Articles

RESURGENCE OF SOCIAL CLAUSE?: A CRITICAL ANALYSIS OF LABOR PROVISIONS IN RTAS IN THE ASIA-PACIFIC REGION

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ABSTRACT

The discussion on the social clause, which repeatedly took place under The General Agreement on Tariffs and Trade/World Trade Organization (hereinafter "WTO") (GATT/WTO), was finally settled in 1996 by the WTO Singapore Ministerial Declaration, which consigned the International Labour Organization (hereinafter "ILO") to deal with core labor standards. The 1998 Declaration on Fundamental Principles and Rights at Work and Its Follow-up (hereinafter "the Declaration") commissioned the ILO members to respect, promote and realize the four core labor rights and denied the use of trade sanctions to enforce them. However, more and more regional trade agreements (hereinafter "RTAs") came to refer to the Declaration and oblige parties to secure the core labor rights. This may be called the resurgence of the social clause. This paper analyzes this treaty practice in the Asia-Pacific region, focusing on the domestic labor law reform of Korea, Vietnam and Japan under their RTAs with the US and the EU. Korea and Vietnam conducted their labor law reform by implementing their treaty obligation to respect, promote and realize the freedom of association under the Declaration which was incorporated in their RTAs with the US and the EU. Japan

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voluntarily conducted its labor law reform and ratified the ILO Convention No.105, but the reference to the core ILO Conventions under the Japan–EU Economic Partnership Agreement (EPA) put political pressure to conduct the reform. Now that these countries ratified the core ILO Conventions, the ILO will monitor their implementation, but the RTAs will also monitor their implementation in parallel with the ILO.

KEYWORDS: *social clause, regional trade agreements (RTAs), trade and sustainable development (TSD), ILO*

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I. INTRODUCTION: RESURGENCE OF THE SOCIAL CLAUSE

Discussion concerning the so-called "social clause"[1] took place under the General Agreement on Tariffs and Trade/World Trade Organization (hereinafter "WTO") (GATT/WTO),[2] and was finally settled in 1996 by the WTO Singapore Ministerial Declaration paragraph 4, which reads:

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

[1] A social clause is a legal provision in a trade agreement aimed at removing the most extreme forms of labour exploitation in exporting countries by allowing importing countries to take trade measures against exporting countries which fail to observe a set of internationally agreed minimum labour standards. *See* Hoe Lim, *The Social Clause: Issues and Challenges*, https://training.itcilo.org/actrav_cdrom1/english/global/guide/hoelim.htm (last visited Jan. 20, 2024).

[2] *See, e.g.*, Steve Charnovitz, *The Influence of International Labour Standards on the World Trading Regime: A Historical Overview*, 126(5) INT'L LABOUR REV. 565, 575 (1987).

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Secretariats will continue their existing collaboration.[3]

The International Labour Organization (hereinafter "ILO") assumed this consignment by the WTO in 1998 by adopting the Declaration on Fundamental Principles and Rights at Work and its Follow-up (hereinafter "the Declaration").[4] On the one hand, the Declaration declared that all ILO Members have an obligation to respect, promote and realize the principles concerning the four (five after the 2022 Amendment[5]) fundamental labor rights, namely, (1) freedom of association and the effective recognition of the right to collective bargaining, (2) the elimination of all forms of forced or compulsory labor, (3) the effective abolition of child labor, (4) the elimination of discrimination in respect of employment and occupation, and (5) a safe and healthy working environment.[6]

On the other hand, the Declaration denied the use of trade sanctions to enforce these fundamental labor rights by stressing that labor standards should not be used for protectionist trade purposes.[7] Instead, the Declaration introduced "a promotional follow-up", consisting of annual follow-up concerning non-ratified fundamental Conventions and global report on fundamental principles and rights at work.[8]

Accordingly, Members of the ILO committed themselves to respect, promote and realize the principles concerning the four (five after the 2022 amendment) fundamental labor rights, regardless of whether they ratified the corresponding eight (ten after the 2022 amendment) ILO Conventions (see Table 1).

[3] World Trade Organization [hereinafter WTO], Singapore WTO Ministerial 1996: Ministerial Declaration, ¶ 4, WTO Doc. WT/MIN(96)/DEC, 36 ILM 218 (1996) [hereinafter Singapore Ministerial Declaration].

[4] INT'L LABOUR ORG. [hereinafter ILO], ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK AND ITS FOLLOW-UP 6 (2022), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/normativeinstrument/wcms_716594.pdf.

[5] On 10 June 2022, the International Labour Conference adopted a resolution amending the Declaration to encompass "a safe and healthy working environment". *See* ILO, *Resolution on the Inclusion of a Safe and Healthy Working Environment in the ILO's Framework of Fundamental Principles and Rights at Work*, at 1-2, ILC.110/Resolution I (June 10, 2022).

[6] ILO, *supra* note 4, at 9.

[7] *Id.* at 10.

[8] *Id.* at 12-13.

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TABLE 1: Fundamental Principles and Rights at Work and the Corresponding ILO Conventions

(a)	Freedom of association	No.87 (1948); No.98 (1951)
(b)	Elimination of forced labor	No.29 (1930); No.105 (1957)
(c)	Abolition of child labor	No.138 (1973); No.182 (1999)
(d)	Elimination of discrimination	No.100 (1951); No.111 (1958)
(e)	A safe and healthy working environment	No.155 (1981); No.187 (2006)

While the Declaration settled the discussion on the social clause by consigning the ILO to commit its Members to respect, promote and realize the fundamental labor rights, and monitoring them through the promotional follow-up, more and more regional trade agreements (hereinafter "RTA") came to refer to the Declaration and oblige parties to implement the fundamental labor rights. This phenomenon may be called a resurgence of the social clause. The US took the lead in the resurgence since the early 2000s through its Free Trade Agreements (hereinafter "FTA") which referred to the Declaration as a baseline reference for labor standards.[9] It must be noted that labor provisions[10] of the US FTAs can be dated further back to the North American Agreement on Labor Cooperation of 1994 that provided for implementation and enforcement of domestic labor laws.[11] The EU followed suit, by referring to the Declaration in Trade and Sustainable Development (hereinafter "TSD") chapters of its FTAs/Economic Partnership Agreements (hereinafter "EPA")[12] since the EU–Korea FTA of 2011.[13]

[9] *See, e.g.*, J.B. Velut et al., *Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements*, THE LONDON SCH. OF ECON. & POL. SCI. 17 (2022), https://www.lse.ac.uk/business/consulting/assets/documents/TSD-Final-Report-Feb-2022.pdf.

[10] The term "labor provisions" is broadly defined as "a provision that explicitly refers to labour, social, development, and human rights considerations, which may have an impact on the rights, functioning, treatment, and well-being of a country's labour force". *See* Gabrielle Marceau et al., *The Evolution of Labour Provisions in Regional Trade Agreements*, 57(3) J. WORLD TRADE 361, 364 (2023). Besides the direct and indirect references to the Declaration, which is the subject matter of this paper, "labor provisions" include reference to labor standards and labor laws in preambular clauses, obligations regulating domestic labor laws, and general exceptions clause for trade in goods. *See id*. at 365.

