement of existing national laws with the intent of gaining a trade or investment advantage*."[86] The recent statement of present USTR Ron Kirk further confirms this direction: "*we will hold our trading partners accountable in*

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[84] Mary Jane Bolle, *DR-CAFTA Labor Rights Issues*, 3.
[85] *Public Submission to the OTLA Under Chapters 16 (Labor) and 20 (Dispute Settlement) of the DR-CAFTA: Concerning the Failure of the Government of Costa Rica To Effectively Enforce its Labor Laws Under the ILO Declaration on Fundamental Principles and Rights at Work*, (submitted 20 July 2010), 2.
[86] *CAFTA Facts*, Office of the United States Trade Representative, CAFTA Policy Brief – June 2005, available at:http://ustraderep.gov/assets/Trade_Agreements/Regional/CAFTA/Briefing_Book/asset_upload_file100_7719.pdf

order to maintain the fairness that creates a level-playing field upon which American workers can compete and win".[87] Finally, the Exchange of letter relative to the recent FTA with South Korea, a newest version of the FTA, indicates that the dispute settlement mechanism may only be applied in cases where the effects on trade or investment of violating the provisions set out under Chapter 19 (Labour) and Chapter 20 (Environment) can be established.[88]

Where a labour right violation has no impact on trade, could it still be subject to enforcement under this Agreement? Practice seems to give a positive answer, but it will be necessary to wait until a CAFTA ad hoc panel, if any, renders a conclusion on the matter.

iv. May 10th Template and expected evolution for TPP

In terms of legal drafting, the May 10th template marks a significant step ahead by dropping the promotional language with regard to the waiver and non-derogation provision[89]. Indeed, the language "shall adopt and maintain", related to the integration of CLS in their domestic legislation, implies a specific obligation of result, which completes the classic obligation to enforce ones labour laws. This is a major breakthrough since the parties now have a precise obligation to integrate CLS within their domestic legislation, which in turn, strengthens the content of the obligation to enforce their labour laws, since the latter should effectively integrate and translate CLS.

With regards to the Trans-Pacific Partnership Agreement, the details of the drafting are not yet available. However, it is likely that it will continue following the prescription of the "May 10th" Template. The trade union proposal requires that "in an egregious case requiring expedited attention, a petitioner is not required to submit evidence of the existence of a sustained or recurring course of action or inaction,"[90] thus allowing to elude the proof of

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[87] See *USTR Kirk Seeks Enforcement of Labor Laws in Guatemala*, Press Release, Office of United States Trade Representative, (May 2011), available at: http://www.ustr.gov/about-us/press-office/press-releases/2011/may/ustr-kirk-seeks-enforcement-labor-laws-guatemala.

[88] Florence Arestoff-Izzo, Rémi Bazillier, Cindy Duc, and Clotilde Granger-Sarrazin, "The Use, Scope and Effectiveness of labour and Social provisions and Sustainable Development Aspects in Bilateral and Regional Free trade Agreements", 46.

[89] Art. 17(2) of US-Peru Promotion Agreements: "Neither Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations implementing paragraph 1 in a manner affecting trade or investment between the Parties, where the waiver or derogation would be inconsistent with a fundamental right set out in that paragraph. US-Peru Promotion Agreements, Chapter 17: Labour, Art. 17.2 (1), (1st February 2009), available online at: http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text

[90] *Ibid.,* Footnote 2 to Article 17(4): Enforcement of Labour Laws.

sustained labour law violations when the matter needs to be addressed urgently, and facilitating the mechanisms of complaint.

The drafting of labour provisions in US FTAs has been increasingly supported a more coherent and comprehensive approach to CLS and the promotion of their compliance. Whereas provisions seemed very weak and undefined at first, they now clearly provide for strong language and precise obligation. In this respect, whereas the initial provisions can be considered as "soft law", their content has significantly hardened and now unequivocally supports CLS. In our view, this finding may be the most important within our labour provision analysis, because the initial CLS as "soft law" have come to being "hard law", not only through their integration in legally binding agreements, provisions that create legally binding obligations upon states. The compliance to CLS does not merely arise from "good faith", as suggested in the 1998 Declaration, but also from a formal and binding instrument. This further increases the relevance of the inclusion of CLS in economic instruments as a basis for establishing a "generalized practice".

c. Enforcement mechanisms

The strength of Enforcement mechanisms in FTA are an important issue as they signify the importance that the US has been willing to give to labour issues and they will ultimately determine whether labour provisions can be submitted to dispute settlement and eventually subject to trade sanctions. Enforcement should be analyzed while keeping in mind our comments on drafting, as if the obligation contained in the provision is soft and does not contain any specific binding obligation, its enforcement under dispute settlement mechanisms is unlikely.

i. US-Cambodia Textile Agreement

In terms of implementation and enforceability, the *US-Cambodia Textile Agreement* has tailored an innovative positive incentive system, making compliance highly desirable.[91]

[91] Art. 10 of U.S. Cambodia Bilateral Textile Agreement "Based on these consultations and other information regarding the implementation of this program and its results, the Government of the United States will make a determination by December 1 of each Agreement Period, beginning on December 1, 1999, whether working conditions in the Cambodia textile and apparel sector substantially comply with such labor law and standards. If the United States makes a positive determination, then the Specific Limits as set forth in paragraph 4 and Annex B shall be increased by 14 percent for the Agreement Year following such certification. The increase will be in addition to the annual growth provided for in Annex B. Any increase granted under this paragraph will remain in

Indeed, the possible quota increase subsequent to compliance is determined on an annual basis, so that companies fulfilling the undertakings benefit quickly from the rewards.[92] Moreover, this mechanism provides an incentive to companies to comply with labour regulations and to improve their employees' rights as companies will benefit directly from the increased quotas. It is also likely that companies will be pressured by the authorities and the corporate community to comply with the undertakings, as the quotas depend on performance in the textile industry as a whole.[93] Finally, a factory-monitoring project supervised by the ILO has been set up in the framework of the Agreement. [94] Indeed, for the first time undertaking the systematic monitoring of production plants within the framework of a trade agreement, the ILO supervision systems were asked to ensure monitoring and supervision of compliance, as the U.S. refused to trust local contractors for this purpose.[95]

As the textile sector export accounted for a very large part of Cambodia's total gross domestic product, the labour provision was likely to have an impact on a substantial share of the country's production.[96] The decision to commit exclusively the textile sector did not come inadvertently, and demonstrates the existence of a flexible solution for States wishing to commit their trading partners to the respect certain standards. Indeed, in economies with low diversification in their trading and production structures, targeting areas amounting for a great share of exports for the developing good practices is likely to be the most effective mechanism for the promotion of these practices.

This scheme of enforcement is likely to be very effective and has led to positive results in CLS compliance.[97] However, despite these positive findings and the high potential impact of this labour provision, its features were not reconducted in later agreements.

ii. U.S.-Jordan Free Trade Agreement Model

Within the *U.S.-Jordan Free Trade Agreement Model,* a Party to the Agreement has the right to challenge the other country for the violation of the whole labour provision (art. 6).

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effect for a subsequent Agreement Year if and only if the United States makes a positive determination by December 1 of the previous Agreement Year."

[92] Florence Arestoff-Izzo, Rémi Bazillier, Cindy Duc, and Clotilde Granger-Sarrazin, "The Use, Scope and Effectiveness of labour and Social provisions and Sustainable Development Aspects in Bilateral and Regional Free trade Agreements", 66-67.

[93] *Ibid*., 67.

[94] *Ibid.*

[95] *Ibid.*

[96] Florence Arestoff-Izzo, Rémi Bazillier, Cindy Duc, and Clotilde Granger-Sarrazin, "The Use, Scope and Effectiveness of labour and Social provisions and Sustainable Development Aspects in Bilateral and Regional Free trade Agreements", 68.

[97] *Ibid.*

Unlike future FTAs, the dispute settlement procedure is identical to the one set out for trade commitments,[98] and thus provides for equally enforceability, which would demonstrate a strong willingness of fostering CLS compliance. In the event of a dispute and failure of mutually agreeable resolution, the subject matter shall be deferred to an independent dispute settlement panel.[99] If the panel does not settle the dispute, art. 17(2) (b) allows Parties "to take any appropriate and commensurate measure".

In the framework of this treaty, the entire labour provision is submitted to dispute settlement, unlike in future FTAs where only one paragraph within the provision is stated as enforceable (see future agreements, such as CAFTA-DR). In case the dispute is not resolved under procedures specified in the agreement, the affected Party shall be entitled to take "any appropriate and commensurate measure" (Article 17.2(b)).

Consequently, the question of the drafting of the clause becomes relevant in order to determine whether the provision imposes legally binding obligations or only reiterates the conduct the Parties should adopt, without involving enforceable obligations. As we have examined through interpretation, the existence of dispute settlement mechanisms is not *per se* a guarantee of effectiveness and of possible enforcement of the labour provision. Where the drafted clause fails to determine a specific enough obligation for the parties, the extent to which there can be a dispute whether the party has failed to respect its undertaking is limited precisely by the difficulty of determining the content of that obligation. Thus, according to this drafting, it appears unlikely that the failure of recognizing CLS in domestic legislation would lead to a dispute settlement. Moreover, if technically the whole provision is submitted to dispute settlement, however, in an exchange of letters between the USTR and Jordanian Ambassador in 2001, the governments reportedly agreed to resolve any potential disputes without resorting to trade sanctions.[100]

However, the drafting may not be an insuperable obstacle, as it will be highlighted in the Bahrain case.

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[98] U.S-Jordan Free Trade Agreement, Art. 17 (1)(a) "The Parties shall make every attempt to arrive at a mutually agreeable resolution through consultations under Article 17, whenever : (i) a dispute arises concerning the interpretation of this Agreement; (ii) a Party considers that the other Party has failed to carry out its obligations under this Agreement";

[99] U.S-Jordan Free Trade Agreement, Art. 17(1)(c).

[100] The letters stated that they "would not expect or intend to apply the Agreement's dispute settlement enforcement procedures to secure its rights under the Agreement in a manner that results in blocking trade." See Mary Jane Boyle, "Overview of Labor Enforcement Issues in Free Trade Agreements", CRS Report for Congress, (February 29 2008): 4.

iii. DR-CAFTA

According to art. 16(6)(7) of the *CAFTA-DR*, only art. 16(2)(1) and thus only the obligation to enforce ones labour domestic legislation is enforceable through dispute settlement under the CAFTA-DR. Therefore, despite being similar to the encouraging U.S.-Jordan FTA, the CAFTA-DR Model labour provision raised number of concerns and was criticized for being sharp regress from the former[101], at least in two issues. Firstly, contrarily to the earlier version, only the obligation to enforce domestic labour laws as set out in art. 16.8 is subject to enforcement through binding dispute settlement and ultimately subject to fines[102] or sanctions. This criticism could be undermined by our previous remarks on the low prospects of enforceability given the explicitly non binding terminology of the other provisions for which dispute settlement is not provided, but as we will discuss in the Bahrein and Honduras Case Studies (*infra*), even provisions that are drafted in a loose way could be useful and should therefore be enforceable. Moreover, only the *sustained failure* to enforce the country's domestic labour laws is enforceable. This implies that for a petition to be eligible, the party should be consistently and within a long period of time, failing to enforce its labour laws. Whereas the interpretation of what is "sustained failure" has not been addressed, it sets a relatively high threshold. Another critic was triggered by the differing dispute settlement procedures for, respectively, trade and labour, whereas the U.S-Jordan FTA provided for identical procedures.[103] Indeed, the setting of distinct procedures and, more importantly, the use of weaker enforcement mechanisms for labour issues as opposed to other trade related obligations, creates a double standard weakening the trade-labour linkage.

Arising from analysis of the ILO and State Department reports, issues have been also raised that labour laws of CAFTA-DR signatory countries fail to comply with at least 20 issues area of the ILO core labour standards, among which the basic right to organize and bargain collectively.[104]

The outcomes of the DR-CAFTA are not, apparently, very positive. The working is weak and the enforcement goes as step behind as compared to the US-Jordan FTA. However, these

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[101] For criticism of the CAFTA labour provision, see for example Report of the Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC), The U.S.-Central America Free Trade Agreement, March 2004, available online at http://ustraderep.gov/assets/Trade_Agreements/Regional/CAFTA/CAFTA_Reports/asset_upload_file63_5935.pdf**;** CAFTA's Weak Labor Rights Protections: Why the Present Accord Should be Opposed, Human Rights Watch, March 2004, available online at http://www.hrw.org/legacy/english/_docs/2004/03/09/cafta90days.pdf

[102] The maximum fine in a particular dispute is set at $15 million per year per violation.

[103] Mary Jane Bolle, *DR-CAFTA Labor Rights Issues,* 4.

