

**Panel of Experts Proceedings
Under Article 13.15 of the
EU – Korea Free Trade Agreement**

**Republic of Korea – Compliance with
Obligations under Article 13.4(3)
of the EU-Korea FTA**

**First Written Submission
by the European Union**

20 January 2020

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TABLE OF ABBREVIATIONS

Abbreviation	Full Name
CFA	Committee on Freedom of Association
EU	European Union
FKTU	Federation of Korean Trade Unions
FTA	Free Trade Agreement
GB	Governing Body of the ILO
ILO	International Labour Organisation
KCTU	Korean Confederation of Trade Unions
KFTU	Korean Fixed-Term Teachers' Union
MOEL	Korea's Ministry of Labour and Employment
MTU	Migrants' Trade Union
The 1998 ILO Declaration	ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up
TSD	Trade and Sustainable Development
TULRAA	Trade Union and Labor Relations Adjustment Act

LIST OF EXHIBITS

E-1	Trade Union and Labor Relations Adjustment Act (Act No. 5310, Mar. 13, 1997)
E-2	Supreme Court Decision 2014Du12598, 12604 Decided June 15, 2018

I. INTRODUCTION AND SUMMARY

1. The European Union (EU) and the Republic of Korea (Korea) are Parties to a Free Trade Agreement (EU-Korea FTA), signed on 6 October 2010,¹ which has been applied provisionally since 1 July 2011² and entered into force, after the completion of approval procedures, on 13 December 2015³.
2. Sustainable development is an overarching objective of the EU-Korea FTA⁴. In order to achieve that objective, the EU-Korea FTA includes a dedicated chapter on Trade and Sustainable Development (TSD)⁵. As part of the TSD Chapter, both Parties have made various commitments with regard to existing multilateral labour standards and agreements⁶.
3. In particular, pursuant to Article 13.4(3) of the EU-Korea FTA, the Parties have committed, in accordance with the obligations deriving from their membership of the International Labour Organisation (ILO) and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up⁷ (the 1998 ILO Declaration), to respect, promote and realise, in its laws and practices, the principles concerning the fundamental rights, including the freedom of association.
4. Korea purports to implement the principle of freedom of association through the Trade Union and Labor Relations Adjustment Act (TULRAA)⁸. For the reasons set out in this submission, the European Union considers that the following provisions of the TULRAA are incompatible with the freedom of

¹ Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ EU L 127/68 of 14.5.2011.

² Notice concerning the provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ EU L 168/1 of 28.6.2011.

³ Notice concerning the entry into force of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ EU L 307/1 of 25.11.2015.

⁴ Article 1 g) of the EU-Korea FTA.

⁵ Chapter 13 of the EU-Korea FTA.

⁶ Cf. Article 13.4 of the EU – Korea FTA.

⁷ International Labour Organization (ILO), ILO Declaration on Fundamental Principles and Rights at Work, June 1988, available at: <https://www.refworld.org/docid/425bbdf72.html> [accessed 14 January 2020].

⁸ Act. No. 5310, 13 March 1997, as successively amended (English translation provided as Exhibit E -2).

association and, therefore, with Korea's obligations under Article 13.4(3) of the EU-Korea FTA:

- Article 2.1 of the TULRAA, which defines a "worker" in such a manner that, as interpreted by the Korean authorities, it excludes from the scope of the freedom of association certain categories of self-employed persons, as well as dismissed and unemployed persons;
 - Article 2.4(d) of the TULRAA, which stipulates that an organisation shall not be considered as a trade union in cases where persons who do not fall under the definition of "worker" are allowed to join the organisation;
 - Article 12, paragraphs 1 to 3, of the TULRAA, in conjunction with Article 2.4 4 and Article 10 of the TULRAA, which provide for a discretionary certification procedure for the establishment of trade unions; and
 - Article 23.1 of the TULRAA, which provides that trade union officials may only be elected from among the members of the trade union.
5. The last sentence of Article 13.4(3) of the EU-Korea FTA further stipulates that each Party will make continued and sustained efforts towards ratifying the fundamental ILO Conventions. For the reasons set out in this submission, the EU considers that Korea's efforts towards ratifying the following fundamental ILO Conventions are inadequate:
- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87);
 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98);
 - Forced Labour Convention, 1930 (No. 29); and
 - Abolition of Forced Labour Convention, 1957 (No. 105).

II. PROCEDURAL HISTORY

6. On 17 December 2018, the European Union requested consultations with Korea pursuant to Article 13.14(1) of the EU-Korea FTA concerning *inter alia* the measures identified in section I of this submission.
7. The consultations took place on 21 January 2019 in Seoul with a view to reaching a mutually satisfactory resolution of the matter. Unfortunately, the matter has not been satisfactorily addressed through those consultations.
8. The European Union, therefore, requested on 4 July 2019 that a Panel of Experts be convened, pursuant to Article 13.15(1) of the EU-Korea FTA.

9. The Panel of experts was composed with effects on 30 December 2019, as follows:

Mr. Thomas Pinansky (Chairman)
Pr. Laurence Boisson de Chazournes
Pr. Jaemin Lee

III. FREEDOM OF ASSOCIATION

A. The legal standard

10. As part of the EU-Korea FTA's Chapter on Trade and Sustainable Development, each Party has committed to respect, promote and realise in its laws and practices the principles concerning certain fundamental labour rights, including the freedom of association.

11. Specifically, Article 13.4(3) of the EU-Korea FTA states in relevant part that:

The Parties, in accordance with the obligations deriving from membership of the ILO and the ILO declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely:

(a) freedom of association;

[...].