[11] *See, e.g.*, *id.* at 374-77.

[12] *See id*. at 383-85. Before inserting Trade and Sustainable Development Chapters in its Free Trade Agreements (FTAs)/Economic Partnership Agreements [hereinafter EPAs], the EU has included labor provisions in its unilateral Generalized System of Preferences (GSP) with developing countries since the mid-1990s, first through a sanctioning mechanism (since 1995) and then through special incentives for countries complying with the ILO core labor standards (since 1999). *See* James Harrison et al., *Labour Standards Provisions in EU Free Trade Agreements: Reflections on The European Commission's Reform Agenda*, 18(4) WORLD TRADE REV. 635, 638-39 (2019).

[13] EU–South Korea Free Trade Agreement, Eur.-S. Kor, Oct. 6, 2010, 3391-95 U.N.T.S. [hereinafter EU–Korea FTA]. In this paper, the regional trade agreements (RTAs) are referred to with their years

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There are two types of resurgence of the social clause, namely the reference to the Declaration in RTAs. First is a direct reference to the Declaration, and the second is an indirect one, where reference is made to the ILO Conventions corresponding to the four (five) fundamental labor standards of the Declaration.[14] While the US has never adopted the second type of resurgence, the EU has consistently been adopting it, whereby the Parties are encouraged or mandated to ratify the ILO Conventions corresponding to the four (five) fundamental labor standards of the Declaration (see Table 2).

TABLE 2: Two Types of Resurgence of the Social Clause in the RTAs of the US and the EU

	US RTAs	EU RTAs
Direct reference to the Declaration	Yes	Yes
Indirect reference to the Declaration	No	Yes

These two types of the resurgence of social clauses result in two different sets of coordination issues between the ILO and RTAs. The first type of the resurgence of the social clause, namely the direct reference to the Declaration in RTAs, has resulted in a parallel track of implementing/monitoring/enforcing fundamental labor standards, namely the ILO-centered track consisting of the Declaration and its promotional follow-up and the RTA track consisting of the reference to the Declaration in RTAs and their implementation/monitoring/enforcement mechanisms under the RTAs. This raises the issue of coordination between the two tracks. Two types of coordination are needed, namely, procedural coordination and substantive coordination. The former is about the coordination of the two mechanisms of implementation/monitoring/enforcement. Coordination is especially difficult when the RTA track is equipped with a dispute settlement mechanism of RTAs with trade sanctions, as such a mechanism might override the promotional follow-up mechanism of the ILO under the Declaration. The latter is about the coordination of substantive interpretations of the fundamental labor rights by the two mechanisms. In this case, the lack of a formal coordination mechanism between the two tracks might result in the fragmentation of interpretations of the fundamental labor rights between the two tracks and among the RTAs. Coordination issues in all of these cases might bring about serious consequences which might undermine the legitimacy and effectiveness of the first track, namely the Declaration, as well as those of the second track, namely the resurgent

of entry into force.

[14] *See* Marceau et al., *supra* note 10, at 386-87.

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social clauses of RTAs.

The second type of resurgence of social clauses results from the reference to the ILO Conventions corresponding to the fundamental labor standards of the Declaration under the RTAs. This phenomenon only started in the early 2010s and is driven by the EU, European Free Trade Association (EFTA) and the UK.[15] In this case, the coordination issue is about the coordination between soft and promotional nature of the ratification of the ILO Conventions under the ILO and the provisions of the RTAs which encourages or mandates the ratification of the ILO Conventions. When the latter mandates the ratification of the Conventions, the Parties to such RTAs assume legal obligation to ratify them, while they do not assume such obligation under the ILO. On the other hand, when the RTAs encourage the ratification of the ILO Conventions, the Parties may decide whether to ratify them or not, and the ratification in such cases is a voluntary act of the Party. In this case, ratification does not entail a coordination issue between the ILO track and the RTA track.

This paper will deal with the coordination issues caused by the social clauses of RTAs, focusing on the direct and indirect references to the Declaration in RTAs of the Asia-Pacific region. Countries in the Asia-Pacific region are latecomers of such treaty practice. With the exception of Korea, most countries in the region did not provide for direct or indirect reference to the Declaration in RTAs until recently.[16] However, by concluding RTAs with the US and the EU, they accepted provisions with direct and indirect reference to the Declaration. What types of obligations did they accept? What were the consequences of the acceptance? How did they tackle the coordination issues accompanied by the acceptance? This paper will take up three countries in the region, namely, Korea, Vietnam and Japan, and their experience with their RTAs with the US and the EU, and analyze these issues. Section 2 will be devoted to the country case study. A brief conclusion will end the analysis.

II. COUNTRY CASE STUDIES: KOREA, VIETNAM AND JAPAN

Before conducting the case study of the three countries, we should check their ratification status of the fundamental ILO Conventions (see Table 3).

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[15] *See id*. at 386.

[16] *See* Japan–Philippines Economic Partnership Agreement, Japan-Phil., art. 103.1, Sept. 9, 2006, https://www.mofa.go.jp/region/asia-paci/philippine/epa0609/main.pdf. The Article provides that "each party shall strive to ensure that it does not waive or 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 Area." But it does not refer directly or indirectly to the Declaration. Other EPAs of Japan, with the exception of the Comprehensive and Progressive Agreement of the Trans-Pacific Partnership (CPTPP) and the Japan–EU EPA, do not refer to international labor rights or the Declaration.

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TABLE 3: Fundamental ILO Conventions: Ratification Status

	C087	C098	C029	C105	C100	C111	C138	C182	C155	C187
US	Not yet	Not yet	Not yet	1991	Not yet	Not yet	Not yet	1999	Not yet	Not yet
France	1951	1951	1937	1969	1953	1981	1999	2001	Not yet	2014
Korea	*2021*	*2021*	*2021*	Not yet	1997	1998	1999	2001	2008	2008
Vietnam	Not yet	*2019*	2007	*2020*	1997	1997	2003	2000	1994	2014
Japan	1965	1953	1932	*2022*	1967	Not yet	2000	2001	Not yet	2007
China	Not yet	Not yet	2022	2022	1990	2006	1999	2002	2008	Not yet
Total Ratifi-cations	157	168	180	178	174	175	175	187	75	58

Table 3 shows us interesting characteristics of the ratification status of Korea, Vietnam and Japan, as well as that of the US and France, the latter representing the EU. First, it is noteworthy that Korea, Vietnam and Japan recently ratified several fundamental ILO Conventions (see italics in Table 3). As will be shown in the following subsections, at least partly, it was the result of the social clauses under the RTAs with the US and the EU. Secondly, the US has ratified only two fundamental ILO Conventions, namely Convention 105 on the elimination of forced labor and Convention 182 on the abolition of worst forms of child labor. However, by referring to the Declaration in its FTAs with other countries including Korea, Vietnam and Japan, the US can oblige them to respect, promote and realize the principles concerning the four fundamental labor rights embodied in the fundamental ILO Conventions, regardless of whether they ratified them.[17] Thirdly, France, representing the EU, has ratified almost all the fundamental ILO Conventions. This means that the EU may impose a quasi-unilateral obligation on the parties of its RTAs to respect, promote and realize the principles concerning the four fundamental labor rights and ratify the

[17] Alston pointed out that "[t]he United States, . . . , which has ratified only two of the eight core conventions, not including No.100, is bound only by these undefined and supposedly content-free 'principles'". *See* Philip Alston, '*Core Labour Standards' and the Transformation of the International Labour Rights Regime*, 15(3) EUR. J. INT'L L. 457, 519 (2004).

