



The enforceability of the trade and sustainable development chapters of the European Union's free trade agreements

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Abstract

Since 2011, the European Union's (EU) free trade agreements (FTAs) include a Trade and Sustainable Development (TSD) chapter which provides for environmental and labour commitments. Nevertheless, the ratification and implementation of these commitments remain insufficient. It is therefore essential to analyse whether the EU has become more ambitious in enforcing the TSD chapter. To analyse the chapter's enforceability, the EU's FTAs with South Korea, Canada and Japan have been compared. The comparative analysis was based on three elements: the labour and environmental commitments, institutional mechanisms and the enforcement procedure. Concerning the latter, the ongoing EU-Korea dispute settlement case over workers' rights in South Korea is the leading example. Until the Commission reveals more assertive enforcement plans, it can be said that the EU has not become more ambitious in enforcing its TSD chapter. Since no major changes were detected in the comparative analysis, several interviewees proposed enforcement mechanisms.

Keywords Enforcement procedure · European Union · Free Trade Agreement · South Korea · Trade and Sustainable Development Chapter

Introduction

Since 2011, the EU's trade agreements provide a TSD chapter which combines multilateral environmental agreements (MEAs) with the International Labour Organization's (ILO) core labour standards (European Commission 2019a). Although compliance with these provisions is legally required, most of the available literature describes no enforcement mechanism which ensures compliance by the trade

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partners. Because of non-compliance with the TSD's labour provisions, the European Commission established a panel of experts in South Korea in November 2019. Since the EU had been unable to ensure compliance with ILO Conventions in South Korea through the institutions created by the FTA (Harrison et al. 2019), it is important to analyse if the EU has become more ambitious in enforcing the TSD chapter. This paper presents a comparative analysis, examining the TSD chapters of the FTAs between the EU and South Korea (EU-Korea), Canada (CETA) and Japan (JEFTA). Hence, the following research question has been posed: *Have Europe's Free Trade Agreements become more ambitious in enforcing the Trade and Sustainable Development clauses?*

In 1999, the EU shifted the focus of its trade policy from bilateral towards multilateral negotiations in the context of the World Trade Organization (WTO) (Woolcock 2007). Since 2006, however, the Global Europe Strategy modified the EU's trade policy again, leading to the conclusion of various bilateral FTAs (Lindberg and Alvstam 2008). This shift can be related to the difficulties faced during multilateral negotiations. First, the EU failed to bring transparency in public procurement, investment and competition on the WTO agenda (Woolcock 2007). Second, the USA (US) and Japan concluded FTAs with major EU-trading partners (Lindberg and Alvstam 2008). Third, European importers, exporters and investors urged the EU to conclude FTAs with rising economies in Asia (Woolcock 2007). Lastly, former EU Trade Commissioner, Peter Mandelson, was more willing to conclude FTAs than his predecessor Pascal Lamy (Woolcock 2007).

The EU-Korea FTA of 2011 is the first agreement between the EU and an Asian country and the first agreement containing a TSD chapter (Durán 2013). This chapter has four provisions: first, substantive standards require the parties to commit to and implement the ILO Conventions (Harrison et al. 2019). Secondly, procedural commitments include “dialogue and co-operation between the parties, transparency in introducing new labour standards measures, monitoring and review of the sustainability impacts of the agreement, and a commitment to upholding levels of domestic labour protection” (Harrison et al. 2019, 261). Thirdly, institutional mechanisms oversee the chapter's implementation. Lastly, a panel of experts examines complaints and provides recommendations (Harrison et al. 2019).

The link between trade and labour/environment remains controversial. Each WTO member may set its own environmental standards at the level it considers appropriate, as long as they are in line with the organisation's standards (Durán 2013). This means different protection standards between countries. Labour and environmental provisions have some similarities; however, their objectives and measures differ too greatly to be merged (Van den Putte and Orbie 2015). By signing the FTA, both parties commit themselves to the four ILO Conventions. However, after 9 years, South Korea still did not deliver on its ILO commitments (European Commission 2019b).

According to a Commission services' non-paper (2017), the TSD provisions are binding and contingent on a dispute settlement mechanism, providing “government-to-government consultations; setting up a panel consisting of independent experts on trade, labour and environment; drafting a panel report that is public and that neither party can block; and monitoring of the implementation of the panel report” (3). Dialogue and cooperation are essential elements in this procedure (Harrison et al

2019). In both American and Canadian FTAs, non-compliance with the labour provisions will be subject to a fine or otherwise sanctioned. The absence of a sanction-based mechanism in the EU's TSD chapter is the consequence of a lack of consensus within the EU (Hradilová and Svoboda 2018; Barbu et al. 2018). Since 2010, Members of European Parliament (MEPs) have been pushing for a legally binding enforcement mechanism. Nonetheless, this did not convince the Commission. In 2017, former Trade Commissioner Cecilia Malmström presented two possibilities to improve the chapter: either a "more assertive partnership based on the current enforcement mechanisms [or a sanctions-based enforcement mechanism] that still needs to be defined" (Hradilová and Svoboda 2018, 1030).

