

The EU–Korea Labor Dispute’s Outcome: An Appraisal under the ILO Conventions and the EU’s Trade and Sustainable Development Chapter

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The European Union (EU) has pursued reforms to strengthen the effectiveness of Trade and Sustainable Development (TSD) chapters in its free trade agreements (FTAs) since 2017. The labor dispute with Korea under the EU–Korea FTA served as a test case for this objective. The Panel of Experts held that Korea violated its obligations regarding freedom of association while satisfied with the obligation to ratify ILO core conventions. This article appraises the dispute’s outcome to assess the extent of the EU’s success in advancing labor rights through trade instruments and the implications for its ongoing TSD reform. It argues that the case reflects the EU’s strategic use of TSD provisions to promote labor standards and recalibrate its enforcement approach. However, given the evolving direction of TSD reforms and the design of recent FTAs, the recurrence of a similar labor-related dispute appears unlikely in the near future.

Keywords

EU’s FTA, Trade and Sustainable Development, Labor Provisions, EU–Korea Labor dispute

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I. Introduction

Labor provisions have been included in the Trade and Sustainable Development (TSD) chapters of the EU's FTAs since 2010. The EU–Korea FTA was the first of the EU's FTA to contain a TSD chapter and labor provisions aimed at ensuring parties' compliance with labor standards in their trade activities. However, after years of implementation, the labor provisions were criticized as ineffective, so that the EU raised concerns regarding Korea's labor rights protection framework.¹ Since 2017, the EU has embarked on a reform process to improve the effectiveness of TSD provisions in general and labor provisions in particular in its FTAs. In line with this effort, the EU initiated a dispute with Korea regarding the implementation of labor provisions under the TSD chapter of the EU–Korea FTA in 2018. In terms of outcome, the Panel of Experts' report struck a balance between both parties' arguments.² On the one hand, the Panel agreed with the EU that Korea's domestic regulations violated the fundamental right to freedom of association as provided for under TSD chapter of the EU–Korea FTA.³ On the other, the Panel found that Korea did not violate the obligation to ratify the International Labor Organization (ILO)'s core conventions.⁴

This research aims to evaluate the outcome of the EU–Korea labor dispute under the TSD chapter and to assess its implications for the EU's TSD reform and potential future recourse under TSD chapters in the EU's FTAs. The article is composed of four parts including Introduction and Conclusion. Part two will review the main arguments presented by the parties and the decisions of the Panel, with particular attention to the implications of the Panel's legal reasoning. Part three will then critically assess the dispute's outcomes and examine their impact on the EU's ongoing TSD reform process, as well as the prospects for future use of dispute settlement mechanism under the TSD chapter.

1 European Public Service Union (EPSU), Annexes to the EU Dag Letter on Korea (Jan. 13, 2014), at annex 1, <https://www.epsu.org/sites/default/files/article/files/Annexes%20to%20EU%20DAG%20letter.pdf>; EPSU, Government consultations pursuant to the EU–South Korea FTA (Dec. 16, 2016), https://www.epsu.org/sites/default/files/article/files/EU%20DAG%20letter%20to%20Commissioner%20Malmstrom_signed%20by%20the%20Chair%20and%20Vice-Chairs.pdf.

2 Report of Panel of Experts, *Republic of Korea–Compliance with Obligations under Chapter 13 of the EU–Korea Free Trade Agreement*, at 78–9 [hereinafter Panel Report], <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/d4276b0f-4ba5-4aac-b86a-d8f65157c38e/details>

3 *Id.*

4 *Id.* at 79.

II. The EU–Korea Labor Dispute: Legal Review

The Korea's violation of labor obligations under the EU–Korea FTA has drawn the concern of the EU since 2014.⁵ The European Parliament adopted a resolution on the implementation of the EU–Korea FTA, noting the continuing violations of the freedom of association, and urged the European Commission to enter into formal consultation with the Korean government.⁶ The EU officially requested consultations with Korea in 2018, raising two major issues: (1) Korea had not made sufficient efforts to ratify four core labor conventions of the ILO; and (2) provisions of the Trade Union and Labor Relations Adjustment Act (TULRAA) were inconsistent with Korea's obligation to respect, promote, and realize fundamental labor rights, notably the right to freedom of association.⁷

After the consultation, the EU Commissioner sent a letter to Korea, clearly expressing the EU's intention to bring the matter to the Panel of Experts stage if there was no substantive progress.⁸ On May 22, 2019, the Korea announced its plan to submit the bills for ratifying of ILO conventions Nos. 29, 87, and 98 to the National Assembly.⁹ The EU decided to request the establishment of a Panel of Experts.¹⁰ The Panel report was released in January 2021.

A. Jurisdiction of the Panel

Korea raised a jurisdictional objection, arguing that the EU had failed to identify “a matter arising under the EU–Korea FTA.”¹¹ Korea based its argument on Article 13.2.1 of the Agreement¹² contending that the EU failed to identify measures

5 EPSU, *supra* note 1.

6 European Parliament, Implementation of the EU–Korea Free Trade Agreement, EUROPARL Doc. 2015/2059(INI), https://www.europarl.europa.eu/doceo/document/TA-8-2017-0225_EN.html.

