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Not That Assertive: The EU's Take on Enforcement of Labour Obligations in Its Free Trade Agreement with South Korea

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Abstract

In 2011, the European Union (EU) concluded the first of a 'new generation' of free trade agreements that contained a separate chapter with obligations relating to 'trade and sustainable development' (TSD) issues. This was the Free Trade Agreement with the Republic of Korea. The EU formally initiated its first TSD complaint, under this agreement, in 2018. This labour complaint came after a non-paper of the European Commission promised 'more assertive' use of the soft dispute mechanism for TSD obligations, following years of pressure by various stakeholders. This non-paper remained apologetic about hard sanctions but promised a review in 2023. This article aims to study to what extent the EU delivered upon its promise to use the soft dispute mechanism more assertively during its first TSD proceedings. It finds that the EU was not prepared to act assertively in relation to certain issues (collective bargaining and the right to strike) and certain workers (in the public and export sectors) during the proceedings before the ad hoc Panel of Experts, which ended in 2021. It argues, in particular, that the EU missed a major opportunity to use its bargaining leverage vis-à-vis Korean consumer conglomerates.

1 Introduction

After the failure to make significant progress towards a multilateral trade agreement in the World Trade Organization's (WTO) Doha Round in 2001, the European Union

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and Korea were disillusioned.¹ They both started exploring their options to conclude bi- or plurilateral trade agreements, a policy that had been frequently promoted by the USA.² The EU outlined its policy in its Global Europe Strategy in 2006.³ Its overarching goal was the exploration of the scope for regulatory cooperation and convergence.⁴ The EU aimed to simultaneously expand 'the competitive space for European firms beyond the physical boundaries of the single market' and the 'regulatory space of the single market, by promoting cooperation on Europe's norms and values abroad'.⁵ Korea was selected as a priority partner to conclude a free trade agreement (FTA) exclusively on the basis of economic criteria.⁶ This was hardly surprising. After the United States of America (USA), Russia and China played out their war on the Korean peninsula in 1950–1953, Korea's developmental authoritarian regime successfully pursued economic growth while preserving military readiness. Politics, business and banking were closely intertwined.⁷

After the democratization in 1988, Korea joined the International Labour Organization (ILO) in 1991 and the Organisation for Economic Co-operation and Development (OECD) in 1996. Korea's first civilian president, Kim Young-sam (1993–1998), increased the accountability of corporations but remained opposed to collective labour rights.⁸ The 1997 Asian financial crisis strengthened this stance further. The Kim Dae-jung administration (1998–2003) agreed to accept a rescue package that was provided by the International Monetary Fund (IMF) and supported by the USA and Japan.⁹ This package came with a stringent and questionable set of neo-liberal structural adjustment conditions of which the consequences can be felt to this day. For example, a considerable part of the Korean workforce earns their income from precarious labour. President Roh Moo-hyun (2003–2008) further entrenched neo-liberal ideals by announcing Korea's FTA Policy Roadmap in 2003. Like the EU's Global Europe Strategy, this roadmap identified trade partners on the basis of economic criteria.

- ¹ Kang, 'EU's Global Europe Initiative and Korea-EU FTA', 8 *Korea University Law Review* (2010) 47, at 55.
- ² Kim, 'The Policy and Institutional Framework for FTA Negotiations in the Republic of Korea', in J. Harrison (ed.), *The European Union and South Korea: The Legal Framework for Strengthening Trade, Economic and Political Relations* (2013) 41, at 42–43.
- ³ European Commission, 'Global Europe: Competing in the World. A Contribution to the EU's Growth and Jobs Strategy', Doc. COM(2006)567 (2006), at 9.
- ⁴ De Lombaerde, Kühnhardt and Filadoro, 'Re-shaping Global Borders: EU Trade Policy and the Interregional Preference', in S. Khorana and M. Garcia (eds), *Handbook on the EU and International Trade* (2018) 263, at 264.
- ⁵ European Commission, 'Communication: A Single Market for 21st Century Europe', Doc. COM(2007) 724 final (2007), at 2.2.
- ⁶ European Commission, *supra* note 3, at 9.
- ⁷ Suh and S.H. Kwon, 'Whiter the Developmental State in South Korea? Balancing Welfare and Neoliberalism', 38(2) *Asian Studies Review* (2014) 676, at 682.
- ⁸ Y.W. Khil, *Transforming Korean Politics: Democracy, Reform, and Culture: Democracy and Culture* (2015), at 152.
- ⁹ J.Y. Lee, 'Neoliberal Developmentalism in South Korea and the Unfulfilled Promise of Economic and Social Rights', in G. MacNaughton and D. Frey (eds), *Economic and Social Rights in a Neoliberal World* (2018) 261, at 261.

The EU-Korea FTA was concluded in 2011 and provisionally applied until its ratification by both parties in 2015.¹⁰ The agreement contained a separate Chapter 13 with trade and sustainable development obligations, which comprise labour and environmental standards. Both the EU and Korea at the time had never included such far-reaching measures regarding labour and environmental issues in an FTA. Previously, the regulation of sustainable development in the EU's FTAs was limited to general exceptions clauses.¹¹ Since the negotiations of the EU-Korea FTA, all the EU's FTAs contain a chapter, or chapters, dedicated to TSD.¹² Korea had previously negotiated labour and environment chapters in its FTA with the USA.¹³ But, up to the present day, the EU-Korea FTA remains Korea's FTA with the most extensive labour obligations that has entered into force.¹⁴

Since 2014, the EU's Domestic Advisory Group (DAG), an innovative civil society dialogue mechanism under Chapter 13 of the EU-Korea FTA, has asked the European Commission to trigger this chapter's soft dispute mechanism for labour rights issues in Korea. After a Commission non-paper in 2018 promised 'more assertive' use of the soft dispute mechanisms for TSD issues in FTAs, the EU filed formal complaints against Korea – its first TSD complaint ever under a FTA. This article aims to study to what extent the EU delivered upon its promise to use the soft dispute mechanism more assertively. The article is organized as follows. The second section explains how Chapter 13 of the EU-Korea FTA links trade to labour issues. It discusses the labour obligations in Chapter 13 and describes that the EU and Korea have agreed that only a soft dispute mechanism – consisting of government consultations and Panel of Experts proceedings – is available for any complaints under this chapter. The third section discusses the initial reluctance of the Commission to start a soft dispute settlement procedure, despite pressure from stakeholders. In what is this article's main contribution to the academic debate, sections 4 and 5 compare the EU complaints that have been brought in the government consultations and the subsequent ad hoc Panel of Experts. This comparative content analysis points out that the EU has made its claims before the

¹⁰ Free Trade Agreement between the European Union and its Member States, of the One Part, and the Republic of Korea, of the Other Part European (EU-Korea FTA), OJ 2010 L 127, at 6.

¹¹ Marín Durán, 'Innovations and Implications of the Trade and Sustainable Development Chapter in the EU-Korea Free Trade Agreement', in J. Harrison (ed.), *The European Union and South Korea: The Legal Framework for Strengthening Trade, Economic and Political Relations* (2013) 124, at 129 (referring to the consolidated version of the Treaty on the Functioning of the European Union, OJ 2012 C 326, Art. 36).

¹² Boisson de Chazournes, 'The ILO and International Judicial Mechanisms: A Story of Control and Trust', in G. Politakis, T. Kohiyama and T. Lieby (eds), *ILO100: Law for Social Justice* (2019) 1, at 24.

¹³ Free Trade Agreement between the United States of America and the Republic of Korea (Korea-USA FTA) 2007, 46 ILM 642 (2007), chs 19, 20.

¹⁴ Korea, *Korea's FTA Network*, available at <http://english.motie.go.kr/en/if/ftanetwork/ftanetwork.jsp>. Gerda van Roozendaal compares labour obligations in Korea's free trade agreements (FTAs) in her article 'Where Symbolism Prospers: An Analysis of the Impact on Enabling Rights of Labour Standards Provisions in Trade Agreements with South Korea', 5(4) *Politics and Governance* (2017) 19. More recently, in 2021, the Free Trade Agreement between the Republics of Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama) and the Republic of Korea (Central America-Korea FTA) signed 21 Feb. 2019 (entered into force 21 Feb. 2018). The labour obligations in this new FTA and van Roozendaal's analysis will be summarized in section 2.B of this article.

Panel of Experts less ‘assertive’ in two ways. First, the EU considered that the issues relating to collective bargaining and the right to strike had been ‘satisfactorily addressed’ during the government consultations. This article argues, however, that there is too little evidence pointing in this direction. It relies, amongst others, upon recent statements made by Korea, civil society in Korea, the EU’s DAG, international bodies (including the ILO’s Committee on Freedom of Association [ILO CFA]) and the academic literature. Second, the EU went to considerable lengths to avoid referring to the public and export sectors and, in so doing, missed a major opportunity to use its bargaining leverage *vis-à-vis* some of the biggest consumer conglomerates in the world. Finally, section 5.B discusses the Panel’s report, a milestone decision that will likely serve as a precedent for future ad hoc panels, and recent developments.

