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LABOUR STANDARDS AND INTERNATIONAL TRADE REGULATION – A NEW ERA OF ENFORCEMENT?

STANDARDY PRACY I MIĘDZYNARODOWE PRZEPISY HANDLOWE – NOWA ERA EGZEKWOWANIA PRZEPISÓW?

Summary: Although the ILO has been in existence for over a century, it is not equipped with international mechanisms for enforcement of the labour standards that it promotes. Globalization and trade liberalization have exposed a strong relationship between labour rights and trade regulation, leading to attempts to regulate labour provisions in a trade context, initially through the WTO and, more recently, through labour clauses in bilateral and regional free trade agreements (FTAs). This contribution provides a historical overview of these attempts and presents most recent developments, which reflect a new policy of the United States and the European Union to use their FTAs as a stronger instrument of labour standards enforcement.

Keywords: ILO, Labour standards, International trade regulation, Enforcement, WTO, FTAs, Labour clauses, EU-Korea FTA, Freedom of association

Streszczenie: Mimo że ILO istnieje od ponad wieku, nie jest ona wyposażona w mechanizmy międzynarodowe do egzekwowania standardów pracy, które promuje. Globalizacja i liberalizacja handlu uwidoczniły silne powiązanie między prawami dotyczącymi pracy i przepisami dotyczącymi handlu, co doprowadziło do prób uregulowania przepisów odnoszących się do pracy w kontekście handlu, początkowo przez WTO, a ostatnio na mocy klauzul dotyczących pracy w dwustronnych i regionalnych umowach o wolnym handlu (FTA). Niniejszy artykuł stanowi historyczny przegląd tych prób i przedstawia najnowsze

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opracowania, które odzwierciedlają nową politykę Stanów Zjednoczonych i Unii Europejskiej wykorzystywania swoich umów o wolnym handlu jako mocnego narzędzia do egzekwowania standardów pracy.

Słowa kluczowe: ILO, standardy pracy, międzynarodowe przepisy handlowe – egzekwowanie, WTO, umowy o wolnym handlu, klauzule dotyczące pracy, umowa o wolnym handlu podpisana między Unią Europejską i Koreą, swoboda zrzeszania się

The authors feel highly privileged to be able to make this brief contribution in honour of Professor Marek Pliszkiewicz who has for many years been our colleague, friend and mentor. We wish him much health and many years of fulfilling professional activities in the future.

INTRODUCTION

On 9 October 2021, *The Economist* published a special report on the new post-pandemic order of trade, devoting a separate section to an important development on the international scene: reinvigorated efforts by certain States to use trade policy in enforcement of labour standards[1]. In recent years, labour provisions have found their way into many free trade agreements (FTAs), in some instances becoming a permanent element thereof. However, enforcement of the ensuing obligations has been limited, even in cases where the FTAs have extended general dispute settlement mechanisms to labour clauses. This appears to be changing. As *The Economist* has noted, since 2017 the United States (US) has advocated a more 'pro-active' approach in this respect, under a scheme operating until 2020, which has resulted in investigations of labour rights in a number of countries. In parallel, the European Union (EU) has been reviewing labour clauses in its FTAs, with a view to strengthening enforcement and offering rewards (such as tariff concessions) for compliance. An interesting recent development has been the issuance in 2021 of the first report by a panel of experts established under an FTA signed by the EU, in this case, with South Korea. There have also been attempts to use generalized systems of preferences for developing countries as a stronger instrument for promoting labour rights.

This contribution provides a brief background to the relationship between labour standards and international trade, beginning first with the presentation of the origins of the debate and an overview of historical efforts to bring this issue within the scope of multilateral trade regulations, followed by highlights of the practice of including labour clauses in trade agreements on a bilateral and regional level.

[1] „The New Order of Trade", *The Economist Special Report* in *The Economist*, 9 October 2019, 8-10.

Selected examples of enforcement of labour provisions are also discussed, with a particular emphasis on the above-mentioned 2021 report of the panel of experts.

LABOUR STANDARDS AND INTERNATIONAL TRADE IN THE PRE-WTO PERIOD

Considering that the International Labour Organization (ILO), established in 1919, has been in existence for over a century, the interaction between labour standards and international trade has become an issue of meaningful debate relatively recently. The First World Economic Conference, held in 1927 under the auspices of the League of Nations, resulted in no follow-up and the matter became dormant for many years. The amendment in 1944 of the ILO's Charter, through the Declaration of Philadelphia, was a harbinger of a change in this respect. The Declaration stipulated that 'labour is not a commodity' and set out the ILO's aims and purposes in post-World War Two reality[2].

