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THE EU-KOREA PANEL REPORT: A WATERSHED MOMENT FOR THE TRADE-LABOR NEXUS OR MERE SYMBOLIC VICTORY?

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Abstract:
There have been increased calls to link international trade law more pertinently with labor and environmental standards in recent years. This has seen a rise in the number of regional trade agreements incorporating labor standards. However, states have long appeared to be reluctant to seek enforcement of the labor standards through trade agreements. The EU-Korea panel report, considered in this contribution, is the first trade panel to hold a state to have breached labor standards in a trade agreement. This contribution reflects on this important decision and what it means for the trade-labor nexus in the future. However, this contribution also acknowledges the lack of enforcement mechanisms and questions whether trade tribunals with limited enforcement powers will be any more successful than the ILO in promoting compliance with international labor standards.

Keywords:
Trade, Core Labor Standards, Freedom of Association

1. Introduction
The international community has long recognized international trade as a critical contributor to economic growth and higher living standards for people across the globe (UNCTAD, 2016). More recently, however, there has been increased recognition of the negative consequences of financial globalization for labor standards. This significant body of literature indicates that improved labor conditions have rarely materialized despite economic progress (Davies and Vadlamannati, 2013). Against this backdrop, there have been increased calls for a social clause within the World Trade Organization (WTO) framework from the mid-1990s. In 1996 the WTO Ministerial Conference adopted the Singapore Declaration, which adopted the position that the International Labor Organization (ILO) is the most appropriate forum for the setting of binding international labor standards (ILS) (WTO Ministerial Conference, 1996).
In light thereof, the WTO did not take any role concerning binding ILS which would permit states to impose trade restrictions in the event of a breach of these standards. Insofar as the WTO is concerned, the matter was definitively settled at the WTO Ministerial Conference in Doha, where the WTO reiterated that it was not the appropriate forum for resolving disputes relating to ILS. There have been no noteworthy attempts to include a social clause within the WTO framework since this last failed attempt in Doha (Harrison, 2019a).
The labor debate within the WTO nevertheless contributed significantly to the eventual adoption of the ILO Declaration on Fundamental Principles and Rights at Work. The ILO has also taken note of the trend whereby international labor standards are increasingly being included in regional trade agreements (Agustí-Panareda et al., 2014). The vast majority of preferential trade agreements that have been concluded since 2013 contain references to labor standards. The increased incorporation of these standards in trade agreements makes a clear understanding of their role of greater importance. (Barbu et al., 2018). However, labor standards in trade agreements have also been criticized as being merely symbolic. Some authors have expressed concerns over states perceived unwillingness to take action against trading partners for widespread labor standards violations (Bodson, 2019).

The EU's declaration of a dispute under the EU- Republic of Korea Free Trade Agreement (EU-Korea FTA) has seen some authors express cautious optimism that the situation may be changing (Koen & Fourie, 2020). This contribution briefly reflects on the core labor standards and the increased incorporation thereof in trade agreements. It then proceeds to consider some of the concerns raised with respect to the trade-labor nexus before providing an overview of the EU-Korea Panel Report and commenting on the extent to which the Panel Report has navigated the key concerns surrounding the trade labor-nexus.

2. The Core Labor Standards

The majority of regional trade agreements incorporating labor standards refer specifically to the ILO's core labor standards. The ILO has recognized eight ILO Conventions as fundamental Conventions. These Conventions address certain rights that are considered core labor standards and include: 'freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labor; the effective abolition of child labor; and the elimination of discrimination in respect of employment and occupation'. States are encouraged to ratify all eight fundamental conventions. However, in the interim states must respect the principles underlying these conventions. States are then required to report to the ILO regarding implementation (ILO Declaration on Fundamental Principles and Rights at Work, 1998).

The core labor standards have also been criticized for creating a perceived hierarchy of rights. Scholars such as Weiss argue that although the declaration appears admirable it creates a perception that these rights are the most important. In contrast, other rights are merely regular or inferior labor rights. Weiss also cautions that the declaration departs from the ILO's traditional focus on hard-law obligations and instead follows a soft law approach (Weiss, 2018). Notwithstanding the reporting obligations, the ILO supervisory mechanisms also do not provide for any sanctions where there is non-compliance with the declaration. This lack of sanctions for non-compliance with the core labor standards through the ILO has also contributed substantially to advocacy for their inclusion in trade agreements.