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corresponding fundamental ILO Conventions.

A. Korean Experience with KORUS FTA (2012, as Amended 2019) and the Korea–EU FTA (2011)

Korea assumed obligations to respect fundamental labor rights as embodied in the Declaration and the fundamental ILO Conventions by its FTAs with the US and the EU. Article 19.2 of the U.S.–Korea FTA (hereinafter "KORUS FTA") makes a direct reference to the Declaration, as follows:

> ARTICLE 19.2: FUNDAMENTAL LABOR RIGHTS
> 1. Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998) (ILO Declaration):
> (a) freedom of association;
> (b) the effective recognition of the right to collective bargaining;
> (c) the elimination of all forms of compulsory or forced labor;
> (d) the effective abolition of child labor and, for purposes of this Agreement, a prohibition on the worst forms of child labor; and
> (e) the elimination of discrimination in respect of employment and occupation.

For the purpose of securing compliance with the obligation under Article 19.2, Article 19.7 provides for a labor consultation between the parties, followed by a consultation by the Labor Affairs Council (Article 19.5) and, finally, the dispute settlement procedure of the Agreement (Chapter 22).

> ARTICLE 19.7 LABOR CONSULTATIONS
> 1. A Party may request consultations with the other Party regarding any matter arising under this Chapter by delivering a written request to the contact point the other Party has designated under Article 19.5.3. . . .
> 2. The Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter and may seek advice or assistance from any person or body they consider appropriate.
> 3. If the consultations fail to resolve the matter, either Party may request that the Council be convened to consider the matter by delivering a written request to the contact point of the other Party. The Council shall convene promptly and endeavor to resolve the matter expeditiously, including, where appropriate, by consulting governmental or other experts and having recourse to such

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> procedures as good offices, conciliations, or mediation.
> 4. If the Parties have failed to resolve the matter within 60 days of the delivery of a request for consultations under paragraph 1, the complaining Party may request consultations under Article 22.7 (Consultations) or refer the matter to the Joint Committee pursuant to Article 22.8 (Referral to the Joint Committee) and, as provided in Chapter Twenty-Two (Institutional Provisions and Dispute Settlement), thereafter have recourse to the other provisions of that Chapter.

The Korea–EU FTA provides for both direct reference to the Declaration and indirect reference to the Declaration. Article 13.4.3 first sentence provides a direct reference to the Declaration, as follows:

> Article 13.4: Multilateral labour standards and agreements
> 3. 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 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 last sentence of Article 13.4.3 provides for an indirect reference to the Declaration, as follows:

> The Parties 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.

So as to secure compliance with these obligations, Article 13.14 provides for consultation between the parties, followed by consideration in the Committee on Trade and Sustainable Development (Art.13.14.3), and by the examination by a Panel of Experts, which is expected to issue a report within 90 days of the last expert being selected (Article 13.15). In contrast to the KORUS FTA, the Korea–EU FTA denies the availability of the general dispute settlement procedure of the Agreement (Article 13.16), and the Panel of Experts is the final stage for the settlement of disputes on labor-related issues.

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> Article 13.14: Government consultations
> 1. A Party may request consultations with the other Party regarding any matter of mutual interest arising under this Chapter . . . . Consultations shall commence promptly after a Party delivers a request for consultations.
> 2. The Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter. . . .
> 3. If a Party considers that the matter needs further discussion, that Party may request that the Committee on Trade and Sustainable Development be convened to consider the matter by delivering a written request to the contact point of the other Party. The Committee shall convene promptly and endeavor to agree on a resolution of the matter. . . .
>
> Article 13.15: Panel of experts
> 1. Unless the Parties otherwise agree, a Party may, 90 days after the delivery of a request for consultations under Article 13.14.1, request that a Panel of Experts be convened to examine the matter that has not been satisfactorily addressed through government consultations. The parties can make submissions to the Panel of Experts. The Panel of Experts should seek information and advice from either Party, the Domestic Advisory Group(s) or international oraganisations as set out in Article 13.14, as it deems appropriate. The Panel of Experts shall be convened within two months of a party's request.
> 2. The Panel of Experts . . . shall provide its expertise in implementing this Chapter. Unless the Parties otherwise agree, the Panel of Experts shall, within 90 days of the last expert being selected, present to the Parties a report. The Parties shall make their best efforts to accommodate advice or recommendations of the Panel of Experts on the implementation of this Chapter. . . .
>
> Article 13.16: Dispute settlement
> For any matter arising under this Chapter, the Parties shall only have recourse to the procedures provided for in Articles 13.14 and 13.15.

So far, there has been no dispute concerning the interpretation and implementation of the social clause under the KORUS FTA. On the other hand, lack of the freedom of association under Korean law has been on the EU members' radar for quite some time, as similar concerns surfaced during Korea's accession process to the Organisation for Economic Co-operation

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and Development (OECD).[18] On 17 December 2018, the EU requested formal consultations with the government of Korea regarding the implementation of Article 13.4.3 of the Korea–EU FTA. As they did not reach mutually satisfactory results through consultations, the EU requested the establishment of a Panel of Experts concerning the interpretation and implementation of Article 13.4.3 on 4 July 2019. On 20 January 2021, a report from the Panel of Experts[19] was published. It found that Korea was in breach of Article 13.4.3 first sentence, under which Korea commits "to respecting, promoting and realizing" fundamental labor rights, including the freedom of association, as its domestic labor legislation fails to grant collective bargaining rights and freedom of association in accordance with the Declaration.[20] The Panel held that the EU's claims regarding Korean domestic labor laws were well-founded. In reaching its conclusion, the Panel referred to the interpretations of the principle of freedom of association by the ILO Committee on Freedom of Association (hereinafter "CFA").[21] It justified the reference to the CFA as follows:

> The substantive content of the ILO Constitutional obligation in relation to freedom of association has been explicated by the ILO supervisory bodies over the years. The CFA was created to hear complaints about compliance with the Constitutional principles, whether or not a member State had ratified Conventions 87 and 98. The Panel decides that it is appropriate to refer to the general statements of the CFA—the 'body of principles'—it has derived concerning the right to freedom of association.[22]

By referring to the interpretations of the principle of freedom of association by the CFA, the report of the Panel avoided the occurrence of the substantive coordination issue between the ILO track and the RTA track on the interpretation of the principle as provided for by the Declaration.

