

**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**

**Oral Statement
by the European Union**

1 October 2020

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EU-4	F. Maupain, “Revitalization not retreat: the real potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights”, EJIL (2005) Vol. 16 No. 3, 439-465
EU-5	R. Wolfrum, “General International Law (Rules, Principles, Standards)”, para. 6, Max Planck Encyclopaedia of Public International Law encyclopedia entry: Principles, Rules, and Standards
EU-6	C. La Hovary, “The ILO’s supervisory bodies’ ‘soft law jurisprudence’, in Research Handbook on Transnational Labour Law, Ed. A. Blackett and A. Trebilcock (2016), at p. 3205

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
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

I. INTRODUCTION

1. The European Union will provide in this oral statement its rebuttal to Korea's written submission. The European Union will address first Korea's jurisdictional objection (Section II). Next, the European Union will show that Korea has misinterpreted the first sentence of Article 13.4(3) of the FTA EU-Korea and that the European Union has duly substantiated its claims under that provision relating to the freedom of association (Section III). Finally, the European Union will show that the efforts made by Korea towards the ratification of four fundamental ILO Conventions are inadequate and do not meet the requirements laid down in Article 13.4(3), final sentence of the FTA EU-Korea (Section IV).

II. JURISDICTION OF THE PANEL

2. Korea objects that the Panel lacks jurisdiction because the matter identified in the Panel request is not a matter arising under Chapter 13 of the FTA EU-Korea¹.
3. In support of this objection, Korea alleges, in essence, that the measures challenged by the European Union fall outside the scope of Article 13.2(1) of the FTA EU-Korea, because the European Union has failed to show that they "affect trade" between the Parties.

A. Korea has misunderstood the role and the meaning of Article 13.2(1) of the FTA EU-Korea

4. Korea's objection reflects a misunderstanding of both the proper role and the correct meaning of Article 13.2(1) of the FTA EU-Korea.
5. Article 13.2(1) of the FTA EU-Korea is introduced by the phrase "except as otherwise provided in this Chapter". It is, therefore, a residual provision. It comes into play only where the scope of application of another provision of Chapter 13 cannot be ascertained in accordance with customary rules of treaty interpretation. As explained later, however, the scope of application of Article 13.4 of the FTA

¹ Korea's written submission, paras. 12-34.

- EU-Korea can be properly established without resorting to the default rule contained in Article 13.2(1).
6. Moreover, Korea has misconstrued the meaning of Article 13.2(1) of the FTA EU-Korea. Korea suggests that, by virtue of that provision, the European Union is required to show that the measures in dispute “affect trade” between the Parties². Yet Article 13.2(1) refers in relevant part to measures affecting “*trade-related aspects of labour*”³, and not to measures “affecting *trade*”⁴. The category of measures affecting “trade-related aspects of labour” is different from, and broader in scope than, the category of measures “affecting trade”. Whereas certain provisions of Chapter 13 do require trade affectation, others do not. Korea’s interpretation of Article 13.2(1) blurs this important distinction, thereby rendering redundant the different language chosen by the drafters for each provision of Chapter 13.
 7. Furthermore, Korea’s narrow interpretation of Article 13.2(1) fails to take into account the relevant context, as well as the object and purpose of Chapter 13 and, more generally, of the FTA EU-Korea as a whole.
 8. Article 13.2(1) identifies expressly Articles 13.1(1) and 13.1(2) as “context”. In turn, Article 13.1(1) refers in relevant part to the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work. That Declaration includes a resolution “to promote full employment and decent work, *inter alia*, by:

(a) respecting, promoting and realizing the principles contained in the International Labour Organization Declaration on Fundamental Principles and Rights at Work and its follow-up, recognizing the central role of the International Labour Organization in this regard;

*(b) Making continued efforts towards ratifying — where Member States have not done so — and fully implementing the International Labour Organization conventions concerning respect for fundamental principles and rights at work*⁵; [...]

² See e.g. Korea’s written submission, paras. 20, 22, 24, 32 and 33.

³ Emphasis supplied.

⁴ Emphasis supplied.

⁵ 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, para. 5., available at:
https://www.un.org/en/ecosoc/docs/declarations/ministerial_declaration-2006.pdf

9. At the same time, and with the same overall objective, that Declaration also encourages both improved market access for internationally traded goods and greater foreign investment⁶.

10. Article 13.1(1) of the FTA EU-Korea further provides that:

The Parties reaffirm their commitments to promoting the development of international trade in such a way as to contribute to the objective of sustainable development and will strive to ensure that this objective is integrated and reflected at every level of their trade relationship.

11. In turn, Article 13.1(2) states that:

The Parties recognise that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development. They underline the benefit of cooperation on trade-related social and environmental issues, as part of a global approach to trade and sustainable development.

12. The context provided by the international instruments cited in Article 13.1(1), and by the sustainable development objectives reaffirmed in both Article 13.1(1) and Article 13.1(2), support a broad interpretation of the scope of application of Chapter 13 and, therefore, of the default rule laid down in Article 13.2(1).

13. Further support for such a broad interpretation is provided by Article 1.1(2) of the FTA EU-Korea, which lists sustainable development as an “overarching objective” of the agreement:

The objectives of the agreement are [...]

(g) to commit, in the recognition that sustainable development is an overarching objective, to the development of international trade in such a way as to contribute to the objective of sustainable development and strive to ensure that this objective is integrated and reflected at every level of the Parties’ trade relationship

14. Korea has sought to downplay the importance of the sustainable development objectives pursued by the FTA EU-Korea. For example, Korea has said, by referring to Article 13.2(2), that “the main thrust of Chapter 13 is to avoid that [...] labour standards are ‘used for protectionist purposes’”⁷. Whereas this is an important clarification, it is manifestly inaccurate to say that it is “the thrust” of Chapter 13. The real “thrust” of Chapter 13 is instead expressed in the sustainable

⁶ *Ibid.*, paras. 15, 20 and 23.

⁷ Korea’s written submission, para. 18.

development objectives affirmed in Article 1.1(2)(g), as well as in Article 13.1(1) and 13.1(2), to both of which Article 13.2(1) refers expressly. The unduly narrow interpretation of Article 13.2 advocated by Korea would poorly serve those objectives.