The commission also discussed the issue with, among others, the TSD expert group, the Trade Policy Committee (TPC), business and civil society organisations. The majority support the current enforcement procedure (EU Commission services 2018). BusinessEurope (2017), for instance, describes sanctions as problematic and inefficient. They "do not influence neither the raise of trade nor the improvement of state compliance with labour rights" (4). Instead, sanctions can disadvantage the EU's position in trade negotiations. Third countries "may not be willing to engage with an excessively demanding EU" (BusinessEurope 2017, 5). Hradilová and Svoboda (2018) have therefore called for increased civil society participation leading to "a 'soft enforcement' mechanism" (1042). Damian Raess' study (2018) shows that such cooperation mechanisms (compared with strong enforcement mechanisms) effectively improve state compliance of ILO Conventions Nos. 87 and 98.

Hence, most authors recommend including the TSD chapter in the dispute settlement procedure and to establish an effective enforcement mechanism, either economic consequences (ETUC 2018) or sanctions as in the US' trade policy. Concerning the latter, whereas Mirela Barbu et al. (2018) claim that the US-Korea FTA does not have any visible effect, Harrison et al. (2019) highlight the EU's inability to ensure compliance with the ILO Conventions in South Korea through the current institutional mechanisms.

This paper complements the available literature by providing a comparative analysis of the TSD chapters of the EU-Korea FTA, CETA and JEFTA. The research covers the ongoing EU-Korea enforcement procedure, which has not been investigated before. The articles by Harrison et al. (2019), Hradilová and Svoboda (2018) and Barbu et al. (2018), for instance, focus on the TSD chapter, labour provisions and South Korea; however, the ongoing enforcement procedure and a comparison between the three FTAs has not been extensively studied by the abovementioned authors.

Methodology

The research compares the TSD chapters from three FTAs: the EU-Korea FTA initiated the model for the TSD chapter for subsequent agreements; CETA opened the debate on the general dispute settlement procedure; and JEFTA has only been signed recently. It is important to examine the first TSD chapter with recently concluded ones to detect differences over time. This comparative study is based on

the benchmark ambition and enforcement, which are linked to the research question. In this question, “ambitious” is about how (and if) the FTAs have improved the enforcement of TSD clauses. Improvement will be measured based on three provisions of the TSD chapter: labour and environmental standards, institutional mechanisms and the enforcement procedure. To clarify, “improvement” means the inclusion of an enforcement mechanism, more stringent language and the implementation of labour and environmental rights. “Enforcement”, on the other hand, is linked to effectiveness. An enforcement mechanism is effective when the mechanism leads to compliance with the TSD provisions, and is ineffective when the mechanism does not change a party’s behaviour towards the ratification process. Therefore, one might conclude that enforcement will be measured in the mechanism’s strength to enforce another party to comply with the TSD commitments. The current EU-Korea dispute settlement case over workers’ rights in South Korea is a case in point.

Although COVID-19 has complicated research, 12 interviews were conducted with Austrian, Estonian, Finnish, French, German, Greek, Italian, Japanese, Portuguese, Romanian and Spanish FTA-experts, living in and outside Europe. To ensure a representative sample, the interviewees’ gender, nationality and (political) affiliation have been taken into account. This means that several stakeholders were contacted for a professional in-person, email, Skype or phone interview. The interviews were adjusted to the specific interviewee.

Because of their importance during trade negotiations, two DG Trade officials of the European Commission and two MEPs from the Greens/EFA and the European People’s Party (EPP), who are both members of the Committee on International Trade (INTA), were interviewed. Once an FTA is in place, the institutional mechanisms of the TSD chapter are important. Therefore, interviews were conducted with two EU-Korea Domestic Advisory Group (DAG) members, two EU-Canada DAG members and one EU-Japan DAG member. The DAG members represent European business, environmental and labour organisations. Because of the wish for anonymity, the specific organisations remain confidential. Furthermore, trade experts of the European Trade Union Confederation (ETUC), the European Centre for International Political Economy (ECIPE) and the KF-VUB Korea Chair were interviewed in addition. Some requests for interviews, in particular with members of the TPC, regrettably remained unanswered, whereas others declined the invitation. This makes the representation of political stakeholders somewhat limited. The insights of the interviews were combined with EU-official documents and existing academic literature.

The negotiation procedure

FTA negotiations start with a mandate drafted by the Commission. This mandate is based on Stakeholder Consultations with industry, social partners and labour unions, and on independent Sustainable Impact Assessments (SIA) to assess the effects of an FTA. Once the Council has adopted the negotiating mandate, DG Trade has the authority to start trade negotiations (ILO 2019; Interview with the Greens/EFA MEP 2020). DG Trade includes a TSD Unit which consults with DG Employment

for the labour aspect of the TSD chapter and with DG Environment and DG Climate Action for the environmental elements (Interview with ETUC 2020).

The Commission uses a template during the negotiation process. However, “since an agreement is a bilateral outcome, it can differ” (Interview with EU Commission DG Trade official 2020), no-one is forced to sign it; therefore, the negotiation procedure can take lengthy (Interview with EU Commission DG Trade official 2020). Its success depends on well-informed negotiators and the parties’ red lines. Based on an offensive and defensive list of interests, both parties will require give-and-take (Interview with member EU-Korea DAG 2020). “Not everyone can be satisfied, but as far as the interests allow this, a win–win principle is always at the fundamentals of negotiation strategies” (Interview with EPP MEP 2020). After each negotiation round, the European Parliament’s INTA and the Council’s TPC are briefed (European Commission, n.d).

