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Sanctioning Capacity in Trade and Sustainability Chapters in EU Trade Agreements: The EU–Korea Case

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Abstract

Although sanctions targeting political regimes receive the most media attention, the EU can also sanction states for labour rights violations through its trade policy. Although in practice such sanctions are applied only in extreme cases, the possibility of suspending trade preferences increases the EU's leverage. In modern trade agreements, the EU incorporates Trade and Sustainable Development (TSD) chapters for labour and environmental matters. However, trade sanctions for non-compliance with this chapter are absent. Instead, a dedicated dispute settlement arrangement exists, leading to recommendations by a panel of experts. In 2019 the EU launched proceedings against South Korea for failing to uphold commitments to ratify and implement International Labour Organisation core conventions regarding trade unions under the 2011 EU–Korea Trade Agreement. In 2021, the panel of experts sided with the EU's interpretation of commitments under the TSD chapter. This initial case represents the EU's intention to focus on the implementation of TSD chapters. Using data from official documents, this article process-traces the dispute with Korea. It argues that the outcome of the case, and Korea's ratification of fundamental International Labour Organisation conventions in 2021, demonstrate the potential of the TSD chapter, when forcefully enforced, to partially redress the weak sanctioning capacity in TSD chapters. It also uncovers important caveats regarding state capacity and alignment with government objectives as conditioning the effectiveness of TSD chapters' non-legally binding sanctioning mechanisms.

Keywords

dispute mechanism; EU; FTA; Korea; labour standards; panel of experts; sanctions; trade and sustainability

Issue

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1. Introduction

In late 2019, after insufficient progress in bilateral consultations, the European Union formally launched dispute proceedings against South Korea under the Trade and Sustainable Development (TSD) chapter of the EU–Korea free trade agreement (FTA) of 2011. This marked the first time that the dispute mechanism under a TSD chapter was triggered. The issue at stake related to concerns over delays in South Korea's ratification of outstanding fundamental conventions of the International Labour Organisation (ILO) and constraints on trade unions. The EU–Korea FTA was the first of a new generation of EU FTAs that for the first time included a TSD

chapter devoted to labour and environmental standards. In line with the implementation of the FTA and the TSD chapter, it was expected that Korea would ratify all ILO fundamental conventions. After triggering proceedings, in January 2021 the panel of experts, set up in accordance with the sui generis dispute settlement mechanism established in the FTA for the TSD chapter, presented its report of findings. In the report, the experts agreed with the EU's interpretation of the TSD chapter as obliging the parties to ratify the International ILO's fundamental conventions on labour rights (Murray et al., 2021). This is the first, and thus far, only case brought under a TSD chapter, and represents a clear statement of intent on the part of the EU to enforce the proper

implementation of what has been agreed in FTAs. It is also interesting because Korea represents a democratic state that shares EU values, has entered into legally binding labour and environmental chapters in trade agreements with the USA, and would be a most-likely case for the gradual and appropriate implementation of the chapter, and the rest of the FTA, to succeed. Therefore, the fact that the implementation was so disputed that it resulted in the establishment of a panel of experts under the dispute mechanism warrants closer scrutiny, as it allows us to shed light on the intervening conditions that determined the decision to invoke TSD chapters dispute settlement proceedings, and the potential weakness in the TSD chapters that led to the inadequate implementation in the first place. Given the similarities between TSD chapters, understanding this case can help us to ascertain when there is a higher or lower likelihood that disputes may arise in other cases. Moreover, the EU's resolve in this case to convene a panel of experts, and the outcome of the recommendations, could enhance the credibility of the EU's commitment to its TSD chapters, and sway other FTA partners to engage more diligently with the expectations of these chapters. Despite the limitations inherent in single case studies in terms of generalisability, the case allows us to delve into debates surrounding the merits and demerits of approaches to TSD chapters that refrain from the imposition of trade sanctions in cases of non-compliance and to shine a light into the potential of promotional approaches. It also facilitates an analysis of the possibilities for monitoring, naming, and shaming to be deployed as tools for eliciting behavioural changes in international relations without the recourse to more traditional trade sanctions. This is especially relevant as the evolving practice and literature on sanctions, in general, have highlighted the indiscriminate effects that trade and economic sanctions can have on sections of societies that bear no responsibility for the breaches of norms or standards that triggered the sanctions (Portela, 2018), and the fact that such sanctions have often failed to achieve their desired objectives (inter alia, Galtung, 1967; Hovi et al., 2005; Pape, 1997).