In contrast to the efficient creation of the ILO, the construction of a solid multilateral trading regime proved to be a long and arduous process. On 30 October 1947, 23 war-fatigued countries signed the General Agreement on Tariffs and Trade (GATT 1947)[3]. It was designed as a provisional framework agreement, to be incorporated into the law of the International Trade Organization (ITO), for which the constitution (known as the 'Havana Charter') was completed in 1948. The Havana Charter was a comprehensive and detailed instrument regulating various aspects of international trade, including labour standards. Its Article 7 (Fair Labour Standards) required ITO members to recognize that 'measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements', and that 'unfair labour conditions, particularly in production for export, create difficulties in international trade and, accordingly, each member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory'[4]. Article 7 obliged the ITO and its members to co-operate with the ILO.

Unfortunately, the ITO never entered into force, leaving the GATT 1947 as the main instrument of international trade regulation for almost half a century. Although the legal system of the GATT 1947 developed, in particular through the conclusion of several optional 'side agreements' at the 1979 Tokyo Round, proposals to introduce the issue of labour standards into its framework or to add a 'social clause' to its text, were never successful[5].

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[2] ILO Constitution, containing in its Annex the Declaration Concerning the Aims and Purposes of the International Labour Organization (Declaration of Philadelphia).

[3] The GATT 1947 remained binding until 31 December 1995. However, its provisions were incorporated in full into GATT 1994 and are now binding as rules of the latter.

[4] The Havana Charter for an International Trade Organization (enacted 24 March 1948, not in force).

[5] See e.g. Steve Hughes and Rorden Wilkinson, 'International Labour Standards and World Trade: No Role for the World Trade Organization', 3 *New Political Economy* (1998) 375, 375-6.

As such, the debate on the relationship between international trade and what was later to be recognized by the ILO Declaration on Fundamental Principles and Rights at Work (1998 ILO Declaration)[6] as 'core labour standards' had been ongoing well before the establishment of the World Trade Organization (WTO)[7]. It should be noted that, from a trade perspective, the focus was not so much on humanitarian concerns over workers' rights and conditions of employment but, rather, on the comparative advantage of producers in countries with low labour standards[8]. Naturally, this was a divisive issue between developed countries, where labour standards are higher, and developing countries, which from a trade perspective benefited from lower standards. To complicate matters, in the latter countries labour reforms were, in many instances, difficult or even impossible to consider.

THE WTO – NO ROOM FOR LABOUR STANDARD ENFORCEMENT?

The WTO came into being on 1 January 1995, after eight years of negotiations within the Uruguay Round (1986-1994). Although the WTO Agreement[9] was by far less comprehensive than the Havana Charter, it was hailed as an impressive achievement, extending not only to trade in goods, but also to trade in services and trade-related aspects of intellectual property rights. Its most revered feature was a novel two-tiered dispute settlement system, equipped with a *de facto* judicial

[6] The ILO Declaration on Fundamental Principles and Rights at Work (adopted 18 June 1998) sets out the following core labour standards in its para. 2: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

[7] See e.g. Jagdish Bhagwati, 'Trade Liberalisation and "Fair Trade" Demands: Addressing the Environmental and Labour Standards Issues', 18 *The World Economy* (1995) 745;Daniel E. Lee, 'Globalization and Labour Standards: A Review of Issues', 136 *International Labour Review* (1997) 173; and a number of submissions in Henner Gött (ed.), *Labour Standards in International Economic Law* (Springer 2018).

[8] For these and other reasons, developing countries are often reluctant to accept commitments relating to labour standards. A prominent example is the elimination of child labour: 'While the health safety, and welfare of working children are often put forward as the reason for implementing trade sanctions, punishing countries on the grounds of child labour practices would be grossly ineffective unless poverty and underdevelopment are addressed', Kishor Sharma, 'Labour Standards and WTO Rules', 43 *Journal of Economic Issues* (2009) 29, 39. On the effect of social clauses on the comparative advantage of developing countries and various views on their suitability, see e.g. Kofi Addo, 'The Correlation Between Labour Standards and International Trade. Which Way Forward?', 26 *Journal of World Trade* (2002)285, and by the same author Core Labour Standards and International Trade (Springer 2015); Clotilde Granger and Jean-Marc Siroen, 'Core Labour Standards in Trade Agreements: From Multilateralism to Bilateralism', 40 *Journal of World Trade* (2006) 813, 817-24; and, from a different perspective, Maayan Menashe, 'The Race to the Bottom Revisited: International Labour Law, Global Trade and Evolutionary Game Theory', 40 *Oxford Journal of Legal Studies* (2020) 53.