15. In support of its narrow interpretation of Article 13.2(1), Korea further invokes⁸ a report of a panel established under a free trade agreement between the United States and various Central American countries, as well as the Dominican Republic (CAFTA-DR FTA)⁹. That report, however, is of little, if any, relevance for the present case. That panel interpreted a different international agreement between different parties, containing different provisions, in a different legal context, and having different objectives and purposes. More specifically, the CAFTA-DR FTA includes no comparable provision to those invoked by the European Union in this dispute. The findings invoked by Korea relate to the interpretation of a provision concerning the enforcement by each party of its own domestic labour standards. That provision required that “a Party shall not fail to effectively enforce its labor laws ..., in a manner affecting trade between the Parties ...”¹⁰. The panel’s interpretation invoked by Korea relates to the terms “in a manner affecting trade”. Those terms have no equivalent either in Article 13.2(1) or in Article 13.4(3) of the FTA EU-Korea, which provides the basis for the EU’s claims in this case. Moreover, the EU’s claims are not concerned with Korea’s lack of enforcement of its own domestic standards, but instead with Korea’s lack of compliance with its pre-existing international obligations as a Member of the ILO and with its deficient efforts to ratify all the fundamental ILO Conventions.

B. Article 13.4 is not subject to a “trade affectation” test

16. The scope of application of Article 13.4(3) is clearly defined in that provision by reference to precisely identified pre-existing international obligations of both

⁸ Korea’s written submission, paras. 20, 22, 32.

⁹ CAFTA-DR Panel Report, *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, report of 14 June 2017, (Exhibit K-7)

¹⁰ Cf. Article 16.2.1(a) of CAFTA-DR, available at <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>.

- Parties as Members of the ILO¹¹ and to the fundamental ILO Conventions¹². This renders unnecessary the application of the default rule set forth in Article 13.2(1).
17. Unlike some other provisions of Chapter 13, Article 13.4(3) does not include a “trade affectation” test. Korea’s interpretation would amount to reading such a “trade affectation” test into a provision where the drafters chose not to include one.
18. Article 13.4(3) may be contrasted, in particular, with Article 13.7, which concerns the application and enforcement of domestic laws, regulations and standards “in a manner affecting trade or investment between the Parties”.
19. This difference between these two provisions reflects, in the first place, the fact that Article 13.7 is concerned with all domestic labour laws, regulations and standards of a Party, whereas Article 13.4(3) concerns only a limited number of well-defined international core labour standards.
20. Moreover, this difference is consistent with Article 13.3, which recognises the right of each Party to establish its own level of labour protection in its domestic laws and policies, while seeking to ensure consistency with the internationally recognised standards referred to in Article 13.4:

Recognising the right of each Party to establish its own levels of [...] and labour protection, and to adopt or modify accordingly its relevant laws and policies, each Party shall seek to ensure that those laws and policies provide for and encourage high levels of ... labour protection, consistent with the internationally recognised standards or agreements referred to in Articles 13.4 and 13.5.

21. Since both Parties are required, by virtue of their membership of the ILO, to comply with the internationally recognised standards referred to in Article 13.4, it would have been inappropriate to qualify such obligation with a “trade affectation” test, which is not part of those international standards.
22. On the other hand, since each Party is in principle free to choose its own level of protection in its domestic labour laws, regulations and standards, it is justified to circumscribe the obligations of the Parties relating to the application or enforcement of those domestic measures to those instances where they affect trade between the Parties.

¹¹ Cf. first sentence of Article 13.4(3) of the FTA EU-Korea.

¹² Cf. last sentence of Article 13.4(3) of the FTA EU-Korea.

23. Moreover, reading a “trade affectation” test into Article 13.4(3) would have manifestly illogical results. For example, it would mean that a Party is required to make continued and sustained efforts towards ratifying the fundamental ILO Conventions only to the extent that their lack of ratification would affect trade between the Parties. Yet, as a matter of international law, a Party cannot choose to ratify those conventions only with regard to certain sectors or situations involving trade between them.
24. While, for the above reasons, Article 13.4(3) is not subject, unlike some other provisions of Chapter 13, to a “trade-affectation” test, this does not mean that the internationally recognised standards referred to in Article 13.4(3) are unrelated to trade. The link between the international core labour standards referred to in Article 13.4.3 and trade has long been recognised by the international community. Article 13.4.3 reflects that recognition.
25. Article 13.4(2), which is part of the immediate context of Article 13.4(3), recalls once again the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, stressing the link made by that Declaration between core labour standards and trade:

The Parties reaffirm the commitment, under the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work, to recognising full and productive employment and decent work for all as a key element of sustainable development for all countries and as a priority objective of international cooperation and to promoting the development of international trade in a way that is conducive to full and productive employment and decent work for all, including men, women and young people.

26. The link between the internationally recognised core labour standards and trade and investment is further recognised in Article 13.6(1):

The Parties reconfirm that trade should promote sustainable development in all its dimensions. 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.

27. The above provision in turn paraphrases the 1996 Declaration of the Ministerial Conference of the World Trade Organization, where the link between trade and

core labour standards had been recognised by all WTO members in an unequivocal fashion:

We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration¹³.

28. The above passage of the Singapore Declaration on the links between trade and core labour standards was echoed in the subsequent 1998 ILO Declaration, which stresses that:

[L]abour should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition the comparative advantage of any country should in no way be called into question by this Declaration and its follow up above.

29. Similarly, the subsequent 2006 ILO Declaration on Social Justice for a Fair Globalisation stresses that:

[T]he violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and (...) labour standards should not be used for protectionist trade purposes.¹⁴

III. FREEDOM OF ASSOCIATION

A. Korea misinterprets the first sentence of Article 13.4(3) of the FTA EU-Korea

¹³ Singapore WTO Ministerial 1996: Ministerial Declaration, WT/MIN(96)/DEC, 18 December 1996, para. 4, available at https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm

¹⁴ ILO Declaration on Social Justice for a Fair Globalisation, adopted by the International Labour Conference at its Ninety-seventh Session, Geneva, 10 June 2008, available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf

30. Korea contends that the EU's claims under the first sentence of Article 13.4(3) of the FTA EU-Korea are based on an erroneous interpretation of that provision¹⁵.
31. According to Korea, Article 13.4(3) of the FTA EU-Korea does not impose upon the parties an obligation to comply with the principles of freedom of association. Instead, according to Korea, that provision expresses a mere "commitment to engage in good faith behaviour towards the overall objective of respecting, promoting and realizing the principles concerning fundamental rights such as the freedom of association"¹⁶. This commitment would be "weaker"¹⁷ than Korea's pre-existing obligations as an ILO Member.
32. As explained below, it is rather Korea which has misunderstood its obligations, both under the FTA EU-Korea and under the relevant ILO instruments.

