The European Union-Korea Free Trade Agreement Sustainable Development Proceeding: Reflections on a Ground-Breaking Dispute

Boisson de Chazournes, Laurence; Lee, Jaemin

How to cite

BOISSON DE CHAZOURNES, Laurence, LEE, Jaemin. The European Union-Korea Free Trade Agreement Sustainable Development Proceeding: Reflections on a Ground-Breaking Dispute. In: The journal of world investment & trade, 2022, vol. 23, n° 3, p. 329–346. doi: 10.1163/22119000-12340250

This publication URL: https://archive-ouverte.unige.ch/unige:162641
Publication DOI: 10.1163/22119000-12340250

BRILL
NIJHOFF

JOURNAL OF WORLD INVESTMENT &
TRADE 23 (2022) 329–346

The Journal of
World
Investment & Trade
Law • Economics • Politics
brill.com/jwit

Editorial

∴

The European Union–Korea Free Trade Agreement Sustainable Development Proceeding: Reflections on a Ground-Breaking Dispute

Laurence Boisson de Chazournes
Faculty of Law, University of Geneva, Geneva, Switzerland
laurence.boissondechazournes@unige.ch

Jaemin Lee
School of Law, Seoul National University, Seoul, South Korea
jaemin@snu.ac.kr

1 Introduction

Free trade agreements (FTAs) increasingly refer to sustainable development.[1] This is generally through the inclusion of substantive provisions dealing with labour issues or environmental protection in dedicated chapters but can also be manifested in specific dispute resolution mechanisms that allow for third-party intervention. The European Union and the United States are key proponents of linking sustainable development and trade in the FTAs they negotiate.[2] That said, many other actors from various regions of the world have

1 See Stephanie Schacherer, *Sustainable Development in EU Foreign Investment Law* (Brill Nijhoff, 2021) 225–41; See also Marco Bronckers and Giovanni Gruni, 'Retooling the Sustainability Standards in EU Free Trade Agreements' (2021) 24 JIEL 25–51.

2 See Demy van't Wout, 'The Enforceability of the Trade and Sustainable Development Chapters of the European Union's Free Trade Agreements' (2021) Asia Europe Journal (online version); See also US Department of State, 'Supporting Free Trade and Environmental Protection' <https://2009-2017.state.gov/e/oes/eqt/trade/index.htm> accessed 26 April 2022.

 | DOI:10.1163/22119000-12340250

concluded FTAs containing chapters or provisions dealing with sustainable development.[3]

Until recently there had not been attempts to challenge the compliance of sustainable development provisions in FTAs through dedicated dispute settlement procedures. The dispute between the EU and the Republic of Korea, which took place under the Free Trade Agreement Between the European Union, of the One Part, and the Republic of Korea, of the Other Part (EU–Korea FTA),[4] is novel in this respect.[5] A few years earlier, a dispute between the United States and Guatemala was brought under the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR).[6] To date, these are the only disputes that have arisen in this context. While they both dealt with links between labour and trade, the type of labour provisions in the two proceedings were not the same. Moreover, the FTAs at stake do not deal with sustainable development in the same way either.[7]

The first panel of experts under Article 13.15 of the EU–Korea FTA (EU–Korea proceeding) was formally established on 30 December 2019 and rendered its report on 25 January 2021. Its proceeding represents an important experiment in this respect. Both the procedure and the report brought to light a number of features that are worthy of consideration when discussing the effectiveness of sustainable development requirements in FTAs as well as the specificities of the dispute settlement proceedings in this area.

The EU–Korea proceeding was brought in the context of a specific chapter of the 2009 EU–Korea FTA, which entered into force on 1 July 2011,[8] namely Chapter 13 entitled 'Trade and Sustainable Development'. The panel of experts

3 For instance, the Free Trade Agreement Between the Republic of Korea and Peru (signed 14 November 2010, entered into force 1 August 2011) (Korea–Peru FTA) includes a provision about sustainable development (Article 19.1). See <www.sice.oas.org/trade/per_kor_fta/texts_26jul2011_e/19_KPFTA_Environment.pdf> accessed 26 April 2022.

4 Free Trade Agreement Between the European Union and Its Member States, of the One Part, and the Republic of Korea, of the Other Part (entered into force 1 July 2011) (EU–Korea FTA) (14 May 2011) OJ L127/6.

5 Panel of Experts Proceeding Constituted Under Article 13.15 of the EU–Korea Free Trade Agreement, 'Report of the Panel of Experts' (20 January 2021) <https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf> accessed 26 April 2022.

6 Arbitral Panel Established Pursuant to Chapter Twenty of the Dominican Republic-Central America-United States Free Trade Agreement, 'In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR, Final Report of the Panel' (14 June 2017) <www.sice.oas.org/tpd/usa_cafta/Dispute_Settlement/final_panel_report_guatemala_Art_16_2_1_a_e.pdf> accessed 26 April 2022.