This article uses the example of the TSD dispute case under the EU–Korea FTA to address the questions of whether the soft law and promotional approach of the TSD chapters, which is not linked to the overall FTA dispute settlement whereby non-compliance can lead to economic sanctioning in the form of withdrawal of trade preferences agreed under the FTA, can achieve its aims, and whether the way this case has been interpreted by the panel of experts enhances the enforceability of TSD chapters in the absence of hard economic sanctions. A thematic analysis of EU policy documents, and documents and reports related to the EU–Korea TSD case, complemented by relevant secondary sources is deployed to process-trace the evolution of the case, and to compare aims of the TSD chapter with the dispute outcomes to assess if and how the promotional approach can achieve its aims. A detailed textual analysis of the

panel of experts' report is conducted to consider if the outcome of this case has the potential to enhance TSD chapters, that have often been considered as too soft in the literature to be effective (Harrison et al., 2019b; Lowe, 2019; Orbie et al., 2005; Van Roozendaal, 2017). In so doing, the article adds nuance to assumptions in the trade agreements and labour standards literature and research on TSD that suggests that without strong legal enforceability and recourse to economic and trade sanctions the transformational capacity of TSD chapters is far too limited. It also contributes to the literatures on FTAs and labour standards, and on sanctions, by considering the potential for non-legally binding dispute settlement mechanisms like that in the TSD chapter and monitoring to function in the absence of recourse to traditional economic sanctioning mechanisms.

The rest of the article is organized as follows. Section 2 provides a background to how the EU has approached the issue of linking labour standards to its trade policy. Section 3 provides an overview of TSD chapters and their sui generis dispute mechanism in FTAs. Section 4 traces the evolution of the implementation of the TSD chapter in the EU–Korea FTA highlighting the origins of the dispute. Section 5 details the actual dispute and analyses the panel of experts' report and outcomes of the dispute. A final conclusion considers the potential implications of this dispute.

2. EU Trade Policy and Labour Standards

Attempts in the 1990s to incorporate labour standards into World Trade Organisation (WTO) provisions failed. On the one hand, labour in developed states highlighted the potential for industry to relocate to jurisdictions with lower costs due to weaker labour rights; on the other, developing states argued this could present a disguised form of protectionism against their competitive advantages (see Bhagwati, 1995). Increased international concern with this issue, as encapsulated in the “free trade versus fair trade debates” (Van Roozendaal, 2002, p. 67) coincided in time with a series of social-democratic governments in Europe more sympathetic to these issues, and who were also faced with increased civil activism in favour of fair trade and concerns over rising European unemployment and the social dumping effects of trade, translating into the incorporation of these matters into EU trade policy (Orbie et al., 2005).

To assuage concerns over the impact of globalization and human rights, labour standards found their way into EU trade policy since the late 1990s. Initially, the EU made unilateral trade preferences granted to developing states conditional on respect for basic human and labour rights. Subsequently, through the Generalised System of Preferences (GSP) Plus, it granted additional market access to the EU to developing states willing to accede to, and implement, core ILO conventions and various multi-lateral environmental agreements. The strong conditionality, and sanctioning capacity of the GSP Plus, namely

the withdrawal of trading privileges, has been applied in very few cases, often linked to other political rights violations, as the EU has preferred to monitor, discuss problems, and focus on capacity building (see Portela, 2018; Portela & Orbie, 2014). This approach has also been criticised for the inconsistency in target selection, ineffectiveness, and the fact that limiting trade preferences can affect workers generally (causing more damage) and is indiscriminate, unlike the more targeted Common Foreign and Security Policy sanctions aimed at the elites infringing political and human rights (Portela, 2018).

The inclusion of labour standards in bilateral trade agreements, has, however, taken a different approach. Unlike the conditionality of the GSP system, and the US approach to labour and environmental chapters in FTAs, where trade preferences can be suspended in the case of violation of labour and environmental chapters via the general dispute settlement mechanism of the FTA, the approach to TSD chapters in modern EU trade agreements excludes the possibility of trade preference cancellation over breach of these chapters, as these are excluded from the dispute settlement of the FTA. This is both a way of accommodating trading partners that object to the linkage of labour standards and trade preferences, as well as reconciling different positions within the EU, where some member states feared facing trade preference withdrawal over other member states' laxer approaches to labour rights (anonymised interview with an EU official), given the reciprocal nature of FTA provisions.

