The best interests of the child in international trade policies: Some remarks on child labour and trade

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1. *Introduction*

2025 is the year envisaged by target 8.7 of the Sustainable Development Goals for the eradication of child labour in all its forms. As we are approaching this deadline, we realize that this might be an impossible outcome. In the last four years, the world did not make any progress in child labour reduction. As of 2020, 160 million children are engaged in child labour, with 79 million of them performing hazardous work.[1] The phenomenon has become so wide and fragmented that it requires a great variety of actions by the international community and individual States, ranging from social and educational inclusion to reduction of extreme poverty.[2]

The international trade system is probably not the most suited framework in which to address such concerns. It is extremely complex to assess the impact that trade liberation has on child labour and the latter takes place in sectors that are not necessarily linked to trade in goods or services. Nonetheless, looking into the framework of trade law can offer a complementary perspective on possible solutions.[3]

This comment will address the relationship between child labour and trade from the perspective of the Convention on the Rights of the Child (CRC) and in particular from its Article 3 on the best interests of the

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[1] International Labour Organization and United Nations Children's Fund, Child Labour – Global Estimates 2020, Trends and the Road Forward (2021) 21-22.

[2] The actions foreseen by the International Labour Organization in this regard were illustrated in its report of 2017 'Ending Child Labour by 2025: A review of policies and programmes'.

[3] H Cullen, 'The Limits of International Trade Mechanisms in Enforcing Human Rights: The Case of Child Labour' (1999) 7 Intl J of Children's Rights 1, 27.

child[4]. Although the provision mostly addresses domestic policies,[5] its breadth and open terms allow for an analysis on the implications that the respect for children's rights can have in designing and implementing States' foreign trade policies.[6]

Section 2 illustrates the content of the best interests of the child and its role in guiding States' discretion over economic policies. Section 3 is devoted to the relationship between child labour and trade in general terms, while section 4 and 5 focus on the use of unilateral trade measures and of trade agreements as tool to enforce labour obligations, including the abolition of child labour. Section 6 draws some conclusions on the relevance of trade policies to secure children's rights, by making a comparison with recent initiatives that have developed in a corporations' due diligence perspective.

2. *The best interests of the child in trade-related matters*

Under Article 3 of the CRC the best interests of the child shall be a primary consideration when States engages in actions 'concerning' children. The Committee on the Rights of the Children (CRC Committee) consistently held that the best interests provision entails a substantive right, an interpretative legal principle, and a rule of procedure.[7] The

[4] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3 (CRC).

[5] For instance, the Convention explicitly refers to the child's best interests in other articles (such as those on separation from parents, family reunification, parental responsibilities and adoption), mainly concerning the need for States' domestic regulations. See UN Committee on the Rights of the Children, 'General Comment No 14' (29 May 2013) UN Doc CRC/C/GC/14 paras 3, 9. Under the CRC, protecting children are all persons under the age of 18 within the jurisdiction of a State party. See also UN Committee on the Rights of the Children, 'General Comment No 7' (1 November 2005) UN Doc CRC/C/GC/14 para 13, recalling that the principle covers 'actions directly affecting children (eg related to health services, care systems, or schools), as well as actions that indirectly impact on young children (eg related to the environment, housing or transport)'.

[6] As is the case with other State's external policies. Cf eg JM Pobjoy, 'The Best Interests of the Child Principle as an Independent Source of International Protection' (2015) 64 ICLQ 327.

[7] General Comment No 14 (n 5) para 6.

scope of the principle is certainly broad and might encompass all kind of activities encroaching upon children's rights.[8]

Although Article 3 CRC has been mainly applied in the context of domestic State policies, one can ask whether its broad terms may become relevant in other domains and especially as regards the protection of children abroad. This seems to be the position of the CRC Committee, whose practice points towards an extensive application of the best interests principle in relation to States' activities that have an impact on children on the global scale.[9]

In its 2013 General Comment (GC) No 16 on State obligations regarding the impact of the business sector on children rights,[10] the Committee recognized the role played by the best interests principle as to actions that should be undertaken to secure fundamental rights of children under the CRC. Some passages of the GC are worth mentioning.

The Committee moves primarily from a business and human rights perspective: it recalls that the GC is to be read in conjunction with other international instruments, especially the UN Guiding Principles on Business and Human Rights, and it bases its analysis on the renowned tripartite duty 'to protect, to respect and to fulfil'. In this context, the role attached to Article 3 CRC is straightforward, albeit quite extensive: 'States must ensure that the best interests of the child are central to the development of legislation and policies that shape business activities and operations, such as those relating to employment, taxation, corruption, privatization, transport and other general economic, trade or financial issues'.[11] Not only the Committee foresees a general relevance for the child's best interests in guiding public choices having an impact on trade relations. It

[8] P Alston, 'The Best Interest Principle: Towards a Reconciliation of Culture and Human Rights' in P Alston (ed), *The Best Interest of the Child: Reconciling Culture and Human Rights* (UNICEF and Clarendon Press 1994) 14. For a distinction between actions "concerning" and actions "affecting" children see J Eekelaar, J Tobin, 'Art. 3 – The Best Interest of the Child' in J Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019) 78-79.