12. As provided expressly in the introductory phrase of Article 13.4(3), the scope and content of the commitments assumed by the Parties with regard to the freedom of association are to be determined in accordance with the obligations deriving from their membership of the ILO and with the 1998 ILO Declaration.
13. As regards the former, when a State decides to become a Member of the ILO, it accepts the fundamental principles embodied in the Constitution of the ILO⁹ and the Declaration of Philadelphia¹⁰ (which is annexed to the Constitution).

⁹ International Labour Organization (ILO), Constitution of the International Labour Organisation (ILO), 1 April 1919, available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO [accessed 14 January 2020].

¹⁰ Declaration Concerning the Aims and Purposes of the International Labour Organization, adopted at the 26th General Conference of the ILO in Philadelphia on 16 May 1946 as an Annex to the ILO Constitution, available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO [accessed 14 January 2020].

14. The Constitution of the ILO alludes expressly in its preamble to the “recognition of the principle of freedom of association”.
15. In turn, the Declaration of Philadelphia “reaffirms the fundamental principles on which the Organization is based and, in particular, that: [...] (b) freedom of [...] association [is] essential to sustained progress.[...]”¹¹.
16. The 1998 ILO Declaration recalls that all Members of the ILO are bound by the rights and principles set out in the ILO Constitution and the Declaration of Philadelphia. On that basis, it goes on to declare that all Members of the ILO have an obligation to respect, promote and realise in their laws and practices the principles concerning the fundamental rights which are the subject of the ILO fundamental conventions, including the freedom of association, regardless of whether they have ratified the relevant convention.
17. More precisely, the 1998 ILO Declaration states in relevant part that the International Labour Conference

Recalls:

(a) that in freely joining the ILO, all Members have endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia, and have undertaken to work towards attaining the overall objectives of the Organization to the best of their resources and fully in line with their specific circumstances;

(b) that these principles and rights have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both inside and outside the Organization.

Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;

(b) the elimination of all forms of forced or compulsory labour;

(c) the effective abolition of child labour; and

¹¹ Ibid. para. I(b).

(d) the elimination of discrimination in respect of employment and occupation.

18. The ILO has recognised eight ILO Conventions as fundamental¹². The relevant fundamental convention in the area of freedom of association is the Freedom of Association and Protection of the Right to Organise Convention of 1948 (No. 87).¹³
19. In 1951, the Governing Body (GB) of the ILO set up the Committee on Freedom of Association (CFA)¹⁴. The CFA has the mandate of examining *inter alia* the alleged infringements of the principle of freedom of association enshrined in the ILO Constitution and in the Declaration of Philadelphia¹⁵. Because that principle is binding on all Members, the CFA may examine complaints relating to the infringement of the freedom of association regardless of whether the country concerned has ratified Convention No. 87.¹⁶
20. The CFA is composed of nine regular members and nine deputies from the Government, Workers' and Employers' groups of the GB, and has an independent Chairperson¹⁷. The CFA meets three times a year and, taking into account the observations transmitted by governments, carries out an examination of the complaints lodged against them and recommends to the GB, as appropriate, that a case requires no further examination (definitive report) or that it should draw the attention of the government concerned to

¹² The eight fundamental ILO Conventions are the following:

- Forced Labour Convention, 1930 (No. 29);
- Abolition of Forced Labour Convention, 1957 (No. 105);
- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87);
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98);
- Equal Remuneration Convention, 1951 (No. 100);
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111);
- Minimum Age Convention, 1973 (No. 138); and
- Worst Forms of Child Labour Convention, 1999 (No. 182).

¹³ Adopted in San Francisco, at the 31st session of the International Labour Conference. It entered into force on 4 July 1950. Text available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232 [accessed on 14 January 2020].

¹⁴ CFA Compilation, Introduction, para. 1. An outline of the procedures followed by the CFA can be found at https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2565060:NO . [accessed on 14 January 2020].

¹⁵ *Ibid.*

¹⁶ CFA Compilation, para. 7.

¹⁷ CFA Compilation, Introduction, para. 2.

the problems that have been found and invite it to take the appropriate measures to resolve them (interim or follow-up reports).¹⁸

21. Since its inception, the CFA has dealt with more than 3,000 cases. The reports issued by the CFA constitute, in practice, the most comprehensive body of international jurisprudence relating to the interpretation of the principles of freedom of association, as enshrined in the ILO Constitution and the Declaration of Philadelphia and proclaimed in the 1998 ILO Declaration.¹⁹
22. The freedom of association, as interpreted by the CFA, entails various rights, including the following three rights relevant for this case: the right of workers, without distinction, to establish or to join organizations²⁰; the right of workers to establish organizations without prior authorization²¹; and the right of organizations to elect their representatives in full freedom.²²

1. Right of workers, without distinction, to establish or to join organizations

23. The freedom of association of workers implies, first and foremost, the right of workers, without distinction, to establish and to join organizations.
24. This right is expressed in Article 2 of Convention No. 87, which provides that:

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.

25. According to the CFA, the words “without distinction” used in Article 2 of Convention No. 87 mean that freedom of association should be guaranteed without discrimination “of any kind”:

Article 2 of Convention No. 87 is designed to give expression to the principle of non-discrimination in trade union matters, and the words

¹⁸ *Ibid.*

¹⁹ The reports of the CFA are available at: <https://www.ilo.org/dyn/normlex/en/f?p=1000:11000:::NO:::> [accessed 14 January 2020].
The CFA also publishes a compilation in concise form of the CFA decisions (the “CFA compilation”), available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0:::NO:70002:P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3949309,0 [accessed 14 January 2020].