Industry tries to influence the negotiation procedure at various stages. Prior to the negotiations, stakeholder consultations are essential. During the negotiations, industry can either contact politicians who in turn brief their representatives in the TPC or INTA’s members consult with “stakeholders from the civil society side, as well as the industry and business actors [which] can substantially influence the negotiations” (Interview with EPP MEP 2020).

When the final text of the FTA is ready, the Commission has to formally ask the Council to sign, apply and conclude the agreement. Some FTAs, like CETA, are considered mixed agreements, consisting of both EU and national competences. In this case, the EU and its Member States can decide to provisionally apply the FTA. Only the features relating to EU competences will be provisionally applied, whereas all Member States’ signatures are required for the full application of the agreement. If the Council approves the content, the agreement will be sent to the INTA Committee (Interview with EPP MEP 2020; Van der Loo and Wessel 2017). Within INTA, one of its members will draft a report to advise the other members. After approval by INTA’s members, the report will be put on the agenda of the Parliament’s plenary session where the MEPs have to give their consent to the FTA. Once the MEPs and Member States have given their approval, the FTA takes full effect (European Commission, n.d).

Comparative analysis

This section compares the TSD chapters from the EU-Korea FTA, CETA and JEFTA. Three elements will be analysed: the labour and environmental provisions, the institutional mechanisms and the enforcement procedure.

Before the EU-Korea FTA of 2011, the EU’s regulation on trade and labour/environment in FTAs was limited to general exceptions clauses based on Article 36 TFEU: “The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants [...]”. The EU-Korea FTA focused primarily on tariffs

rather than on labour and environmental rights. With both the Sustainable Development Strategy and the Global Europe Strategy adopted in 2006, the EU shifted its trade policy and introduced the TSD chapter in its FTAs (Interview with member EU-Canada DAG 2020b; Durán 2013; Harrison 2013). “Trade has moved from being free, to being free and fair and subsequently to being free, fair and sustainable” (Interview with EPP MEP 2020). The chapter “is part of an FTA but outside its traditional field”, the DG Trade official (2020) added. Over years, it has become stronger as it has gained more importance. However, this also depends on the partner’s willingness, the DG Trade official (2021) stated.

Compared with the EU-Korea TSD chapter, chapters of recently concluded FTAs have been broadened by themes such as labour inspection, occupational health and safety, and working conditions (EU Commission services 2018). “Having health and safety issues in the TSD chapter [is something] which we definitely have to welcome” (Interview member EU-Japan DAG 2020). However, whereas CETA includes *maintaining a system of labour inspection in accordance with its international commitments aimed at securing the enforcement of legal provisions relating to working conditions and the protection of workers which are enforceable by labour inspectors* (Article 23.5.1), JEFTA merely refers to ‘inspections’ in another chapter (Article 18.13).

The EU-Korea DAG member (2021) emphasised that the TSD chapter is not taken seriously. The chapter is short and its focus is on trade. Under the pressure of NGOs, the TSD chapter provides environmental commitments. However, the EU-Korea DAG member (2021) “would have expected from the EU to take a much broader role in climate policies”. This might change with the European Commission’s current focus on green issues.

Labour and environmental commitments

The first clauses which can be compared are the labour and environmental commitments. Since 2008, EU’s FTAs include the ILO Core Labour Standards (Van den Putte and Orbie 2015). The eight fundamental ILO Conventions have been merged under four areas:

1. **Freedom of association:** Forced Labour Convention (No. 29) and Freedom of Association and Protection of the Right to Organise Convention (No. 87);
2. **Forced Labour:** Right to Organise and Collective Bargaining Convention (No. 98) and Equal Remuneration Convention (No. 100);
3. **Discrimination:** Abolition of Forced Labour Convention (No. 105) and Discrimination (Employment and Occupation) Convention (No. 111);
4. **Child Labour:** Minimum Age Convention (No. 138) and Worst Forms of Child Labour Convention (No. 182) (ILO n.d.-a).

The ILO Conventions are the EU’s minimum standards, the DG Trade official (2021) explained. The TSD chapters include four ILO Conventions: Nos. 98, 105, 111 and 182. In the three FTAs compared, all parties commit to respect, promote

and realise the fundamental rights in their laws and practices. The EU-Korea FTA states: *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* (Article 13.4.3). JEFTA, moreover, highlights: *Each Party shall make continued and sustained efforts on its own initiative to pursue ratification of the fundamental ILO Conventions and other ILO Conventions which each Party considers appropriate to ratify* (Article 16.3.3). The language, thus, has become stronger. Whereas the EU-Korea FTA contains soft-law language where the parties *will make* efforts towards ratifying the Conventions, under JEFTA each party *shall make* these efforts. However, the latter agreement mentions explicitly continuing ILO efforts *on its own initiative [...] which each Party considers appropriate to ratify* (Article 16.3.3), weakening the article's strength. Thus, the FTA does not compel the parties to ratify the Conventions, but merely stresses their commitment. This is clear in the case of Korea and Japan.