[9] Considering that State actions might concern – directly or indirectly – not only individual children, but also specific groups or children in general. General Comment No 14 (n 5) para 23.

[10] UN Committee on the Rights of the Children, 'General Comment No 16 on State obligations regarding the impact of the business sector on children rights' (17 April 2013) UN Doc CRC/C/GC/16.

[11] ibid III.B.

also makes clear that the functioning of the principle lies in balancing competing interests, such as 'short term economic considerations and longer-term development decisions'.[12]

States weighing the needs of trade liberalisation against the protection of children rights should then conduct a careful assessment of their choices, prioritizing measures that ensure the best interests of children. An argument that is not too far from the considerations drawn by the Committee on Economic, Social and Cultural Rights in its 2017 General Comment No. 24, where the Committee held that 'the obligation to respect economic, social and cultural rights is violated when States parties prioritize the interests of business entities over Covenant rights without adequate justification, or when they pursue policies that negatively affect such rights'.[13] In turn, this would entail for States the duty to 'identify any potential conflict between their obligations under the Covenant and under trade or investment treaties'.[14] This perspective reinforces the idea that, also in our scenario, the best interests principle is not only the autonomous source of States' obligations, but also a tool to secure all the other rights protected by the CRC.[15]

A different question arises when considering that the CRC is mainly territorial in scope. It can be applied extraterritorially under the general requirements for extraterritorial application of human rights, based on the exercise of State's jurisdiction abroad. However, the Committee attaches to the home State certain duties regarding the operation of its enterprises in third countries. First, within the obligation to respect the CRC and in particular Article 3, States 'should not directly or indirectly facilitate, aid and abet any infringement of children's rights'.[16] This might open to the possibility of holding the State accountable for its trade

[12] ibid.

[13] ICESCR Committee, 'General comment No 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (10 August 2017) UN Doc E/C.12/GC/24 para 12.

[14] ibid para 13.

[15] See U Kilkelly, 'The Best Interests of the Child: A Gateway to Children's Rights?' in EE Sutherland, L-A Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child – Best Interests, Welfare and Well-being* (CUP 2017) 51.

[16] General Comment No 16 (n 10) para IV.B.1.

relations that contribute to violations of children rights abroad.[17] Secondly, home States have the obligation to respect, protect and fulfil children rights in the context of business extraterritorial activities and operations, by adopting the necessary domestic legislation.[18]

In light of these few remarks, it is certainly possible to claim that States have a duty to adopt trade policies in compliance with children's rights, given the impact that economic relations with third countries might produce on children. In this regard, the focus shifts primarily towards child labour, for the reasons that will be addressed in the next paragraph.

3. *Child labour in the trade-labour divide*

Defining child labour in comprehensive legal terms might prove particularly complex and even not entirely desirable. The forms of child labour can significantly diverge from country to country and the concerns for the phenomenon change depending on economic, cultural and social factors[19].

The CRC addresses children economic exploitation in its Article 32 albeit not prohibiting child labour *per se*. The provision recognises the right of children to be protected from economic exploitation, hazardous work or any other form likely to impair the child's right to education and development.[20] It also sets forth the duty of States to adopt the necessary measures to fully implement such right, in particular those related to the minimum age and to the regulation of hours and conditions of employment.

International obligations related to child labour are mostly enshrined in International Labour Organization (ILO) conventions, namely the

[17] The approach would to a certain extent resemble the concept of art 16 of the Articles on State Responsibility dealing with aid or assistance in the commission of an internationally wrongful act.

[18] General Comment No 16 (n 10) para V.C.

[19] For a discussion see F Humbert, *The Challenge of Child Labour in International Law* (CUP 2009) 14.

[20] See P Alston, 'Art. 32 – The Right to Protection from Economic Exploitation' in J Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (OUP 2019) 1225, 1231, noting that art 32 must be read in conjunction with the other provisions of the CRC dealing with exploitation of children.

1973 Convention 138 on the Minimum Age for Admission to Employment,[21] and the 1999 Convention 182 on the Worst Forms of Child Labour.[22] A duty to effectively abolish child labour is included in the ILO Declaration on the Fundamental Principles and Rights at Work of 1998. The entire set of rules provided by these instruments differentiate between a tolerable child work and exploitative child labour, prohibiting labour under the minimum age, hazardous work and the worst forms of labour (such as trafficking and prostitution).[23]

The phenomenon of child labour has long historical roots and cannot be entirely ascribed to globalisation of business activities. Nonetheless, some deem that the growing dimension of international trade is linked to the increase of child labour, especially in the global South[24]. Or that at least trade policies may have an impact in the effort of eradicating the worst forms of child labour. This argument inevitably leads to the long-debated question on the relationship between trade and core labour standards.