[104] *Ibid.*

remarks should be considered alongside with recent developments in the Bahrain case study, (see Bahrain and Honduras Case Studies, *infra*), as a submission was successfully introduced under the promotional commitment that the parties shall strive to implement CLS. In any case, the provision contains sufficient reference to CLS to infer that these "soft law" standards have been hardened through their inclusion in a legally binding instrument, however unsatisfactory it may be.

iv. May 10th templates and current development under the Trans-Pacific Partnership (TPP)

The *May 10th template* reintroduces the same dispute settlement mechanisms or penalties available for other FTA non-labour related obligations, thus responding to the concern that different and weaker dispute settlement mechanism create double standards for trade and labour issues.[105] Moreover, all matters arising under the labour chapter could be taken to dispute settlement and the Model provides for new limitations on "prosecutorial" and "enforcement" discretion according to which the countries cannot invoke the limitation of their resources or other priorities to defend themselves against failure to enforce laws related to the core labour standards.[106] Nevertheless, a footnote in the agreements under this model requires for a party seeking to challenge violations to demonstrate that the failure to adopt or maintain *ILO core labor standards* has been "in a manner affecting *either* trade *or* investment between the two countries."[107]

Recent evolution within the new Trans-Pacific Partnership aims toward a fully enforceable labour provision similar as the one found in the U.S.-Peru Promotion agreement with integrates the features of the May 10th model.[108] Moreover, the available information of the current proposal indicates it may also contains a requirement that countries take

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[105] J. F. Hornbeck, "The U.S.-Panama Free Trade Agreement", Congressional Research Service (April 26, 2012): 22-23

[106] Congress Administration Trade Deal, *Inside U.S. Trade,* May 11, 2007; and *Trade Facts: Bipartisan Trade Deal.* Office of the USTR. Bipartisan Agreement on Trade Policy, May 2007.

[107] Article 17, footnote 1 of the FTA with Peru. So far, petitions have included only cases for labour violations in sectors exporting to the United States. Whether it is sufficient that the violations have occurred in a traded sector, not exporting to the US, is unclear.

[108] USTR Tables TPP Labor Proposals that goes beyond May 10 Template, *Inside U.S. Trade* (January 6, 2012): 1-2

affirmative steps to discourage the importation of goods made by forced labor or child labor.[109]

Whereas limitations[110] still exist, this evolution demonstrates that greater coherence and precision has been tailored within the provision for allowing a greater potential impact. Even though the acceptance of a submission is still a highly political decision exercised with discretion, the recently submitted cases and accepted for review demonstrate that there is political will to enforce the labour provisions in FTAs. The enforcement mechanisms have positively evolved over time, expressing the commitments of the US Administration to not only promote the values inherent to CLS, but also to enforce them when they are violated. As we shall discuss in the third part of this research, the inclusion mechanisms can overall be viewed as attempts to socialize other states to the principles of CLS, through coercion, persuasion and acculturation.

2. US Generalized System of Preference

The US Generalised System of Preferences (GSP) is an unilateral mechanism under which industrialized States can and have been granting non-reciprocal trade preferences to "developing" States. The US GSP came into force in 1976[111], under Title V of the 1974 *Trade Act* and was amended in 1986 to introduce a compulsory conditional eligibility to preferential trade treatment to the respect of a set of labour standards. Indeed, a state will not be granted beneficiary status if *it has not taken or is not taking steps to afford internationally recognized*

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110 Indeed, the template requires that each Party shall adopt and maintain in its statutes, regulations, and practices, the *rights* as stated in the *ILO Declaration and its Follow-Up.* However, the agreements contain a footnote limiting the obligations of Parties to those specified in the *ILO Declaration* without also including the *Follow-Up,* which calls for annual reports by countries that have not ratified one or more Conventions, on the status of implementing the core labor standards. Another footnote requires that a party seeking to challenge violations is required to demonstrate that the failure to adopt or maintain *ILO core labor standards* has been "in a manner affecting *either* trade *or* investment between the two countries," (Article 17, footnote 1 of the FTA with Peru.) In Model 4 agreements, there are no caps on penalties. Only the agreement with Peru has been approved by Congress at this time (P.L. 110-138, December 14, 2007).

111 19 U.S.C. 2461 et seq.

workers rights[112] to its workers.[113] Other preferential programmes also include similar conditions. [114]

With regards to the potential effectivity, the GSP has the distinctive advantage of creating incentives to comply with internationally recognized workers rights through the granting of preferential tariffs. Indeed, a beneficiary country that fails to fulfil its commitments under the GSP can lose its preferential tariffs relating to all or certain of its exports to the US, as the Administration is authorized to completely or partially withdraw or suspend the advantages.[115] For the purpose of reviewing whether a country is conforming to its obligations, annual reports on the state of workers' rights in the countries in question must be issued.

Moreover, the blend of positive incentives (granting favourable tariffs for implementation of workers' rights) with the possibility of withdrawing those advantages also creates an incentive for local industries that benefit from those preferential tariffs to take individual measures to comply with those standards, as the loss of those advantage might directly affect their economic growth and sustainability[116] (See also the case of U.S. Cambodia textile agreements). However, were these incentives not sufficient, a beneficiary country might not have strong incentives to raise its labour standards, as there is no minimum level of compliance provided by the GSP and therefore the country might be tempted to raise it standards in an only marginal way and make insufficient efforts.[117] This could nevertheless be

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[112] These rights include 1) the right of association, 2) the right of organize and bargain collectively, 3) freedom from compulsory labour, 4) a minimum age for the employment of children, and 5) acceptable conditions of work with respect to minimum wage, hours of work and occupational safety and health. Moreover, GSP beneficiaries must implement any commitments it makes to eliminate the worst forms of child labour.

[113] 19 U.S.C. 24628(b) (2) (G)

[114] See e.g., The 1983 *Caribbean Basin Economic Recovery Act* (CBERA and CBTPA) excludes any country that "has *not taken or is not taking steps to afford interationaly recognized workers rights to workers in the country"* The "Andean *Trade Preference Act"* of 1990, designed to prevent drug production and trafficking, also refers to the criterion regarding upholding international workers' rights. The *African Growth and Opportunities Act* (AGOA), which opens up "duty *free"* access to 38 Sub-Saharan African countries, recognises the protection of international workers' rights as a criterion". Arestoff-Izzo, Florence, Bazillier, Rémi, Duc, Cindy and Granger-Sarrazin, Clotilde, "The Use, Scope and Effectiveness of labour and Social provisions and Sustainable Development Aspects in Bilateral and Regional Free trade Agreements", 55.

[115] *Ibid.*

[116] e.g In a poll in Sri Lanka, when Asked whether losing GSP+ concessions was good or Bad for Sri Lanka's economy, 81.8% of the respondents said bad. Moreover, to the question « Should Sri Lanka continue a dialogue with the EU on this issue as suggested by the European Union », 86.36% of the respondents said that Sri Lanka should continue the dialogue, *in* « BT Poll: Sri Lankans urge government to continue GSP+ dialogue », *the Sunday Times*, (July 11 2010), available online at : http://sundaytimes.lk/100711/BusinessTimes/bt33.html

[117] Jeff Vogt and Lance Compa, Labor Rights in the Generalized System of Preferences: A 20-Year Review, Comparative Labor Law & Policy Journal, 22, 199-238. (2001): 1-42

put into perspective as eligibility to the GSP can be challenged through the filling of a country practice petition by a third party, such as trade unions.

A feature in the labour relative provision contains however a major flaw in the monitoring and enforcement system. Indeed, the government exercises a complete discretion in the monitoring, application of the statute and decision as to whether a preference should be withdrawn.[118] This has been demonstrated by the important number and well documented petitions filled to the USTR that have been rejected. The Executive of the US is competent for examining the compliance of a beneficiary through its own experts and monitoring system and has often considered that the country under review complied with its obligations, regardless of the violations documented by the petitions.

Moreover, the feature of "continuing review", allowing the executive to leave the case open and wait during a certain laps of time to see whether a country is making sufficient progress necessary to retain its eligibility, sets a problematic *de facto* probatory period. Indeed, during that laps of time, violations of labour rights that motivated the petition.

The GSP enforcement also generally lacks a great deal of transparency as to the reasons for refusing a petition, for accepting it, for submitting it to "continuous review". While the absence of motivation for any decision is related to its discretionary nature, it also does not encourage the filling of petition as no precedent or case law can be established to guide the petitioners and trade unions to identify the cases in which the likelihood of acceptance or rejection is high. Moreover, this uncertainty as to whether a case will be accepted or not weakens the pressure trade unions and workers could have on governments to comply with labour standards and domestic labour legislation.

3. Case Studies

Several cases have been brought to the USTR under FTA and six countries are currently under review.[119] In this section, we will briefly present a set of relevant case studies illustrating the impact/lack of impact of labour provisions in FTAs.

In evaluating effectiveness of the existence of labour provisions, different stages of impact can be examined to determine whether labour laws and practices have evolved through the negotiation and ratification of these agreements. One the one hand, it is useful to look at

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[118] *Ibid.*
[119] Guatemala, Peru, Mexico, Honduras, Bahrain and Dominican Republic.

the period of negotiation and preceding ratification, to see whether the labour practices of states is modified by this prospect. Then naturally, the examination of the period following ratification will allow us to see to what extent those provisions have been successful in shaping the behaviour of states.

Case study 1: DR-CAFTA and the complaint submission of the U.S. against Guatemala for labour rights violations under the FTA

a. Alleged CAFTA-DR violations by Guatemala

Despite Guatemala's commitments to reform its laws and improve its labour inspection and judicial system, and despite substantial funding directed towards labour capacity building, the labour rights situation in Guatemala continued to deteriorate, as workers were regularly dismissed for exercising their right to associate and as the administration and the judicial system did little to enforce the law. The conclusion of the FTA was also followed by a dramatic increase of assassination of trade unionists.[120]

Consequently, a petition was filed in April 2008 by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and 6 Guatemalan trade unions to the U.S. Trade representative (USTR) claiming that Guatemala had breached provisions of art. 16.1[121], 16.2.1 (a)[122] and 16.3.1[123] of CAFTA-DR.[124]

On 30th July 2010, a letter from US trade representative Ron Kirk requested a consultation with the government of Guatemala pursuant to art. 16.1 CAFTA-DR to discuss

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[120] USLEAP, « Background Information: Guatemala, Trade Union Violence, and CAFTA : Violence Against Trade Unionists in Guatemala », (2011), available at : http://usleap.org/usleap-campaigns/murder-and-impunity-colombia-and-guatemala/background-information-guatemala

[121] "1. The Parties reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)* (ILO Declaration).1 Each Party shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in Article 16.8 are recognized and protected by its law".

[122] "A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement".

[123] "Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to tribunals for the enforcement of the Party's labor laws. Such tribunals may include administrative, quasi-judicial, judicial, or labor tribunals, as provided in the Party's domestic law".

[124] CAFTA-DR Agreement, Chapter 16: Labor, available at: http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file320_3936.pdf

issues related to 16.2.1.[125] The US claims it has conducted an 11 months extensive examination of Guatemala's compliance to chapter 16 of the Agreement. This included a review of the country's labour law in the sense of art. 16.8 as well as a collection of factual data. It found that Guatemala is failing to conform to its obligations under art. 16.2. 1 (a) with respect to effective enforcement of its laws related to the right of organization, the right to organize and collectively bargain and acceptable conditions of work. It also found that the Ministry of Labour had failed to investigate alleged labour rights violations and enforcing justice, as well as failure by courts to enforce Labour Court orders in cases involving labour rights violations.[126]

According to the Agreement, the parties had sixty days from the date of the complaint to come to an agreement in bilateral consultations under art. 20.4 (art.16.6.6). After that deadline, the mechanisms built into the CAFTA-DR FTA could subject Guatemala to an annual penalty of US$15 million. Should Guatemala then fail to pay the US$15 million, the US could respond using trade sanctions - including the suspension of CAFTA-DR tariff benefits.

On 16 may 2011, the dispute was taken a step further when the United States requested a meeting of the Free Trade Commission under article 20.5.2 of CAFTA-DR regarding the Guatemala's failure to effectively enforce its labour laws.[127] The dispute settlement procedure is thus going through the final dispute settlement process in the DR-CAFTA.

b. CAFTA-DR provisions and potential for enforcing labour rights and resolving disputes

As we pointed out in the analysis of the provisions of CAFTA-DR, although the Agreement contains a list of rights that parties must commit to, only the domestic laws, as opposed to provisions of an ILO ratified Convention or 1998 ILO Declaration, can be subject to enforcement under the in-build dispute settlement mechanisms.

More importantly, a previous petition filed with the USTR on 13 December 2004 seeking a review of Guatemala's eligibility for beneficiary status under the GSP reported that the Constitutional Court of Guatemala had stricken key provisions of the 2001 labour code reforms, including the empowerment the Ministry of Labour to levy administrative fines

[125] Letter from US Trade representative Ron Kirk to Guatemala requesting for consultations under CAFTA-DR Chapter 16.
[126] *Ibid*.
[127] See "Guatemala Submission under CAFTA"

against employers that violate the labour code.[128] It underlined that the Ministry of Labour was powerless to sanction any employer for a violation of the labour code. Thus Guatemalan legislation does not allow such procedures and does not effectively protect workers rights, which employers may continue to violate, knowing that they do not face administrative sanction.[129] In this respect, the CAFTA Standard requirement that a signatory country implements its own labour laws does not sufficiently guarantee the effective respect of these laws.