On the other hand, the report recognized that Korea had made continued and sustained efforts towards ratification of the fundamental ILO Conventions, as mandated by Article 13.4.3 last sentence.[23]

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[18] The Nordic countries and Austria were particularly active in pressing Korean labor reform during Korea's accession process to the Organisation for Economic Co-operation and Development [hereinafter OECD]. OECD Members further tended to coalesce informally around Korea ratifying ILO Conventions 87 and 98 as a prerequisite to Korea's accession to the OECD. *See* James Salzman, *Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development*, 21(4) MICH. J. INT'L L. 769, 801 (2000).

[19] *See generally* Report of the Panel of Experts, *Panel of Experts Proceeding Constituted Under Article 13.15 of the EU–Korea Free Trade Agreement* (Jan. 20, 2021).

[20] *Id.* ¶¶ 196, 208, 227, 257.

[21] *Id.* ¶¶ 163, 192, 205, 223-26, 256.

[22] *Id.* ¶ 110.

[23] *Id.* ¶ 293.

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Although the report of the Panel of Experts was not legally binding,[24] Korea followed the recommendations of the report and ratified the ILO Conventions No.87 (freedom of association and the right to organize) and 98 (the right to organize and collective bargaining) on 20 April 2021. Article 13.4.3 of the Korea–EU FTA and the report of the Panel of Experts had the effect of having the Korean government take the plunge and ratify them. The report settled the procedural coordination between the ILO track and the RTA track by prioritizing the former track, as the report does not decide that Korea has violated Article 13.4.3 last sentence on the ratification of the ILO Conventions No.87 and 98. Now that Korea voluntarily ratified these ILO Conventions, the ILO track prevails, and its ordinary means of monitoring the implementation of these treaties will henceforth be applied to Korea.

B. Vietnamese Experience with the TPP and Vietnam–EU FTA (2020)

The US and Vietnam agreed on a Plan for the Enhancement of Trade and Labour Relations (hereinafter "the Plan") as annexed to the Trans-Pacific Partnership Agreement (hereinafter "TPP").[25] The Plan provides for legal commitments of Vietnam on freedom of association, among others. The Plan mandates Vietnam to provide in its law and practice that workers may choose to establish grassroots labor unions through the Vietnam General Confederation of Labor (hereinafter "VGCL") or the competent government body, and shall establish the necessary legal procedures and registration mechanisms for recognition of a grassroots labor union either by joining the VGCL or by registration with the competent government body.[26] The fact is that the VGCL was the only labor union authorized under the labor law of Vietnam. The Plan intended to break the monopoly of the VGCL by admitting grassroots labor unions that are independent from the VGCL.[27] It also provides that Vietnam shall provide in its law and practice that grassroots labor unions may, if they so choose, form or join organizations of workers, including across enterprises and at the levels above the enterprise, including the sectoral and regional levels, consistent with the labor rights as stated in the ILO Declaration and domestic procedures not inconsistent with those labor rights.[28]

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[24] *See* EU–Korea FTA, *supra* note 13, art. 13.15.2, second sentence. ("The Parties shall make their best efforts to accommodate advice or recommendations of the Panel of Experts on the implementation of this Chapter . . . .")

[25] United States–Vietnam Plan for Enhancement of Trade and Labour Relations, Viet.-U.S., Feb. 4, 2016, https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-VN-Plan-for-Enhancement-of-Trade-and-Labour-Relations.pdf [hereinafter The Plan].

[26] *Id*. at 1-2, II.A.1.

[27] Nghia Trong Pham, *Trade and Labour Rights: The Case of the TPP* 5-6 (U. Oxford, Glob. Econ. Governance Programme (GEG), Working paper No. 124, 2017).

[28] The Plan, *supra* note 25, at 2, II.A.2.

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So as to implement the commitment, the Plan provides that Vietnam shall enact the legal and institutional reforms prior to the date of entry into force of the TPP Agreement between the US and Vietnam.[29] In other words, fulfilling the commitment is the necessary condition for Vietnam to the application of the TPP. The Plan also provides that Vietnam shall comply with paragraph II.A.2 of the Plan no later than five years from the date of entry into force of the TPP Agreement between the US and Vietnam.[30]

As the US withdrew from the TPP in January 2017, the Plan did not take effect. However, Vietnam continued its effort to meet the requirements of the Plan by enacting a new Labor Code in November 2019.[31] Article 170 of the Labor Code allows workers to organize independent labor unions not affiliated with VGCL. Vietnam also ratified ILO Convention No.98 (right to organize and collective bargaining) in 2019.

Why did Vietnam conduct its domestic labor law reform, despite the "death" of the Plan? It was because of (1) the provision of the TPP which came into effect as a result of the Comprehensive and Progressive Agreement of the Trans-Pacific Partnership (hereinafter "CPTPP") (2018), and (2) the provision of the Vietnam–EU FTA of 2020, both of which provide for obligations similar to those of the Korea–EU FTA.

Article 19.3.1 of the TPP provides as follows:

> Article 19.3: Labour Rights
> 1. Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights as stated in the ILO Declaration:
> (a) freedom of association and the effective recognition 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, for the purposes of this Agreement, a prohibition on the worst forms of child labour; and
> (d) the elimination of discrimination in respect of employment and occupation."

Article 13.4.2 of the Vietnam–EU FTA provides as follows:

> Article 13.4 Multilateral Labour Standards and Agreements
> 2. Each Party reaffirms its commitments, in accordance with its obligations under the ILO and the ILO Declaration . . . to respect, promote and effectively implement the principles concerning the

[29] *Id.* at 9, VII.1.
[30] *Id.* at 10, VII.2.
[31] LABOUR CODE (No.45/2019/QH14) (Viet.).

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> fundamental rights at work, namely:
> (a) the freedom of association and the effective recognition 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.
> 3. Each Party shall: (a) make continued and sustained efforts towards ratifying, to the extent it has not yet done so, the fundamental ILO conventions;

Both Article 19.3.1 of the TPP and Article 13.4.2 of the Vietnam–EU FTA directly refer to the Declaration. Under these provisions, Vietnam commits to respecting, promoting and effectively implementing the principles concerning the fundamental rights at work, as provided by the Declaration. In addition, under Article 13.4.3 of the Vietnam–EU FTA, Vietnam shall make continued and sustained efforts towards ratifying the fundamental ILO Conventions. This is classified as an indirect reference to the Declaration. The reform of the domestic law of Vietnam corresponds to the above commitment of Vietnam under the TPP and the Vietnam–EU FTA. The ratification of ILO Convention No.98 corresponds to the best effort obligation under Article 13.4.3 of the Vietnam–EU FTA. In that sense, the direct reference and the indirect reference to the Declaration under the TPP and Vietnam–EU FTA had an effect on Vietnam to continue its domestic legal reform as well as ratification of the relevant ILO Convention.