7 European Commission, Korea Labour Commitments, https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/bilateral-disputes/korea-labour-commitments_en.

8 European Commission, Letter from Commissioner Malmström to Korean Ministers on the ongoing government consultations under the TSD chapter of the EU–Korea FTA (2019), https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157723.pdf.

9 Soo-yeon Kim, (*LEAD*) *Gov't to seek parliamentary ratification of key ILO conventions*, YONHAP NEWS AGENCY (May 22, 2019), <https://en.yna.co.kr/view/AEN20190522003751315>.

10 CIRCBAC, 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, at 1, <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/dfc6a2fa-eb47-4f37-85d0-c8d6cbb266c7/details>.

11 Panel Report, *supra* note 2, at ¶ 54.

12 Free Trade Agreement art. 13.2.1. It reads: “Except as otherwise provided in this Chapter, this Chapter applies to measures adopted or maintained by the Parties affecting trade-related aspects of labor and environmental issues in the context of Articles 13.1.1 and 13.1.2.”

affecting trade-related aspects of labor, thereby preventing the alleged dispute from falling within the scope of the TSD chapter and its dispute settlement procedure.¹³

The Panel noted that Article 13.4.3 fell within the scope of the “except as otherwise stated in this chapter” qualification under Article 13.2.1.¹⁴ In the Panel’s view, Article 13.4.3 was formulated to ensure that its scope of application would not be limited solely to trade-related aspects of labor.¹⁵ Further, the Panel noted that measures covered by Article 13.4.3 are not confined to trade-related aspects of labor and this does not mean that the matters at issue are unrelated to trade. The Panel held that the national measures implementing fundamental labor principles and rights are inherently related to trade. Based on the combination of a TSD chapter, it argued that there exists a strong connection between promotion and attainment of such rights in the preamble of the FTA, as well as the parties’ commitment to comply with international instruments promoting labor rights.¹⁶

The Panel’s decision on jurisdiction triggered a debate on whether the Panel properly adhered to the text of the article, while considering the jurisdiction of the case.¹⁷ The Panel’s conclusion was based on the provisions of the FTA, which support the view that the trade affection test must be a result of the explicit wording of the treaty.¹⁸ However, the Panel was criticized for exceeding the text of the FTA since Article 13.4.3 does not expressly state that it constitutes an exception to the scoping provisions.¹⁹ Furthermore, the Panel’s position contradicted the decision of the Panel in the US–Guatemala labor dispute.²⁰ The EU–Korea Panel’s

13 Panel Report, *supra* note 2, at ¶ 56.

14 *Id.* at ¶ 63.

15 *Id.* at ¶ 65.

16 *Id.* at ¶ 95.

17 Geraldo Vidigal, *Regional Trade Adjudication and the Rise of Sustainability Disputes: Korea – Labor Commitments and Ukraine – Wood Export Bans*, 116(3) AM. J. INT’L L. 567 (2022); Louis Koren & Davy Rammila, *The EU–Korea panel report: a watershed moment for the trade-labor nexus or mere symbolic victory?*, 7(2) J. INT’L TRADE L. LOGISTICS & L. 53 (2021); Laurence Chazournes & Jaemin Lee, *The EU–Korea FTA sustainable development proceeding: reflections on a ground-breaking dispute*, 23(3) J. WORLD INV. & TRADE (2022); Tonia Novitz, *Asserting jurisdiction to assess compliance with ‘multilateral labor standards and agreements’ – the EU–Korea FTA panel decision*, OXFORD HUM. RTS. HUB. (Feb. 4, 2021), <https://ohrh.law.ox.ac.uk/asserting-jurisdiction-to-assess-compliance-with-multilateral-labour-standards-and-agreements-the-eu-korea-fta-panel-decision>; Simon Lester, *Guest Post: The Panel Report under the EU–Korea Trade Agreement Concerning Labor Practices: What are the Purposes of Trade Agreements as they Relate to the ILO’s Fundamental Labor Rights?*, INT’L ECON. L. & POL’Y BLOG (Feb. 8, 2021), <https://ielp.worldtradelaw.net/2021/02/guest-post-the-panel-report-under-the-eu-korea-trade-agreement-concerning-labor-practices-what-are-t>.