The EU's promotional approach to labour standards in FTAs has been criticized by trade unions, the European Economic and Social Committee, and the European Parliament. The latter, since being granted an increased role in trade policy and trade agreement ratification in the Treaty of Lisbon, has raised the level of ambition around the trade–labour rights linkage (Van den Putte & Orbie, 2015). Beyond insisting on the need for TSD chapters, in resolutions on specific FTA negotiations (with India, Vietnam, Colombia, Peru; European Parliament, 2011, 2012, 2014) and in general resolutions on human rights, environment, and trade (European Parliament, 2010), the European Parliament has called for the EU to include legally binding TSD chapters in FTAs and make these subject to preference withdrawal. In response to criticism against the lack of enforceability, absence of focus on specific labour issues in partner countries, and lack of capacity in partner countries to engage in TSD processes (see Harrison et al., 2019a), the Commission instigated an internal debate within the EU in 2017–2018 to consider the future of TSD chapters (European Commission, 2017b). Submissions to the European Commission (2017a) reveal diverse views amongst stakeholders, with business groups expressing concerns over sanctions that could cause other partners to limit access to their markets (BusinessEurope, 2017), and environmental groups and trade unions supporting more stringent sanctions. After extensive con-

sultations, the Commission decided to eschew following the US approach of subjecting labour and environmental chapters in trade agreements to the possibility of trade preference suspension, given the unconvincing evidence with regards to its effectiveness (European Commission, 2018). Instead, the Commission proposed working more closely with the European Parliament and civil society to enhance the monitoring of the implementation of TSD chapters (European Commission, 2018). It also proposed a series of improvements such as pushing for early ratification of ILO conventions (unlike what happened in the Korean case), agreeing with partners on specific localized labour issues to address within the TSD monitoring dialogues, improving transparency, and facilitating civil society's participation in the monitoring and implementation of TSD chapters in FTAs with €3 million of funds (European Commission, 2018). In essence, the approach to TSD chapters remains the same in broad lines, but with greater emphasis on faster implementation, stricter monitoring, and ensuring greater clarity of commitment prior to finalizing a trade agreement.

3. Trade and Sustainable Development Chapters in EU Free Trade Agreements

The EU–Korea FTA was the first to include a specific TSD chapter. This has since become a feature of subsequent EU FTAs, which follow inclusion of the same substantive rights and approach (Harrison et al., 2019a). These chapters reaffirm the parties' commitments to the ILO, ILO fundamental conventions, and decent work agenda. In the case of Korea, as Korea had not yet ratified all eight fundamental ILO conventions, Article 13.4 commits the parties to make sustained efforts to ratify these. The chapter commits the parties:

To respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. (Free Trade Agreement, 2011, p. 63)

Thus, the TSD chapter establishes a requirement to abide by core ILO standards, even if some fundamental conventions remain unratified. Article 13.2.2 stresses that labour standards will not be used in protectionist ways nor to bring into question comparative advantage (Free Trade Agreement, 2011, p. 63), incorporating concerns raised by non-Western states. Article 13.3 reiterates the right of each party to establish its own levels of labour and environmental protection, although the parties "should strive to improve" these (Free Trade Agreement, 2011, p. 63). In terms of substantive commitments, the TSD in the EU–Korea FTA requires efforts

to ratify fundamental ILO conventions, and implementation of domestic laws which should guarantee the principles of the ILO that the parties have agreed to abide by through membership of the ILO, as well as enforcing their own labour (and environmental) laws. Subsequent agreements have deviated slightly in the wording on the ILO in cases (like Canada) where the party has already ratified the relevant ILO conventions. In the case of Japan, the language used is more forceful than in the Korean case, as Japan “shall make efforts” (Van’t Wout, 2021, p. 3) to ratify the core ILO conventions, perhaps reflecting lessons from Korea’s case. However, the qualification of this with “on its own initiative” has been interpreted as again reinstating some ambiguity into the commitment (Van’t Wout, 2021, p. 3). Newer TSD chapters have also broadened the scope to themes such as labour inspection, occupational health and safety, and working conditions (Van’t Wout, 2021), although these can range from mentioning inspections (Article 18.13 in the Japan Agreement) to commitments to maintain a system of labour inspections with enforcement powers (Canada Agreement, Article 23.5.1).