7 Report of the Panel of Experts (n 5) para 93.

8 ibid.

proceeding is set forth in Article 13.15 of the EU–Korea FTA.[9] For any dispute arising under Chapter 13 (Trade and Sustainable Development), this proceeding is applied exclusively.[10] This proceeding in the EU–Korea FTA is specific in comparison to other FTAs negotiated by the EU. It is worth noting that it was the first FTA of this type negotiated by the EU. Recent FTAs, such as the Comprehensive Economic and Trade Agreement (CETA) concluded between the EU and Canada,[11] have widened the number of covered labour themes by including occupational safety and health issues, labour inspection or

9 Article 13.15 of the EU–Korea FTA provides as follows:

> Article 13.15: Panel of Experts
>
> 1. Unless the Parties otherwise agree, a Party may, 90 days after the delivery of a request for consultations under Article 13.14.1, request that a Panel of Experts be convened to examine the matter that has not been satisfactorily addressed through government consultations. The Parties can make submissions to the Panel of Experts. The Panel of Experts should seek information and advice from either Party, the Domestic Advisory Group(s) or international organisations as set out in Article 13.14, as it deems appropriate. The Panel of Experts shall be convened within two months of a Party's request.
>
> 2. The Panel of Experts that is selected in accordance with the procedures set out in paragraph 3, shall provide its expertise in implementing this Chapter. Unless the Parties otherwise agree, the Panel of Experts shall, within 90 days of the last expert being selected, present to the Parties a report. The Parties shall make their best efforts to accommodate advice or recommendations of the Panel of Experts on the implementation of this Chapter. The implementation of the recommendations of the Panel of Experts shall be monitored by the Committee on Trade and Sustainable Development. The report of the Panel of Experts shall be made available to the Domestic Advisory Group(s) of the Parties. As regards confidential information, the principles in Annex 14-B (Rules of Procedure for Arbitration) apply.
>
> 3. Upon the entry into force of this Agreement, the Parties shall agree on a list of at least 15 persons with expertise on the issues covered by this Chapter, of whom at least five shall be non-nationals of either Party who will serve as chair of the Panel of Experts. The experts shall be independent of, and not be affiliated with or take instructions from, either Party or organisations represented in the Domestic Advisory Group(s). Each Party shall select one expert from the list of experts within 30 days of the receipt of the request for the establishment of a Panel of Experts. If a Party fails to select its expert within such period, the other Party shall select from the list of experts a national of the Party that has failed to select an expert. The two selected experts shall decide on the chair who shall not be a national of either Party.

10 Article 13.16 of the EU–Korea FTA stipulates:

> Article 13.16: Dispute Settlement
>
> For any matter arising under this Chapter, the Parties shall only have recourse to the procedures provided for in Articles 13.14 and 13.15.

11 Comprehensive Economic and Trade Agreement Between Canada, of the One Part, and the European Union and Its Member States, of the Other Part (signed 30 October 2016, entered into force provisionally 21 September 2017) (14 January 2017) (CETA) OJ L11/23.

responsible management of supply chains.[12] Other FTAs contain provisions on trade and climate change, reflecting the 2015 Paris Agreement's commitments.[13] They cover renewable energy and energy-efficient goals and services and the promotion of international standards.[14]

Chapter 13 is also unique in comparison to the sustainable development chapters of FTAs negotiated by the United States. The scope of the disputes that can arise, the trade-related conditions to be met, or the enforcement measures that can be adopted as follow-up measures attest to the differences between the US-negotiated FTAs and those negotiated by the EU.[15] Those differences presented themselves in the CAFTA-DR proceeding between the United States and Guatemala, and the EU–Korea proceeding.[16]

As such, the EU–Korea proceeding presents an important occasion to explore and contemplate various issues associated with stand-alone dispute settlement procedures for sustainable development from a systemic point of view. Insights and observations from the proceeding are expected to help formulate and administer future dispute settlement procedures in FTAs.

---

12 See Chapter 23 'Trade and Labour' of the CETA.

13 For instance, Article 13.6 of the EU–Vietnam FTA (signed 30 June 2019, entered into force 1 August 2020) stipulates the following:

> Article 13.6 Climate Change
>
> 1. In order to address the urgent threat of climate change, the Parties reaffirm their commitment to reaching the ultimate objective of the United Nations Framework Convention on Climate Change of 1992 (hereinafter referred to as 'UNFCCC') and to effectively implementing the UNFCCC, the Kyoto Protocol to the United Nations Framework Convention On Climate Change, as last amended on 8 December 2012 (hereinafter referred to as 'Kyoto Protocol'), and the Paris Agreement, done at 12 December 2015, established thereunder. The Parties shall cooperate on the implementation of the UNFCCC, the Kyoto Protocol and the Paris Agreement. The Parties shall, as appropriate, cooperate and promote the positive contribution of this Chapter to enhance the capacities of the Parties in the transition to low greenhouse gas emissions and climate-resilient economies, in accordance with the Paris Agreement .
>
> 2. Within the UNFCCC framework, the Parties recognise the role of domestic policies in addressing climate change. Accordingly, the Parties shall consult and share information and experiences of priority or of mutual interest, including:
>
> (a) best practices and lessons learned in designing, implementing, and operating mechanisms for pricing carbon; (b) the promotion of domestic and international carbon markets, including through mechanisms such as Emissions Trading Schemes and Reducing Emissions from Deforestation and Forest Degradation; and (c) the promotion of energy efficiency, low-emission technology and renewable energy.

