

EVFTA: GOING BEYOND LABOUR COMMITMENTS IN A NEW GENERATION FREE TRADE AGREEMENT

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Abstract

This article provides profound knowledge of labour commitments in the new-generation European Union (EU) free trade agreement (FTA). It sheds light on the historical and theoretical rationales that underlie trade-labour linkages in EU policy in general and the labour commitments under the new-generation EU FTA in particular. The article further elaborates on how labour commitments are proposed in EU FTAs by making a comparison among developing countries, including the EU-Vietnam FTA (EVFTA). And ultimately, the paper revisits and critically analyses the decision of the panel of experts with reasoning regarding the EU-South Korea (Korea) dispute under labour commitments within the EU-Korea FTA so as to clarify the nature of these commitments in EU FTAs and suggest policy implications for Vietnam and other developing countries on how to effectively implement them within EU FTAs in the long run.

Keywords: EVFTA, EU, Vietnam, free trade agreement, labour commitment.

1. Introduction

It is undeniable that the proliferation of FTAs has played a significant role in multilateral and bilateral collaboration under the fast-paced evolution of international economic integration nowadays¹. As one of the leading partners of countries and regions around the world, the EU would also be regarded as one of the most prosperously open markets for developing countries², and it has paid a lot of attention to social dimensions in its trade agreements besides the pursuance of the policy on "Trade for

all"³. To be more specific, the EU-Korea FTA in 2011 paved the way for a new-generation FTA that embraces not only commercial but non-commercial aspects, including labour and environmental commitments⁴. Given the same approach, among developing countries, the EVFTA in 2020 is noteworthy as the most comprehensive and promising FTA between

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¹ Shujiro Urata, "Globalization and the growth in free trade agreements", *Asia Pacific Review*, 2002, 9(1), pp. 27-28.

² European Commission, *EU position in world trade*, available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/eu-position-world-trade_en (last access: 08.10.2023).

³ European Commission, "Trade for All Towards a More Responsible Trade and Investment Policy". In: *Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions*, 2015, Brussels.

⁴ European Commission for Trade, *The EU-Korea Free Trade Agreement in practice*, 2011, European Union, Luxembourg, p. 3.

the EU and a developing nation⁵. However, experiences from international legal practice and labour dispute settlement cases reveal the limits of compliance with EU FTAs in terms of labour commitments among nations globally, even for developed ones like Korea⁶. So it is necessary to require an in-depth comprehension of labour commitments in EU FTAs not only for Vietnam and other developing countries but also for EU partners in trade negotiations in order not to put them in Korea's place.

The remaining parts of this article, except for the conclusion part, are organised into three sections: The next section revisits the relationship between trade and labour in EU policy and the foundation of labour commitments in new-generation EU FTAs. In Section 3, by making a comparison between the EVFTA and several typical FTAs, it illustrates how labour commitments are promulgated in EU FTAs among developing nations. Based on the labour dispute settlement under the EU-Korea FTA, Section 4 suggests policy implications for Vietnam in the EVFTA labour commitments enforcement. Eventually, the research would be an expected model lesson for other developing countries and upcoming EU trade partners as well.

2. The trade-labour linkage in EU policy and labour commitments in EU free trade agreements

From historical and theoretical perspectives, this section clarifies the backdrops that the EU has incorporated social dimensions/labour provisions into its schemes of preferences and FTAs and then provides the background of labour commitments in its trade agreements.

Tracing back to the 1990s, there was a passionate debate between 'free trade versus fair trade'⁷, accordingly, for those who supported the 'free trade' theory, they believed that the International Labour Organisation (ILO) and its labour standards were not necessary⁸. These would even be barriers against the economic market and labour or working conditions, and besides that, everybody, of course, including employees, would benefit from globalisation⁹. On the other hand, 'fair trade' advocates followed the idea of revealing the undoubted dark sides of globalisation¹⁰ and the ILO and international labour standards would play a significant role in preventing

⁵ Areg Navasartian, "EU-Vietnam Free trade agreement: Insights on the substantial and procedural guarantees for labour protection in Vietnam", *European Papers – A Journal on Law and Integration*, 2020, 5(1), p. 562.

⁶ European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation and Enforcement of EU Trade Agreements*, 2022, Brussels, pp. 17-18.

⁷ Gerda van Roozendaal, *Trade unions and global governance: The debate on a social clause*, 2002, Psychology Press, p. 67.

⁸ Drusilla K. Brown, Alan V. Deardorff and Robert M. Stern, *Trade and labour standards*, *Open Economies Review*, 1998, 9(2), pp. 171-194.

⁹ De Wet Erika, *Labor standards in the globalized economy: the inclusion of a social clause in the General Agreement on Tariff and Trade/World Trade Organization*, *Human Rights Quarterly*, 1995, 17, p. 3; Alston Philip, *Post-post-modernism and international labour standards: The quest for a new complexity*, Werner Sengenberger/Duncan Campbell (Eds.), *International Labour Standards and Economic Interdependence*, 1994, Geneva, pp. 95-104 and Vandaele Arne, *International labour rights and the social clause: friends or foes*, Cameron May, 2005, p. 73.

¹⁰ Jan Martin Witte, *Realizing Core Labour Standards: The Potential and Limits of Voluntary Codes and Social Clauses: A Review of the Literature*, GTZ, 2008, Eschborn, p. 16.

nations from 'a race to the bottom' and 'social dumping'¹¹.