In August 2011, as all cooperative means had failed to resolve the situation, the US requested the establishment of an arbitral tribunal. While dialogue continues, the parties have neither agreed to an action plan nor has the U.S. demanded arbitration. Meanwhile, severe CLS violation persist in Guatemala and, in 2012, several trade unionists have been assassinated. Given that the case was submitted in 2008 and that it is still not settled in 2012, the Guatemala study cannot conclude that the provided dispute settlement mechanism is effective. Indeed, even the triggering procedure, regardless the potential outcome, has not led to any positive developments regarding its compliance to CLS, as it was acknowledged by the ILO.[130]

Case study 2: Bahrain[131]

In the context of the "arab spring" in 2011, and with heavy demonstration in search for greater political freedom and economic reforms, the government of Bahrain established a hard repression, notably through dismantling the main Trade Union and punishing its leaders and workers for joining the strikes. On the basis of the U.S. Bahrain FTA (2006), which provisions are similar to DR-CAFTA's, the ALF-CIO brought a submission on 21 April 2011 and urged for the U.S. to withdraw from the FTA on the basis of Article 21.5.2.[132] Because the submission could not be based on the obligation to enforce its own labour laws, the case was brought uniquely on the basis of the failure by the Bahraini Government to "respect,

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[128] See *Why CAFTA's "enforce your own Labor Laws" Standard portends disaster for Guatemalan workers*, (Washington Office for Latin America, 17 june 2005), available at: http://www.wola.org/news/wola_gsp_petition_filed_on_guatemalas_failure_to_meet_conditions_on_workers_rights?download=Central%20America/Guatemala/Past/cafta_congressional_memo_on_labor_gsp.pdf

[129] *Ibid.*

[130] ILO attests to climate of "total impunity" in Guatemala*, (29 March 2012), available at :* http://www.bananalink.org.uk/ilo-attests-climate-total-impunity-guatemala

[131] Office of Trade and Labor Affairs (OTLA), Free Trade Agreements (FTAs), How Labor Rights Are Enforced in FTAs (Submissions),available online at : http://www.dol.gov/ilab/programs/otla/freetradeagreement.htm

[132] "Either Party may terminate this Agreement on 180-days written notice to the other Party."

promote and realize" core workers' rights outlined in the ILO 1998 Declaration and reaffirmed under art. 15.1[133], that require the party to "strive to ensure that such labor principles and the internationally recognized labour rights set forth in Article 15.7 are recognized and protected by its law."

According to the existing enforcement mechanism, any dispute on these matters can be subject to specific consultation (different from those of applicable to the rest of the FTA), but in case of failure to find a solution, only failing to carry out obligations under paragraph 1(a) of Article 15.2 can trigger dispute settlement mechanisms.[134] However, over time it became clear that the violations were also violating the Bahraini laws and thus could be subject to enforcement through dispute settlement procedure, and not only consultations. We point out that, despite the promotional nature of this provision, OTLA accepted the petition on that basis and is currently reviewing it.

Whereas the case of Bahrain is still under review, the acceptance of the petition under a provision which we had identified as failing to create a precise and enforceable obligation suggests that despite the weak formulation of the obligation[135], it can still be subject to consultations and dispute settlement if the US Administration makes use of its discretionary power to accept submissions. It also suggests that the US Administration is interpreting these weakly drafted provisions in the light of current more consistent and legal binding vocabulary present in more recent agreements. It might also be that the loose vocabulary used to define the obligations was a necessary compromise that allows the US Administration to exercise complete discretion on whether it decides to review a claim on these legal bases. Whereas this would not benefit the predictability and the certainty that a claim would be accepted by the US Administration, it nevertheless brings into perspective our previous comments on the low legal content of commitments drafted with promotional vocabulary. This further strengthens our opinion that CLS have been significantly hardened through their integration in FTAs.

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[133] "The Parties reaffirm their obligations as members of the International Labor Organization ("ILO") and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998)* ("ILO Declaration"). Each Party shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in Article 15.7 are recognized and protected by its law. "

[134] See also Art. 15. 6(5): "Neither Party may have recourse to dispute settlement under this Agreement for any matter arising under any provision of this Chapter other than paragraph 1(a) of Article 15.2."

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Case study 3: Honduras

On March 26, 2012, the Office of Trade and Labour Affairs (OTLA) received a petition from the AFL-CIO and 26 Honduran Federations, Trade Unions and Civil Society Organizations alleging repeated labour rights violations by the Government of Honduras.[136] The violations consist in the failure to enforce domestic labour laws (art. 16.2 (1) (a) CAFTA-DR) relating to relating to freedom of association, the right to organize, child labour, the right to bargain collectively, and acceptable conditions of work.[137] Moreover, as the AFL-CIO noted, the Honduran government has also taken steps to weaken the labour standards since CAFTA was implemented in 2006. For example, in 2010, the government approved a measure allowing employers to hire up to 40% of their workers on temporary contracts for work that should be treated as permanent work. On May 14, 2012, OTLA accepted the submission for review and is currently conducting its review of the submission to determine its findings on the allegations in the submission.

Interestingly, the petition also claims that Honduras has fallen short on its commitments to "respect, promote and realize" the core labour rights enshrined in the 1998 ILO Declaration.[138] In this respect, the submission argues that by failing to enact laws consistent with ILO Recommendations, Honduras fails to reaffirms its commitments under the ILO 1998 Declaration and its commitment to "strive to ensure" that these "labour principles and the internationally recognized labour rights set forth in art. 16.8" are recognized and enforced, Honduras violated its obligations under the Agreement.[139] Since under DR-CAFTA art. 16.6, a Party may request consultations with another Party regarding any matter arising under the labour provision, the petition urges the US Government to consult with the Government of Honduras.[140]

Whereas the case of Honduras is still under review, the acceptance of the petition under a provision, which we had identified as failing to create a precise and enforceable obligations, suggests similar conclusions as in the Bahrain case.

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[136] Public Submission to the OTLA under Chapter 16 (Labor) and 20 (Dispute Settlement) of the DR-CAFTA: Concerning the failure of the Government of Honduras to effectively enforce its labor laws and comply with its commitments under the ILO Declaration on Fundamental Principles and Rights at Work, (26 March 2012), available online at: http://www.dol.gov/ilab/programs/otla/freetradeagreement.htm

[137] USLEAP, "Honduran Unions, with AFL-CIO, File CAFTA Labor Complaint with U.S.", (30 March 2012), available online at: http://www.usleap.org/honduran-unions-file-cafta-labor-complaint-afl-cio

[138] Public Submission concerning Honduras, at. 58.

[139] Ibid.

[140] Ibid.

4. Conclusion

Whereas the enforcement mechanisms are still problematic, the inclusion of CLS in US trade instruments now strongly supports a state practice suggesting that the normativity of CLS has been hardened. States that wish to have commercial relations with the United States are requested to implement and enforce CLS in their domestic legal order, also demonstrating that these standards represent an important value promoted into the international legal order.

B. EU Free Trade Agreements and GSP

1. EU FTAs

This section will analyze the normativity and effectiveness of the most recent EU FTAs and the EU trade policy in general with relation to labour, in order to ascertain whether the practice of European States also contributes to strengthen the normativity of core labour standards.[141] Whereas the EU has negotiated many FTAs[142], until recently their labour provisions are far less extensive[143] compared to those in US agreements, as most FTAs or association agreements contain very limited provisions, in their section related to social matters and cooperation dialogue,[144] and the EU had pursued a more effective and aggressive stance through its GSP framework.

However, the recent conclusion of the EU-Korea FTA might set a possible new trend of drafting more proactive provisions. Art. 13.4 requires that the parties "commit to respecting, promoting and realizing, in their laws and practices, the principles concerning the fundamental rights", "in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up". The parties are thus required to enforce their domestic labour laws. Moreover, the language is

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[141] As we have examined the US trade-labour policy more exhaustively and concluded that the evolution of including labour provisions in FTAs supports the strengthening of core labour standards, we will only examine more briefly how recent EU practice contributes and is an evidence of the increasing normative character of CLS.

[142] The Cotonou Agreement, between the EC and 79 African, Caribbean and Pacific (ACP) States, was the first EU agreement linking trade to labour in a specific labour clause, which did not formulate any consistent labour obligation; available online: http://www.ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/WCMS_115822/lang--en/index.htm

[143] Cotonou Agreement (2000). The clause was limited to "reaffirming their commitment to the internationally recognised core labour standards, as defined by the relevant International Labour Organisation (ILO) Conventions, and in particular the freedom of association and the right to collective bargaining, the abolition of forced labour, the elimination of worst forms of child labour and non-discrimination in respect to employment"[143], however "anxious" was the preambule "to respect basic labour rights, taking account of the principles laid down in the relevant conventions of the International Labour Organisation".

[144] See eg. Tittle VII, chapter 1 of the EU-Lebannon FTA.

indicates that there is a binding obligation to integrate CLS in domestic legislations. In this respect, the substantial obligations arising from this agreement are thus similar to those in recent US FTA. The EU-Korea FTA contains also an innovative feature, that the Parties "reaffirm the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the European Union have ratified respectively" and that they "will make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as 'up-to-date' by the ILO".[145]

However, the main difference lies in the enforcement mechanisms as it does not provide for a dispute settlement process nor does it provide for fines or sanctions like in the US FTAs. The EU-Korea FTA provides for monitoring and assessment of the implementation impact, and establishes an annual of a civil society forum. Consultations can be requested by the parties and ultimately if the party deems that further discussion is necessary, the party may request that the Committee on Trade and Sustainable Development be convened with an aim to agree on a resolution. If that fails, a party may request that a panel of experts be convened to examine the matter. At the last stage of the process and in the worst case scenario, the experts will issue a report with recommendations, the implementation of which will be monitored by the Committee on Trade and Sustainable Development.

In terms of reference to labour standards and promotion of compliance, the EU is thus moved towards a similar practice as the US, even going a step further with reference to ILO Convention and the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work. Despite enforcement not being envisaged as contentious, the normative substance of CLS is enhanced as the parties acknowledge that these obligations derive "from membership of the ILO and the ILO Declaration".

2. EU GSP and GSP+

Whereas the EU is a relative beginner with regards to labour provisions in FTAs, its Generalized System of Preferences provides for labour criteria as a condition of eligibility. The substantial content of the commitments relating to labour has strongly evolved over time, providing for strong obligations and even higher standards required to apply for and remain eligible for the special incentive arrangement. Again, rather than focusing on the evolution of

[145] Art. 13.4, EU-Korea FTA, (6 october 2010): 58.

the system, we will analyze the obligations arising from the current GSP scheme and their potential in promoting compliance to CLS.

With regards to substantial obligations arising for beneficiary of GSP schemes, the incentive can be granted to a country which laws incorporates the substance of the standards laid down in the eight ILO fundamental Conventions[146] which have been integrated into a "sustainable development and good governance" program[147] following the dispute brought to the WTO by India against the EU GSP scheme.[148] Moreover, beneficiaries should have *ratified and effectively implemented* the eight ILO core conventions, alongside with 18 other human rights and environmental conventions.[149] Trade preferences can temporarily be withdrawn if there was a "serious and systematic violation of principles laid down in the (CLS) on the basis of the conclusions of the relevant monitoring bodies".[150]

Contrarily to what is provided in FTAs, the EU GSP uses strong language and creates legally binding obligations to ratify and implement the ILO Convention containing the core labour standards. Moreover, the EU thus requires that the beneficiary country respects and implements a package of labour and human rights instruments, which demonstrate that, in the views of the EU, core labour standards are part of the minimum set of norms to be complied with.

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[146] ILO Conventions No 29 and No 105 on forced labor, No 87 and No 98 on the freedom of association and the right to collective bargaining, No 100 and No 111 on non-discrimination in respect of employment and occupation, and No 138 and No 182 on child labor and which effectively applies that legislation. See Council Regulation (EC) No 2501/2001, Art 14

[147] Council Regulation (EC) No 980/2005 of 27 June 2005, Article 8-11

[148] In 2002, India requested consultations with the EC concerning the conditions under which the EC accords tariff preferences to developing countries under its current GSP scheme. It argued that the program was inconsistent with the Most Favored Nation principle and violated the enabling clause, which requires non-reciprocal and non-discriminatory preferences. Whereas the panel initially found that the program was discriminatory. However, the Appellate Body reversed the Panel's legal interpretation of paragraph 2(a) of the Enabling Clause, by concluding that, in granting differential tariff treatment, preference-granting countries are required, by virtue of the term "non-discriminatory", to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the same "development, financial and trade needs" to which the treatment in question is intended to respond. Therefore, "preference-granting countries can "respond positively" to "needs" that are not necessarily common or shared by all developing countries." However, the types of needs to which a response is envisaged are limited to "development, financial and trade needs." Further, the existence of a "development, financial [or] trade need" must be assessed according to an objective standard. With respect to the consistency of the challenged measure with the Enabling Clause, the Appellate Body upheld the Panel's conclusion that the European Communities failed to demonstrate that the challenged measure was justified under paragraph 2(a) of the Enabling Clause. See WTO presentation, "European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries", available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm. See also CARIS, *Mid-term Evaluation of the EU's Generalised System of Preferences* (2010), at. 18.

[149] Michael Gasiorek , *Mid-term Evaluation of the EU's Generalised System of Preferences,* CARIS Report (2010): 18.