2 Trade and Labour Obligations

This section first summarizes the debate of a social clause under international law. It then explains how Chapter 13 of the EU-Korea FTA links trade to labour issues and describes the labour obligations and dispute mechanism in Chapter 13.

A International Law

Since the adoption of the North American FTA and its labour side agreement in the beginning of the 1990s, there has been a divisive debate on regulatory links between trade concessions and compliance with labour standards.¹⁵ While social clauses alleviate fears that developing and emerging states compete with their peers in a ‘race to the bottom’ by keeping the costs associated with domestic laws as low as possible, they have a patronizing or neo-colonial air. In addition, social clauses can at least be partly labelled as a form of disguised protectionism.¹⁶ States have an interest in taking away the comparative advantage of other states with weaker labour protection that can produce goods and deliver services at a lower opportunity cost.

For these reasons, many developing and emerging states opposed a multilateral social clause in the late 1990s.¹⁷ As a result, the declaration made at the WTO Singapore Ministerial Conference in 1996 referred labour standards to the ILO.¹⁸ This declaration also proposed that labour standards may not be used for protectionist purposes and that the comparative advantage of countries may in no way be questioned.¹⁹ The Singapore

¹⁵ North American Free Trade Agreement 1992, 32 ILM 289, 309 (1993); North American Agreement on Labor Cooperation 1993, 32 ILM 1499 (1994); Siroën, ‘Labour Provisions in Preferential Trade Agreements: Current Practice and Outlook’, 152(1) *International Labour Review* (2013) 85, at 100.

¹⁶ Garcia and Masselot, ‘EU-Asia Free Trade Agreements as Tools for Social Norm/Legislation Transfer’, 13 *Asia Europe Journal* (2015) 241, at 246.

¹⁷ Various non-hegemonic developing and emerging states have supported a multilateral social clause in more recent years. See Nissen, ‘Can WTO Member States Rely on Citizen Concerns to Prevent Corporations from Importing Goods Made from Child Labour?’, 14 *Utrecht Law Review* (2018) 70, at 74.

¹⁸ World Trade Organization (WTO), Singapore Ministerial Declaration, Doc. WT/MIN(96)/DEC/W, 18 December 1996, at 4.

¹⁹ *Ibid.*

consensus clearly influenced the formulation of Chapter 13 of the EU-Korea FTA. Article 13.2.2 of this agreement stated that TSD standards should not be used for protectionist trade purposes and that the comparative advantage should in no way be questioned.

In 1998, the ILO adopted a declaration that set out certain fundamental labour standards that apply to all ILO member states, including Korea and the EU members states, 'even if they have not ratified the Conventions in question'.²⁰ In particular, ILO member states are obliged to respect, promote and realize in good faith the elimination of child and forced labour; the elimination of discrimination in respect of employment and occupation and the freedom of association; and the effective recognition of the right to collective bargaining. These obligations are laid down in eight fundamental labour conventions, and their fundamental status was reaffirmed in a 2008 follow-up declaration.²¹ While the EU member states have ratified all eight core labour conventions, Korea had not ratified four of them at the time of the ratification of the EU-Korea FTA. These concerned ILO Conventions 29 and 105 on the Abolition of Forced Labour, ILO Convention 87 on the Freedom of Association and Protection of the Right to Organize and ILO Convention 98 on the Right to Organize and Collective Bargaining.²² In 1990, Korea had also made a reservation to Article 22 of the International Covenant on Civil and Political Rights on the freedom of association, declaring that this article shall be applied in such a way that it is to conform to the provisions of the local laws.²³

When Korea joined the OECD, the Kim Young-sam administration committed to reforming regulations on industrial relations in line with international standards, including the core labour conventions.²⁴ In 1997, however, the problematic Trade Union and Labour Relations Adjustment Act (TULRAA) was adopted by the ruling New Korea Party.²⁵ The OECD reacted by creating a special monitoring process.²⁶ This process stopped in 2007, but various issues remain.²⁷ Similarly, the ILO CFA has been

²⁰ International Labour Organization (ILO), Declaration on Fundamental Principles and Rights at Work (Declaration on Fundamental Rights), 86th International Labour Conference (ILC) Session, 18 June 1998, Art. 2.

²¹ ILO Convention C029: Forced Labour Convention (1930) 39 UNTS 55; ILO Convention C087: Freedom of Association and Protection of the Right to Organise Convention (1948) 68 UNTS 17; ILO Convention C098: Right to Organise and Collective Bargaining (1949) 96 UNTS 257; ILO Convention C100: Equal Remuneration Convention (1951) 165 UNTS 303; ILO Convention C105: Abolition of Forced Labour Convention (1957) 320 UNTS 291; ILO Convention C111: Discrimination (Employment and Occupation) (1958) 362 UNTS 31; ILO Convention C138: Minimum Age Convention (1973) 1015 UNTS 297; ILO Convention C182: Worst Forms of Child Labour Convention (1999) 2133 UNTS 161; ILO, Declaration on Social Justice for a Fair Globalization, 97th ILC Session, 10 June 2008, at 6–7.

²² ILO Convention 29, *supra* note 21; ILO Convention 105, *supra* note 21; ILO Convention 87, *supra* note 21; ILO Convention 98, *supra* note 21.

²³ International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

²⁴ See S. Kang, *Human Rights and Labor Solidarity: Trade Unions in the Global Economy* (2012), at 85.

²⁵ Trade Union and Labour Relations Adjustment Act (TULRAA), 1997 (KR).

²⁶ Trade Union Advisory Committee to the Organisation for Economic Co-operation and Development (OECD), *Upholding Labour Rights in Korea in an OECD Context* (2016), at 2, available at https://members.tuac.org/en/public/e-docs/00/00/11/D8/document_doc.phtml.

²⁷ *Ibid.*, at 3.

trying to nudge Korea to respect trade union rights for a quarter of a century. To date, it has considered 13 cases and issued various recommendations.²⁸ This will be illustrated in section 5.A, demonstrating that various issues addressed in the committee's first opinion from 1995 are still ongoing today.

B EU-Korea FTA

While the EU has systematically included 'human rights clauses' in its trade agreements since 1995,²⁹ it started focusing on fundamental labour rights after the adoption of the ILO's 1998 Declaration on Fundamental Rights.³⁰ This development has been dubbed the 'ILO-ization' of the EU's trade policy.³¹ The references to labour rights in EU trade agreements were initially less explicit than those in the trade agreements of Canada and the USA.³² But the EU's position has often been the focus of debate, not least because the EU sees itself as a 'leading example' and seeks to promote 'its' values in the wider world, especially since the adoption of the Treaty of Lisbon.³³ Famously, Ian Manners has argued that this was a way for the EU to legitimize and present itself as more than 'merely' a form of economic government in response to the increasing resistance by its citizens to economic liberalization after the Cold War.³⁴ Yet the EU's normative interests are in reality more rational than it likes to portray them to be.³⁵ Normative interests are often only a priority when they coincide with other strategic interests, most notably economic interests that are inspired by a neo-liberal agenda. Closely related is the observation that the EU's approach has triggered criticism of protectionism, paternalism and neo-colonialism by trade partners and experts. Such criticism often makes sense because it appears as if the social clause is introduced 'through the back door', while various developing and emerging states have refused such a clause in the WTO.³⁶

²⁸ See, e.g., ILO Committee on Freedom of Association (ILO CFA), Case no. 1865 (1995); ILO CFA, Case no. 3262 (2016).

²⁹ A human rights clause has only been inserted indirectly in the EU-Korea FTA, *supra* note 10. Art. 15.14.1 of the EU-Korea FTA states that 'unless specified otherwise, previous agreements between the [parties] are not superseded or terminated by this Agreement'. Art. 1.1 of the Framework Agreement for Trade and Cooperation between the European Community and Its Member States, on the One Hand, and the Republic of Korea, on the Other Hand, OJ 2010 L 20, contains a human rights clause.

³⁰ Siroën, *supra* note 15, at 91–93; Declaration on Fundamental Rights, *supra* note 20.

³¹ Orbie, Vos and Taverniers, 'EU Trade Policy and a Social Clause: A Question of Competences?', 3 *Politique Européenne* (2005) 159, at 168.

³² Siroën, *supra* note 15, at 91.

³³ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, OJ 2007 C 306. For a historical overview of the development of the European Union's (EU) position on a social clause in trade agreements, see Garcia and Masselot, *supra* note 16; Orbie *et al.*, *supra* note 31, at 160–174.

³⁴ Manners, 'Normative Power Europe: A Contradiction in Terms', 40 *Journal of Common Market Studies* (JCMS) (2002) 235, at 244.

³⁵ See, e.g., Damro, 'Market Power Europe', 19 *Journal of European Public Policy* (2012) 682; Nissen, *The European Union, Emerging Global Business and Human Rights* (forthcoming).