In fact, however, independent workers' organizations have not officially existed, since regulations and instructions on how to register independent labor unions have not yet been promulgated.[32] Furthermore, even if independent labor unions come into existence, the Labor Code places strict limits on what they can and cannot do, meaning that unless the government is willing to allow further changes, workers' organizations will be unable to engage in national-level policy discussions or form regional and sectoral federations.[33] The law reform of Vietnam could simply be used by the authorities as window dressing. As Vietnam ratified the ILO Convention No.98, this situation will be subject to the review of the ILO track, namely, the CFA. Or, the situation will be subject to the implementation/monitoring/enforcement procedure of the TPP or the Vietnam–EU EPA.

TPP Chapter 19 provides for a series of

[32] Michael Tatarski, *Vietnamese Workers Still in the Dark About Potential of New Representative Organisations*, CHINA LABOUR BULL. (Jan. 21, 2021), https://clb.org.hk/en/content/vietnamese-workers-still-dark-about-potential-new-representative-organisations.
[33] *Id.*

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implementation/monitoring/enforcement procedures comprising public submission (Article 19.9), labour consultations, consideration by the Labour Council and, finally, the dispute settlement procedure of the Agreement (Article 19.15).

> Article 19.9: Public Submissions
> 1. Each Party, through its contact point . . . shall provide for the receipt and consideration of written submissions from persons of a Party on matters related to this Chapter in accordance with its domestic procedures. . . .
> 2. A Party may provide in its procedures that, to be eligible for consideration, a submission should, at a minimum:
> (a) raise an issue directly relevant to this Chapter;
> (b) clearly identify the person or organization making the submission; and
> (c) explain, to the degree possible, how and to what extent the issue raised affects trade or investment between the Parties.
> 3. Each Party shall
> (a) consider matters raised by the submission and provide a timely response to the submitter, including in writing as appropriate; and
> (b) make the submission and the results of its consideration available to the other Parties and the public, as appropriate, in a timely manner.
>
> Article 19.15: Labour Consultations
> 2. A Party (requesting Party) may, at any time, request labour consultations with another Party (responding Party) regarding any matter arising under this Chapter by delivering a written request to the responding Party's contact point. . . .
> 3. The responding Party shall, unless agreed otherwise with the requesting Party, reply to the request in writing no later than seven days after the date of its receipt . . . .
> 5. The Parties shall begin labour consultations no later than 30 days after the date of receipt by the responding Party of the request.
> 8. The consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter through labour consultations under this Article . . . .
> 10. If the consulting Parties are unable to resolve the matter, any consulting Party may request that the Council representatives of the consulting Parties convene to consider the matter by delivering a written request to the other consulting Party through its contact point. . . . The Council representatives of the consulting Parties

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> shall convene no later than 30 days after the date of receipt of the request, unless the consulting Parties agree otherwise, and shall seek to resolve the matter, including, if appropriate, by consulting independent experts and having recourse to such procedures as good offices, conciliation or mediation.
> 12. If the consulting Parties have failed to resolve the matter no later than 60 days after the date of receipt of a request under paragraph 2, the requesting Party may request the establishment of a panel under Article 28.7 (Establishment of a Panel) and, as provided in Chapter 28 (Dispute Settlement), thereafter have recourse to the other provisions of that Chapter.
> 13. No Party shall have recourse to dispute settlement under Chapter 28 (Dispute Settlement) for a matter arising under this Chapter without first seeking to resolve the matter in accordance with this Article.

Articles 13.16 and 13.17 of the Vietnam–EU FTA provide for government consultations to settle any matter covered under Chapter 13 on Trade and Sustainable Development.

> Article 13.16: Government Consultations
> 1. In the event of disagreement on any matter covered under this Chapter, the Parties shall only have recourse to the procedures established under this Article and Article 13.17 (Panel of Experts). Except as otherwise provided for in this Chapter, Chapter 15 (Dispute Settlement) and its Annex 15-C (Mediation Mechanism) do not apply to this Chapter.
> 2. A Party may request consultations with the other Party regarding any matter arising under this Chapter by delivering a written request to the contact point of the other Party. . . .
> 3. The Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter. . . .
> 4. If a Party considers that the matter needs further discussion that Party may . . . request that the Committee on Trade and Sustainable Development be convened to consider the matter. The Committee on Trade and Sustainable Development shall convene promptly and endeavor to agree on a resolution of the matter.

> Article 13:17: Panel of Experts
> 1. If the matter has not been satisfactorily resolved by the Committee on Trade and Sustainable Development within 120 days, or a longer period agreed by the Parties, after the delivery of a request for consultations under Article 13.16 (Government

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> Consultations), a Party may request . . . that a Panel of Experts be convened to examine that matter.
> 7. In matters relating to the respect of the multilateral agreements as set out in Article 13.4 (Multilateral Standards and Agreements) . . . the Panel should seek information and advice from the ILO . . . .
> 8. The Panel of Experts shall issue an interim and a final report to the Parties. These reports shall set out the findings of facts, the applicability of the relevant provisions and the basic rationale behind any findings and recommendations. . . . The Panel of Experts shall issue the final report to the Parties no later than 180 days after the date of its establishment, unless the Parties agree otherwise. This final report shall be made publicly available unless otherwise mutually decided.
> 9. The Parties shall discuss appropriate actions or measures to be implemented taking into account the final report of the Panel of Experts and the recommendations therein. The Party concerned shall inform its domestic advisory group or groups and the other Party of its decisions on any actions or measures to be implemented no later than 90 days, or a longer period of time mutually agreed by the Parties, after the final report has been submitted to the Parties. The follow-up to the implementation of such actions or measures shall be monitored by the Committee on Trade and Sustainable Development. The domestic advisory group or groups and the joint forum may submit observations to the Committee on Trade and Sustainable Development in this regard.

In contrast to Article 13.15 of the Korea–EU FTA that provides for the panel of experts procedure,[34] the panel of experts procedure of the Vietnam–EU FTA reinforced the implementation/monitoring/enforcement of the report of the panel of experts. Although the report is not legally binding, Article 13.19.9 provides for follow-up to the Party's implementation of actions or measures recommended in the report by the Committee on Trade and Sustainable Development.

So far, neither the parties to the CPTPP nor the EU has made recourse to the implementation/monitoring/enforcement procedure of the CPTPP or the Vietnam–EU FTA concerning the failure of Vietnam to complete the domestic legal process of admitting independent labor unions according to its Labor Code and the ILO Convention No.98. However, even though Vietnam ratified the ILO Convention No.98 and this situation will be subject to the review of the ILO track, the RTA track is still available, and the Parties

[34] *See supra* p. 263.

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to the CPTPP and the EU is eligible of making recourse to the RTA track, as has been done by the EU against Korea.

