

Regulatory Network Calibration in the EU-Korea Free Trade Agreement

Cho-Hsin Su*

The European Union (EU) and South Korea (Korea) created the world's biggest free trade deal since 1994 in 2011. It was not only the biggest in terms of economic size, it was also the most ambitious one that the EU has ever negotiated. The EU-Korea free trade agreement (EU-Korea FTA) is ambitious in the sense that it tackles not only the tariff barriers but also the non-tariff ones to reach full liberalization in trade. This article aims to weigh the European normative power via this interesting trade deal, the EU-Korea FTA. It takes a normative perspective to examine the concretization of the EU normative power with measurable standards, and tries to discern the impacts of the European values and norms on Korean reforms in trade. The article will focus on the regulatory network built up by the two sides in order to enforce and monitor the provisions especially on non-tariff barriers (NTBs) issues, and it concludes with the finding that the degree of normativity that the EU norms possess in Korean market is moderate, with strong rhetorical commitment, slow formal adoption, and unremarkable behavioural compliance. Certain European values have indeed been transformed into concrete regulations in the FTA, such as IPRs regulation, sustainable development, etc. However, for the implementation of the agreement to be effective, it takes not only government's endeavour to enforce regulatory framework, but also more communication and cooperation on the social level to create this normative legitimacy for the Korean society to take in the European norms and values. It is believed that continuous dialogues through the regulatory network on different layers of the society would still be necessary on fostering and strengthening the bilateral relationship between the EU and Korea.

1 INTRODUCTION

The European Union (EU) and South Korea (Korea) created the world's biggest free trade deal since 1994 in 2011. It was not only the biggest in terms of economic size, but also the most ambitious one that the EU has ever negotiated. This free trade agreement (FTA) actually came at the right place in time. From the EU side, it announced its new strategy for trade in 2006, named 'Global Europe: Competing in the World',¹ stressing the need for a 'rejection of protectionism at home' and emphasizing on the conclusion of a new generation of FTAs which was expected to be deep and comprehensive, including far-reaching liberalization of

* Assistant Professor at Department of Diplomacy, National Chengchi University in Taiwan (www.nccu.edu.tw). Email: chohsin@nccu.edu.tw.

¹ European Commission (2006), http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf (accessed 27 Dec. 2017).

service and investment, tackling both tariff and NTBs. On the other hand, Korea has always been an export-led economy that accentuates on international trade. After the 1997 Asian financial crisis, the Korean government showed its determination in creating a more transparent and welcoming business and inward investment environment in order to attract foreign capital, technology and know-how to sustain its growth and domestic economy. With the ambitious program of building a 'free trade network' pinned down in 1998 by President Kim Dae-jung and the 'FTA Roadmap' launched by the successor Roh Moo-hyun in 2003,² in one decade, Korea has transformed itself into an FTA hub in East Asia, which provides it with greater presence in the international community. At the time of agreement signing, the EU was the largest investor to Korea, and the second largest trade partner of Korea. As a result of its economic and political rationale, signing an FTA with EU seemed to be just one righteous deal. Under the strong volition and mutual commitment from both parties, negotiations on the FTA between the EU and Korea were launched in May 2007. After eight rounds of talk, the FTA was signed on 6 October 2010. The European Parliament gave its consent to the FTA on 17 February 2011, and the FTA took effect since 1 July 2011, with duties for goods being eliminated progressively except for a limited number of agricultural products.

The EU-Korea FTA consists of fifteen chapters, three protocols, several annexes and appendixes, and four understandings.³ Compared to the previous FTAs that the EU has signed, this agreement is unprecedented both in scope and in speed at which trade barriers are removed. Except for a limited number of agricultural and fisheries products that have transitional periods, and rice and a few agricultural products that are excluded from the agreement, the majority of customs duties on goods were removed at the time when the FTA entered into force, which corresponded to almost 99% of all duties paid by Korean exporters before the agreement. But the most characteristic attribute of the EU-Korea FTA lies in its comprehensiveness. The agreement addressed a wide range of NTBs that can in fact hinder everyday business activities. To make sure the execution of these NTBs removal and full trade liberalization, it thus requires a vast regulatory network for both the EU and Korea to calibrate the standards and to monitor the implementation.

The distinctive development thus calls forth a series of research inquiry: how did the two very distinct economies manage to set up a regulatory network for

² Office of the President, R. O. K., *Global Korea. The National Security Strategy of the Republic of Korea* 29 (2002); Ministry of Foreign Affairs and Trade, R. O. K., *FTA Status of Korea* 1 (2010).

³ For the text of the agreement, see European Commission, *EU-Korea Free Trade Agreement Online* (2011), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2011:127:FULL&from=EN> (accessed 27 Dec. 2017).

continuous calibration on their trade norms? And successively, after five years of operation, how does it perform? In order to answer these inquiries, this article takes a normative approach to conduct the research. The first part comprises a literature overview of the normative power Europe (NPE) and a study on the Korean market which depicts a normative environment different from the European one. Then the article will focus on the regulatory network built up by the two sides in order to enforce and monitor the implementation of the provisions especially on the NTBs issues. With the normative perspective, the article wishes to examine the concretization of the NPE with measurable standards, and tries to discern the impacts of the European values and norms on Korean reforms in trade.