The TSD chapter sets up dedicated institutions to monitor rights and the implementation of the chapter. Firstly, the TSD Committee, made up of official-level representatives, is tasked with meeting annually to discuss the implementation of the chapter and report to the FTA’s Joint Committee. A Civil Society Forum (CSF), that feeds into the TSD Committee, meets annually, and brings together non-governmental representatives from the EU and Korea. These non-governmental representatives are the members of the Domestic Advisor Groups (DAGs), which comprise independent representative organisations of civil society in a balanced representation of environment, labour, and business organisations as well as other relevant stakeholders (Art. 13.12, European Commission, 2011, p. 64). Research on DAGs has revealed lack of independence in some cases, insufficient resources (Orbie et al., 2017), or, as in the case of Korea, lack of knowledge and understanding of the purposes of DAGs (Van’t Wout, 2021). These shortcomings have hindered the potential for DAGs to support expedient and efficient implementation of TSD chapters.

Finally, the TSD chapter creates a specific mechanism for the resolution of disputes under the agreement. Article 13.14 establishes that a party can call another into formal consultations to attempt to resolve issues arising from the chapter. Article 13.15 gives the parties recourse to an independent panel of experts if consultations do not bring about the desired effects. The parties agree to establish a list of 15 potential panel of expert members. In the case of referral to a panel of experts, “the implementation of the recommendations of the Panel of Experts shall be monitored by the Committee on Trade and Sustainable Development” (Free Trade Agreement, 2011, p. 65). The dispute resolution mechanism is based on the promotional and monitoring methods that are prevalent in the ILO. Whilst this is more palatable from

a political perspective, not least to EU partners, the literature examining TSD chapters and their implementation has suggested that without recourse to trade sanctions (withdrawal of preferences) these are unlikely to be effective (Lowe, 2019; Marx et al., 2017; Van Roozendaal, 2017). Turning to the EU–Korea TSD dispute in subsequent sections allows for an exploration of these claims.

4. Implementation of the EU–Korea Free Trade Agreement’s Trade and Sustainable Development Chapter

Research on TSD chapters and their effects on labour rights in practice in specific case studies indicates that these have not, to date, resulted in improved labour rights on the ground (Harrison et al., 2019b; Marx & Brando, 2016; Marx et al., 2017; Orbie et al., 2017; Van Roozendaal, 2017). Insufficient resources and bureaucratic capabilities have been identified as key impediments to improvements (Harrison et al., 2019b; Marx & Brando, 2016; Orbie et al., 2017). Governments’ reluctance to regulate and ensure improvements for workers or in rights of association have also contributed to unimpressive impacts (Van Roozendaal, 2017). In a study based on interviews with officials and trade unionists, Harrison et al. (2019b, p. 266) uncovered that often civil servants thought that “labour standards were not a legislative or procedural priority in terms of the operationalization of the agreement.” The specific EU–Korea case fits this pattern. Indeed, it was the inadequate implementation of the chapter that eventually led to the dispute under the TSD chapter, and during the dispute proceedings the Korean representatives argued that they understood the obligations in the chapter differently to the EU. However, as Van Roozendaal (2017, p. 19) points out, given the democratic regime and level of development in Korea and bureaucratic capabilities, compliance would have been expected. The particularities of Korean trade union laws, corporate practices, and governmental reluctance (especially under President Park’s administration) have meant, however, that implementation of the TSD chapter has been far from smooth and efficient, eventually leading to the dispute.

South Korea’s laws on trade union registration and certain labour practices have been subjected to long-standing domestic and international trade union criticism. Specifically, limitations on the right to strike and assembly (requiring permission; and the criminalisation of obstruction to business), the use of migrant workers while restricting their rights (non-registration of Migrants’ Trade Union), excessive police force against organized labour, have been highlighted (Lee, 2009). Certain categories of workers like public servants, defence industry workers, teachers, and others in essential public services are severely limited in terms of right to strike. The hostile environment for unions allows heavy fines through the criminal act against unionists engaged in activities that disrupt business even if these

are non-violent (Van Roozendaal, 2017, p. 25). Korean and international trade unions have raised 16 complaints on these matters with the ILO since 1992.

Whilst the ILO plays a role in the monitoring of labour standards, especially of conventions that members have ratified, the organization lacks sanctioning capacity. Its recommendations can enhance the legitimacy of complainants' (or governments') positions, but it is up to governments to decide whether to abide by the recommendations. The ILO has upheld trade unions' concerns over restrictions to freedom of association and right to assembly in Korea's Trade Union and Labour Relations Adjustment Act (TULRAA) in a number of cases (ILO, 2021a). For instance, in response to a complaint raised by the Korean Federation of Trade Unions and the Korean Professors Trade Union in 2010, given that some categories of teachers were unable to unionise under Korean law as they were a category of public servant deemed essential, the ILO's Committee on Freedom of Association recommended a revision of the law, which by 2017 had not yet occurred (Van Roozendaal, 2017, p. 25).