²⁰ CFA Compilation, paras. 315-418.

²¹ CFA Compilation, paras. 419-471.

²² CFA Compilation, paras. 585-665.

*without distinction whatsoever used in this Article mean that freedom of association should be guaranteed without discrimination of any kind based on occupation, sex, colour, race, beliefs, nationality, political opinion, etc., not only to workers in the private sector of the economy, but also to civil servants and public service employees in general.*²³

26. The CFA has clarified that, in particular, the right to establish or join an organization cannot be made dependant on the existence of an employment relationship:

*The criterion for determining the persons covered by the right to organize is not based on the existence of an employment relationship. Workers who do not have employment contracts should have the right to form the organizations of their choosing if they so wish.*²⁴

27. The CFA has further clarified that the right to establish and join organizations must be recognized without discrimination based on the type of occupation:

*All workers, without distinction whatsoever, including without discrimination in regard to occupation, should have the right to establish and join organizations of their own choosing.*²⁵

28. More specifically, the CFA has confirmed that, by virtue of the principles of freedom of association, the right to establish and join an organization cannot be made dependant on the existence of an employment relationship and must be accorded also to self-employed workers:

*By virtue of the principles of freedom of association, all workers with the sole exception of members of the armed forces and the police should have the right to establish and join organizations of their own choosing. The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which is often non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organize.*²⁶

29. The CFA has also found that it is contrary to the principles of freedom of association to deprive dismissed workers from the right to join organizations:

A provision depriving dismissed workers of the right to union membership is incompatible with the principles of freedom of association since it deprives the persons concerned of joining the organization of their choice. Such a provision entails the risk of acts

²³ CFA Compilation, para. 315.

²⁴ CFA Compilation, para. 330 and related cases cited therein.

²⁵ CFA Compilation, para. 332 and related cases cited therein.

²⁶ CFA Compilation, para. 387 and related cases cited therein.

of anti-union discrimination being carried out to the extent that the dismissal of trade union activists would prevent them from continuing their trade union activities within their organization.²⁷

30. Similarly, the CFA has found that it is incompatible with the freedom of association to deny unemployed workers the right to join an organization.²⁸

2. Right of workers to establish organizations without prior authorization

31. Article 2 of Convention No. 87 reflects the principle that workers and employers have the right to establish organisations without previous authorisation.

32. The CFA has repeatedly stated that:

The principle of freedom of association would often remain a dead letter if workers and employers were required to obtain any kind of previous authorization to enable them to establish an organization. Such authorization could concern the formation of the trade union organization itself, the need to obtain discretionary approval of the constitution or rules of the organization, or, again, authorization for taking steps prior to the establishment of the organization. This does not mean that the founders of an organization are freed from the duty of observing formalities concerning publicity or other similar formalities which may be prescribed by law. However, such requirements must not be such as to be equivalent in practice to previous authorization, or as to constitute such an obstacle to the establishment of an organization that they amount in practice to outright prohibition. Even in cases where registration is optional but where such registration confers on the organization the basic rights enabling it to further and defend the interests of its members, the fact that the authority competent to effect registration has discretionary power to refuse this formality is not very different from cases in which previous authorization is required.²⁹

33. Thus, the CFA has concluded in several cases that, although the founders of a trade union should comply with the formalities prescribed by legislation, these formalities should not be of such a nature as to impair the free establishment of organizations.³⁰
34. The CFA has also recalled, notably in the follow-up to Case No. 1865, concerning a complaint filed on 14 December 1995 against Korea, that:

²⁷ Case No. 1865 (Korea), Report No. 382, June 2017, para. 42.

²⁸ See e.g. Case No. 1865 (Korea), Report No. 353, March 2009, para. 720.

²⁹ CFA Compilation, para. 419 and related cases cited therein.

³⁰ CFA Compilation, para. 424 and related cases cited therein.

the formalities prescribed by law for the establishment of a trade union should not be applied in such a manner as to delay or prevent the establishment of trade union organizations. Any delay caused by authorities in registering a trade union constitutes an infringement of Article 2 of Convention No. 87. National legislation providing that an organization must deposit its rules is compatible with Article 2 of Convention No. 87 if it is merely a formality to ensure that those rules are made public. However, problems may arise when the competent authorities are obliged by law to request the founders of organizations to incorporate in their constitution certain provisions which are not in accord with the principles of freedom of association [Digest, op. cit., paras 279–280].³¹

3. Right of organizations to elect their representatives in full freedom

35. Freedom of association also implies the right of workers and employers to elect their representatives in full freedom. This right is expressed in Article 3 of Convention No. 87, which provides that:

1. *Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.*
2. *The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.*

36. The CFA has observed that:

The right of workers organizations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any intervention which might impair the exercise of this right, whether it be in determining the conditions of eligibility of leaders or in the conduct of the elections themselves.³²

37. As regards in particular the conditions of eligibility, the CFA has found that:

The determination of conditions of eligibility for membership or office is a matter that should be left to the discretion of union/employer organization by-laws and the public authorities should refrain from any intervention which might impair the exercise of this right.³³

³¹ Effect given to the recommendations of the committee and the Governing Body - Report No 363, March 2012, para. 125.

³² CFA Compilation, para. 589 and related cases cited therein.

³³ CFA Compilation, para. 606 and related cases cited therein.