³⁶ Garcia and Masselot, *supra* note 16, at 246.

Under Chapter 13 of the FTA, Korea and the EU maintain the right to determine their levels of labour (and environmental) protection.³⁷ Furthermore, they commit to cooperating towards increasing levels of protection and ensuring that laws and policies provide for and encourage 'high levels' of protection, consistent with internationally recognized labour (and environmental) standards (Article 13.3). Korea and the EU recognize the importance of taking account of scientific and technical information (Article 13.8). They also agree to develop, introduce and implement measures aimed at protecting the labour (and environmental) conditions that affect trade between them transparently, with due notice and public consultation (Article 13.9).

Apart from these soft provisions, there are two categories of specific labour obligations in Chapter 13. First, there are obligations with a national focus.³⁸ The parties agree to 'uphold levels of protection in the application and enforcement of laws, regulations or standards' in Article 13.7. The first paragraph of this article stipulates that the parties shall not fail to effectively enforce their labour laws through a sustained or recurring course of action or inaction in a manner affecting trade and investment between the parties.³⁹ The second paragraph of this article sets out that the parties shall not weaken or reduce the achieved protection in their laws to encourage trade and investment by waiving, offering to waive or otherwise derogating from their laws, regulations and standards in a manner affecting trade and investment between the parties.⁴⁰ This provision prevents the parties from competing in a 'race to the bottom' and creates conditions of fair competition between companies. Second, Article 13.4.3 contains three obligations, in accordance with the obligations deriving from membership in the ILO, the ILO's Declaration on Fundamental Rights and its 2008 Declaration on Social Justice.⁴¹ To begin, the parties commit to respecting, promoting and realizing the ILO's fundamental labour rights in their laws and practices (Article 13.4.3, first sentence). In addition, the parties reaffirm the commitment to effectively implement the ILO conventions that they have ratified (Article 13.4.3, second sentence). Finally, the parties agree to make continued and sustained efforts towards ratifying the fundamental ILO conventions as well as the other conventions that are classified as being 'up-to-date' by the ILO (Article 13.4.3, last sentence).

No other FTA that has entered into force in Korea to date contains such far-reaching labour obligations.⁴² To begin, various more recent FTAs contain labour clauses with a national focus. Yet they are generally limited to the ILO's fundamental labour

³⁷ EU-Korea FTA, *supra* note 10, Art. 13.3.

³⁸ These obligations also exist in relation to environmental domestic laws.

³⁹ EU-Korea FTA, *supra* note 10, Art. 13.7.1.

⁴⁰ *Ibid.*, Art.13.7.2.

⁴¹ Declaration on Social Justice, *supra* note 21. Similarly, the parties 'reaffirm their commitments to the effective implementation in their laws and practices of the multilateral environmental agreements to which they are party'. EU-Korea FTA, *supra* note 10, Art. 13.15.2.

⁴² With the exception of the commitment obligation with an international focus in the Free Trade Agreement between Canada and the Republic of Korea (Canada-Korea FTA) 2014, Art. 18.2.

rights.⁴³ Only the enforcement clause in the Central America-Korea FTA and the non-regression clauses in Korea's FTAs with Turkey and Colombia refer to all labour laws (like the EU-Korea FTA).⁴⁴ In addition, various FTAs that Korea is part of contain labour clauses with an international focus. Some of these FTAs contain commitment obligations. The commitment obligation in the Canada-Korea FTA is unique because it is broader than the commitment obligation in Article 13.4.3 of the EU-Korea FTA.⁴⁵ It refers to the fundamental labour standards and a number of other rights, including the prevention and compensation of occupational injuries.⁴⁶ A ratification obligation (such as in the last sentence of Article 13.4.3 of the EU-Korea FTA) has not been included in any other FTA that has entered into force in Korea, but the Korea-Turkey FTA echoes the obligation in the second sentence of this article.⁴⁷

The EU or Korea cannot trigger hard dispute mechanisms to obtain some kind of monetary or trade sanction for violations of Chapter 13 of the EU-Korea FTA.⁴⁸ This can be contrasted with the hard sanction mechanisms in the Canada-Korea FTA and the Korea-USA FTA in as far as violations of labour (and environmental) obligations have an effect on trade and investments.⁴⁹ The Canada-Korea FTA does not allow the regular FTA dispute settlement procedure to be evoked, but monetary fines can be imposed.⁵⁰ Under the Korea-USA FTA, there is a dispute settlement procedure that is similar to those used for other parts of the agreement.⁵¹

The soft dispute settlement system under Chapter 13 of the EU-Korea FTA consists of two steps. Article 13.14 sets out that the parties are first required to engage in government consultations. The parties have to make every attempt to arrive at a mutually satisfactory resolution, but each party can request the establishment of a Panel of Experts for matters that have 'not been satisfactorily addressed' after 90 days (Article 13.15). The Committee on TSD, which oversees the implementation of Chapter 13, monitors whether the parties make their best efforts to accommodate the Panel's recommendations. The European Commission has long defended this soft approach to sustainability disputes. The origins of this approach lie in the multilateral trade talks

⁴³ Van Roozendaal, *supra* note 14, at 21. Note that the enforcement clauses in Korea's FTAs with the USA and Canada refer to the fundamental labour rights and a limited number of other rights. Canada-Korea FTA, *supra* note 42, Arts 18.2, 18.4; Korea-USA FTA, *supra* note 13, Arts 19.3, 19.8.

⁴⁴ Van Roozendaal, *supra* note 14, at 21; Free Trade Agreement between the Republic of Colombia and the Republic of Korea 2012, Art. 16.7.3; Framework Agreement Establishing a Free Trade Area between the Republic of Korea and the Republic of Turkey (Korea-Turkey FTA) 2012, Art. 5.7.2; Central America-Korea FTA, *supra* note 14, Art. 16.2.4.

⁴⁵ Canada-Korea FTA, *supra* note 42; Van Roozendaal, *supra* note 14, at 21.

⁴⁶ Canada-Korea FTA, *supra* note 42, Art. 18.2.

⁴⁷ Korea-Turkey FTA, *supra* note 44, Art. 5.4.4; van Roozendaal, *supra* note 14, at 21.

⁴⁸ EU-Korea FTA, *supra* note 10, Art. 13.16. The parties can also not have recourse to arbitration for violations of this chapter.

⁴⁹ Korea-USA FTA, *supra* note 13; Canada-Korea FTA, *supra* note 42.

⁵⁰ Canada-Korea FTA, *supra* note 42, Annex 18-E.

⁵¹ Korea-USA FTA, *supra* note 13, Art. 19.7.

described in section 2.A. of this article.⁵² The EU Council committed to ‘firm opposition to any sanctions-based approaches’ to labour and trade-related disputes in the WTO in 1999.⁵³ But, under pressure from this body, the European Parliament, civil society and several EU member states, the Commission reconsidered a sanctions-based model to enhance the implementation of TSD chapters in a 2017 non-paper.⁵⁴ The Commission ultimately argued against such a hard approach in another non-paper one year later.⁵⁵ This non-paper writes that it is uncertain whether sanctions can be translated into economic compensation and whether such sanctions would result in effective, sustainable and lasting improvement on the ground.⁵⁶ It further alleges that negotiating partners would require the EU to reduce the scope of TSD obligations if they were to be made enforceable.⁵⁷ The non-paper concludes that it was impossible to move towards a hard approach at that time. This position will be reconsidered at the latest by 2023.

3 Informal Consultations

The DAGs on both sides are tasked with advising on the implementation of Chapter 13 of the EU-Korea FTA.⁵⁸ The DAGs can undertake action at the request of the Committee on TSD, at the request of the side that it advises or on its own initiative. They are composed, in theory, of representatives of labour, environmental and business organizations as well as other relevant stakeholders. The composition of the DAGs has raised questions on both sides. Environmental organizations have been under-represented in the EU’s DAG, and there were concerns regarding the independence of civil society representatives in Korea’s DAG.⁵⁹ The vast majority of the members of Korea’s DAG were senior academics, and the Korean Confederation of Trade Unions (KCTU) was only included after significant pressure from the European side and beyond.⁶⁰ The members

⁵² Ankersmit, ‘Dispute Settlement in the Current Generation of Trade and Investment Agreements of the EU: Departing from the Days of Caution and Restraint?’, *Schweizerisches Jahrbuch für Europarecht/ Annuaire Suisse de Droit Européen* (2018) 365, at 380.

⁵³ *Ibid.* (referring to EU Council, ‘Preparation of the Third WTO Ministerial Conference: Draft Council Conclusions’, Doc. 12092/99 (1999), at 13).

⁵⁴ European Commission, *Non-paper of the Commission Services: Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs)* (2017), available at https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_156686.pdf.

⁵⁵ European Commission, *Non-paper of the Commission Services: Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements* (2018), at 8–9, available at https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf.

⁵⁶ *Ibid.*, at 3.

⁵⁷ *Ibid.*

⁵⁸ EU-Korea FTA, *supra* note 10, Art. 13.13.