It is within this context that the negotiation and implementation of the FTA, and TSD chapter, have taken place. During negotiations, the parties, at the EU's insistence, agreed to reference the ILO's eight core fundamental conventions in the FTA, and to commit to make "continued and sustained efforts towards ratifying the fundamental ILO conventions, as well as other conventions that are classified as 'up-to-date' by the ILO." (Art. 13.4 EU–Korea FTA; Free Trade Agreement, 2011). At the time, Korea had only ratified four of the eight fundamental ILO conventions, namely C100 on equal remuneration, C111 against discrimination in employment and occupation, C138 on minimum age (which Korea established at 15 years of age), and C182 against the worst forms of child labour (ILO, 2021b). During FTA negotiations, Korea managed to reduce the references to ILO conventions, and, crucially, to remove mentions to any immediate obligation to ratify fundamental ILO conventions (Campling et al., 2021). Since the start of the implementation of the FTA, the EU has been demanding that Korea ratify and implement the remaining four fundamental ILO conventions: C098 on the right to organize and to collective bargaining, C029 on forced labour, C087 on freedom of association and protection of the right to organize, and C105 on the abolition of forced labour. This is a constant theme that appears in all TSD Committee minutes and joint DAG statements (Civil Society Forum, 2018; TSD Committee, 2015, 2017, 2018). Korea has consistently justified its slow pace towards this due to alleged "legal incompatibilities" (Van Roozendaal, 2017, p. 21).

This lingering matter of ratification and implementation of fundamental ILO conventions on freedom of association is, also, related to other specific issues and cases that the DAGs have brought to the attention of the TSD Committee since 2012. DAGs raised the same concerns trade unions had forwarded to the ILO relat-

ing to inability for civil servants, teachers, or train drivers to unionise within the TULRAA (Campling et al., 2016, p. 371), as well as raising concerns over the imprisonment of union leaders and demanding their release (Civil Society Forum, 2018).

EU DAG representatives asked the European Commission to initiate formal consultations with Korea under the TSD chapter back in 2014, but the Commission opted to avoid this and discuss concerns more informally within the bilateral political dialogue with the Korean government (Bronckers & Gruni, 2019, p. 8). This is in line both with the FTA and TSD chapter, which requires that initial attempts to resolve disagreements via amicable discussions should be the initial approach. The FTA with Korea represented the EU's first with an Asian economy and with a major developed economy. Its implementation dovetailed in time with the climax of the euro-crisis. Politically, and economically, for the Commission and member states, maintaining a positive relation with Korea and demonstrating the value of the FTA was important, hence the preference for a less charged dialogue rather than a full dispute. A commentator close to the DAG criticised this decision and the "EU [for] taking a very mechanical reading of the arrangements" in the TSD chapter (Campling et al., 2016, p. 371), whereby as long as Korea could demonstrate that it was making some efforts, researching how to make its laws compatible with ILO conventions, it could be construed to not be in flagrant violation of the TSD chapter. Trade unions also considered that these dialogues would not succeed, given insufficient EU influence over the Korean government, the EU not taking a strong stance on labour standards, and antagonistic society–state relations in Korea, characterised by the political influence of large family corporate conglomerates known as *chaebols* (Harrison et al., 2019b, p. 271).

Indeed, throughout President Park's tenure, EU–Korea discussions on these labour matters and the ILO conventions ratifications did not produce any breakthroughs. Her government insisted it was undertaking research on how to adapt its laws, in response to EU dialogues. There is, therefore, no evidence of positive EU influence, as the labour unions had suspected. However, the situation appeared to change with President Park's impeachment on corruption charges in March 2017 and President Moon's election in May. President Moon, and the Democratic Party, had committed to a society that values workers as part of their election campaign. Upon entering office, they abandoned some of the repressive labour reforms of Park's party, and started preparing legislation to increase minimum wages, cap working weeks at 52 hours, and release union presidents from prison (Campling et al., 2021). Exogenous factors to the FTA, the domestic politics and party dynamics in Korea itself, had finally provided the window of opportunity for labour law changes to be enacted in Korea.