18 Koren & Rammila, *supra* note 17, at 57.

19 Vidigal, *supra* note 17, at 574.

20 Final Report, *In the Matter of Guatemala – Issues relating to the obligations under Article 16.2.1(a) of the CAFTA-DR*, at ¶ 594, https://www.trade.gov/sites/default/files/2020-09/Guatemala%20%E2%80%93Obligations%20Under%20Article%2016-2-1%28a%29%20of%20the%20CAFTA-DR%20%20June%2014%202017_1_0.pdf.

decision raised concerns among the developing countries about the potential protectionist intent behind labor provisions in trade agreements since the trade-labor connection has not been prioritized. Meanwhile, the US–Guatemala Panel’s conclusion triggered concerns among developed countries regarding the effectiveness and enforceability of labor obligations in trade agreements since the burden of proof on the trade-labor link was considered excessively high.²¹

Regardless of debates, the EU–Korea Panel’s decision carries broad implications. It makes clear that the trade affection test is not subject to all trade-labor cases and the requirement on connection between trade and labor must be grounded in wording of relevant provisions.²² The decision also suggests that the purposes of an FTA may evolve with the inclusion of labor commitments in the agreement, thus potentially affecting the interpretation of all its provisions. Additionally, it implies that trade commitments which involve obligations to adopt and enforce sustainable development measures may render violations of TSD commitment inherently trade-related without the need for additional evidence of a connection.²³

B. First Complaint: The Obligation to Respect, Promote and Realize the Principle of Freedom of Association

The EU’s first complaint concerned the inconsistencies between certain provisions of TULRAA and Korea’s obligation to respect, promote, and realize the principle of freedom of association recognized under Article 13.4.3 of the EU–Korea FTA. The EU submitted four claims, including: (1) Article 2(1) TULRAA excludes self-employed, dismissed, and unemployed persons from the definition of “workers,” thus, depriving them of their freedom of association; (2) Article 2(4)(d) TULRAA provides that an organization cannot be a trade union if they allow non-workers to join the organization; (3) Article 23(1) TULRAA requires that trade union officials may only be elected from among the members of trade unions; and (4) Article 12(1)–(3) of Korean Trade Union Act in connection with Article 2(4) and Article 10 establish a discretionary certification procedure for the establishment of trade unions.²⁴

The Panel agreed with three out of four issues. First, the Panel found that the definition of “worker” under Article 2(1) TULRAA is inconsistent with the

21 Lester, *supra* note 17.

22 Koren & Rammila, *supra* note 17, at 57.

23 Vidigal, *supra* note 17, at 574.

24 Panel Report, *supra* note 2, at ¶¶143, 198, 210 & 229.

freedom of association²⁵ since it requires a continuing and exclusive binary relationship between workers and employers under the definition of workers, thereby excluding many self-employed persons from the enjoyment of freedom of association.²⁶ Second, the Panel held that Article 2(4)(d) TULRAA is inconsistent with the principle of freedom of association,²⁷ since the combination of the definition of “worker” under Article 2(1) TULRAA and the definition of a “trade union” under Article 2(4)(d) TULRAA restricts freedom of association of not only dismissed union members, but also every other member of the unions which extend their membership to the non-workers.²⁸ Third, the Panel concurred with the EU that the requirement to select trade union officials exclusively from among the union’s own members violates the freedom of association.²⁹ Fourth, the Panel was unable to conclude whether the certification procedure was discretionary due to the absence of consistent evidence from both parties.³⁰ Thus, it could not find the inconsistency with the freedom of association and encouraged the parties to continue discussion on this issue through institutional mechanisms under the TSD chapter.³¹

Nevertheless, it is argued that the Panel overlooked some important issues in reaching these conclusions.³² In particular, the Panel did not take into account the observations of the ILO Committee of Experts on the Application of Conventions and Recommendations and failed to adequately consider Korea’s non-ratification status of ILO core conventions on freedom of association.³³ Either, the Panel did not rely on the decisions of the ILO Committee on Freedom of Association relating to Korea when accessing the claims under Article 13.4.3.³⁴

C. Second Complaint: The Obligation to Ratify the ILO Conventions

In the second complaint, the EU alleged that Korea’s efforts to ratify four core ILO conventions were inadequate under the standard of “continued and

25 *Id.* at ¶¶ 196-7.

26 *Id.* at ¶170.

27 *Id.* at ¶ 208-9.

28 *Id.* at ¶ 206.

29 *Id.* at ¶ 227.

30 *Id.* at ¶ 255.

31 *Id.* at ¶¶ 257-8.

32 Novitz, *supra* note 17, at 5-6.

33 *Id.*

34 *Id.*

sustained efforts” and Korea failed to resort to all appropriate measures to attain the objective.³⁵ The Panel, however, held that the last sentence of Article 13.4.3 establishes a legally binding obligation.³⁶ This obligation does not require a party to make efforts “without interruption,”³⁷ but rather constitutes a “best endeavor” obligation, meaning that more than “merely minimal steps or none at all” is sufficient to meet the standard.³⁸ The parties are not required to explore and mobilize all available measures at all times to fulfil this obligation.³⁹ Furthermore, the obligation is not one of ‘result’ but of ‘effort’ and the parties did not commit themselves to a specific timeframe for ratifying the ILO Conventions.⁴⁰ According to this reasoning, the Panel set a relatively low threshold for assessing compliance with the obligation to ratify ILO core conventions. It signaled to the non-EU countries that the delay of ratification of the ILO convention for as long as ten years or more might still be acceptable as long as they are making efforts, no matter how slowly.⁴¹

During the proceedings, the Korean government submitted bills for ratification of ILO Conventions No. 29; 87, and 98 to the National Assembly in October 2019 while ratification of ILO Convention No. 105 proceed more slowly, as amendments to the related domestic law required additional time.⁴² Taking these developments into account, the Panel considered that Korea had been making tangible efforts towards ratification since at least 2017,⁴³ though it noted that overall efforts were “less than optimal.”⁴⁴ Consequently, the Panel concluded that Korea had acted consistently with the obligation under the last sentence of Article 13.4.3.