[9] The Marrakesh Agreement Establishing the World Trade Organization (signed 15 April 1994, entered into force 1 January 1995).

tribunal, the Appellate Body. The novelty of the WTO and its specific dispute resolution mechanism made it an attractive forum to potentially embrace many trade-related problems, including those relating to environmental protection, competition, investment, and labour standards[10].

During the Uruguay Round proposals to include a 'social clause' in WTO regulations were put forward but rejected. However, the relationship between trade and labour standards was addressed by the WTO relatively quickly after its establishment. At its first regular biennial ministerial meeting in 1996 WTO members adopted the Singapore Ministerial Declaration, which confirmed their 'commitment to the observance of internationally recognized core labour standards'. It stated further: 'We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question.' It also made clear that the ILO was 'the competent body to set and deal with these standards', noting that 'the WTO and ILO Secretariats will continue their existing collaboration'[11].

Nevertheless, the adoption of the Singapore Declaration raised expectations that the WTO would (and even should) accept a more active role in the enforcement of labour standards. Most far-reaching proposals called for an 'Agreement on Trade-Related Aspects of International Labour Standards', based on a similar concept as the WTO's Agreement on Trade-Related Intellectual Property Rights, which contains 'minimum standard' obligations incorporated from a number of intellectual property conventions[12]. Such expectations were quickly dispelled and, after the 1999 Seattle Ministerial Conference, trade and labour issues were ultimately removed from the WTO's agenda. The WTO has consistently argued that the ILO, not the WTO, is the appropriate institution to deal with labour issues.

Other proposals to bring compliance with core labour standards under the WTO umbrella have included the application of the general exceptions clause in Article XX GATT 1994 (and its counterpart, Article V of the General Agreement on Trade in Services (GATS))[13]. Article XX(b) allows WTO members to take measures which

[10] It has also been suggested that the WTO should become, by virtue of its position on the international scene and its 'constitutionalization', an 'advocate' of human rights, including those relating to labour rights, see e.g. Ernst-Ulrich Petersmann, 'The WTO Constitution and Human Rights', *3 Journal of International Economic Law* (2000) 19; Carlos M. Vázquez, 'Trade Sanctions and Human Rights – Past, Present and Future', *6 Journal of International Economic Law* (2003) 797; James Harrison, *The Human Rights Impact of the World Trade Organization* (Hart 2007).

[11] Paragraph 4 (Core Labour Standards) of the Singapore Ministerial Declaration (adopted 13 December 1996).

[12] See Hughes and Wilkinson (n 5) 382-3; Renee Chartes and Bryan Mercurio, 'A Call for an Agreement on Trade-related Aspects of Labour: Why and How the WTO Should Play a Role in Upholding Core Labor Standards', 37 *North Carolina Journal of International Law and Commercial Regulation* (2012) 665.

[13] It should also be noted that Article XX GATT 1994 envisages a specific 'labour' exception; its paragraph (e) allows WTO members to take measures 'relating to the products of prison labour'.

are 'necessary to protect human health', which – if interpreted broadly – could also encompass measures such as prohibition of child labour or trade restrictions relating to minimum working conditions. Another possible basis is found in Article XX(a), which allows the adoption of 'measures necessary to protect public morals'[14]. However, so far, no dispute relating to trade restrictions justified by non-compliance with core labour standards has been reviewed by WTO dispute settlement bodies.

In sum, unlike, for example, the relationship between trade and environment, which has been enhanced both through WTO institutions and jurisprudence, the relationship between trade and labour has not achieved a prominent position on the WTO agenda[15]. In recent years, the stalemate in WTO negotiations, marked by the failure of the Doha Development Round, as well as the paralysis of its dispute settlement system[16], has led to the WTO's losing the spark of attractiveness as an enforcement mechanism for core labour standards.

FREE TRADE AGREEMENTS – A NEW ROUTE FOR LABOUR STANDARDS ENFORCEMENT?