2 NORMATIVE APPROACH

As a *sui generis* in world politics, the EU has already decades' history of multi-level governance within its community. Ever since the NPE discourse came into sight, first introduced by Ian Manners in his seminal article published in the *Journal of Common Markets Studies* in 2002, the EU has begun to exercise its power in other parts of the world through unconventional channels.⁴ By the definition of Manners himself, normative power refers to the 'ability to shape concepts of "normal" in international relations'.⁵ While military power or economic power concepts focus on material power to create influence in world politics, normative power focuses on 'non-material exemplification found in the contagion of norms'. To put it simply, NPE exerts its influence by projecting its norms on other international actors. And in this way, the EU distinguishes itself as a unique actor on world stage. Manner then further elaborated the concept that 'the principles that guided the development and enlargement of the European project are also the "constitutive" features that make the EU a distinctive and unique polity and a "normative power" in international relations'.⁶

⁴ Similar affirmation of the EU as a global actor can be found in the following literature: C. Bretherton & J. Vogler, *The European Union as a Global Actor* 4 (2d ed., Routledge 2006); C. Bretherton & J. Vogler, *A Global Actor Past Its Peak?*, 27(3) *Int'l Rel.* 377, 375–390 (2013); C. Hill & M. Smith, *International Relations and the European Union: Themes and Issues*, in *International Relations and the European Union* 4, 3–17 (C. Hill & M. Smith eds, Oxford University Press 2005); J. McCormick, *The European Superpower* 8 (Palgrave Macmillan 2007); *Europe's Global Role: External Policies of the European Union* 12 (J. Orbie eds, Ashgate 2008); J. Peterson, *The EU as a Global Actor*, in *The European Union: How Does It Work?* (E. Bomberg, J. Peterson & R. Corbett eds, 3d ed., Oxford University Press 2012); K. E. Smith, *Beyond the Civilian Power EU Debate*, 17 *Politique européenne* 63–82, 64–65 (2005); R. Youngs, *The EU's Role in World Politics: A Retreat from Liberal Internationalism* 12 (Routledge 2010).

⁵ I. Manners, *Normative Power Europe: A Contradiction in Terms?*, 40(2) *J. Com. Mkt. Stud.* 239 (2002).

⁶ *Ibid.*, at 252.

Regarding the core of the NPE – the norm itself – the NPE discourse emphasizes the cosmopolitan nature of the EU's principles by 'a commitment to placing universal norms and principles at the center of its relations with its Member States and the world'.⁷ More specific definition can be found in Article 2 of the Lisbon Treaty:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The burgeoning literature on NPE has been witnessed since then, from the comprehensive examination⁸ to empirical studies⁹ and more critical perspectives.¹⁰ In practice, NPE has been applied through many channels and in many different fields. But mainly, it has been exercised in EU's neighbourhood, with the enlargement agenda or closer cooperation under the framework of European Neighbourhood Policy (ENP) or Eastern Partnership (EaP). Since the enlargement to Central and Eastern Europe (CEE) in 2004 and the launch of ENP the same year, numerous NPE researches were conducted in this domain.¹¹ The findings vary in accordance with the different contexts where NPE is carried out. By and large, the enlargement to CEE countries was considered a success as the new

⁷ I. Manners, *The European Union as a Normative Power: A Response to Thomas Diez*, 35(1) Millennium 176 (2006).

⁸ See Z. Laïdi, *La norme sans la force. L'énigme de la puissance européenne* (2d ed., Presses de Sciences Po 2008); *Normative Power Europe: Empirical and Theoretical Perspectives* (R. G. Whitman eds, Palgrave Macmillan 2011); R. G. Whitman, *The Neo-Normative Turn in Theorising the EU's International Presence*, 48(2) Cooperation & Conflicts 171–183 (2013).

⁹ See F. Schimmelfennig & U. Sedelmeier, *Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe*, 11(4) J. Eur. Pub. Pol'y 669–687 (2004); M. Pace, *The Construction of EU Normative Power*, 45(5) J. Com. Mkt. Stud. 1041–1064 (2007); F. Trauner, *From Membership Conditionality to Policy Conditionality: EU External Governance in South Eastern Europe*, 16(5) J. Eur. Pub. Pol'y 774–790 (2009); A. Niemann & T. De Wekker, *Normative Power Europe? EU Relations with Moldova*, European Integration Online Papers 14 (2010), <http://eiop.or.at/eiop/pdf/2010-014.pdf> (accessed 27 Dec. 2017); *Importing EU Norms. Conceptual Framework and Empirical Findings* (A. Björkdahl. et al. eds, Springer 2015).

¹⁰ See T. Diez, *Constructing the Self and Changing Others: Reconsidering 'Normative Power Europe'*, 33(3) Millennium 613–636 (2005); A. Hyde-Price, *'Normative' Power Europe: A Realist Critique*, 13(2) J. Eur. Pub. Pol'y 217–234 (2006); H. Sjursen, *The EU as a 'Normative Power': How Can This Be?*, 13(2) J. Eur. Pub. Pol'y 234–251 (2006); M. Merlingen, *Everything Is Dangerous: A Critique of 'Normative Power Europe'*, 38(4) Sec. Dialogue 435–453 (2007).

¹¹ See J. Kelly, *New Wine in Old Wineskins: Promoting Political Reforms Through the New European Neighborhood Policy*, 44(1) J. Com. Mkt. Stud. 29–55 (2006); F. Schimmelfennig, *Europeanisation Beyond Europe*, 4(3) Living Rev. Eur. Governance (2009), <http://www.europeangovernance-livingrev.org/Articles/lreg-2009-3/download/lreg-2009-3Color.pdf> (accessed 27 Dec. 2017); T. A. Börzel, *The Transformative Power of Europe Reloaded. The Limits of External Europeanization*, KFG Working Paper 11 (Belin, Kolleg-Forschergruppe 'The Transformative Power of Europe', Freie Universität Berlin 2010); *Explaining Policy Change in the European Union's Eastern Neighborhood* (J. Langbein & T. A. Börzel eds, Routledge 2014).

Member States were willing to go through sometimes painful domestic reforms to meet the EU norms and standards because of the membership aspiration. On the other hand, the ENP and EaP received more critical appraisal since firstly, the ENP and EaP partners share greater incompatibility with EU norms in terms of economic and democratic development compared with CEE countries, and secondly, with no prospects for EU membership these countries simply lack the biggest motivation for reforms.