⁵⁹ Van den Putte, ‘Involving Civil Society in Social Clauses and the Decent Work Agenda’, 6(2) *Global Labour Journal* (2015) 221, at 228.

⁶⁰ D. Martens, D. Potjomkina and J. Orbie, *Domestic Advisory Groups in EU Trade Agreements* (2020), at 52, available at <http://library.fes.de/pdf-files/iez/17135.pdf>. The authors interviewed six members of the EU’s Domestic Advisory Group (DAG) and Korea’s DAG.

of both DAGs meet at a Civil Society Forum. This forum is normally organized once a year, but no forum took place in 2019 and 2020 because the labour issues that will be discussed below created tensions between the EU's DAG and Korea's DAG.⁶¹

The EU's DAG wrote two letters to start formal TSD consultations to the two respective commissioners for trade, Karel De Gucht and Cecilia Malmström. Despite some reluctance from the business representatives in the EU's DAG to write the first letter in 2014,⁶² the EU's DAG expressed the idea that Korea was in serious violation of its commitments under Article 13.4.3 of the EU-Korea FTA.⁶³ The EU's DAG requested to start government consultations regarding precarious working conditions as well as the core labour rights – in particular, the right to freedom of association. The EU's DAG attached its 2013 opinion in which it had extensively referred to these issues to its letter.⁶⁴ This opinion relied upon material from the ILO CFA, the OECD and the IMF. Furthermore, the EU's DAG flagged alleged attacks on unions for teachers and educators, government employees, including railway workers, and the KCTU under then President Park Geun-Hye (2013–2017). It also noted Korea's failure to ratify the four outstanding fundamental labour conventions.

In the second letter in 2016, the EU's DAG referred not only to alleged Article 13.4.3 violations but also to alleged Article 13.3, 13.9 and 13.7.2 violations of the EU-Korea FTA.⁶⁵ The EU's DAG referred, in particular, to the difficulties that railway workers, truck drivers and workers at the Hyundai Motor Company have to associate. It annexed two 2016 reports from United Nations (UN) experts who had visited Korea.⁶⁶ The EU's DAG requested government consultations regarding all the issues that it raised in the second letter. This time around, the EU's DAG used much stronger language: '[F]ailure of the EU to act in this case, in the light of the overwhelming evidence of the breach of Article 13, would undermine the effectiveness of Sustainable Development chapters in EU's trade agreements, and could further erode confidence in the EU trade policy in general.'⁶⁷

⁶¹ *Ibid.*

⁶² Van den Putte, *supra* note 59, at 229. The written output of the EU's DAG must be agreed upon by consensus or simple majority. EU DAG, *Rules of Procedure of the EU Domestic Advisory Group Created Pursuant to Chapter 13 (Article 13.12) of the EU-Korea Free Trade Agreement* (2016), available at www.eesc.europa.eu/en/sections-other-bodies/other/eu-republic-korea-domestic-advisory-group.

⁶³ EU DAG, *Serious Violations of Chapter 13 of the EU-Korea FTA: Letter to Karel De Gucht, Member of the European Commission DB-REX/2014/D/109* (2014), available at <https://mempportal.eesc.europa.eu/Handlers/ViewDoc.aspx?doc=EESC-2014-01767-00-00-TCD-TRA-EN.doc>.

⁶⁴ EU DAG, *Opinion on the Fundamental Rights at Work in the Republic of Korea, Identification of Areas for Action*, Doc. CES746–2013_00_01_TRA_TCD (2013), at 3.1.6.1.

⁶⁵ EU DAG, *Government Consultations Pursuant to the EU-Korea FTA: Letter to Cecilia Malmström, Member of the European Commission* (2016), available at www.epso.org/article/eu-domestic-advisory-group-dag-calls-european-commission-open-labour-consultations-trade-0.

⁶⁶ Human Rights Council (HRC), Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association on his Mission to the Republic of Korea, UN Doc. A/HRC/32/36/Add.2, 15 June 2016; UN Working Group on Business and Human Rights, *Statement at the End of Visit to the Republic of Korea* (2016), available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20038&LangID=E.

⁶⁷ EU DAG, *supra* note 65.

The trade commissioners, however, preferred informal talks through a multitude of communication channels.⁶⁸ A member of the EU's DAG observed that the Korean officials had 'not understood the gravity of the situation'.⁶⁹ They were reportedly not prepared to answer questions from the Commission.⁷⁰ But Malmström alleged that a joint project on gender discrimination had been 'meaningful' in offering greater understanding, which was said to be 'far from obvious, given Korea's initial reactions to such events'.⁷¹ She saw this project as the basis on which to engage more closely with Korea on the rights to association and the effective recognition of collective bargaining. While a committee of the European Parliament suggested that the DAGs could prepare a similar project on the implementation of all core labour conventions,⁷² the chairs of both DAGs noted that the project on gender discrimination had not been up to the ILO's standards.⁷³

The Commission's perceived wait-and-see approach has been heavily criticized by civil society organizations.⁷⁴ It fits in with the above-described tendency to subjugate normative interests to economic interests. In this case, the Commission allegedly wanted to prioritize the conclusion of an additional investment agreement over taking a strong stance on labour rights.⁷⁵ Ultimately, in 2017, the European Parliament also asked the Commission to start formal government consultations and, if necessary, request the creation of a Panel of Experts.⁷⁶ The Parliament referred, amongst other things, to 'troubling examples of imprisonment of trade union leaders and interference in negotiations' and to Korea's failure to ratify the four outstanding fundamental labour conventions. The Parliament supported the deepening of trade and investment relations with Korea but noted that these TSD issues would need to be resolved first. In 2018, pressure on the Commission became untenable. At that time, the Commission had found itself required to adopt the non-papers discussed in section 2.B of this article.

⁶⁸ Letter from Karel De Gucht, Commissioner for Trade to Thomas Jenkins, Doc. EU DAG EU–Korea FTA, 20 February 2014; Letter from Cecilia Malmström, Commissioner for Trade to Georgi Stoev, Thomas Jenkins and Gaelle Dusepulchre, Doc. EU DAG EU–Korea FTA, 7 February 2017.

⁶⁹ V. Füller, 'Trade and Sustainable Development Mechanisms — Beyond Window-Dressing and Talking Shops?' (2018) (thesis on file at Lund University), at 35–36, available at <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=8940379&fileId=8940380>. The author interviewed four members of the EU's DAG, including two labour representatives and one business representative and three officials of the European Commission's Directorate-General for Trade.

⁷⁰ *Ibid.*

⁷¹ Malmström, *supra* note 68.

⁷² European Parliament, Committee on Employment and Social Affairs, *Opinion*, Doc. 2015/2059(INI) (2016), at 4–5.

⁷³ H.-G. Lee (Chair Korea DAG) and G. Stoev (Chair EU DAG), *Joint Statement Sixth Meeting of the Committee on TSD under the EU-Korea FTA* (2018), available at www.eesc.europa.eu/en/documents/joint-statement-chairs-korea-dag-and-eu-dag.

⁷⁴ Civic Consulting and Ifo Institute, *Evaluation of the Implementation of the Free Trade Agreement between the EU and Its Member States and the Republic of Korea, Interim Technical Report Part 1: Synthesis Report* (2018), available at https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157716.pdf.

⁷⁵ Harrison *et al.*, 'Governing Labour Standards through Free Trade Agreements: Limits of The European Union's Trade and Sustainable Development Chapters', 57 *JCMS* (2018) 260, at 269.

⁷⁶ European Parliament, *Motion for a European Parliament Resolution on the Implementation of the Free Trade Agreement between the European Union and the Republic of Korea*, Doc. 2015/2059(INI) (2017), at 5, 10.

While the 2018 non-paper remained apologetic about hard sanctions, it promised to use the soft dispute settlement procedures more ‘assertively’.⁷⁷ In what follows, it will be determined what this meant for the EU in its first TSD complaint ever under a FTA.

4 Government Consultations

In December 2018, the EU requested government consultations with Korea. The Commission raised two issues in Seoul on 21 January 2019.⁷⁸ Both issues related to Korea’s obligations under Article 13.4.3 of the EU-Korea FTA. They are discussed in turn in sections 4.A and 4.B.

A Ratification of Fundamental Labour Conventions

To begin with, the EU alleged that Korea’s efforts to ratify the four core labour conventions had been inadequate. The EU considered that Korea failed to act with the determination required to comply with Article 13.4.3 of the EU-Korea FTA. While the Korean president has the constitutional power to conclude and ratify treaties, the legislature has the right to consent to treaties concerning important international organizations and some other constitutionally important treaties.⁷⁹ The Korean government announced its plan to submit the bills for the ratification of ILO Conventions 29, 87 and 98 to the National Assembly in May 2019, after the government consultations.⁸⁰ This was followed by the actual submission of the bills in October 2019. The Korean Ministry of Employment and Labour also initiated a publicity campaign to raise awareness regarding the necessity of ratification.⁸¹ This action was considerable progress, as the Korean side (including Korea’s DAG) had previously held that the ratification of core labour conventions was conditional upon the amendment of domestic legislation.⁸² However, President Moon Jae-in’s Democratic Party of Korea did

⁷⁷ European Commission, *supra* note 54, at 3, 7.