14 ibid.

15 See James Harrison, 'The Labour Rights Agenda in Free Trade Agreements' (2019) 20 JWIT 710–15.

16 Report of the Panel of Experts (n 5) paras 91–96.

2 Reflections of the EU–Korea Proceeding from a Systemic Perspectives

With this in mind, this editorial examines the systemic insights of the EU–Korea proceeding in five segments. The distinctiveness of Chapter 13's institutional and dispute settlement mechanisms will first be appraised. The focus will then turn to jurisdictional and substantive issues as well as the perspectives taken through recommendations issued by a panel of experts. Next, the editorial will discuss incrementalism, followed by logistical challenges and constraints. Indeed, the discussions in this editorial are not intended to be comprehensive; rather they are intended to help facilitate relevant future discussions in this regard.

2.1 *Reflections on the Unique Nature of the Chapter 13 Dispute Settlement Procedure*

The dispute settlement procedure enshrined in Chapter 13 is distinct and different from the one included in the dispute settlement chapter (Chapter 14) of the EU–Korea FTA, which applies to ordinary trade disputes arising under the FTA.[17] The latter resembles in large part the WTO dispute settlement procedure, albeit that there is no appellate review stage. The parties to the EU–Korea FTA have entrenched the distinctiveness of each dispute settlement procedure by stressing that 'for any matter arising under … Chapter [13], the Parties shall only have recourse to the procedures provided for in Articles 13.14 and 13.15'.[18] Thus, disputes arising under Chapter 13 can only proceed to the unique dispute settlement procedure contained in Chapter 13. Two articles in Chapter 13 are dedicated to the dispute settlement procedure in this respect. Article 13.14 stipulates government consultation when a dispute under Chapter 13 first arises. Article 13.15 in turn stipulates a panel of experts proceeding when the dispute 'has not been satisfactorily addressed through government consultations'.[19]

That said, these two chapters are contained in the same FTA and thus share its preamble. In accordance with the general rules of treaty interpretation codified in Article 31 of the Vienna Convention on the Law of Treaties (VCLT),[20] a treaty preamble plays a role in the determination of the meaning of the substantive provisions of a treaty. An approach based on the ordinary meaning

17 See EU–Korea FTA art 14.2.

18 ibid art 13.16.

19 ibid art 13.15.1.

20 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) (VCLT) 1155 UNTS 331.

of the terms of a treaty together with their context, in light of the object and purpose of the treaty, and in accordance with the principle of good faith, should guide the interpreters.[21] In this context, the panel of experts in the EU–Korea proceeding took into consideration that the parties to the FTA reaffirm in the preamble 'their commitments to the Charter of the United Nations (UN Charter) and the Universal Declaration of Human Rights (UDHR)' and that they also reaffirm 'their commitment to sustainable development'.[22] This allowed the panel of experts to note that 'decent work is at the heart [of the parties'] aspirations for trade and sustainable development'.[23]

While the Chapter 13 dispute settlement procedure presents features that make it distinct in comparison to other dispute settlement procedures in trade agreements (as a non-binding dispute settlement mechanism confined to labour and environmental issues, closely coordinated with FTA parties' continued consultation), they are nevertheless quite similar to those contained in the sustainable development chapters of other recent EU FTAs.[24] In fact, some of these features are also found in recent FTAs concluded by the United States as regards sustainable development disputes.[25] It is important to note that the procedure of Chapter 13 of the EU–Korea FTA involves various stages. First, a proceeding is initiated with a request for consultations by one of the parties.[26] They take place at the bilateral level or through the Committee on Trade and Sustainable Development, which is composed of representatives of the two parties.[27] Thereafter, a party may, 90 days after the delivery of a request for consultations, request that a panel of experts be convened to examine the matter that has not been satisfactorily addressed through governmental consultations.[28] Moreover, the FTA states that a panel of experts 'shall be convened within 2 months of a Party's request'.[29] Unless otherwise agreed by the parties, 'the Panel of Experts shall, within 90 days of the last expert being selected, present to the Parties a report'.[30] The report may include 'advice or recommendations on the implementation' of Chapter 13, which the parties 'shall make their best efforts to accommodate'.[31] The implementation

21 Report of the Panel of Experts (n 5) para 46.
22 ibid paras 78 and 79.
23 ibid para 96.
24 Stephanie Schacherer (n 1) 245–52.
25 See eg Article 19.7 of the US–Australia FTA (entered into force 2005).
26 EU–Korea FTA art 13.14.1.
27 ibid arts 13.14.2 and 13.14.3.
28 ibid art 13.15.1.
29 ibid.
30 ibid art 13.15.2.
31 ibid.

of the recommendations is then monitored by the Committee on Trade and Sustainable Development.[32]

Members of a panel of experts are selected from a list of at least 15 persons, 'of whom at least five persons shall be non-nationals of either party who will serve as chair of the Panel of Experts'.[33] They should be 'independent of, and not be affiliated with or take instructions from, either Party'. Noteworthy is the fact that the persons should have 'expertise on the issues covered' by Chapter 13.[34] Sustainable development covers various areas ranging from labour law to environmental protection. Given that these fields are quite distinct, it is important that the composition of the lists of experts takes this into account, alongside other consideration factors. Indeed, specialised knowledge plays a role in ensuring the smooth conduct of proceedings. Equally important in this regard is how to apportion the limited number of experts in a list among different sectors included in the sustainable development chapter; experts on labour and those on environment, distinct from one another, should preferably be fairly represented in the list.