Besides engaging with its neighbouring countries, the EU also began to use FTA negotiations as a tool for norm diffusion since the 2006 Global Europe agenda. More specifically, FTA could not only serve its economic trade-creation effects, the institutional framework between the signing parties could have more significant meaning on harmonizing policies and standards, which in turn, lower transaction costs and also convey certain values and norms to the counterpart. Progressively, the EU has deliberately put some values that the European hold dearly at heart, such as 'sustainable development' and 'social solidarity', at the centre of EU trade policy discourse. In other words, the EU takes advantage of its vast and prosperous market, and uses the access to the market as a leverage to impose certain values of its own on its trading partners. This has probably become the most effective foreign policy tool of the EU. Sophie Meunier and Kalypso Nicolaïdis thus argued that trade is at the very core of the EU's potential or actual power.¹² It has also become an explicit policy direction of the EU. In 2002, Trade Commissioner Pascal Lamy stated that trade policy is 'not a stand-alone policy, it contributes to the achievement of the Union's overall objectives ... [such as] to promote sustainable development'.¹³ His successor, Karel De Gucht, described trade policy as one of the key vectors for promoting the EU's values and principles, not least because it was the external policy area where the Union had 'the strongest teeth'.¹⁴ More officially, the European Commission has stated in its Communication regarding trade in 2012 that 'effective trade policy is critical in boosting growth and jobs in Europe and abroad and in projecting EU values and interests in the world'.¹⁵

¹² S. Meunier & K. Nicolaïdis, *The European Union as a Conflicted Trade Power*, 13(6) *J. Eur. Pub. Pol'* 906 (2006).

¹³ Speech delivered in Brussels, 5 Feb., entitled 'The Convention and Trade Policy: Concrete Steps to Enhance the EU's International Profile'.

¹⁴ A. R. Young & J. Peterson, *Parochial Global Europe. 21st Century Trade Politics* 183 (Oxford University Press 2014).

¹⁵ See European Commission, *Trade, Growth and Development: Tailoring Trade and Investment Policy for Those Countries Most in Need*, COM(2012) 22 (Jan. 2012). More elaboration on how the EU uses trade policy as foreign policy can be found in Young & Peterson, *supra* n. 14, Ch. 8.

3 MISMATCHED GLOBALIZATION OF KOREA

The regulatory convergence could be advantage for both sides as it could lower trading costs. However, this development does not go without saying. In fact, many factors could hamper this course, including the role of domestic interests, attitudes towards the role of government, the role of political systems, the role of cultural values and differences preferences.¹⁶ Researchers on ENP and EaP often define this incompatibility between EU norms and partner countries' circumstances as 'misfit' that exists not only in policies but also in politics.¹⁷ This situation can be found in the case of the EU-Korea FTA as well.

Since its establishment in 1948, Korea has gone through a characteristic course of economic and political development, which has been studied by many researchers and been referred to as 'developmental state'. According to the definition by Marx et al., the developmental state refers to the role played by state planning and regulation in macroeconomic planning. In this model, the state has a strong influence on macroeconomic policy but also develops strategies for private sector development.¹⁸ As mentioned earlier, the 1997 Asian financial crisis has seriously hit the Korean economy and hence altered the governmental vector utterly. In order to receive bailout package from the IMF, the Korean government was willing to enact a series of market-oriented reforms.¹⁹ The 1998 'Free-Trade Network' policy exhibited its full ambition in conducting bilateral and regional free trade negotiations, it also demonstrated its determination in creating a more transparent and welcoming business and inward investment environment in order to attract foreign capital, technology and know-how. This direction has then subsisted solidly until now, in spite of the changing of several governments with different political standpoints.

The continued reforms of internal market environment in Korea was observed and well recognized by the international community, nevertheless, in 2006 and 2007, several EU executives still showed their concerns about the remaining problems arising from the 'software' aspect of doing business in Korea, namely challenges related to attitudes, perceptions and culture. Judith Cherry therefore depicted this situation as a 'mismatched globalization' that shows the mismatch between governmental policy and its implementation at the working level, and the lack of transparency, consistency and predictability in the implementation of trade – and investment-related

¹⁶ A. Marx et al., *EU-Korea in a Changing World Project: Main Results and Recommendations*, 12 Asia-Eur. J. 246 (2014).

¹⁷ Langbein & Börzel (eds), *supra* n. 11, at 2.

¹⁸ Marx et al., *supra* n. 16, at 232.

¹⁹ W. H. Cooper et al., *The Proposed U.S.-South Korea Free Trade Agreement (KORUS FTA): Provisions and Implications*, Congressional Research Service Reports and Issue Briefs (2011).

regulations.²⁰ The similar observation was also made by Lowell Dittmer in his article on the exceptionalism of Asian globalization and democratization in 2002, he introduced the concept of ‘hybrid globalization’, arguing that the globalization of many Asian countries, including Korea, ‘has been moving in counterpoint with (their) attempt to maintain a distinctive normative regime and political-economic culture’.²¹

This is often referred to as sociocultural barriers to the implementation of FTAs. In the case of Korea, Cherry classifies a third kind of barriers to trade, besides tariff and non-tariff ones, as social, cultural and institutional barriers which can also serve as stumbling blocks to the effectiveness of FTA. From a series of interviews the author conducted with European expatriate and officials in Seoul in 2009, before the agreement was initialled, the author identified these barriers as ‘soft’ barriers which include the lack of predictability, consistency and transparency in the regulatory environment (including IPR protection), labour militancy, and attitudes towards globalization. For example, the inability or lack of willingness to be clear-cut and transparent when doing business has often been reflected from the Europeans as frustrations trying to get a clear and accurate grasp of the regulatory framework within which they were operating. Same remark was made by American trading parties. During negotiations of US-South Korea FTA (KORUS FTA), US exporters and negotiators also identified the lack of transparency of Korea’s trading and regulatory system as one of the most significant barriers to trade with Korea, in almost every major product sector.²²