Paradoxically, the WTO's reluctance to deal with labour standards, as well as its weakening institutional and multilateral status, created a gap that gradually became filled by specific arrangements permitted under WTO law itself: regional (preferential) free trade agreements[17]. The past two decades have witnessed a boom in such bilateral and multiparty trade arrangements, culminating in the nascent of 'mega-regionals', which establish free trade areas (trade blocks) among major economies across continents[18]. Recent FTAs go well beyond the scope of

[14] See e.g. Thomas Cottier, 'The Implications of *EC – Seal Products* for the Protection of Core Labour Standards in WTO Law' in Gött (ed.) (n 7) 69-92; see also Chartes and Mercurio (n 12) 708-16.

[15] It should be noted, however, that on at least one occasion, labour standards were invoked in a WTO complaint in a case brought by India against the EU. India challenged, among others, 'special incentive arrangements for the protection of labour rights' in Council Regulation (EC) No. 2501/2001 of 10 December 2001, which set up a system of tariff preferences for developing countries. According to India, the conditions set forth in the Regulation violated the most-favoured-nation clause in Article I:1 GATT 1994 and were not justified by the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (known as the 'Enabling Clause'); see WTO, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* (DS 246), Appellate Body and Panel reports adopted on 20 April 2004.

[16] The WTO dispute settlement mechanism is currently in crisis, with the operation of its Appellate Body paralyzed since December 2019 because of the blocking of new judges' appointments by the United States.

[17] Such agreements are permitted for WTO members by Article XXIV GATT 1994 and Article V GATS.

[18] Examples of mega-regionals include the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (entered into force 30 December 2018); the African Continental Free Trade Area (AfCTA) (entered into force 30 May 2019); the Regional Comprehensive Economic Partnership (RCEP) (signed 15 November 2020). Social clauses in such agreements are discussed by e.g. Reingard Zimmer, 'Implications of CETA and TTIP on Social Standards' in Gött (n 7); see also Chad P. Bown, 'Mega-Regionals and the Future of the WTO', 8 Global Policy (2017) 107; Thilo Rensmann (ed.), *Mega-Regional Trade Agreements* (Springer 2017).

WTO regulations and include rules on digital trade and electronic commerce, government procurement, transparency, anticorruption, and investor-state arbitration. Most importantly, they also include environmental and labour clauses[19], covering collective bargaining rights, forced labour, child labour and employment discrimination, with reference to ILO instruments and the 1998 ILO Declaration, in particular[20]. Such agreements are equipped with their own dispute settlement procedures, which often apply also to labour provisions (in some cases labour clauses are subject to specific dispute settlement mechanisms).

The most prominent model labour provisions are those of the US and the EU[21]. The practice of the US of including labour clauses in trade agreements dates back to the North American Agreement on Labour Cooperation, signed in 1993 with Mexico and Canada[22], as a side agreement to the North American Free Trade Agreement (NAFTA). Labour provisions were included in subsequent US FTAs, since 2004 taking the form of 'Labour Chapters', which promote core labour standards contained in the 1998 ILO Declaration. The US approach is distinct in that it focuses on the enforcement of its trade partner's domestic labour laws, rather than on acceptance of international instruments (to which in many cases the US itself is not a party). The primary aim is to address competitive advantage concerns related to a trade partner's lower labour standards. Therefore, breaches of the US FTAs are limited to cases where the failure to enforce domestic labour laws is done 'in a manner affecting trade between the parties'. The US model stands out in that labour disputes are subject to the respective FTA's general dispute settlement mechanisms (sometimes with a limit on the amount of compensation).

[19] On the nascent of labour clauses in FTAs see e.g. Roman Grynberg and Veniana Qalo, 'Labour Standards in US and EU Preferential Trading Arrangements', 40 *Journal of World Trade* (2006) 619; see also James Harrison, 'The Labour Rights Agenda in Free Trade Agreements', 20 *Journal of World Investment and Trade* (2019) 705; and *Handbook on Assessment of Labour Provisions in Trade and Investment Agreements* (ILO 2017).

[20] For an analysis of the different ways in which ILO conventions and the 1998 ILO Declaration are referenced in FTAs (reaffirmation, definition of labour provisions, incorporation) see Jordi Agusti-Panareda, Franz Ch. Ebert, Desiree LeClercq, 'ILO Labor Standards and Trade Agreements: A Case for Consistency', 36 *Comparative Labour Law and Policy Journal* (2015) 347, 356-67. The authors note that although the increase in references to ILO instruments is 'a first step toward greater coherence between trade agreements and the ILO's labour standards system', the fact that most such references are to the general ILO 1998 Declaration 'may lead to greater legal uncertainty' and 'an inconsistent application of the same labour standards' by the parties or dispute settlement bodies, ibid. 379.

