

Enforceable social clauses in trade agreements with ‘bite’?

Implications of the EU–South Korea Panel of Experts Report of 20 January 2021

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Policy implications

- The EU–South Korea Panel of Experts Report (‘the Report’) confounded expectations by asserting that it had jurisdiction to consider a breach of core labour standards under the relevant provision of the relevant Free Trade Agreement (FTA), regardless of whether there was an impact on trade.
- The Report asserts that freedom of association principles are not so vague or uncertain that they cannot be subjected to scrutiny under trade agreements, relying on established international human rights norms and International Labour Organization standards, as interpreted and applied by the Committee on Freedom of Association and other UN supervisory bodies.
- The Report makes reference at various significant junctures to the role of sustainable development provisions as a basis for understanding the relationship between economic, environmental and social objectives, which are stated to be inter-related. There is an indication that a different decision could be reached regarding the relevance of freedom of association to trade on this basis. There are some significant findings regarding the implications of freedom of association principles concerning its application to persons not formally designated ‘workers’, relating also to trade union rights to registration and collective bargaining.

Introduction

The European Union (EU) has been concluding bilateral and multilateral free trade agreements for a long time, but more recently it has begun to utilise human rights clauses and sustainable development chapters, which make trade liberalisation contingent on compliance with certain labour standards. These clauses have been the subject of extensive academic debate, in which their merits and efficacy have been questioned (Gammage 2019; Van den Putte and Orbie 2015). In January 2021, the EU and the Republic of South Korea ('Korea') released the Report of a Panel of Experts ('the Report')¹ on matters raised under the Trade and Sustainable Development Chapter of the EU–Korea Free Trade Agreement (FTA) ('the Agreement'),² which does not address all relevant concerns associated with these types of clauses, but does cast a different light on their normative implications, at least in terms of the type of legal commitments that the signatory parties undertake when they include them in FTAs. In particular, the findings of the Report can be compared and contrasted with the outcome in 2017 of the CAFTA-DR arbitration claim by the United States,³ which had failed on the basis that Guatemala's breach of freedom of association was not 'in a manner affecting trade', as required under the terms of that FTA (Compa *et al.* 2018). Demonstrating that a breach of labour standards, such as trade union rights and collective bargaining, has a concrete measurable economic impact can be difficult, as those findings established. The Expert Panel in EU–Korea ('the Panel') skilfully evaded those difficulties, as shall become apparent.

This was achievable because the EU's complaint, which led to the formation of the panel request, was not based on Article 13.7, which refers to the obligation 'not to fail to implement and enforce their domestic laws ... in a manner affecting trade or investment between the Parties'. Instead, the EU relied on Article 13.4.3 of the EU–Korea FTA under which two allegations were made. The first was that the Korean Trade Union and Labour Relations Act 1997 (the TULRAA) did not comply with Korea's commitment to respect, promote and realise 'freedom of association and the effective recognition of collective bargaining', which was upheld in the Report in three respects.⁴ The second was that Korea had made insufficient efforts to ratify fundamental ILO Conventions, as required by the last sentence of Article 13.4.3, because four of these eight conventions remained unratified. In the absence of a timeframe for ratification agreed by the Parties, the Panel found that the acceleration of activity by Korea since 2017 (culminating in significant measures taken in 2019) was just sufficient

1. Report of the Panel of Experts: Proceeding constituted under Article 13.15 of the EU–Korea Free Trade Agreement, 25 January 2021. Panel: Dr Jill Murray (Chair), Professor Laurence Boisson de Chazournes and Professor Jaemin Lee. https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf.

2. Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L127/6, 14 May 2011. [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22011A0514\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22011A0514(01)).

3. Final Panel Report (2017) Dominican Republic – Central America – United States free trade agreement arbitral panel established pursuant to chapter twenty, In the matter of Guatemala – issues relating to the obligations under article 16.2.1(a) of the CAFTA-DR, Final panel report, 14 June 2017. Panel: Professor Kevin Banks (Chair), Mr Theodore R. Posner, Professor Ricardo Ramírez Hernández. <https://worldtradelaw.typepad.com/files/caftaguatemalalabor.pdf>.

