

**PANEL OF EXPERTS PROCEEDING
ESTABLISHED UNDER ARTICLE 13.15
OF THE KOREA-EU FREE TRADE AGREEMENT**

CONTENTS OF THE HEARING of 8 and 9 October 2020

**MINISTRY OF EMPLOYMENT AND LABOR
REPUBLIC OF KOREA**

**EUROPEAN COMMISSION
EUROPEAN UNION**

This report contains the parties' agreed summary of the hearing that was held via videoconference on 8 and 9 October 2020. It does however not provide a verbatim record of the hearing

Written QUESTIONS FOR KOREA

1. **Could Korea please elaborate why it believes that the 1998 Declaration does not include a legal obligation? Does Korea argue that the 1998 Declaration does not impose *any* legal obligation as it is contained in Article 13.4.3?**

Korea submits that it is well-recognised that the 1998 Declaration is a significant political instrument that does not impose any self-standing legal obligations. It is a document that expresses a consensus between States on the importance of, notably, the principle of freedom of association but without that consensus resulting in a legal obligation that can be enforced and form the basis for a finding of legal responsibility in case of breach. It can be seen as type of “soft law” instrument. Its content is persuasive and politically important. A hard law instrument, the Korea-EU FTA, can have both soft law and hard law within its obligations. Some provisions, such as Chapter 13, are meant to be aspirational and general in their effect, while others lay down more specific and concrete obligations. Therefore, the 1998 Declaration does not impose obligations of which the European Union alleges a breach in these proceedings.

Korea submits that the reference to the 1998 Declaration in the first sentence of Article 13.4.3 and the fact that that sentence refers to “the obligations deriving from membership of the ILO and the [1998 Declaration]” does not mean that, by virtue of Article 13.4.3, the political consensus expressed in the 1998 Declaration has been transformed into an enforceable obligation.

The EU did not contest to the position of Korea.

2. **Korea raises a claim on jurisdiction of the Panel.**

- A. **Could one at least say that the two Parties have a matter arising under Chapter 13? In other words, should any issue relating to any provision in Chapter 13 be regarded as a “matter” arising under Chapter 13?**

Korea stated that a matter has arisen in the relationship between both parties to the Korea-EU FTA. However, that matter is not a matter within the meaning of Article 13.15.1.

Article 13.2.1 states that Chapter 13 applies solely to “measures adopted or maintained by the Parties affecting trade-related aspects of labour and environmental issues in the context of Articles 13.1.1 and 13.1.2”. Subject to any exceptions to this rule set out in Chapter 13, measures that do not affect trade-related aspects of labour issues in the context of Articles 13.1.1 and 13.1.2 do not fall within the scope of Chapter 13. Such measures cannot constitute a “matter” for the purposes of Article 13.15.1 and thus cannot be examined by the Panel. Such measures might fall,

depending on whether they result in questions regarding the interpretation and application of other provisions of the Korea-EU FTA, within the scope of Chapter 14.

If the European Union has not identified measures adopted or maintained by Korea affecting trade-related aspects of labour issues or measures that otherwise fall within the scope of Article 13, the Panel must conclude that it lacks any jurisdiction because the European Union has brought before the Panel a matter which the Panel may not examine.

B. In this regard, we would like to seek Korea's response regarding the EU's argument of "residual provision" in its OS, para. 5.

Korea strongly disagrees with the European Union's characterization of Article 13.2.1 as a "residual provision" which "comes into play only where the scope of application of another provision of Chapter 13 cannot be ascertained in accordance with the customary rules of treaty interpretation."

Article 13.2.1 defines the scope of application of all of the provisions found in Chapter 13. It limits that scope to "measures adopted or maintained by the Parties affecting trade related aspects of labour". Only those measures are subject to the provisions laid down in Chapter 13. Other measures fall outside the scope of Chapter 13.

There is nothing in the text of Article 13.2.1 to suggest that it operates as a special principle of interpretation for the purposes of Chapter 13.

C. As Korea acknowledges, Article 13.6.1 of the bilateral FTA stipulates the Parties' recognition of "the beneficial role that core labor standards and decent work can have on economic efficiency, innovation and productivity". If so, one might argue that it indicates trade-related aspects of core labor standards. What would be Korea's view on this?

First, the burden does not fall on Korea to demonstrate that this dispute concerns trade-related aspects of labour. That burden lies with the European Union.

Second, Korea agrees with the Panel that core labor standards can play a beneficial role with regards to "economic efficiency, innovation and production" as highlighted in Article 13.6.1 of the Korea-EU FTA. However, the mere fact that there can be linkages of this type, as recognised by the Parties, does not mean that every action or inaction of a Party necessarily is a measure affecting trade-related aspects of labour.

Korea submits that showing that measures adopted or maintained by the other Party affect trade-related aspects of labour involves demonstrating that the measures at least confer some competitive advantage on employers that engage in the cross-border exchange of goods and services between Korea and the European Union.

D. Wouldn't Korea's interpretation regarding jurisdiction (and trade-related aspect) render such provisions as Article 13.4.3 inutile at the end of the day?

Korea respectfully disagrees.

Assume that a Party would halt any efforts previously made in ratifying the fundamental ILO Conventions or adopt legislation that manifestly takes away established protections of the freedom of association that affect sectors involve the cross-border exchange of services or goods between Korea and the European Union. In such a context, Article 13.4.3 could play an important role.