D. Critical Assessments of the Outcomes

The Panel decision struck a balance between both parties’ arguments. On the one hand, it agreed with the EU that Korea’s domestic regulations were inconsistent

35 Panel Report, *supra* note 2, at ¶ 264.

36 *Id.* at ¶¶ 268–9.

37 *Id.* at ¶ 273.

38 *Id.* at ¶ 277.

39 *Id.* at ¶ 275.

40 *Id.* at ¶ 280.

41 Ji Sun Han, *The EU–Korea labor dispute: A critical analysis of the EU’s Approach*, 26(4) EUR. FOREIGN AFF. REV. 543 (2021).

42 Nissen Aleydis, *Not that assertive: the EU’s take on enforcement of labor obligations in its free trade agreement with Korea*, 33(2) EUR. J. INT’L L. 607–30 (2022).

43 Panel Report, *supra* note 2, at ¶ 286.

44 *Id.* at ¶ 291.

with the fundamental right of freedom of association. On the other, the Panel disagreed with the EU regarding its claim that the obligation to ratify ILO core conventions had not met. This outcome raises a question whether the EU succeeded in triggering the first dispute under the TSD chapter with Korea. In other words, did the case represent a success or a failure of the EU in promoting and protecting labor rights through labor provisions in free trade agreements? The answer lies in the underlying objectives of the EU when it initiated the dispute case, which, unfortunately, are not clearly stated.

If the EU's objective was to present a symbolic case to demonstrate that the dispute settlement mechanism under the EU's TSD chapter is effective and labor issues can be appropriately promoted through trade agreements, the case can be considered the EU's success for several reasons. First, the EU-Korea case is the first and so far, the only dispute in which labor issues have been addressed through the dispute settlement proceedings under the TSD Chapter. The TSD issues were also raised in the case of the Ukraine-Wood Export Ban (2020) under the EU's FTA with Ukraine but without success.⁴⁵ The EU challenged Ukraine's complete ban on the export of timber and sawn wood and a ten-year temporary ban on exports of all unprocessed timber under the EU-Ukraine FTA. Ukraine sought to justify the measures on environmental grounds, contending that any dispute regarding "trade in forest products" should be adjudicated by a TSD panel rather than a trade panel.⁴⁶ However, the Panel agreed with the EU that the case had been properly initiated as a trade dispute under the dispute settlement chapter and therefore denied applying the TSD chapter to the trade obligations of the parties.⁴⁷ It was not until the EU-Korea case that the TSD issues were separately adjudicated by an independent mechanism under the TSD chapter. It is the first, and definitely not the last, instance of the EU to challenge its partners' compliance with the labor provisions of an EU-negotiated FTA. Lessons and insights from this case could be a wake-up call for EU's FTA partners whose labor conditions are still under the EU's radar. In practice, Peru has been warned to face a similar case if it fails to improve the implementation of its TSD obligations under the EU-Peru FTA.⁴⁸

45 Final Report of the Arbitration Panel, *Restrictions applied by Ukraine on exports of certain wood products to the European Union*, at 18, <https://circabc.europa.eu/rest/download/89749bde-3615-413c-8834-0110021e6522>.

46 *Id.* at ¶¶ 89 & 93.

47 *Id.* at ¶¶ 132-3.

48 European Commission, Letter by Commissioner Cecilia Malmstrom to Minister Rogers Valencia (2018), <https://www.fdiel.org/wp-content/uploads/2018/08/La-Plataforma-Europa-Peru-welcomes-letter-by-Commissioner-Cecilia-Malmstrom.pdf>.

Second, the Panel’s decision on the jurisdiction of the case suggests an intrinsic link between trade and fundamental labor rights, paving the way for states to address labor matters in the context of sustainable development independently of any direct trade-related connection. The EU–Korea case distinguishes itself from the US–Guatemala case, in which the excessively high threshold for establishing the trade-labor link rendered labor provisions unworkable in protecting fundamental rights of labor within the trade agreement. Therefore, the EU has been successful in linking the TSD goals in FTAs to improvements in legal protections for laborers regardless of the existence of trade advantages.⁴⁹