⁷⁸ EU, *Republic of Korea – Compliance with Obligations under Chapter 13 of the EU – Korea Free Trade Agreement Request for Consultations by the European Union* (2018), available at https://trade.ec.europa.eu/doclib/docs/2018/december/tradoc_157586.pdf.

⁷⁹ Korean Republic, Constitution 1948, Arts 60(1), 73.

⁸⁰ Korea, Ministry of Employment and Labour, *Employment and Labor Policy in Korea 2019* (2020), at 45, available at <https://www.moel.go.kr/english/resources/publications.do>.

⁸¹ Panel of Experts, *Proceeding Established under Article 13.15 of the Korea-EU Free Trade Agreement Contents of the Hearing of 8 and 9 October 2020* (2020), available at https://trade.ec.europa.eu/doclib/docs/2020/november/tradoc_159077.pdf (answer by Korea to written question 32. This document contains the summary of the hearing as agreed by Korea’s Ministry of Employment and Labour and the European Commission).

⁸² HRC, *supra* note 66, at 11; Committee on Trade and Sustainable Development, *Minutes of the 5th Meeting* (2017), at 2, available at https://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153802.pdf; see also H. König (European Commission [DG Trade]), W.D. Lee (Korea [Ministry of Environment]) and C.K. Park (Korea [Ministry of Employment and Labour]), *Joint Statement of the 4th Meeting of the Committee on TSD under the EU-Korea FTA* (2015), at 3, available at https://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153802.pdf; statements by Korea reported in ILO, *Country Baseline under the ILO Declaration Annual Review, Republic of Korea 2011–2017* (2017), at 6, available at www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_629643.pdf.

not have the required three-fifths majority in the National Assembly to push through legislation unilaterally at this time. The opposition parties objected to the formal discussions in the National Assembly.⁸³

Korea's efforts in relation to the ratification of ILO Convention 105 on the Abolition of Forced Labour were, in comparison, much slower.⁸⁴ Korea does not intend to leave out this convention, but it plans to ratify the three other fundamental labour conventions first.⁸⁵ It is useful to elaborate upon three important motivations that Korea has for delaying the ratification of ILO Convention 105.⁸⁶ First, subsequent Korean governments have indicated that the abolition of forced labour is problematic because the country has a mandatory military 'service' for Korean men under the age of 28.⁸⁷ Korea finds conscription to be non-negotiable due to the ongoing war with its only neighbour, the authoritarian Democratic People's Republic of Korea. While Article 2(2) of ILO Convention 29 does explicitly state that military service is not 'forced or compulsory labour', ILO Convention 105 does not contain such a provision.⁸⁸

The second issue also relates to the war on the Korean peninsula. Article 7 of the 1948 National Security Act stipulates a prison sentence involving prison labour for expressing political opinions favourable towards the Democratic People's Republic of Korea. While prison labour would also be prohibited under the older ILO Convention 29,⁸⁹ Article 1(a) of ILO Convention 105 explicitly stipulates forced or compulsory labour as a means of political coercion, education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system. Korea ponders whether 'it is necessary for us to repeal the provision of imprisonment with labour or to convert the imprisonments with labour into imprisonment without labour all at once'.⁹⁰ This is considered to be a sensitive issue that requires extensive public debate.

⁸³ S.-Y. Kim, *Gov't Seeks Labor Law Revisions for Parliamentary Ratification of Key ILO Conventions* (2019), available at <https://en.yna.co.kr/view/AEN20190730004651315?section=search>; see also EU, *LTTs the Panel Proceedings under the TSD Chapter of EU Korea FTA* (2019), at 4, available at <https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=37647>.

⁸⁴ ILO, *Review of Annual Reports under the Follow-up to the ILO Declaration and Rights at Work*, Doc. GB.338/INS/6 (2020), at 16, 19, 31, 32.

⁸⁵ Panel of Experts, *supra* note 81 (answer by Korea to written question 35). See a similar statement by Korea reported in ILO, *supra* note 82, at 5; ILO, *General Survey Concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)*, 96th ILC Session (2007), at 6–7; Committee on TSD, *Minutes of the 7th Meeting* (2021), at 2, available at https://trade.ec.europa.eu/doclib/docs/2021/may/tradoc_159567.pdf.

⁸⁶ Cf. Kourula and Mäkinen, 'Bringing Political Context Back into International Business Studies of Human Rights', 13(1) *Management and Organization Review* (2017) 193.

⁸⁷ Statements by Korea reported in ILO, *supra* note 82, at 5–6. For a discussion of gender and militarization in Korea, see I. Kwon, 'A Feminist Exploration of Military Conscription: The Gendering of the Connections Between Nationalism, Militarism and Citizenship in South Korea', 3 *International Feminist Journal of Politics* (2000), 26.

⁸⁸ ILO Convention 29, *supra* note 21; ILO Convention 105, *supra* note 21.

⁸⁹ ILO, *Q&A on Business and Forced Labor*, available at www.ilo.org/empent/areas/business-helpdesk/faqs/WCMS_DOC_ENT_HLP_FL_FAQ_EN/lang--en/index.htm.

⁹⁰ Panel of Experts, *supra* note 81 (answer by Korea to oral question 2).

The third issue has not been explicitly mentioned by Korea but is likely to also be important. The 2003 Act on Foreign Workers' Employment contains a visa scheme that benefits sectors suffering from labour shortages while protecting the Korean labour market.⁹¹ Under this scheme, migrants can fill jobs involving manual tasks and work for up to three years at a small- and medium-sized factory with fewer than 300 employees. To do this, they have to sign a labour contract with a Korean employer before entering the country and often pay a recruitment fee.⁹² Once in Korea, some migrants find that the jobs are different from those they were promised; they may be more dangerous or less well paid than they had expected. The scheme provides, however, few rights to negotiate a change of job and makes migrants vulnerable to all forms of exploitation, including forced labour.⁹³ The ILO has often suggested that migrant workers are coerced through debt and other forms of bondage caused by high recruitment fees.⁹⁴ While ILO Convention 29 would also prohibit such migrant labour,⁹⁵ Article 1(b) of ILO Convention 105 explicitly prohibits forced or compulsory labour as a method of mobilizing and using labour for the purposes of economic development.

B Respecting, Promoting and Realizing Fundamental Labour Rights

The EU, furthermore, complained in the government consultations that Korea does not respect, promote and realize in its laws and practices the fundamental labour rights according to the obligations resulting from membership in the ILO (Article 13.4.3 of EU-Korea FTA). The EU questioned Korean laws relating to both categories of core labour rights that are articulated in ILO Conventions 82 and 98: the right to association and the effective recognition of collective bargaining.⁹⁶ It also paid some attention to the right to strike, an intrinsic corollary of the fundamental right of freedom of association.⁹⁷ All these issues had previously been raised by the EU's DAG in its 2013 opinion, its letters and the annexes to these letters.⁹⁸

The EU's complaints regarding the right to association were the most extensive. There were three specific complaints. First, the EU questioned whether workers have the right, without distinction, to establish or to join organizations of their choosing. It was particularly worried that Article 2(1) of the TULRAA defines a 'worker' as a person who lives on wages, a salary or another equivalent form of income earned in pursuit of

⁹¹ Kee, 'Foreign Workers' Policies and Issues in South Korea: Focus on the Workers from the East Asian Region', 7 *Proceedings of the 6th Biennial Conference of the Korean Studies Association of Australasia* (2009) 1, at 553–554.

⁹² *Ibid.*, at 556.

⁹³ Korea Ministry of Employment and Labour, *supra* note 80, at 54. See also EU DAG, *supra* note 64, at 3.3.2.

⁹⁴ ILO, *supra* note 89.

⁹⁵ *Ibid.*

⁹⁶ ILO Convention 82, *supra* note 21; ILO Convention 98, *supra* note 21.

⁹⁷ For a discussion of the status of the right to strike, see van der Heijden, 'The ILO Stumbling towards Its Centenary Declaration', 15 *International Organizations Law Review* (2018) 203, at 212–215.