Obligations deriving from international trade law and those related to labour rights often follow incompatible patterns. The tension between such rules stems from the idea of comparative advantage and from fear of protectionist policies[25]. While lower labour standards might constitute a comparative advantage for developing countries over industrialised

[21] Convention (No 138) concerning minimum age for admission to employment (adopted 26 June 1973, entered into force 19 June 1976) 1015 UNTS 297.

[22] Convention (No 182) concerning the prohibition and immediate action for the elimination of the worst forms of child labour (adopted 17 June 1999, entered into force 19 November 2000) 2133 UNTS 161.

[23] F Humbert, 'The WTO and Child Labour: Implications for the Debate on International Constitutionalism' in H Gött (ed) *Labour Standards in International Economic Law* (Springer 2018) 95.

[24] S Jodoin, C Pollack, 'Children's Rights, International Trade Law and Economic Globalisation' in C Fenton-Glynn (ed), *Children's Rights and Sustainable Development Interpreting the UNCRC for Future Generations* (CUP 2019) 261. For a discussion cf D Samida, 'Protecting the Innocent or Protecting Special Interests – Child Labour, Globalization and the WTO' (2005) 33 Denver J Intl L & Policy 411; S Chauduri, MR Gupta, 'Child Labour and Trade Liberalization' (2005) 55 The Japanese Economic Rev 201. Another view contends that market openness could instead reduce child labour by increasing a country's gross national product- See RC Shelburne, 'An Explanation of the International Variation in the Prevalence of Child Labour' (2001) 24 *The World Economy* 359, 374.

[25] Cf C Kaufmann, Trade and Labour Standards in Max Planck Encyclopedia of Public International law.

ones, the latter have been concerned by a potential race to bottom in the protection of labour law together and by an adverse effect on their domestic markets. This dynamic can be easily transposed in our context, where child labour predominantly occurs within low-income countries and where children are considered a low-wage and accessible workforce, especially for hazardous works.[26]

Notwithstanding the numerous efforts to establish a link between trade and labour and human rights, as of today the institutional system of international trade has been quite reluctant to address the issue. The World Trade Organization (WTO) agreements do not contain any reference to human and labour rights and any attempt to intervene in such matter was unsuccessful. In 1996, at the Singapore first WTO Ministerial Conference, some countries proposed a discussion on trade-labour linkages, while the majority opposed by deeming the WTO not to be the suited forum to deal with the issue. While States agreed that growth and development fostered by trade liberalisation could contribute to the promotion of labour standards, the ILO was considered the proper and competent organisation.[27]

On the other side, the ILO has followed a different path: only in one case the ILO Conference recommended member States to take appropriate measures in relation to forced and compulsory labour in Myanmar, which prompted trade restrictions by the US in 2003.[28] However, ILO action has focused primarily on the inclusion of labour rights clauses in trade agreements.[29]

As regards child labour, stronger indications came from the practice of the CRC Committee. In a number of Concluding Observations from 2011, the Committee referred to the possibility of resorting to import bans with regard to products coming from countries investigated by the ILO for child labour.[30] It also highlighted the duty of CRC State parties

[26] Child Labour – Global Estimates 2020 (n 1) 50.

[27] Singapore Ministerial Declaration, WT/MIN(96)/DEC, 13 December 1996. Cf G Adinolfi, 'ILO Child Labour Standards in International Trade Regulation: The Role of WTO' in G Nesi, L Nogler and M Pertile (eds), *Child Labour in a Globalized World – A Legal Analysis of ILO Action* (Ashgate 2008) 265-267.

[28] US Congress, Public Law 108 - 61 - Burmese Freedom and Democracy Act of 2003.

[29] See Section 5.

[30] UN Committee on the Rights of the Children, 'Consideration of Reports submitted by States Parties under Art. 44 of the Convention. Concluding Observations: Finland'

to use trade agreements and national legislation 'to require that the products entering its market are child-labour free'.[31]

The relevance of this conclusion is two-fold: on the one hand, the Committee seems to share the view that trade restrictions can be legitimate when adopted to secure children rights under the CRC; on the other hand, it indicates the tools available to prevent child labour products to enter the market by referring to both national legislation and trade agreements. However, these options are not as straightforward as they have been presented.

4. *Obstacles to unilateral trade restrictions addressing child labour*

Resorting to unilateral trade restrictions for products deriving from child labour is a choice facing several difficulties and with highly unpredictable outcomes.[32]

From a political perspective this is certainly a sensitive question: States unilaterally restricting trade might face allegations of depriving other countries of their competitive advantage while adopting disguised protectionist policies.[33] This is especially so when developed States invoke the protection of fundamental rights as the objective of economic measures,[34] as it is often the case with economic sanctions.

(2011) UN Doc CRC/C/FIN/CO/4; UN Committee on the Rights of the Children, 'Consideration of Reports submitted by States Parties under Art. 44 of the Convention. Concluding Observations: Italy' (2011) UN Doc CRC/C/IT/A/CO/3-4.

[31] UN Committee on the Rights of the Children, 'Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Republic of Korea' (2011) UN Doc CRC/C/KOR/CO/3-4 paras 26-27.