South Korea has not yet ratified ILO Conventions Nos. 98 and 105. Japan has not ratified No. 105 either and also needs to ratify No. 111 (Chowdhry et al. 2018). Canada, in contrast, ratified all Conventions (ILO n.d.-b). Therefore, CETA's article 23.2 outlines: *each Party shall seek to ensure those laws and policies provide for and encourage high levels of labour protection and shall strive to continue to improve such laws and policies with the goal of providing high levels of labour protection*. Concerning the eight fundamental conventions, only Korea has not yet ratified Nos. 29 and 87 either, bringing its total score to four unratified Conventions.

Successful ratification and implementation depends on a country's attitude towards labour rights, the organisation of its labour market and its traditional protection (Interview with member EU-Canada DAG 2020a). Whereas the EU-Korea DAG member (2021) underlined the TSD chapter's effectiveness in implementing labour commitments, Hartwell and Movchan (2018) argue that "the [EU-Korea] FTA can be said to not have had its desired effect of encouraging greater labour rights, as South Korean authorities have behaved the same pre- and post-FTA" (31). Despite various calls, the country did not change its stance (Interview with member EU-Korea DAG 2020). This contravenes the FTA, since *each Party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental and labour protection, consistent with the internationally recognised standards or agreements* (Articles 13.3, EU-Korea FTA). South Korea ratified its last Convention in 2014, but no fundamental Convention has been ratified since the EU-Korea FTA has entered into force. In October 2019, its National Assembly proposed to ratify three fundamental ILO Conventions and to reform its labour law. "However, the National Assembly has not taken any formal steps to discuss or vote on these bills, yet" (Interview with EPP MEP 2020). Whereas the KF-VUB Korea Chair (2021) highlighted Korea's political willingness to implement/sign the Conventions, other interviewees claimed that Korea wants to retain the criminal punishment system derived from its National Security Law, violating Convention Nos. 87 and 105. Its 'obstruction of business' law under the Criminal Code, moreover, can be used to fine and imprison trade unions, violating the freedom of association, and bankrupting and frightening South Korean trade unions (ITUC 2020; Interview with member EU-Korea DAG 2020). In addition, its Trade Union and Labour Relations

Adjustment Act does not recognise the definition of “worker”, self-employed, dismissed and unemployed people. These persons are prohibited from joining a trade union. If they do, the trade union itself will face decertification. This Act is in non-compliance with Conventions Nos. 87 and 98, breaching, again, the EU-Korea FTA (ITUC 2020; Interview with member EU-Korea DAG 2020).

The Korean government was optimistic about the FTA, but “did not intend, by agreeing to [the TSD chapter], to subject their labour laws and policies...to obligations that bear no connection to trade (or investment)” (EU-Korea Panel of Experts 2021, 16). Korean labour representatives outline that the current government is not convinced about prioritising the Conventions (Harrison et al 2019). The EU-Korea DAG member (2021) and the KF-VUB Korea Chair (2021), however, underlined the government’s preparedness to act and are confident about the Conventions’ implementation. This bodes well.

Aside from the labour commitments, the TSD chapter covers MEAs to fight global environmental challenges (EU Commission services 2018). In the EU-Korea FTA, *the Parties reaffirm their commitment to reaching the ultimate objective of the United Nations Framework Convention on Climate Change and its Kyoto Protocol [...] (Article 13.5)*. While the EU-Korea FTA refers to the Kyoto Protocol, CETA mentions *the multilateral environmental agreements to which it is party (Article 24.4.2)*. JEFTA states on the contrary: *The Parties reaffirm their commitments to effectively implement the UNFCCC and the Paris Agreement [...] (Article 16.4.4)*. Although Canada and South Korea also signed the Paris Agreement, only JEFTA mentions it. Canada withdrew from the Kyoto Protocol in 2011 and the 2015 Paris Agreement entered into force after CETA was signed. Nevertheless, the CETA Joint Committee, composed of Canada’s Minister for International Trade and a European Commission’s trade representative, have recommended the Paris Agreement’s inclusion in CETA (European Commission 2018a). Remarkably, a consolidated CETA is unavailable.

“Since the entry into force of the Paris Agreement there has been a different, enhanced substance in the TSD chapters [...]” (Interview with EPP MEP 2020). Recent FTAs like CETA and JEFTA include more detailed environmental provisions and, therefore, “reaffirm a shared commitment to the effective implementation of the Paris Agreement [and] commit the parties to close cooperation in the fight against climate change [...]” (EU Commission services 2018, 10). Both FTAs include paragraphs on *Sustainable management of forests and trade in timber and timber products* and *Trade and sustainable use of fisheries resources and sustainable aquaculture* (Articles 16.7/16.8, JEFTA). JEFTA also includes an article on *Biological diversity*, referring to the Convention on Biological Diversity and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Article 16.6). The latter Convention is also cited in CETA. In the article on *Trade in fisheries and aquaculture products* (Article 24.11), CETA indicates sanctions to adopt or maintain effective surveillance measures; this is omitted in JEFTA.