[21] Also Canada, New Zealand, Chile and Japan use such clauses in their FTAs, see Agusti-Panareda and others (n 20); see also *Labour Provisions in G7 Trade Agreements: A Comparative Perspective* (ILO 2019) and *Social Dimensions of Free Trade Agreements* (ILO 2nd ed. 2015).

[22] North American Agreement on Labour Cooperation with Mexico and Canada (entered into force 1 January 1994); for a review of its provisions, as well as the labour clauses in other early US FTAs, see Grynberg and Qalo (n 19) 626ff.; see also Phillip Paiement, 'Leveraging Trade Agreements for Labour Law Enforcement: Drawing Lessons from the US-Guatemala CAFTA Dispute', 49 *Georgetown Journal of International Law* (2018) 675, 680-83; and Harrison (n 19) 715-20.

By the end of 2020 the US had filed complaints relating to labour commitments under several of its FTAs[23], most of which resulted in ministerial and informal consultations, with only one case proceeding to arbitration. The latter was a dispute initiated in 2010 under the Dominican Republic – Central America Free Trade Agreement (CAFTA-DR)[24]. The US alleged that Guatemala had breached its enforcement obligations with respect to the freedom of association, by failing to investigate violent actions against labour organizers and not effectively enforcing court decisions protecting labour rights. The work of the arbitration panel was suspended in 2013 (when the parties agreed on an 'enforcement plan') but resumed a year later. In its final decision, issued on 14 June 2017, the panel found that although in certain instances Guatemala had not enforced its labour laws, the US had not demonstrated, as it was required under the CAFTA-DR, that such failure had been 'through a sustained course of action or inaction' and 'in a manner affecting trade between the parties'[25]. The requirement that a breach must be such as to 'affect trade' under the FTA proved a difficult hurdle to surpass.

An important step forward, and possibly a harbinger of a new model in US practice of enforcement of domestic labour provisions, was the entry into force in 2020 of the successor to NAFTA, the US-Mexico-Canada Agreement (USMCA)[26]. It established two innovative bilateral mechanisms (applying to Mexico and Canada, respectively) to ensure 'remediation' in case of denial of workers' rights in listed facilities, each called the 'Facility-Specific Rapid Response Labour Mechanism'[27]. In May 2021, the US triggered its first proceedings under this mechanism, challenging a collective bargaining agreement at an automotive plant in Silao, Mexico. The US scored a 'rapid' indeed win and in August 2021, as a result of the remediation proceedings, the workers at the plant were able to vote on and ultimately rejected the contested collective agreement[28].

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[23] See e.g. Labour Enforcement Issues in U.S. FTAs, Congressional Research Service, 18 December 2020.

[24] The initial version of CAFTA was signed on 28 May 2004; the renamed version on 5 August 2004; it entered into force successively for each acceding state (most recently, for Costa Rica on 23 December 2008).

[25] *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, Final Report (14 June 2017); for a discussion of the decision see Paiement (n 22), 683-92; and Tequila J. Brooks, 'U.S.-Guatemala Arbitration Panel Clarifies Effective Enforcement Under Labor Provisions of Free Trade Agreement', 4 *International Labor Rights Case Law* (2018), 45-51.

[26] US-Mexico-Canada Agreement (entered into force on 1 July 2020). It is also interesting to note that the USCMA rules of origin with respect to vehicles refer in Article 7.3 of Chapter 4 to an 'average production wage of at least $16 per hour' in the calculation of high-wage material and manufacturing expenditures, and high-wage assembly expenditures. Since the US FTA with Jordan, the US FTAs have often contained obligations for the parties to enact legislation setting forth a minimum wage; see Grynberg and Qalo (n 19) 630 ff.

[27] The respective mechanisms are found in Annex 3-A (United States and Mexico) and Annex 3-B (United States and Canada); see also Maria A. Corvaglia, 'Labour Right Protection and Its Enforcement under the USCMA: Insights from a Comparative Perspective', *World Trade Review* (published online 29 July 2021).

[28] 'Ambassador Tai, Secretary Walsh Applaud Successful First Course of Remediation under USCMA's Rapid Response Mechanism, Office of the United States Trade Representative', 22 September 2021.