[32] The paragraph does not address the whole set of unilateral measures available to tackle non-trade concerns, such as generalized system of preferences. For a comprehensive analysis see O de Schutter, *Trade in the Service of Sustainable Development – Linking Trade to Labour Rights and Environmental Standards* (Bloomsbury 2015).

[33] A Nissen, 'Can WTO Member States Rely on Citizen Concern to Prevent Corporations from Importing Goods Made from Child Labour?' (2018) 14 Utrecht L Rev 70, 72.

[34] See S Chaudhuri, JK Dwibedi, 'Trade Sanctions and Child Labour' in S Chaudhuri and JK Dwibedi (eds), *The Economics of Child Labour in the Era of Globalization: Policy Issues* (Routledge 2017) ch 3.

There are also practical obstacles, deriving not only from the complexity of demonstrating that a certain product has been realized through child labour, but also from the potential ineffectiveness of such measures. Indeed, most of child labour takes place in the informal economy, especially within the family, and it is thus difficult to track.[35] In particular, it is complex to have a precise picture of the relevance of child labour in a given economy and to distinguish between export and domestic production sectors.[36] Recent studies demonstrate that child labour predominantly occurs in production linked to domestic production and consumption, particularly in regions where children in child labour are mainly involved in family-based subsistence agriculture.[37] Consequently, import bans targeting child-labour products in the export sector might not be entirely effective when child labour is wider in the production of locally consumed products. Moreover, such restrictions could also bear a negative effect, being short-term responses that would only increase children extreme poverty.[38]

Finally, trade restrictions should overcome several legal hurdles stemming from international trade law and WTO obligations.

Firstly, trade measures adopted to contrast child labour in third countries might constitute a prohibited discrimination under the GATT regime, on which the most-favoured nation clause (Article I) and the national treatment clause (Article III) are based. They could also be deemed incompatible with market access obligations under Article XI GATT. It is true that discriminations only occur between 'like' products, that is by assessing the competitive relationship between and among imported and domestic products.[39] Import bans based on fundamental rights considerations fall within the debate on the relevance of non-product related process and production methods (PPM) for the purpose of their legitimacy under WTO law. It is sometimes claimed that PPM might impact on the

[35] Child Labour – Global Estimates 2020 (n 1) 37.

[36] See eg, on the agricultural sector, B Carter, K Roelen, 'Prevalence and Impacts of Child Labour in Agriculture' Institute of Development Studies (5 May 2017).

[37] ILO, Organisation for Economic Co-operation and Development, International Organization for Migration, and United Nations Children's Fund, 'Ending child labour, forced labour and human trafficking in global supply chains' (2019) 8.

[38] Alston (n 20) 1253-1254, recognizing that unilateral trade measures could nonetheless fall within the scope of art 32 CRC on children economic exploitation.

[39] M Matsushita, TJ Schoenbaum, PC Mavroidis and M Hahn, *The World Trade Organization – Law, Practice and Policy* (OUP 2017) 190.

definition of a product and exclude the 'likeness' requirement for assessing discriminatory measures. In other words, a product realized by means of child labour could not be compared to other 'child labour free' products and thus a restriction on the import of the first kind of products should not amount to a discrimination.[40] However, it should be noted that the WTO Dispute Settlement Body (DSB) never expressly accepted such construction.

The door remains theoretically open to address distinctions based on PPM within the scope of the general exceptions of Article XX GATT[41]. This path too is not without uncertainties: for a measure to be justified under Article XX GATT it must fall within one of the policy objectives listed in the provision, to be necessary to attain that objective and it must not constitute an arbitrary or unjustifiable discrimination. Child labour-based measures could be justified under the 'public morals' or the 'human health' exceptions. As to the first, the dynamic character of public morals – as recognised by DSB practice – would certainly offer a chance of success, especially when interpreted 'in light of contemporary concerns of the community of nations'.[42] In particular, the existence of widely ratified treaties on children protection – such as the CRC and ILO Convention 182 – would prove the existence of such concerns within the international community.[43] As regards human health, few doubts can be raised on the fact that the prohibited forms of child labour do amount to a threat for the life of children.

However, unilateral trade measures must not have the effect of an unjustifiable or arbitrary discrimination or of a disguised restriction to international trade. The unpredictable outcomes of this test constitute a major difficulty in our scenario, especially since a restriction would target one or more countries (or one or more specific sectors) but not all those

[40] Humbert (n 23) 96, 98-99. See more generally, on the PPM doctrine, R Howse, D Regan, 'The Product/Process Distinction – An Illusory Basis for Disciplining Unilateralism' (2000) 11 Eur J Intl L 249; S Charnowitz, 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality' (2000) 27 Yale J Intl L 59; CR Conrad, *Processes and Production Methods (PPMs) in WTO Law – Interfacing Trade and Social Goals* (CUP 2011).

[41] See eg E Vranes, *Trade and the Environment – Fundamental Issues in International Law, WTO Law, and Legal Theory* (OUP 2009) 322, 327.