Third, there have been positive developments in the promotion and protection of labor rights in Korea as a result of the case. Korea has submitted bills for ratifying the ILO’s three core conventions after consultation with the EU. Soon after the issuance of the Panel’s report, Korea finally ratified the Conventions No. 87, 98 and 29 on April 20, 2021.⁵⁰ Following these ratifications, Korea is obligated to submit reports on the measures taken to implement these three Conventions to the Committee of Experts on the Application of Conventions and Recommendations of the ILO every three years.⁵¹ In this sense, the EU has successfully brought Korea’s labor standards under the regime of the ILO’s monitoring system. Though the ratification of the ILO Convention No. 105 on forced labor progressed more slowly due to the need to review the domestic penal system, the EU and Korea have also reached an agreement to jointly review Korea’s preparatory work towards ratifying this Convention.⁵² Moreover, Korea’s National Assembly passed amendments to the TULRAA on December 9, 2020, shortly before the Panel’s final decision on the case. Though the amendments might not reflect the recommendations of the Panel, it is undeniable that the case has played a critical role in accelerating the domestic labor reforms of Korea. Additionally, the EU and Korea have convened the Ad-hoc Interim Meeting of the Committee on TSD to jointly review the amended TULRAA provisions.⁵³

49 Rebecca Walker, The “trade-related” conundrum of the EU–Korea FTA Expert Panel: Are FTAs a novel forum to enforce sustainable development goals?, International Institute for Sustainable Development (Oct. 7, 2021), <https://www.iisd.org/itm/2021/10/07/the-trade-related-conundrum-of-the-eu-korea-fta-expert-panel-are-ftas-a-novel-forum-to-enforce-sustainable-development-goals>.

50 ROK Ministry of Foreign Affairs, Ratification of Three Fundamental ILO Conventions marked in virtual ceremony with ILO (2021), https://www.mofa.go.kr/eng/brd/m_5676/view.do?seq=321641.

51 ILO Const. art. 22.

52 European Commission, EU–Republic of Korea agreement ensured resilient trade despite pandemic (2021), https://policy.trade.ec.europa.eu/news/eu-republic-korea-agreement-ensured-resilient-trade-despite-pandemic-2021-04-29_en.

53 CIRCABC, The EU–Korea TSD Committee-Minutes of the 8th Meeting (2022), <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/3d1d9557-4318-45b1-b277-77da4eaba260/details>.

After the case, meanwhile, the Domestic Advisory Group (DAG) of the EU and Korea jointly held the Civil Society Forum for the first time since 2018, allowing both parties to further discuss and cooperate to promote labor issues.⁵⁴ To this extent, the EU–Korea case has produced fruitful results and successfully proved that the promotion of labor rights through the dispute settlement of the TSD chapter is feasible.

Fourth, the findings and reasoning of the Panel provide meaningful guidance for the use of extra-FTA international instruments, such as the ILO’s soft law, in interpreting the provisions of TSD chapters and clarifying labor obligations.⁵⁵ It successfully signals the non-EU countries with comparable provisions in similar FTA that will likely catch the EU’s attention in future disputes. In interpreting “the principles concerning the fundamental rights,” for instance, the Panel disagreed with Korea’s argument that these principles were not sufficiently clear and indirectly supported the view that the freedom of association is a constitutional principle, and therefore clearer than other principles.⁵⁶ This interpretation suggests that EU may proceed with future cases concerning the principle of freedom of association for a better chance of success. Moreover, when the Panel was unable to decide on the discretionary nature of the certification procedure without concrete evidence, it also implied that future disputes may arise on this point if the EU is capable of providing more supporting evidence.⁵⁷ Accordingly, the EU–Korea is undoubtedly a success of the EU in promoting labor provisions through the TSD chapters in its trade agreements.

On the contrary, if the EU’s underlying objective is to tackle and eliminate labor rights violations in Korea through the TSD dispute settlement mechanism under its trade agreement, the case seems to reflect the EU’s unsuccessful efforts. First, changes in labor conditions in Korea after the issuance of the Panel Report are not substantial. Although the case stimulated and accelerated amendments of the TULRAA, the contents of the amended TULRAA do not reflect the recommendations of the Panel. Three articles that the Panel recommended for modifications are kept almost the same: (1) Article 2(1) still excludes the self-employed persons from the scope of the definition of “worker”; (2) Article 2(4)(d) still excludes an organization from the definition of “trade union” if it allows non-

54 EESC, Civil society representatives celebrate the 10th anniversary of the EU–Korea FTA with a debate on labor issues (Apr. 12, 2021), <https://www.eesc.europa.eu/en/news-media/news/civil-society-representatives-celebrate-10th-anniversary-eu-korea-free-trade-agreement-debate-labour-issues>.

55 Chazournes & Lee, *supra* note 17, at 345.

56 Panel Report, *supra* note 2, at ¶ 143.

57 Han, *supra* note 41, at 542.

workers to join the organization; and (3) Article 23(1) maintains the requirement to select union official from the union members.⁵⁸ Thus, these visible procedural amendments hardly reflect any substantial change in the labor conditions in Korea.