In addition to this, under pressure from rising unemployment in Europe, besides the social dumping effects of international commerce and the impact of globalisation and human rights, the EU found a way to incorporate these matters into its trade policy¹². However, attempts by the EU, US, and other developed countries at that time to integrate labour standards into multilateral coordination of trade liberalisation (WTO negotiations) were unsuccessful, leading the EU and many states to turn to bilateral coordination to further their agendas¹³. And thereby, labour provisions have featured significantly in EU trade-policy-making through three milestones, as follows: (i) from the mid-1990s, they were most prominent in the EU's unilateral systems for developing countries, which include commitments in relation to labour standards under its Generalised Systems of Preferences Plus (GSP+)¹⁴; (ii) during the 2000s, quotations to labour standards within those FTAs 'widened and deepened', especially with the presence of the 2007 Lisbon Treaty as an important institutional factor¹⁵. From the EU's perspective, typical for this time were the first-generation agreements with Egypt, Israel, Jordan, Lebanon, Tunisia and Morocco, signed in

the early 2000s and collectively known as the Euro-Mediterranean Association Agreements, followed by the agreement with Mexico and Chile signed in 2000 and 2002, respectively; (iii) the second and newest generation of EU FTAs came into being after the signing of European Commission 'Global Europe: Competing in the World' communication in 2006. Under its new strategy towards international trade laid out in this communication, the EU embarked on aggressive negotiation of bilateral trade deals in response to the US's successful wave of FTAs in the 1990s and early 2000s. Multiple FTAs have been negotiated following this communication. The EU-Korea FTA, signed in 2010, was the first one signed under the new strategy and has been a model for the agreements that followed. Since this FTA, within the chapter titled 'Trade and Sustainable Development' (TSD), these provisions have been combined with rules governing environmental protection. And these chapters are now a crucial component of the EU's 'new-generation' FTAs¹⁶. According to this, the FTA between the EU and Columbia/Peru/Ecuador and the one between the EU and Central America, both signed in 2012, were significant FTAs in this period. It was not until 2020, with the signing of EVFTA, the EU, for the first time,

¹¹ According to Namgoong June, 'Two Sides of One Coin: The US-Guatemala Arbitration and the Dual Structure of Labour Provisions in the CPTPP', *International Journal of Comparative Labour Law and Industrial Relations*, 2019, 35(4), pp. 487-488. Social dumping: 'The practice whereby workers are given pay and/or working and living conditions which are substandard compared to those specified by law or collective agreements in the relevant labour market, or otherwise prevalent there'. See European Commission, *Social Dumping*, available at: socialdumping.europa.eu (last access: 09.10.2023).

¹² Jan Orbie, Hendrik Vos and Liesbeth Taverniers, *EU trade policy and a social clause: A question of competences?*, *Politique Européenne*, 2005, 17(3), pp. 159-187.

¹³ Smith Adrian et al, *Free Trade Agreements and Global Labour Governance: The European Union's Trade-Labour Linkage in a Value Chain World*, 2022, Routledge, p. 4.

¹⁴ European Commission, *European Union's GSP+ Scheme*, 2019, available at: factsheet.ontheEuropeanUnion.org/GSP+ (last access: 09.10.2023).

¹⁵ Lore Van den Putte and Jan Orbie, 'EU bilateral trade agreements and the surprising rise of labour provisions', *International Journal of Comparative Labour Law and Industrial Relations*, 2015, 31(3), pp. 263-269.

¹⁶ Roberto Bendini, *The future of the EU trade policy*, European Parliament, 2015, available at: [The future of the EU trade policy.europa.eu](http://futureoftheEUtradepolicy.europa.eu) (last access: 09.10.2023).

expected that it would be the most comprehensive and promising FTA between the EU and a developing nation¹⁷.

3. Labour commitments in EU free trade agreements: old wine in new bottles?

With the aim to clarify the characteristic traits of labour commitments in the EVFTA in particular and in EU FTAs among developing countries in general, this study focuses on these commitments regarding their scope, implementation and enforcement provisions relevant in a brief comparison study¹⁸. Broadly speaking, the research offers a comprehensive examination of labour commitments and seeks to identify any similarities or disparities among EU FTAs with developing countries. Where applicable, the study differentiates between labour commitments in first-generation FTAs and second-generation ones among the examined nations. To conclude, the EVFTA has not only similar labour commitments to others' but also a 'wider and deeper' approach in some aspects.

Six EU FTAs are picked up for this study¹⁹. According to the EU, they are all typical for FTAs that are currently in force and represent FTAs between the EU and developing nations²⁰, as illustrated in Table 1 below:

Table 1: EU FTAs selected for the comparative study

Free trade agreement	Signature date	Comings into effect**	Labour commitments and relevant regulations***
EU-Mexico Partnership Agreement (the Global Agreement)	27/11/2000	01/07/2001 (J48)	Not promulgated
EU-Chile Association Agreement****	18/11/2000	01/02/2002 (provisionally); 01/05/2005 (J48)	Article 44 on Social cooperation and Article 10, 11 on Civil Society Dialogue
EU-Eurasia FTA	04/16/2010	01/07/2011 (provisionally); 01/02/2013 (J48)	Chapter 13 TSD includes provisions on labour and Annex 13 deals with cooperation on TSD.
EU-Colombia/Ecuador Trade Agreement	28/06/2012	01/09/2013, 01/06/2013 & 01/01/2017 (provisionally with Peru, Colombia & Ecuador respectively)	Title 16 TSD includes labour provisions.
EU-Central America Association Agreement	29/06/2012	01/02/2013 (provisionally Honduras, Nicaragua, Panama); 01/10/2013 (provisionally Costa Rica, El Salvador); 01/12/2013 (provisionally Guatemala)	Part IV on Trade, Title VII on TSD include provision on labour, Part II on Cooperation, Title 8 on Social Development and Social Cohesion. Include provisions on employment and social protection, indigenous peoples and other ethnic groups, vulnerable groups, gender. Title VI on Economic and Trade Development includes Article 63 on Cooperation and Technical Assistance on TSD.
EVFTA	30/06/2019	01/08/2020 (J48)	Chapter 13 TSD includes provision on labour. Chapter 14 on Cooperation and capacity building includes provisions on cooperation in TSD.

Source: Author analysis

* Information cited from EUBC.eu.