The approach of the EU (as well as New Zealand and Chile) differs from that of the US and focuses on cooperation and dialogue, rather than sanctions for non-implementation. EU practice centres on the reaffirmation by the parties of their obligations as ILO members and their commitments under the 1998 ILO Declaration[29].

The first labour clause in an EU FTA appeared in the agreement signed in 1999 with South Africa, while a reference to core labour standards was made, for the first time, in the agreement signed in 2002 with Chile[30]. The currently used model dates back to the FTA signed in 2009 with South Korea (Korea) (EU-Korea FTA)[31]. In contrast to US practice, environmental and labour provisions are contained in one chapter, on 'Trade and Sustainable Development' (TSD chapter)[32], reflecting the assumption that sustainable development rests on the interaction between economic development, social development and environmental protection. Implementation of TSD chapters is overseen by a joint committee (Committee on Trade and Sustainable Development, TSD Committee) composed of representatives of the parties to the FTA. The 'institutional mechanism' is supported by a 'civil society dialogue mechanism', the basic pillars of which are 'domestic advisory groups' established by each party (composed of representatives of business, trade unions and NGOs), with the task of advising on the implementation of the FTA.

In contrast to the US model, labour provisions in EU FTAs are not subject to general dispute settlement rules, nor are sanctions for non-compliance envisaged[33]. Instead, chapter-specific rules apply, providing for a 'soft' model of dispute settlement. For example, in the EU-Korea FTA Article 13.16 (Dispute Settlement) excludes the application to TSD chapter disputes of any procedures other than those listed in Articles 13.14 (Government Consultations) and 13.15 (Panel of

[29] Having compared the the US and EU models, Harrison characterizes the major difference as follows: 'Whereas the EU model contains an obligation to monitor and review the sustainability (including labour) impacts of the agreement itself, the US model concentrates on reporting in relation to relevant labour issues within the parties to the agreement. The US model thus focuses on reaching out to address labour issues in the domestic systems of its trade partners. The EU model, on the other hand, centres – at least in theory – on reaching into the trade agreement to ascertain how the new trading relationship will affect conditions for workers, together with broader social and environmental impacts, once the trade agreement comes into force', Harrison (n 19) 716.

[30] For an overview of EU practice with respect to labour provisions see e.g. James Harrison, Mirela Barbu, Liam Campling, Franz Ch. Ebert, Deborah Martens, Axel Marx, Jan Orbie, Ben Richardson, Adrian Smith, 'Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda', 18 *World Trade Review* (2019) 635, 638-42. Most recently, the EU has negotiated an 'Investment and sustainable development' chapter in the EU-China Comprehensive Agreement on Investment (concluded 'in principle' in December 2020).

[31] Free Trade Agreement between the EU and Its Member States, of the One Part, and of the Republic of Korea, of the Other Part (entered into force 13 December 2015) OJ L 127, 6-1343.

[32] However, chapters on 'Trade and Sustainable Development' and 'Trade and Labour', respectively, were singled out in the EU – Canada Comprehensive and Economic Trade Agreement (CETA) (signed 30 October 2016, provisionally applied 21 September 2017).

[33] On this basis, the ILO has distinguished between a 'conditional' and 'promotional' approach to enforcement; see *Social Dimensions* (n 21) chapters 2 and 3.

Experts). In further affirmation of a 'soft' approach, the two latter provisions do not even use the term 'dispute' but instead refer to 'any matter of mutual interest arising under the Chapter'. Should such matter arise, a party may request consultations with the other party, in the course of which the parties 'shall make every attempt to arrive at a mutually satisfactory resolution'. A party may request that the TSD Committee be convened, in which case advice may be sought of either or both Domestic Advisory Groups (each party may seek such advice from its own Group). If a party considers that consultations have failed and 90 days have passed since the consultation request, it may request the establishment of a Panel of Experts, from a list of 15 experts agreed upon by the parties upon the entry of the FTA. The Panel of Experts should issue a report within 90 days of the last expert being selected. Most importantly, the parties are not under an obligation to implement the report; according to Article 13.15.2, they 'shall make their best efforts to accommodate advice or recommendations of the panel'.

It should be noted that the ILO supports efforts to regulate labour standards through FTAs, without advocating a preference for any of the above models, and has acknowledged its role to assist members in this respect[34]. It has expressed the view that its 'role in RTAs is grounded in its constitutional mandate to promote ratification of and compliance with international labour standards, as well as in its provision of technical assistance and development cooperation'[35]. This, inversely, is reflected in the respective labour provisions in FTAs, which assign various functions to the ILO and stipulate cooperative arrangements with the Organization[36].

