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NAKAGAWA, Junji
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Resurgence of the Social Clause?: A critical analysis of labor provisions in RTAs in the Asia-Pacific region*

Junji NAKAGAWA
RIETI & Faculty of Liberal Arts, Chuo Gakuin University

Abstract

The discussion on the social clause, which repeatedly took place under the GATT/WTO, was finally settled in 1996 by the WTO Singapore Ministerial Declaration, which consigned the ILO to deal with core labor standards. The 1998 Declaration on Fundamental Principles and Rights at Work and its Follow-up (the Declaration) commissioned ILO members to respect, promote, and realize the four core labor rights and forbade the use of trade sanctions to enforce them. However, an increasing number of regional trade agreements (RTAs) came to refer to the Declaration and obliged parties to secure core labor rights. This phenomenon is referred to as the resurgence of the social clause. This study analyzes this treaty practice in the Asia-Pacific region, focusing on the domestic labor law reforms of Korea, Vietnam, and Japan under their RTAs with the US and EU. Korea and Vietnam carried out their labor law reform by implementing their treaty obligations to respect, promote, and realize freedom of association under the Declaration, which was incorporated into their RTAs with the US and EU. Japan voluntarily conducted its labor law reform and ratified ILO Convention No.105; however, the reference to the core ILO Conventions under the Japan-EU EPA put political pressure on carrying out the reform. Now that these countries have ratified the core ILO Conventions, the ILO will monitor their implementation, but RTAs will also monitor their implementation in parallel with the ILO.

Keywords: social clause, regional trade agreements (RTAs), trade and sustainable development (TSD), ILO
JEL classification: F13, F18, F23, F53, J83

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1. Introduction: Resurgence of the social clause

Discussion concerning the so called "social clause"[1] took place under the 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 Secretariats will continue their existing collaboration."[3]

The ILO assumed this consignment with 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 stated 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: (1) freedom of association and the

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[1] A social clause is a legal provision in a trade agreement aimed at removing the most extreme forms of labor exploitation in exporting countries by allowing importing countries to take trade measures against exporting countries that fail to observe a set of internationally agreed minimum labor standards. See H. Lim, "The Social Clause: Issues and Challenges," ILO, no date. Available at <https://training.itcilo.org/actrav_cdrom1/english/global/guide/hoelim.htm> (Accessed January 20, 2024.)

[2] See, for instance, Steve Charnovitz, "The influence of international labour standards on the world trading regime: A historical overview," *International Labour Review*, Vol.126, No.5, 1987, pp.565–584.

[3] WTO, Singapore Ministerial Declaration, adopted December 13, 1996, para.4.

[4] ILO, ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted in 1998 and amended in 2022. Available at <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/normativeinstrument/wcms_716594.pdf> (Accessed January 20, 2024.)

[5] On June 10, 2022, the International Labor Conference adopted a resolution amending the Declaration to encompass "a safe and healthy working environment." See ILO

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).

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 promotional follow-up, more and more regional trade agreements (hereinafter "RTAs") came to refer to the Declaration and oblige parties to implement the fundamental labor rights. This phenomenon is known as the resurgence of the social clause. The US took the lead in the resurgence since the early 2000s through its FTAs, which referred to the Declaration as a baseline reference for labor standards.[9] It

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Document ILC.110/Resolution 1.

[6] ILO, *supra* n.5, Section 2.

[7] *Ibid*., Section 5.

[8] *Ibid.,* Annex II and III, respectively.

[9] See, for instance, J.B. Velut *et al*, *Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements*, London School of Economics and Political Science, 2022, p.17.

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 European Union (EU) followed suit, by referring to the Declaration in Trade and Sustainable Development (TSD) chapters of its FTAs/EPAs[12] since the EU-Korea FTA of 2011.[13]

There are two types of resurgence of the social clause: reference to the Declaration in RTAs. The first is a direct reference to the Declaration, and the second is an indirect reference 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 adopted 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 EU

	US RTAs	EU RTAs

[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," *Journal of World Trade*, Vol.57, No.3, 2023, pp.361–410, p.364. Besides direct and indirect reference to the Declaration, which are the subject matter of this study, "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 *ibid*., p.365.