[150] Council Regulation (EC) No 2501/2001, Art 14

Concerning the enforcement mechanisms, as opposed to the US GSP that relies solely on punitive withdrawal of preferences, the EU does not pursue a trade sanctions-based approach to labour standards, but instead provides for positive measures[151], offering additional tariff preferences to countries which have signed and are effectively implementing the core UN/ILO human/labour rights international conventions. However, whereas the substantial commitments are high, the EU interpretation of GSP procedures has practically devoid the instrument of its effectiveness. Indeed, since the India challenge of the GSP Scheme and probably to eliminate the possibility of accusations of discriminatory application of the regulation[152], the EU Commission determines whether preferences should be temporarily withdrawn on the basis of the "conclusions of the relevant monitoring bodies,"[153] ie in this case, the ILO. Conditioning review for eligibility on the conclusions of the relevant monitoring bodies seriously prevents the EU Commission from actually enforcing GSP conditionality.[154] Despite the fact that it could be praised as an attempt to enhance cooperation with the ILO and limit fragmentation of international case law, this interpretation seriously limits the possibility of effectively enforcing the GSP scheme and has allowed countries to violate labour rights while continuing to receive trade benefits. Indeed, in the case a beneficiary has not ratified an ILO convention, the ILO organs will not be competent for issuing observations that could serve as the basis for the EU Commission's action,[155] with the exception for the Committee on Freedom of Association which can review a country's compliance and issue a recommendation in the absence of ratification.

Moreover, the interpretation according to which a serious and systematic violation occurs only when, on very rare occasions, the ILO Governing Body establishes a Commission of Inquiry to investigate a country's failure to secure the effective observance of a convention or when the ILO Conference Committee on the Application of Standards (CAS) reviews a country for non-compliance with a ratified convention and has decided to put its conclusions in a special paragraph.[156] The ineffectiveness of these mechanisms are further demonstrated

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[151] Tonia Novitz, The European Union and International Labour Standards: The Dynamic between the EU and the ILO, in Philip Alston (ed.) Labour Rights as Human Rights, (Oxford: Oxford University Press, 2005): 230
[152] European Trade Union Confederation (ETUC) and International Trade Union Confederation (ITUC), *The Trade-Labour linkage in EU trade Preference Programmes: A trade Union response to the "Proposal for a regulation of the European Parliament and of the Council applying a scheme of Generalized System of Preferences*", Brussels, (October 2011): 4-5 Available online at: http://www.tuc.org.uk/tucfiles/113/EU_GSP_submission.pdf
[153] *Ibid.*
[154] *Ibid.*
[155] ETUC and ITUC, "The Trade-Labour linkage in EU trade Preference Programmes", 4
[156] *Ibid.*

by the fact that notwithstanding the seemingly high substantial obligations arising from GSP schemes, the withdrawal of preferences as so far occurred only twice, in the case of Myanmar and Belarus.[157] Overall, EU GSP has been said to be most often ineffective at improving compliance among its beneficiaries.[158] However, it has contributed to promoting high labour standards, and the current reform process, addressing notably the procedure for review, delinking it to decisions of monitoring bodies, could significantly increase compliance and support compliance to CLS.

This finding further demonstrates that substantial obligations need to be linked to effective enforcement mechanisms in order to support state practice in striving for promoting core labour standards.

C. Investment agreements

Interestingly, notwithstanding the clearly different purpose of Bilateral Investment Treaties (BITs), ie to protect the foreign investor from the host government, these treaties are slowly engaging in a similar trend as FTAs. Though practice is more recent and less developed, the inclusion of a labour provision in the US 2004[159] and 2012 Model BIT[160] and the frequent references to labour standards alongside the elaboration of the European common investment policy instruments make the analysis of BIT clauses an important element in our discussion to support the view that the inclusion of labour provisions in economic instruments is a relevant practice influencing the legal status of CLS. It should be noted that because the function of BITs is to protect investors and their investment from the acts and legislation of the host state, the aim of including labour rights in those Agreements diverges from the mere promotion of labour standards. Rather, these provisions try to manage a legislative space and leverage for host countries to regulate their labour legislation without coming under attack by investors under the arbitral dispute settlements mechanisms provided by BITs. This section will briefly examine how CLS have been integrated into these agreements and to what extent they can be expected to contribute to a greater respect of international labour rights.

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[157] *Ibid*., at 6.
[158] *Ibid.*
[159] US Model BIT 2004, available at: *www.state.gov/documents/.../117601.pdf*
[160] US Model BIT 2012, available at:
http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf

1. US Model BITs: labour provisions under Article 13

Art. 13 of the US 2004 Model BIT (BIT 2004) contains a specific provision linking Investment and Labour,[161] aiming at avoiding that the parties weaken or reduce the protections afforded to workers in domestic labour laws. Art. 13 (1) sets out the principal commitment, namely that "each Party *shall strive to ensure* (emphasize added) that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights" "as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory." Labour laws are understood in a similar way as they are in FTAs, that is statutes and regulations directly related to the internationally recognized labor rights, which include three CLS but leave out the elimination of discrimination in respect of employment and occupation. Whereas enforcement under dispute settlement provisions is not provided, a party can request consultations when it considers that the other Party has offered has lowered its labour legislations with respect to the three CLS in order to encourage the establishment, acquisition, expansion or retention of an investment. The provision is drafted using promotional terms, "shall strive to ensure".

One major issue is the provision providing for a State to State consultations. Having in mind the fact that the existence of BITs is primarily justified by desire to avoid State to State dispute settlement of these matters and thus move away from the scheme of diplomatic protection, and giving the economic importance of investment for home and host countries, one fails to see the motives that would politically justify a home state intervening into the host state sphere of sovereign power for lowering the labour standards that will ultimately benefit the home state's investor.

However, the BIT also contains a major positive and innovative element, which is the precise description of what can constitute an expropriation (art. 6 and annex A and B). Indeed, under international customary law, a party may lawfully expropriate or nationalize an investment, providing it responds to a public purpose, it is done in a non-discriminatory manner and in accordance with due process, and gives raise to prompt, adequate and effective compensation. However, some recent arbitral decisions have considered, when interpreting the expropriation provisions that most often mention direct and indirect expropriation through

[161] US Model BIT 2004.

measures equivalent to expropriation or nationalization, that a national legislation substantially reducing the expected benefits of a investment could tantamount to expropriation and thus require full and prompt compensation. In these cases, the existence of a BIT can be seen as significantly reducing the possibility for the host state to increase workers' protection or status under domestic law, as these could give rise to investor's complaint. In this respect, after having clarified the meaning of indirect expropriation and introduced important leverage for sovereign action,[162] para 4 (b) clarifies that "except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations." It is likely that labour legislation will be included into measure to "protect legitimate public welfare objectives" and that a law raising the labour standards will not tantamount to indirect expropriation and thus no compensation will be necessary.

The US 2012 Model BIT[163] basically contains similar obligations, but importantly reaffirms the obligation of the parties as members of the ILO and their commitments under the ILO Declaration. Moreover, the provision no longer uses promotional language with regards to the obligation of not lowering the standards of protection in domestic law, replacing "shall strive to ensure" with "shall ensure". Consequently, the content of legal obligation is strengthened. Moreover, the 2012 BIT now clearly mentions the fourth CLS.

However, the labour provisions remain explicitly excluded from state-to-state dispute resolution (Article 37.1 and 37.5). Instead, the only available remedy is state-to-state consultations, according to art. 13 (3) *in fine*, "the Parties shall consult and endeavor to reach a mutually satisfactory resolution."

Despite the absence of requirement to take measures to bring in their labour laws into compliance with international labour standards, the recent drafting of US BITs have been able to take into account the growing concerns that BITs might create a disproportionate protection of the investor when the host states takes legitimate measures for increasing environment and labour protection. Within these treaties, obligations with respect to CLS are reaffirmed and the treaty provides sufficient policy space for the host state to regulate in these matters without risking facing a claim of indirect expropriation.

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[162] US Model BIT 2004, Annex B.
[163] US Model BIT 2012.

2. EU Investment policy

European states have been negotiating BITs since 1959, when Germany entered into one with Pakistan. However, that competency has shifted to the EU level following the entry into force of the Lisbon Treaty in December 2009,[164] and the EU is currently shaping its common investment policy. Numerous calls for integrating expressly CLS within the texts of the future agreements and the potential major role in supporting CLS have been raised in the civil society and within the European institutions. Indeed, the Committee on Development issued an opinion for the Committee on International Trade on the Future European Investment International policy, suggesting "EU investment treaties ought to contain provisions giving (…) investors obligations in relation to compliance with human rights, labour rights and corporate social responsibility."[165] Moreover, the European Parliament has adopted a resolution calling "to include in all future agreements specific clauses laying down the right of parties to the agreement to regulate, inter alia, in the areas of protection of national security, the environment, public health, workers'(…) rights.[166] Moreover, the EC Commission issued a communication on Promoting Core Labour Standards and Improving Social Governance in The Context of Globalization, where it stressed the importance of integrating CLS in their overall foreign economic policy.

Moreover, some European State integrate CLS within their past BITs, even though since 2009, the EU has the exclusive competence to negotiate these treaties. In this respect, the Belgian model BIT contains specific provisions on labour, protecting and promoting states' authority to implement labour legislation, preventing race to the bottom as a means of encouraging investment, and recognizing the parties' commitments to promote internationally recognized labour rights and their obligations to ensure their labour legislation supports those rights.[167]

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[164] The Lisbon Treaty. See, Consolidated Version Of The Treaty On The Functioning Of The European Union, available online at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF.

[165] Committee on International Trade, "On the future European international investment policy" (2010/2203(INI)) (22 March 2011), Opinion of the Committee on Development, para 6. http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0070&language=EN

[166] European Parliament, *European Parliament resolution of 6 April 2011 on the future European international investment policy* (2010/2203(INI)), para 25. Available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0141&language=EN

[167] Nathalie Bernasconi-Osterwalder and Lise Johnson, "Belgium's Model Bilateral Investment Treaty: A review", IISD, (March 2010), 23-24. Available online at: www.iisd.org/pdf/2011/belgiums_model_bit.pdf

However, the major concern of the European Commission seems to achieve "legal certainty and maximum protection for EU Investors".[168] In this respect, it will be necessary to wait until the EU starts negotiating its Agreements to see how its practice will develop. This finding does not however undermine our results on the growing practice supporting an enhanced legal status of CLS since the EU has since long integrated CLS within their commercial policy.

3. Intermediar Conclusion

It has become undeniable that trade has a role to play in supporting efforts to improve the living standards and working conditions, through the encouragement to strengthen labour laws as they relate to the core labour standards. Trade Unions, which play an essential role in assessing the current regimes and bringing complaints, estimate that the adoption and effective enforcement of internationally recognized worker rights is absolutely necessary for the workers are to reap a fair share of the potential rewards of expanded trade with the United States.[169]

The analysis of the aforementioned agreements and practices leads us to conclude whereas highly political, discretionary and procedural enforcement mechanisms still bar the way for an effective compliance incentive, a clear trend has indisputably emerged to promote CLS compliance. Our study has demonstrated that the content of the labour provisions has grown increasingly complete and coherent, alongside the adoption of more binding formulation, resulting in progressively more binding commitments. However, with regards to effective results, substantial influence of labour provisions to promote compliance to labour rights still needs to be demonstrated,[170] as apparently negotiation and conclusion of these agreements often had little impact on labour rights compliance and that any successful result

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[168] Marc Maes, "the Lisbon treaty and the new Eu investment competence", in EU Investment Agreements in the Lisbon Treaty Era: A Reader, (2011), 13. Available online at: http://www.s2bnetwork.org/fileadmin/dateien/downloads/eu_investment_reader.pdf

[169] American Federation of Labor and Congress of Industrial Organization (AFL-CIO), "Comments concerning the application of Vietnam to be designated as an eligible beneficiary developing country under the Generalized system of Preference", *Report to the United States Trade Representative*, (4 march 2008).

[170] CARIS, "Mid-term Evaluation of the EU's Generalised System of Preferences", 159. According to this evaluation, the Costs of implementation are an important factor in countries' decisions to adopt international labour conventions. Case studies suggest that in some instances the costs of complying with ILO conventions in practice can be identified with the costs of effective implementation of the labour code. Overall, benefits are believed to outweigh costs, in some instances (e.g. child labour) by a very large margin.

ultimately rests on the willingness of the party to collaborate and to abide to its obligations under the treaty.

It can thus be concluded that treaty practice substantially supports the implementation of CLS, regardless the initial practice of their inclusion in economic agreements through soft content provisions. The normativity of these provisions has indisputably hardened over time, strengthening the sense of legal obligation that may arise from these clauses and from supported CLS. Hence, the integration of core labour standards into economic instruments has contributed to enhancing their legal status by strengthening initial "soft law" provisions into more binding legal commitments. Whereas serious enforcement issues remain, the numerous recently submitted petitions under the US FTAs demonstrate that there is some political will to enforce CLS.

However, the nature of the legal status of core labour standards as such remains undefined. However, however bringing to mind that the ILO Declaration and the identification of CLS was enabling a fairer globalization, State practice in including CLS in economic agreements can undoubtedly be seen as a strong element of practice and *opinio juris*, or as evidencing the emergence of CLS as general principles of law.