[42] WTO Appellate Body, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (15 June 2001) para 129.

[43] Adinolfi (n 27) 286-287.

affected by child labour, with a wide margin of discretion upon national competent authorities.[44] Moreover, the Appellate Body clarified that States should resort to unilateral measures only when a negotiated solution with the interested partners has failed.[45]

Considering the abovementioned reasons, an enforcement of children protection through WTO law seems if not impossible at the very least extremely complex. This probably explains the general inaction of States to enact trade restrictions as a tool to fight child labour. Nonetheless, the debate il still ongoing and initiatives have been taken by various actors, included the EU and the US. The latter recently adopted an import ban on goods produced using forced labour in China, especially the Xinjiang Uyghur Autonomous Region, which also includes a presumption that all goods produced in the region derive from forced labour.[46] The European Parliament has also called upon the Commission and the Council to adopt a similar import ban[47] and in the latest State of the Union, the President of the Commission has confirmed the intention to introduce a ban on the import of products made with forced labour into the EU market.[48]

Whether this kind of actions will pass the test of international trade obligations and whether they will prove effective is simply too early to assess. But even potential challenges by trade partners could prove

[44] WTO Appellate Body, European Communities — Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400-401/AB/R (22 April 2014) para 5.320.

[45] See T Cottier, 'The Implications of EC – Seal Products for the Protection of Core Labour Standards in WTO Law' in H Gött (ed), *Labour Standards in International Economic Law* (Springer 2018) 90-9.

[46] See US Secretary of State, Press Statement - The Signing of the Uyghur Forced Labor Prevention Act <www.state.gov/the-signing-of-the-uyghur-forced-labor-prevention-act/>.

[47] See already European Parliament, Resolution of 25 November 2010 on Human rights, social and environmental standards in International Trade agreements, 2009/2219(INI). In 2016 the Council endorsed the request, manifesting a certain caution on the use of unilateral trade measures. See Council Conclusions on Child Labour, adopted by the Council at its 3477th meeting (20 June 2016) para 8.

[48] The Commission will also face internal concerns in this regard: Financial Times, EU urges caution on any ban on imports made with forced labour – Brussels tells MEPs that such moves could risk challenges by trade partners (available at <www.ft.com/content/748a837b-ac51-4f2e-9a5d-3af780ec8444>).

useful, at least in the perspective of addressing the issue for the first time in the context of the WTO dispute settlement procedure.

5. *Enforcing children rights through trade agreement?*

This section will offer an overview of how free trade agreements (FTAs) of new generation can perform a better role in ensuring the respect of children rights and in the fight against child labour. Although the discussion on the inclusion of social clauses in FTAs is now wide and rich, some recent development might add a new layer of analysis.

First of all, using trade agreements to protect labour and children rights represents one of the many facets of the duty of international co-operation set forth by the CRC. Indeed, Article 4 of CRC requires the parties to ensure children economic, social and cultural rights 'to the maximum extent of their available resources and, where needed, within the framework of international co-operation'. And as already outlined, the CRC itself has confirmed the duty for States to use trade agreements to address child labour issues.[49] Few data will be useful to describe recent trends.

Since the enactment of the North American Agreement on Labor Co-operation (NAALC) in 1993 as a side agreement to the North American Free Trade Agreement (NAFTA), the number of trade agreements including labour standards have increased significantly. This practice relates mostly to agreements concluded with developed countries (primarily the US and the EU), but it is extending to agreements concluded between developing countries, although with major differences.[50] As of 2016, about 80 trade agreements explicitly refer to labour standards on a total of 350 FTAs notified to the WTO.[51] The first examples have not proven particularly effective: in the NAALC for instance, parties undertook certain duties of cooperation on labour matters, while focusing on enforcement of their respective domestic labour law.[52] Subsequent agreements referred to ILO obligations, including the prohibition and the

[49] See above section 3.

[50] ILO, Social Dimensions of Free Trade Agreements (2015) 19-20.

[51] ILO, Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements (2017) 11-12.

[52] Adinolfi (n 27) 269.

elimination of worst forms of child labour.[53] On the US side, the recent Trans-Pacific Partnership (TPP) and the US-Mexico-Canada Agreement (USMCA) include explicit references to the 1998 ILO Declaration on Fundamental Principles and Rights at Work.[54] A very similar pattern has been followed also in FTAs concluded by the EU with third countries.[55]

In most of these provisions, however, the obligation to enforce labour standards only refers to trade-related issues. For instance, the USMCA commits the Parties not to violate nor derogate from enforcing domestic and international labour protection regulations 'in a manner affecting trade or investment between the Parties'.[56] This means that a violation of labour standards (such as the use of prohibited child labour) could only be invoked when affecting trade between the Parties. Although providing for a presumption that a violation of these provisions always affect trade unless proven otherwise, this still constitute an obstacle to the effectiveness of labour clauses in FTAs.[57]

EU FTAs include the same limitation. The connection between trade and labour standards is expressed through three main obligations, as in the case of the Comprehensive Economic and Trade Agreement concluded between the EU and Canada (CETA). Firstly, through the recognition 'that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their labour law and standards'. Secondly, with a non-derogation clause requiring Parties not to waive or otherwise derogate from its labour law and standards to encourage trade. And finally, by prohibiting the Parties to fail, through a sustained or recurring course of action or inaction, to effectively enforce its labour law and standards to encourage trade or investment.[58]

[53] See e.g. arti 18.8 of the 2003 US-Chile FTA. For a comprehensive analysis of US FTAs between 1993 and 2005 see Humbert (n 19) 197.