There is little evidence that the EU-Korea FTA affects the Korean environmental progress. The EU-Korea DAG member (2021) thought that COVID-19 prompted Korea’s environmental policies, not the TSD chapter. The agreement merely commits parties to perform through the MEA; therefore, environmental improvements

are secondary. Although not further explained, Hartwell and Movchan (2018) emphasise that the environmental clauses did not improve nor affect the environment due to increased trade. Whereas the business sector confirms this, civil society organisations highlight the negative impacts regarding water, energy use and air pollution (European Commission 2017). Concerning CETA, the Commission states that both parties reaffirmed the environmental commitments and will not lower them, whereas CETA-opponents express the negative effects of the dispute settlement mechanism on environmental standards (Hartwell and Movchan 2018). This debate is similar for JEFTA. Although article 16.4.2 underlines the *commitment to effectively implement in its laws, regulations and practices the multilateral environmental agreements to which it is party*, Japan does not deliver on the Paris Agreement's commitments. "It does not materialise yet on what they are doing" the EU-Japan DAG member (2020) stated. The interviewee of the EU-Japan DAG (2020) feared Japan "will become a repetition of Korea [because the EU has] not insisted before the conclusion of the agreement that Japan delivers on that ratification". The EPP MEP (2020) stated, on the contrary, that during the negotiations, "there was much pressure to ratify additional ILO core conventions, and a related timetable here by the Japanese government played an important role in the conclusions of the negotiations". Japanese trade unions have raised the issue, but the country has still not delivered on its commitments. Whereas the EU-Japan DAG member (2020) aimed for "a common pre-conditionality before the final signing and conclusion of the agreement", the DG Trade official (2021) was clear that not signing the Paris Agreement implies no FTA with the EU.

But why did Korea and Japan not sign Convention No. 105, for instance? Both do not use forced labour nor the intention to introduce it. Changing their domestic legislation is, therefore, unnecessary. The EU should define its intention and the remedy it seeks. The TSD chapter is not an incentive for compliance, the ECIPE interviewee (2021) continued: The EU's normative powers are limited, hence direct engagement and political dialogue are more effective (Interview with ECIPE 2021). This statement contradicts most interviewees who support the chapter and compliance with its commitments.

Institutional mechanisms

As the second comparative element, the institutional mechanisms oversee the implementation of the TSD chapter, i.e. the Committee on Trade and Sustainable Development (TSD Committee), DAG and Civil Society Forum. The TSD Committee is the FTA's governmental body. While the EU-Korea FTA requires *senior officials from within the administrations of the Parties* (Article 13.12.2), CETA refers to *high level representatives responsible for matters covered by this Chapter* (Article 22.4.1). JEFTA, on the contrary, does not even specify its members. Nevertheless, DG Trade represents the EU. The TSD Committee reviews and monitors the chapter's implementation and operation and prepares the meeting between the EU Trade Commissioner and the partner's Trade Representative. After a TSD Committee meeting, the DAGs will be debriefed (Interview with member EU-Canada DAG

2020a; Interview with ETUC 2020). Whereas the EU-Korea FTA provides a limited article on this mechanism, CETA and JEFTA-texts are more extensive. Concerning public involvement, however, JEFTA merely mentions *interacting with civil society on the implementation of this Chapter* (Article 16.13.2). CETA, meanwhile, is more specific: *Each regular meeting or dedicated session of the [...] [TSD Committee] includes a session with the public to discuss matters relating to the implementation of the relevant Chapters* (Article 22.4.4).

Aside from the TSD Committee, *each Party shall establish a Domestic Advisory Group(s) on sustainable development (environment and labour) with the task of advising on the implementation of this Chapter* (Article 13.12.4, EU-Korea FTA). The EU-DAG consists of civil society groups related to labour and environment: the employers/industry group, trade unions representing the workers group and the interest group. This format is common in the EU but unknown in partner countries, which use different formats like separate labour and environmental groups. The EU-DAG, on the contrary, combines these two groups because social partners and environmental issues are intertwined. The EU-DAGs are managed by the European Economic and Social Committee and meet two/three times a year. Once a year, a DAG-to-DAG joint meeting between the DAGs of the EU and its trade partners takes place to discuss the implementation of the TSD chapter and draft a joint declaration with recommendations to the TSD Committee (Interview with member EU-Canada DAG 2020a; Interview with ETUC 2020). Additionally, a Civil Society Forum between the DAGs and civil society organisations will be organised to *conduct a dialogue encompassing sustainable development aspects of trade relations between the Parties* (Article 13.13.1, EU-Korea FTA).

Nonetheless, one DAG-to-DAG joint meeting per year is inadequate, the EU-Korea DAG member (2021) stated. The DAGs are unaware of domestic developments such as labour rights. Korean DAGs argue there is a one-way relationship; Europeans are uninterested in South Korean issues (Smith et al 2020). Moreover, mistrust exists between business representatives (employers) and trade unions (employees), which have different mindsets (Interview with member EU-Korea DAG 2021). This might explain the difficulties in forming the DAGs.