THE EU-KOREA FTA LABOUR DISPUTE

On 17 December 2018 the EU requested consultations under the EU-Korea FTA regarding two sets of issues: the alleged violation by several provisions of South Korea's Trade Union and Labour Relations Adjustment Act (TULRAA) of the first sentence of Article 13.4.3 of the EU-Korea FTA; and, second, the alleged violation by Korea of the last sentence of Article 13.4.3 for failure to ratify four core ILO conventions[37]. With respect to the first set of issues, the EU alleged the incom-

[34] See e.g. Article II.A of the 2008 ILO Declaration on Social Justice for a Fair Globalization (adopted 10 June 2008), which refers to the promotion of international labour standards within the framework of bilateral or multilateral agreements; the ILO website lists publications on this topic and contains a section with the texts of US, EU and Canadian FTAs.

[35] *Labour Provisions in G7 Agreements* (n 21) 37.

[36] Various FTA clauses relating to the ILO are discussed by Agusti-Panareda and others (n 21) 367-78.

[37] Article 13.4.3 provides: 'The Parties, 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 (…) commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely: (a) freedom of association and the effective recognition

patibility with freedom under association under Article 13.4.3 of, in particular, the TULRAA's narrow definition of 'worker' (which excluded some categories of self-employed persons); its provisions precluding organizations where persons other than 'workers' could join from being considered as trade unions; the requirement that only 'workers' could be elected as trade union officials; and the 'discretionary certification procedure' for the establishment of trade unions, which deprived certain organizations of trade union status.

The Panel of Experts was formally established on 30 December 2019 and issued its report on 20 January 2021[38]. Due to the nature of this contribution, the Panel's conclusions can be summarized here only briefly.

At the outset, Korea raised a jurisdictional objection that the matter was not one 'arising under' the TSD Chapter because it did not 'affect trade-related aspects of labour', as Korea argued was required by the provision setting out the TSD Chapter's scope, Article 13.2.1[39]. The Panel pointed out that Article 13.2.1 began with the clause '[e]xcept as otherwise provided in this Chapter' and, as such, the 'clear and unambiguous meaning of this paragraph' left no room for doubt that the provisions of Article 13.4.3 fell within this exception; a different interpretation would have been incompatible with the explicit commitment in Article 13.4.3 to enforce ILO conventions. The Panel also rejected Korea's supporting jurisdictional argument that the EU's complaint constituted a proposal to harmonize labour standards, in contravention to Article 13.1.3[40]; the Panel could not find any indication that the EU was so proposing.

In this context, the Panel also distinguished the reviewed matter from the above-mentioned dispute under CAFTA-DR (see section 4 above). Korea invoked the dispute because the wording of Article 16 of the CAFTA-DR was very similar to that of Article 13.7.1 of the EU-Korea FTA, with the latter providing that '[a] Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, in a manner af-

of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. The Parties reaffirm the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the EU have ratified respectively. The Parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions, as well as other Conventions that are classified as "up-to-date" by the ILO'.

[38] Panel of Experts Proceeding Constituted under Article 13.5 of the Eu-Korea Free Trade Agreement, Report (20 January 2021).

[39] Article 13.1.1 provides: 'Except as otherwise provided in this Chapter, this Chapter applies to measures adopted or maintained by the Parties affecting trade-related aspects of labour and environmental issues in the context of Article 13.1.1 and 13.1.2.' (footnote omitted)

[40] Article 13.1.3 provides, among others, that '[t]he Parties recognize that it is not their intention in this Chapter to harmonize the labour or environment standards of the Parties'. It should also be noted that Article 13.3 recognizes the right of each Party to establish its own levels of environmental and labour protection, and to adopt or modify accordingly its relevant laws or policies.

fecting trade or investment between the Parties'. As has been mentioned, in the CAFTA-DR dispute the US failed to demonstrate that Guatemala's breach satisfied these criteria. In addressing Korea's defence, the Panel emphasized that the EU was not alleging, as the US had done with respect to Guatemala, that Korea had failed to enforce its domestic labour laws; as such, the invoked decision was not relevant to the current matter. Interestingly, the Panel took this opportunity to address the differences between the two agreements, pointing out that the CAFTA-DR 'does not have the same contextual setting of sustainable development as the EU-Korea FTA, nor does it refer to the range of multilateral and international agreements and declarations which the Parties have included in the EU-Korea FTA'[41].