By mid-2018, however, President Moon's commitments to labour reform were being increasingly

challenged by the powerful *chaebols* and a more vocal opposition in the National Assembly amidst an economic downturn, leading to a slowdown of reforms, and a mass strike in November 2018 led by the Korean Federation of Trade Unions against rollbacks to reforms of *chaebols* and working hours (Campling et al., 2021, p. 154). It was at this moment that the European Commission decided to follow through with the implementation of the TSD chapter and pursue dispute settlement. In essence, the Commission was reacting to the backtracking in policies in Moon's government once pro-labour reforms had started to be set in motion. Commission officials have suggested that coming up to the tenth anniversary of the FTA, it was deemed that Korea had had sufficient time to make the necessary adaptations (anonymised interview with an EU official). It may well be the case that the Commission had given Korea plenty of time to adapt, but the timing, proceeding not under Park's hostile government, but rather Moon's pro-labour government, seems more than coincidental. Given Park's government's lack of engagement in TSD dialogues, it seems unlikely that the dispute settlement procedure would have resulted in any different behaviour, least of all when Park's government was safe in the knowledge that a panel would be unable to recommend a suspension of trade preferences or financial penalty. Indeed, numerous ILO reports against Korea's policies, as outlined above, had failed to shame Park's government into any reforms.

DAGs had been requesting that the EU escalate the matter of compliance with the labour provisions of the TSD and invoke the formal dispute procedure for TSD in Article 13.4 since 2014, and the European Parliament called for the Commission to initiate consultations with Korea in 2016 (European Parliament, 2016). However, it was only once a new more pro-labour government came to power, and in line with the EU's decision to emphasise the implementation of TSD chapters (European Commission, 2018), that the Commission finally decided to take the step of formally triggering the dispute settlement mechanism of the TSD chapter.

5. EU–Korea Dispute Under the Trade and Sustainable Development Chapter

In December 2018, the European Commission sent a letter to the Korean government requesting the start of formal consultations under the TSD chapter of the FTA. These took place on 21 January 2019, and although they helped to provide clarification, they also “strengthened [the EU's] view that further urgent steps [were] required for Korea to meet the FTA commitments” (Malmström, 2019). In her letter to the Korean Ministers Yoo and Lee, after the consultations, EU Commissioner Malmström reminded the Korean government of their campaign pledges including a society that values workers. The letter warned that unless immediate actions were taken by the Korean government to remedy the issues raised in the consultations, the EU would proceed to the next

phase of the dispute process, referring the matter to a panel of experts.

In July 2019, the European Commission formally requested a panel of experts. The EU's complaints related to two matters: (a) insufficient progress towards ratification of the outstanding fundamental ILO conventions; and (b) inadequacy of TULRAA to guarantee labour rights.

The specific concerns with regards to the Korean Trade Union Act, as summarized in the Report of the Panel of Experts, related to:

- Art. 2 paragraph 1 defining workers too narrowly as someone who lives on wages, salary, and other remuneration, excluding certain categories of self-employed, unemployed, and dismissed workers from participating in trade unions.
- Art. 2 paragraph 4 (d) stating that a trade union cannot be recognized if it includes people not under the official narrow definition of worker.
- Art. 23 paragraph 1 whereby trade union officials may only be elected from among members of the trade union.
- Art. 12 paragraphs 1–3 (in conjunction with Art. 2, paragraph 4 and 10) that provides for a discretionary certification procedure for the establishment of trade union (Murray et al., 2021, p. 28).

The panel of experts commenced its work in December 2019. Given the Covid-19 outbreak, hearings were held virtually in October 2020, having been postponed from August 2020 due to Korean officials' lack of availability. The Report's findings and recommendations were published on 20 January 2021.

During the proceedings, Korea objected to the EU's position on various grounds. Korea claimed that the EU was raising aspects related to labour without connection to EU–Korea trade, and argued that they “did not intend, by agreeing to Chapter 13 [in the FTA] to subject their labour laws and policies to obligations that bear no connection to trade (or investment)” (Murray et al., 2021, p. 16). The Korean government was privileging Article 13.7 in the TSD chapter, which stressed that the parties “will not fail to apply” their labour and environmental laws so as to affect trade, and “will not weaken” protections to attract trade and investment or in a way that affects trade (Free Trade Agreement, 2011). A similar obligation to not waive protections in a manner affecting trade also appears in Korea's FTA with the US in Article 19.2 paragraph 2 (United States Trade Representative, 2019), and Korea was interpreting both chapters as equivalent. Moreover, in the only other case to date where international arbitration has occurred on a labour matter under a trade agreement (US vs. Guatemala under the US–Dominican Republic/Central America Free Trade Agreement), the panel dismissed the case, even though it determined that labour rights infringements had indeed occurred. The reason for the

dismissal was that a clear impact of the infringement on trade advantages could not be established (International Centre for Trade and Sustainable Development, 2017). The Korean government was, thus, making a connection to this case and this narrower interpretation of TSD commitments.