4. For an English translation, see https://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=46398.

to amount to ‘continued and sustained efforts’ towards ratification, although the Panel did express concern regarding a lack of progress regarding Convention No. 105, which they requested should proceed expeditiously (see paragraphs 289–290 of the Expert Panel Report). Notably, in the aftermath of the Report, on 26 February 2021, Korea ratified Conventions Nos 29, 87 and 98, but Convention No. 105 remains outstanding (as the Panel predicted).⁵

This policy brief has two parts. The first explains how the Panel in the EU–Korea dispute asserted jurisdiction with reference to principles concerning fundamental rights (such as those relating to freedom of association) in Article 13.4.3, which were found to be ascertainable with reference to international labour standards and human rights law, particularly the Compilation of Findings of the International Labour Organization (ILO) Committee on Freedom of Association. The significance of this decision for international labour law is considered accordingly. The second part considers in greater detail the Panel’s findings regarding the scope of freedom of association and their implications as regards ‘workers’ and ‘trade unions’, especially the capacity of the latter to include as members and to represent the unemployed and precarious workers, which may also have broader significance in the wider international community.

Jurisdiction in relation to principles concerning fundamental rights

Korea made a jurisdictional objection, arguing that the EU had failed to identify a ‘matter arising under the FTA’, relying on Article 13.2.1 of the Agreement (‘Scope’), which states that the Chapter applies to ‘measures adopted or maintained by the Parties affecting trade-related aspects of labour’. Hence, apparent obligations based on Article 13.4.3 were never intended to be implemented. Indeed, the claim was that commitments made to principles concerning the fundamental rights, including freedom of association, were too vague to be enforceable.

Article 13.4.3 states:

‘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, adopted by the International Labour Conference at its 86th Session in 1998, 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 Parties reaffirm the commitment to effectively implement the ILO Conventions that Korea and the Member States of the European Union

5. Ratification was widely reported in the Korean press. See <http://news.koreaherald.com/view.php?ud=20210226000824&np=2&mp=1>; and <https://en.yna.co.kr/view/AEN20210226006551315>.

have ratified respectively. 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.’

The Report rejected the argument presented by Korea that Article 13.4.3 was unenforceable unless it affected trade. In support of that argument, Korea explicitly relied on the findings of the earlier *Guatemala* arbitral decision (para. 58). However, in reliance on Articles 31 of the Vienna Convention on the Law of Treaties (VCLT), the Panel found that the ordinary meaning of the words of Article 13.4.3 (such as ‘obligations’ and the language of ‘commitment’), read in context and in light of the object and purpose of Chapter 13 and the Agreement as a whole, meant that there was no intention to limit the principles of freedom of association to trade-related aspects of labour (paras 61–73). As the ordinary meaning of Article 13.4.3 was clear there was no need to refer (under Article 32 of the VCLT) to supplementary preparatory materials, presented by Korea as their record of discussions at the time the FTA was concluded (see paras 42–53).

Moreover, the Panel rejected claims that the EU was, by seeking to enforce Article 13.4.3, illicitly proposing to ‘harmonise’ labour laws (cf. Article 13.1.3 of the FTA, for which see para. 80). This is because ‘the concept of harmonisation of labour standards suggests a bringing into alignment of actual standards such as minimum rates of pay, maximum hours of work, or access to job security procedures’, but fundamental principles such as freedom of association do not require such uniformity of ‘domestic labour laws or outcomes’ (para. 81). This view is consistent with the provision of ‘a right to regulate’ labour standards in Article 13.3, which is expressly subject to consistency ‘with the internationally recognised standards or agreements referred to in Article(s) 13.4...’ (para. 83). Similarly, the Panel rejected the claim that its interpretation of Article 13.4.3 called into question Korea’s comparative advantage (which would be a breach of Article 13.2.2, discussed at para. 85), citing OECD and ILO studies which show that compliance with international labour standards tends to enhance economic performance (para. 88).