With respect to substantive issues, the Panel considered the elements of Article 13.4.3, first focusing on the requirement to act 'in accordance with the obligations deriving from membership of the ILO'. The Panel interpreted this term broadly, as including the obligation to ensure freedom of association under ILO conventions (even though Korea had not yet acceded to these) and in light of rulings of the ILO Committee on Freedom of Association. The Panel found that although the 1998 ILO Declaration was not binding as such, Korea's obligations derived from Article 13.4.3, taken as a whole and binding on the parties. The Panel also clarified various terms used in this provision, such as 'commit to', 'respecting', 'promoting', and 'realizing', as well as the term 'principles concerning the fundamental rights'. In light of Korea's slow progress in ratifying several conventions (including four core ILO conventions), it was particularly important to determine what was covered by the notion of 'commit to'. The Panel disagreed with Korea that this simply implied an 'aspiration' and ruled that it had a meaning tantamount to a 'legally binding obligation of commitment'.

The Panel thus ruled that the EU-Korea FTA did indeed create an obligation to 'respect, promote and realise' all terms of the ILO Constitution. With respect to the particular claims, while being careful to stress that it was not interpreting the ILO Constitution (an exclusive prerogative of the International Court of Justice), but solely the obligations under the US-Korea FTA, the Panel ruled that the TULRAA had violated, in all alleged respects, the principles of freedom of association, which Korea was obliged to respect, promote and realize by Article 13.4.3. The Panel found that the TULRAA lacked protection for the self-employed and did not introduce any substantial safeguards for the protection of union members from discriminatory dismissal; moreover, freedom of association had been violated by requiring trade union officials to be selected from union members and also by the rules on union decertification.

[41] Report (n 38), para. 93.

In a somewhat unexpected bow to Korea, the Panel dismissed the EU's claim that Korea had not made 'continued and sustained efforts' towards ratifying core ILO conventions, in violation of the last sentence of Article 13.4.3. Despite Korea's decade-long delay in the ratification of four ILO conventions, the Panel could not find a breach of this obligation; however, it assessed Korea's efforts to ratify these as 'less than optimal'.

CONCLUDING REMARKS

The lack of proper enforcement mechanisms in EU FTAs have precipitated views that TSD chapters 'seem incapable of having any significant effect'[42] and resulted in calls on the EU, especially from trade unions and civil society organizations[43], to redress the weaknesses of its 'soft' model. Such proposals have, so far, been treated cautiously by the EU[44]. Against this background, the Panel's ruling may have an effect of providing more dynamism to the hitherto rather dormant mechanism. As the EU Commissioner for Trade has asserted, '[t]his panel ruling shows the effectiveness of our cooperation-based approach to trade and sustainable development. (…) [T]he panel of experts process led to concrete actions by Korea'[45].

It may well be that the Panel's ruling, and the EU and US tightening stands on enforcement, will give the long-sought impetus to labour standard enforcement. The 'softness' of the EU model may have an advantage over binding arbitrations in US FTAs, in that it reduces the dangers that frequent resort to dispute settlement could lead to legal uncertainty and fragmentation of international labour rules[46]. However, unlike, for example, international investment law where this phenomenon has already occurred, in the case of labour standards the existence of the ILO may serve as a safeguard or 'harmonizing umbrella', possibly avoiding such fragmentation. Because of this the EU model could well prove more attractive than its US counterpart, as it allows for more dialogue and flexibility. Hopefully, the near future will show whether this optimism is justified.

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[42] Harrison (n 19) 714.

[43] On recent efforts to reform see Harrison and others (n 30) 647-57. There have also been alternative proposals, such as giving individuals the right to complaint, see Henner Gött, 'An Individual Labour Complaint Procedure for Workers, Trade Unions, Employers and NGOs in Future Free Trade Agreements' in Gött (ed.) (n 7).

[44] This 'soft' dispute settlement approach has led to accusations that there may be a lack of political will on the EU's part to 'prioritise action on labour issues'; see Harrison (n 19) 721-22.

[45] *Panel of experts confirms Republic of Korea is in breach of labour commitments under our trade agreement*, European Commission Directorate General for Trade, 25 January 2021.

[46] As some authors have cautioned, '[a]ny legal uncertainty, which may arise through an incoherent or fragmented application, is all the more costly in trade agreements that (…) are increasingly linking their labour standards commitment to dispute settlement mechanisms and possible sanctions', Agusti-Panareda and others (n 21) 380.

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