[54] See respectively arts 19.1 and 19.3 of the TPP and arts 23.1 and 23.3 of the USMCA.

[55] Especially in the newest generation of EU FTAs that followed the European Commission 2006 communication on 'Global Europe: Competing in the World'. Examples are offered by the 'Trade and Sustainable Development Chapters' in the agreements concluded with South Korea, Canada and Mexico.

[56] Art 23.4 of the USMCA.

[57] See BM Araujo, 'Labour Provisions in EU and US Mega-Regional Trade Agreements: Rethoric and Reality' (2018) 67 ICLQ 238; MA Corvaglia, 'Labour Rights Protection and Its Enforcement under the USMCA: Insights from a Comparative Legal Analysis' (2021) 20 World Trade Rev 648, 655-658.

[58] Art 23.4 of the CETA.

Besides these provisions though, recent FTAs refer to several broader obligations on social standards, requiring the parties to reaffirm their commitment as ILO member States and integrating binding references to ILO instruments. In particular, most FTAs include standard references to the already mentioned 1998 Fundamental Principles Declaration, ILO fundamentals conventions and the ILO 2008 Social Justice Declaration.[59] Moreover, EU FTAs usually require the parties to 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'.[60]

While substantive labour standards have become a common feature of FTAs, enforcement mechanisms still differ greatly depending on the contracting Parties.[61]

The obligations referred to labour rights have been already scrutinised in two different disputes arisen in the context of the US-Central America (CAFTA-DR) and of the EU-South Korea agreements. Both deserve to be analysed in detail.

5.1. *The US-Guatemala dispute*

The dispute that arose between US and Guatemala is the first and only to have addressed the issue of labour standards under a US FTA. The dispute was initiated by the US, claiming the responsibility of Guatemala for its lack of action in enforcing labour protection and for violence against workers. The relevant obligation was the one set forth by Article 16.2(a), according to which 'A Party shall not fail to effectively

[59] See eg art 23.3.1. of CETA. FTAs thus incorporate these as hard obligations within the trade regime binding upon the parties. As to the 1998 Fundamental Principles Declaration, each party 'shall ensure that its labour law and practices embody and provide protection for the[se] fundamental principles and rights at work'. See L Bartels, 'Human Rights, Labour Standards, and Environmental Standards in CETA' in S Griller, W Obwexer, and E Vranes (eds), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (OUP 2017), 203.

[60] Art 13.4.3. of the EU-Korea agreement.

[61] For instance, US FTAs are generally considered as having stricter enforcement procedure in comparison to EU FTAs. See E Postnikov, *Social Standards in EU and US Trade Agreements* (Routledge 2020) 22. The trend of including social standards in trade agreements is not limited to the EU and the US. For an overview see L Engen, 'Labour Provisions in Asia-Pacific Free Trade Agreements' (United Nations 2017).

enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the

Parties'. The arbitration panel had to solve a two-tier question: whether Guatemala effectively failed to enforce labour laws and whether this failure affected trade with the US. The burden of proof was in this case placed upon the complainant party, but the Panel found that the US had established sufficient evidence to demonstrate that Guatemala had indeed failed to implement certain judicial orders of reinstatement in favour of illegitimately dismissed workers.

The Panel then turned to interpreting the requirement of effects on trade. The US had suggested quite a broad interpretation, claiming that 'in a manner affecting trade' means 'that has a bearing on, influences or changes cross-border economic activity, including by influencing conditions of competition within and among the CAFTA-DR Parties'.[62] On the contrary, according to Guatemala, a violation of labour standards would be relevant under the trade agreement only if the impact on trade was the 'intended consequence' of that violation.[63]

The Panel ruled in favour of Guatemala, casting doubts upon the interpretation suggested by the US, that would imply that 'all failures to effectively enforce such laws would be in a manner affecting trade to the extent that they affected employers engaged in trade'.[64] According to this argument, in order for a failure to affect trade 'it must change conditions of competition by conferring a competitive advantage upon an employer engaged in trade'. Therefore, a complainant must demonstrate that labour cost effects reasonably expected in light of the record evidence are sufficient to confer some competitive advantage.

The strict approach taken by the Panel has inevitably a bearing on the discussion on effectiveness of FTAs in protecting labour rights. The high threshold required in order to prove violations of labour standards arising out of a 'recurring course of action or inaction' would significantly

[62] Final Panel Report, *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR* paras 155-156. The US had also claimed that an economic analysis of the impact on trade deriving from the violation of labour standards would not be required by the agreement.