C. Japanese Experience with the Japan–EU EPA (2019)

As is shown in Table 3, Japan did not ratify the ILO Convention No.105 on the elimination of forced labor until 2022. It was because of a Japanese law against the political activities of public servants, which the penalty was imprisonment with hard labor. The government of Japan considered that this penalty was classified as "forced labor" which shall be eliminated under the ILO Convention No.105. In June 2021, a bill sponsored by a group of lawmakers was submitted to the Diet, whose objective was to amend the law for the ratification of the ILO Convention No.105. Mr. Hiroshi Hase, one of the sponsors of the bill, explained the reason for the bill, as follows:

> This Convention (the ILO Convention No.105) is one of the eight fundamental ILO Conventions, and the Japan–EU EPA provides that each Party shall make continued and sustained efforts on its own initiative to pursue its ratification. . . . However, Japan has not ratified it yet. . . .[35]

Mr. Hase referred to Article 16.3.3 of the Japan–EU EPA, which provides as follows:

> Article 16.3 International labour standards and conventions
> 3. Each Party **shall make continued and sustained efforts on its own initiative to pursue ratification** of the fundamental ILO Conventions and other ILO Conventions **which each Party considers appropriate to ratify.** (Emphasis added by the author.)

Article 16.3.3 provides for a best effort, self-judging obligation of each Party to ratify the fundamental ILO Conventions, including the ILO Convention No.105. As Japan is not legally obliged to ratify them, Japan voluntarily ratified the ILO Convention No.105 in 2022 without recourse to the implementation/monitoring/enforcement procedure of the Japan–EU EPA (Article 16.17 (Government consultations) and Article 16.18 (Panel of experts).

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[35] Explanation by Hiroshi Hase, member of the House of Representatives, at Health, Labor and Welfare Committee, House of Representatives, 204th Session, 2 June 2021. *Kousei Roudou Iinkai* (厚生労働委員会) [*Diet Session, Health, Labor and Welfare Committee*], SHŪGIIN (衆議院) [HOUSE OF REPRESENTATIVES], No.24, (June 2, 2021), https://www.shugiin.go.jp/internet/itdb_kaigiroku.nsf/html/kaigiroku/009720420210602024.htm#p_honbun (Japan).

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Article 16:17: Government consultations
1. In the event of disagreement between the Parties on any matter regarding the interpretation or application of this Chapter, the Parties shall only have recourse to the procedures set out in this Article and Article 16.18. The provisions of this Chapter shall not be subject to dispute settlement under Chapter 21.
2. A Party may request in writing consultations with the other Party on any matter concerning the interpretation and application of this Chapter. . . .
3. When a Party requests consultation pursuant to paragraph 2, the other Party shall reply promptly and enter into consultations with a view to reaching a mutually satisfactory resolution of the matter.
5. If no solution is reached through the consultations held in accordance with paragraphs 2 to 4, the Committee shall be convened promptly on request of a Party to consider the matter in question.

Article 16.18: Panel of experts
1. If, no later than 75 days of the date of the request by a Party to convene the Committee pursuant to paragraph 5 of Article 16.17, the Parties do no reach a mutually satisfactory resolution of the matter concerning the interpretation or application of the relevant Articles of this Chapter, a Party may request that a panel of experts be convened to examine the matter. . . .
3. The panel of experts may obtain information from any source it deems appropriate. For matters related to ILO instruments . . . , it should seek information and advice from the relevant international organisations or bodies. . . .
5. The panel of experts shall issue an interim and a final report to the Parties setting out the findings of facts, the interpretation or the applicability of the relevant Articles and the basic rationale behind any findings and suggestions. . . . The final report shall be issued no later than 180 days after the date of establishment of the panel. . . .
6. The Parties shall discuss actions or measures to resolve the matter in question, taking into account the panel's final report and its suggestions. Each Party shall inform the other Party and its own domestic advisory group or groups of any follow-up actions or measures no later than three months after the date of issuance of the final report. The follow-up actions or measures shall be monitored by the Committee. . . .

It is true, however, that this Article was one of the factors that pushed

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Japan to ratify the Convention, as was admitted by Mr. Hase.

III. CONCLUDING REMARKS

A. Legal Effects of Labor Provisions in RTAs in the Asia-Pacific Region

Countries in the Asia-Pacific region are latecomers of labor provisions in RTAs. Recently, they concluded RTAs with the US and the EU with provisions referring directly and indirectly to the Declaration. Experiences of Korea, Vietnam and Japan show us that labor provisions of these RTAs had an effect of pressing the domestic legal reform and ratification of the fundamental ILO Conventions in these countries. However, the effects of the labor provisions differ, depending on the context in which they were referred to, and coordination issues were accordingly settled differently.

In the case of Korea, the report of the Panel of Experts concluded that Korea violated Article 13.4.3 first sentence, which committed Korea to respect, promote and realize, in their laws and practices, the principles concerning fundamental rights including the freedom of association.[36] Although the report is not legally binding, it put political pressure on Korea to conduct domestic legal reform and to ratify the ILO Conventions No.87 and 98. In this case, the substantive coordination was secured by the report of the Panel, as it referred to the interpretation of the principle of freedom of association by the CFA, the competent body of the ILO, when it interpreted Article 13.4.3 first sentence.[37] The procedural coordination issue was settled by the voluntary ratification, and ILO will henceforth monitor Korea's implementation of the Conventions through the monitoring mechanism of the ILO.

In the case of Vietnam, Vietnam conducted domestic legal reform and ratified ILO Conventions No.98 in 2019, initially as fulfilling its commitment under the Plan annexed to the TPP, and later as fulfilling its commitments under Article 19.3.1 of the TPP and Article 13.4.2 of the Vietnam–EU FTA, and as corresponding to the best effort obligation under Article 13.4.3 of the Vietnam–EU FTA.[38] The direct reference to the Declaration and the indirect reference to the Declaration under the TPP and Vietnam–EU FTA had an effect for Vietnam to continue its domestic legal reform as well as ratification of the ILO Convention. Now that Vietnam ratified the ILO Convention, ILO will henceforth monitor Vietnam's implementation of the Convention through the monitoring mechanism of the ILO. However, this does not exclude the possibility of applying the

[36] *See supra* p. 264.
[37] *See* EU–Korea FTA, *supra* note 13, art. 13.15.2 second sentence.
[38] *See supra* pp. 266-67.

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implementation mechanism of the TPP and the Vietnam–EU FTA[39] to monitor Vietnam's failure to complete domestic legal reform. The procedural coordination issue has, therefore, not been settled by Vietnam's ratification of the ILO Convention.

In the case of Japan, it voluntarily conducted domestic legal reform and ratified the ILO Convention No.105 in 2022, without recourse to the implementation/monitoring/enforcement procedure of the Japan–EU EPA. However, the best effort, and self-judging obligation of the Japan–EU EPA was one of the factors that pushed Japan to ratify the Convention, while this entails no procedural coordination between the RTA track and the ILO track. Now that Japan ratified the ILO Convention No.105, the ILO will henceforth monitor Japan's implementation of the Convention through the monitoring mechanism of the ILO.