B. Articles 2(1) and 2(4)(d) of the TULRAA breach the right of workers, without distinction, to establish and to join organizations

38. Article 5 of the TULRAA provides that:

Workers are free to organize a trade union or to join it, except for public servants or teachers who are subject to other enactments.

39. The term “worker” is defined in Article 2(1) of the TULRAA as:

a person who lives on wages, salary, or other equivalent form of income earned in pursuit of any type of job.

40. Article 2(4) of the TULRAA further provides that an organization “shall not be regarded as a trade union” where it falls into one of the following categories:

[...]

D. Where those who are not workers are allowed to join the organization. Provided that a dismissed person shall not be regarded as a person who is not a worker, until a review decision is made by the National Labor Relations Commission when he/she has made an application to the Labor Relations Commission for remedies for unfair labor practices.

[...]

41. The definition of “worker” in Article 2(1) of the TULRAA, as interpreted by the Korean authorities, excludes some categories of self-employed workers, as well as dismissed and unemployed workers, from the beneficiaries of the freedom of association accorded by Article 5 of the TULRAA.

42. More specifically, according to a recent decision of Korea’s Supreme Court, which restates previous case-law:

“Worker” under the Trade Union and Labor Relations Adjustment Act (hereinafter “Trade Union Act”) refers to any person who provides labor to another party based on a subordinate relationship and receives wage, etc. in return. Determination as to whether a person may be deemed a “worker” as prescribed by the Trade Union Act ought to consider the following: (i) whether a worker’s source of income is mainly dependent on a specific employer; (ii) whether an employer unilaterally decides the terms of a contract, including wage, that it concludes with a worker who provides the necessary labor; (iii) whether a worker gains market access by way of providing the essential labor to perform an employer’s business; (iv) whether the legal relationship between a worker and an employer is of a substantially continuous and exclusive nature; (v) whether there exists a certain degree of supervisory/managerial relationship between an employer and a worker; and (vi) whether income, such as wage or salary, that a worker receives from his/her employer is a consideration for provision of labor (see, e.g., Supreme Court

*Decisions 90Nu1731, May 25, 1993; 2005Da20910, May 11, 2006).*³⁴

43. Relying on the above criteria, the Korean authorities have excluded from the notion of “worker” and, as a result, denied the right to establish and join organizations to certain categories of self-employed workers.³⁵
44. For example, as acknowledged by the Korean Government before the CFA in the Case No. 2062, Korea’s Supreme Court has excluded from the notion of workers under the TULRAA the drivers of certain types of vehicles:

*[...] the Committee notes that the Government states that: (i) the provisions of labour laws are, in principle, applicable only to workers and employers with a “contractual employment relationship”; (ii) according to the Supreme Court, this necessitates an employer–employee relationship which is given if the worker is under the supervision or direction of the alleged employer, is paid wages by the employer as a reward for the work performed, and according to the nature and specifics of the work; (iii) the Supreme Court denied the employee status of drivers of ready-mixed concrete/cargo/dump trucks because the drivers have the ownership of the vehicles, work independently without specific supervision and oversight by the company and bear overall costs incurred on the job; their organizations are thus not acknowledged as trade unions pursuant to the TULRAA; [...].*³⁶

45. The provision in the last sentence of Article 2(4)(d) of the TULRAA has the a *contrario* implication that dismissed workers are not to be considered as workers; and, indeed, dismissed workers are generally denied by the Korean authorities the right to establish, join or remain members of a union.

³⁴ Supreme Court Decision 2014Du12598, 12604 decided 15 June 2018 (English translation provided as Exhibit E – 2).

³⁵ According to the *amicus curiae* brief submitted by the Korean Confederation of Trade Unions (KCTU),

Out of 25 million working population, about 2.3 million (9.2 %) are in non standard forms of employment, such as broadcasting and animator creators, the caregivers, the door-to-door delivery persons, the motorized delivery service persons, the replacement drivers, the telemarketers. The right to freedom of association of workers in non standard forms of employment is denied due to the narrow definition of “worker” under the Article 2.1 of the TULRAA.

(KCTU’s *amicus curiae* brief, page 4).

More precisely, the KCTU observes that, for example, “[...] trade union registration of the insurance planners, the replacement drivers, the construction equipment operators and the cargo truck drivers have been repeatedly rejected or delayed” (*Ibid.*). Similarly, according to the KCTU, “the union registrations of after school activity lecturers, chauffeur service drivers has been delayed until today.” (*Ibid.*, page 5).

See also the *amicus curiae* brief submitted by the Federation of Korean Trade Unions (FKTU), at pages 1 to 2.

³⁶ Case No 2602, Report No 363, March 2012, para. 460.

46. Similarly, unemployed workers are not regarded as “workers” within the meaning of Article 2(1) of the TULRAA and are generally denied the right to establish or join a union.³⁷
47. The Korean Government has confirmed before the CFA in Case No. 1865 that dismissed and unemployed workers are not considered as “workers” for the purposes of the TULRAA and are not allowed to join unions, except in some cases where trade unions have been organized above the enterprise level, e.g. at the industry, sector or regional levels.³⁸
48. As explained above in Section III.A.1, the right to establish or join organizations must be accorded to all workers, including all categories of self-employed workers, as well as all dismissed and unemployed workers, regardless of the level at which the unions are organised. By failing to do so, the TULRAA is in breach of the freedom of association.
49. The CFA has repeatedly found that, for the reasons explained above, the TULRAA is incompatible with the freedom of association and recommended Korea to take the necessary measures.
50. Thus, as regards self-employed workers, the CFA recommended in Case No. 2062 that Korea takes:

*[...]the necessary measures to ensure that “self-employed” workers, such as heavy good vehicle drivers, fully enjoy freedom of association rights, in particular the right to join the organizations of their own choosing.*³⁹

51. In turn, as regards dismissed and unemployed workers, the CFA has repeatedly recommended in Case No. 185 that Korea

*[...] repeal the provisions prohibiting dismissed and unemployed workers from keeping their union membership ... (section [...] 2(4)(d) [...] of the TULRAA).*⁴⁰

³⁷ For example, in 2013 Korea’s Ministry of Labour and Employment (MOEL) refused the registration of the Korean Teachers and Education Workers Union (KTU) on the ground that its by-laws allowed the membership of dismissed and unemployed workers. See KCTU’s *amicus curiae* brief at page 8. See also the *amicus curiae* brief submitted by the Korean Fixed-Term Teachers’ Union (KFTU) at para. 5.

Similarly, according to KFTU, MOEL has rejected the registration of KFTU in 2018, and again in 2019, because its by-laws allow unemployed and dismissed workers as members. (KFTU’s *amicus curiae* brief, paras. 4 and 5 and accompanying evidence).

³⁸ Case No 1865, Report No. 353, March 2009, paras. 664 and 720.

³⁹ Case No 2062, Report No. 363, March 2012, paras. 461 and 467 e).

⁴⁰ Case No 1865, Report No. 353, March 2009, CFA Recommendations, para. 749, c) (v).

52. So far, however, Korea has not implemented either of the above mentioned CFA recommendations.

C. *Article 12, paragraphs 1 to 3, of the TULRAA, in conjunction with Article 2, paragraph 4, and Article 10, paragraph 1, breach the right of workers to establish organizations without prior authorization*

53. Article 12, paragraphs 1 to 3, of the TULRAA, in connection with Article 2, paragraph 4, and Article 10, paragraph 1, provide for a discretionary certification procedure for the establishment of trade unions.

54. Article 2, paragraph 4, of the TULRAA provides that an organization “shall not be regarded as a trade union” where it falls into one of the following categories:

A. *Where an employer or other persons who always act in their employer’s interest are allowed to join the organization;*

B. *In cases where most of the expenditure is supported by the employer;*

C. *Where activities of an organization are only aimed at mutual benefits, moral culture or other welfare undertakings;*

D. *Where those who are not workers are allowed to join the organization, provided that a dismissed person shall not be regarded as a person who is not a worker, until a review decision is made by the National Labor Relations Commission when he/she has made an application to the Labor Relations Commission for remedies for unfair labor practices;*

E. *Where the aims of the organization are mainly directed at political movements;*

55. Article 10, paragraph 1, of the TULRAA requires a person who intends to establish a trade union to prepare a report containing a number of information elements and to submit that report, together with the bylaws of the organization, to the competent administrative authorities. Pursuant to Article 12, paragraph 1, the certificate shall be issued by the administrative authorities within three days after receiving the report on establishment referred to in Article 10, paragraph 1, except in the cases prescribed in paragraphs 2 and 3.

56. Paragraphs 2 and 3 of Article 12 of the TULRAA provide:

(2) In cases where a report or bylaws need to be supplemented because of any omission or other reasons, the administrative

authorities shall order a supplement thereof by designating a submission period up to twenty days in accordance with the Presidential Decree. Upon receiving the supplemented report or bylaws, a certificate shall be issued within three days.

(3) The administrative authorities shall return a report filed in cases where a trade union which made the report falls under any of the following subparagraphs:

1. Where a trade union falls within the categories of each subparagraph 4 of Article 2;

2. Where supplements are not submitted within the designated period in spite of the order to supplement a report in accordance with the provisions of paragraph (2).

57. As a result of these provisions, the competent Korean administrative authorities have in the past delayed or refused the certification of trade unions.⁴¹ The power granted to these authorities to order a supplement of the report required by Article 10 has a discretionary nature, because it may be exercised not only in the case of omissions, but also for "other reasons"⁴² which are not specified in the TULRAA.
58. Moreover, in accordance with Article 12, paragraph 3, the certification may be refused where the trade union falls within any of the categories described in Article 2, paragraph 4, namely if, in the opinion of the administrative

⁴¹ According to the KCTU's *amicus curiae* brief (at page 9), "*the administrative authority exercises a wide range of discretionary power when it reviews the union establishment report and delay or reject to issue a certification.*"

KCTU gives the examples of the National After School Activity Lecturers' Union and of the National Chauffeur Service Drivers Union as recent instances of delay or rejection of union certification by MOEL. In its view, "*the system of rejecting the establishment report under Article 12 of the TULRAA infringes the freedom of association by causing 'the same result as prior approval by the administrative authorities'.*"

The *amicus curiae* brief submitted by the Korean Federation of Service Workers' Union (KFSU) confirms these examples (at pages 3 to 6) and adds the example of the National Home-study Material Business Union (at pages 5 and 6).

Similarly, according to the FKJU's *amicus curiae* brief (at page 2), "*the Korean Government has implemented a de facto authorization system [...] many union establishment reports filed by home-study teachers, insurance planners, hired drivers, parcel delivery persons, construction machine workers, cargo truck drivers, telemarketers, etc. have been rejected.*"

The Korean Fixed-term Teachers Union also alleges in its *amicus curiae* brief that its applications for certification have been repeatedly rejected by MOEL and provides English translations of the 2018 and 2019 rejection letters (at pages 5 and seq.). It adds the example of the Korean Teachers and Education Workers Union (KTU) whose certification was rejected in 2013.