1. Meaning of "commit to respecting, promoting and realising"

33. Pursuant to the first sentence of Article 13.4(3) of the FTA EU-Korea, the Parties "commit to respecting, promoting and realising" the "principles" concerning *inter alia* the freedom of association. Korea's interpretation rests upon a contrived and implausible reading of each of those terms.

i) "To commit"

34. Korea asserts that the ordinary meaning of the verb "to commit" "appears to imply an aspiration, at best an obligation of means towards [an] objective"¹⁸.
35. Yet, the dictionary definition quoted by Korea provides no basis for that reading. According to that definition, "to commit" means "to obligate or bind (a person, group, etc.) to following a particular course of action, policy etc."¹⁹ This dictionary definition thus confirms that commitments are "obligatory" or "binding".
36. Further confirmation is provided by the dictionary definition of the related term "commitment". Relevant meanings of that term include:

¹⁵ Korea's written submission, para. 36-73.

¹⁶ Korea's written submission, para. 72.

¹⁷ Korea's written submission, para. 37.

¹⁸ Korea's written submission, para. 39.

¹⁹ Korea's written submission, para. 39, citing Oxford English Dictionary, www.oed.com, verb, meaning 15b (Exhibit K-10)

The action or an act of obligating or binding oneself or another to a particular course of action, policy, etc.; the action of giving an undertaking, either explicitly or by implication. Also: an undertaking or pledge of this kind.

An act or course of action to which a person is bound or obligated; an obligation, responsibility; a liability; an engagement.²⁰

37. It may be possible, of course, to limit one's "commitment" to making best efforts towards an objective (just like it is possible to frame an "obligation" as a "best efforts" obligation). But the object of such a "best efforts" commitment should not be mistaken for an intrinsic characteristic of each and every commitment. One can as well commit (i.e. "bind" or "obligate" oneself) to achieve a certain result, including to ensure compliance with a certain rule of conduct.
38. For example, under the FTA EU-Korea, both Parties have given "commitments" to accord market access and national treatment to the service providers and investors of the other party in respect of certain sectors²¹. It is unquestionable that those commitments are mandatory. It would be absurd to pretend, on the basis of a contrived reading of a dictionary definition, that they express a mere "aspiration" simply because they have been labelled "commitments".
39. As illustrated by this example, the term "commit", and the related term "commitment", are sometimes used to designate obligations assumed by a party or parties in respect of a pre-existing or separate legal obligation or standard.
40. Similarly, the use of the term "commit to" in Article 13.4(3) reflects the fact that the Parties do not seek to create new substantive obligations, but rather to bring within the framework of the FTA EU-Korea pre-existing obligations of Korea and the EU Member States resulting from their membership of the ILO, thereby making them subject to the enforcement mechanisms provided for in the FTA EU-Korea.
41. Article 13.4(3) the FTA EU-Korea refers expressly to the 1998 ILO Declaration, which is therefore part of the immediate context relevant for the interpretation of that provision. The terms "commit to respecting, promoting and realising" in Article 13.4(3) of the FTA EU-Korea paraphrase point 2 of the 1998 ILO

²⁰ Oxford English Dictionary on line, meanings 6.a. and 6.b, accessible at <https://www.oed.com/view/Entry/37161?redirectedFrom=commitment#eid>

²¹ Cf. Articles 7.5, 7.6, 7.7, 7.11, 7.12 and 7.13 of the FTA EU-Korea.

Declaration, which, as will be discussed below, recognises that all Members of the ILO “have an obligation [...] to respect, to promote and to realize [...]” the principles concerning the freedom of association. This provides further confirmation that the drafters of the FTA EU-Korea used the term “commit to” as being equivalent to the term “obligation”. Korea, nevertheless, argues that this terminological difference would imply that Article 13.4(3) expresses a “weaker obligation”²² than the pre-existing obligations of the Parties as ILO Members. That outcome, however, would deprive Article 13.4(3) of the FTA EU-Korea of much of its *effet utile*. Moreover, it would be manifestly at odds with the sustainable development objectives pursued by Chapter 13 of the FTA EU-Korea, which seeks to uphold and strengthen existing labour standards, rather than “weakening” them.

42. The drafting history of the 1998 ILO Declaration provides further confirmation that the terms “commitment” and “obligation” were regarded as equivalent by the ILO Members and, therefore, that no inferences can be drawn from that terminological difference. In response to a question raised by one ILO Member, the Legal Adviser of the ILO clarified that the terms “obligation” and “commitment”

*represented two ways of seeing the same thing: namely the content of the contract between Member States and the Organization. When countries became Members of the Organization, they made certain “commitments” under the Constitution towards the Organization. “Obligations” represented what the Organization could expect of States under the Constitution once they become Members.*²³

ii) *Respecting, promoting and realising*

43. The enumeration of verbs “respecting, promoting and realising” shows that the obligation imposed by Article 13.4.3 of the FTA EU-Korea goes beyond merely “promoting” the achievement of the principles concerning the freedom of association, contrary to one of the recurring themes in Korea’s submission.

²² Korea’s written submission, para. 45.

²³ ILO, Report of the Committee on the Declaration of Principles, 86th Session of the International Labour Conference, 1998, para. 202, available at: <https://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-decl.htm> (last accessed on Feb. 13, 2020) (Exhibit K-15).

44. Korea goes through the motions of reciting the dictionary meanings of the terms “respecting”, “promoting” and “realising”²⁴. But it then fails to analyse and take into account the ordinary meanings disclosed by those dictionary definitions.
45. Korea limits itself to assert, without further explanation, that “realizing” is the “furthest reaching of the three verbs” and “does not mean apply”²⁵.
46. In support of the latter assertion, Korea invokes the drafting history of the 1998 ILO Declaration, but fails to provide any reference²⁶. The European Union assumes that Korea had in mind paragraph 199 of the Committee’s report, which reads as follows in relevant part:

*The Government member of Mexico noted distinctions between the text read in English and in Spanish, since in Spanish "aplicar" appeared to be different from the English version, which referred to "realize" and not "apply". [...] The Chairperson agreed to find the appropriate Spanish language phrasing [...]*²⁷.

47. It is, of course, correct that the Spanish word “aplicar” is not an accurate translation of “realize”. A more accurate translation is the one included in the final official Spanish version of the 1998 ILO Declaration (“hacer realidad”). But this does not imply that the term “realize” is less far-reaching than the term “apply”. To the contrary, the ordinary meaning of the term “realize” identified by Korea (“[t]o make real or actual; to convert something imagined, planned, etc. into real existence or fact; to bring (a scheme, ambition, etc.) to fruition”²⁸) strongly suggests that “realize” is, in fact, a more encompassing and demanding term, which requires the Parties to ensure the effectiveness of the principle of freedom of association, including through its application both in law and in fact. The terms “in their laws and practices”, which follow the terms “respecting, promoting and realising” in Article 13.4(3) of the FTA EU-Korea lend further support to this interpretation.