The parties may use *new or existing domestic advisory group or groups on economic, social and environmental issues related to this Chapter* (Article 16.5.1, JEFTA). Although CETA also mentions this, the EU-Korea FTA's article is limited. Perhaps this caused confusion about the Korea-DAG's membership (Interview with member EU-Canada DAG 2020a). South Korea was unfamiliar with civil society inclusion on a governmental level. Initially, the country refused this proposal. The EU therefore reduced the number of civil society representatives involved (Smith et al 2020). This shift affected the nature of civil society representation. Nearly half of these representatives are academics. "The issue with academics is that they speak for themselves", while the DAG should provide political representation of various interests, the EU-Korea DAG member (2020) claimed. Composing the Canadian DAG was also difficult, consisting of a labour DAG made up of trade unions, employers and academics, and an environmental DAG comprised of environmental organisations and academics (Interview with member EU-Canada DAG 2020a). Similar to the Canadian case, the Japan-DAG is divided into a labour and

an environmental group. Since the Japan-DAGs use the Labour and Environmental Councils (comprising over 100 members), its members are unknown to the EU-DAG members, complicating cooperation (Interview with member EU-Japan DAG 2020).

In spite of this, the DAGs importance and strength have increased. For instance, the Canadian government shared their behind closed doors proposal for CETA on a confidential basis among both DAGs (Interview with member EU-Canada DAG 2020a). Moreover, the EU-DAGs urged the Commission to broaden their monitoring scope since the whole of the FTA touches sustainable development. This will be introduced from the EU-Mexican FTA onwards (Interview with member EU-Canada DAG 2020a; Interview with EU Commission DG Trade official 2020). Monitoring the chapter is a difficult process (Interview with member EU-Canada DAG 2020a). Therefore, the Greens/EFA MEP (2020) suggested financial and administrative support for the DAGs. Strengthening institutional mechanisms is also in line with a Commission Staff Working Document (European Commission 2019d).

The changes in the institutional mechanisms are thus limited. Besides widening its scope, the DAG experienced no major improvements between the three FTAs. The EU-Japan DAG member (2020) thought the institutional mechanisms should intensify cooperation to achieve the best result. However, South Korean interviewees argue that the best outcome cannot be achieved through the institutional mechanisms, especially when it concerns non-compliance with the Conventions. Various European Trade unions and NGOs agree, claiming the ineffectiveness of intergovernmental dialogues (Harrison et al 2019).

Enforcement procedure

The third comparative element is the highly criticised enforcement procedure of the TSD chapter. *The provisions of this Chapter shall not be subject to [the general] dispute settlement* (Article 16.17, JEFTA). Instead, government consultations and a panel of experts are to be set up. “This is a political choice”, the Greens/EFA MEP (2020) stated. The EU official (2020) clarified, “it is the nature of this chapter to deal with it this way”. “This has to do with legal provisions and different jurisdictional contexts in different target states”, the EPP MEP (2020) added.

This section will focus on the ongoing dispute settlement over Korea’s workers’ rights. To date, Canada and Japan have not had any disputes with the EU. This is the first time the EU has taken steps in its enforcement procedure. The panel’s hearing was in November 2020, after which it published the report in January 2021.

In the first stage of the enforcement procedure, the concerned party seeks government consultations by *delivering a written request to the contact point of the other Party* (Article 13.14.1, EU-Korea FTA). Therefore, on 17 December 2018, the Commission contacted the South Korean government: “Korea commits to respect, promote and realise, in its laws and practices, the principles concerning the fundamental rights, namely the freedom of association and the effective recognition of the right to collective bargaining, 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” (European Commission 2018b). However, Korea’s measures are inconsistent with these obligations. Hence, government consultations started on 21 January 2019 but “did not lead to the matters being satisfactorily addressed” (European Commission 2019c). Therefore, *the 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 [...] (Article 13.15.1)*. Whereas CETA also refers to 90 days, JEFTA allows this *no later than 75 days (Article 16.18)*.

The interviewees are content with the Commission’s decision. For 8 years, the EU-Korea DAG tried to convince the EU to start the enforcement procedure. South Korea “is actually not making any progress”; either in the ratification of the four ILO Conventions or in the implementation of the eight fundamental ones (Interview with member EU-Korea DAG 2020). However, it is a sensitive topic, the DG Trade official (2021) explained. While Korean employers disregard the ILO rules and were dissatisfied with the procedure, trade unions welcomed it (Interview with member EU-Korea DAG 2020).

Yet, there was one concern. During the negotiation process, both parties vowed to *agree on a list of at least 15 persons with expertise on the issues covered by this Chapter (Article 13.15.3, EU-Korea FTA)*. When a panel is formed, a neutral chair as well as a European and Korean expert need to be chosen as panellists (Interview with the Greens/EFA MEP 2020). Nevertheless, various interviewees criticised the panel system. The panel of expert’s report shows that both panellists are Professors of Law (2021). While it is compulsory in the US, the EU disregarded the DAG’s request to select a labour panellist (Interview with member EU-Korea DAG 2020; ILO 2019). This is also ill defined in the FTAs, as only CETA mentions individuals that have *specialised knowledge or expertise in labour law [...] (Article 23.10.7)*. The DG Trade official (2020) could not explain the panellists’ selection process since the interviewee was unfamiliar with this procedure. Nevertheless, the interviewee thought, but was uncertain, that “when there is a case and the list does not provide a suitable person, other experts will be identified.”