In more specific cases, for example, IPRs violation was treated as a ‘minor, magistrates’ court type of crime. To a certain extent, copying was even seen more as a compliment than an illegal action. And the continuing importance of hierarchy and personal connections within Korean society was evident throughout the government and business community. There is a received wisdom among businessmen operating in Korea that contacts were more important than contracts.²³ In Wolfgang Pape’s study on the industrial policy of Korea, he pointed out the historically strong Confucianism – including the culture of deference, focus on education, diligence, frugality, discipline and hierarchy – that can be well reflected on the top-down imposition of industrial development priorities.²⁴ This also

²⁰ J. Cherry, *Foreign Direct Investment in Post-crisis Korea: European Investors and ‘Mismatched Globalization’* (Routledge 2007).

²¹ L. Dittmer, *Globalization and the Twilight of Asian Exceptionalism*, in *Globalization and Democratization in Asia: The Construction of Identity 22* (C. Kinnvall & K. Jönsson eds, Routledge 2002).

²² Cooper et al., *supra* n. 19, at 51.

²³ J. Cherry, *Upgrading the ‘Software’: The EU-Korea Free Trade Agreement and Sociocultural Barriers to Trade and Investment*, 25(2) *Pac. Rev.* 247–268 (2012).

²⁴ W. Pape, *EU-Korea Relations to Promote Regulatory Cooperation in Economic Policies, in Particular Industrial Development Policies*, in *EU-Korea Relations in a Changing World 269–287* (A. Marx et al. eds, Leuven Centre for Global Governance Studies 2013).

corresponds to another characteristic development in Korea – *chaebol*, the fast-growing family enterprise groups that drives the Korean economy. The industrial development policy of Korea has been centralized throughout the entire country. Starting from 1960s, the government began to implement the national development plans on the chosen *chaebol*, which led to the repression of the development of innovative entrepreneurship in small and medium-sized enterprises (SMEs). For decades, these *chaebol* have grown into gigantic conglomerates – Samsung, LG, SK, to name a few – and are now dominating the Korea economy. Soonghyun Daniel Lee mentioned the ‘Korea’s Chaebol-based economic structure and its strict hierarchical and loyalty-based work culture’ in his study on KORUS FTA. He concluded with the remark that it is important to take into account the cultures of trading parties when setting legal framework because without appreciating such underlying norms, ‘it would be hard to distinguish which substantive rules are legally effective and which are not’.²⁵ Ehrlich and Kang pointed out the similar idea by saying that ‘in Korea, there has long been a gap between the law on the books and the law in action. The laws on the books have been in accordance with global standards for several years, but it has not been an easy task to reform the actual business conduct of the *chaebol*’.²⁶ They used an insightful example of a 2003 lawsuit which charged SK Group, one of the Korea’s biggest *chaebol*, with a USD 1.2 billion accounting fraud. The case resulted in a chain reaction where numerous Korean multinational corporations went adopting codes of conduct. However, in their research findings, these new codes of conducts either lacked the enforcement mechanism or omitted crucial aspects that the board of directors actually needed to focus on. In reality, such codes of conduct would be ‘nothing more than vague exhortations from the company’s Chairman to work hard and do a good job’.²⁷

All these sociocultural traits of the Korean society have become one way or another the barriers to trade in a globalized sense. Here let us focus on the EU-Korea FTA. We will first point out the actors and venues for regulatory calibration, and then highlight some particular policy areas to examine the functioning of the regulatory network.

²⁵ S. D. Lee, *Laissez-Faire International Investor-State Dispute Resolution Mechanism: The Inadequacy of Adopting U.S. Legal Standards for the KORUS FTA*, *Transnat’l L. & Contemp. Probs.* 520, 499–523 (2009).

²⁶ C. P. Ehrlich & D.-S. Kang, *A Look at Korea Corporate Codes of Conduct*, in *Legal Reform in Korea* 106 (T. Ginsburg ed., Routledge Curzon 2004).

²⁷ *Ibid.*, at 97.

4 TRANSNATIONAL REGULATORY NETWORK UNDER THE EU-KOREA FTA

The two very different normative environments thus present a great challenge to the regulatory convergence. On the operational level, the institutional provisions of the FTA established seven Specialized Committees, seven Working Groups and an Intellectual Property Dialogue. The annual EU-Korea FTA Trade Committee at ministerial level plays a supervisory role and ensure that the FTA operates properly. The Trade Committee, therefore, plays a pivotal role in regulatory calibration, since it consistently monitors implementation and generates mechanisms for learning in case of implementation gaps. Specialized Committees and Working Groups also provide institutional platform for the experiences and best practices sharing. In doing so, both sides expect to exchange information and cooperate in order to avoid regulatory divergences and NTBs to trade. The structured cooperation and dialogue, and even informal networking and exchanging policymakers, all contribute to the harmonization of the regulatory framework on the emerging policy areas. Through the sharing of experiences and best practices, the two parties come near with each other on their regulatory framework.

Take the implementation of FTA concerning trade and sustainable development for example, in the statement made by the European Commission after the FTA signing, the Domestic Advisory Group (DAG) shall be established in order to ensure proper implementation.²⁸ The DAG will be composed of equal representation of business, trade unions and non-governmental organizations. During the annual meeting of Committee on Trade and Sustainable Development, the forum for performance examination and the venue to address new issues, a wide range of topics will be brought to table, mainly on the environmental segment and the labour policy segment. In the meeting, the Civil Society Forum, a forum where the EU and Korea's members meet once a year to conduct dialogue on sustainable development of trade aspects, will also present an update on the work of DAGs. Other international platforms where both the EU and Korea take part of, such as Asia-Europe Meetings (ASEM) or World Trade Organization (WTO), could also serve as venues for calibration.