At this point, one could wonder about the practical relevance of trying to further ascertain the normative status of CLS and whether it matters that, beyond these instruments, exists the evidence of it as a customary norm or as general principles of law. To this we obviously argue that it is important for a number of practical reasons. First at the domestic level, constitutions usually incorporate customary international law automatically, which can in turn influence greatly the national practice towards greater compliance.[171] Moreover, whether these principles can be said to be obligations *erga omnes*, other international actors and International Organizations should respect these principles, and more importantly, should abstain from taking measures preventing their Members to fulfil their obligations.[172] Furthermore, because integration in treaties merely strengthens CLS by giving them a binding instrumental support, their status of treaty provisions makes them dependant from the provided treaty mechanisms, which we have witnessed to be relatively ineffective. Finally, their linkage to trade, which is a field with very high economic stakes for countries, would require that their normativity would be high and undeniable. As treaty provisions may change

[171] Bruno Simma and Philip Alston,,'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles', 12 *Australian Year Book of Int'l L* (1988–1989): 85-86.
[172] Isabelle Duplessis, "La Declaration de l'OIT", 69.

and compromise on those issues, the quest of legal status should continue to ascertain a more independent and lasting normative value. In this respect, ascertaining the normative status of CLS is fundamental. Therefore, the following section will follow this path of analysis to acknowledge the other elements that can lead us to ascertain the normative status of CLS.

PART 3: Normativity and legal status of core labour standards

1. *Systematization of current trends: what legal status for Core labour standards?*[173]

In the previous chapters, we have tried to determine the normative content of CLS arising from the ILO 1998 Declaration and from their integration in economic agreements. Throughout this quest for a systematization of the current trends, CLS appear as the guideline pushing states to create more and more normative substance in their provisions[174], guaranteeing a more coherent approach. This in turn has contributed in hardening the legal status of CLS, through their inclusion in legally binding treaties. The question that will be addressed in the following section is what does this phenomena tell us on the evolving legal status in international law of these core labour standards?

The present exercise requires now that we look at the normative function of core labour standards in the current international society and determine whether it can be unified under a normative category. For this purpose, we will examine the legal and social mechanisms behind the setting and the expansion of the trade-labour linkage through these systems of conditionality and sanctions, drawing on an inductive analysis on the basis of the previous findings illustrating the current practice, as well as on the relevant literature, in order to reconstruct and define the normative status of core labour standards.

Despite this apparent heterogeneity in the inclusion of labour standards in FTAs and BITs, arguably also influenced by an evolving practice which has not quite found a middle

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[173] For the analysis of the normativity of CLS, our method was inspired from the article of Andrea Bianchi, analyzing the normativity of the precautionary principle in, Andrea Bianchi, "Principi di diritto, Modularita funzionale e relatività normativa: Il concetto di precauzione in diritto internazionale", in Bianchi and Gestri (eds.), *Il principio precauzionale nel diritto internazionale e comutario*', (Milano: Giuffrè, 2006).
[174] Labour provisions now constitute a 10 pages provision, against half a page 10 years ago.

way in the satisfactory promotion of labour rights and the maintained control over these matters by the government[175], a common feature is undoubtedly the emergence of a set of labour standards embodying minimum rights that should be recognized by all nations. In the following sections, we will thus examine whether evidence can be found to ascertain the normative status of CLS through their qualification as a customary norm or as a general principles of law recognized by civilized nations.

2. Core Labour Standards as customary norms of international law?

Some authors have argued that the core labour standards contained within the Declaration are of customary nature.[176] Indeed, some evidence of the existence of a general practice and *opinio juris* could lead to consider that these standards are an "international custom, as evidence of a general practice accepted as law".[177] However, despite the practice of including CLS in economic instruments, we recall the statement of the International Court of Justice "the mere fact that States declare their recognition of certain rules in not sufficient for the Court to consider these as part of customary international law, and as applicable as such to those States."[178]

Indeed, ascertaining the existence of customary norms requires the delicate verification of the existence of its two composing elements*: Opinio juris* is the material and objective

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[175] The evolution of the inclusion of labour standards in Free Trade Agreements is strongly influenced by the growing demand of civil society and trade unions, as well as it is counterbalanced by an apparently strong recicence from Republicains to further include more coercive or clearly defined obligations. For influence of the current drafting of the Trans-Pacific Partnership, see "USTR Tables TPP Labor proposals that go beyond may 10 Template", *Inside U.S. Trade*, Vol. 30 No. 1 (6 january 2012).

[176] Marleau, Véronique "Réflexion sur l'idée d'un droit international coutumier du travail", in Jean-Claude Javillier et Bernard Gernigon, (ed.) "Les normes internationales du travail: un patrimoine pour l'avenir: Mélanges en l'honneur de Nicolas Valticos", (Genève: BIT, 2004) 363-435; See also Madeleine Bullard, "Child labour prohibitions are universal, binding, and obligatory law: The evolving state of customary international law concerning the unempowered child labourer", *Houston Journal of International Law,* vol. 24, 2001, p. 124; Leslie Deak, "Customary international labour laws and their application in Hungary, Poland, and the Czech Republic", *Tulsa Journal of Comparative and International Law,* vol. 2, 1994, p. 1; Yasmine Rassam, "Contemporary forms of slavery and the evolution of slavery and the slave trade under international customary law, *Virginia Journal of International Law,* vol. 39, 1999, p. 303. See also Isabelle Duplessis,

[177] *Colombian-Peruvian Asylum case* (Colombia v. Peru), 1950 I.C.J. 276, 277. The Court set out the two requirements for custom, stating that "the party which relies on custom…must prove that its custom is established in such a manner that it has become binding for the other party" and "that the rule invoked…is in accordance with a constant and uniform practice. See also Arne Vandaele, *International labour rights and the Social Clause: Friends of Foes*, (Cameron May, 2005). 235.

[178] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua vs. United States of America), ICJ, Merits, judgment, ICJ Reports, (*MERITS*). *Judgment* of 27 June 1986. para. 184.

element of international custom, the necessary statement of legal obligation.[179] Generalized practice requires an assessment whether the actual practice is in accordance with and demonstrates the existence of *opinio juris*.[180] Notwithstanding the critics formulated against the binary approach requiring both the generalized practice and the *opinio juris* in the identification and extraction of a customary norm, the ICJ has continued to faithfully abide by this doctrine.[181] Moreover, for a norm to ever be recognized as custom, it must have a "norm creating character", namely that the content of the rule is sufficient and adequately self defined.[182]

Despite their limited legal status, non-binding instruments often stimulate state practice leading to the formation of customary international law.[183] The ascertaining of customary law requires compliance through state practice, not only as a result of an obligation, but as constitutive and essential to the process of creation of law. In this respect, the recent practice of states in economic agreement is significant. Moreover, "soft law" instruments also sometimes provide for the necessary statement of legal obligation (*opinio juris*) to precede or evidence the emergence of custom through state practice, and have assisted to establishing the content of the norm.[184] The ILO Declaration, which was adopted by an overwhelming majority,[185] enabled the identification and the extraction of core labour standards, which subsequent integration in economic agreement can be viewed as the evidence of *opinio juris*.[186] Since our previous examination of state practice leads us to envisage the possibility that CLS are norms of customary nature, the following section will analyse some core elements of current practice and *opinio juris* to dertermine whether it is possible to ascertain such a statement. Since Core labour standards are, by definition, an aggregate assemblage of four standards, an attempt to define its legal status of the whole should first study each standard individually.

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[179] *North Sea Continental Shelf* (Germany vs. Danemark; Germany vs. The Nederlands), Judgment, I.C.J. Reports 1969, 43 para 74.
[180] *North Sea Continental Shelf,* para 74
[181] Andrea Bianchi, "Principi di diritto, Modularita funzionale e relatività normativa", 441.
[182] "A bar to the formation of a new rule of customary international law on the basis of what bras originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been bot11 extensive and virtually uniform in the sense of the provision invoked;- and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved. See *North Sea Continental Shelf,* ICJ, para 74.
[183] Dinah Shelton, "Soft Law", 7.
[184] *Ibid.*
[185] The vote was 273 for, and zero against, with 43 abstentions.
[186] See for example, art. 13.4 EU GSP.

A. Freedom of association and the recognition of the right to collective bargaining

The Freedom of association and the effective recognition of the right to collective bargaining was acknowledged by some as early as in 1975 as a customary norm[187]. Moreover, Paul Ramadier, Chairman of the Committee on Freedom of Association of the ILO's Governing Body for 10 years, stated that " the principle of freedom of association is a kind of customary rule in common law, standing outside or above the scope of any Conventions or even of membership of one or other of the international organizations".[188] One of the first element in determining state practice is treaty law and their ratification. Freedom of association and collective bargaining standard is derived from ILO Conventions 87 and 98, which have been ratified respectively by 150 and 160 Members, out of 183.[189]

More recently and more importantly, beyond these doctrinal affirmations closely linked to internal practice of the ILO, the US District Court of Alabama recognized the customary nature of in *Estate of Rodriguez v. Drummond Co., Inc* under the Alien Tort Claim Act (ACTA)[190] in 2003.[191] In this case, the plaintiffs asserted that the corporation violated international law through its "denial of the fundamental rights to associate and organize".[192] Despite the decision of the court to eventually dismiss the case, the court found that the rights to associate and organize were contained in a number of international declarations and treaties and that it was endowed to "evaluate the status of international law at the time the lawsuit was brought."[193] The court then determined that "the rights to associate and organize are generally recognized as principles of international law sufficient to defeat defendants' motion to dismiss,"[194] despite that ILO Convention 87 had not been ratified by the United States, thus

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[187] Nicolas Valticos, «Droit international du travail et souverainetés étatiques», in F. Nathan (ed), *Mélanges Fernand Dehousse*, (1979). 127

[188] *Ibid.*

[189] Ratification Chart of ILO Fundamental Conventions, available online at: http://www.ilo.org/ilolex/english/docs/declworld.htm

[190] According to ATCA, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States". Although the initial and intended aim of the ACTA was to "furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations"[190], the case law since the famous Filartiga case has extended the condition of violation of the law of nations to customary law in general. s*ee e.g.,* Sosa v. Alvarez-Machain, 542 U.S. 692, 720 (2004); See also Véronique Marleau, "Réflexion sur l'idée d'un droit international coutumier du travail", 392.

[191] *Estate of Rodriquez v. Drummond Co*., 256 F. Supp. 2d 1250, 1264 (N.D. Ala. 2003). See Also Wesley V. Carrington, "Corporate Liability for Violation of Labor Rights Under the Alien Tort Claims Act", 94 Iowa Law Review (2009), at 1384. See also Véronique Marleau, "Réflexion sur l'idée d'un droit international coutumier du travail", 392-393

[192] *Estate of Rodriquez v. Drummond Co,* 256 F. Supp. 2d at 1258.

[193] *Ibid.,* at 1264.

[194] *Ibid.*

recognizing that these labour principles are sufficiently established in customary international law to support an ATCA claim.

Nevertheless, it must be acknowledged that despite the fact that according to practice related to ACTA, judges have a substantial amount of discretion in determining whether a norm meets the ACTA standard, or in other terms, whether a norm is part of the law of nations. Notwithstanding that the courts are encouraged to use "great caution" when considering extending the law of nations to include private rights and recognizing new international-law claims[195], this decision does not bind the international legal order to recognize the aforementioned standards as a rule of customary nature. If this statement is undoubtedly an element of practice, it is alone ultimately insufficient to demonstrate convincingly that the right to collective association is a custom in international law.[196]

B. Elimination of all forms of forced or compulsory labour

Beyond its recognition as a fundamental principle of international law within the ILO system, the prohibition of Forced labour is quite steadily anchored within the international legal order. In the ILO Convention 29 (1930), forced labour is defined as following: "forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".[197] Convention 29 and 105, embodying the prohibition of forced labour have

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[195] The opinion acknowledged that judges have a substantial amount of discretion in determining whether a norm meets ATCA standards and stressed that judges should take into account the "practical consequences" of allowing a particular ATCA claim. *Sosa* stated that judges "have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding . . . have not affirmatively encouraged greater judicial creativity." Similarly, courts should use "great caution" when considering extending the law of nations to include private rights. The Court concluded that courts should exercise "vigilant doorkeeping" when considering international norms, but that the "door is still ajar" for additional actionable international norms. Therefore, *Sosa* delivered a cautionary message about recognizing new international-law claims under the ATCA, but it left the door "ajar" for judicial discretion. Ultimately, courts will require more than a norm that *might* be defined as customary international law or that has only a modicum of international influence. Rather, the norm must be an "established" and "'universally recognized'" rule of customary international law. *See* Wesley V. Carrington, "Corporate Liability for Violation of Labor Rights Under the Alien Tort Claims Act",1403

[196] Ibid., U.S. courts have generally formulated other requirements for the determination of whether a claim pleads a violation of customary international law under the ATCA: (1) the norm must have acquired *opinio juris* binding status, and (2) the norm must contain sufficiently specifiable and articulable standards so as to allow a judge to adequately identify a violation. This last condition is however not a condition for the recognition of the customary nature of a principle or right in the admitted practice in International law, but is only applicable for defining the scope of application of ACTA.