One hundred eighty days after the panel’s establishment, both CETA and JEFTA require to *make the final report publicly available (Article 23.10.11, CETA; 16.18.5, JEFTA)*. In Article 13.15.2 of the EU-Korea FTA, however, an interim report is not mentioned, nor making the outcome publicly available. Under this article, the report of the EU-Korea panel should have been published in March 2020. Due to COVID-19 its hearing, however, was postponed to November 2020, the report to be published in January 2021. Whereas the EU-Japan DAG member (2020) was concerned about the subsequent outcome, the DG Trade official (2020) was confident: the report will propose a way forward, he felt. The report’s effectiveness, and Korea’s behaviour, will be monitored by the TSD Committee (Article 13.15.2, EU-Korea FTA) in an unknown timeframe.

Most interviewees were dissatisfied with the current enforcement procedure as “the package is not complete” (Interview with member EU-Japan DAG 2020). In January 2020, the EP adopted a resolution on the European Green Deal, ensuring “that all international trade and investment agreements include strong, binding and enforceable sustainable development chapters [...] that fully respect international commitments [...]” (European Parliament 2020, 23). Since this precludes already

concluded FTAs, the Greens/EFA MEP favours a review of all existing FTAs to include TSD chapters (2020). However, one interviewee compared the reopening of an FTA with opening a Pandora's box. When it concerns a mixed agreement, all Member States would have to ratify the agreement again (Interview with ETUC 2020). The DG Trade official (2020) was uncertain as to whether the Commission would want to revise an agreement.

To strengthen the chapter, six interviewees proposed sanctions. During the CETA negotiations, Canada pushed for the inclusion of sanctions, something which is at odds with the EU's interests. Canada did agree with the current mechanism because something is better than nothing (Interview with ETUC 2020), but its position to include sanctions still stands. During the TSD Committee of November 2019, Canada proposed a voluntary but binding arbitration mechanism. If the current procedure does not lead to any progress, both parties will have to agree on binding arbitration. To avoid reopening of the chapter, the enforcement mechanism can be included as a side protocol (Interview with member EU-Canada DAG 2020a).

Nevertheless, the Commission maintains a contrary position. The EU-Canada DAG member (2020) said in frustration: "Of course we have not seen any problems arising yet, but it does not mean that they will never arise. So, it is kind of a like the chicken or egg debate, who was coming first? [...] Do we need violations first and then we [...] try to see how we can solve them" or is it more convenient to have a mechanism in place when such violations occur? If CETA included sanctions, the FTA could have served as a blueprint for future agreements (Interview with ETUC 2020). It would also benefit Canada since the exclusion of sanctions weakens its own negotiation position with other countries (Interview with member EU-Japan DAG 2020).

Besides this proposal, the Greens/EFA MEP (2020) suggested extending the scope of the general dispute settlement mechanism. The Commission's diplomatic and soft powers are essential in influencing the trading partner, but action plans including timetables should ensure the provisions' implementation (Interview with the Greens/EFA MEP 2020). Another proposal is linked to the previous one and is based on the American model. If the issue cannot be solved by government consultations, a panel of (labour) experts would be convened. The panel would draft an action plan with timetables and ILO recommendations. In the event of non-compliance, sanctions would restore tariffs to the pre-FTA level (Interview with member EU-Korea DAG 2020). The third initiative entails an open complaint mechanism where the DAG could raise issues as well. The panel would provide a roadmap for the violating party. When there is political reluctance to comply, material consequences (i.e. sanctions or suspension of certain preferences) would be applied (Interview with member EU-Canada DAG 2020b).

Other interviewees, however, do not favour sanctions. Sanctions affect diplomacy negatively in negotiations. They "[...] are not proven to bring any added value to the implementation of TSD Chapters. TSD Chapters ought to be platforms for discussion and incentivising factors of progress, not coercive mechanisms that forcefully induce change in target actors", the EPP MEP (2020) argued. The ECIPE interviewee (2021) agreed: sanctions sometimes achieve the opposite effect. South Korea and Japan would probably not even sign an FTA, the KF-VUB Korea Chair (2021)

said. The EU-Korea DAG member (2021) added, it assumes non-compliance or violation of the FTA by the other party. Therefore, a panel of experts should suffice. Additionally, labour violations are difficult to measure in terms of applying sanctions (Interview with EU Commission DG Trade official 2020).

Due to the EU's high standards, sanctions would only apply to developing countries as the EU cannot force a third party to implement European values/mindset (Interview with ETUC 2020). Therefore, both the EU-Korea FTA and JEFTA aim [...] *to promote sustainable development, and [...] not to harmonise the environment or labour standards of the Parties* (Article 16.2, JEFTA), but [...] *environmental and labour standards should not be used for protectionist trade purposes [...]* (Article 13.2.2, EU-Korea FTA; 16.3.6, JEFTA). The high standards of the developed West can be interpreted as protectionist for partners like Korea and Japan (Puccio and Binder 2017). "How far can we impose obligations to others [...]?" the DG Trade official (2021) wondered. The ECIPE interviewee (2021) argued that the EU "cannot tell other countries to change their laws [...]". In that respect, Korea perceives the panel request as a form of harmonisation (EU-Korea Panel of Experts 2021). The country prefers negotiations over enforcement mechanisms (Interview with KF-VUB Korea Chair 2021). Thus, Koreans wonder "why is Europe implementing European standards on Korea?", the EU-Korea DAG member (2021) explained.