Another feature to be noted is the openness of the procedure. Various stakeholders may be involved in a proceeding in different ways. Chapter 13 of the EU–Korea FTA emphasises the proactive role of domestic advisory groups. Each party establishes a domestic advisory group(s) on sustainable development for 'advising on the implementation of the [chapter]',[35] which comprise(s) 'independent representative organisations of civil society in a balanced representation of environment, labour and business organisations.'[36] To facilitate dialogue on issues of sustainable development, members of domestic advisory groups meet at a Civil Society Forum on an annual basis.[37] Most notably, domestic advisory groups play an important role in dispute settlement proceedings as well. At the governmental consultations stage as well as when a panel of experts has been established, domestic advisory groups are consulted.[38] On its part, a panel of experts 'should seek information and advice from … Domestic Advisory Group(s).'[39]

At the stage of the consultations, the parties may also seek advice from international organisations, such as the International Labour Organisation

32 ibid.
33 ibid art 13.15.3.
34 ibid.
35 Article 13.12.4 of the EU–Korea FTA art 13.12.4.
36 ibid art 13.12.5.
37 ibid art 13.13.1.
38 ibid arts 13.12.4, 13.12.5, 13.14.4 and 13.15.1.
39 ibid art 13.15.1.

(ILO), or multilateral environmental organisations or bodies.[40] For its part, the panel of experts should seek information or advice from these international organisations 'as it deems appropriate'.[41]

At the stage of the panel of experts proceeding, parties may agree on the possibility that *amicus curiae* are received by the panel. In the EU–Korea proceeding, the Rules of Procedure provided for written submissions by *amicus curiae*. Five institutions and 22 individuals submitted their *amicus curiae* briefs within the designated deadline.[42] The panel of experts discussed the arguments exposed in the *amicus curiae* briefs in its report.[43] In fact, it was also foreseen that these actors could attend oral hearings in Geneva. These hearings, however, did not take place due to the global COVID-19 pandemic.

This feature of the procedure allowing for public consultation, access to expert advice from international organisations and the submission of *amicus curiae* briefs allows for interactions with various stakeholders. It also highlights the public character of the procedure. As will be discussed, this is also an important feature when considering the implementation of recommendations of a panel of experts. As a matter of fact, in their FTA the EU and Korea also agreed to a general obligation to ensure interactions with diverse stakeholders in 'develop[ing], introduc[ing] and implement[ing] any measures aimed at protecting … labor conditions that affect trade' through 'due notice and public consultation, and … appropriate and timely communication to and consultation of non-state actors including the private sector.'[44]

It is already evident that the Chapter 13 dispute settlement procedure is made up of several different stages and allows for various types of interactions between the parties and other actors. It is foreseen that these stages and interactions should take place within rather short deadlines, and, in case a panel of experts is established, a proceeding should not last longer than 90 days.[45] Although the EU–Korea proceeding encountered unforeseen hurdles, with the passing of the original chairperson of the panel of experts and the global spread of the COVID-19 pandemic, there is a need to reflect on the suitability, desirability and feasibility of the short deadlines provided for in the FTA. A 90-day deadline may well prove to be too short a timeframe within which to complete

40 ibid art 13.14.2.

41 ibid art 13.15.1.

42 See Report of the Panel of Experts (n 5) Appendix – List of Submissions and Exhibits, 80–81.

43 Report of the Panel of Experts (n 5) para 161.

44 EU–Korea FTA art 13.9.

45 ibid art 13.15.2 stipulates that 'the Panel of Experts shall, within 90 days of the last expert being selected, present to the Parties a report'.

various procedural obligations incumbent on a panel of experts including receiving parties' submissions, soliciting *amicus curiae* submissions, conducting hearings, consulting with domestic advisory groups and international organisations, internal deliberations, and the issuance of a report. One would find any dispute arising under sustainable development legally complex and politically sensitive. Under these circumstances, completing all the procedural obligations within a 90-day window arguably poses a serious challenge to any prospective panel of experts. More than anything else, it is doubtful whether a party can effectively participate in a proceeding. The burden may prove to be too heavy for the respondent party, whose legal defence can start only after the receipt of the request for the establishment of a panel of experts by a claimant party. Even though the parties can agree to extend the deadlines, there is a need to consider whether they allow all procedural and logistical issues properly to play their role in guaranteeing the sound delivery by the panel of experts of its report and the full implementation of its recommendations.

