

Compliance with Labour Obligations Under EU-Korea FTA's Trade and Sustainable Development Chapter



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On 4 July 2019, the European Commission (the **EU Commission**) triggered the second stage of the dispute settlement procedure against the Republic of South Korea in a case on compliance with labour obligations under Chapter 13 of the EU-Korea FTA. While the first stage, already discussed in a [previous post](#), pertained to consultations between both parties, the second stage provides for the settlement of the dispute by a Panel of Experts.

Recap of the case's main elements

On 17 December 2018, the EU Commission sent to the Korean authorities a [letter requesting consultations](#) on the implementation of some of the labour obligations included in the EU-Korea FTA. These consultations took place in Seoul on

21 January 2019.

Considering the impossibility of reaching a mutually satisfactory resolution of the matter, and well beyond the minimum consultation period of 90 days set under Article 13.15 paragraph 1 of the EU-Korea FTA, the EU Commission requested [in a letter](#) of 4 July 2019 that a Panel of Experts be convened to examine the issue.

Article 13.15 of the EU-Korea FTA provides that a Panel of Experts shall be convened within two months of a Party's request (*i.e.*, at the latest on 4 September 2019). 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 (*i.e.*, at the latest on 3 August 2019). 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.

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 Panel shall provide its expertise in implementing Chapter 13, and the Parties shall make their best efforts to accommodate advice or recommendations of the Panel of Experts on the implementation of the Chapter.

In the terms of reference contained in its letter of 4 July 2019, the EU Commission raised two complaints, namely :

- Four measures of Korean labour law were allegedly inconsistent with Korea's obligations under Article 13.4 para. 3 of the EU-Korea FTA. Under this provision, 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”.

More specifically, the letter of 4 July 2019 provides that “[the] EU considers that the restrictive definition and interpretation of the notion of ‘worker’ operated by the [contested] measures [...], [that] the requirement that trade union officials be elected from among trade union members [...], [and that the discretion accorded by the measures to the administrative authorities when certifying trade unions] are inconsistent with the above mentioned principles of freedom of association and, therefore, with Article 13.4 paragraph 3 of the EU-Korea FTA”.

– That Korea violated the last sentence of Article 13.4 para. 3 of the EU-Korea FTA, which stipulates that the Parties shall make continued and sustained efforts towards ratifying the fundamental Conventions of the International Labour Organisation (the ***ILO Conventions***).

However, according to the EU Commission’s letter of 4 July 2019, “[the] EU considers that Korea’s efforts towards ratifying the following fundamental ILO Conventions are inadequate:

– *C87 Freedom of Association and Protection of the Right to Organise Convention, 1948;*

– *C98 Right to Organise and Collective Bargaining Convention, 1949;*

– *C29 Forced Labour Convention, 1930; and*

– *C105 Abolition of Forced Labour Convention, 1957”.*

The EU Commission seems to base its assessment on the following two grounds:

- *“eight years after the entry into force of the EU-Korea FTA, Korea has still not ratified the aforementioned four fundamental ILO Conventions“*; and
- *“Korea has not been making efforts towards ratification of the above fundamental Conventions that could be qualified as sustained and continuous over this period“*.

A few observations on the legal questions raised by this case

Several interesting legal issues are likely to be treated by the Panel of Experts.

(1) With respect to the first complaint, the EU argues that four measures under Korean labour law are *“inconsistent with the principle of freedom of association and, therefore, with Article 13.4 paragraph 3 of the EU-Korea FTA“*. As already mentioned, this provision sets obligations for each contracting Party *“to respect, promote and realise, in its laws and practices, the principles concerning the fundamental rights, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; [...]”*. In order to assess whether or not the four measures contravene this provision, the Panel of Experts will need to define the exact scope of the obligations in question. In this regard, Article 13.4 paragraph 3 of the EU-Korea FTA further stipulates that these obligations are derived *“from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up [...]”*.

Considering these elements, the Panel of Experts could deem, as the Court of Justice of the European Union did in its [Opinion 2/15](#) of 16 May 2017 (also discussed [here](#)), that *“the scope of the obligations stemming from the international agreements to which the envisaged agreement refers is a matter covered by the interpretation, mediation and dispute*

settlement mechanisms that are in force for those international agreements" (at para. 154). Accordingly, the Panel of Experts could consider it inappropriate to undertake any interpretation of the scope of the ILO obligations, and prefer to refer to the interpretation already made by the ILO itself, especially in the case law of its Committee on Freedom of Association.