Second, the Panel established a relatively low threshold for assessing compliance with the obligation to ratify ILO core conventions, making it disadvantageous for the EU's efforts to promote and protect labor rights through the TSD provisions. It has signaled to the non-EU countries that delaying ratification of the ILO Convention so long as 10 years or longer might still be acceptable, as long as some is shown, no matter how minimal.⁵⁹ Korea still delayed the ratification of Convention No. 105 without specific commitment or timeframe. Meanwhile, such countries as China have entered into the Comprehensive Agreement on Investment with the EU and committed to ratify ILO Conventions. In this regard, they now feel relieved of pressure regarding this obligation since they have not ratified ILO Conventions No. 87, 98, 29 and 105.⁶⁰

Third, even if Korea completes the ratification of the ILO's core conventions, it does not necessarily ensure the improvement of labor conditions, because the root causes of labor issues, such as security concerns and the traditional practice of trade unions, have not been adequately addressed. For security reasons with North Korea, the government of South Korea still maintains the alternative form of military service⁶¹ even though it has ratified the ILO Convention No. 29 on forced labor under pressure from the dispute. Indeed, the Korean government does not appear to have a sound plan to change the alternative military system; it would rather seek to justify it by focusing on its voluntary nature in the individuals' freedom to choose between active or alternative military.⁶² Furthermore, although the ratification of ILO Conventions Nos. 87 and 98 could positively empower trade unions, the persistent discriminatory hiring process within Korea's trade unions culture⁶³ suggest that it is also necessary to prevent the abuse of the rights

58 Korea's Trade Union and Labor Relations Adjustment Act, <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/46398/98328/F-1930628468/KOR46398%20Eng%202021.pdf>.

59 Han, *supra* note 41, at 543.

60 Novitz, *supra* note 17.

61 The alternative military requires individuals to serve in public or private companies or organizations or social services to fulfill their national military responsibility. Under Korea's military system, individuals can choose to serve in either alternative or active military service. The alternative form of the military is considered forced labor according to the ILO standards.

62 Han, *supra* note 41, at 547.

63 In practice, as a result of strong demands and frequent strikes from trade unions, some big automobile corporations such as KIA, Hyundai Motor, or General Motors (GM) have to apply a hiring process in which children of long-term employees of the companies will be prioritized.

of trade unions.⁶⁴ Given the above, through this dispute case, the EU has not been successful in yielding substantial results in improving labor conditions in Korea.

Unfortunately, the EU has not expressly stated its underlying objectives when initiating the case, making it impossible to conclude whether the case reflects a success or a failure of the labor provisions in the EU FTAs. The author is of the opinion that the former objective seems to prevail due to several reasons.

First, the EU has delayed the initiation of the case regardless of the two EU DAGs' attempts to complain about the Korean violation of labor rights in 2014 and 2016, respectively. Thus, the EU's primary concern in this case might not be the protection of labor rights and elimination of violation practices in Korea.

Second, the timing of the case coincides with the period when the EU was taking efforts on improving the implementation and enforcement of the TSD chapter by issuing two non-papers in 2017 and 2018 suggesting the ways to make the TSD dispute settlement mechanisms stronger.⁶⁵ Therefore, the dispute case with Korea was likely part of the EU's efforts to demonstrate the effectiveness of the TSD dispute settlement mechanism.

Third, during the proceedings, the EU is believed to be less assertive in addressing the root of labor rights violation issues in Korea.⁶⁶ In its written complaints, the EU did not refer to the effective recognition of collective bargaining and the right to strike though these issues had been discussed in the government consultation without any progress.⁶⁷ In addition, though the EU DAGs had flagged some sectors, such as the automobile and electronics sectors, of Korea as problematic, the EU avoided referring to public sectors and export sectors in its written submissions.⁶⁸ These pieces of evidence illustrate the EU's reluctance to substantively address the fundamental root cause of violations of labor rights in Korea. These efforts are in line with the EU's approach to labor provisions in FTA, in which institutional arrangement and cooperation are prioritized, and the Panel of Experts' decision plays a supportive role. In consequence, the EU-Korea labor dispute case may be viewed as a success of the labor provisions in the EU FTAs.

64 Han, *supra* note 41, at 548.

65 European Commission, Trade and Sustainable Development (TSD) chapters in the EU free trade agreements (2017), at 5 [hereinafter 2017 Non-paper], http://chil.me/download-file/dbf25e65-8f20-45fa-a435-fa77d4282063/sustainable-development-chapter-on-fta_2017; European Commission, Feedback and way forward on improving implementation and enforcement of TSD chapters in EU FTAs (2018), at 2 [hereinafter 2018 Non-paper], <https://www.politico.eu/wp-content/uploads/2018/02/TSD-Non-Paper.pdf>.

66 Nissen, *supra* note 42.

67 *Id.* at 16.

68 *Id.* at 18.