Here we highlight certain regulatory areas in the EU-Korea FTA that are not usually included in FTAs but lay out essential norms to the EU.

4.1 REGULATIONS ON IPRS

Looking first at the IPRs regulations of the EU-Korea FTA, which represent one of the core values the EU stands for, the agreement establishes a strong chapter on

²⁸ See EU-Korea FTA, Art. 13.12(3)–(5).

intellectual property regulations.²⁹ It includes some innovative provisions on copyright, designs, and GIs. More remarkably, the chapter contains a whole section on the enforcement of IPRs based on the EU's internal rules in the enforcement directive.³⁰ More than that, it actually demonstrates a high-standard regulatory framework, including some provisions that were not even regulated under the EU law.³¹ As for border measures, they can now be applied in case of suspected infringements of IP rights such as counterfeit trademark goods, patents, plant variety rights, etc. As for the circumstances under which border measures may be applied, the agreement cover importation, exportation, and transit of goods.³² And it is specifically written in Article 10.67 (4) that Korea shall fully implement the obligation under the border measures clauses within two years of the entry into force of the agreement. In effect, Korea has amended its legislation which only covered trademark and copyright infringements to provide for the possibility of border measures against patents. Institutional wise, this demonstrates how the European Commission has successfully introduced its core values during the FTA negotiation process and has then induced national regulatory reform. In this way, the agreement offers a high level of protection for commercially important European GIs, especially those valuable GI-designated agricultural and beverage products, which goes beyond what other multilateral trading rules provide.³³

In practice, the annual report on the implementation of the EU-Korea FTA in 2016 shows that during the IP Dialogue held in Seoul on 25 September 2014, both sides gave an update about the legislative and policy developments in the IP area and also discussed the enforcement issues and their respective strategies towards IP issues in third countries. However, the EU also recalled the FTA implementation issue concerning the provisions on public performance rights, and the need for aligning Korea legislation with the FTA, especially about the pending revision of the Copyright Act by Korea.³⁴

4.2 REGULATIONS ON ENVIRONMENT

Environmental issue has always been an eminent subject for the EU policy-making. Nevertheless, the diffusion of environmental norms under FTA framework is less constraining. In fact, it is observed that most of the environmental

²⁹ *Ibid.*, Art. 10.

³⁰ *Ibid.*, Ch. 10, s. C, Art. 10.41–10.69.

³¹ E.g. the criminal enforcement of IPRs provision in Art. 10.54 of the EU-Korea FTA.

³² *Ibid.*, Art. 10.67.

³³ D.-C. Horng, *Reshaping the EU's FTA Policy in a Globalizing Economy: The Case of the EU-Korea FTA*, 46(2) *J. World Trade* 314–316 (2012).

³⁴ European Commission, *Report from the Commission to the European Parliament and the Council. Annual Report on the Implementation of the EU-Korea Free Trade Agreement*, COM(2016) 268 final, 9–10 (2016).

clauses of EU bilateral agreements simply provide very general objectives and possible key areas for cooperation without noting concrete cooperation activities which are left to further discussion and regular dialogue between parties.³⁵ It is also the case with the EU-Korea FTA. Before the agreement came into light, the two parties have taken the sidelines of ASEM meetings to convene issues of common interests, especially to set priorities for environmental cooperation on various fields, such as climate change, green growth, energy technologies and energy efficiency.³⁶ Within the framework of the EU-Korea FTA, it is under Chapter Thirteen of the FTA, Trade and Sustainable Development, where Article 13.5 is contributed on the 'Multilateral environmental agreements'. The parties simply 'reaffirm their commitments to the effective implementation in their laws and practices of the multilateral environmental agreements to which they are party'³⁷ without specifying the agreements in question. However, the rhetoric remains general, loose, and conditional, which indicates a low degree of normativity. No clear benchmarks or indicators of success in implementing environmental clauses were determined, neither could we see precise monitoring and evaluation procedures.

Regarding the follow-up of the chapter, it is the Committee on Trade and Sustainable Development that takes the role of monitoring chapter application and continuous calibration on environmental policies. Going through and annual report on the agreement implementation, we can see that this mechanism has indeed served as the venue of dialogue and integration on environmental issues. According to the latest report, for example, during the Committee meeting in September 2015, the EU and Korea have once again exchanged their best practices on recycling, and also agreed to cooperate on illegal logging.³⁸ Other positive developments in environmental governance have also occurred in Korea. On 1 January 2015, Korea launched its Emissions Trading Scheme (ETS),³⁹ the first nation-wide cap-and-trade program in operation in Asia. With a cap of 573 MtCO₂e in 2015, it is the second largest ETS worldwide after the EU. As a non-Annex I country under the Kyoto Protocol, Korea has actually no legally binding obligation to reduce its emissions. But the Korean parliament has almost unanimously voted for adopting this framework, and the greenhouse gases

³⁵ M. Durán & E. Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Hart Publishing 2012).

³⁶ E. Morgera, *Environmental Cooperation between the EU and Korea*, in *The European Union and South Korea. The Legal Framework for Strengthening Trade, Economic and Political Relations* 194–211 (J. Harrison ed., Edinburgh University Press 2013).

³⁷ See EU-Korea FTA, Art. 13.5(2).

³⁸ European Commission, *supra* n. 34, at 10.