[197] International Labour Organization (ILO), *Forced Labour Convention,* art. 2 (1), *C29*, 28 June 1930, C29, available at: http://www.unhcr.org/refworld/docid/3ddb621f2a.html [accessed 25 June 2012].

been ratified by respectively 175 and 171.[198] Moreover, the ILO Conventions contain obligations setting precise standards and requiring strict compliance, regardless of the economic development of the country.[199]

Despite the difference in concept, forced labour is seen as a comprised in the concept of slavery[200], which is one of the two admitted examples of *jus cogens* by the International Court of Justice, embodying a peremptory principle of international law that is universal and non-derogable, thus applicable to all States. Moreover, an obiter dictum of the ICJ in the Barcelona Traction case acknowledged that slavery had "entered into the body of general international law.[201] Moreover, the inclusion of enslavement as a crime against humanity in the Statute of Rome establishing the International Criminal Court further supports that these practices should be prohibited under international customary law.[202]

In 2002, the 9th District Court of Appeal stated in the case Doe v. Unocal[203] that, on the basis of U.S Court practice and international instruments, forced labour was equivalent to a "modern variant of slavery"[204] and thus constituted a crime under international law on the basis of its recognition as a rule of jus cogens: "Moreover, forced labor is so widely condemned that it has achieved the status of a *jus cogens* violation".[205 and 206] As appealing as this finding may be, we should nevertheless stress that the 9th district appeal court wanted to "attributes individual liability" to the violation of the prohibition of forced labour" such that

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[198] Ratification Chart of ILO Fundamental Conventions.
[199] Arne Vandaele, "International labour rights and the Social Clause*"*, 259.
[200] In this respect, we note the different definition given to slavery in the Slaverly convention: (1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised. (2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves. Slavery Convention, art. 1.1926, 60 LNTS 253/ [1927] ATS 11/ [1927] UKTS No. 16 (Cmd. 2910); See Véronique Marleau, "Réflexion sur l'idée d'un droit international coutumier du travail", 396-398; See also Arne Vandaele, "International labour rights and the Social Clause*"*, 259-261.
[201] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment of 5 Feb. 1970, ICJ Rep 3, para. 33.
[202] See art. 7(1)(c), Statute of Rome. See also the *Furundzija* case, stating that "the Rome Statute by and large may be taken as constituting an authorative expression of legal views of a great number of states." In International Criminal Tribunal for Former Yugoslavia, *Prosecutor v. Furundzija* (10 December 1998), 38 I.L.M. 317. Para 277. For developments, *see also* Arne Vandaele, International labour rights and the Social Clause: Friends of Foes, Cameron May, (2005), at 259-260.
[203] John Doe I, et al., v. UNOCAL Corp., et al., 395 F.3d 932 (9 Cir. 2002)
[204] *Ibid.* at 14210
[205] *Ibid*. at 14208
[206] The Court cite the following legal instruments: *"*Universal Declaration of Human Rights, G.A. Res. 217(A)III (1948) (banning forced labor); Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 82 U.N.T.S. 280 (making forced labor a war crime)", *see also* Arne Vandaele, International labour rights and the Social Clause: Friends of Foes, Cameron May, (2005), at 259-260.

state action is not required". In this sense, it might have been tempted to hurriedly determine that its violation was one of *jus cogens*.

However, after having demonstrated some elements that can be taken account to determine the customary nature of the prohibition of forced labour, it is very likely that the prohibition of forced labour can be considered as a customary norm of international law. In this respect, it should be noted that this labour standard is the most established and widely recognized among core labour standards.

C. Effective abolition of child labour

We should first not that the ILO conventions relative to the prohibition of child labour (Conventions 138 and 182) have been ratified by 161 and 174 States respectively. However, Child labour is usually conceived in terms of prohibition under a certain age and studies shows that there is a lack of consensus in various domestic practices on the minimum age of employment, varying from 12 to 16 years.[207] In this respect, state practice as evidence for *opinio juris* is difficult to be built into a consistent and invariable one.

Despite the rapid increase in the ratification status of Convention 138, the ratification of which increased from 64 States in 1998, to more than double in 2012, it is only recently that Asian countries, which account for a large part of child labour[208], have ratified these conventions.[209] Moreover, it is stated that Convention 138 prescribes as set of very flexible rules alongside with general policy goals, which makes it difficult to grasp the core of the legal obligations.[210]

To the extend that child exploitation can be assimilated to slavery-like practices, it will fall under the customary prohibition of forced labour, as outlined in the analysis of the previous standard. Otherwise, it must be concluded that the abolition of child labour fails to pass the test of customary law.

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[207] Arne Vandaele, "International labour rights and the Social Clause", 273.
[208] *Ibid.*
[209] *Ibid.,* 269.
[210] *Ibid.*

D. Elimination of discrimination in respect of employment and occupation

Whereas the principle of non discrimination in general is accepted to have a customary international character in the decisions of the ICJ[211], the content and extent of this principles is not agreed upon. In international labour law, these principles are embodied in ILO Conventions No. 100 on Equal remuneration and No. 111 on Discrimination in employment and occupation, ratified respectively by 168 and 169 States.[212] However, the flexible approach of these conventions makes its hard to determine well defined obligations with regards in the areas of equal pay and the prohibition of discrimination.[213]

There is evidence of *opinio juris* of the prohibition of discrimination: The Universal Declaration of Human Rights recalls that the "recognition of … the *equal* and inalienable *rights* of all members of the human family is the foundation of freedom, justice and peace in the world" and that "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."[214]

An interesting development was issued by the Interamerican Court of Human Rights through its Advisory Opinion No. 18 on the legal status of migrant workers, in which the Court announced that the principles of equality and non-discrimination are general principles of law of peremptory nature.[215] Indeed, the court acknowledges "an inseparable connection between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination".[216] The Court also finds that the "fact that the principle of equality and non-discrimination is regulated in so many international instruments is evidence that there is a universal obligation to respect and guarantee the human rights arising from that general basic principle."[217] The Court goes on saying that "the principle of equality before the law and non-discrimination permeates every act of the powers of the State" and that "this principle may be

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[211] ICJ, *Legal consequences for States of the continued presence of South Africa in Namibia* (South West Africa) notwithstanding Security Council Resolution 276 (1970), Order No. 1 of 26 january 1971, Advisory Opinion, 1971 I.C.J. 3, 76; ICJ, *United States Diplomatic and Consular Staff in Teheran*, Judgment, (United States v. Iran), 1980, I.C.J. 3, 42.
[212] Ratification Chart of ILO Fundamental Conventions.
[213] Arne Vandaele, "International labour rights and the Social Clause", 268.
[214] Preambule and Art. 7, UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: Human Rights, available online at: http://www.un.org/en/documents/udhr/
[215] *Juridical Condition and Rights of the Undocumented Migrants*, IACHR Advisory Opinion OC 18/03, September 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003). available at: http://www1.umn.edu/humanrts/iachr/series_A_OC-18.html; See also
[216] Ibid., para 85.
[217] *Ibid.,* para 86.

considered peremptory under general international law, inasmuch as it applies to all States, whether or not they are party to a specific international treaty".[218]

Despite this statement and despite how well these principles may be established in domestic constitutions and international convention, domestic legislations often violate these norms. Indeed, state practice generally does not conform to the principles of non-discrimination, as even the practice of industrialized countries shows the obvious disparities in salaries between men and women, witnessing that there is no consistent evidence for demonstrating that state practice is generalized enough to demonstrate the element of customary norm.

E. Conclusion

The determination of the existence of a norm of customary international law requires to ascertain the existence of a generalized practice that is testified by the States believing that in doing so, they are conforming themselves to a legally required and socially necessary behaviour.[219] The ascertainment of the customary nature of a norm requires a high threshold and, therefore, only a few norms are considered to have reached this status. Even though it could be arguable that the importance of State practice for the acknowledgement of custom is sometimes a formality, as demonstrated by the widely accepted customary rules prohibiting genocide, slavery, torture and other cruel, inhumane or degrading treatment or punishment or systematic racial discrimination despite extended literature and reports on worldwide human rights violations,[220] customary rules remain a limited number. Ascertaining the existence of custom continues to be a delicate process. In this respect, whereas the customary nature of the prohibition of forced labour can be ascertained, and to a certain extent so could the prohibition of child labour for age under 12, *opinio juris* and practice do not yet support the statement that freedom of association and collective bargaining, as well as the elimination of discrimination with regards to employment are of customary nature. Therefore, core labour standards as a whole cannot be viewed as customary law.

The current practice nevertheless does not say the growing inclusion of core labour standards in economic instruments will not contribute to consolidating their possible future

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[218] *Juridical Condition and Rights of the Undocumented Migrants,* at 100.
[219] *See* Andrea Bianchi, "Principi di diritto, Modularita funzionale e relatività normativa", 441.
[220] Niels Petersen, *Customary law without custom? Rules, principles and the role of state practice in intermational norm creation*, American University International Law Review 23, no.2 (2007): 280.

status as customary international law.[221] Indeed, there is strong support that for *opinio juris*, despite the weakness of general practice and arguing at this stage of early development that CLS are of customary nature would involve the risk of diluting the nature and the function of recognized sources of international law and consequently jeopardizing their credibility. An example of these inconsistencies is illustrated by the notion of "instant custom"[222] attempting to grasp the normative reality of law-making within the traditional categories of sources of law, yet overlooking the criteria of law ascertainment and creating incoherence for the sake of justifying the emergence of norms. Moreover, the fact that traditional sources of law may not be adapted to grasp the reality of legal interactions in international relations should not imply to restlessly argue that norms, regardless their degree of normativity, fall under the traditional categories of sources of law. Therefore, maintaining the integrity of the process of acknowledging custom requires that we do not to read more that what the practice reveals. However, with these considerations in mind, remains the necessity to explain how core labour standards have suddenly emerged and been integrated into economic agreements and what impact it has had on their normative status. In this respect, the practice of including CLS and conditioning economic advantages to their compliance could shape a new State practice that would increasingly comply to CLS, even though the current evidence of this influence is little and mitigated. However, as Alston and Simma have argued[223], it could also be that the process for ascertaining customary norms does not properly take into account non-conforming State practice and that the attempts to ascertain the legal character of human rights and labour rights under custom does fundamental and irreparable violence to the concept. They suggest that general principles of law are a better means to reach the desired solution of ensuring that the relevant human rights norms are solidly grounded in international law.[224] We should turn to examining whether general principles of law are a good alternative for acknowledging the normative status of CLS.

In the following section, we will examine whether CLS can be subsumed under the legal category of "general principles of international law recognized by civilized nations".

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[221] Francis Maupain, "Revitalization not retreat", 458.
[222] See Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?,* 5 Indian journal of International Law, (1965): 35-40.
[223] Bruno Simma and Philip Alston, "The sources of human rights law", 83-107.
[224] Ibid., 83-84.

3. Core Labour standards as "General principles of international Law recognized by civilized nations"?

Another accepted legal category that can be set forth to qualify the normativity of core labour standards is provided by art. 38 para. 1 of the ICJ statute, that recognizes general principles of law, understood as principles extracted from municipal legal orders and inherent to them commends their application in interstate relations, insofar as they are applicable as a subsidiary a source of normativity.[225] Whereas principles of law are generally qualified as general and abstract, they are eligible as legal principles, as opposed to political principles, when they have been formulated in the intention to modify elements of the existing legal order or if their implementation could reach this objective.[226] It nevertheless remains necessary to establish, beyond the normative character of the principles, whether they have gained a positive status within the international legal order. Again, according to generally accepted conceptions, the law ascertaining character must be channelled through the "doctrine of sources". Thus, the enunciation of a set of principles deemed necessary to respond to the international community's social needs, such as the regulation of the current globalization remains in the dead lock of *lege ferenda*, in absence of legal ascertainment and in lack of legal authority of its creator to set international norms. [227]

Whereas the temptation to argue in favour of the elevation of core labour standards to the rank of general principles of law as understood by art. 38 ICJ, a few elements of conceptualization should remind us to use this category with caution, as its seemingly broad understanding is misleading and ascertaining a concept as a general principle of law also obeys to high thresholds. Identifying a general principle of law involves a similar process as the one for identifying a rule of customary law, characterized by the centrality of the role of the judge, thus involving all the limitations arising for this judicial acknowledgment, such as the blurred distinction between the exercise of recognition of a general principle or its creation *ex nihilo* by the judge.[228] More importantly, these principles are those which are derived from different national legal orders, and which can be transposed to the international

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[225] Sir Robert Jennings and Sir Arthur Watts (eds) "Oppenheim's international law", vol. 1, Peace, (9th ed.), Longman (1992), at. 36.
[226] Michel Virally, « Le role des « principes » dans le développement du droit international », in *Mélanges Guggenheim*, (1968). 199.
[227] *Ibid.,* 200.
[228] Dominique Carreau and Fabrizio Marella, "Droit international", 11th ed., (Paris: Pedone, 2012). 330.

legal order. As these principles are aimed at filling the gaps to the international legal order when no other rule is applicable, they have been increasingly used to regulate the expanding areas dealt by international law that are still relatively devoid of rules, such as the field of international environmental law.[229]

It is possible to envisage core labour standards enshrined into a general principle of international law. First, they have been qualified as fundamental and guiding principles by the 1998 ILO Declaration, which in turns makes them sufficiently abstract and general to fill in the legal function of general principles. Their use in economic instruments and its relative success, regardless their sometimes low degree of normative formulation and highly dependant enforcement, also demonstrates that CLS are increasingly shaping the economic legal system. Moreover, as we examined in the analysis devoted to custom, there is some evidence for each individual standard of a practice and *opinio juris*. Albeit it may not be sufficient to demonstrate the existence of a customary norm, it nevertheless demonstrates a certain consistent practice. The hypothesis of core labour standards as general principles of law, as understood by Art. 38 of the Statute of the ICJ, is appealing primarily because the content of CLS originates in part from the practice in some municipal systems, which have shaped their labour policies according to these standards. Moreover, CLS are enunciated to influence State practices to concretize and realize these principles in their own legal orders and in their policies, with the technical and financial support of the ILO.