** Information cited from EUBC.eu.

*** Information cited from EUBC.eu.

**** Although the EU and Chile have concluded the modernisation of the existing EU-Chile Association Agreement recently, within the context of the paper, this study focuses on the EU-Chile Association Agreement as the representative of the first-generation EU FTAs. See Delegation of the European Union to Chile, EU-Chile Advanced Framework Agreement, 2022, available at: <https://chile.adm.ec.europa.eu/external-relationships> (last access: 09/10/2023).

3.1. Scope of labour commitments in EU FTAs

The study examines the scope of labour commitments by categorising related provisions into the following areas:

Reference to the ILO and international labour standards

Except for the agreement with Mexico, all the EU FTAs examined refer to the ILO and its significant role in reinforcing social standards in the country partners. However, the EU-Chile Association Agreement just mildly indicates the ILO importance and its relevant conventions regarding freedom of association, collective bargaining rights, forced/child labour abolition, non-discrimination at work and men-and-women equal treatment²¹, all the remaining EU FTAs pertain to core labour standards admitted at an international level and promulgated in eight fundamental

¹⁷ Navasartian, *op. cit.*, p. 562.

¹⁸ For each category examined, the author chose specific factor(s) to be the major point of comparison.

¹⁹ These six FTAs include the EU-Mexico Partnership Agreement (the Global Agreement) and the EU-Chile Association Agreement, which represent the first-generation EU FTAs; the EU-Colombia/Peru/Ecuador Trade Agreement, the EU-Central America Association Agreement, and the EVFTA, which represent the second-generation EU FTAs between the EU and developing nations; and the EU-Korea FTA as the model for a new generation of FTAs and also as the one employed in the next Section under the context of the labour dispute settlement between the EU and this country.

²⁰ See European Commission, *Free trade agreements*, available at: Free trade agreements | Access2Markets (europa.eu) (last access: 08/10/2023).

²¹ For example, article 44.1 of the EU-Chile Association Agreement.

Conventions of the ILO²²; specifically, they all link to the 'ILO Declaration on Fundamental Principles and Rights at Work' in 1998²³, encompassing freedom of association, rights to organise/collectively bargain, forced/child labour elimination, and non-discrimination at the workplace. Besides aforementioned fundamental rights (ILO core labour standards), the EVFTA, same as other new-generation EU FTAs, tend to broaden the scope of referred international labour standards, for instance, health/safety at occupation and migrant workers rights²⁴. For more details, see Table 2 below:

Table 2: International labour standards references

Free trade agreement	Freedom of association	Right to organise & collectively bargain	Forced labour abolition	Child labour abolition	Non-discrimination	Occupational health & safety	Migrant workers rights
EU-Mexico Partnership Agreement (The Global Agreement)							
EU-Chile Association Agreement	✓	✓	✓	✓	✓		
EU-Korea FTA	✓	✓	✓	✓	✓		
EU-Col/Peru/Ecuador Trade Agreement	✓	✓	✓	✓	✓	✓	✓
EU-Central America Association Agreement	✓	✓	✓	✓	✓	✓	✓
EVFTA	✓	✓	✓	✓	✓		✓

Source: Author analysis

Reference to other social commitments

Once again, except for the agreement with Mexico and Chile, the other EU FTAs

promulgate commitments on Corporate Social Responsibility (CSR)/Responsible Business Conduct (RBC). While previous agreements have shown a preference for clauses that aim to enable and enhance trade in commodities that are subject to CSR programmes, such as the EU-Korea FTA. Recent FTAs tend to prioritise the promotion of CSR/RBC, besides relating instruments at an international level, including the OECD Guidelines supporting multinational enterprises²⁵, the UN Global Compact²⁶, and ILO Tripartite Declaration of Principles concerning multinational enterprises and Social Policy²⁷, as seen in the EU-Colombia/Peru/Ecuador Trade Agreement. Besides, four out of six agreements also refer to gender, as shown in Table 3 below:

Table 3: Other social commitments

²² Conventions on Freedom of association and effective recognition of collective bargaining rights (No. 87 and 98); Conventions on Forced/compulsory labour elimination (No.29 and 105); Conventions on Effective child labour abolition (No. 138 and 182); Conventions on Elimination of employment and occupational discrimination (No.100 and 111). Up to now, the ILO has updated one fundamental Convention (No. 155) and a Promotional Framework for Occupational Safety and Health (No.187). See International Labour Organization (ILO), *Conventions and Recommendations*, available at: Conventions and Recommendations (ilo.org) (last access: 08/10/2023).

²³ For example, article 13.4 of the EU-Korea FTA; article 269 of the EU-Colombia/Peru/Ecuador Trade Agreement; article 63 of the EU-Central America Association Agreement and article 13.1, 13.4 of the EVFTA.

²⁴ For example, article 276, 278 of the EU-Colombia/Peru/Ecuador Trade Agreement; article 49, 292 of the EU-Central America Association Agreement and article 13.14 of the EVFTA.

²⁵ OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, 2023, OECD Publishing, Paris, available at: <https://doi.org/10.1787/81f92357-en> (last access: 08/10/2023).

²⁶ See United Nations Global Compact, *Social Sustainability*, available at: Social Sustainability | UN Global Compact (last access: 09.10.2023).

²⁷ See International Labour Organization (ILO), *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration)*, 2022, available at: Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) (ENTERPRISES) (ilo.org) and Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ilo.org) (last access: 08/10/2023).

Free trade agreement	Gender	CSR/RBC Promotion
EU-Mexico Partnership Agreement (The Global Agreement)		
EU-Chile Association Agreement	✓	
EU-Korea FTA	✓	✓
EU- Col/Peru/Ecuador Trade Agreement		✓
EU-Central America Association Agreement	✓	✓
EVFTA	✓	✓

Source: Author analysis

Labour regulatory sovereignty

All second-generation EU FTAs contain provisions on the domestic right to regulate in labour that prohibit derogations from domestic labour laws in order to promote trade/investment²⁸. This aspect is not available in the first-generation EU FTAs.