³⁹ This system was first carried out by the EU in 2005, with the intention to fight global warming. Under the 'cap and trade' principle, a maximum (cap) is set on the total amount of greenhouse gases that can be emitted by all gas-emitting companies. Allowances for emissions are then auctioned and allocated for free, and can subsequently be traded.

emissions in Korea is now expected to reduce – 37% of usual business level by 2030.⁴⁰ In the third meeting of the Committee on Trade and Sustainable Development held in Brussels in December 2014, the ETS launch was very much emphasized by both parties on further cooperation and business opportunities stemming from the carbon markets in Europe and East Asia.

4.3. REGULATIONS ON LABOUR RIGHTS

Another important vector of the sustainable development lies in the labour policies. As mentioned earlier, with the new generation of FTAs the EU tries to incorporate the standards for labour protection equalled to that of International Labour Organization (ILO) conventions in its FTAs signing with the world. The EU-Korea FTA is no exception. Under the Chapter on Trade and Sustainable Development, Article 13.4 is established for ‘Multilateral labor standards and agreements’. Not only are there declaratory affirmations on labour rights protection, clear references for both parties to follow,⁴¹ the agreement also specifically lists out the obligations deriving from the ILO fundamental principles, namely freedom of association and the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect to employment and education.⁴² Annex 13 of the FTA on ‘Cooperation on Trade and Sustainable Development’ also provides a more detailed indicative list with specific areas of cooperation. All these provisions on the labour issues indeed demonstrate the EU’s strong volition in promoting labour protection within its partner countries. Interestingly, we can also find this clause of labour protection in the KORUS FTA but with looser constraint. In KORUS FTA, the parties are under clear obligation to adopt and maintain ILO standards within their domestic laws and practices, meaning that this obligation is only enforceable to the extent that violations occur in a manner affecting trade or investment between parties.⁴³

As for the follow-up cooperation on the matter, the Committee on Trade and Sustainable Development also serves as the key mechanism as implementation tool. In the meeting of 2015, besides usual updates on best practices and lessons learned on the implementation of ILO Convention, the ratification of the core ILO Conventions and other Conventions classified as ‘up-to-date’ by the ILO was

⁴⁰ See *International Carbon Action Partnership*, https://icapcarbonaction.com/en/?option=com_etsmap&task=export&format=pdf&layout=list&systems%5B%5D=47 (accessed 27 Dec. 2017)

⁴¹ Decent Work Agenda of the ILO and the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work.

⁴² See EU-Korea FTA, Art. 13.4.

⁴³ See Art. 19.2 of the KORUS FTA.

emphasized by both parties, in particular concerning forced labour, freedom of association and the right to collective bargaining. The Korean side also agreed to share texts setting out additional intended concrete steps towards removing remaining obstacles for ratification. Both parties agreed to launch a project under the Partnership Instrument to look into the implementation of the ILO Convention 111 on non-discrimination in employment and occupation, with the aim of enhancing compliance.⁴⁴

4.5 REGULATIONS ON INDUSTRY

For policies on industry, the focuses are mostly put on the competition norms, which aim not only at fair competition, but also at the protection of the process of competition.⁴⁵ The EU and Korea traditionally have very different approaches to this matter. While the former focuses more on competitiveness ranging from entrepreneurship and SME promotion to fostering Research and Development (R&D) and innovation, the latter, as mentioned earlier, is used to an industrial policy that is centralized throughout the entire country.⁴⁶

Chapter 11 of the EU-Korea FTA lays out the regulations on competition with some interesting new provisions which go beyond existing multilateral discipline, including the enactment and enforcement of competition law,⁴⁷ cooperation between the competent authorities⁴⁸ and the duties applicable to public corporations and state monopolies.⁴⁹ However, the above mentioned provisions are not subject to arbitration under dispute settlement chapter of the agreement. Rather, the cooperative mechanisms set up under this chapter⁵⁰ and the 2009 Agreement Between Government of the Republic of Korea and the European Community concerning Cooperation on Anti-competitive Activities provide the only forum for settling disputes. In other words, the disputes arising from these innovative competition clauses must be settled through negotiation, rather than litigation.⁵¹

Take the example of the mechanical engineering industry, an industry that plays crucial role in economic growth and development in both Korea and a lot of EU Member States. From Bernadette Andreosso-O'Callaghan's study, the new

⁴⁴ European Commission, *supra* n. 34.

⁴⁵ J. H. Sung, *Some Reflections on Competition and Subsidies under the EU-Korea FTA*, in Harrison (ed.), *supra* n. 36, at 87–101.

⁴⁶ Pape, *supra* n. 24.

⁴⁷ See EU-Korea FTA, Art. 11.1–11.2.

⁴⁸ *Ibid.*, Art. 11.3.

⁴⁹ *Ibid.*, Art. 11.4–11.5.

⁵⁰ *Ibid.*, Art. 11.6–11.8.

⁵¹ Sung, *supra* n. 45, at 94.

direction of FTA has led to simplified export procedures and less bureaucracy. The mechanical engineering industry is characterized by a myriad of standards, technical regulations, market entry administrative procedures and rules related to IPRs. With the EU-Korea FTA, now the exported products to Korea do not require an export license issued by a foreign exchange bank anymore and the Ministry of Knowledge Economy helps exporters by making the information about trade restrictions readily available. The motivation for Korea to reform its structure lies in the facilitation of Korea exports of mechanical engineering into the EU market. That said, the author also mentioned about the insufficiency on the incorporation of the SMEs interests in their respective policy-making process, which should be worked on more for both sides.⁵²

Besides the above sectors of the regulatory framework, there are still other policy areas that demand further calibration and continuous monitoring. For example, regarding the chemicals regulation, Korea stays at an infancy stage of development,⁵³ which means that Korea could learn from EU experiences and build up its own upon them. Or about the rules of origin (ROO), a delicate area where the EU puts much attention to, the Korean exporters will need to make due efforts to fully comprehend the EU's ROO, and create a monitoring system to ensure compliance.