The panel of experts, however, dismissed these objections. It interpreted the language of fundamental rights in the context of the ILO Constitution and 1998 Declaration as expressing the universality of these standards, rather than any qualification relating to “trade-relatedness” (Murray et al., 2021, p. 18). The panel further emphasised that it is not possible to ratify ILO conventions only for workers in trade-related sectors, not least as the ILO does not permit ratification subject to reservations (Murray et al., 2021, p. 19). Here, the difference between the EU and US chapters comes to the forefront. The US agreement refers to “adopting and maintaining in statutes and regulations the rights” based on references to the ILO principles of freedom of association, the effective recognition of the right to collective bargaining, the elimination of all forms of compulsory or forced labour, a prohibition on the worst forms of child labour, and the elimination of discrimination in respect of employment and occupation (United States Trade Representative, 2019, Article 19.2, para. 1). By contrast, in the EU agreement, in Article 13.4 paragraph 3 the parties commit to “make continued and sustained efforts towards ratifying the fundamental ILO Conventions.” In the US agreement Korea had made no such commitment. However, it was that commitment and the indivisibility of ILO conventions that led the panel to disregard the curtailment of labour standards only to instances where impacts on the trading relationship can be established.

As a result, the panel concluded that Korea’s TURLAA Art. 2(1), Art. 2(4)(d), and Art. 23(1) are not consistent with the fundamental right of freedom of association that is referenced in Art. 13.4 of the EU–Korea FTA. It also concluded that TURLAA Art. 21(1)(3) is contrary to the obligations under the TSD chapter with the EU (Art. 13.4.3; Murray et al., 2021, p. 79). In the latter, the parties had:

Commit[ted] to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. (Free Trade Agreement, 2011, p. 63)

The panel recommended a reform of TURLAA to bring it into compliance with these commitments. Of special note is the panel’s determination that the TSD chapter has implications and commitments that bond beyond

the narrow interpretation of labour matters that impact trade and investment or can be construed as creating a trade or investment advantage. Indeed, the TSD chapter refers to principles and obligations derived from membership of the ILO and to maintaining laws that ensure that in practice there is freedom of association, no forced labour, and so on.

On the matter of Korea’s delays in ratifying the outstanding fundamental ILO conventions, the panel dismissed the EU’s suggestion that making “sustained efforts” (as specified in the last line of Art. 13.4.3 of the EU–Korea FTA) meant that efforts need to be “uninterrupted” (Murray et al., 2021, p. 73). The panel determined that with respect to this, Korea had not acted inconsistently with the TSD chapter (Murray et al., 2021, p. 79).

On 20 April 2021, South Korea finally ratified three out of four of its outstanding fundamental ILO conventions: C098 on the right to organize and collective bargaining; C029 against forced labour; and C087 on freedom of association and protection of the right to organise. These will enter into force in South Korea on 20 April 2022 (ILO, 2011). At the 7th meeting of the EU–Korea TSD Committee of 2021, meeting for the first time since 2018, Korea was congratulated for ratifying these conventions and for amendments to TURLAA to ratify and implement the ILO conventions and was again urged to take make “continuous and sustained efforts towards ratification of ILO C105” (TSD Committee, 2021). The Korean side indicated that it would initiate a research project to identify what changes they would need in their legal frameworks to avoid non-compliance with ILO C105 (TSD Committee, 2021).

This initial case shows the possibility for naming and shaming, and for international pressure to encourage changes, even in the absence of trade sanctions and penalties. Prior to the dispute case, Korea had claimed to be undertaking preparatory work to ratify the outstanding fundamental ILO conventions, working with researchers to identify changes to domestic laws required to do this, even under Park’s Presidency (TSD Committee, 2015, p. 2), but had not actually completed the ratifications. Under President Moon, more concrete steps were taken as explained above, including proposals submitted to the National Assembly in March 2018 to recognize the basic labour rights of public officials, and the recognition of the Korean Government Employees’ Union (TSD Committee, 2018), but facing opposition at home, further labour reforms and steps towards ILO ratification slowed down. External pressure from the EU and the panel of experts provided additional support and encouragement for the government to face down domestic opposition and proceed with the legislative reforms that it wanted to undertake. These reforms of TURLAA would ensure the appropriate implementation of the EU–Korea FTA TSD chapter as stated by the panel of experts, enabling Korea to ratify three more of the fundamental ILO conventions. Considering that Korea, as