3. Opportunities and Challenges in Linking Trade and Labour Standards

Advocates for trade and sustainable development have driven the inclusion of labor standards in trade agreements. The sustainable development movement advocates for the integration of a range of economic, environmental and social interests in a manner that results in the prosperity and posterity of humankind. Gjuzi (2018, at 103) opines that at "the core of the concept are the global and local concerns for environmental protection (including human health) and social welfare (including human rights) in the context of economic development and growth". Proponents of the trade and sustainable development movement such as Stoll, Gött and Abel (2018) have also argued that sustainable trade involves recognition by states that certain forms of labor, including work in the informal economy, involves a specific vulnerability of workers which may hinder the attainment of decent work for all. They argue that states are obligated to implement measures to address decent work deficits which these workers face in line with this recognition and their existing international obligations.

Proponents of linking trade and labor standards have also argued that states are more responsive to economic pressure than the 'toothless mechanisms of the ILO and other international organisations' (Leeg, 2019). Trade sanctions have been proposed as a mechanism to enforce compliance with international labor standards. The authors support these arguments in principle. However, broad economic sanctions can have far-reaching implications for the most vulnerable members of society and further inhibit sustainable development. It has become increasingly apparent that the adverse effects of economic sanctions disproportionately impact the poorest members of society (Peksen, 2011). It would be counterproductive to the purpose of trade and sustainable development chapters if the adverse consequences of sanctions were so severe as to contribute to a substantial rise in poverty. This contribution's support for 'sanctions' is accordingly limited to methods such as the suspension of benefits granted under the trade agreement rather than a wholesale economic embargo.

This approach would also align more closely with WTO law. Ultimately, regional trade agreements operate outside of the General Agreement on Tariffs and Trade (GATT) framework by virtue of the Article XXIV exception. Imposing limited measures under the regional trade agreement—that do not affect the state's rights as members of the WTO—would accordingly not need to be justified under the GATT. The state would merely need to continue providing the party who breached the labor standards with the most favorable treatment it offers to the most favored nation, outside of the context of a regional integration agreement, to be compatible with WTO law (Koen &

Fourie, 2020). The authors, however, acknowledge that the suspension of benefits under the trade agreement may still contribute to an increase in poverty, albeit less severely. Therefore, it may also be of value to investigate different compliance mechanisms in future trade agreements.

In addition to challenges surrounding the enforceability of labor standards in trade agreements, the mere inclusion of labor and social standards in international trade agreements has attracted criticism. Certain scholars posit that globalization has affected many social issues, so that connecting each of these with free trade is 'like hanging too many ornaments on a Christmas tree'. They argue that this may well result in the collapse of the international trade agreement system. The proponents of economic liberalism also argue that open markets will result in more rapid economic growth, ultimately leading to improved working conditions in developing countries (Lyutov, 2017). Many developing countries also initially expressed concern that social standards within trade agreements could be vulnerable to abuse by developed countries for protectionist purposes.

Other scholars support the linkage between trade agreements and labor standards but caution the need to ensure an interpretation of labor standards that align with the ILO's (Addo, 2015 at 12). The responsibility for monitoring compliance with core labor standards has traditionally been the sole responsibility of the ILO, while trade disputes are resolved in other forums (such as the WTO) established specifically for the resolution of trade-related disputes. There is a risk of diverging interpretations of labor standards by these bodies and the ILO. However, these challenges can be easily addressed, especially considering that the ILO supervisory mechanisms continuously monitor the implementation of ratified ILO Conventions. These institutions have published and issued full and detailed comments on the meaning of provisions in the conventions and the core labor standards (Agustí-Panareda, 2014). If the institutions responsible for implementing labor standards in international trade agreements take due account of the views of ILO supervisory bodies, they can provide an effective additional avenue for the implementation of international labor standards (Koen & Fourie, 2020).

4. The EU/Korea Labour Dispute

The EU-Korea labor dispute has its genesis in a request for consultations made by the European Union to Korea in December 2018, the failure of which led to the former declaring a dispute and requesting that a panel be convened pursuant article 13.15.1 of the EU-Korea Free Trade Agreement (EU-Korea FTA) in July 2019. The EU disputed measures taken by the Korean government and provisions of the Korean Trade Union and Labour Relations Adjustment Act (TULRAA). Specifically, the EU contested the propriety of four provisions of the TULRAA which the EU claimed violated the first sentence of article 13.4.3 of the EU-Korea FTA by limiting the scope of the right to freedom of association (Panel Report, 55). The first part of article 13.4.3 enjoined the parties on the basis of their shared ILO and Declaration on Fundamental Rights at Work membership to respect, promote and realize "in their laws and practices, the principles concerning fundamental rights … [including the right to] freedom of association and effective recognition of the right to collective bargaining" (Panel Report, 61). Furthermore, the EU also took exception to what it deemed to be the failure by Korea to make sufficient efforts to ratify the ILO core labor Conventions in accordance with the third part of article 13.4.3, which states that the "[parties] will make continued and sustained efforts towards ratifying the fundamental … [and other up-to-date ILO Conventions]" (Panel Report, 55).