Now that Korea, Vietnam and Japan ratified these fundamental labor conventions, the ordinary ILO track will monitor the implementation of these Conventions. However, this does not mean that the RTA track will not be applied in the future. The labor provisions of the RTAs that directly refer to the Declaration may be applied to monitor the domestic implementation of these Conventions. The parallel track will continue to be available to the parties to the RTAs. Vietnam's failure to complete domestic legal reform to admit independent labor unions may be subject to the review procedure under the TPP or the Vietnam–EU EPA, while it may also be subject to the review procedure under the ordinary ILO track. In this sense, the labor provisions of the RTAs will continue to have their teeth even after the ratification of the fundamental labor conventions by their parties.

B. De Facto *Acceptance of the Social Clauses*

These experiences of three countries in the Asia-Pacific suggest that they have virtually followed the Euro-American trend of revitalizing social clauses in their trade agreements. In that sense, these countries are "rule-takers" rather than "rule-makers".[40] However, it is premature to conclude that they have totally given up their decades-old policy of refraining from adopting social clauses in their trade agreements, for the following two reasons. First, they haven't made any official statements to that effect. Secondly, except for these trade agreements with the US and the EU, they haven't adopted any social clauses in their trade agreements. A notable example is the Regional Comprehensive Economic Partnership (RCEP) of

[39] *See supra* pp. 267-70.

[40] *See generally* RULE-MAKERS OR RULE-TAKERS? EXPLORING THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (Daniel S. Hamilton & Jacques Pelkmans eds., 2015). *See also* Matthew P. Goodman, *From Rule Maker to Rule Taker*, 7(7) GLOB. ECON. MONTHLY 1, 1-2 (2018).

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2022,[41] comprising fifteen countries in the Asia-Pacific regions including Korea, Vietnam and Japan, which has no social clause. Thirdly, they haven't made any attempt to renegotiate their dozens of trade agreements that have no social clause. Last but not least, as was shown in the previous section, their "acceptance" of the social clauses with their trade agreements with the US and the EU was conducted as "voluntary" domestic legal reform and ratification of the ILO Conventions, rather than as legal implementation of the social clauses. They made *de facto*, rather than legal, acceptance of the social clauses, leaving room for further consideration of whether they officially adopt social clauses in their trade policy.

I argue that this attitude should not be reprehensive, for two reasons. First, the resurgence of the social clause should be evaluated from the viewpoint of appropriate allocation of jurisdiction between the ILO and trade agreements regulating internationally recognized core labor standards. Since the WTO Ministerial Declaration of 1996 clearly declared, the ILO is the authentic body dealing with internationally recognized core labor standards and their realization.[42] The resurgence of the social clause is, at best, a circumvention of this official statement of the WTO members as a whole. On the other hand, secondly, the ILO seems to acquiesce to this circumvention, as it has never reproached the resurgence of the social clause, namely, reference to the 1998 Declaration in trade agreements. Quite to the contrary, the ILO is becoming increasingly involved in dispute resolution processes relating to social clauses in trade agreements. Starting with the US–Cambodia Textile Agreement of 1999 that outsourced surveillance mechanism to the ILO,[43] and continued in Expert Panels established under recent EU TSD chapters that may consult the ILO, the ILO is increasingly being active in the enforcement processes of the social clauses in trade agreements through its Supervisory Bodies.[44] To this, we share the legitimate concern of Philip Alston, who eloquently criticized the 1998 Declaration, as it might hollow out the decades-old soft and incremental approach of the ILO in encouraging its members to ratify the ILO Conventions including the core ILO Conventions.[45] He argues that "despite the enthusiasm which has greeted the emerging international labor rights regime, some of its characteristics have the potential to undermine or even undo much of what has been achieved in this field in the course of the second

[41] Regional Comprehensive Economic Partnership Agreement, Nov. 15, 2020, https://www.mfat.govt.nz/assets/Trade-agreements/RCEP/RCEP-Agreement-Legal-Text.pdf.
[42] *See* Singapore Ministerial Declaration, *supra* note 3.
[43] *See New Trade Regime in Textiles and Clothing How Cambodian Factories Improved Their Image*, ILO (Oct. 26, 2005), https://www.ilo.org/global/about-the-ilo/mission-and-objectives/features/WCMS_075533/lang--en/index.htm#:~:text=The%20foundation%20for%20the%20unique,Law%20and%20international%20labour%20standards.
[44] *See* Marceau et al., *supra* note 10, at 409.
[45] *See* Alston, *supra* note 17, at 499-506.

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half of the twentieth century."[46] If the argument of Alston is right, the 1998 Declaration was a conspiracy of the ILO and the US of virtually reinventing social clauses, under the guise of "ILO-proper" approach to internationally recognized core labor standards, shared by the ILO and the WTO members as a whole.

In conclusion, the attitude of Korea, Vietnam and Japan might be coined as "goodwill circumventers" of social clauses in the US and EU RTAs. What should be done is for these countries to officially declare the true intention of their attitude, and start open discussions on the appropriate means of realizing internationally recognized core labor standards, discussing issues such as, whether and to what extent RTAs may serve that purpose, whether the ILO and RTAs should work together to such purpose, and whether there is a better allocation of jurisdiction among the ILO, WTO and RTAs on this issue.

C. Reflections on the Method of Enforcing Labor Provisions in RTAs

The foregoing analysis leads us to consider the appropriate means of enforcing labor provisions in RTAs. The three case studies of labor provisions in RTAs in the Asia-Pacific suggest that a stringent method of enforcing labor provisions, namely, through the mandatory state-to-state dispute settlement procedure of the RTAs, is, at least, not a necessary means of enforcing labor provisions. Quite to the contrary, the four RTAs in question, namely, the Korea–EU FTA, TPP, Vietnam–EU EPA and the Japan–EU EPA do not apply mandatory state-to-state dispute settlement procedures to the labor provisions. It must be noted that the report of the Panel of Experts under the Korea–EU FTA is not legally binding.

Non-mandatory means of enforcing labor provisions in these RTAs proved effective, for two reasons. First, their soft characteristics allowed Korea, Vietnam and Japan to conduct domestic legal reforms smoothly. Secondly, they also made it easy for these countries to bridge their obligations under the labor provisions in these RTAs with their commitment under the relevant ILO Conventions, the enforcement of which is hortatory, rather than mandatory. These reasons hold true for enforcing labor provisions of RTAs in regions other than the Asia-Pacific. In this sense, the soft, non-mandatory means of enforcement is an appropriate means of enforcing labor provisions in general.

D. Implications of China's Request for Accession to the CPTPP

Finally, the analysis of this paper has an implication on China's request

[46] *Id*. at 518.