[11] See, for instance, *ibid*., pp.374–377.

[12] See *ibid*., pp.383–385. Before inserting Trade and Sustainable Development Chapters in its FTAs/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," *World Trade Review*, Vol.18, No.4, 2019, pp.635–657, pp.638–639.

[13] EU-Korea FTA, signed October 6, 2010, entered into force July 1, 2011. In this study, the RTAs are referred to with their years of entry into force.

[14] See Marceau *et al., supra* n.11, pp.386–387.

Direct reference to the Declaration	Yes	Yes
Indirect reference to the Declaration	No	Yes

These two types of resurgence of social clauses result in two different sets of coordination issues between the ILO and RTAs. The first type of resurgence of the social clause, namely, 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 the coordination between the two tracks. Two types of coordination are required, procedural and substantive. The former involves the coordination of two mechanisms of implementation/monitoring/enforcement. Coordination is especially difficult when the RTA track is equipped with a dispute settlement mechanism for RTAs with trade sanctions because such a mechanism may override the promotional follow-up mechanism of the ILO under the Declaration. The latter concerns the coordination of substantive interpretations of 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 fundamental labor rights between the two tracks and among the RTAs. Coordination issues in all these cases might have serious consequences that undermine the legitimacy and effectiveness of the first track, namely the Declaration, as well as those of the second track, namely, the resurgent social clauses of RTAs.

The second type of resurgence of the social clause results from references to the ILO Conventions corresponding to the fundamental labor standards of the Declaration under the RTAs. This phenomenon only began in the early 2010s and was driven by the EU, EFTA, and UK.[15] In this case, the coordination issue concerns the coordination between the soft and promotional nature of the ratification of the ILO Conventions and the provisions of RTAs that encourage or mandate the ratification of the ILO Conventions. When the latter mandates the ratification of the Conventions, Parties to such RTAs assume a legal obligation to ratify them, whereas they do not assume such obligations under the ILO. Conversely, when the RTAs encourage the ratification of the ILO Conventions, the Parties may decide whether to ratify them, and ratification in such a case is a voluntary act of the Party. In this case, ratification does not entail coordination between the ILO and RTA tracks.

[15] See *ibid*., p.386.

This study deals with the coordination issues caused by the social clauses of RTAs, focusing on direct and indirect references to the Declaration in RTAs of the Asia-Pacific region. Countries in the Asia-Pacific region are latecomers to such treaty practices. Except for Korea, most countries in the region did not provide for direct or indirect references to the Declaration in RTAs until recently.[16] However, by concluding RTAs with the US and EU, they accepted provisions with direct and indirect references to the Declaration. What type of obligations do they accept? What are the consequences of acceptance? How did they address the coordination issues that accompany acceptance? This study examines three countries in the region, namely Korea, Vietnam, and Japan, and their experiences with their RTAs with the US and EU, and analyzes these issues. Section 2 presents a country case study. A brief conclusion summarizes the analysis.

2. Country case studies: Korea, Vietnam, and Japan

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

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	Not	2022	2022	1990	2006	1999	2002	2008	Not

[16] Article 103.1 of the Japan-Philippines EPA of 2006 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 CPTPP and the Japan-EU EPA, do not refer to international labor rights or the Declaration.

	yet	yet								yet
Total ratifications	157	168	180	178	174	175	175	187	75	58

Table 3 shows the interesting characteristics of the ratification statuses of Korea, Vietnam, and Japan, as well as that of the US and France, the latter representing the EU. First, Korea, Vietnam, and Japan recently ratified several fundamental ILO Conventions (see italics in Table 3). As shown in the following subsections, this was at least partly the result of the social clauses under the RTAs with the US and EU. Second, the US ratified only two fundamental ILO Conventions, namely, Convention 105 on the elimination of forced labor and Convention 182 on the abolition of the 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] Third, France, representing the EU, ratified almost all the fundamental ILO Conventions. This means that the EU may impose a quasi-unilateral obligation on the parties to its RTAs to respect, promote, and realize the principles concerning the four fundamental labor rights and ratify the corresponding fundamental ILO Conventions.