2.2 *Reflections on Jurisdictional and Substantive Issues*

The EU–Korea proceeding was initiated by the EU on 17 December 2018 by submitting a request to Korea pursuant to Article 13.14.1 of the EU–Korea FTA concerning certain measures, including provisions of Korea's Trade Union and Labour Relations Adjustment Act (TULRAA) and Korea's non-ratification of certain core ILO Conventions.[46] Following governmental consultations on 4 July 2019, the EU requested a panel of experts to be convened in accordance with Article 13.15 of the EU–Korea FTA. Relying on the first and last sentences of Article 13.4.3 of the FTA,[47] the EU alleged that the TULRAA did not comply

46 Trade Union and Labour Relations Adjustment Act, Act No 5310 (Korea) (13 March 1997) (TULRAA).

47 The first sentence of Article 13.4.3 of the EU–Korea FTA reads as follows:

> The Parties, in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up … commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely:
> (a) freedom of association and the effective recognition of the right to collective bargaining;
> (b) the elimination of all forms of forced or compulsory labour;
> (c) the effective abolition of child labour; and
> (d) the elimination of discrimination in respect of employment and occupation.

The last sentence of Article 13.4.3 of the EU–Korea FTA reads as follows:

> The Parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as 'up-to-date' by the ILO.

with Korea's commitment to respect, promote and realise the freedom of association and the effective recognition of collective bargaining, and that Korea had made insufficient efforts to ratify fundamental ILO Conventions given that four of those conventions remained unratified at the time.[48]

On 30 December 2019, the panel of experts was formally established. On 20 January 2020, the EU submitted its initial submissions, and, on 14 February 2020, Korea submitted its reply to the EU's initial submission. On 10 January 2020, *amicus curiae* submissions were received by the panel. The hearings were held from 8 October 2020 to 9 October 2020 in a virtual format. On 16 October 2020 and 20 October 2020, the EU and Korea provided their respective replies to the oral questions of the panel posed during the hearings. On 6 November 2020, the two countries submitted the consolidated and agreed content of the hearings. The panel issued its report to the parties on 20 January 2021.

The report concluded that three aspects of the Korean legislation (TURLAA) were inconsistent with the principle of freedom of association, as defined within the ILO system, which Korea is obliged to respect, promote and realise under Article 13.4.3.[49] With respect to the ratification of ILO Conventions, the panel of experts considered that Article 13.4.3 laid down an obligation of best endeavours[50] and found that Korea had not acted inconsistently with the last sentence of Article 13.4.3 and therefore had not failed 'to make continued and sustained efforts' towards ratification of the core ILO Conventions.[51] It took note, in particular, of Korea's efforts for the ratification of the said conventions since 2017. With respect to Convention 105 (Abolition of Forced Labour Convention, 1957), however, the Panel observed that Korea had treated it separately – for reasons acknowledged by the Panel – from the three other Conventions at issue.[52] The Panel nonetheless stated that it 'expects that the ratification process of Convention 105 will be completed in an expeditious manner'.[53]

To deal with these substantive issues and to decide upon breaches of the FTA, the panel of experts had to address the relationship between Chapter 13 and trade. It considered that the 'measures based on Article 13.4.3 are not limited to trade-related aspects of labour' while saying that it 'does not mean that the Panel has concluded that the EU's Panel Request refers to matters which

48 Report of the Panel of Experts (n 5) paras 105 and 264.
49 ibid paras 197, 209 and 228.
50 ibid para 277.
51 ibid para 293.
52 ibid para 289.
53 ibid para 290.

have no connection with trade'.[54] It thus admitted that there was a link. In doing so, it noted that the 'various international declarations and statements referred to in the EU–Korea FTA … have been referenced by the Parties to show that decent work is at the heart of their aspirations for trade and sustainable development, with the "floor" of labour rights an integral component of the system they commit to maintaining and developing.'[55]

While acknowledging the trade-labour relationship, the Panel rejected the jurisdictional objection made by Korea that had argued that limited scope is applied to 'trade-related labour' under the terms of Article 13.4.3.[56] In deciding this, the Panel referred to international instruments and declarations mentioned in the preamble of the EU–Korea FTA[57] and the general provision in Chapter 13,[58] as well as to other related documents that were considered as indicative of the context of Chapter 13 for identifying the intent of the parties. It, therefore, made full use of the FTA's provisions, references to other instruments made in the FTA, as well as of the political and legal context of Chapter 13, in providing its interpretation in accordance with Article 31 of the VCLT.

Lastly, it should be re-emphasised that FTAs are negotiated between two or more contracting parties. They represent bilateral or plurilateral endeavours. Each of the parties can thus make a request for consultations with another party in case it believes there is non-compliance on the part of that other party. Interestingly, both parties in the EU–Korea proceeding referred to legislative acts adopted by the other party or decisions given by domestic courts of the other party. The EU referred to a decision of the Supreme Court

54 ibid para 94.

55 ibid para 95.

56 ibid para 68.

57 In the preamble of their FTA, the EU and Korea reaffirm 'their commitment to sustainable development and convinced of the contribution of international trade to sustainable development in its economic, social and environmental dimensions, including economic development, poverty reduction, full and productive employment and decent work for all…; desiring to strengthen the development and enforcement of labour and environmental laws and policies, promote basic workers' rights and sustainable development and implement this Agreement in a manner consistent with those objectives …'.