However, it should be recalled that the ascertainment of the existence of international principles of law obeys to similar methods as those for ascertaining customary law, since the demonstration of existing law-making practices are substantially identical.[230] Therefore, even for acknowledging that core labour standards are general principles of law as understood by art. 38 ICJ, it will be necessary to demonstrate a constant and consistent practice, by a plurality of States representing different legal and cultural traditions.[231]

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[229] Andrea Bianchi, "Principi di diritto, Modularita funzionale e relatività normativa", 445.
[230] *Ibid.,* 446.
[231] *Ibid*.

4. Core labour standards as General principles of international law

Having exhausted the traditionally accepted normative categories allowing to ascertain the legal status of Core labour standards as a binding norm, does this entail that it cannot have a legal status under international law, with a definite normative content explaining behaviors of international actors and with a specific function in the international legal order?[232]

This stage of our research imposes to reflect on the normative structure in the current international legal order. In this respect, we agree with scholars like Lowe who have argued that the legal order has evolved into a being complete and mature, which can now respond to the requirements of international social life.

A. Evidence of completeness of the International legal order and changing law-making mechanisms.

The completeness and maturity of the international legal order is demonstrated through the presence in the international system of sufficient systemic normative principles that can guarantee international legal order coherence.[233] Evidence of this evolution is also strikingly found within the changing process of normativity ascertaining itself and the growing phenomena of "relative normativity". First, the increasing reliance on "soft law" is the expression of the growing complexity of the international legal system and the development of different forms of commitments to regulate state and non-state behaviour.[234] The existence and reliance by international actors on the so-called non binding commitments, whereas it can undermine options for enforcement, does not however deny that these instruments create legal effect, as well as sincere and strongly held expectations of compliance.[235] Moreover, the creation of the concept of *jus cogens*, norms peremptory in nature and from which no derogation is allowed under any circumstances, implies that the legal hierarchy does not rely on the formal source, but within their content.[236]

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[232] Andrea Bianchi, "Principi di diritto, Modularita funzionale e relatività normativa", 449.
[233] *Ibid.*
[234] Dinah Shelton, "Soft Law", 21.
[235] *Ibid.,* at. 22
[236] Andrea Bianchi, "Principi di diritto, Modularita funzionale e relatività normativa", 450.

Arguing that the international legal order is now characterized by different degrees of normativity that are defined by the possible function of these norms, is, in our view, a necessary tribute to acknowledge the completeness and maturity of the international community.[237] Consequently, the international legal order requires acknowledging, aside of traditional sources of international law, other law-making mechanisms that will be able to grasp the complexity of the system's evolution and that will carry out different functions.[238]

Many scholars have persuasively participated to shedding light on the changes in the structure and the law-making processes occurring in the international legal order and their propositions are more and more shaping our renewed understanding of law-making. Acknowledging the importance of the role of doctrine in the shaping of international law, the findings of these scholars will undoubtedly, and probably already do, contribute shaping the understanding of the international legal order.

For example, Alan Boyle and Christine Chinkin identified the modification of the law-making processes through their observation that international law is no longer 'made' by a finite number of entities (States) through a handful of intergovernmental processes. Instead, a large number of actors and institutions interact through a variety of multilateral processes, tribunals and organs of international organizations,[239] further supporting the theory of completeness and maturity. Although States remain the primary makers of international law, they are joined by other participants that are undeniably influential in the making of international law. In this respect, civil society, through various channels, is increasingly shaping State practice and the development of international law.

This evidence of a maturing legal system is further demonstrated by the research undertaken in the field of informal international law-making. According to Joost Pauwelyn, Informal international law-making is characterized through changes in the channels of law-making processed in three levels: some law-making processes are now informal (cross-border cooperation between public authorities, with or without the participation of other actors, in a forum other than a traditional international organization), they are characterized by actor informality and their output is informal, in the sense that it does not result in a formal treaty or

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[237] *Ibid.*
[238] Ibid.,
[239] In addition, whereas states remain the primary makers of international law, they are joined by other participants and influential entities such as international organizations, judges, non-governmental organizations that ultimately participate in the shaping of international law. See Boyle, Alan and Chinkin, Christine. *The Making of International Law* . New York : Oxford University Press , 2007 . at. 288

traditional source of international law.[240] Whereas the study of informal law-making does not fall within the scope of our research, the presence of these informal channels further demonstrates that the normative character of legal propositions should also focus the practical and concrete impact of the latter, instead of focusing on their binding/non-binding nature.

Another evidence of the changing character of law-making, perhaps more disturbing, is the attempt to create a "New theory of customary human rights", according to which "a norm ought to be considered customary law if States generally believe that is desirable, now or in the near future, to institute the norm as legally binding on the global community of States, and if it comports with certain fundamental ethical principles in contemporary international law anchored in a preeminent principle of "unity in diversity."[241] No matter how desirable the implied outcome may be, we do not share this view. However, this hypothesis is symptomatic of the urging need, experienced in the international community or at least among scholars, to establish the legal validity of these desirable norms. Whereas our study also tries to establish the normative status of core labour standards, we do not believe that the understanding of the process for ascertaining the customary nature of a norm has been altered. Rather it suggests that the international legal order should recognize other types and degrees of normativity for ascertaining the legal changes currently occurring.

Acknowledging the completeness and maturity of the international legal order implies that the existence of a set of sufficient legal concepts, rules and principles, alongside with the institutional setting of international organizations and other actors capable of formulating desirable normative statements, supported by the persuasive power of doctrine. The underlying assumption is that the system of rules is now capable of generating solutions to new challenges and social issues of the international society.

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240 Joost Pauwelyn, "Informal International Lawmaking: Framing the Concept and Research Questions", Forthcoming in Informal International Lawmaking, J. Pauwelyn, R. Wessel and J. Wouters (Oxford University Press, 2012): 1-28

241 See Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications*, Cambridge University Press, (2010).

B. Constitutionalization of International labour law?

Therefore, evidence of changes in the normative structure in the international community are ever more undeniable. In this sense, another striking theoretical trend is the attempt to enhance the coherence of the international legal order is the current doctrinal trend of "constitutionalization" of international law. Relying in an increasing consolidation of the notion of international community and its underlying values and normative instruments of expression, such as *jus cogens* and obligations *erga omnes,* the identification of fundamental norms seems to illustrate a process of "constitutionalization" of the international legal regime.[242]

In this respect, the history of the law-making experience of the ILO, read alongside recent developments, suggests a substantial change in the way the organization perceives its role and its normative function. Until recently, the vast majority of the law-making process in the formation of labour standards was operated in a classical scheme of the organization adopting a text that would be binding upon ratification, in conformity with the constitutional competences and the mandate of the ILO. However, the past decade has witnessed an attempt to establish its law-making powers independently from the accepted interpretation of its constitution. Indeed, as we have stated previously, the ILO Declaration – not without explicit reference to the ILO constitution - established the core labour standards of the organization and its activities, imposing them to its Members regardless of whether they ratified the related conventions. The next step in transforming the system came along with the 2008 Declaration on Social Justice for a fair Globalization. In this document, the ILO restates its mandate and objectives and creates major innovations that will shape its future activities: first, it makes a strategic presentation of mission to justify its proactive activity around the four core labour standards.[243] Second, the 2008 Declaration reaffirms the strengthening of the status of fundamental principles and rights at work with regards to the ongoing globalization.[244] Through this process, the organization is legitimizing its activities and also its normative innovations in issuing core labour standards. In this respect, the ILO presents CLS as fundamental principles, which function is to guarantee and strengthen the coherence of labour law through their intrinsic ability to enable other labour rights. More importantly, their function in the international legal order is also to promote the fundamental values of the ILO,

[242] Andrea Bianchi, "Human Rights and the Magic of Jus Cogens", *EJIL* Vol. 19 No. 3, (2008): 494.
[243] Francis Maupain, "New Foundation or New Façade?", 823.
[244] *Ibid.*

which is competent on the basis of mandate and constitution to create and promote labour standards, which come as *lex specialis*. As we have previously pointed out, the choice of a "soft law" instrument was aimed at enhancing the effectiveness of the organization and of labour law in general. .

However, we should recall that normativity and the sources of international law have always been a thorny subject and that one of the first manifestation of its complications was the assessment of the legal status of the United Nations General Assembly Resolutions (UNGAR). As this instrument and its objectives share many similarities, we find it useful to compare the two instruments and the qualifications given to the UNGAR to the ILO Declaration in order to determine what analogies can be drawn.

C. Comparing ILO Declaration to UN General Assembly Resolution?

Prima facie similarities between these phenomena brings us to compare the function and the legal status of principles issued through UNGAR to the core labour standards within the declaration. First, the ILO and the UN are International Organizations (hereafter IOs) and which competences supposedly rest on their constitution or statute. Therefore, they have a certain law-making power with regards to their Members. Moreover, the UN Assembly's resolutions have been characterized as "soft law", or more precisely, declaration of promotional nature that do not have binding effects. The ILO Declaration is similarly qualified as a "soft law" instruments However, the ICJ noted when considering the mandate of the League of Nations that "it cannot tenably be argued that the clear meaning of the mandate institution could be ignored by placing upon the explicit provisions embodying its principles a construction at variance with its object and purpose."[245] Interestingly for the purpose of our study, the acceptance of the unilateral acts of international organizations, went from resting as a form of conventional agreement between member States to, the predominant acceptance today, that international organizations have an established normative and autonomous competence.[246]

As Georges Abi-Saab points out, the growing visibility of the resolutions of the General Assembly acknowledged the emergence of a new instrument reflecting the transformation of

[245] *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ, at 50.
[246] Dominique Carreau and Fabrizio Marella, "Droit international", 271.

the international legal.[247] Indeed, UNAGR are usually not considered as autonomous sources of law, rather as "derived" sources founded of a derived legal order of the International Organization, not part of the accepted sources based on art. 38 of the ICJ Statute. Nevertheless, Abi-Saab also recalls that:

« Quand on parle des sources, notamment de celles de l'art. 38, ce n'est pas tant dans le sens du fondement ultime de l'obligation, mais plutôt dans celui des mécanismes ou de procédés de production normative. Et dans ce sens là, les résolutions - dans les cadres constitutionnels appropriés – peuvent constituer des procédures et des modalités originales de production normative, quelque soit le fondement ultime de l'obligation».[248]

He adds that :

« Il faut garder en vue que le caractère obligatoire ou non obligatoire d'un acte ou d'un instrument n'épuise pas tous ses effets juridique, et que ceux-ci à leur tour ne recouvrent pas toute la signification juridique de l'instrument »[249]

Moreover, the legislative function of UNAG Resolution has been recognized by the ICJ in the Namibia case, that "it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design."[250]

A resolution may make determination or has operative design when it indicates "qui doit quoi à qui", and thus become sufficiently specific in order to allow the objective verification of respect or violation a normative proposal.[251] Moreover, other criteria based on the behaviourist approach and deduction have been provided for determining the likelihood that such a resolution would be followed and implemented by UN Members: 1) the degree of consensus, 2) the degree of specific/ concrete content and 3) the established follow up and implementation procedure. On the basis of these elements, comparison to the ILO declaration is relevant.

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[247] Georges Abi-Saab, "Cours Général de droit International public", 207 *Receuil des cours de l'Académie de droit international*, (Hague, 1987). 154.
[248] Georges Abi-Saab, "Cours Général de droit International public", 154-155.
[249] *Ibid*., at 155.
[250] *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276,* 50.
[251] Georges Abi-Saab, "Cours Général de droit International public", 163.

As we have mentioned previously, despite the thorny negotiations around the adoption of the declaration, a relative consensus emerge as to the specific content of ILO Declaration and follow-up procedure and framework provided. The adoption of the Declaration was nevertheless conditioned to it taking the form of a non-binding declaration and that the follow-up would be promotional. No State voted against the adoption of the Declaration and few abstained. The content of the Declaration is specific, as it sets up as fundamental principles of labour that are found in its fundamental conventions. Whereas the principles as such do not detail the implications embedded in the principles, their aim is clear and can be interpreted easily in the light of the respective ILO Conventions. Finally, the Declaration provides for a follow up mechanism that assesses the compliance of its Members.

In this respect, the declarations of International organizations are analyzed in the light of these criteria as a whole, which enable it to translate the existence of a practice that in turns attests of the founding consensus towards the creation of a legal norm. The declarations should be considered in the light of these elements as a whole, and in the light of the necessary modalities and repetition for it to be a source of normativity. However, these criteria still carry along the attempt to subsume the normativity to a practice and *opinio juris*, thus creating merely a lower version of custom which is more easily identifiable because the relevant principles have been integrated voluntarily in a instrument facilitating its repetition and attesting of a certain consent of States.