⁹⁸ While the EU DAG had not referred directly to Arts 10 and 12(1–3) of the TULRAA, *supra* note 25, it had raised key cases that have frustrated unionists and tested the fairness of the notification system for the establishment of trade unions.

any job. This definition excludes dismissed and unemployed persons. It also excludes, in the words of the EU, ‘self-employed persons (including those working mainly for one employer)’.⁹⁹ With this wording, the EU seems to refer to the widespread system of ‘dispatch work’ in Korea, which was introduced after the 1997 Asian financial crisis.¹⁰⁰ The EU’s DAG explained in its 2013 opinion such triangular employment relationships, where corporations transfer precarious workers into unspecified employment relationships.¹⁰¹ Companies do not directly hire workers but rely upon full-time workers that are employed by temporary employment agencies. Doing so allows them to evade the exercise of trade union rights because Article 2(4)(d) of the TULRAA specifies that an organization cannot be considered to be a trade union in cases where ‘non-workers’ have joined the organization. Second, the EU was concerned about the right of workers to establish organizations without previous authorization. Article 12(1–3), in conjunction with Articles 2(4) and 10 of the TULRAA, contains a certification procedure for the establishment of trade unions.¹⁰² The EU alleged that this procedure was discretionary. Third, the EU said that Article 23(1) of the TULRAA impedes the right of organizations to elect their representatives in full freedom. This article states that trade union officials may only be elected from among the members of the trade union.

The EU also paid attention to some issues relating to the effective recognition of collective bargaining and the right to strike in its complaint. Regarding the effective recognition of collective bargaining, the EU claimed that Article 31(2–3) of the TULRAA violated this right. The EU alleged that the labour administration uses this article to request changes to collective agreements. Regarding the right to strike, the EU questioned Article 314 of the 1953 Penal Code on ‘obstruction of business’, which states that obstruction of business is ‘interfering with the business of another by injuring their credit through lies or fraudulent means, threat of force, or damaging record and record-keeping equipment’. The Korean police and public prosecutor’s office would use this provision to stop certain peaceful strike actions.¹⁰³

5 Panel of Experts

In July 2019, the EU called for a Panel of Experts to be created while remaining open to finding a mutually agreed solution to the matter.¹⁰⁴ This section of the article first

⁹⁹ EU, *supra* note 78.

¹⁰⁰ Nissen, *supra* note 35; Yun, *Empowering “the Bottom” of Supply Chains to Establish Corporate Responsibility* (2015), at 3, available at www.global-labour-university.org/fileadmin/GLU_conference_2015/papers/YUN.pdf; South Korean NGO Coalition, *Joint NGO Submission (77 NGOs): The 28th Session of the Universal Periodic Review Republic of Korea* (2017), at 26, available at <https://uprdoc.ohchr.org/uprweb/download-file.aspx?filename=4238&file=EnglishTranslation>.

¹⁰¹ EU DAG, *supra* note 93, at 4.3.2.

¹⁰² See H. Kwon, ‘Workers Rights’, in Y.M. Lee and B. Kaufman (eds), *The Evolution of Korean Industrial and Employment Relations* (2018) 249, at 259–261.

¹⁰³ EU, *supra* note 78; see also Trade Union Advisory Committee to the OECD, *supra* note 26, at 16; Nissen, *supra* note 35; HRC, *supra* note 66, at 72; South Korean NGO Coalition, *supra* note 100, at 24.

¹⁰⁴ EU, ‘Republic of Korea – Compliance with Obligations under Chapter 13 of the EU – Korea Free Trade Agreement Request for the Establishment of a Panel of Experts by the European Union’, Doc. Ares(2019)4194229-02/07/2019 (2019).

argues that the EU tried to make the proceedings in the Panel of Experts less assertive than in the government consultations. On the one hand, the language was softened to not refer to certain workers. On the other hand, certain issues were wrongly claimed to be resolved in the government consultations. After explaining that the EU underestimated its bargaining power *vis-à-vis* Korean export sectors, the section shows that the Panel of Experts was largely unbothered by the EU's ploys. For civil society, this was no doubt a relief.

A EU Complaints

The EU set out its grievances in its written submissions of 20 January 2020.¹⁰⁵ They were written by two staff members of the European Commission who acted as EU agents. Two issues were considered to be outstanding. First, the EU repeated its request for the ratification of the core labour conventions. While some progress had been made, it was still not clear at the time, according to the EU, whether the four outstanding core labour conventions would be ratified (under Article 13.4.3 EU-Korea FTA). Second, the EU complained that Articles 2(1), 2(4)(d) and 23(1) and Article 12(1–3), in connection with Articles 2(4) and 10 of the TULRAA, violated Korea's commitment to respecting, promoting and realizing in its laws and practices the fundamental labour rights in accordance with the obligations deriving from its membership in the ILO. According to the EU's written submissions, this complaint exclusively related to the right to association, as expressed in Articles 2 and 3 of ILO Convention 82 (under Article 13.4.3 of the EU-Korea FTA), and no reference was made to violations of ILO Convention 98.

The EU did not refer to the effective recognition of collective bargaining and the right to strike in its written submissions.¹⁰⁶ After the government consultations, the EU explicitly claimed that sufficient progress was made regarding these rights.¹⁰⁷ It elaborated only on its reason for maintaining that Article 314 of the Penal Code had been sufficiently resolved in its lines to take.¹⁰⁸ The Commission said that this article had not been amended but that the Korean Supreme Court had 'gradually adopted a narrower interpretation of this provision (judgments of 2011, 2015 and 2017)'.¹⁰⁹ Following the 2017 judgment, the Korean Public Prosecutor's Office withdrew charges against workers that had participated in strikes, based on Article 314. The Commission, therefore, held that it trusted that these judgments would lead in future to the non-applicability of this provision to peaceful strikes.

¹⁰⁵ EU, *Panel of Experts Proceedings under Article 13.15 of the EU – Korea FTA. First Written Submission* (2020), available at https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158585.pdf.

¹⁰⁶ Note that the request for a Panel of Experts, *supra* note 104 refers to both the right to association and the effective recognition of collective bargaining.

¹⁰⁷ EU, *General Overview of Active WTO Dispute Settlement Cases Involving the EU as Complainant or Defendant, of Cases under Bilateral Agreements and of Active Cases under the Trade Barriers Regulation*, Doc. Ares(2019)6871629 (2019), at 45–46, available at https://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154243.pdf.

¹⁰⁸ EU, *supra* note 83, at 9.

¹⁰⁹ *Ibid.*

This explanation is not sufficient. In 2018, the Korean government also referred to the three Supreme Court judgments regarding the application of Article 314 of the Penal Code in proceedings in the ILO CFA.¹¹⁰ While the ILO CFA welcomed this application, it noted that the courts still favoured a restrictive approach to the application of obstruction of business to strike actions.¹¹¹ It encouraged the government to follow up on its stated intention to review Article 314 of the Penal Code and referred back to its recommendations in Case no. 1865 in 1995.¹¹² More generally, while political and legal change may arise from litigation,¹¹³ the causal relationship can also go in the other direction. It is common practice in Korea to create new laws after court proceedings to legitimize labour rights violations. For example, in 2012, the police authority had rejected the union's plan to hold a rally union in front of the Samsung Electronics headquarters because another union had already registered to hold a rally.¹¹⁴ The Seoul Administrative Court cancelled this decision.¹¹⁵ It found that this other union was an enterprise-level union that had applied to hold rallies more than 130 times that year but had never actually held any.

This judgment was a victory for trade unions rights, but, in 2016, an amendment was introduced in the Assembly and the 2007 Demonstration Act to legitimize such practices by enterprise-level unions to incapacitate independent and democratic unions.¹¹⁶ Moreover, the Commission should have been aware of persistent issues regarding the effective recognition of collective bargaining and the right to strike in Korea because the EU's DAG raised them in its 2013 opinion. For example, the EU's DAG has noted that the overly broad interpretation of 'essential services' in the TULRAA allows the replacement of workers in various 'public sectors', which are as diverse as radio and railway.¹¹⁷ Similarly, the EU's DAG has noted that Article 29(2) of the TULRAA contains a problematic procedure for determining the bargaining agent.¹¹⁸ It has stated that collective bargaining must be conducted through a single bargaining channel unless the employer agrees to hold multiple negotiations. This has meant that the biggest (coalition of) union(s) has the sole right to bargain if multiple unions fail to decide upon a common bargaining agent. Corporations can easily abuse this system by establishing enterprise-level unions.

¹¹⁰ ILO CFA, 386th Report, Doc. GB.333/INS/6/3 (2018), at 185.

¹¹¹ *Ibid.*, at 206.

¹¹² ILO CFA, Case no. 1865, *supra* note 28.

¹¹³ H. Duffy, *Strategic Human Rights Litigation: Bursting the Bubble on the Champagne Moment* (2017), at 6–7, available at <https://openaccess.leidenuniv.nl/handle/1887/59585>.

¹¹⁴ Nissen, *supra* note 35.

¹¹⁵ 'Court Allows Union Rally in Front of Headquarters', *Korea Times* (July 2012), available at www.korea-times.co.kr/www/news/nation/2012/07/117_115713.html.

¹¹⁶ Assembly and Demonstration Act 2007 (KR), Art. 6, amended by Act no. 13834 2016 (KR).

¹¹⁷ TULRAA, *supra* note 25, Arts 43, 71(2); EU DAG, *supra* note 93, at 3.1.8.1.2, referring to ILO CFA *Digest of Decisions* (2006), at 587; EU DAG, *supra* note 93, at 3.1.8.1.7, referring to ILO CFA, Case no. 1865, Report no. 353 (2009), at 711.