[63] ibid para 117.

[64] ibid paras 478-479.

limit the capacity of FTAs to constitute an effective tool of enforcement.[65] In turn, it would mean that a State failing to implement labour law – such as those protecting children from certain forms of labour – would not be held accountable for a violation of the trade agreement unless a concrete effect on trade is demonstrated. At the very least, this approach would be not applicable to child labour products that are not destined to the export sectors,[66] thus limiting the capacity of trade agreements to provide an effective enforcement framework for tackling in a comprehensive manner the use of child labour in domestic economies.

5.2. *The EU-Korea dispute*

The dispute arose out of a complaint brought by the EU against South Korea under the 2011 EU-South Korea FTA.[67] The EU contested to South Korea the violation of labour standards deriving from a piece of domestic legislation on trade unions and labour relations, together with the failure to make sufficient efforts towards the ratification of ILO core labour conventions. Both obligations stem from Article 13.4.3. of the FTA, in the so-called 'Sustainable Development Chapter' of the agreement.

Under paragraph 3 of the Article, the Parties committed to respect, in accordance with ILO conventions and with the ILO 1998 Declaration on Rights at Work, four fundamental rights: freedom of association and the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation. Moreover, under the same provision, the Parties undertook to 'make continued and sustained efforts towards ratifying the fundamental ILO

[65] P Paiement, 'Leveraging Trade Agreements for Labour Law Enforcement: Drawing Lessons from the US-Guatemala CAFTA Dispute' 49 Georgetown J Intl L (2018) 690. The outcome also explains the innovation adopted within the USMCA on a presumption on effects on trade. See Corvaglia (n 57) 660-661.

[66] See Section 4 above.

[67] The agreement was provisionally applied since 2011 but entered into force in 2015. See Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, in OJ L127/1, 14 May 2011.

Conventions as well as the other Conventions that are classified as "up-to-date" by the ILO'.

One of the first objection raised by South Korea related to the scope of this provision and to the fact that the EU contested 'aspects related to labour … as such, without any established connection with trade between EU and Korea'. [68] The EU had relied especially on Article 13.2 to claim that no effects on trade should be established to ascertain a violation by South Korea of core labour rights. Article 13.2 provide for a general clause on the scope of application of Chapter 13: 'Except as otherwise provided in this Chapter, this Chapter applies to measures adopted or maintained by the Parties affecting trade-related aspects of labour and environmental issues'.

The Panel took quite an extensive approach in addressing the issue: it argued that, being Article 13.4.3. silent on the trade-relatedness matter, the obligations provided therein fall in fact within the clause on the scope of application.[69] According to the Panel, the fundamental and universal character of rights enshrined in the 1998 ILO Declaration led the Parties to draft 'Article 13.4.3 in such a way as to exclude the possibility that this domestic commitment to achieve or work towards these key international labour principles and rights exists only in relation to trade- related aspects of labour'.[70] Along the same line, the Panel also rejected the relevance of the US-Guatemala dispute, which revolved around a provision expressly requiring a connection with trade.[71]

This interpretation certainly favours labour standards protection over trade concerns, which might seem at odd with the general objectives of an FTA. The Panel was probably aware of this when it affirmed that 'the Parties have drafted the Agreement in such a way as to create a strong connection between the promotion and attainment of fundamental labour principles and rights and trade' and that national measures implementing labour rights 'are therefore inherently related to trade as it is

[68] It is noteworthy that this issue was raised by South Korea as a bar to the Panel of Expert's jurisdiction on the case.

[69] Panel of Experts proceeding constituted under art 13.15 of the EU-Korea Free Trade Agreement, Report of 20 January 2020, para 63.

[70] ibid para 65. The Panel (para 66) also argued that 'if Korea's position were correct … Article 13.4.3 would permit a Party to institute a form of slavery or child labour for workers who were deemed not to fall within the category of 'trade-related labour"'.

[71] ibid paras 92-93.

conceived in the EU-Korea FTA'.[72] The Panel confirmed in the end that Korea violated the fundamental freedom of association and the right of collective bargaining, while dismissing the claim over the lack of effort in ratifying ILO Conventions.[73]

The findings of the Panel in the EU-Korea dispute come with a number of consequences for our discussion. As a first consideration, the Panel attached a remarkable relevance to rights and duties enshrined in the 1998 ILO Declaration, which include the abolition of child labour. Given the uncertain status of the Declaration in international law,[74] its integration within FTAs might prove effective in securing the enforcement of the provided principles. Moreover, having overcome the limit imposed by a trade-relatedness requirement for violations of labour standards, FTAs could become an additional forum to address fundamental rights concerns in a cooperative framework.[75]

One should however remind that in EU FTAs disputes over sustainable development chapters are regulated by specific rules, providing for a weaker enforcement mechanism. This might explain the 'generous' interpretation adopted by the Panel in the EU-Korea dispute, but at the same time suggests caution in assessing the concrete impact of such a decision for future labour rights protection.[76] Developments on this plane could derive from the more assertive enforcement approach envisaged by the EU Commission in its recent 2021 Trade Policy Review.[77]

[72] ibid para 95.