⁴² That conclusion remains valid if, as argued by the Korean authorities during the consultations, the correct translation of the relevant part of Article 12, paragraph 2, is not "need to be supplemented because of any omission or other reasons" but rather "need to be supplemented because of any omission, etc."

authorities, “the aims of the organization are mainly directed at political movements”.⁴³

59. In this respect, in a case concerning Korea, the CFA had the opportunity to recall that:

provisions imposing a general prohibition on political activities by trade unions for the promotion of their specific objectives are contrary to the principles of freedom of association. A general prohibition on trade unions from engaging in any political activities would not only be incompatible with the principles of freedom of association, but also unrealistic in practice. Trade union organizations may wish, for example, to express publicly their opinion regarding the Government’s economic and social policy [see Digest, op. cit., paras 500 and 503]. The full exercise of trade union rights calls for a free flow of information, opinions and ideas, and to this end workers, employers and their organizations should enjoy freedom of opinion and expression at their meetings, in their publications and in the course of other trade union activities. Nevertheless, in expressing their opinions, trade union organizations should respect the limits of propriety and refrain from the use of insulting language [Digest, op. cit., para. 154].⁴⁴

60. The CFA has also reiterated on several occasions that administrative authorities should not be able to refuse registration of an organization simply because they consider that the organization could exceed normal union activities or that it might not be able to exercise its functions. Such a system would be tantamount to subjecting the compulsory registration of trade unions to the previous authorization of the administrative authorities.⁴⁵
61. For the above reasons, the EU considers that the discretion accorded by the TULRAA to the administrative authorities when certifying trade unions is inconsistent with the principle of freedom of association that Korea committed to respecting, promoting and realising under Article 13.4 paragraph 3 (a) of the EU-Korea FTA.

D. Article 23(1) of the TULRAA breaches the right of organizations to elect their representatives in full freedom

62. Article 23(1) of the TULRAA provides that:

⁴³ According to the *amicus curiae* brief submitted by KCTU (at page 9) :

“In case of Migrants’ Trade Union (MTU) and the Youth Union, the Ministry of Employment and Labour have returned the reports of the establishment with a false allegation that their aims are mainly directed at political movement.”

⁴⁴ Case No 1865 (Korea), Report No 363, para. 131.

⁴⁵ CFA Compilation, para. 451.

Union officials shall be elected from among the union members.

63. This requirement is incompatible with the right of the unions to elect their representatives in full freedom, which is expressed in Article 3 of Convention No. 87. As explained above in Section III.A.3, that right implies that the determination of the conditions of eligibility should be left to the discretion of the union.
64. Moreover, in conjunction with the restrictive definition of “workers” in Article 2(1) and with Article 2(4)(d) of the TULRAA, which exclude dismissed workers from union membership, Article 23(1) entails the risk of acts of anti-union discrimination being carried out, to the extent that the dismissal of a trade union activist could be used in order to prevent them from continuing their activities as trade union officials.⁴⁶
65. For the above reasons, the CFA has repeatedly found in Case No. 1865 that Article 23(1) of the TULRAA is incompatible with the freedom of association and recommended Korea to repeal it.⁴⁷ So far, however, Korea has not implemented this recommendation.⁴⁸

E. Conclusion

66. For the above reasons, Korea does not comply with the principles of the freedom of association and, therefore, with its obligations pursuant to Article 13.4 (3) of the EU-Korea FTA.

IV. RATIFICATION OF OUTSTANDING FUNDAMENTAL ILO CONVENTIONS

A. Legal Standard

67. The last sentence of the last subparagraph of Article 13.4, paragraph 3, of the EU-Korea FTA requires the Parties to make continued and sustained efforts towards ratifying the fundamental ILO Conventions.
68. That subparagraph, which records the commitments of the Parties as regards ILO Conventions, is worded as follows:

The Parties reaffirm the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the European

⁴⁶ Case No 1865 (Korea), Report No 382, June 2017, para. 42.

⁴⁷ See Case No 1865, report 353, March 2009, CFA Recommendations, para. 749, c) (v).

⁴⁸ See KCTU’s *amicus curiae* brief, at p. 9 and FKJU’s *amicus curiae* brief at p. 2.

Union have ratified respectively. The Parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as 'up-to-date' by the ILO.

69. In the preamble to the EU-Korea FTA, the Parties have noted their commitment to sustainable development, notably in its social dimension, including full and productive employment and decent work for all.⁴⁹ They have also declared their desire to strengthen the development and enforcement of labour laws and policies, promote basic workers' rights and implement the FTA in a manner consistent with these objectives.⁵⁰
70. In Article 13.1, paragraph 1, of the FTA, the Parties reaffirmed their commitment to promoting the development of international trade in such a way as to contribute to the objective of sustainable development and to ensure that this objective is integrated and reflected at every level of their trade relationship.
71. In addition, in Article 13.6, paragraph 1, of the FTA, they have acknowledged that core labour standards and decent work should be an integral part of the economic and trade policies pursued by the Parties:

[...] The Parties recognise the beneficial role that core labour standards and decent work can have on economic efficiency, innovation and productivity, and they highlight the value of greater policy coherence between trade policies, on the one hand, and employment and labour policies on the other.