²⁴ Korea’s written submission, para. 42.

²⁵ Korea’s written submission, para. 44.

²⁶ Korea’s written submission, para. 44.

²⁷ ILO, Report of the Committee on the Declaration of Principles, 86th Session of the International Labour Conference, 1998, para. 199, available at: <https://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-decl.htm> (last accessed on Feb. 13, 2020) (Exhibit K-15).

²⁸ Korea’s written submission, para. 42, citing Oxford English dictionary, www.oed.com, verb, v2, meaning 1(a) (Exhibit K-14).

48. Since the European Union complains in this case that Korea's labour laws, as interpreted and applied by the Korean authorities, violate the principles of freedom of association, it is particularly relevant to consider the meaning of the term "respecting".
49. According to the dictionary definition supplied by Korea, the relevant ordinary meaning of "respect" is "[t]o uphold, maintain, refrain from violating (a right, privilege, law, decision, etc.)"²⁹.
50. Remarkably, though unsurprisingly, Korea provides no further analysis of the meaning of the term "respect".
51. Indeed, the above quoted definition of "respect" confirms that, by virtue of Article 13.4(3), the Parties are under an obligation to, *inter alia*, "refrain from violating" the principles concerning the freedom of association. The European Union has shown that Korea's laws and practices do violate those principles. By doing so, Korea fails to "respect" those principles and, therefore, acts inconsistently with Article 13.4(3) of the FTA EU-Korea.

2. The 1998 ILO Declaration

52. Article 13.4(3) of the FTA EU-Korea provides that the Parties commit to respecting, promoting and realising the principles concerning the freedom of association "in accordance with" the 1998 ILO Declaration.
53. Both parties seem to agree that the 1998 ILO Declaration is highly relevant for the interpretation of Article 13.4(3), by virtue of this express reference.
54. Korea stresses repeatedly that the 1998 ILO Declaration does not create any obligation for ILO Members. This is, however, uncontroversial. Korea's protestations respond to arguments which the European Union has never made.
55. The European Union has nowhere argued that the 1998 ILO Declaration imposes obligations on ILO Members; or that Korea has breached Article 13.4(3) of the FTA EU-Korea because it has violated its obligations under the 1998 ILO Declaration.

²⁹ Korea's written submission, para. 42, citing Oxford English dictionary, www.oed.com, verb, meaning 6(e) (Exhibit K-11).

56. The 1998 ILO Declaration is relevant because it recognises that all ILO Members have a pre-existing obligation to promote, respect and realize the principles concerning certain fundamental rights, including the freedom of association. This obligation does not arise from the 1998 ILO Declaration. It arises “from the very fact of membership in the ILO”³⁰. Those principles are embedded in the ILO Constitution and the Declaration of Philadelphia, which all ILO Members have endorsed when joining the ILO. In the words of a distinguished commentator, “the Declaration is like the wisdom tooth of the Constitution, which was already there but finally pierced through the gum in its maturity”³¹.
57. Therefore, while Korea has not ratified yet Convention No. 87, it is under an obligation to promote, respect and realize the principles concerning the freedom of association by virtue of its membership of the ILO.
58. Article 13.4(3) of the FTA EU-Korea imposes upon the Parties a formally distinct obligation, but with the same substantive content as the obligation deriving from their membership of the ILO, to comply with the principles of freedom of association.

3. The obligations deriving from ILO Membership

59. Article 13.4(3) of the FTA EU-Korea refers not only to the 1998 ILO Declaration, but also, directly, to the “obligations deriving from membership of the ILO”.
60. As just recalled, the existence of those obligations was recognised by the 1998 ILO Declaration. Those obligations include the obligation to promote, respect and realize the principles concerning the freedom of association.
61. Korea appears to suggest that the 1998 ILO Declaration would be *ultra vires* because, according to Korea, it would recognise obligations which are not stipulated in the ILO Constitution or in the Philadelphia Declaration³². According to Korea, the ILO Constitution and the Philadelphia Declaration would impose no obligations with regard to the freedom of association, but merely state

³⁰ 1998 ILO Declaration, point 2.

³¹ F. Maupain, “Revitalization not retreat: the real potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights”, EJIL (2005) Vol. 16 No. 3, 439-465, at p. 444 (Exhibit EU – 4).

³² Korea’s written submission, paras. 47-50.

- “objectives”. Thus, according to Korea, “States that become ILO Members recognise the principle of the freedom of association as an objective of the ILO”³³.
62. As explained earlier, this is not, however, what the 1998 Declaration says. Instead, the 1998 ILO Declaration recognises unequivocally an “obligation” to “respect, promote and realize” the principles concerning the freedom of association. As further explained, the term “respect” enjoins the ILO Members to refrain from violating those principles.
63. As noted by Korea, the meaning of the term “principle” may vary according to the specific context³⁴. Nevertheless, generally speaking, the term “principle” refers to a binding legal statement which describes an obligation³⁵. Again, generally speaking, “principles” may be distinguished from “rules” in that “principles” describe obligations in more abstract terms than “rules”³⁶. Principles may be the source of more specific rules. But principles may also entail by themselves obligations ready for direct application³⁷.
64. Korea contends, by citing the opinions expressed (on a personal basis) by the authors of a paper published by the ILO³⁸, that the principles mentioned in the 1998 ILO Declaration “do not appear to be as well suited as legal rules to decide concrete cases”³⁹; and that, “because the principles in the Declaration do not expressly define the rules of conduct”⁴⁰, “it may be more challenging to assess the compliance of conduct with legal obligations in concrete cases”⁴¹.
65. However, it will be noted that these opinions do not deny that the principles cited in the 1998 ILO Declaration have normative content. Nor do those opinions deny the possibility to assess compliance with those principles. Rather, they make the

³³ Korea’s written submission, para. 51.

³⁴ Korea’s written submission, para. 60.

³⁵ R. Wolfrum, “General International Law (Rules, Principles, Standards)”, para. 6, Max Planck Encyclopaedia of Public International Law (Exhibit EU – 5).

³⁶ *Ibid.*

³⁷ *Ibid.* paras. 6-7 and 16-17.

³⁸ Jordi Agustí-Panareda, Franz Christian Ebert and Desirée LeClercq, “Labour Provisions in Free Trade Agreements: Fostering their Consistency with the ILO Standards System”, International Labour Office, Background Paper Social Dimensions of Free Trade Agreements, March 2014, accessible at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/genericdocument/wcms_237940.pdf, (last accessed on Feb. 13, 2020) (Exhibit K-17)

³⁹ Korea’s written submission, para. 60.

⁴⁰ Korea’s written submission, para. 61.