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for accession to the CPTPP. China requested accession to the CPTPP in September 2021.[47] So as to be admitted to the CPTPP, China will have to meet its high level legal standards including the following:

> Article 19.3: Labour Rights
> 1. Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights as stated in **the ILO Declaration**:
> (a**) freedom of association and the effective recognition 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, for the purposes of this Agreement, a prohibition on the worst forms of child labour; and
> (d) the elimination of discrimination in respect of employment and occupation. (Emphasis added by the author.)

The focus here is Article 19.3.1(a) on freedom of association. All workers in China have the right to form or join a trade union. However, that right is curtailed in that all enterprise unions must be affiliated with the single legally-mandated body, the All-China Federation of Trade Unions (ACFTU). This is similar to the situation in Vietnam before its recent domestic legal reform.[48] So as to join the CPTPP, China will have to conduct domestic legal reform to allow the formation of independent labor unions.[49] Is China prepared to do so?

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[47] *China Applies to Join Pacific Trade Pact to Boost Economic Clout*, REUTERS (Sept. 18, 2021), https://www.reuters.com/world/china/china-officially-applies-join-cptpp-trade-pact-2021-09-16/.

[48] *See supra* pp. 273-74.

[49] Tsugami argues that "[d]iscussing the content of the agreement (CPTPP) provides a 'good reason' to negotiate on such issues as free labor unions and forced labor that China tends to refer to as 'internal affairs'". *See* Toshiya Tsugami, *Simultaneous Application for CPTPP Membership by China and Taiwan: A Valuable Platform for Dialogue with China?*, JAPAN INST. INT'L AFF. (Feb. 4, 2022), https://www.jiia.or.jp/en/ajiss_commentary/simultaneous-application-for-cptpp-membership-by-china-and-taiwan.html.

臺大學術期刊資料庫

REFERENCES

Book

HAMILTON, DANIEL S. & JACQUES PELKMANS (eds.) (2015), RULE-MAKERS OR RULE-TAKERS? EXPLORING THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP.

Articles

Alston, Philip (2004), '*Core Labour Standards' and the Transformation of The International Labour Rights Regime*, 15(3) EUROPEAN JOURNAL OF INTERNATIONAL LAW 457.

Charnovitz, Steve (1987), *The Influence of International Labour Standards on the World Trading Regime: A Historical Overview*, 126(5) INTERNATIONAL LABOUR REVIEW 565.

Goodman, Matthew P. (2018), *From Rule Maker to Rule Taker*, 7(7) GLOBAL ECONOMICS MONTHLY 1.

Harrison, James et al. (2019), *Labour Standards Provisions in EU Free Trade Agreements: Reflections on The European Commission's Reform Agenda*, 18(4) WORLD TRADE REVIEW 635.

Marceau, Gabrielle et al. (2023), *The Evolution of Labour Provisions in Regional Trade Agreements*, 57(3) JOURNAL OF WORLD TRADE 361.

Salzman, James (2000), *Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development*, 21(4) MICHIGAN JOURNAL OF INTERNATIONAL LAW 796.

WTO-Related Document

World Trade Organization (1996), Singapore WTO Ministerial 1996: Ministerial Declaration, WT/MIN(96)/DEC, 36 ILM 218.

Treaties

EU–South Korea Free Trade Agreement, European Union-South Korea, October 6, 2010, 3391-95 U.N.T.S.

Japan–Philippines Economic Partnership Agreement, Japan-Philippines, September 9, 2006, https://www.mofa.go.jp/region/asia-paci/philippine/epa0609/main.pdf.

Regional Comprehensive Economic Partnership Agreement, November 15, 2020, https://www.mfat.govt.nz/assets/Trade-agreements/RCEP/RCEP-Agreement-Legal-Text.pdf.

United States–Vietnam Plan for Enhancement of Trade and Labour Relations, Vietnam-United States, February 4, 2016, https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-VN-Plan-for-Enhancement-of-Trade-an d-Labour-Relations.pdf.

臺大學術期刊資料庫

Statute

LABOUR CODE (No.45/2019/QH14) (Vietnam).

Internet Sources

China Applies to Join Pacific Trade Pact to Boost Economic Clout, REUTERS (September 18, 2021), https://www.reuters.com/world/china/china-officially-applies-join-cptpp-trade-pact-2021-09-16/.

Health, Labor and Welfare Committee, House of Representatives, 204th Session, 2 June 2021. *Kousei Roudou Iinkai* (厚生労働委員会) [*Diet Session, Health, Labor and Welfare Committee*], SHŪGIIN (衆議院) [HOUSE OF REPRESENTATIVES], No.24, (June 2, 2021), https://www.shugiin.go.jp/internet/itdb_kaigiroku.nsf/html/kaigiroku/00972042021 0602024.htm#p_honbun (Japan).

INTERNATIONAL LABOUR ORGANIZATION (2022), ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK AND ITS FOLLOW-UP, https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/normativeinstrument/wcms_716594.pdf.

INTERNATIONAL LABOUR ORGANIZATION, *Resolution on the Inclusion of a Safe and Healthy Working Environment in the ILO's Framework of Fundamental Principles and Rights at Work*, ILC.110/Resolution I (June 10, 2022).

Lim, Hoe, *The Social Clause: Issues and Challenges*, https://training.itcilo.org/actrav_cdrom1/english/global/guide/hoelim.htm.

New Trade Regime in Textiles and Clothing How Cambodian Factories Improved Their Image, INTERNATIONAL LABOUR ORGANIZATION (October 26, 2005), https://www.ilo.org/global/about-the-ilo/mission-and-objectives/features/WCMS_075533/lang--en/index.htm#:~:text=The%20foundation%20for%20the%20unique,Law%20and%20international%20labour%20standards.

Report of the Panel of Experts, *Panel of Experts Proceeding Constituted Under Article 13.15 of the EU–Korea Free Trade Agreement* (January 20, 2021).

Tatarski, Michael, *Vietnamese Workers Still in The Dark About Potential of New Representative Organisations*, CHINA LABOUR BULLETIN (January 21, 2021), https://clb.org.hk/en/content/vietnamese-workers-still-dark-about-potential-new-representative-organisations.

Tsugami, Toshiya, *Simultaneous Application for CPTPP Membership by China and Taiwan: A Valuable Platform for Dialogue with China?*, JAPAN INSTITUTE OF INTERNATIONAL AFFAIRS (February 4, 2022), https://www.jiia.or.jp/en/ajiss_commentary/simultaneous-application-for-cptpp-membership-by-china-and-taiwan.html.

Velut, J.B. et al. (2022), *Comparative Analysis of Trade and Sustainable*

臺大學術期刊資料庫

Development Provisions in Free Trade Agreements, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE, https://www.lse.ac.uk/business/consulting/assets/documents/TSD-Final-Report-Feb-2022.pdf.

Working Paper

Pham, Nghia Trong, *Trade and Labour Rights: The Case of the TPP* (University of Oxford, Global Economic Governance Programme (GEG), Working paper No. 124, 2017).

臺大學術期刊資料庫