58 In this regard, Article 13.1 of the EU–Korea FTA provides:

> Article 13.1: Context and Objectives
>
> 1. Recalling Agenda 21 on Environment and Development of 1992, the Johannesburg Plan of Implementation on Sustainable Development of 2002 and the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, the Parties reaffirm their commitments to promoting the development of international trade in such a way as to contribute to the objective of sustainable development and will strive to ensure that this objective is integrated and reflected at every level of their trade relationship.

of Korea[59] to sustain some of its arguments. On its part, Korea also relied on certain EU Members' legislative acts or judicial decisions in its written submissions to defend its rights.[60] The panel, however, noted that in the context of the EU–Korea proceedings, the 'matters to do with EU Member States' laws and practices … are outside the Panel's jurisdiction'.[61] The jurisdiction of the panel extends only to the terms of reference of the panel request, which was submitted by the EU on 4 July 2019 according to the EU–Korea FTA provision and has not been challenged by Korea since then.[62] Had Korea purported to raise its own claim vis-à-vis the EU, it should have submitted its own request for consultations and a panel proceeding. That said, the Panel considered 'that these matters may assist in interpreting the notions at stake [in relation to Korea's argument about EU legislation and court decisions] and notes that they may be the subject of discussions between the Parties in the future'.[63] The EU–Korea FTA is indeed a two-way agreement that in the future could see a request for consultations brought by Korea against the EU in the context of Chapter 13. Interpretations and observations of a panel of experts in a proceeding may well permeate relevant measures and government practices of all contracting parties. This two-way, ongoing dialogue process is probably one of the reasons why the parties have carved out a distinct and separate dispute settlement mechanism for sustainable development.[64]

2.3 *Reflections on Follow-Up Perspectives*

The result of a proceeding under Chapter 13 is a Report of the panel of experts that may contain advice or recommendations, which the parties 'shall make their best efforts to accommodate'.[65] The terms that are used reveal the legal status of these pronouncements, namely that they are non-binding. That said, the parties have subscribed to a qualified commitment 'to make their best efforts' to implement them. The advice and recommendations are not binding in the sense of 'legally binding' in trade dispute settlement proceedings constituted under Chapter 14 of the EU–Korea FTA, but a party complained against does have the legal obligation to (i.e. shall) 'make best efforts' nonetheless. The

59 Report of the Panel of Experts (n 5) para 152. For the Seoul Administrative Court, see ibid para 159.
60 ibid paras 158 and 173.
61 ibid para 175.
62 ibid para 98.
63 ibid para 174.
64 See EU–Korea FTA art 13.16.
65 ibid art 13.15.2.

absence or lack of such best efforts may be regarded as a breach of this kind of legal obligation.

In this regard, the Committee on Trade and Sustainable Development established under Article 15.2.1 of the EU–Korea FTA and composed of representatives of the parties has the mandate to monitor the implementation of the recommendations. Dialogue and monitoring are the means for ensuring compliance with a report. Surveillance over time through dialogue takes place in a dedicated setting to ensure the implementation of the recommendations in case a party is reluctant to accommodate them. It is expected that the different recommendations, together with the rationale underpinning them, will be able to help the Committee on Trade and Sustainable Development to continue the dialogue in an objective and transparent manner and facilitate the implementation.

The EU and Korea have met since the issuance of the Report of the Panel of Experts.[66] In April 2021, Korea ratified the three ILO Conventions at issue (Conventions 29, 87, and 98)[67] in the EU–Korea proceeding.[68] ILO Convention 105[69] remains pending. Legislative changes to TULRAA to reflect some of the issues raised in the EU–Korea proceeding were also made in December 2020. The remaining issues are discussed among the parties and experts of Advisory Groups and international organisations.[70]

Transparency also plays a role in ensuring compliance with the recommendations of a report. The EU–Korea FTA requires that a report of a panel of experts is made available to the domestic advisory group(s) of the parties.[71] It is then discussed with the party representatives. The EU and Korea agreed upon further transparency in the EU–Korea proceeding. Accordingly, at the end of the EU–Korea proceeding, the report was made available to the public at large. Access to a report would allow for its discussion among a wider group of actors.

66 See European Economic and Social Committee, 'EU–Korea DAG Follows the Developments in South Korea Subsequent to the Report of the Panel of Experts and South Korea's Ratification of ILO Conventions' (24 November 2021) <www.eesc.europa.eu/en/news-media/news/eu-korea-dag-follows-developments-south-korea-subsequent-report-panel-experts-and-south-koreas-ratification-ilo> accessed 26 April 2022.

67 ILO C29 Forced Labour Convention (1930); ILO C87 Freedom of Association and Protection of the Right to Organise Convention (1948); ILO C98 Right to Organise and Collective Bargaining Convention (1949).

68 Korean Ministry of Foreign Affairs Press Release, 'Ratification of Three Fundamental ILO Conventions Marked in Virtual Ceremony with ILO' (21 April 2021) <www.mofa.go.kr/eng/brd/m_5676/view.do?seq=321641> accessed 26 April 2022.

69 ILO C105 Abolition of Forced Labour Convention (1957).

70 European Economic and Social Committee (n 66).

71 EU–Korea FTA art 13.15.

In particular, the representatives of the concerned sectors of economic activity can rely on and refer to it through formal and informal processes.