For the first conclusion, in terms of the scope of labour commitments, the first-generation EU FTAs tend to be overwhelmed by the second-generation ones. Besides, not all the first-generation EU FTAs cover social aspects, like the EU-Mexico Partnership Agreement, which is still considered to be upgraded and revised in the near future²⁹. The EVFTA, like all the other second-generation FTAs, covers almost all aspects of 'social dimensions' in EU policy, not only about labour but also related aspects, including gender and promotion of CSR/RBC. In addition, regarding some areas, for instance, ILO labour standards, the EVFTA even guarantees more standards than developing countries besides the mandatory core labour

standards, for example, EU-Korea FTA in Table 2.

3.2. Implementation of labour commitments in EU FTAs

The analysis continues to examine the implementation provisions related to labour commitments in terms of the two main levels:

Intergovernmental mechanisms

Regarding this aspect, the second-generation EU FTAs still reveal the predominance of diversity and level of interaction between the EU and host nations in terms of labour commitments, compared to the remaining-generation EU FTAs. For more details, except for the EU-Mexico Partnership Agreement and EU-Chile Association Agreement, all evaluated EU FTAs require regulatory cooperation on labour matters, including information exchange on ratification and implementation of labour conventions. Technology and best practices can also be shared in regulatory cooperation³⁰.

Besides, some of the EU FTAs that promulgate technical assistance and capacity-building provisions in labour matters are the ones signed with developing countries, including the EVFTA³¹. And almost FTAs selected have incorporated the establishment of an intergovernmental committee as a means to facilitate the execution of labour commitments. The nomenclature for such an entity may vary depending on the specific provisions outlined in the agreement, with possible designations including committee³², sub-

²⁸ For example, article 13.7 of the EU-Korea FTA; article 277 of the EU-Colombia/Peru/Ecuador Trade Agreement; article 291 of the EU-Central America Association Agreement and article 13.3 of the EVFTA.

²⁹ See European Commission, *EU-Mexico Trade Agreement*, available at: EU-Mexico (europa.eu) (last access: 08.10.2023).

³⁰ For example, article 12.7 of the EU-Korea FTA.

³¹ For example, article 13.14 of the EVFTA.

³² For example, article 6 of the EU-Chile Association Agreement and article 13.15 of the EVFTA.

committee³³, or board³⁴. Intergovernmental committees often address labor-related topics and consist of senior leaders from each party's administration who hold responsibility for labour or general affairs³⁵.

Collaboration in scientific endeavours is frequently anticipated in the realm of labour affairs (in two out of six EU FTAs). However, while the EU-Central America Association Agreement provides the cooperation relatively simply (Article 292), in the EVFTA, by contrast, provisions might specifically pertain to aspects related to international labour law, but more comprehensive and explicit cooperation on 'trade-related aspects of the ILO Decent Work Agenda, in particular the inter-linkage between trade and full and productive employment for all, including youth, women and people with disabilities, labour market adjustment, core and other international labour standards, labour statistics, human resources development and lifelong learning, social protection for all including for vulnerable and disadvantaged groups, such as migrant workers, women, youth and people with disabilities, and social inclusion, social dialogue and gender equality' (Article 13.14.1).

Please see the table 4 below for details:

Table 4: Intergovernmental mechanisms

Free trade agreement	Regulatory cooperation*	Technical assistance and capacity-building	Intergovernmental committee	Joint scientific cooperation
EU-Mexico Partnership Agreement (The Global Agreement)				
EU-Chile Association Agreement			✓	
EU-Korea FTA	✓		✓	
EU-COL/Peru/Ecuador Trade Agreement	✓	✓	✓	✓
EU-Central America Association Agreement	✓	✓	✓	✓
EVFTA	✓	✓	✓	✓

Source: Author analysis

* This category includes cooperation activities, such as information exchange

Civil society participation

Almost the EU FTAs examined include provisions for civil society participation in monitoring the implementation of labour commitments at the national and transnational levels³⁶. But there is still a big gap between the first-generation EU FTAs and the second-generation ones because the majority of the latter-generation FTAs call for the participation of civil society in estimating the agreement's impacts on labour. And all of them allow the general public or specific elements of civil society to submit comments and views on the implementation of labour commitments. Public submissions can be made to the Parties themselves, for instance, through the Civil Society Forum or Domestic Advisory Group (DAG) within the EU-Korea FTA³⁷, or the Sub-committee under the EU-Colombia/Peru/Ecuador Trade Agreement³⁸. In addition, through specific consultative mechanisms, both parties are required to notify their respective civil society organisation about the aforementioned communications³⁹. Please see the table 5 below for details:

Table 5: Civil society participation in monitoring labour commitments' implementation

Free trade agreement	Monitoring of implementation of national level	Monitoring of implementation of transnational level	Participation in impact assessment	Public submission
EU-Mexico Partnership Agreement (The Global Agreement)				
EU-Chile Association Agreement	✓	✓		
EU-Korea FTA	✓	✓	✓	✓
EU-COL/Peru/Ecuador Trade Agreement	✓	✓	✓	✓
EU-Central America Association Agreement	✓	✓	✓	✓
EVFTA	✓	✓	✓	✓

Source: Author analysis

³³ For example, article 280 of the EU-Colombia/Peru/Ecuador Trade Agreement.

³⁴ For example, article 294 of the EU-Central America Association Agreement.

³⁵ For example, article 6, 9 of the EU-Chile Association Agreement.

³⁶ For example, article 48 of the EU-Chile Association Agreement; article 13.13 of the EU-Korea FTA; article 282 of the EU-Colombia/Peru/Ecuador Trade Agreement; article 295 of the EU-Central America Association Agreement and article 13.15 of the EVFTA.