Korea, arguing against the property of the panel request on the specific issues, suggested that the measures contained in Chapter 13 of the FTA were subject to a trade affectation test and were therefore limited to issues that affected trade or investment between the parties (Panel Report, 56). However, so proceeded the contention, the EU had yet to establish that the issue before the panel constituted "a matter arising under the EU-Korea FTA" (Panel Report, 54). Moreover, Korea also argued that an adverse finding against its efforts, or lack thereof, to align its labor laws with, and give effect to, the rights in the aforementioned ILO instruments would amount to a proposal to harmonize the domestic labor laws of Korea with those of EU member states (Panel Report, 80). From Korea's point of view, the parties in concluding the FTA had not pledged to subject their sovereign rights to set levels of protection and standards in their labor laws against the provisions of the Agreement, something which the EU panel request attempted to do. Korea further suggested that the language of article 13.2.2 of the FTA, which precludes the use of Chapter 13 for protectionist purposes, supported its contention that the parties had not intended to subject their domestic labor laws to the application of the Agreement beyond trade or investment (Panel Report, 86).

The EU contrasts Korea's first claim by arguing that article 13.2.1 of the FTA includes the residual phrase "(e)xcept as otherwise provided in this chapter" which only operates when a provision in Chapter 13 cannot be ordinarily ascertained (Panel Report, 59). In the EU's opinion, the meaning of article 13.4.3 could be determined without defaulting to the rule under article 13.2.1 and was thus not subject to a trade affectation test.
The Panel agreed with the EU on the first point, observing that viewed both in context and in isolation, article 13.4.3 was unique within the architecture of Chapter 13. It noted that the parties had drafted article 13.4.3 in such a way that the limitations to matters relating to trade between the parties that were present in other provisions of the chapter were completely absent therein (Panel Report, 72-74). Having examined the meaning of the provision, the Panel concluded that Korea's argument suggesting that the provision should be interpreted within the confines of trade-related aspects of labor could not be sustained. It opined that, in its ordinary meaning, article 13.4.3 fell within the scope of the "except as otherwise stated in this chapter" qualification contained in article 13.2.1 (Panel Report, 63). Furthermore, it indicated that the first part of article 13.4.3 focused on both parties' obligations arising from their voluntary membership of the ILO and the 1998 Declaration (Panel Report, 64).
The specificity with which the parties referenced the ILO Constitution and the 1998 Declaration including its attendant fundamental principles in the first sentence of article 13.4.3 was, in the Panel's opinion, indicative of the parties' intention to commit themselves to the full scope of the internationally accepted meaning thereof (Panel Report, 64). The meaning within the context of the ILO instruments is one of universality of fundamental principles, of which the parties gave specific expression to by their replication of the instruments' language. As such, the Panel concluded that article 13.4.3 had been drafted in a manner that rendered the obligations assumed by the parties in terms of the provision incapable of being restricted to trade-related aspects of labor, as argued by Korea (Panel Report, 65). Moreover, the Panel further noted that the EU-Korea FTA was explicitly constructed with these ILO instruments promoting links between trade and labor in mind, that the "promotion and attainment of fundamental labour principles and rights" envisioned by article 13.4.3, was inextricably linked to trade (Panel Report, 95).
The Panel also rejected Korea's harmonization argument and noted that what article 13.4.3 imposed on the parties was rather an obligation to establish the bedrock of fundamental labor rights. The right to set the levels and scope of protection fell squarely within the province of the respective member states. The Panel said:
"[t]he fundamental principles and rights and core labour standards mentioned in Article 13.4.3 do not require harmonization of domestic labour laws or outcomes. … Many of the member States which have ratified the relevant Conventions both comply with their international obligations and maintain disparate systems of industrial relations, with very different substantive outcomes in terms of levels of economic development" (Panel Report, 81).
The Panel also considered various WTO, ILO and OECD positions on the use of labor standards for protectionist purposes, each of which recognizes the compatibility of ILO core labor standards with trade and investment. The opinion from empirical research conducted by OECD as expressed by the Panel notes that:
"Any fears that the application of these standards [the core labour standards and fundamental principles and rights referred to in Article 13.4.3] might influence the competitive positioning of these countries in the context of [trade] liberalization are unfounded. On the contrary, they might even in the long term tend to strengthen the economic performance of all countries" (Panel Report, 88).
The Panel was convinced that the EU panel request did not amount to an attempt to use Chapter 13 for protectionist purposes, as envisaged in article 13.2.2, and accordingly rejected Korea's contention.