⁴¹ Korea’s written submission, para. 61.

uncontroversial observation that those principles are typically broader than the specific provisions contained in the relevant ILO conventions. As result, it may be “more challenging”, but by no means impossible, to assess compliance with the principles than with those provisions.

66. That it is indeed possible to assess compliance with the principles concerning the freedom of association is demonstrated beyond doubt by the large *acquis* of reports and recommendations issued by the CFA, to which we will refer later.

4. The Fundamental ILO Conventions

67. Korea complains that the European Union argues that the obligations recognised in the 1998 ILO Declaration mean that ILO Members must comply with the concrete rights laid down in the eight fundamental Conventions, regardless of whether they are parties to those Conventions⁴².
68. Once again, however, Korea is responding to arguments that the European Union has not made.
69. The 1998 ILO Declaration clarifies that the principles and rights mentioned therein have been “expressed and developed in the form of specific rights and obligations”⁴³ in the fundamental Conventions. In view of this, the fundamental Conventions, and in particular Convention No. 87, may provide relevant context for the interpretation of the principles concerning the freedom of association.
70. Thus, the reports of the CFA refer sometimes to provisions of the Convention No 87 by way of context as part of its assessment of compliance of a Member’s measures with the freedom of association. To mention but one example, in its report 362 in case No 2620, concerning a complaint against Korea, the CFA began its analysis by recalling Article 2 of Convention No 87, even though Korea has not ratified that convention⁴⁴.
71. Similarly, in its written submission the European Union has referred to certain provisions of Convention No 87 as part of its legal reasoning by way of context.

⁴² Korea’s written submission, para. 54.

⁴³ 1998 ILO Declaration, point 1(b).

⁴⁴ Case No 2620, Report 362, November 2011, para. 595, accessible at https://www.ilo.org/dyn/normlex/en/f?p=1000:70006:0::NO:70006:P70006_COMPLAINT_TEXT_ID,P70006_PARAGRAPH_NO:2911246,595

The European Union has nowhere alleged that Korea violates the freedom of association because it violates Convention No 87. Instead, the EU's legal argument relies on findings by the CFA to the effect that the ILO Member concerned had breached the principles concerning the freedom of association. More specifically, most of the claims submitted by the European Union rely on CFA's findings to the effect that the same Korean measure at issue in this case violated the principles of the freedom of association.

72. Obviously, to say that Convention No 87 provides context for the interpretation of the principles of the freedom of association is not the same as saying that the latter impose the same obligations as the former. The fundamental conventions “express”, but also “develop” the principles concerning the relevant fundamental rights. Certain basic, broadly defined, provision of a fundamental convention may be seen as the necessary expression of a principle. On the other hand, other, more specific, provisions of a fundamental convention may involve policy choices by the drafters, which go beyond the requirements of the principle concerned and, therefore, do not exclude that other policy choices could be equally compatible with that principle.

5. The CFA's Decisions

73. The Committee on Freedom of Association is a body established in 1951 by the Governing Body of the ILO⁴⁵. It is a tripartite body. In other words, its members are designated by governments, workers and employers from among the members of the Government Body⁴⁶. In practice, they are usually internationally acknowledged experts.
74. The CFA's mandate is to “examin[e] alleged infringements”⁴⁷ of the principles of freedom of association and the effective recognition of the right to collective bargaining enshrined in the Constitution of the ILO and in the Declaration of Philadelphia.

⁴⁵ CFA Compilation, Introduction, para. 1.

⁴⁶ CFA Compilation, Introduction, para. 2.

⁴⁷ CFA Compilation, Introduction, para. 1.

75. The principles of freedom of association covered by the CFA's mandate are the same principles concerning the freedom of association referred to in the 1998 ILO Declaration.
76. The CFA's mandate presupposes necessarily that: first, contrary to Korea's allegations, those principles impose obligations (as recognised later by the 1998 ILO Declaration); and, second, that, contrary also to Korea's contentions, it is possible to assess compliance with the obligations imposed by those principles.
77. The CFA is not a court. Nor can the interpretations made by the CFA be regarded as authentic. Article 37 of the ILO Constitution offers two options for interpreting the ILO Constitution and subsequent Conventions: recourse to the International Court of Justice and setting up a Tribunal to deal with interpretations. The first has not happened since the 1930s, however, while the second has never been put into practice.
78. As a result, in practice, the decisions of the CFA constitute the most comprehensive and authoritative source of guidance for the interpretation of the principles of freedom of association. Many authors have not hesitated to describe the CFA's *acquis* as "jurisprudence" in a broad sense⁴⁸. Furthermore, the CFA's decisions have been cited by international courts, such as the European Court of Human Rights, in support of its own decisions⁴⁹.
79. As noted by Korea⁵⁰, the CFA's reports are not binding. Nor can the CFA "punish"⁵¹ the infringing Member. However, these limitations result from the mandate conferred upon the CFA by the ILO's Governing Body and, ultimately from the ILO's Constitution, rather than from the intrinsic legal value of the principles of freedom of association applied by the CFA. It is a manifest *non-sequitur* to infer, as Korea does, from the limitations of the CFA's mandate that the principles of freedom of association impose no binding obligations on the ILO Members, or that it is impossible to assess compliance with such obligations.

⁴⁸ See e.g. the doctrine cited by C. La Hovary, "The ILO's supervisory bodies' 'soft law jurisprudence', in Research Handbook on Transnational Labour Law, Ed. A. Blackett and A. Trebilcock (2016), at p. 3205 (Exhibit EU – 6).

⁴⁹ See ECtHR 12.11.2008, no. 34503/97 (Deimir & Baykara); and ECtHR, 21.04.2009, no. 68959/01 (Enerji Yapi Yol Sen).

⁵⁰ Korea's written submission, para. 66.

⁵¹ Korea's written submission, para. 65.

80. As further noted by Korea⁵², the 1998 ILO Declaration provides for its own “follow-up” mechanism. Unlike the CFA supervision procedure, that follow-up mechanism is not based on complaints and aims at assessing the efforts made by ILO Members which have not ratified the fundamental conventions. However, that follow-up mechanism is without prejudice to the pre-existing CFA supervision procedure. Both mechanisms co-exist as far as the principles of freedom of association are concerned.