³⁷ According to article 13.13 of the EU-Korea FTA.

³⁸ According to article 280 of the EU-Colombia/Peru/Ecuador Trade Agreement.

³⁹ For example, article 13.17.9 of the EVFTA.

For the second conclusion, in terms of labour commitments on implementation, among the EU FTAs examined, the second-generation FTAs are definitely more specific and comprehensive than the first-generation ones. Among the second-generation EU FTAs, the EVFTA still illustrates that it almost covers more aspects than other developing country parties, from intergovernmental mechanisms to civil society participation. In other words, it could also be understood that the EU requires Vietnam to maintain a relatively higher level of commitment regarding the implementation of the EVFTA.

3.3. Enforcement of labour commitments in EU FTAs

Despite relative differences in institutions responsible for dispute settlement in terms of labour commitments, for instance, non-compliance, between the first-generation EU FTAs and the second-generation ones, for more details, within the EU-Chile Association Agreement, the Association Committee and arbitrators are in charge of resolving these disputes (Articles 6 and 185), besides the presence of a committee and a panel of experts under the latter generation of EU FTAs⁴⁰. Except for the EU-Mexico Partnership Agreement, there are always two steps to follow focusing on cooperation and consultations to avoid and settle disputes: Government

consultations and the panel/group of experts' or arbitrators' who facilitate the proceedings. In the event that the disagreement remains unresolved following the government consultation, it may be necessary to convene a panel/group of experts, or alternatively, arbitration panels, to facilitate the resolution of the dispute between the involved parties⁴¹. Although more specified institutions get involved in resolving disputes related to labour commitments from the second-generation EU FTAs' perspective⁴², the EU persists in maintaining the policy that generally excludes regulations pertaining to trade sanctions and potential remedies, including compensation, for instances of non-compliance or failure to implement those commitments⁴³.

For the third conclusion, in terms of labour commitments on enforcement, the way that the EU chooses to settle disputes related to commitments in labour is consistent, even with developing or developed country partners, and Vietnam is no exception. Based on 'naming and shaming'⁴⁴ as well as encouraging approaches⁴⁵, the EU urges parties to fulfil labour commitments and avoid non-compliance in reality in order to guarantee that trade liberalisation leads to economic growth and higher labour standards⁴⁶ and therefore to achieve sustainable development goals.

⁴⁰ For example, article 13.15 of the EU-Korea FTA; article 284 of the EU-Colombia/Peru/Ecuador Trade Agreement; article 297 of the EU-Central America Association Agreement and article 13.17 of the EVFTA.

⁴¹ For example, article 184 of the EU-Chile Association Agreement; article 13.14, 13.15 of the EU-Korea FTA; article 283, 284 of the EU-Colombia/Peru/Ecuador Trade Agreement; article 296, 297 of the EU-Central America Association Agreement and article 13.16, 13.17 of the EVFTA.

⁴² According to article 285(4) of the EU-Colombia/Peru/Ecuador Trade Agreement and article 13.17(9) of the EVFTA.

⁴³ Evgeny Postnikov, *Social Standards in EU and US Trade Agreements*, 2020, Routledge, p. 21.

⁴⁴ María J. García, *Sanctioning Capacity in Trade and Sustainability Chapters in EU Trade Agreements: The EU-Korea Case, Politics and Governance*, 2022, 10(1), pp. 58-67.

⁴⁵ This argument is further explained in Section 4 of the paper.

⁴⁶ European Commission (2015), *op. cit.*

Overall, it is clear that the EU's strategy regarding the incorporation of labour commitments in FTAs has evolved quite significantly since the 1990s. And now, the second-generation EU FTAs, known as the new-generation ones, have the TSD chapters that are fully binding, integrated into the main text of the agreement dealing with trade issues, and have a wider scope, containing more specific and comprehensive country-based provisions on labour while treating them under the same heading. Among those new-generation FTAs, the EVFTA would be noticeable and regarded as one of the most comprehensive and promising FTAs between the EU and a developing nation. However, the enforcement of labour commitments in EVFTA and other EU FTAs based on dialogue and cooperation still remains the EU's hallmark approach⁴⁷.

Back to the earlier question, may labour commitments in EU FTAs be regarded as old wine in new bottles? Probably, it depends on the point of view, but it cannot be denied that these commitments are not totally brand new, because they also refer to essential issues in labour like fundamental principles/rights at the workplace and highlight the importance of the ILO as a partner of the EU in trade negotiations⁴⁸. However, recent legal practice has revealed that even though both EU and US FTAs refer to ILO core labour standards as well as their related conventions, the legal consequences of violating the obligations under those FTAs

are different⁴⁹. So, that requires an in-depth understanding of the nature of the EU labour commitments so as to set a good example not only for Vietnam but also for developing nations in trade negotiation and implementation with the EU.

4. Labour dispute settlement under the context of the EU FTA and policy implications

By concisely examining the case as a 'milestone dispute' between the EU-Korea within the context of EU-Korea FTA labour commitments, the Section aims to reveal the nature of these commitments and then make suggestions for Vietnam and other EU FTA parties in the future⁵⁰.

4.1. EU-Korea dispute related to labour commitments under the TSD chapter

Background of the dispute

Unions both at home and abroad have long criticised Korea's trade union registration regulations and other labour practises as restrictive. In particular, the use of migrant workers without providing them with basic protections (such as the nonregistration of Trade Union of Migrants) and disproportionate police force used against labour unions have been called into

⁴⁷ Postnikov, *op. cit.*, p. 22.

⁴⁸ Daniela Sicurelli, 'The EU as a partner of ILO in trade negotiations. Explaining labour reform in Vietnam', *Journal of Contemporary European Studies*, 2022, 30(3), pp. 461-473.

⁴⁹ This will be clarified in the next Section.