The EU–Korea dispute represents a milestone decision that carries implications for future labor disputes under the TSD chapter of the EU FTAs. The EU has neither won all the arguments nor been successful in yielding substantial results in improving labor conditions in Korea. Practical evidence, however, supports the view that the EU’s underlying objective was to present symbolic dispute case to demonstrate that the dispute settlement mechanism in the EU’s TSD chapter is effective and labor issues can be appropriately promoted through trade agreements. Therefore, the EU has been successful in proving that the TSD chapter’s dispute settlement mechanism under the EU’s FTA could function well for a labor case, and labor rights could effectively be promoted and protected via labor provisions in trade agreements. Nevertheless, the decision raised concerns about the potential protectionist motives of labor provisions in trade agreements and about the low threshold established for the obligation to ratify ILO core conventions.

III. Implications of the EU–Korea Labor Dispute Case’s Outcome

A. Implications for the EU’s Reform Process

The EU–Korea Labor Dispute case provides significant empirical ground for the EU to initiate its reform for dispute settlement framework concerning TSD issues. The EU’s approach to the reform process for its labor provisions in TSD chapters has been reflected in a series of non-papers and policy papers issued by the European Commission (EC). In 2017, the EC first issued a non-paper on TSD chapters in the EU’s FTAs to explore possible ways to enhance implementation of TSD commitments.⁶⁹ The EC proposed two reform options, including building a more assertive partnership on TSD through the complaints mechanism, and introduction of a sanction-based model.⁷⁰ In 2018, the EC released a second non-paper, setting out the way forward to enhance the implementation and enforcement of TSD chapters.⁷¹ The proposal rejected the sanction-based model,⁷² instead emphasizing the reinforcement of implementation through 15 concrete

69 2017 Non-paper, *supra* note 65, at 5.

70 *Id.*

71 2018 Non-paper, *supra* note 65, at 7-8.

72 *Id.* at 3.

and practicable actions.⁷³

As previously mentioned, although the Panel of Experts issued its findings, Korea's subsequent domestic labor law reforms did not substantially reflect the Panel's recommendations. This highlights the limited effectiveness of the TSD dispute settlement mechanism in enforcing rulings in reality. In response to this shortcoming, the EU's proposed reforms to the TSD chapter have increasingly focused on enhancing the overall enforceability of TSD commitments, as well as strengthening the effectiveness of the dispute settlement mechanism itself.⁷⁴

The third significant effort of the EC to reform labor provisions in the EU's TSD chapters was articulated in its policy paper titled, "The power of trade partnerships: together for green and just economic growth" published in June 2022.⁷⁵ The policy paper set out six policy priorities and 20 key action points aiming at improving the effectiveness of the existing TSD approach. These priorities include: taking a more proactive approach to cooperation with partners; promoting a country-specific approach; integrating sustainability across all areas of trade agreements beyond TSD chapters; strengthening monitoring of TSD commitments; enhancing civil society's roles; and improving enforcement by using trade sanctions as last-resort measure.⁷⁶

The EU's new TSD strategy is noticeable for several advancements, including strengthening the country's specific approach to enhance the sustainability credentials of future TSD chapters; improving the TSD enforcement mechanism; and reinforcing the civil society's roles. The most significant development is that the enforceability of the TSD chapter will be strengthened by extending the FTA's general state-to-state dispute settlement mechanism to the labor provisions and introducing the possibility of trade sanctions as a last resort for serious violations of the ILO's fundamental principles and rights at work.⁷⁷ Accordingly, labor provisions can be enforced through the general dispute settlement procedure with certain adjustments, such as requiring panelists to have expertise in both trade and labor matters.

However, no sanction is imposed even if the parties do not comply with

⁷³ *Id.* at 4-12.

⁷⁴ *Id.*

⁷⁵ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – The power of trade partnerships: together for green and just economic growth (June 22, 2022), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022DC0409>.

⁷⁶ *Id.* at 4.

⁷⁷ *Id.* at 11.

the panel report's findings.⁷⁸ Trade sanctions can only be applied in case of serious infringements of the ILO principles and the rights at work, relying on the monitoring functions of the ILO.⁷⁹ This proposal marks a departure from the previous proposal in 2018 which rejected the idea of trade sanctions for labor violations. Rather, it aligns with the EU's recent tendency in using trade tools to enforce bilateral FTA obligations.⁸⁰ Nevertheless, the use of trade sanctions as a last resort remains ambiguous. It is unclear how a "serious violation" of the ILO's fundamental rights will be determined.

By allowing the application of the general trade dispute settlement mechanism to the issues of sustainable development under the TSD chapter, the EU's new approach introduces the possibility of economic sanctions for the violations of TSD obligations. This marks a significant departure from previous practice and may help address the enforcement shortcomings observed in implementing labor commitments, as exemplified by the EU–Korea case.