(2) The second complaint (*i.e.*, the allegation that Korea's efforts towards ratifying four fundamental ILO Conventions were inadequate) seems to rely on two grounds. First, the EU Commission claims that Korea's lack of ratification of the Conventions amounts to a violation of the underlying EU-Korea FTA obligation. Second, the EU Commission argues that Korea's efforts over this period cannot be considered to be "*sustained and continuous*".

Regarding the first basis for the complaint, the EU Commission arguably views Korea's non-ratification ("*eight years after the entry into force of the EU-Korea FTA*") of the aforementioned four fundamental ILO Conventions as constituting a breach of its obligation under the last sentence of Article 13.4 para. 3 of the EU-Korea FTA. Along this line of thought, the EU Commission interprets the obligation as binding the contracting Parties to achieve a specific result, namely the ratification of the ILO Conventions. Yet the Panel of Experts may consider that the terms to "*make sustained and continued efforts towards ratifying the fundamental ILO Conventions*" rather bind the contracting Parties to a certain conduct. Consequently, the fact that Korea has not ratified the Conventions in question "*eight years after the entry into force of the EU-Korea FTA*" may be considered less relevant for the assessment of Korea's compliance with this specific obligation.

The second basis referred to by the EU is perhaps more convincing. In this regard, it will be the task of the Panel of Experts to clarify what the double qualification "*continued*

and sustained” adds to the parties’ obligation “*to make efforts towards ratifying the fundamental ILO Conventions*”. The Vice-President of the EU Commission, Federica Mogherini, already hinted at what the EU’s interpretation may be in this regard. [Commenting](#) on the same obligation under the EU-Vietnam FTA, she argued that “[the] *interpretation of ‘continued and sustained efforts’ should take into account the context of the [domestic] governance system and its internal procedures. In general, the Commission would aim to see evidence that steps are being taken towards ratification of a non-ratified fundamental ILO convention and that such steps are part of a process rather than sporadic in nature*”. As a consequence, the EU Commission will need to demonstrate hypothetically to the Panel of Experts that Korea failed to take the necessary steps towards the ratification of the relevant ILO Conventions and/or that these steps did not form a process, but rather were sporadic in nature.

(3) A third interesting legal question that the Panel of Experts may have to address is the question on the relationship between the two grievances raised by the EU Commission. Let us recall that in its first complaint the EU Commission contended that Korea had failed “*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*”. As already mentioned, these obligations originate “*from membership of the [ILO] and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*”. In this regard, the ILO’s definition of the right of freedom of association invariably refers to the *C87-Freedom of Association and Protection of the Right to Organise Convention* of 1948. Yet this Convention is also at the core of the second complaint made by the EU against Korea.

Therefore, if the Panel of Experts considers Korea’s commitments towards ratifying the ILO Fundamental Conventions

to amount to an obligation of conduct, rather than result, and that Seoul *does not have* to ratify the *C87-Freedom of Association and Protection of the Right to Organise Convention*, it will be interesting to see how the Panel treats the obligations included in Article 13.4 paragraph 3 of the EU-Korea FTA, the content of which is largely derived from the very same C87-Convention.

(4) Finally, the rules of procedure applicable before the Panel of Experts have not been agreed upon between the contracting Parties (in spite of [repeated calls](#) in this sense and the submission of a text by the Commission to its Korean counterpart). The lack of agreed-upon rules of procedure raises important questions with respect to aspects such as the remuneration of panel members, the treatment of evidences, etc. Moreover, Korea's apparent reluctance in engaging in the discussion on rules of procedure could possibly be assessed in light of its duty to cooperate under article 13.11 of the EU-Korea FTA. It will also be interesting to see what the Panel of Experts' position is on this issue.

Conclusion

How the Panel of Experts addresses these different legal questions will certainly fuel the larger discussion on the protection of workers' rights in FTAs. Following the [U.S.-Guatemala](#) arbitral decision of 26 June 2017, the EU-Korea litigation is indeed the second case on compliance with labour commitments under an FTA. However, the EU Commission's approach contrasts with that of the U.S., in that it does not provide for sanctions in the case of violations of labour commitments. The lack of teeth in the EU model has been regularly criticized among observers. Sabine Weyand, Director-General for Trade at the Commission, [recently argued](#), however, that "*you cannot deliver protection of core labour standards against a society*". Instead, one must support debate and dialogue at home, mobilization of the civil society and domestic pressure for implementation. Thus, this [first case](#) on

compliance with labour obligations under the Trade and Sustainable Development Chapter of the EU-Korea FTA will be of utmost importance for the credibility and capacity of the European Union to protect labour rights.

Whether the ongoing dispute between the EU and the Republic of South Korea will be able to do just that is a question for the next few months. In matters of labour rights protection under FTAs, as in many other areas, the proof of the pudding is in the eating.

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