(1) 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 through its FTAs with the US and EU. Article 19.2 of the KORUS FTA directly references 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;

[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," *European Journal of International Law*, Vol.15, No.3, 2004, pp.457–521, p.519.

(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."

To secure 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 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 direct and indirect references to the Declaration. In Article 13.4.3, the first sentence provides for 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."

To ensure compliance with these obligations, Article 13.14 provides for consultation between the parties, followed by consideration by the Committee on Trade and Sustainable Development (Article 13.14.3) and an 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.

"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."

Thus far, there have been no disputes concerning the interpretation and implementation of the social clause under the KORUS FTA. Conversely, the lack of freedom of association under the Korean law has been on the radar of EU members for some time, as similar concerns surfaced during Korea's accession to the OECD.[18] On December 17, 2018, the EU requested formal consultations with the Korean government 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 July 4, 2019. On January 20, 2021, a report by the Panel of Experts[19]

[18] The Nordic countries and Austria were particularly active in pressing Korean labor reform during Korea's accession process to the 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 J. Salzman, "Labor rights, globalization and institutions: The role and influence of the Organization for Economic Cooperation and Development," *Michigan Journal of International Law*, Vo.21, No.4, 2000, pp.769–848, p.801.

[19] Panel of Experts proceeding constituted under Article 13.15 of the EU-Korea Free

was published. It found that Korea was in breach of the first sentence of Article 13.4.3, 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 (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 and RTA tracks on the interpretation of the principle, as provided for by the Declaration.

In contrast, the report recognized that Korea had made continued and sustained efforts toward ratifying the fundamental ILO Conventions, as mandated by the last sentence of Article 13.4.3.[23]

Although the report of the Panel of Experts was not legally binding,[24] Korea followed the recommendations of the report and ratified ILO Conventions No.87 (freedom of association and the right to organize) and 98 (the right to organize and collective bargaining) on April 20, 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

Trade Agreement, Report of the Panel of Experts, January 20, 2021.
[20], *Ibid*., paras.196, 208, 227, 257.
[21] *Ibid.*, paras.163, 192, 205, 223~226, 256.
[22] *Ibid*., para.110.
[23] *Ibid*., para.293.
[24] See the second sentence of Article 13.15.2 of the Korea-EU FTA. ("The Parties shall make their best efforts to accommodate advice or recommendations of the Panel of Experts on the implementation of this Chapter …")

and RTA tracks by prioritizing the former track, as the report does not decide that Korea has violated the last sentence of Article 13.4.3 on the ratification of 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.

(2) Vietnamese experience with the TPP and Vietnam-EU FTA (2020)

The US and Vietnam agreed on a Plan for the Enhancement of Trade and Labor Relation (hereinafter "the Plan") as annexed to the TPP.[25] The Plan provides for Vietnam's legal commitments to 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 (VGCL) or the competent government body, and shall establish the necessary legal procedures and registration mechanisms for the recognition of a grassroots labor union either by joining the VGCL or by registration with the competent government body.[26] The VGCL was the only labor union authorized under Vietnam's labor law. The Plan intended to break the monopoly of the VGCL by admitting independent grassroots labor unions.[27] It also suggests 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 stated in the ILO Declaration and domestic procedures not inconsistent with those labor rights.[28]

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 apply to 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

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[25] United States-Vietnam Plan for Enhancement of Trade and Labor Relations (herein after "the Plan"), February 4, 2016. Available at <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-VN-Plan-for-Enhancement-of-Trade-and-Labour-Relations.pdf>（Accessed January 20, 2024.）

[26] The Plan, *ibid*., II.A.1.

[27] Nghia Trong Pham, "Trade and Labour Rights: The Case of the TPP," *GEG Working Paper*, No.124, University of Oxford, Global Economic Governance Programme (GEG), 2017, pp.5–6.

[28] The Plan, *supra* n.26, II.A.2.

[29] The Plan, *ibid.,* VII.1.

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 efforts 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 that are not affiliated with the 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 (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 is 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 is 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 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;

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[30] The Plan, *ibid*., VII.2.

[31] See ILO, NATLEX, Viet Nam, Labour Code (No.45/2019/QH14). Available at <https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=110469&p_count=13&p_classification=01>（Accessed January 20, 2024.）

(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 is committed 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 to ratify 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 for Vietnam to continue its domestic legal reform as well as ratification of the relevant ILO Convention.