⁵⁰ Not in order to clarify all the information related to the case, this Section is supposed to focus on the core requirements of the EU-Korea obligations regarding labour commitments based on the conclusions of the panel of experts and noticeable misunderstandings from both sides, the EU and Korea, so as to set the outcome lessons for Vietnam and other parties in trade negotiations with the EU. See more the report of the panel of experts: Jill Murray, Laurence Boisson de Chazournes and Lee Jaemin, 'Report of the panel of experts'. In: *Panel of experts proceeding constituted under Article 13.15 of the EU-Korea Free Trade Agreement*, 2021.

question⁵¹. Certain occupational groups, including as public employees, military sector workers, educators, and individuals employed in vital public services, have significant restrictions on their ability to engage in strike actions. The prevailing hostile environment against labour unions allows for the enforcement of significant sanctions for engaging in activities that disrupt corporate operations, even in instances where such activities are nonviolent, thereby establishing a criminal infraction against union members⁵².

Since 1992, ILO has received a total of 16 complaints from both Korean and foreign trade unions over these issues. Although these concerns have also been continuously raised in ILO conferences and even during FTA negotiations with the EU, during that period, out of the ILO's eight core Conventions, Korea had only ratified four. These include Convention 100, which addresses the issue of equal remuneration, Convention 111, which aims to combat discrimination in employment and profession, and Convention 138, which focuses on establishing minimum age requirements, and Convention 182 to combat the most severe manifestations of

child labour⁵³. Furthermore, Korea potentially decreased the reliance on ILO conventions as references and, significantly, eliminated any explicit mention of an immediate requirement to ratify core ILO conventions⁵⁴.

Since the FTA initiation, the EU has consistently urged Korea to ratify and enforce the outstanding essential ILO conventions, including Convention 87 and 98 address freedom of association and rights to organise/collectively bargain; Convention 29 and 105 address forced labour. All the minutes from the TSD Committee and all the joint DAG statements have this as a common theme⁵⁵. However, Korea has always given 'legal incompatibilities' as an excuse for its poor progress in this area⁵⁶.

In the last month of 2018, the European Commission made a formal statement to the government of Korea, encouraging the commencement of official negotiations in alignment with the TSD chapter. The correspondence conveyed a cautionary message indicating that the EU intends to forward to the subsequent stage of the procedure for settling disputes, thereby bringing the subject to a panel comprised of experts unless the Korean government took

⁵¹ Lee D, *Repression against workers—Republic of Korea, Asian Labour Update*, 2009, 72, pp. 8–14, available at: <https://www.amrc.org.hk/content/repression-against-workers-republic-korea> (last access: 08.10.2023).

⁵² Gerda van Roozendaal, 'Where symbolism prospers: Impact on evolving rights of labour provisions in FTAs with the Republic of Korea', *Politics and Governance*, 2017, 5(4), p. 25.

⁵³ International Labour Organisation (ILO), *Ratifications for Republic of Korea*, 2021, available at: Ratifications of ILO conventions: Ratifications for Republic of Korea (last access: 08.10.2023).

⁵⁴ Campling Liam, et al, *South Korea's automotive labour regime, Hyundai motors' global production network and trade-based integration with the European Union*, *British Journal of Industrial Relations*, 2021, 59(1), pp. 139–166.

⁵⁵ Civil Society Forum, *Joint statement by the chairs of the Korea DAG and the EU DAG*, 2018, available at: <https://www.eesc.europa.eu/en/documents/joint-statement-chairs-korea-dag-and-eu-dag>; TSD Committee, *Minutes of 4th meeting of the TSD Committee*, EU–Korea FTA, 2015, available at: https://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153802.pdf; TSD Committee, *Minutes of 5th meeting of the TSD Committee*, EU–Korea FTA, 2017, available at: https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156839.pdf; TSD Committee, *Summary of discussions of 6th meeting of TSD Committee*, EU–Korea FTA, 2018, available at: https://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157105.PDF.

⁵⁶ Van Roozendaal, 2017, *op. cit.*, p. 21.

immediate action to address the problems raised in the consultations. In July of 2019, the European Commission made a formal proposal for a panel of experts establishment. The EU has raised concerns over two issues: *firstly*, the lack of significant advancements in the ratification process of the pending fundamental conventions of the ILO; *secondly*, the insufficiency of the Trade Union and Labour Relations Adjustment Act (TULRAA) of Korea in ensuring the labour rights protection⁵⁷.

Legal issues

From the EU's perspective, it officially raised several major concerns about the TULRAA, related to: According to Article 2.1, the definition of employees is limited to individuals who get compensation in the form of wages, salary, or other forms of remuneration. This definition excludes specific groups such as self-employed individuals, jobless individuals, and those who have been terminated from their employment, from being eligible to join trade unions⁵⁸. In addition, according to Article 2.4.d, the recognition of a trade union is prohibited if it encompasses individuals who do not fall within the prescribed and specific definition of a worker⁵⁹. According to Article 23.1, individuals serving as trade union officials are restricted to being elected exclusively from the pool of trade union members⁶⁰. Article 12.1.3 outlines a

discretionary certification system that governs the foundation of a trade union⁶¹.

Besides, the EU has also asserted its concerns regarding Korea's prolonged delays in ratifying the essential conventions of the ILO. It also proposed that the concept of 'sustained efforts' outlined in Article 13.4.3 the EU-Korea FTA entails the requirement for efforts to be continuous or 'uninterrupted'⁶². So, despite subjective or objective reasons given by Korea, especially related to the time for political change, the EU still reaffirms the opinion that the delays mentioned mean a violation of this FTA⁶³.