5. Discussion

The caution with which the Panel handled the issues it was confronted with is noteworthy. As opposed to pivoting on the external material that it considered, the Panel took care to restrict its observations within the confines of the provisions of the FTA. The language in which Chapter 13 is couched thus played a pivotal role in how the Panel interpreted article 13.4.3 and, indeed, in dismissing Korea's objections. As noted above, Chapter 13 of the EU-Korea FTA includes a provision which deals with the scope of the Chapter. Article 13.2.1 notes that the Chapter only applies where the parties adopt or maintain measures that affect "trade-related aspects of labour …" but this restriction is prefaced with the proviso "(e)xcept as otherwise provided in this Chapter …".
The Panel correctly notes that the qualification infers that certain provisions in the Chapter are capable of establishing their own scope beyond trade or investment. The comparison that the Panel draws between article 13.4.3 and other provisions contained in the Chapter further serve to underline this point. In other provisions such

as article 13.8 and 13.9, the parties inserted the phrase "that affect trade" to limit the scope of the application of each respective provision. Nowhere does article 13.4.3. place such a trade limitation, which would accordingly place it in the province of the qualification in article 13.2.1. The Panel is also correct in noting that the want of a trade affectation restriction, for which Korea contended, accompanied by explicit references to the instruments of the ILO, was indicative of the Parties' commitment to accepting the accepted understanding of said instruments as is. In the authors' view, the Panel did not impose its own perceptions but rather relied on the provisions of the FTA to reach its correct conclusions.

The Panel also navigated the concerns in respect of coherence of content between trade-labor panels and the interpretation by the ILO well. In interpreting the content of the standards agreed upon, the Panel clearly considered the longstanding jurisprudence of the ILO Freedom of Association Committee as contained in the Compilation of Decisions (ILO, 2018). Novitz (2021) also notes that the panel had notably avoided reliance on observations made by the ILO Committee of Experts on the Application of Conventions and Recommendations. She argues, and this contribution aligns itself with this argument, that the Panel's decision not to rely on the Committee of Experts was appropriate given that Korea has not ratified ILO conventions Nos. 87 and 98. Ultimately, Korea had not become a party to these conventions through the trade agreement but merely committed itself to respecting these conventions' fundamental principles. The decisions by the Freedom of Association Committee provided valuable guidance in giving content to the core principles of the right to freedom of association.

The Panel report is also significant as it makes it clear that not all trade-labor cases are subject to a trade affection test. While such a test was required in a previous dispute brought by the United States against Guatemala, scholars have long agreed that the trade affection test, in that case, arose as a result of the explicit wording of the treaty (van 't Wout, 2021). The panel report further supports these scholarly arguments and could be of great persuasive value in future trade-labor disputes. However, despite this value it remains to be seen if the report will be implemented and if Korea will make any changes to its laws to align with the core labor standards given the absence of enforcement mechanisms in the FTA.

The Trade and Sustainable Development Committee is empowered to monitor the implementation of the report but does not have the power to take any corrective measures where a party fails to implement it. While agreements such as those by the United States make provision for reversion to the pre-FTA trade position if parties breach their labor and environmental obligations, the EU-Korea FTA contains no such provisions (van 't Wout, 2021). This has long been recognized as a key challenge in the way the trade and sustainable development chapter in the agreement has been designed (Harrison et al, 2019b). Nevertheless, the VCLT does allow a party to suspend an agreement where there is a material breach of an agreement. The CJEU had previously opined that this provision of the VCLT would entitle the EU to suspend a trade agreement where the counterparty breaches its obligations under the trade and sustainable development chapter. Even if this were to be correct, the practical cost of enforcement against a large trading counterpart may well discourage the EU from taking such action.

6. Conclusion

This contribution has considered the key rationale for the linkage between trade and labor standards and commented on some of the conceptual difficulties in linking these two areas of law. From this contribution it has become apparent that the panel of experts in the EU-Korea dispute has navigated these criticisms skillfully and has not overstepped in any way. However, it is also quite apparent that the enforcement mechanisms leave much to be desired and raise questions about the value of resolving labor disputes through trade panels in the first place. Ultimately, the panel of experts has no greater powers than the ILO to enforce the core labor standards in this instance.

In future agreements there should ideally be enforcement mechanisms included in the agreement. These enforcement mechanisms should be formulated in a way that encourages compliance without having such severe consequences that they defeat the purpose of sustainable development clauses. Clearly resorting to the wholesale suspension of the FTA has proven undesirable and may have equally negative consequences for the party who has breached core labor standards and the non-breaching party especially where the party in breach is a strategic trade partner. Only enforcing these standards when the counterparty is a non-strategic trade partner would also erode the moral authority of the party seeking to enforce it.

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