[73] See on the latter aspect S Peers, 'Free Trade v Freedom of Association? The EU/South Korea Free Trade Agreement and the Panel Report on the EU Challenge to South Korean Labour Law', EU Law Analysis (26 January 2021) <http://eulawanalysis.blogspot.com/2021/01/free-trade-v-freedom-of-association.html>.

[74] See *inter alia* P Alston, '"Core Labour Standards" and the Transformation of the International Labour Rights Regime' (2004) 15 Eur J Intl L 457; E de Wet, 'Governance through Promotion and Persuasion: The 1998 ILO Declaration on Fundamental Principles and Rights at Work' (2008) 9 German L J 1429, 1437.

[75] See A Nissen, 'And So It Begins: Trade and Sustainable Development Recommendations by a Panel of Experts under a European Union Free Trade Agreement' (2021) 7 Intl Labour Rights Case L 257, 261.

[76] See M Bronckers, G Gruni, 'Taking the Enforcement of Labour Standards in the EU's Free Trade Agreements Seriously' (2019) 56 CMLR 1591.

[77] EU Commission, Trade Policy Review - An Open, Sustainable and Assertive Trade Policy, COM(2021) 66 final, 18 February 2021.

6. *Conclusions*

The analysis conducted in the previous sections has sketched some of the features and of the problems raised by the relationship between child labour and trade. The phenomenon of children economic exploitation represents to a certain extent a test for international trade rules and for their capacity to accommodate competing interests.[78]

One the one hand, it would be hard to draw general conclusions on the concrete relevance that trade policies might have in contributing to the protection of children rights. More often than not, the international trading system has proven unable to properly interact with other legal regimes, for reasons that are linked both to its substantial rules and to its enforcement mechanisms.

However, on the other hand, recent developments in trade practice show that margins for addressing the relationship with other values – such as fundamental rights or labour standards – are wider than in the past. Indeed, the system still presents major levels of uncertainty: while unilateral domestic measures face the risk of legal challenges, cooperation in the framework of FTAs very much depends on how preferential rules are drafted and applied in the various dispute settlement procedures.[79]

In general terms, one could confirm that there is space for the best interests of the child to play a role in this context. The principle could not only be of guidance for States in designing their internal and external policies, but also constitute an interpretative principle for dispute settlement mechanisms. Especially considering its universality and wide formulation, it can contribute to balancing the interests at stake in trade

[78] More generally, it represents one of the many facets of the complex relationship between trade and fundamental rights. For an analysis of the different approach in this regard see F Seatzu, 'Reconciling International Human Rights with International Trade' in I Bantekas, MA Stein (eds), The Cambridge Companion to Business and Human Rights L (CUP 2021) 22.

[79] In a recent report on a dispute arisen under the USMCA the Panel held that the reference to 'freer, fairer markets' in preamble of the agreement reflects 'an intent to open markets to a greater degree than was the case before its effective date and under predecessor agreements'. Although not specifically relevant to the issue at stake, this interpretation would favour trade liberalization over other protected values. See Panel Report, Canada – Dairy TRQ Allocation Measures (CDA-USA-2021-31-010) (20 December 2021) para 117.

disputes potentially dealing with child labour and to create 'a culture of rights' beyond the CRC.[80]

Its implications could also be assessed in the change of paradigm currently occurring in various domestic legislations, where the focus is shifting from trade to corporations' duties. The recent enactment of the Dutch Child Labour Due Diligence Law in 2019 is evidence of this trend. The law sets forth due diligence obligations not only for companies incorporated in the Netherlands, but also for large foreign companies conducting activities in the Netherlands or selling a product on the Dutch market. The EU is also moving in a similar direction as the Commission and the European Parliament envisage the future enactment of a new mandatory system of due diligence for supply chains.[81] The new legislation should impose upon EU companies due diligence obligations on human rights and the environment, including those on workers' rights and child labour. While addressing many of the concerns also raised by the CRC Committee in its 2013 General Comment, these examples also prove that responses to children's rights violations cannot be isolated in one single regime and need a transnational approach.[82] Trade and trade policies are not the solution to a problem, but changes in the current legal framework are to be welcomed as additional tools in the eradication of child labour.

[80] L Woll, *The Convention on the Rights of the Child Impact Study: A Study to Assess the Effect of the UN CRC on the Institutions and Actors W1ho Have the Responsibility and Ability to Advance Child Rights* (Save The Children 2000).

[81] European Parliament, *Towards a Mandatory EU System of Due Diligence for Supply Chains* (October 2020).

[82] See eg as regards labour standards the discussion in A Trebilcock, 'Why the Shift from International to Transnational Law is Important for Labour Standards' in H Gött (ed) *Labour Standards in International Economic Law* (Springer 2018) 57.