Comparing the ILO Declaration to the UNGA Resolutions has emphasized that non-binding declarations of international organizations can constitute, when certain circumstances are met, new modes or procedure of law-making that will facilitate the emergence of rule of law. These mechanisms are manifestations of the existence of an international community and of its underlying values that are recognized as important and necessary within the current international social order. In the case of CLS, the ILO Declaration was an attempt to create fundamental principles of labour law that would influence the behavior of member States within the context of globalization. By doing so, and despite the “soft law” status of the ILO Declaration, it has granted a normative value to these principles that edict a desirable conduct. Recalling that we have been unable to demonstrate the legal status of CLS through accepted sources of international law, our analysis of their legal validity should now take a more critical stance on the current evolution or acknowledgments of modes for normative production.

D. What normative status for CLS?

Surrendering to the statement that the legal status of CLS cannot yet be acknowledged through classical sources of law would ultimately amount to an unsatisfactory and unarguable undermining of the function of general normative prescriptions in assuring the coherent working of the international legal order. Moreover, it would further appear unreasonable to be able to acknowledge a consistent and evolving practice of inclusion of CLS in economic agreement, as well a likely pattern of emerging custom, but not be able to ascertain any legal status beyond the conventional instruments it is contained in.

Their legal effects may not ultimately be translated into the binary opposition of binding and non-binding. However, in this respect, it may be relevant to recall the critic of Fitzmaurice that the ICJ statute does not distinguish between the source of law and the source of obligation might be relevant.[252] The process of creating the law, ie a normative proposal that aims at shaping the conduct and behavior of actors, may be generated through a conjunction of practices that witnesses the importance of the underlying values and elevates such values to the rank of desirable conduct. Indeed, Ago had already identified the existence of meta-legal general principles that constituted general directives and instructions of the legal order, inspiring the content of the norms and their interpretation.[253]

Evidence that values have come to shape the development of international law through their normative translation can be found in the identification by Lowe of interstitial norms, or meta-principles, that operate the interstices of primary norms.[254] These norms have their own legal validity which arises however not from traditional sources of law but rather directly from the international social order that prescribes fundamental values to be used to reconcile conflicting rules. Lowe uses the example of sustainable development, addressed by the ICJ in the Gabcikovo case, which emerged as a necessary principle "to reconcile economic development with the protection of the environment".[255] In this respect, comparison with the ILO CLS is highly relevant, since their identification arises from the need to reconcile economic development with the desirability of a fairer globalization. Whereas we may not

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[252] Sir Gerald Fitzmaurice,"Some Problems Regarding the Formal Sources of International Law", in: F.M. van Asbeck et al. (eds), *Symbolae Verzijl,* (1958). 153.
[253] Andrea Bianchi, "Principi di diritto, Modularita funzionale e relatività normativa", 452.
[254] Vaughan Lowe, "The Politics of Law-Making: Are the Methods and Character of Norm Creation Changing", in M. Byers (ed.), *The Role of Law in International Politics*, Oxford University Press, (2000), 7-8. available online at: http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199244027.001.0001/acprof-9780199244027-chapter-11
[255] *Ibid*.,8.

agree with Lowe that the interstitial norm are necessarily only "interstitial", nor that they come about merely to reconcile primary norms, this theory is nevertheless a very useful grasp of alternative means of producing law and further evidence of the ability of the system to produce its own normative principles. The reflections of Judge Weeramantry consider that sustainable development is "more than a mere concept. (It is)…a principles with normative value," adding also that "the law necessarily contains within itself the principle of reconciliation. That principle is the principle of sustainable development."[256] In our view, the qualification of principle of reconciliation is not necessary, but is rather a rhetorical statement to justify validity of the emergence of the principle of development on other primary norms. However, this phenomenon can also be viewed as a demonstration of the possibility of having norms which take their source in the international social society, as the expression of a general will to respond to the problems that these principles aim to address.[257] These principles are consistent with and carry out the political trends deemed as desirable by international society by occupying the judicial spaces and influencing other norms and legal systems.[258] This trend can be identified through the emergence of Core Labour Standards, which adequately illustrates the important function that a general normative prescription it has been brought to exercise, highlighting the current dominant cultural trends.

However, the obligation itself, as opposed to law, may arise from other processes, through which States and international actors find it social interesting or necessary to conform to these values for reasons inherent to society and social relations. This phenomenon is well described by the theory of acculturation of Goodman and Jinks, which emphasize the role and the use of values in shaping the international legal order.[259]

The theory of acculturation studies the way States behave and under what conditions their behavior changes. Goodman and Jinks argue that the behavior of States is principally shaped by processes of socialization through coercion, persuasion and acculturation.[260] Whereas their study aims at understanding the ways States-behavior can be shaped, we infer from this theory that the process of socialization through which behavior can be altered also explain how certain values inherent in a social culture of certain States can be upgraded to the status

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[256] Vaughan Lowe, "The Politics of Law-Making", 10.
[257] Andrea Bianchi, "Principi di diritto, Modularita funzionale e relatività normativa", 452.
[258] *Ibid*.
[259] See Ryan Goodman and Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, University of Chicago Law School, Public Law & Legal Theory Working Paper Series, Research Paper No. 62 (2004).
[260] *Ibid.*

of legal norms through those processes and can become obligations. In this respect, they specifically address the issue of conditional membership on the basis of compliance to certain human rights standards, ie, whether membership should be inclusive or restrictive.[261] At this point, we should draw a link to the process triggered by the ILO on elevating CLS to principles arising from membership. Membership is thus inclusive, but now becoming a member entails to respect, promote and realize core labour standards. Goodman and Jinks acknowledge that broad membership amplifies social pressure to conform and helps to substantiate the claim that the principled commitments of the regime are universal.[262] Moreover, research demonstrates that participation in international institutions thus plays a significant role in promoting standardized, pro-social models.[263] Importantly, institutions with broad membership also show that the social processes by which states adopt norms identifies with being a modern state, which is socially desirable in the international community. In this respect, "the mechanism of acculturation, unlike coercion and persuasion, operates much more effectively, and sometimes necessarily, through international organizations."[264] The analogy of these mechanisms to the process of creation of CLS is striking. Indeed, have we have argued, core labour standards have initially emerged as soft law within an International Organization to strengthen the process of acculturation. Alongside this process, CLS have been included into legally binding treaty subject to potential coercive means (trade sanctions) and through persuasion (incentive bases compliance in FTAs and GSP). Through these tridimensional socialization processes, a legal obligation as slowly emerged derived both from soft law, treaty law and to some extent customary law, increasingly shapes the international legal order, through growing practice.

One could point out that our examination of law-making processes through the acculturation theory and the values of the international legal systems always brings us back to trying to demonstrate elements of practice and *opinio juris*. Indeed, if States believe that a value should be considered as law and they abide their conduct to it, elements of *opinio juris* are present. Also, when examining of process of socialization which influences the international legal order by translating value to legal norms, the mere examination of the socialization process needs to implies that there has been a growing generalized practice, that

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[261] *Ibid*., 22
[262] Ryan Goodman and Derek Jinks, "How to Influence States*",*30-31
[263] *Ibid.*
[264] *Ibid.*

can be explained precisely by socialization. Does it mean that we are not really moving away from the traditional sources of international law?

Perhaps. However, we do not find it dramatic nor should it prevent a wider recognition of alternative sources of law since it would be unfaithful to deny the any influence of the traditional source of international law on alternative sources of normativity. History tells us "Ubi societas, ibi jus", and it should be kept in mind that every law-making process is ultimately a process emerging through social interaction, regardless of the intensity, the frequency and the repetition. In the light of these remarks, it is only logical that different law-making processes share certain similarities, as they ultimately arise from the same social group. What vary are thus precisely the modalities and the necessary conditions for acknowledging the status of law, and perhaps the subsequent degree of normativity.

CLS are an expression of the current complexities of law-making and the difficulty to translate their intuitive legal value of standards into accepted legal forms. In this respect, we find that these general normative prescriptions can be acknowledged as general principles of law, arising directly from international legal order and justified by their underlying moral content.

5. General principles of law arising from the international legal order.

Authors such as Cassese, Lammers, Alston or Simma argue that general principles of international law can also be derived from the international legal order. In this part, we will argue that general principles of international law can as principles carrying the values and the needs of the international social order, in order to address issues that are viewed as essential by States. On the basis of our previous discussion, we will argue and conclude that core labour standards can be viewed as general principles of international law arising directly from the international legal order, derivating from its natural evolution and the need to respond to the requirement of evolving international social community, and adequately reflect its increasing complexity.

Simma and Alston have argued that instead of undermining the role of State practice to ascertain the legal status of human rights through customary law, more attention should be

directed to the role of general principles of law in acknowledging the legal status of a norm.[265] Even though the dominant view has a narrow understanding of this concept and restricts it to principles arising from domestic orders, we will follow the view that general principles can, on the contrary, arise directly from the international legal order.[266] This view is justified because by the aforementioned argument of completeness. Moreover, the drafters of art. 38 of the ICJ Statute justified their domestic origin by the necessity of validating general principles of law in a reliable way and not from mere speculations,[267] as these principles could ultimately lead to dispute and enforcement by the Court. Simma and Alston rely on the finding that, whereas *jus cogens* and custom presuppose a similar practice, acceptance and recognition by the international community to be qualified as such, rules of *jus cogens* are hardly ever supported by a generality of practice, because their normative content is usually prohibitive and requires abstention, which is difficult to evidence.[268] The attention therefore shifts to the element of *opinio juris* and falls back to the traditional pattern of Human Rights, (and by extension, of Core Labour standards) which is characterized by the wide recognition of these principles but poor records of State conduct. They then infer that peremptory norms "express the articulation of principles in the first instance, *ab initio* or progressively being accepted and recognized as binding and peremptory norms by the international community as a whole". General principles of law are thus the result of a process of emerging customary status, but not yet custom.

Whereas CLS seem to fit perfectly into an analogical application of this theory, we disagree with these authors that general principles of law are just a stage before the ascertainment of their status under traditional sources of law. However, we believe that these general principal of law have their own independent legal status, regardless whether they are in a process of becoming customary.[269] In our view, the statement of Simma and Alston nevertheless keeps its validity when demonstrating that some fundamental human rights are inherent in the international legal order, present *ab initio.*[270] The same acknowledgment can be made about fundamental labour rights, which are the enabling rights from which derives the rest of the international labour law and which therefore can be viewed as general principles of law, inherent to the system, present *ab initio*. This can be further confirmed by

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[265] Bruno Simma and Philip Alston, "The sources of human rights law",102.
[266] *Ibid.*
[267] *Ibid.*
[268] Bruno Simma and Philip Alston, "The sources of human rights law", 104.
[269] *Ibid.,*105.
[270] *Ibid.*

the presence in the ILO Constitution of three of the Core Labour Standards, and supporting the substance for the fourth.

We believe that these legal principles have the function of reconciling international legal regulation with the changing international social reality. This acknowledgment implies considering the international legal order as a complex system made out of functional units interacting, the combination of which allows understanding the functioning and evolution of the system.[271] Indeed, according to Bianchi, the system can be characterized by the existence of basic normative units prescribing a normative conduct of variable nature and sufficiently complete to produce various legal effects. These normative units aim at achieve various normative functions and from which ultimately new legal rules can arise.[272]

Thus, CLS incarnate values considered as desirable by the international community and capable of responding to its social requirements. These social values acquire their legal validity through their integration into State practice and processes of socialization and acculturation that ultimately shapes the legal status of the principles. As we have noted, these alternative law-making processes can also rise to more traditional law ascertaining processes, but the legal validity of the former is seen as independent from the outcome of the latter. With Core Labour standards in mind, we recall the statement of Abi Saab, that "soft law" is not a *lex imperfecta*, but rather a law in *statu nascendi*.[273]

Conclusion

The creation of international law is a process. Whereas there is evidence to support that CLS are in a process of becoming international customary norms, this status cannot yet be ascertained. However, the increasing reliance of some states on CLS through their economic agreements is significantly influenced the capacity of their standards to carry out their function of regulating the globalization process. In this respect, principles embedded in CLS have come to shape the international legal order and operate as intersticiary principles within international economic relations, operating as norms that are desirable to promote a fairer

[271] Andrea Bianchi, "Principi di diritto, Modularita funzionale e relatività normativa", 451-452.
[272] *Ibid*
[273] Georges Abi Saab, "Cours Général de droit International public", 286-287.

impact of globalization. Whereas theses principles could appear initially as *lege ferenda*, the current process of including consistent and increasingly enforceable CLS in economic instruments has in return shaped the practice of States. Whereas their legal source might be fragmented between different conventions, declarations and case law, the current practice has given a legal validity to these principles. Whereas is undisputed that these principles are promoted by industrialized States rather than developing countries, the latter still retain the necessary influence to shape their commercial partners to comply to values that they deem necessary. Moreover, recalling the argument of completeness and maturity of the international legal order, these values has also taken over other economic institution such as the IMF and the World Bank, which also increasingly shape their activities in accordance to these principles. These fundamental values, inherent to the current political culture, have an undeniable legal effect that have in turn shaped their process of law ascertainment, from normative values, to general principles of international arising directly from the international legal order. Acknowledging the completeness and maturity of the international legal order, they are derived from its natural evolution and the need to respond to the requirement of evolving international social community, and adequately reflect its increasing complexity.

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