In Korea's opinion, the objection was raised against the EU's stance on multiple grounds. Korea argued that the scope of Chapter 13 under the EU-Korea FTA was narrowed to 'trade-related aspects of labour', and further argued that they 'did not intend, by agreeing to Chapter 13, to subject their labour laws and policies to obligations that bear no connection to trade (or investment)'⁶⁴. This argument was based on the citations from two articles in the trade agreements between Korea and the EU/US, which were deemed equivalent by this country. Korea illustrated that because of the Korea-US FTA requirement to establish evidence of non-compliance with labour commitments that has an impact on trade/investment between the parties, the TSD Chapter within the EU-Korea FTA (Chapter 13) would have to take the same

⁵⁷ García, *op. cit.*, p. 63.

⁵⁸ Murray, Boisson de Chauzournes and Lee, *op. cit.*, p. 41.

⁵⁹ *Idem*, p. 53.

⁶⁰ *Idem*, p. 56.

⁶¹ *Idem*, p. 61.

⁶² According to article 13.4.3: "Each Party shall: (a) make continued and sustained efforts towards ratifying, to the extent it has not yet done so, the fundamental ILO conventions". See Murray, Boisson de Chauzournes and Lee, *op. cit.*, p. 73.

⁶³ *Idem*, pp. 71-72.

⁶⁴ *Idem*, p. 16.

approach⁶⁵. This argument was also supported by the only arbitral panel decision to date in the context of a labour dispute inside the framework of an FTA, specifically the case involving the US and Guatemala within the Dominican Republic-Central America FTA (CAFTA-DR)⁶⁶. The EU was addressing aspects relating to labour commitments that were not directly linked to EU-Korea trade, so the authority of the Panel does not extend to the examination of the concerns highlighted by the EU's request for the Panel of Experts establishment within Chapter 13⁶⁷.

Legal conclusions

Firstly, the provisions of TURLAA, including Articles 2.1, 2.4.d, and 23.1, appear to be incongruous with the underlying freedom of association principle, as outlined in the EU-Korea FTA Article 13.4. The group of experts has additionally determined that TURLAA Article 12.1.3 is in conflict with the responsibilities outlined in the TSD chapter aforementioned⁶⁸.

Secondly, however, the panel reached the conclusion that Korea's actions were not

in violation of the provisions outlined in the TSD chapter regarding the obligations to ratify the outstanding fundamental conventions indicated of the ILO⁶⁹, because one of the most important conclusion was that the panel identified a noteworthy aspect in the absence of a stated goal date or milestone for the ratification process in the final language of Article 13.4.3. Instead, the provision simply emphasises the need for the parties to engage in 'continued and sustained efforts towards ratification'⁷⁰.

Thirdly, the Korea-EU FTA and Korea-US FTA, even though they have things in common, including labour commitments that refer to ILO labour standards, have different approaches to upholding the enforcement of these standards, and the way that Korea cited the agreement between this country and the US to refuse the role of the EU (in particular, the panel of experts) in raising the problem related to the TSD Chapter is inappropriate⁷¹. And therefore, even though labour commitments have become an essential part of the EU and US FTAs, the nature of this linkage is not the same, as the EU and the US exhibit distinct approaches

⁶⁵ According to article 13.7 of the Korea-EU FTA, TSD chapter: '1. A Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties. 2. A Party shall not weaken or reduce the environmental or labour protections afforded in its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws, regulations or standards, in a manner affecting trade or investment between the Parties'. See Official Journal of the European Union, *The FTA between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part*, L 127; and article 19.2.2 of the Korea-US FTA: 'Neither Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations implementing paragraph 1 in a manner affecting trade or investment between the Parties, where the waiver or derogation would be inconsistent with a fundamental right set out in that paragraph'. See Office of the United States Trade Representative, *Korea-US Trade Agreement*, 2019, available at: Final Text (as of January 1, 2019) | United States Trade Representative (ustr.gov) (last access: 08.10.2023).

⁶⁶ Kevin Banks, Theodore R. Posner and Ricardo Ramirez Hernandez, Final Report of the Panel, In the *Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of CAFTA-DR*, 2017, available at: Final Report of the Panel - Article 16.21(a) of the CAFTA-DR (Guatemala Labor) (trade.gov) (last access: 09.10.2023).

⁶⁷ Murray, Boisson de Chauzournes and Lee, *op. cit.*, p. 16.

⁶⁸ *Idem*, p. 79.

⁶⁹ *Ibid.*

⁷⁰ *Idem*, p. 74.

⁷¹ *Idem*, pp. 18-19.

towards it. In stark contrast to the EU, the US emphasises sanctions as a means of enforcing labour commitments/social provisions. While the scope of labour commitments in EU FTAs has been gradually increasing over time⁷², the EU has adopted a distinctive approach in enforcing employment commitments, characterised by collaborative implementation and interaction with partner governments and civil society, therefore enhancing transnational connections⁷³. This would probably be partly explained through the EU's policy on 'Trade for all'⁷⁴ and 'making friends' with the ILO in trade negotiations⁷⁵, as well as how weak institutional insulation of trade policy executives from societal actors results in the inclusion of labour commitments in the EU and the US⁷⁶.

4.2. Policy implications for Vietnam and other countries

Above all, in terms of nature, labour commitments in the TSD chapter under the new-generation EU FTAs refer to the principles and obligations derived from ILO membership and the maintenance of laws

that ensure freedom of association, absence of forced labour, etc, in practice⁷⁷. In other words, in order to fulfil the long-term purpose to incorporate social standards into their FTAs⁷⁸, the EU, by the way regarding the ILO as a partner in trade negotiations⁷⁹, has employed and reinforced the parties' principles and obligations under the ILO membership, but at a more comprehensive and higher level⁸⁰.

First and foremost, the EU requests that the party members fully comply with ILO fundamental principles/rights at work, which are also deemed to be ILO core labour standards promulgated in eight ILO fundamental Conventions and so on⁸¹. Regarding these labour standards, it is noteworthy that there are differences between ILO core labour standards and other international labour standards⁸². All members, not only Vietnam, are bound by an inherent commitment, irrespective of their ratification status of the relevant fundamental conventions, to uphold, advance, and actualise the concepts pertaining to fundamental rights. This obligation stems directly from their membership in the ILO, the 1998

⁷² Also see Section 3.