72. The obligation to make continued and sustained efforts towards ratifying the fundamental ILO Conventions is a key element in the balance of rights and obligations arising from the EU-Korea FTA. As recalled in the 1998 ILO Declaration, these Conventions express and develop the core principles and rights that all ILO Members have endorsed when they freely joined the ILO. Under the EU-Korea FTA, the Parties have made specific commitments in this respect, as detailed in the last subparagraph of Article 13.4, paragraph 3.
73. Under the EU-Korea FTA, ratification by the Parties of all the fundamental ILO Conventions is not only required to comply with specific commitments, it is also necessary to attain the wider sustainable development objectives of the FTA.
74. Therefore, the obligation to make continued and sustained efforts towards ratifying the fundamental ILO Conventions is a distinct obligation imposed on

⁴⁹ See the fifth recital of the preamble to the EU-Korea FTA.

⁵⁰ See the eleventh recital of the preamble to the EU-Korea FTA.

the Parties to the EU-Korea FTA, which goes beyond the obligations of ILO Members in respect of Conventions as laid down in Article 19(5) of the ILO Constitution.

B. Korea has failed to make continued and sustained efforts to ratify fundamental ILO Conventions

75. Korea has been a Member of the ILO since 9 December 1991. Although Korea has ratified four out of the eight fundamental ILO Conventions, it has so far failed to ratify the following four fundamental Conventions:
- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87);
 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98);
 - Forced Labour Convention, 1930 (No. 29); and
 - Abolition of Forced Labour Convention, 1957 (No. 105).
76. The provision of the EU-Korea FTA requiring the Parties to make continued and sustained efforts towards ratifying the fundamental ILO Conventions has applied since 1 July 2011, in accordance with Article 15.10, paragraph 5, of the FTA.⁵¹
77. The EU considers that Korea's efforts towards ratifying the outstanding fundamental ILO Conventions are inadequate and constitute a breach of the last sentence of the last subparagraph of Article 13.14, paragraph 3, of the EU-Korea FTA.
78. To the best of the EU's knowledge, between 2011 and 2017 the Korean authorities took no significant steps towards the ratification of the outstanding four fundamental ILO Conventions mentioned above.
79. It was only in May 2017 that the newly elected President, Mr. Moon Jae-In, announced, for the first time, the executive's intention to set in motion the process of ratification of those fundamental Conventions. Nevertheless, their ratification was made conditional upon the previous amendment of the TULRAA and other provisions of domestic law, in accordance with the principle "legislation first, ratification later".

⁵¹

Providing for provisional application of the EU-Korea FTA. As noted above, the FTA entered into force, following the completion of approval procedures, on 13 December 2015.

80. In order to implement that approach, the Korean government set up an Expert Committee on Labour Relations Laws and Systems (Expert Committee) with the task of analysing the differences between national laws and the outstanding fundamental ILO Conventions. The Expert Committee was expected to produce non-binding recommendations. Based on these recommendations, the tripartite partners (government, employers and workers) were to discuss specific ways to improve laws and regulations as necessary for the ratification of the fundamental ILO Conventions.⁵² However, the social partners involved in the tripartite process failed to reach any agreement.⁵³
81. In May 2019, long after it had become clear that the tripartite process had failed, the Korean government announced that it would submit bills to the National Assembly for ratifying three of the outstanding fundamental Conventions and amending the TULRAA⁵⁴. Yet, it was not until October 2019 that the Government finally submitted to the National Assembly the announced bills for ratification of Conventions No. 87, No. 98 and No. 29.
82. The government's failure to submit to the National Assembly a bill for ratifying Convention No. 105 is allegedly due to certain inconsistencies between that convention and the provisions of Korea's criminal law which the government wishes to maintain.⁵⁵

⁵² See the minutes of the 6th EU Korea TSD Committee, Available at: https://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157105.PDF [accessed on 14 January 2020]

⁵³ The trade unions have expressed the view that the principle "legislation first, ratification later" is just an excuse for delaying the ratification. For example, according to KCTU's *amicus curiae* brief (at page 10):

[...] the Government is adhering to 'legislation first, ratification later' approach because it believes that the employers and the opposition in the National Assembly will oppose the ratification. It is the real intention of the Korean Government not to ratify the fundamental ILO Conventions by using the opposition as an excuse.

According to KCTU's brief, it would be both legally possible, according to article 60(1) of Korea's Constitution, and sufficient "to ratify first and then improve domestic laws and systems" (*Ibid.*, at pages 3 and 10).

Similarly, according to FKTU's *amicus curiae* brief (at page 4):

The Korean Government wasted too much time to reach a social consensus among tripartite partners in the Economic, Social & Labour Council although the employers' side keeps clearly opposing the amendment of labour laws and any consensus.

⁵⁴ The trade unions are of the view that the proposed amendments to the TULRAA are insufficient to bring it into conformity with the outstanding fundamental ILO Conventions. Furthermore, they consider the proposals "regressive" in other respects. See KCTU's *amicus curiae* brief, pages 3 to 4 and 11 to 12. See also FKTU's *amicus curiae* brief, pages 4 to 5.

⁵⁵ See KCTU's *amicus curiae* brief, page 11 and footnote 4.