5 CONCLUSION

This article takes a normative perspective to examine the first FTA that the EU has signed under its new generation of FTAs strategy with Korea. The EU actually concluded this FTA in the aftermath of the financial crisis in Europe since 2009, under strong mobilization of protectionists with access to policy-makers,⁵⁴ which shows a vigorous neoliberal discourse within the EU to take the new generation of FTAs as a new tool to shape the new economic order in the world. From the Korean side, signing FTAs creating more liberalized trade environment have also been the national direction since 1998, albeit governments from different political parties. Both the EU and Korea thus decided to make good use of trade policy to pioneer overseas markets and to arrange investment protection mechanisms for their companies. The unprecedented FTA was in this way engendered at the right place in time. The most distinctive feature of this FTA lies in its ambition in

⁵² B. Andreosso-O'Callaghan, *The EU-Korea FTA and the Relaxation of Regulatory Measures in the Mechanical Engineering Industry*, in Marx et al. (eds), *supra* n. 24, at 105–120.

⁵³ K. Biedenkopf, *Assessing Possibilities for Enhanced EU-South Korea Cooperation on Chemical Regulation*, in Marx et al. (eds), *supra* n. 24, at 167–194.

⁵⁴ G. Siles-Brügge, *Resisting Protectionism After the Crisis: Strategic Economic Discourse and the EU-Korea Free Trade Agreement*, 16(5) *New Pol. Econ.* 627–653 (2011).

creating a comprehensive FTA that includes NTBs removal. The fact that the EU has only concluded two FTA⁵⁵ since the launching of the new generation of FTAs strategy suggests that for most countries, the comprehensive deep liberalization agenda that the EU promotes might be too ambitious from the outset.⁵⁶

This agreement thus makes a great example of a new generation of FTA that tries to converge regulatory framework and harmonize standards between two markets. In order to put into practice this new complex system of trade, the EU and Korea have developed together a regulatory network to implement the FTA provisions and monitor its execution. The effort is expected to be mutually beneficial. For the Korean side, the improved economic structure with institutional reform, thereby enhancing transparency and predictability in trade, is expected to foster incoming foreign direct investment (FDI) and structural adjustments. On the other hand, the EU not only aspires to benefit from the cost-reduction due to the converging regulatory framework, more importantly, it wishes to successfully export its trade rules and ideas through this new generation FTA. From the agreement we can well discern the values that the EU holds so dearly about being transformed into provisions, such as IPRs regulation, sustainable development, etc. It breaks new ground in these fields and enables closer dialogue and long-term engagement between the EU and Korea.⁵⁷

However, the findings of this article suggest a more reserved regard on EU's normative power on trade regulations and current practice with the case of EU-Korea FTA. In the section of 'Transnational regulatory network under the EU-Korea FTA', the article brought out a few policy areas to examine the EU norm diffusion in Korea, and it ends up with the conclusion that the degree of normativity that the EU norms possess in Korean market is moderate, with strong rhetorical commitment, slow formal adoption, and unremarkable behavioural compliance. In terms of rhetorical commitment, it can be well recognized both in the agreement and in the annual report of the FTA implementation that these EU norms have been repeatedly pledged by the Korean authorities. Not only that the agreement contains a lot of innovative provisions on sustainable development and social solidarity, these norms have been affirmed and reaffirmed by the Korean public discourse. At the same time, the formal adoption of these norms into legal measures has been slow. We can notice in the annual report of the FTA implementation that the EU has been recalling the FTA implementation issue and the need for aligning Korea legislation with the FTA. As for behavioural compliance, it

⁵⁵ The EU has also finalized the FTA with Singapore in 2014, though still waiting for formal approval by the EU, which makes it the second comprehensive FTA of the new generation of FTAs.

⁵⁶ B. A. Melo Araujo, *Intellectual Property and the EU's Deep Trade Agenda*, 16(2) J. Int'l Econ. L. 442 (2013).

⁵⁷ Hornig, *supra* n. 33, at 314.

might take more time and long-term empirical research to see the effects. However, with the current studies⁵⁸ no remarkable behavioural norm compliance has been recognized, except for, arguably, the ETS project launched by Korea in 2015. From a sociological perspective, more and more Korean movies are made that are based on labour rights issue and are receiving rave reviews, such as ‘The Empire of Shame (2014)’, ‘Cart (2014)’, which also reflects to a certain level the bleak working situation in Korea that has not respected the labour rights.

The NPE discourse thus is questioned in the case of EU-Korea FTA. In fact, the NPE faces its biggest challenge when the incentive is not big enough for EU’s counterpart to conduct regulative reforms and when its legitimacy is put into question. The most important incentive for Korea to carry out regulative reforms in order to meet the EU’s standards lies in the access to EU’s market and the potential flow of inward FDI. However, when we check the statistics of the five-year evaluation of the FTA (see Annex), we can see that even though the overall development in trade in goods is positive for both sides, it is much more profitable for the EU than for Korea. Regarding the legitimacy of the NPE discourse, a normative power can only be legitimate when it is recognized as one by its counterpart. In the case of EU-Korea relations, what hinders the EU norms recognition in Korea lies in the huge existing socio-cultural gap and the lack of understanding between the two societies. Europe and Korea are two societies with very different historical background and cultural heritage. The way people do business and their mentalities of doing business are therefore dissimilar. With the EU-Korea FTA, the rules are made, the regulatory framework is built, but if the new system is not acquired consciously by the people actually operating the system, the implementation of the agreement would not be as effective as expected. It takes not only government’s endeavour to enforce regulatory framework, it needs more communication and cooperation on the social level to create this normative legitimacy for the Korean society to take in the European norms and values. Besides the cultural factors that hamper the free trade argued in the ‘mismatched globalization’ section of this article, in the study on Korean elites’ views on the EU, even though the EU-Korea FTA enjoys a high profile as the most important issue in the Korea-EU bilateral relation, the overall EU perception over the past few years has not been positive, mainly due to the ongoing economic crisis.⁵⁹ With the ‘clean Brexit’⁶⁰ negotiations launched in 2017, the uncertainty and

⁵⁸ Cherry, *supra* n. 23; Andreosso-O’Callaghan, *supra* n. 52; Pape, *supra* n. 24; Marx, et al., *supra* n. 16.