The EU–Korea proceeding is a pioneering one. It is the first time that an attempt has been made to challenge compliance with the sustainable development provisions of an EU-negotiated FTA. Lessons and insights from this experiment can indeed be drawn and deserve attention. Discussions on compliance are ongoing, and it will be important to assess the procedure in its entirety.

In terms of follow-up measures related to labour law, primacy appears to have been given to legislative changes and the ratification of ILO Conventions. In some political and academic circles, there are claims that these outcomes would not be sufficient and that sanctions should also be considered.[72] This is not the place to discuss the appropriateness of sanctions and the type of sanctions that could come into play. Suffice it to note that sanctions in the trade area (also generally referred to as suspension of concessions and benefits) are not frequent,[73] and that, in the ILO context, sanctions are rare and considered as a means of last resort.[74] The accent is rather placed on reporting, following up on recommendations and fact-finding.[75] Sanctions may be useful in some contexts of the FTA administration, but their absence in other contexts does not necessarily indicate ineffectiveness in that context.

Given what has happened in the labour sector in the course of and the aftermath of the proceeding, one might note its contribution to the achievement of the objectives of Chapter 13. The fact that the proceeding is non-binding may not necessarily discount its systemic importance in dealing with these new norms in trade agreements. The two-way dialogue between FTA parties on an ongoing basis, supported and facilitated by a finding of a panel of experts, stands to contribute to the resolution of disputes on sustainable development.

---

72 See Marco Bronckers and Giovanni Gruni, 'Taking the Enforcement of Labour Standards in the EU's Free Trade Agreements Seriously' (2019) 56 Common Market Law Review 1591–1622; Bronckers and Gruni (n 1) 13–27. See also Robert Francis, 'Trade and Sustainability Chapters and the Stalling of the EU's FTA Agenda' (*Borderlex*, 12 September 2021) <https://borderlex.net/2021/12/09/analysis-trade-and-sustainability-chapters-and-the-stalling-of-the-eus-fta-agenda/> accessed 26 April 2022.

73 Gracia Marin Duran, 'Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues' (2020) 57(4) Common Market Law Review 1054–68.

74 See Lars Thomann, 'The ILO and Compliance' in Lars Thomann (ed), *Steps to Compliance with International Law Standards* (Springer 2011) 81–90.

75 See Laurence Boisson de Chazournes, 'The ILO and International Judicial Mechanisms: A Story of Control and Trust' in Tomi Kohiyama and Thomas Lieby (eds), *ILO 100 Law for Social Justice* (ILO 2019) 189–216; Steve Charnovitz, 'The Lost History of the ILO's Trade Sanctions' in ibid 217–56.

2.4 *Reflections on Incrementalism*

The inclusion of sustainable development chapters in FTAs is a significant step ahead. There is an ongoing reflection on the suitability of framing separate chapters dealing with trade on the one hand and sustainable development on the other. Although there is support for mainstreaming sustainable development throughout FTAs, views are still divergent as to whether to have a specific chapter dedicated to this theme. The EU–Korea proceeding represents an attempt to test in practice various provisions of a stand-alone chapter on sustainable development (Chapter 13) and, as such, constitutes an experiment that could be replicated. The insights from the EU–Korea proceeding and those that will be gathered in case future proceedings take place could accumulate to provide meaningful guidance in formulating and administering separate chapters on sustainable development in future trade agreements.[76] As of now, there have only been two cases examining labour issues in FTAs. Elaboration and clarification will come as experiences and lessons accumulate over time.

Follow-up measures from reports of panels of experts is another concern for some. Indeed, implementation lies at the heart of any dispute settlement mechanism. The effectiveness of implementation could also be evaluated from a long-term perspective, i.e. what has been changed and is being changed as a result of the proceedings and recommendations. If changes are none or minimal, then one could assume that the dispute settlement procedure at issue has a fundamental flaw. If, on the other hand, changes are taking place in a meaningful manner, though over time, and if such an incremental approach is what the parties intended in the first place, then such a dispute settlement procedure may still be credited for its contribution through a staged, incremental fulfilment. In this respect, while the pro-sanction arguments do raise valid points, they should also take due consideration of the dialogue and ongoing pressure aspects of the dispute settlement procedure of sustainable development chapters in FTAs. The true impact of the outcome of proceedings is worth exploring from many different angles. This endeavour is just beginning with the conclusion of the EU–Korea FTA Chapter 13 proceeding. The current paralysis of the WTO dispute settlement proceeding based on a

76 By way of example, the Report of the Panel of Experts (n 5) is being examined and referred to in the context of the EU–China Comprehensive Agreement on Investment, which is currently underway. See Julien Chaisse, 'FDI and Sustainable Development in the EU–China Investment Treaty: Neither High nor Low, just Realistic Expectations' (24 January 2022) Columbia FDI Perspectives No 323, 2 (examining the requirement for 'continued and sustained' efforts to ratify the fundamental ILO conventions by analysing similar discussions in the Report of the Panel of Experts of the EU–Korea proceeding).

sanction-oriented, legally binding dispute settlement mechanism may indicate that an alternative approach deserves renewed attention.