The Panel also refused to concede that non-compliance with freedom of association did *not* affect trade (para. 94). In so doing, they referred to the commitments made to sustainable development in Article 13.1.1 and the statement in 13.1.2 that ‘economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development’ (para. 74). In this context there was a pointed statement that, even if there was a requirement that non-compliance with labour standards affected trade, the outcome in the present case might well be different to the arbitral findings regarding *Guatemala* as that case did ‘not have the same contextual setting of sustainable development’ (para. 93).

This is a significant finding which may encourage the EU in its ambitious pursuit through FTAs of interlinked objectives (including ‘decent work’) set out in the 2015 United Nations Sustainable Development Goals,⁶ as outlined in part 5 of the 2020 Commission Communication ‘A Strong Social Europe for Just

6. United Nations: Transforming our world: The 2030 Agenda for sustainable development, General Assembly, 70th Session, A/Res/70/1, New York, NY, 2015.

Transitions'. Indeed, it would seem that the sustainable development agenda, previously identified as potentially weakening enforcement of labour standards in trade relations (van den Putte and Orbie 2015; Bartels 2012) could now have the opposite effect.

The scope of freedom of association and its application to workers and trade unions

In relation to the ILO Declaration on Fundamental Principles and Rights at Work 1998, both the Parties agreed that its terms were not legally binding (paras 119–121). However, the Panel noted that the Parties had created new legal commitments when they formalised the EU–Korea FTA. The binding nature of the commitments to respect, promote and realise the principles of the fundamental rights to freedom of association arose from Article 13.4.3 itself, rather than from the instruments to which this provision referred (para. 122). Nor was this thwarting the sovereign choice of Korea whether to ratify Conventions Nos 87 and 98, as the fundamental principles regarding freedom of association have been recognised as inherent in the ILO constitution (paras 139–141).

A related concern raised by Korea was that such principles were not 'sufficiently clear and concrete' to enable their use to evaluate Korean trade union legislation. In so doing, Korea cited an article written by three ILO officials, albeit in their personal capacities (Agusti-Panareda, Ebert and LeClercq 2014). By way of response, the Panel noted a later article by the same authors, which stated that it 'may be difficult for States to obtain guidance on the precise legal implications of the fundamental principles', qualifying this view with reference to 'one exception', being 'the principle of freedom of association, which, as a constitutional principle, has long been examined by the ILO supervisory system, even absent ratification of the relevant Conventions' (Agusti-Panareda, Ebert and LeClercq 2015: 365). Whether the Panel could extrapolate from this that they should rely on the findings of the ILO Committee on Freedom of Association (CFA) may be another matter (see para. 138),⁷ but they did so.

Certainly, the Introduction to the 2006 5th edition of the Digest of the Committee on Freedom of Association decisions invites this kind of usage 'in the various bodies responsible for the application of law relating to freedom of association, for the resolution of major collective disputes and in publications on jurisprudence'. Even the updated 'Compilation' is said by the Introduction to be 'intended to raise awareness and guide reflections for the effective respect of the fundamental principles of freedom of association and the effective recognition of the right to collective bargaining'. This is despite the strong contestation of its content and influence by the employers' group, which would prefer that no generalised principles were derived (Vogt *et al.* 2020: 188).

Notably, the Panel did not rely on the observations of the ILO Committee of Experts on the Application of Conventions and Recommendations, which have proven so controversial for the employer group in the context of the right to

7. Regarding which see LeClercq's blog at <https://ielp.worldtradelaw.net/2021/02/guest-post-the-panel-report-under-the-eu-korea-trade-agreement-concerning-labor-practices-what-are-t.html>.

strike (Novitz 2020), and nor would this have been appropriate, given the non-ratification by Korea of ILO Conventions Nos 87 and 98. Neither were individual CFA decisions related to Korea used by the Panel, which decided to rely solely on the material evidence provided to it in relation to the Article 13.4.3 claims. Reference was made to the broader human rights context and the decisions of some national and regional courts which supported the Panel's view of the CFA as an authoritative source of the relevant principles, leading to the finding that Korea's trade union legislation was in breach of the principle of freedom of association in three key respects, and thereby Article 13.4.3 of the EU–Korea FTA.