83. Moreover, it appears that the bills submitted by the government have not yet been discussed by all the relevant parliamentary committees or put on agenda of the plenary of the National Assembly. It is also unclear whether legislators will discuss the ratification bills before they have approved related domestic legislation, for which proposals are also pending. Since the next general election to the National Assembly will take place in April of 2020 and the parliamentary session will end in mid-February 2020, it is unlikely that the ratification bills will be significantly discussed, let alone approved, during the current session. Pending legislative proposals will decay at the end of the parliamentary session and will have to be submitted afresh to the National Assembly.⁵⁶
84. Given this context, the EU concludes that Korea has neither continued nor sustained its efforts towards ratification of the ILO fundamental Conventions during the period of over eight years since the start of application of the EU-Korea FTA, which covered its Chapter 13 on Trade and Sustainable Development.
85. In fact, Korea has failed to act with the determination required in order to comply with its specific commitment under the last sentence of the last subparagraph of Article 13.14, paragraph 3, of the EU-Korea FTA.
86. That commitment is binding not only on the government of Korea, but also on its National Assembly and all other authorities or institutions that are constitutionally responsible for ensuring Korea's observance of its international obligations.
87. The nature of the commitment undertaken by Korea under the EU-Korea FTA in so far as the ratification of ILO Conventions is concerned, is substantially different from the obligations arising from Korea's membership of the ILO.
88. Article 19, paragraph 5, of the ILO Constitution defines the obligations of Members in respect of Conventions in the following terms:

In the case of a Convention:

(a) the Convention will be communicated to all Members for ratification;

(b) each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than 18 months from the closing of the

⁵⁶ See FKTU's *amicus curiae* brief, at page 4.

session of the Conference, bring the Convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action;

(c) Members shall inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring the Convention before the said competent authority or authorities, with particulars of the authority or authorities regarded as competent, and of the action taken by them;

(d) if the Member obtains the consent of the authority or authorities within whose competence the matter lies, it will communicate the formal ratification of the Convention to the Director-General and will take such action as may be necessary to make effective the provisions of such Convention;

(e) if the Member does not obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member except that it shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention.

89. In order to comply with the commitment undertaken under the EU-Korea FTA, it is not sufficient for the Government of Korea to “bring the Convention before the authority or authorities within whose competence the matter lies”. All competent Korean authorities or institutions are bound by the obligation to make continued and sustained efforts towards ratifying the fundamental ILO Conventions, as is also the case with the competent authorities or institutions of the EU Member States. Other obligations arising from the EU-Korea FTA are also binding on all the authorities or institutions of the Parties, which include legislative, executive, administrative and judicial authorities. The obligations stemming from the EU-Korea FTA are not exclusively addressed to the governments of the Parties.
90. The Oxford Dictionary of English⁵⁷ defines the word “effort” as “a vigorous or determined attempt”. The use of the adjectives “continued” and “sustained” denotes an obligation to make efforts that are both “persistent” and “without interruption”.
91. As can be seen from the above summary of steps taken by the Korean authorities to ensure ratification of the outstanding fundamental ILO Conventions, they have not resorted to all the appropriate measures and

procedures that could allow Korea to attain the desired objective. Therefore, Korea has so far refrained from making determined attempts to achieve ratification of the ILO fundamental Conventions.

92. In addition, it can be drawn from the above summary of steps that the Korean authorities have not persisted in their efforts, nor have they made uninterrupted efforts to ensure ratification of the relevant conventions.
93. Rather, during a period of nearly 6 years since the start of application of the EU-Korea FTA in July 2011, no significant steps were taken by the Korean authorities to comply with their specific obligation to make continued and sustained efforts towards ratification of the outstanding ILO fundamental Conventions.
94. Although the EU acknowledges that since May 2017 Korea has taken certain steps towards ratification of the fundamental ILO Conventions, its efforts remain inadequate.
95. Korea's failure to ratify the outstanding ILO fundamental Conventions prevents the Parties to the EU-Korea FTA from attaining their objective of promoting the development of international trade in such a way as to contribute to the objective of sustainable development, as stated in its Article 13.1, paragraph 1. Attainment of this objective is of the utmost importance for the EU and its Member States.
96. The Panel should find that by not making continued and sustained efforts towards ratifying the fundamental ILO Conventions, Korea has breached its obligation under the last sentence of the last subparagraph of Article 13.14, paragraph 3, of the EU-Korea FTA.

V. REQUEST FOR FINDINGS AND RECOMMENDATIONS

97. For the reasons set out in this submission, the European Union requests the Panel to find that the following measures applied by Korea are in breach of its obligation under Article 13.4, paragraph 3, of the EU-Korea FTA to respect, promote and realise, in its laws and practices, the principles concerning the freedom of association in accordance with the obligations deriving from membership of the ILO and the ILO declaration on Fundamental principles and Rights at Work:
 - Article 2.1 of the TULRAA, which defines a "worker" in a manner that, as interpreted by the Korean authorities, excludes certain categories of self-

employed persons, as well as dismissed and unemployed persons, from the scope of the freedom of association;

- Article 2.4(d) of the TULRAA, which stipulates that an organisation shall not be considered as a trade union in cases where persons who do not fall under the definition of “worker” are allowed to join the organisation;
- Article 23.1 of the TULRAA, which provides that trade union officials may only be elected from among the members of the trade union;
- Article 12, paragraphs 1 to 3, of the TULRAA, in conjunction with Article 2.4, paragraph 4, and Article 10, paragraph 1, which provide for a discretionary certification procedure for the establishment of trade unions.

98. The European Union also requests the Panel to find that Korea has failed to comply with its obligation under the last sentence of the last subparagraph of Article 13.4, paragraph 3, of the EU-Korea FTA to make continued and sustained efforts towards ratifying the following fundamental ILO Conventions:

- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87);
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98);
- Forced Labour Convention, 1930 (No. 29); and
- Abolition of Forced Labour Convention, 1957 (No. 105).

99. The European Union further requests the Panel to recommend Korea to take the necessary measures in order to fully implement the above mentioned obligations.



Margarida AFONSO



Ramon VIDAL-PUIG

Agents for the European Union