To demonstrate sanctions' inefficiency, the Commission refers to the US-Guatemala case. Although the US-Guatemala FTA includes sanctions, the mechanism did not enforce labour rights. In 2008, the US started a case regarding Guatemala's violations of labour rights and subsequently breaching their FTA (Hradilová and Svoboda 2018). Under the FTA, the violation should affect trade, but "it was not a matter relating to the trade agreement, it was an internal matter" (Interview with ETUC 2020). Guatemala did enforce its labour legislation ineffectively, but this did not affect trade (Smith et al 2020). Therefore, the case is seen as a US failure. However, in line with the US argument, the ETUC interviewee (2020) claimed that the "problem was in the way the provisions were written back at the time". During the EU-Korea panel of experts' hearing, Korea also referred to the US-Guatemala case to illustrate "[...] that the failure to comply or enforce labour laws does not necessarily and automatically result in trade diversions or distortions or affect trade flows" (EU-Korea Panel of Experts 2021, 17). Nevertheless, the context differs. Whereas the US-Guatemala case refers to the failure of enforcing labour laws, the EU Panel Request does not mention this at all. Instead, the EU-Korea panel of experts insists that Korea adjusts its labour laws and ratifies the ILO Conventions (European Commission 2021). It remains to be seen whether this decision is sufficient or a stronger chapter is needed.

Rather than strengthening the TSD chapter, former Trade Commissioner Malmström focused more on an attitude of "I want to deliver as many agreements as possible", asserted the EU-Japan DAG member (2020). Today, however, "the EU is putting more emphasis on the sustainability of trade practices", the EPP MEP (2020) highlighted. Since July 2020, Dennis Redonnet has been appointed the EU's Chief Trade Enforcement Officer, monitoring and improving FTAs' compliance. In contrast to the DG Trade official (2020), the DG Trade official (2021) revealed that

the Commission is developing an assertive TSD chapter. Whether the chapter will strengthen its current dispute settlement procedure or become part of the general one remains to be seen. A further course of action might be to accelerate or delay the liberalisation of products based on the implementation of obligations. Although discussions are still ongoing, sanctions are not excluded. This is an interesting development that will affect future FTAs.

Conclusion

Until the Commission reveals its new enforcement plans, it can be said that Europe has not become more ambitious in enforcing its TSD chapter. Although the chapter includes stronger language and up-to-date labour and environmental commitments, it also provides opportunities to avoid obligations. This weakens the chapter's strength. The chapter merely includes the existing commitments of the parties but lacks the provision of an additional tool to have these implemented. The FTAs have widened their environmental scope; however, this does not make them more "climate proof", as the Greens/EFA MEP (2020) claimed. The TSD chapter and environmental provisions are not a good combination. "If it does not work one time on labour, it does not work ten times on environment" (Interview with member EU-Korea DAG 2020). Unlike the ILO, there is no international instrument that outlines which environmental measures a state should take in a certain situation. "The same approach will be explored in the case of MEAs" (EU Commission services 2018, 5). But so far, nothing has changed.

The enforcement procedure did not change over the years. Even though the panel of experts' report requests South Korea to implement the ILO Conventions, its effectiveness will only be visible once the recommendations are followed up. It remains unclear why the Commission waited 9 years. This is exactly the reason why most interviewees expressed frustration: the TSD chapter is unimportant for the Commission; the chapter is merely included to have a good appearance worldwide, but in reality, the Commission does not care about workers; and "the EU's behaviour when it comes to the Trade and Sustainable Development chapter is [...] hypocritical" (Interview with member EU-Korea DAG 2020). The interviewees therefore advocate an enforcement mechanism. Although the DG Trade official (2020) criticised enforcement mechanisms and expressed the impracticability of projecting European standards on partner countries, the DG Trade official (2021) revealed the Commission's willingness to find a new approach. Covering the TSD chapter under the general dispute settlement, providing sanctions or accelerating trade liberalisation are under discussion. Furthermore, the Commission has promised to expand the DAG's scope; however, the lack of human and financial resources will complicate monitoring.

To conclude, the panel's effectiveness and the European Commission's more assertive approach are still work in process and, therefore, not yet measurable. Further research is recommended on how to quantify non-compliance in the context of the TSD chapter, especially since enforcement mechanisms remain controversial.

Additionally, are trade partners still willing to conclude FTAs once such a mechanism is included? Nevertheless, the thinking on TSD chapters should shift, stated the Greens/EFA MEP (2020): we need to *recognise the need to harness trade for sustainability, not the other way round*.

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Declarations

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Research involving Human Participants and/or Animals Interviews.

Informed consent I have all the forms. Since the interviewees want to stay anonymous, I will only send them when required.

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