a developed state and OECD member, has the capabilities to implement its own domestic laws, the changes to TURLAA should result in improvements of workers' rights of association on the ground. In this way, the case can substantiate some of the claims in the literature that complaints in TSD chapters could help to make violations more visible and raise their status as a political concern (Oehri, 2017). Critically, however, it is also the partner government that needs to be interested in those violations. Moon's government instigated the reforms, and the outcome of the panel helped it to use that international pressure to confront domestic opposition. Given Park's government's prior behaviour over nearly a decade, it seems unlikely that her government would have responded to the panel's recommendations as quickly. A more likely hypothetical response from her government would have been a continuation of research and work on paper towards ratification for an indefinite period of time, without actually implementing the recommended reforms in practice.

6. Conclusion

This article has examined the first, and thus far only, case that has resulted in the launching of the sui generis dispute settlement mechanism created in an EU FTA TSD chapter. Seven years after the entry into force of the EU–Korea FTA, and despite repeated requests to start consultations stemming from civil society representatives in the DAGs created in the TSD chapter, the European Commission launched official consultations with President Moon's government in December 2018. Dissatisfied with the discussions regarding Korea's delays in ratifying its four outstanding fundamental ILO conventions, the EU proceeded to request that a panel of experts be set up under Article 13.14 of the FTA, to consider the issue. On 20 January 2021, the panel released its report and recommendations. The panel rejected Korea's objections that the TSD relates only to provisions that have a bearing on trade or investment. Instead, the panel suggested that labour rights and ILO conventions apply to the whole economy and not just trade-related sectors. This is an important interpretation. By eschewing the need for that clear linkage, the panel granted TSD chapters a broader applicability than that typically found in trade agreements that include the possibility of trade sanctions for breach of labour and environmental chapters. The panel determined that TURLAA, with its restricted definition of workers, restrictions on certain civil servants' rights to association and strike, and arbitrary processes for trade union certification, ran counter to commitments in the TSD to ensure freedom of association rights. Although Moon's government, and his Democratic Party, insisted on making labour reforms since their election in 2017, and started a programme of reforms in 2018, as well as discussions to ratify the final fundamental ILO conventions, the pace slowed with an emboldened opposition in the

National Assembly and resistance from the corporate sector (Campling et al., 2021).

By launching the dispute, the EU pacified both internal European Parliament and DAG concerns, demonstrated its intention to pursue effective implementation of its FTAs, including TSD chapters to all partners, and afforded a Korean government, that, unlike Park's government, was committed to labour reforms, additional support to counter domestic opposition to the reforms. Three months after the panel of experts published its recommendations, the government of Korea had achieved relevant reforms of TURLAA enabling it to ratify three of the four outstanding fundamental ILO conventions and was working towards the ratification of the final one on the abolition of forced labour. The case hints at the possibility of non-legally binding sanctions (naming and shaming) achieving desired outcomes, without the arbitrary punishment that trade sanctions and trade restrictions can inflict (Hovi et al., 2005; Pape, 1997; Portela, 2018), provided, importantly, that the receiving government is interested in making changes. It signals to partners the EU's commitment to improved implementation of TSD chapters. Even though the TSD dispute mechanism does not lead to financial penalties, in responding to a dispute, states must invest time and resources to provide documentation, and governments are exposed to domestic pressure from stakeholders and possibly negative media coverage. The perceived "cost" of this will vary from government to government and will be greater for elected governments. Nonetheless, in the shadow of a dispute, governments may be more responsive in future to issues raised in TSD Committees, dialogues, and consultations so as to avert a full dispute and panel. The Korean dispute symbolizes a renewed commitment from the EU to TSD chapters. Negotiating partners already knew inclusion of such a chapter represented a sine qua non condition for concluding a FTA with the EU, and this case reinforces that. However, states have, like Korea, signed FTAs with the EU including TSD chapters under the expectation that the lack of recourse to trade sanctions would spare them from having to undertake dramatic domestic reforms. They interpreted the commitments as akin to those in other agreements where existing regulations must not be diluted to gain trade advantages. The panel's ruling in this instance clarifies that is not the case. It remains to be seen whether current and future negotiating partners will, therefore, insist on language that curtails the possibility of future TSD chapters reforming their existing labour laws, and whether the economic interests in completing agreements will trump a renewed commitment to TSD.

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Conflict of Interests

The author declares no conflict of interests.

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