¹¹⁸ EU DAG, *supra* note 93, at 3.1.3.1, 3.1.3.2, referring to ILO CFA, Case no. 1865, Report no. 363 (2012), at 116, 118.

In addition to limiting its written submissions to the right to association, the EU avoided referring to the public sector and the export sector, two sectors that had been flagged by the EU's DAG as problematic. Two pieces of evidence illustrate this issue. First, the wording in the request for the establishment of a Panel of Experts was changed. It was noted in section 4.B of this article that the request for government consultations referred to illegally dispatched workers by expressing concerns about 'self-employed persons (including those working mainly for one employer)'. The request for the creation of a Panel of Experts, however, refers to 'self-employed persons such as heavy goods vehicle drivers'. Second, the written submissions rely heavily upon the ILO Cases nos. 1865 (1995), 2602 (2007) and 2829 (2012), which concerned the Korean public sector and conglomerates in the automobile sector (Hyundai) and the electronics sector (Hynix). But they refer nowhere to these sectors explicitly. The alleged problems with the registration procedure, for example, were exclusively illustrated by referring to teachers and drivers. Similarly, the problems with Article 2 of the TULRAA were illustrated by referring to teachers, drivers, broadcasting and animator creators, caregivers, door-to-door delivery persons, motor delivery service persons, telemarketers and construction equipment operations. While some of these workers are indirectly working for the export sector, the EU never refers to workers who are working in factories that produce mainly for export markets.

The public sector and the export sector are considerably more controversial than the categories of workers that the Commission has singled out. Trade union rights for public officials sit in a special category in international law. While Article 2 of ILO Convention 87 does not allow exceptions for 'the administration of the state', Article 8 of the International Covenant on Economic, Social and Cultural Rights (which Korea has ratified) allows such exceptions for public officials.¹¹⁹ The export sector is equally sensitive. James Harrison and his co-authors aptly note that one of the reasons why labour provisions have not been well enforced in FTAs by the Commission is that 'trade officials may perceive such provisions as impairing the competitiveness of export industries'.¹²⁰ This is certainly the case in Korea. The literature on the subject describes that Korean politicians have long served the interests of large conglomerates at the expense of workers in these sectors.¹²¹ Conglomerates that have been the subject of proceedings in the ILO CFA such as Samsung, Hyundai and Hynix have made Korea the economic powerhouse it is today.¹²² Together, these three groups accounted for more than 36 per cent of Korea's nominal gross domestic product in 2020.¹²³

The Commission missed an opportunity by avoiding any references to the Korean export sectors. The Commission underestimated its influence over these sectors. Korean conglomerates sell some of the highest-profile brands in the world. Notably, the

¹¹⁹ International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3, Art. 8.

¹²⁰ Harrison *et al.*, 'Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda', 18 *World Trade Review* (2019) 1, at 21.

¹²¹ See, e.g., Nissen, *supra* note 35.

¹²² ILO CFA, Case no. 2602 (2007); ILO CFA, Case no. 3047 (2017).

¹²³ 'Samsung, Hyundai Motor, SK, LG Behind Half of Corporate Sales, Payroll in Korea', *MK News* (June 2021), available at www.mk.co.kr/news/english/view/2021/06/532180/.

Samsung group ranked 17th in Reprtrak's 2021 Global Reputation index, which measures 'how people feel, think, and act towards companies globally'.¹²⁴ Furthermore, Samsung Electronics and the Hyundai Motor Company were two of the Korean companies in Fortune's 2021 ranking of the World's 333 Most Admired Companies.¹²⁵ While many corporations are relatively immune to reputational pressures, these high-profile conglomerates are relatively vulnerable to such pressures because they deliver directly to their end consumers.¹²⁶ They will likely voluntarily improve their fundamental labour rights track record when there is a greater risk that harmful behaviour will be exposed in order to preserve (or restore) brand reputations in the EU.¹²⁷ Questioning labour rights issues in the Korean export sector during the proceedings before the Panel of Experts could certainly have increased reputational risks. Deflecting negative publicity raised in dispute proceedings would also have been difficult in the EU. In Korea, in comparison, this has been relatively easy because Korean conglomerates have considerable influence over domestic media and channels of communication. They have the power to withhold advertising revenue from the press and have the law on their side.¹²⁸ Chapter 33 of the Penal Code on 'crimes against reputation' enables conglomerates to suppress critics even when they speak the truth.

Several factors can explain why the Commission complained only about certain issues and certain workers to the Panel of Experts. After years of failed negotiations on TSD issues with Korea, the Commission was well aware of the difficulties in its attempts to influence the Korean domestic take on labour rights.¹²⁹ Therefore, the EU could have chosen to focus on less controversial sectors and fewer issues in order to have had at least some tangible effect. The Commission could also have considered that Korea might not be particularly eager to change its attitude since the EU-Korea FTA has not (yet) provided many benefits to Korea. While EU exports to Korea have increased, Korea's exports to the EU have decreased.¹³⁰ Although this is likely to be a temporary effect of a protected market that is opening up, this had not been forecasted during the treaty negotiations.

The Commission's non-confrontational stance further served its own agenda. The EU has relatively limited bargaining power *vis-à-vis* Korea due to Korea's economic power and relative importance to the EU as a trading partner.¹³¹ By *a priori* limiting the

¹²⁴ 'Global ReptTrak', *Reprtrak* (2021), available at www.reprtrak.com/rankings.

¹²⁵ 'World's Most Admired Companies', *Fortune* (2021), available at <https://fortune.com/worlds-most-admired-companies>.

¹²⁶ Cf. Oxfam America, Stiglitz and Heal, Brief of Amici Curiae in Support of Respondents in *Nestlé USA Inc v John Doe I et al* and *Cargill Inc v John Doe I et al*, Doc. 19-416 and 19-453 (2020), at 34–36.

¹²⁷ Cf. Short, Toffel and Huggill, 'Improving Working Conditions in Global Supply Chains: The Role of Institutional Environments and Monitoring Program Design', 73 *Industrial and Labor Relations Review* (2020) 873, at 879, 905.

¹²⁸ Nissen, *supra* note 35; C. Kim, *Samsung, Media Empire and Family: A Power Web* (2015), at 133–136.

¹²⁹ Cf. Van den Putte, *supra* note 59, at 229; see also Kelly, 'Korea-European Union Relations: Beyond the FTA', 12 *International Relations of the Asia Pacific* (2012) 101.

¹³⁰ Y.-D. Kang, 'Korea-EU FTA: Breaking New Ground', in A. Elijah *et al.* (eds), *Australia, the European Union and the New Trade Agenda* (2017) 19, at 26.

¹³¹ Marín Durán, *supra* note 11, at 141.

number of (controversial) issues submitted to the Panel of Experts, the Commission made it easier to ‘solve’ these issues. This, in turn, made it easier for the Commission to start negotiations on an investment chapter. Recall that the European Parliament expected progress regarding TSD before the start of such negotiations. But the stakes were higher than this single dispute. An ‘easier to solve’ dispute makes it easier for the Commission to demonstrate that its soft approach towards sustainable development in trade relations ‘works’. The Commission will ‘need’ such evidence during its 2023 review of the sustainable development dispute mechanisms in FTAs.

B The Panel of Experts

During the hearing of the Panel of Experts in October 2020, Korea predictably argued that the EU’s request fell outside the Panel’s jurisdiction because the issues raised did not refer to trade-related aspects. Korea argued that Article 13.2.1 of the EU-Korea FTA limits Chapter 13 to trade-related aspects. This article reads as follows: ‘Except as otherwise provided, ... this Chapter applies to measures adopted or maintained by the Parties affecting trade-related aspects of labour and environmental issues.’ Korea said that it did not believe that ‘alleged difficulties experienced by, for example, chauffeur service drivers will affect trade between Korea and the European Union’.¹³² The Panel disagreed and noted that ‘Article 13.4.3 was clearly an exception that Article 13.2.1 allows to exist’.¹³³ According to the Panel, Article 13.4.3 was drafted in such a way that it excluded the possibility that domestic commitments to achieve or work towards key international labour principles and rights exist only in relation to trade-related aspects of labour.¹³⁴ Requiring ‘trade-relatedness’ conflicts with the language of ‘fundamental rights’ in the context of the ILO Constitution and the 1998 ILO Declaration on Fundamental Rights.¹³⁵

The Panel also had to return to the Singapore consensus because Korea argued that Article 13.2.2 of the EU-Korea FTA prohibits protectionism and calls into question its comparative advantage. The Panel first referred to empirical research conducted in 1996 by the OECD that demonstrated that the protection of core labour rights does not ‘influence the competitive positioning of these countries in the context of [trade] liberalization’.¹³⁶ On the contrary, such protection might even ‘strengthen the economic performance of all countries’.¹³⁷ It then highlighted more recent research conducted by the ILO.¹³⁸ Ultimately, the Panel made a point of saying that measures

¹³² Panel of Experts, *supra* note 81 (answer by Korea to written question 3).