B. The European Union has substantiated its claims under the first sentence of Article 13.4(3) of the FTA EU-Korea

81. Korea contends that the European Union has failed to substantiate its claims under the first sentence of Article 13.4(3) of the FTA EU-Korea.⁵³
82. Before addressing the EU’s claims, Korea provides a lengthy “general overview of the freedom of association guaranteed by Korean law”⁵⁴. That overview is of very limited relevance for this dispute. The issue before the Panel is not whether Korea’s law is “generally” compliant with the freedom of association, but instead whether the specific provisions of the TULRAA identified by the European Union are compatible with that freedom.
83. The European Union has duly substantiated all its claims under the first sentence of Article 13.4(3) of the FTA EU-Korea FTA. Far from rebutting those claims, Korea’s arguments involve an implicit recognition that Korea remains in breach of the obligations imposed by that provision.

6. Claims relating to the right of workers, without distinction, to establish or to join organizations

i) Self-employed workers

84. Korea has confirmed that, according to well-established jurisprudence of Korea’s Supreme Court, the existence of a “worker” for the purposes of the TULRAA “depend[s] on the existence of a relationship of ‘subordination’”⁵⁵. Traditionally,

⁵² Korea’s written submission, para. 67.

⁵³ Korea’s written submission, paras. 74-161.

⁵⁴ Korea’s written submission, paras. 79-119.

⁵⁵ Korea’s written submission, para. 133.

- Korea's Supreme Court had applied a strict test for establishing the existence of such relationship of subordination⁵⁶. As a consequence, self-employed workers were not recognised as “workers” for the purposes of the TULRAA and were not allowed to join unions.
85. Korea argues that, following a ruling of Korea's Supreme Court of 2006, the test for establishing whether a self-employed person is a “worker” has been “relaxed”⁵⁷. As a result, according to Korea, the freedom of association is now “also guaranteed for (certain categories) of self-employed persons”⁵⁸. In particular, Korea's Supreme Court would have recognised the freedom of association of golf caddies, workbook teachers, railway snack bar operators and car salesmen⁵⁹.
86. In addition, Korea refers to a recent ruling of the Seoul Administrative Court, which has recognised the status of ‘workers’ under the TULRAA to certain ‘couriers’/‘delivery truck drivers’.⁶⁰ That ruling, however, has been appealed before Seoul High Court. Moreover, the ruling concerned only a very narrow category of drivers, who delivered parcels by using light vehicles for the company CJ Logistics Corporation. The workers in question were bound to the agents appointed by that company by contracts requiring exclusivity⁶¹.
87. Korea further explains that, relying on this case-law, the Government has recently certified certain unions of self-employed workers, namely the National Delivery Workers Union (in 2017) and the COWAY CS Workers' Union (in 2019)⁶². Again, however, these decisions appears to concern very narrow categories of self-employed workers⁶³.
88. The European Union notes with interest these factual developments, which appear to go in the right direction towards the recognition of freedom of association for all self-employed workers. Nevertheless, the European Union remains concerned that the TULRAA, as interpreted by Korea's courts and administrative authorities, still remains incompatible with the principles of the freedom of association.

⁵⁶

Ibid.

⁵⁷

Korea's written submission, para. 134.

⁵⁸

Korea's written submission, para. 134. Underlining added.

⁵⁹

Korea's written submission, para. 135.

⁶⁰

Korea's written submission, para. 135.

⁶¹

See Exhibit EU – 3 KCTU, Information on trade union rights of self-employed persons, 3 July 2020

⁶²

Korea's written submission, para. 136.

⁶³

See Exhibit EU – 3, KCTU, Information on trade union rights of self-employed persons, 3 July 2020

89. The developments described by Korea suggest that, as it stands now, Korean law fails to accord the freedom of association to all categories of self-employed workers in a systematic and readily accessible manner. Instead, self-employed workers are often forced to extract recognition of their freedom of association from reluctant administrative authorities by resorting to costly and time-consuming litigation, going all the way up to Korea's Supreme Court.
90. For example, according to the *amicus curiae* brief submitted by the Korean Confederation of Trade Unions (KCTU), "[...] 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"⁶⁴. Similarly, according to the KCTU, "the union registrations of after school activity lecturers [and] chauffeur service drivers has been being delayed until today."⁶⁵
91. The European Union further recalls that the CFA has examined the issue raised by this claim in a case initiated on the basis of a complaint lodged by the Korean unions in 2008 (case No. 2602).
92. The CFA concluded in that case that the refusal by the Korean authorities to recognise self-employed workers, such as the self-employed drivers of heavy goods vehicles at issue in that case, as "workers" for the purposes of the TULRAA was incompatible with the principles of freedom of association⁶⁶. The CFA, therefore, requested Korea to take 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.*⁶⁷

93. In a subsequent report issued in March 2015 the CFA noted that the Korean Government "ha[d] not indicated any steps taken with respect to its previous recommendation" and reiterated the same recommendation.⁶⁸ In its report issued in

⁶⁴ KCTU's *amicus curiae* brief, p. 4. At the request of the EU, KCTU has provided further information on the obstacles to the registration of certain categories of self-employed workers. See Exhibit EU – 3, KCTU, Information on Trade union rights of self-employed persons, 3 July 2020.

⁶⁵ KCTU's *amicus curiae* brief, p. 5.

⁶⁶ Case No 2602, report No. 363, March 2012, paras. 461, available at https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3057164.

⁶⁷ Case No 2602, report No. 363, March 2012, paras. 461 and 467 e).

⁶⁸ Case No. 2602, Report 374, March 2015, para. 51, available at https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3237652

October 2015 the CFA asks to be kept informed of any new developments on the open recommendations.⁶⁹

ii) *Dismissed and unemployed workers*

94. Korea argues that, following a judgement of Korea's Supreme Court of 2004, the Korean authorities have allowed dismissed and unemployed workers to join "non-enterprise-level" unions⁷⁰. According to Korea, "non-enterprise level" are unions "that are not organized for the specific purpose of a particular enterprise but might be, for example, sector-based or regional."⁷¹
95. Korea further argues that, in October 2019, the Korean government submitted a bill to the Korean National Assembly, proposing to amend the definition of a "worker" in the TULRAA, so as to "expressly recognize [...] that the unemployed or dismissed enjoy the right to join any organizational types of union (both enterprise-level and non-enterprise level)"⁷².
96. Korea's arguments contain the implicit recognition that, as of today, Korea continues not to allow unemployed and dismissed workers to join "enterprise-level" unions, which continue to account for nearly half of the total number of union members in Korea.⁷³
97. The European Union recalls that the CFA has been examining the issue raised by this claim in a case initiated on the basis of a complaint lodged by the Korean unions already in 1995 (case No. 1865)⁷⁴.
98. The Korean Government has made before the CFA the same arguments submitted to this Panel, including with regard to the possibility for dismissed and unemployed workers to join "non-enterprise level unions"⁷⁵. The CFA has

⁶⁹ [CFA report of October 2015](#) point 152.

⁷⁰ Korea's written submission, paras. 125-126.