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 ILO Convention No.98, this situation will be subject to a 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.

Chapter 19 of the TPP provides for a series of implementation/monitoring/enforcement procedures comprising public submission (Article 19.9), labor consultations, consideration by the Labor Council, and the dispute settlement procedure of the Agreement (Article 19.15).

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[32] Michael Tatarski, "Vietnamese workers still in the dark about potential of new representative organisations," *China Labour Bulletin*, January 21, 2021.
[33] *Id*.

“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 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 provides for government consultations to settle any matter covered under Chapter 13 on Trade and Sustainable Development (TSD).

"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 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 a 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 domestic legal process of admitting independent labor unions according to its Labor Code and ILO Convention No.98. However, even though Vietnam ratified ILO Convention No.98, and this situation will be subject to a review of the ILO track, the RTA track is still available, and the Parties to the CPTPP and the EU are eligible to make recourse to the RTA track, as has been done by the EU against Korea.

(3) Japanese experience with the Japan-EU EPA (2019)

As shown in Table 3, Japan did not ratify ILO Convention No.105 on the elimination of

[34] See *supra* p.9.

forced labor until 2022. This was because of the Japanese law against the political activities of public servants, for 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 ILO Convention No.105. In June 2021, a bill sponsored by a group of lawmakers was submitted to the Diet with the objective of amending the law for the ratification of ILO Convention No.105. Mr. Hiroshi Hase, one of the sponsors of the bill, explained the reasons 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 the following:

> "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 the best effort, the self-judging obligation of each Party, to ratify the fundamental ILO Conventions, including ILO Convention No.105. As Japan is not legally obliged to ratify them, it voluntarily ratified 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).

> "Article 16:17: Government consultations
> 1. In the event of disagreement between the parties regarding the interpretation or application of this Chapter, the Parties shall only have recourse to the procedures

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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, June 2, 2021. *Minutes of the Health, Labor and Welfare Committee*, *House of Representatives*, No.24, June 2, 2021, Available at <https://www.shugiin.go.jp/internet/itdb_kaigiroku.nsf/html/kaigiroku/00972042021060 2024.htm#p_honbun> （Accessed January 20, 2024.）

set out in this Article and Article 16.18. The provisions in this chapter are not subject to dispute settlement under Chapter 21.

2. A Party may request written consultation 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. …"

However, it is true that this Article was one of the factors that pushed Japan to ratify the Convention, as Mr. Hase admitted.

3. Concluding remarks

Countries in the Asia-Pacific region are latecomers to labor provisions in RTAs. Recently, they concluded RTAs with the US and EU, with provisions referring directly and

indirectly to the Declaration. The experiences of Korea, Vietnam, and Japan show us that the labor provisions of these RTAs had the effect of pressing domestic legal reform and ratification of the fundamental ILO Conventions on these countries. However, the effects of labor provisions differ depending on the context in which they are referred to, and coordination issues are settled accordingly differently.

In the case of Korea, the report of the Panel of Experts concluded that Korea violated the first sentence of Article 13.4.3, 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 puts political pressure on Korea to carry out domestic legal reform and ratify ILO Conventions No.87 and 98. In this case, substantive coordination was secured by the report of the Panel, which referred to the interpretation of the principle of freedom of association by the CFA, the competent body of the ILO, when it interpreted the first sentence of Article 13.4.3.[37] The procedural coordination issue was settled by voluntary ratification, and the ILO will monitor Korea's implementation of the Conventions through its monitoring mechanism.

In the case of Vietnam, it 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 on Vietnam continuing its domestic legal reform as well as ratifying the ILO Convention. Now that Vietnam has ratified the ILO Convention, the ILO will monitor Vietnam's implementation of the Convention through its monitoring mechanism. However, this does not exclude the possibility of applying the implementation mechanism of the TPP and the Vietnam-EU FTA[39] to monitor Vietnam's failure of completing domestic legal reform. Therefore, the procedural coordination issue has not been settled by Vietnam's ratification of the ILO Convention.