The EC's recent reform proposals have already been incorporated into the TSD chapters of the EU's recently concluded trade agreements with the UK and New Zealand. The EU–United Kingdom Trade and Cooperation Agreement 2020 (EU–UK Agreement) allows the suspension of commercial obligations in case of non-compliance with recommendations of Panel reports.⁸¹ The EU–UK Agreement also allows for the adoption of rebalancing measures in cases where substantial divergences in either labor, social, environmental, or other TSD-related policies and priorities result in material effects on the EU–UK trade and investment relationship.⁸² Meanwhile, the EU–New Zealand FTA (2022) embodies the new reform-oriented approach outlined in the EC's 2022 policy paper. It establishes a unified dispute settlement mechanism applicable

78 *Id.*

79 European Commission, *supra* note 75, at 11.

80 In 2020, the EU brought three disputes against Ukraine regarding the Ukrainian export ban on wood; against South Africa regarding poultry; and against Algeria regarding import restrictions under respective bilateral trade agreements with these countries. See European Commission, Bilateral Disputes, https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/bilateral-disputes_en.

81 EU–UK FTA art. 410.3. It reads: "The Parties recognize that, where the respondent Party chooses not take any action to conform with the report of the panel of experts and with this Agreement, any remedies authorized under Article 749 continue to be available to the complaining Party."

82 EU–UK FTA art. 411.2. It reads: "If material impacts on trade or investment between the Parties are arising as a result of significant divergences between the Parties in the areas referred to in paragraph 1, either Party may take appropriate rebalancing measures to address the situation. Such measures shall be restricted concerning their scope and duration to what is strictly necessary and proportionate to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Agreement. A Party's assessment of those impacts shall be based on reliable evidence and not merely on conjecture or remote possibility."

to both violations of TSD obligations and general trade obligations.⁸³ Moreover, departing from the traditional approach, the EU–New Zealand FTA broadens the use of the temporary measures to sanction serious violations of TSD obligations, including violation of core labor standards.⁸⁴ The two recent EU FTAs with the UK and New Zealand clearly signify a fundamental shift in the EU approach to the enforcement of TSD chapters.

In sum, the outcome of the EU–Korea dispute has provided important practical evidence supporting the EU’s efforts to reform its TSD dispute settlement provisions, thereby strengthening the enforcement of sustainable development commitments in future trade agreements.

B. Prospects for Future Recourse under the TSD Chapter

The EU–Korea case marked a milestone as the first time in which the TSD dispute settlement mechanism was initiated. However, there are several reasons to believe that the EU is unlikely to initiate a similar labor-related dispute in the near future. First, among the EU’s existing FTAs that contain TSD provisions similar to those in the EU–Korea agreement – such as those with Singapore, Japan, and Viet Nam – the EU’s trade partners have generally demonstrated satisfactory compliance with their obligations to ratify core ILO Conventions. Japan and Singapore ratified 8 out of 10, while Vietnam ratified 9 out of 10 fundamental ILO Conventions.⁸⁵ Moreover, the obligation to ratify has been interpreted at a relatively low threshold by the Panel of Experts in the EU–Korea dispute.⁸⁶

Therefore, the EU has little legal and strategic rationale for raising similar claims in other existing FTAs. Furthermore, the EU has shifted towards a more pragmatic, country-specific approach, coupled with enhanced engagement with civil society mechanisms that allow for more effective monitoring and enforcement of labor commitments under the TSD chapters. For these reasons, the EU might not find it necessary to resort to a formal dispute proceeding soon.

Second, the incorporation of economic sanction mechanisms into the EU’s more recent FTAs – such as those with the UK and New Zealand – marks a significant reinforcement of the TSD framework. These provisions are expected to improve compliance and reduce the possible serious violation TSD obligations. Moreover, considering that UK and New Zealand are developed trade partners,

83 EU–New Zealand FTA art. 26.2.

84 *Id.* art. 26.16(2).

85 ILO, Ratifications by Country, https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:11001:0::NO::.

86 Panel Report, *supra* note 2, at ¶ 277.

there is less chance that their domestic labor frameworks could be challenged by the EU in a formal dispute proceeding.

Meanwhile, although the EU is actively negotiating FTAs with several Asian countries - such as the Philippines, Indonesia, Malaysia, and India - and is pushing for the incorporation of more robust dispute settlement mechanisms in these agreements, the conclusion and ratification of such FTAs remain uncertain. As a result, any potential labor dispute arising under future agreements with these countries is unlikely to take place in the short term. Taken together, these developments imply that although the EU-Korea labor dispute has served as a key precedent in the evolution of TSD enforcement, the emergence of a comparable dispute in the foreseeable future remains limited.

IV. Conclusion

The EU-Korea case marked the first initiation of the dispute settlement mechanism under the TSD chapter, demonstrating its operational effectiveness in enforcing labor commitments within the EU's FTAs. Korea's domestic reforms to align with the ILO standards and expedite the ratification of core ILO Conventions further confirm the mechanism's potential for achieving tangible results. This case highlights the EU's success in proving that the TSD chapter's enforcement mechanisms can function effectively in practice. Moreover, the case has provided implications for the EU's efforts to reform the TSD provisions in its FTA through strengthening the enforcement of sustainable development commitments. Yet, the probability of the EU initiating another such dispute in the near term is minimal, as its focus has moved toward an assertive enforcement strategy ensuring the practical realization of commitments, reinforced by the increasingly ambitious and comprehensive provisions of recent FTAs.

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