⁷¹ Korea's written submission, para. 126.

⁷² Korea's written submission, para. 129.

⁷³ Korea's written submission, para. 125.

⁷⁴ The numerous CFA Reports relating to this case can be consulted in the ILO's website, at https://www.ilo.org/dyn/normlex/en/f?p=1000:20060:0::FIND:NO:20060:P20060_COUNTRY_ID,P20060_COMPLAINT_STATU_ID:103123,1495811

⁷⁵ CFA Report 353, March 2009, in Case No. 1865, para. 720, available at https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2903791

“note[d] this development with interest”⁷⁶. Nevertheless, the CFA has, time and again, confirmed its long-standing position that the exclusion of unemployed and dismissed workers from the right to join unions is incompatible with the freedom of association, regardless of the “level” of the union.⁷⁷ The CFA has recommended Korea to amend the TULRAA and other legislative instruments providing for such exclusion⁷⁸. Thus, in its latest follow-up report in this case, of June 2017, the CFA concluded as follows:

*[...] Considering that its previous recommendation to this effect are yet to be implemented, the Committee once again firmly requests the Government to take the necessary measures without delay to repeal the provisions in the TULRAA, the AEOTUT and the AEOPOLU that prohibit dismissed workers from being trade union members and to provide detailed information on developments in this regard*⁷⁹.

7. Claim relating to the right of workers to establish organizations without prior authorization

99. Korea contests the European Union’s conclusion that the provisions of the TULRAA regulating the conditions for a trade union to be registered and certified as such – Article 12, paragraphs 1 to 3, in conjunction with Article 2, paragraph 4 and Article 10, paragraph 1 – confer on administrative authorities a discretion that breaches the right of workers to establish organizations without prior authorization.⁸⁰
100. According to Korea, the task of administrative authorities is limited to verifying whether the required documents have been submitted and whether there is a ground for disqualification.⁸¹
101. Nonetheless, Korea does not contest that, pursuant to Article 12(2) and (3) of the TULRAA, the administrative authorities may refuse or delay registration whenever the report or bylaws submitted by a trade union “need to be supplemented because of any omission or other reasons”. In those cases, the

⁷⁶

Ibid.

⁷⁷

Ibid.

⁷⁸

Ibid., para. 749 c) v). See also CFA Report 382, June 2017, in Case No. 1865, paras. 33- 42, available at https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3329802.

⁷⁹

CFA Report 382, June 2017, in Case No. 1865, para. 42.

⁸⁰

Korea’s written submission, paras. 140, 147 and 152.

⁸¹

Korea’s written submission, para. 147.

- authorities must order the documents to be supplemented within a designated period.⁸²
102. Although Korea argues that Article 9(1) of the Enforcement Decree of the TULRAA⁸³ provides an exhaustive list for “any omission or other reasons”, the text of that provision again refers to “any omission or false [incorrect]⁸⁴ facts”. This suggests that the relevant authorities are entitled or even required to determine whether any facts stated in the report or bylaws of a trade union are “false” or “incorrect”. Moreover, in accordance with point 2 of the same Article 9, administrative authorities are also required to make determinations as to whether the procedure for the election of executives or for the enactment of bylaws comply with the applicable provisions of the TULRAA.
103. The European Union submits that this detailed and in-depth examination by the authorities of the documents submitted by a trade union for the purpose of its registration, as provided for in the relevant provisions of the TULRAA and confirmed in its Enforcement Decree, shows that the submission of such documents is not a mere formality. The competent authorities are required to pursue a full-fledged inquiry as to the extent to which the composition of the trade union and the contents of its bylaws comply or not with any other applicable rules. While carrying out this task, and when deciding that the submitted documents must be corrected or supplemented, the TULRAA and its Enforcement Decree grant those authorities a discretionary power to delay or prevent registration.
104. The European Union recalls that, in order to be consistent with the principles of freedom of association, a national legislation providing that an organization must deposit its rules must be merely a formality to ensure that those rules are made public.⁸⁵
105. The TULRAA’s inconsistency with the right of workers to establish organizations without prior authorisation is also obvious when one considers the various grounds for disqualification provided for in its Article 2, paragraph 4.

⁸² Korea’s written submission, paras. 142 and 143.

⁸³ Exhibit K-62.

⁸⁴ The translation in Exhibit K-62 uses the expression “false facts” while the quotation of the provision in para. 148 of Korea’s written submission uses the expression “incorrect facts”.

⁸⁵ See the follow-up to Case No. 1865, reported in the EU’s first written submission, para. 34.

106. Korea does not dispute the existence and application by the authorities of these criteria, arguing only that, in practice, they rarely result in turning down registration requests.⁸⁶ Thus, implicitly, Korea recognizes that the application of such disqualification criteria, including the criterion concerning the alleged political objectives of a workers' organization,⁸⁷ have led to the refusal of its registration and certification as a trade union.
107. As stated by Korea, trade unions which have a certificate of establishment issued by the authorities are recognized as legitimate unions under the TULRAA and are granted statutory rights, including the rights to collective bargaining and collective action, among other important rights.⁸⁸ However, the fact that registration and certification produces such crucial effects for trade unions in Korea cannot justify maintaining a system that "is not very different from cases in which previous authorization is required".⁸⁹
108. The fact that a decision to return the application for registering a trade union is subject to administrative and judicial review under Korean law is not sufficient either to eliminate the inconsistency with the principles of freedom of association. For as long as the relevant provisions of the TULRAA continue to allow the administrative authorities to scrutinize the requests for registration and apply various criteria disqualifying trade unions, any administrative or judicial review is likely to acknowledge that the authorities have acted in accordance with the legislation in force.
109. The European Union therefore reiterates its view that the discretion accorded by the TULRAA to the administrative authorities when certifying trade unions is inconsistent with the principles of freedom of association that Korea committed to respecting, promoting and realising under Article 13.4(3) of the FTA EU-Korea.

8. Claim relating to the right of organizations to elect their representatives in full freedom

⁸⁶ Korea's written submission, para. 147.

⁸⁷ Article 2, paragraph 4 (v).

⁸⁸ Korea's written submission, para. 146.

⁸⁹ CFA Compilation, para. 424, reported in the EU's first written submission, para. 32.