In the case of Japan, it voluntarily conducted domestic legal reform and ratified 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

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[36] See *supra* p.10.
[37] See *supra* n.23 and the corresponding text.
[38] See *supra* pp.12–13.
[39] See *supra* pp.13–16.

pushed Japan to ratify the Convention, which entailed no procedural coordination between the RTA and ILO tracks. Now that Japan has ratified ILO Convention No.105, the ILO will monitor Japan's implementation of the Convention through its monitoring mechanism.

Now that Korea, Vietnam, and Japan have ratified these fundamental labor conventions, the ordinary ILO track will monitor their implementation. However, this does not imply that the RTA track will not be applied in the future. The labor provisions of RTAs that directly refer to the Declaration may be applied to monitor the domestic implementation of these Conventions. This parallel track will continue to be available to parties to RTAs. Vietnam's failure of completing 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 RTAs will continue to have their teeth even after the ratification of the fundamental labor conventions by their parties.

The experiences of the three countries in the Asia-Pacific region 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 abandoned their decades-old policy of refraining from adopting social clauses in their trade agreements for two reasons. First, they have not made any official statements regarding the effects. Second, except for these trade agreements with the US and EU, they have not adopted any social clauses in their trade agreements. A notable example is the RCEP of 2022,[41] comprising 15 countries in the Asia-Pacific region, including Korea, Vietnam, and Japan, which has no social clauses. Third, they have not attempted to renegotiate dozens of trade agreements that have no social clauses. Finally, as was shown in the previous section, their "acceptance" of the social clauses with their trade agreements with the US and 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, acceptances of social clauses, leaving room for further

[40] See Daniel S. Hamilton and Jacques Pelkmans eds., *Rule-Makers or Rule-Takers? Exploring the Transatlantic Trade and Investment Partnership*, Rowman & Littlefield International, Ltd., 2015. Also see Matthew P. Goodman, "From Rule Maker to Rule Taker," *Global Economic Monthly*, Vo.7, Issue 7, July 2018.

[41] Regional Comprehensive Economic Partnership (RCEP) Agreement, signed on November 15, 2020, entered into force on January 1, 2022.

consideration of whether they officially adopted 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 the appropriate allocation of jurisdiction between the ILO and trade agreements regulating internationally recognized core labor standards. Since the WTO Ministerial Declaration of 1996, the ILO has been 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. Second, the ILO seems to have acquired this circumvention as it has never reproached the resurgence of the social clause, referring to the 1998 Declaration in trade agreements. By contrast, the ILO is becoming increasingly involved in the dispute resolution process relating to social clauses in trade agreements. Starting with the US-Cambodia Textile Agreement of 1999, which outsourced surveillance mechanisms to the ILO[43] and continued in Expert Panels established under recent EU TSD chapters that may consult the ILO, the ILO is increasingly active in the enforcement processes of social clauses in trade agreements through its Supervisory Bodies.[44] To this end, 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 half of the twentieth century."[46] If the argument of Alston is right, the 1998 Declaration was a conspiracy of the ILO and 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 attitudes of Korea, Vietnam, and Japan might be coined as

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[42] See *supra* n.4 and the corresponding text.
[43] See ILO, "New trade regime in textiles and clothing How Cambodian factories improved their image." October 26, 2005. Available at < 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.> (Last accessed January 7, 2024.)
[44] See Marceau *et al., supra* n.11, p.409.
[45] See Alston, *supra* n.18, pp.499–506.
[46] *Ibid*., p.518

"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 for such a purpose, and whether there is a better allocation of jurisdiction among the ILO, WTO, and RTAs on this issue.

Finally, the analysis of this study has implications for China's request for accession to the CPTPP. China requested accession to the CPTPP in September 2021. [47] To be admitted to the CPTPP, China will have to meet the following high-level legal standards:

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

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[47] "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/> (Accessed January 20, 2024.)
[48] See *supra* p.11.
[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

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dialogue with China?", Japan Institute of International Affairs, *AJISS-Commentary*, February 4, 2022. <https://www.jiia.or.jp/en/ajiss_commentary/simultaneous-application-for-cptpp-membership-by-china-and-taiwan.html> (Accessed January 20, 2024.)