¹³³ Panel of Experts, *Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement Report of 20 January 2021* (2021), at 63, available at https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf.

¹³⁴ *Ibid.*, at 65.

¹³⁵ *Ibid* referring to ILO Constitution (1946) 15 UNTS 35.

¹³⁶ Panel of Experts, *supra* note 133, at 88, referring to OECD, *Trade, Employment and Labour Standards: A Study of Core Workers’ Rights and International Trade* (1996).

¹³⁷ *Ibid.*

¹³⁸ Panel of Experts, *supra* note 133, at 88, referring to ILO, *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements* (2017), at 18.

based on Article 13.4.3 'are not limited to trade-related aspects of labour' but that this finding does not mean that it 'has concluded that the EU's Panel Request refers to matters which have no connection to trade'.¹³⁹ The Panel determined that 'decent work' is at the heart of the aspirations for TSD formulated by Korea and the EU. The 'floor' of labour rights was determined to be an integral component of the system that they commit to maintaining and developing.¹⁴⁰ National measures implementing such rights are 'inherently related to trade' under the EU-Korea FTA.¹⁴¹

Remarkably, the Panel of Experts did not mind that the EU had not referred to the right to the effective recognition of collective bargaining in its written submissions. While the EU's claim regarding the registration procedure of trade unions was rejected, the Panel found that the other disputed TULRAA provisions violated Korea's commitment to respecting, promoting and realizing in its laws and practices the fundamental labour rights in accordance with the obligations deriving from membership in the ILO.¹⁴² The Panel determined that Korea violated this obligation because these TULRAA provisions violate both the freedom of association and the effective recognition of collective bargaining.¹⁴³ The Panel referred to these two fundamental labour rights as the 'principles of freedom of association' 'for ease of reference'.¹⁴⁴

Furthermore, in its assessment of Article 2(1) of the TULRAA, the Panel elaborated upon the effective recognition of collective bargaining. It said that it considered issues relating to collective bargaining 'on the ground' as submitted in the *amicus curiae* brief of the KCTU.¹⁴⁵ The Panel also considered Korea's interpretation of collective bargaining in its assessment of Article 23(1) of the TULRAA. Ignoring the rich literature on this topic,¹⁴⁶ Korea said that 'collective bargaining between labour and management in Korea typically occurs at enterprise level' because of the unique partnership and daily contacts between union members and the management of the enterprise.¹⁴⁷ The Panel, however, noted that the ILO CFA explicitly states that a requirement that union officials work in the enterprise of the enterprise union is contrary to freedom of association.¹⁴⁸ Workers' organizations are entitled to elect their representatives in full freedom.

The Panel rejected the EU's claim that Korea's efforts to ratify ILO Conventions 29, 87, 98 and 105 on core labour had been insufficient. The Panel determined that the last sentence of Article 13.4.3 affords leeway to the parties and does not require that ratification efforts should take place 'without interruption'.¹⁴⁹ The

¹³⁹ Panel of Experts, *supra* note 133, at 94.

¹⁴⁰ *Ibid.*, at 95.

¹⁴¹ *Ibid.*

¹⁴² EU-Korea FTA, *supra* note 10, first sentence.

¹⁴³ Panel of Experts, *supra* note 133, at 104, 160–161, 216–220.

¹⁴⁴ *Ibid.*, at 104.

¹⁴⁵ *Ibid.*, at 160.

¹⁴⁶ See, e.g. Kwon, *supra* note 102.

¹⁴⁷ Panel of Experts, *supra* note 133, at 216–220.

¹⁴⁸ *Ibid.*, at 226.

¹⁴⁹ *Ibid.*, at 272, 278.

efforts that had taken place, which are described in section 4.A of this article, were considered to be ‘tangible’.¹⁵⁰ In April 2021, three months after the Panel of Experts issued its recommendations, Korea also ratified ILO Conventions 28, 87 and 98. The Commission’s director-general for trade Sabine Weyand was quick to claim that this was a case of ‘enforcement of our #TSD chapter EU-Korea in practice’.¹⁵¹ This public statement was less modest than a statement that had previously been made by one of the members of the EU’s DAG. This member noted that ‘the fact that [the] Korean government decided to look into the ratification of the ILO conventions is partly the result of our activities, but of course if many people knock on the door sooner or later it will open’.¹⁵² Korea, from its side, claimed that the previous progress that was made in relation to its ratification efforts had nothing to do with the government consultations.¹⁵³ A likely explanation for this reaction is that Korea perceived the dispute proceedings as insulting and interfering with its internal affairs.¹⁵⁴ I have determined in older research – a case study that I carried out in Korea in 2018 – that any form of collaboration – international, regional or bilateral – is regularly perceived as interference in Korea due to the trauma that has been inflicted by Japanese colonization, the Korean war and the continued presence of the USA in Korea.¹⁵⁵

In any case, it appears that major steps forward have been made since the government consultations started. Various other positive developments can be reported. First, the Commission announced in April 2021 that the EU and Korea had agreed to review jointly Korea’s preparatory work to ratify ILO Convention 105.¹⁵⁶ Korea indicated that it would undertake a research project to identify what needed to be changed in its legal framework to avoid incompliance with this convention in the most recent meeting of the Committee on TSD.¹⁵⁷ Second, the EU and Korea agreed to jointly review the application of new TULRAA provisions after they entered into force in July 2021, in an ad hoc interim meeting of this committee.¹⁵⁸ Third, the EU’s DAG and Korea’s DAG met for the first time since 2018 to hold a Civil Society Forum.¹⁵⁹

¹⁵⁰ *Ibid.*, at 287.

¹⁵¹ S. Weyand, ‘Enforcement of our #TSD Chapter EU-Korea in Practice’, *Twitter* (2021), available at <https://twitter.com/WeyandSabine/status/1365222408454627334>.

¹⁵² Martens *et al.*, *supra* note 60, at 54.

¹⁵³ Panel of Experts, *supra* note 81 (answer by Korea to written question 33).

¹⁵⁴ Cf. Risse and Ropp, ‘Introduction and Overview’, in T. Risse, S. Ropp and K. Sikkink (eds), *The Persistent Power of Human Rights* (2013) 3, at 17.

¹⁵⁵ Nissen, *supra* note 35. Such sentiments are especially strong amongst Koreans that have been raised under the authoritarian regime. See Kim, ‘Historical Awareness of the Post-War Generation in Korea and National and Social Responsibility’, 22(4) *Korean Journal of Defense Analysis* (2010) 435, at 445–456.

¹⁵⁶ European Commission, *EU-Republic of Korea Agreement Ensured Resilient Trade Despite Pandemic* (2021), available at <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2267>.

¹⁵⁷ Committee on TSD, *supra* note 85.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

6 Conclusion

This article has analysed how the EU approached the first government consultations and Panel of Experts proceedings for ‘trade and sustainable development’ issues under a FTA. The EU’s requests came after the EU promised a more assertive approach towards the enforcement of labour and environmental issues in 2018. This article has compared the EU’s labour complaints in the government consultations and in the Panel of Experts. It has demonstrated that the EU was not prepared to be assertive about certain issues (the effective recognition of collective bargaining and the right to strike) and about certain workers (in the public sector and the export industries) during the proceedings in the Panel of Experts, after years of difficult negotiations on trade and sustainable development issues with a country that has not yet captured the forecasted economic benefits of free trade.

With this approach, the Commission made it easier to deliver some of the results that the stakeholders had been requesting for a long time while, at the same time, paving the way for the negotiation of an investment agreement. The Panel of Experts was unimpressed (and considered the effective recognition of collective bargaining at length). This resulted in a balanced opinion, which has led to some results. Most importantly, Korea ratified ILO Conventions 29, 87 and 98 in April 2021. The Commission thus seems to have obtained what it needs for the 2023 review of the ‘trade and sustainable development’ dispute mechanisms in FTAs: evidence that its ‘soft approach’ works. After the publication of the Panel of Experts report, Valdis Dombrovskis, executive vice-president and commissioner for trade, produced a press release noting that the Panel’s ruling shows ‘the effectiveness of our cooperation-based approach to trade and sustainable development’.¹⁶⁰ Nevertheless, the Commission missed a major opportunity for sustainable development. It underestimated the EU’s bargaining power *vis-à-vis* Korean export sectors. While many corporations are relatively immune to reputational pressures because they do not directly deliver to end consumers, Korea is home to some of the largest consumer conglomerates in the world, and they can effectively mitigate reputation risks in Korea due to their outsized power and influence. They would have been under considerable pressure to improve their fundamental labour rights track record if there would have been a greater reputational risk in the EU.

¹⁶⁰ European Commission, *Panel of Experts Confirms Republic of Korea Is in Breach of Labour Commitments under Our Trade Agreement* (2021), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_203; see also European Commission, *EU-Republic of Korea Trade Grows Twice as Fast under Trade Agreement* (2021), available at https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3261.