⁷³ Harrison James, et al, *Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda*, *World Trade Review*, 2019, 18(4), pp. 635-657 and Postnikov, *op. cit.*, p. 22-23.

⁷⁴ European Commission (2015), *op. cit.*

⁷⁵ Sicurelli, *op. cit.*, pp. 461-473.

⁷⁶ Postnikov, *op. cit.*, p. 3.

⁷⁷ García, *op. cit.*, p. 64.

⁷⁸ The historical and theoretical perspectives are revisited in the Section 2 of the paper.

⁷⁹ Sicurelli, *op. cit.*, pp. 461-473.

⁸⁰ See Section 3.

⁸¹ For instance, in the EVFTA and several FTAs outlined in Section 3, there is an extended scope of fundamental Conventions on occupational health and safety and migrant workers rights. Recently, this tendency has also been employed in EU FTAs among developing countries like Canada and the UK in terms of fundamental Conventions on minimum wage and labour inspection. See more at European Commission, *CETA chapter by chapter*, available at: CETA chapter by chapter (europa.eu); and European Commission, *EU-United Kingdom Trade and Cooperation Agreement*, available at: The EU-UK Trade and Cooperation Agreement (europa.eu) (last access: 09.10.2023).

⁸² European Commission, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation and Enforcement of EU Trade Agreements*, 2021, p.18.

Declaration⁸³, and must be fulfilled in a sincere manner and in conformity with the ILO Constitution⁸⁴.

So a key priority obligation for Vietnam and other EU parties under TSD Chapters in EU FTAs has been the ratification of fundamental Conventions of the ILO first, and the implementation of these core labour standards, besides the other ones that have already been ratified, provided that the ILO Conventions ratification would come along with timing domestic legal internalisation because of the inherent limits in legislation, for instance in Korea⁸⁵ and Vietnam as well⁸⁶.

Last but not least, there is the obligation to guarantee that the implementation of core labour standards and other labour standards will be effective⁸⁷. However, in order to fulfil all the requirements from labour commitments indicated or to avoid putting parties in Korea's place at least, based on lessons from the case between Korea and the EU aforementioned⁸⁸, it is believed that Vietnam and other parties should carefully

follow annual recommendations from the ILO in terms of ILO fundamental convention ratification and implementation⁸⁹.

5. Conclusion

Behind the EU's statement regarding the EVFTA as the most comprehensive new generation FTA among other FTAs between the EU and developing countries, the study would clarify aspects of labour commitments in EU FTAs and highlight that the key obligations for parties to the new-generation EU FTAs in terms of these labour commitments are the ratification of ILO conventions, legal internalisation, and their implementation in practice. Recent scholarly study has indicated that the implementation of TSD chapters has not yet yielded tangible improvements in workplace rights in practical terms⁹⁰, and, besides, although the party, for instance, Vietnam, has even ratified ILO conventions yet, present limits

⁸³ Cuc Nguyen and Phuoc Huu Ngo, *Elimination of Child Labor in Vietnam's New Generation of Free Trade Agreements*, Lentera Hukum, 2022, 9(1), p. 128.

⁸⁴ See International Labour Organization (ILO), *ILO Declaration on Fundamental Principles and Rights at Work (1998), as amended in 2022*, available at: Key document - ILO Declaration on Fundamental Principles and Rights at Work (1998), as amended in 2022 (last access: 9.10.2023).

⁸⁵ See Part 1 in Section 4 of the paper.

⁸⁶ Xuan Thu Nguyen, Tien Dung Nguyen and Xuan Hung Nguyen, "Labour Commitments in the EVFTA: Amendments and Supplements to Vietnamese Law and Recommendations", *Journal of Law, Policy and Globalization*, 2022, 125, pp. 76-83.

⁸⁷ For example, article 13.4 of the EU-Korea FTA; article 286 of the EU-Colombia/Peru/Ecuador Trade Agreement; article 285 of the EU-Central America Association Agreement and article 13.4 of the EVFTA.

⁸⁸ Campling, *op. cit.*, pp. 139-166.

⁸⁹ See International Labour Organization (ILO), *Committee of Experts on the Application of Conventions and Recommendations*, available at: Committee of Experts on the Application of Conventions and Recommendations (ilo.org) (last access: 09.10.2023).

⁹⁰ Harrison James et al, "Governing labour standards through free trade agreements: Limits of the European Union's trade and sustainable development chapters", *Journal of Common Market Studies*, 2019, 57(2), pp. 260-277; Marx Axel, Brando Nicolas and Lein Brecht, "The protection of labour rights in trade agreements: The case of the EU-Colombia Agreement", *Journal of World Trade*, 2016, 50(4), pp. 587-610; Marx Axel, Ebert Franz and Hachez Nicolas, *Dispute settlement for labour provisions in EU FTAs: Rethinking current approaches, Politics and Governance*, 2017, 5(4), pp. 49-59; Orbie Jan, Van den Putte Lore and Martens Deborah, 'The impact of labour rights commitments in EU trade agreements: The case of Peru', *Politics and Governance*, 2017, 5(4), pp. 6-18 and Van Roozendaal, *op. cit.*, pp. 19-29.

in the legislation⁹¹ as well as in the implementation of institutional mechanisms still remain⁹². So, it is time to revisit TSD chapters and conduct further empirical

research in order to warrant their effectiveness in protecting employees under the pressure of globalisation./.

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⁹¹ Nguyen, Nguyen and Nguyen, *op. cit.*

⁹² Chi, Do Quynh, *Formation of the EU-Vietnam Free Trade Agreements Domestic Advisory Group: What it means for the civil society in Vietnam?*, Working Paper, 2022, 191/2022, Hochschule für Wirtschaft und Recht Berlin, Institute for International Political Economy (IPE), Berlin.

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