The Panel was thus able more confidently to uphold three of the EU's claims recommending that the following laws be brought into conformity with the principles of freedom of association:

- Article 2(1) of the TULRAA, which excluded from the Act's definition of 'worker' the self-employed, dismissed and unemployed;
- Article 2(4)(d) of the TULRAA, which disallowed a union from certification under the Act if it permitted non-workers to join and remain members; and
- Article 23(1) of the TULRAA which required that trade union officials could only be elected from amongst the trade union membership.

The definition of 'worker' of course remains controversial, not only in Korea but in the EU (Kountouris 2018). Nevertheless, the Panel saw its task as being to examine the Korean legislation and its implications, rather than investigating the EU legal position, the latter being beyond their remit.

The Panel proceeded in reliance on ILO CFA jurisprudence, which makes clear the entitlement of self-employed workers to form and join trade unions, evident from Convention No. 87, but also flowing from ILO constitutional guarantees (para. 148, and see De Stefano 2021). The Panel appreciated that the bilateral employment relationship required for identification as a 'worker' by the TULRAA 'would exclude self-employed workers with numerous different clients, and so-called platform workers whose tasks are delivered to them via automated means and who may be legally defined as entrepreneurs' (para. 165). The Korean statute is also contrary to ILO CFA principles, which state that those engaged in the 'liberal professionals', whose source of income is unlikely to be 'mainly dependent upon a specific employer', should be eligible to claim freedom of association rights. Overall, the Panel's findings reflect concerns about access to collective labour rights, asserting that these should not be dependent on an employment relationship, which may be increasingly difficult to identify in contemporary labour markets.

The Panel further noted the dangers of preventing persons dismissed and unemployed from remaining members of their trade union, because this risks anti-union discrimination. The reason, as stated by the CFA, is that 'the dismissal of trade union activists would prevent them from continuing their trade union activities within their organization' (cited at para. 181). This vulnerability to punitive dismissal led to an expression of the Panel's concern with its consequences under Article 2(4)(d) in terms of access to union certification (if a union continued to represent dismissed workers as members). Deregistration would seem entirely inappropriate in this context. Linked to this was the

inability of a trade union official to continue in their role in an enterprise union if dismissed, by virtue of Article 23(1) of the TULRAA (paras 182–197). While Korea argued that there was separate protection from discrimination on grounds of trade union membership and activities, the legislative architecture was exposed as highly problematic. The argument (outlined at para. 214) offered by Korea that it was more democratic for those working for an employer to be trade union officials in enterprise unions as they would have a direct interest in the outcome of bargaining was ultimately unconvincing. Members of a union should be able to choose freely who will represent them and could determine the pros and cons of officials hired directly by their own employer (para. 221).

Of course, this Panel Report is binding only between the Parties. There is to be ‘appropriate follow-up to further recommendations made in expert panel reports’ (European Commission 2018: 3 and 8), but it is uncertain what this will mean in practice for freedom of association and collective bargaining in Korea.

Conclusion

Regardless of the Report’s subsequent implementation, this was a significant decision. It demonstrates that principles of freedom of association and collective bargaining may be enforceable under an FTA without a need to demonstrate that non-compliance affected trade. The Report even suggests that the linkage to sustainable development may further bolster the case for enforceability. The Report also elaborates on collective labour rights for precarious workers, and broader issues of trade union representation, offering a collation of internationally recognised norms that will serve as a valuable source of reference globally. Social clauses in FTAs may be on the verge of developing some of the bite that they have traditionally lacked to match their bark.

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All links were checked on 10 May 2021.

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The ETUI Policy Brief series is edited jointly by Nicola Countouris, Jan Drahokoupil, Philippe Pochet, Aída Ponce Del Castillo, Kurt Vandaele and Sigurt Vitols.
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The ETUI is financially supported by the European Union. The European Union is not responsible for any use made of the information contained in this publication.