As a matter of fact, the usefulness of the non-binding dispute settlement mechanism is being realised gradually. Apparently, contracting parties realise that some disputes are more prone to amicable discussion and candid interaction to reach a resolution. It follows that some recent treaties purport to introduce non-binding dispute settlement mechanisms in addition to the legally binding ones. A variety of formats are adopted, such as mediation, conciliation, or joint committees. For instance, the very EU–Korea FTA and the Korea–China FTA adopted a non-binding mediation mechanism to deal with disputes of non-tariff barriers (NTBs).[77] Noting that unpredictable exercise of discretion and invisible regulatory restriction couched in vague terms underpin NTBs, the parties may have realise that a new scheme of dispute settlement (mediation) may offer a flexible alternative in certain situations. The procedure also aims for a non-sanction, dialogue-based, amicable resolution of disputes between parties, expecting a long-term impact on the regulatory systems of parties. Arguably, the same rationale would equally apply to non-sanction dispute settlement procedures in sustainable development chapters.

2.5 *Reflections on Logistical Aspects*

Another challenge for the future administration of various types of dispute settlement procedures included in FTAs is how to address logistical obstacles. The introduction of multiple dispute settlement procedures in a single FTA would inevitably lead to an increasing logistical burden. The burden rises exponentially with the proliferation of FTAs that each country concludes. As such, for the smooth operation of any dispute settlement procedure, it would be critical to secure adequate logistical support. At the end of the day, it is human and financial resources that actualise in any dispute settlement proceeding and move it forward. Most of the FTAs, however, are silent on this point; they establish dispute settlement procedures, be it binding or non-binding, and then stipulate minimal requirements such as the adoption of rosters of experts/professionals to serve in these procedures. But that is pretty much about it. Almost all issues are deferred to future discussions between parties, or between parties and adjudicators. Once a specific proceeding begins, all these issues wait for discussions from scratch. As specific details are absent, experts, panellists and arbitrators are thrown into a structural vacuum. Not surprisingly, it would take

77 Annex 14-A of the EU–Korea FTA and Article 20.5, para 4 of the Korea–China FTA (signed 1 June 2015, entered into force 20 December 2015).

a longer time than would have been otherwise predicted. If the substantive issues presented are complex, a proceeding will be further delayed.

The EU–Korea proceeding also took a longer time: 13 months in total compared to 90 days stipulated in the text of the FTA. As stated, part of the delay was caused by the unfortunate passing of the chairperson and by the pandemic, but part of it seems to have been the result of the absence of adequate infrastructure and resources. Assuming more disputes will come the parties' way, it would then be critical to secure adequate logistical support to manage and administer these disputes in the future.

This experience of the EU–Korea proceeding underscores the importance of contemplating the establishment of a standing administrative entity for a future FTA comprising a variety of different dispute settlement mechanisms. Joint committees of contracting parties carry out this function to some extent, but their ad hoc nature contains inherent limitations. As for mega-FTAs with multiple parties, it could be a secretariat.[78] Any experiment's ultimate success would depend on the systemic preparation that practically handles attendant issues as much as the quality of the original idea.

3 Concluding Thoughts

After the 2017 US–Guatemala dispute, the EU–Korea proceeding offered a second occasion to examine the nature of legal obligations contained in a stand-alone chapter on sustainable development. It also offered the first opportunity to assess labour issues independent of trade-related aspects. In addition, it brought to light procedural and logistical issues associated with or arising from preparing, managing and administering a dispute settlement proceeding in the overall architecture of an FTA. As sustainable development becomes a core issue of international concern, it is also becoming an integral part of new trade agreements. Having an effective dispute settlement procedure will be critical to achieving the objectives of sustainable development.

The reflections from the EU–Korea proceeding indicate the viability of addressing labour matters of contracting parties in the context of sustainable development independent of the 'trade-related' connection. They also show ways to coordinate with and incorporate other extra-FTA international instruments to interpret provisions of sustainable development chapters and clarify obligations flowing from them. The reflections also suggest that the impact

78 Pasha Hsieh, *New Asian Regionalism in International Economic Law* (CUP 2021) 98.

of a proceeding should be evaluated from the perspective of incrementalism through two-way dialogues and ongoing interaction with stakeholders.

The insights and observations of the EU–Korea proceeding do not end in sustainable development. As diverse dispute settlement mechanisms in various sectors make inroads into trade agreements, insights and observations from the proceeding are expected to help formulate and administer future dispute settlement procedures in trade agreements in an effective and feasible manner.

Biographical Note

Laurence Boisson de Chazournes is professor at the University of Geneva and Director of the Geneva LL.M. in International Dispute Settlement (MIDS) in Geneva, Switzerland, and Jaemin Lee is professor at the School of Law, Seoul National University in Seoul, Korea.

Disclaimer

The authors were members of the Panel of Experts in the Proceeding Constituted Under Article 13.15 of the EU–Korea Free Trade Agreement, together with Dr Jill Murray, who acted as Chairperson of the panel of experts. A first draft was presented at a workshop organised by the National University of Singapore and Queen Mary University London, School of Law, on 10 December 2021. Special thanks go to Dr Stephanie Schacherer for convening this meeting.