110. Korea argues that Article 23(1) of the TULRAA “does not restrict unions’ autonomy”⁹⁰. On the contrary, according to Korea, that provision would be necessary to preserve the unions’ autonomy by preventing outsiders from “using” a union for “promoting personal profit or political motives”⁹¹.
111. The alleged rationale of Article 23(1) of the TULRAA is immediately contradicted, however, by Korea’s subsequent announcement that the Korean Government has proposed to the National Assembly in October 2019 “an amendment bill that would abolish Article 23(1) of the TULRAA and allow autonomous decision-making on eligibility requirements for the officer posts of labor unions by industry or region through their bylaws.”⁹²
112. Once again, the European Union notes with interest the proposed amendment to the TULRAA. As it stands now, however, Korea’s law remains incompatible with the freedom of association.
113. The European Union recalls that the CFA has been examining the issue raised by this claim in Case No. 1865 since 1995. In that context the CFA has repeatedly cautioned that “the determination of conditions of eligibility of union membership or union office is a matter that should be left to the discretion of union by-laws”⁹³. The CFA has further noted that, in conjunction with Article 2(4) (d), which excludes dismissed workers from union membership, Article 23(1) of the TULRAA “entails the risk of acts of anti-union discrimination being carried out to the extent that the dismissal of a trade union activist would prevent him from continuing his trade union activities within his organization”⁹⁴.
114. For those reasons, the CFA has repeatedly urged Korea to repeal both Article 2(4)(d) and Article 23(1) of the TULRAA.⁹⁵

IV. RATIFICATION OF OUTSTANDING FUNDAMENTAL ILO CONVENTIONS

⁹⁰ Korea’s written submission, para. 155.

⁹¹ Korea’s written submission, para. 156.

⁹² Korea’s written submission, para. 160.

⁹³ See e.g. Report 309, March 1998, para. 153; Report 320, March 2000, para. 515; and Report 327, March 2002, para. 490.

⁹⁴ See e.g. Report 353, March 2009, para. 720; and Report 382, June 2017, para. 42.

⁹⁵ See e.g. Report 363, March 2012, para. 126; and Report 382, June 2017, para. 42

115. Korea contends that the European Union's claim under the final sentence of Article 13.4(3) assumes that this provision imposes "a requirement to ratify" rather than "to make continued and sustained efforts towards ratification".⁹⁶ Korea's contention is misguided, as the European Union made clear that Korea breached the obligation in that provision "by not making continued and sustained efforts towards ratifying the fundamental ILO Conventions".⁹⁷
116. The European Union also made clear, however, that the obligation in the final sentence of Article 13.4(3) of the FTA EU-Korea is substantially different from the obligation that impends on all ILO Members, in accordance with Article 19, paragraph 5 of the ILO Constitution, to ratify the conventions communicated to them for ratification.⁹⁸ While the ILO Constitution only requires ILO Members to "bring the Convention before the authority or authorities within whose competence the matter lies",⁹⁹ to inform the Director-General of the ILO of action taken by those authorities,¹⁰⁰ and to report on further developments "at appropriate intervals",¹⁰¹ the FTA EU-Korea obliges the Parties "to make continued and sustained efforts towards ratifying the fundamental ILO Conventions".
117. The European Union referred to the overarching sustainable development objective of the FTA EU-Korea, as emphasized in its preamble and in various provisions of its Chapter 13, as context for interpreting the distinct obligation laid down in the final sentence of Article 13.4(3).¹⁰²
118. The consideration of this context shows that 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 FTA EU-Korea.¹⁰³ The European Union notes that Korea has not contested the importance and centrality of this element in the general design and architecture of the FTA EU-Korea. In its written submission, Korea has only sought to diminish what were

⁹⁶ Korea's written submission, para. 164.

⁹⁷ EU's first written submission, para. 96.

⁹⁸ EU's first written submission, para. 96.

⁹⁹ Article 19 (5)(b) of the ILO Constitution.

¹⁰⁰ Article 19 (5)(c) of the ILO Constitution.

¹⁰¹ Article 19 (5)(e) of the ILO Constitution.

¹⁰² EU's first written submission, paras. 69 to 74.

¹⁰³ EU's first written submission, para. 72.

- the expectations of the Parties as regards the intensity of the efforts to be deployed for ratifying the fundamental ILO Conventions.¹⁰⁴
119. Incidentally, the reply by the European Commission to a question raised by a member of the European Parliament in respect of the interpretation of a similar provision included in the FTA EU-Vietnam, does not confirm that the efforts to be expected from the Parties can be half-hearted. Quite apart from the fact that this reply is not directly relevant for the interpretation of Article 13.4(3) of the FTA EU-Korea, it actually shows the opposite of what Korea suggests. Efforts towards ratification of fundamental ILO Conventions must be persistent and not sporadic, and the European Union has consistently urged its FTA Partners to intensify those efforts.¹⁰⁵
120. As regards the steps that Korea has actually taken, since the start of application of the FTA EU-Korea on 1 July 2011, to achieve ratification of the four outstanding fundamental ILO Conventions, the European Union reiterates its view that they have been inadequate and do not meet the criteria of “continued and sustained efforts” agreed by the Parties.
121. Korea’s own description of the steps taken since 2011 do not show otherwise. While the European Union does not criticize the fact that Korea considered it necessary to carry out several related research projects¹⁰⁶ and to consult widely with workers’ and employers’ organizations,¹⁰⁷ these activities cannot justify the eight-year delay in starting ratification procedures. According to Korea, the official announcement by the Korean Government that the appropriate bills for ratifying Conventions Nos. 87, 98 and 29 would be submitted to the National Assembly was made only in May 2019¹⁰⁸ and actual submission of those bills took place in October 2019.¹⁰⁹
122. Although Korea does not refer to that fact, it would appear that the ratification and related legislative amendment bills submitted in 2019 may have lapsed due to the end of the session of the National Assembly before the organisation of the general

¹⁰⁴ Korea’s written submission, paras. 165 to 175.

¹⁰⁵ See Korea’s written submission, para 176 and Exhibit K-84.

¹⁰⁶ Korea’s written submission, para. 186.

¹⁰⁷ Korea’s written submission, paras. 187 to 190.

¹⁰⁸ Korea’s written submission, para. 192.

¹⁰⁹ Korea’s written submission, para. 193.

election on 15 April 2020.¹¹⁰ Moreover, Korea confirms that it has decided not to pursue for the moment the ratification of Convention No. 105, one of the eight fundamental ILO Conventions, because this would require an additional review of its penal system.¹¹¹

123. Therefore, the European Union must conclude that Korea's efforts towards ratification of the four outstanding fundamental ILO Conventions are still lacking and have not met the standard of "continued and sustained efforts" as required by the final sentence of Article 13.4(3) of the FTA EU-Korea.

V. CONCLUSION

124. For the above reasons, the European Union reiterates the requests for findings and recommendations set out at paragraphs 97 and 98 of its first written submission.

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¹¹⁰ EU's first written submission, para. 83.

¹¹¹ Korea's written submission, para. 196.