⁵⁹ In the article, the authors argue that elites play a crucial role in influencing the public opinion in Korea by stratified levels of the spread of information with the elites on the top, media in the middle and the public at the bottom. See S.-H. Park & S.-W Yoon, *The EU in the View of Korean ‘Elites’: New Findings and Some Lessons*, 13 Asia-Eur. J. 1–21 (2015).

⁶⁰ UK’s Prime Minister Theresa May announced in 18 Jan. 2017, a ‘clean break’ for the UK would be the direction of further Brexit negotiations with the EU.

the expected long and daunting process are only going to make trade partners, such as Korea, even more doubtful about the EU economy. In terms of international relations, it is also noted that the Pacific Ocean still enjoys greater attention than the Eurasian continent in the Korean public's eyes.⁶¹ The lack of understanding and the not-so-positive public image would also damage the formation of normative power, which might lead to less willingness in undertaking the norms. In addition, before signing FTA with the EU and the US, the FTAs that Korea signed with other parties were of lower-level of liberalization, the impacts on industries were therefore not evident. Now with more and more products going into full liberalization, the Korean industries might have stronger opposing reaction to the high-standard FTA.

Hence, the implementation of new generation of FTA might need a new angle to tackle. Although generally speaking, the legal framework for NTBs areas remains in a soft-law term. And without strong incentive, such as financial and technical assistance or tremendous economic interest, it would be difficult to see straightaway compliance on EU norms in Korea. In some aspects, the regulatory framework has also some space for clearer calibration and more normativity assertion. Still, it makes a great example of how the EU uses its external action to assert its normative power with an FTA in an Asian country whose culture and values differ greatly from Europe. From the data gathered in this article, we can see that various platforms of different levels are taking place between the EU and Korea – formal committees and working groups, non-governmental stakeholders, civil society forum, and also, the emerging cooperative structures that are outside of the realm of established multilateral framework. It is believed that continuous dialogues through the transnational regulatory network on different layers of the society would make real impact on not only fostering and strengthening the bilateral relationship between the EU and Korea, but converging the two economies in terms of norms-setting for the new economic order of the twenty-first century, even only by increments.

ANNEX

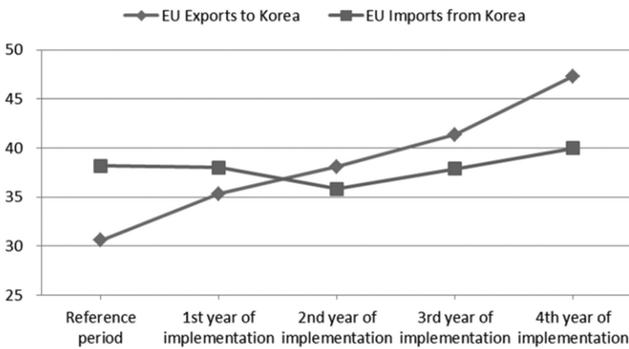
1 July 2016 marks the fifth anniversary of the EU-Korea FTA. In the annual report published by the European Commission on the implementation of the EU-Korea FTA in 2016, we can get an overall assessment of trade evolution between the two parties.⁶² The overall evolution for trade in goods is positive for both sides, especially in benefit for the EU (see Graph 1). EU exports of goods to Korea increased by 55%, from EUR 30,6 billion in the twelve-month

⁶¹ Pape, *supra* n. 24.

⁶² European Commission, *supra* n. 34.

period before the FTA took effect to EUR 47,3 billion in the fourth year of the FTA implementation. During the same period, EU exports to Korea of products that were fully or partially liberalized by the FTA grew more than overall exports, i.e. by 57% and 71% respectively. On the other hand, EU imports from Korea were broadly stable. The main reason for the weaker performance of imports from Korea was the decreased demands in the EU due to the financial crisis. It is worth noting that in the fourth year of implementation, EU imports from Korea increased more than EU imports from the world, which increased 2% compared to the previous year. Overall, the EUR 7,6 billion trade deficits with Korea turned into a trade surplus of EUR 7,3 billion in the EU's favour.

*Graph 1 EU Exports to and Imports from Korea, July 2010–June 2015
(Billion EUR)*



Source: EUROSTAT-COMEXT.

As for FDI, the statistics showed that in 2014 the FDI reached a new peak (see Table 1) for both sides, with EU FDI outward stocks to Korea equal to EUR 43.7 billion, whereas the EU FDI inward stocks from Korea totalled EUR 20.3 billion. However, from the reference year to the latest development, the number in FDI did not demonstrate a linear growing curve but rather a floating route. EU's outward FDI to Korea even showed a declining course until 2014.⁶³

⁶³ *Ibid.*, at 6.

Table 1 EU-Korea Foreign Direct Investment (Billion EUR)

	<i>Stocks</i>		<i>Flows</i>	
	<i>Inward</i>	<i>Outward</i>	<i>Inward</i>	<i>Outward</i>
2010	13,140	37,480	4,012	2,448
2011	10,782	36,306	1,810	2,217
2012	16,866	35,206	4,302	-179
2013(b)	14,871	32,308	1,751	1,172
2014	20,252	43,720	4,436	5,629