In any event, in its Panel request and written submission, the European Union has set out detailed allegations regarding how Korea's laws allegedly violate Article 13.4.3 of the Korea-EU FTA. Korea does not see why demonstrating that these alleged violations of the first sentence of Article 13.4.3 affect trade-related aspects of labour as required under Article 13.2.1 would be impossible. Nor has the European Union put forward any arguments in that regard.

Korea notes that, at paragraph 21 of its Oral Statement, the European Union argues that "[s]ince 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."

Insofar as this argument is supposed to apply to the first sentence of Article 13.4.3, the European Union's reference to "internationally recognized standards", which under ILO law refers to the rules set out in the ILO Conventions, again seems to conflate the Parties commitment under the first sentence of Article 13.4.3 to "respecting, promoting and realizing, in their laws and practices, the principles concerning fundamental rights" with the concrete rights and obligations contained in the ILO Conventions. However, although the obligation under the first sentence in Article 13.4.3 must be interpreted "in accordance with" the 1998 Declaration, it must also be interpreted in light of the other provisions set out in Chapter 13. As such, Article 13.4(3) is limited by the general scope of Chapter 13 as set out in Article 13.2.1.

Furthermore, with regard to the final sentence of Article 13.4.3, the European Union claims at paragraph 23 of its opening statement that "reading a 'trade affectation' test into Article 13.4(3) would have manifestly illogical results" because "a Party cannot choose to ratify those conventions only with regard to certain sectors or situations involving trade between them".

This misses the point. The point is the European Union should have shown why the measure that is the focus of its complaint under the final sentence of Article 13.4.3, namely the failure to ratify certain Conventions, affects sectors involving the cross-border exchange of services or goods between Korea and the European Union

3. Can it be said that in the context of the trade relations between Korea and the EU as governed by the EU-Korea FTA, labour conditions as referred to in

Article 13.4 may not affect trade? If yes, in which circumstances? Which are the legal effects deriving from the fact that Chapter 13 is one of the chapters as contained in the EU-Korea FTA?

The issue is not whether labour conditions can affect trade, in general. For that reason, paragraphs 25 to 29 of the European Union's Opening Statement are irrelevant to the Panel's determination of whether the European Union's panel request has identified a matter falling within its jurisdiction.

What matters is whether the measures that are the subject of the European Union's claims are measures affecting trade-related aspects of labour, meaning measures affecting aspects of labour conditions that relate to trade between both Parties. The reason for including a chapter such as Chapter 13 in the Korea-EU FTA is because certain measures in respect of labour conditions can affect that specific trading relationship. At the same time, certain measures in respect of labour conditions may not bear on that trading relationship or they might affect the trading relationship between one of the Parties and another third country. There is no basis to assume that in a bilateral trade agreement, the Parties would seek to regulate measures having no bearing on their trade relationship. The purpose of Article 13.2.1 is to make clear that Chapter 13 is concerned only with measures affecting aspects of labour conditions that relate to trade between both Parties.

For example, the European Union refers in footnote 41 of its written submission to alleged difficulties experienced by National Chauffeur Service Drivers Union in having its trade unions registered. Korea does not believe that it can be presumed, without any further substantiation, that alleged difficulties experienced by, for example, chauffeur service drivers will affect trade between Korea and the European Union. The European Union has certainly not alleged, for example, that there are European suppliers of chauffeur service drivers in Korea.

4. Korea claims that “objective...under Chapter 13...is not...a source of obligation for either Party”. Would Korea agree that while the objective itself does not impose an obligation, the contents codified in the provisions of Chapter 13 do?

In accordance with the customary rules of international treaty interpretation, the terms of a treaty should be given their ordinary meaning in the light of their context and the treaty's objective and purpose. The objective of the Korea-EU FTA may therefore be used to interpret the discrete obligations set out in other provisions, but the objective of sustainable development cannot itself be relied on to infer obligations not otherwise clearly provided for in those other provisions.

Sustainable development is an objective underlying the commitments made under Chapter 13. However, that overall objective cannot result in the assumption that every measure of a Party necessarily falls within the scope of Chapter 13. The concept of sustainable development “does not mean that every issue regarding

labour protection is necessarily also related to trade”.

5. **Korea makes an argument that only trade-related aspects of labor and environmental protection fall under the ambit of Chapter 13. But at the same time the text of Chapter 13 sometimes explicitly sets forth specific obligations without mentioning trade or trade relationship. If that is the case, in Korea’s view what is the legal nature of these provisions and obligations? Would all these provisions be hortatory in nature?**

Korea’s understanding is that Article 13.2.1 applies to every provision of Chapter 13. It is not limited to the provision where the phrase ‘affecting trade’ is reiterated.

To argue that only provisions expressly referring to trade apply to measures affecting trade-related aspects of labour completely alters the wording of Article 13.2.1. Article 13.2.1 states that the general rule is that Chapter 13 applies to measures adopted or maintained by the Parties affecting “trade-related” aspects of labour. The exception is where a provision expressly states differently.

The European Union’s position in essence means that the relationship between the general rule and the exception is reversed. The general rule becomes that Chapter 13 applies to all measures, unless a provision expressly states that it applies specifically to trade-related aspects of labour.

Korea asks the Panel to respect the wording used in Article 13.2.1.

Korea also emphasizes that the question of whether or not a provision imposes a particular type of obligation is distinct from the question of the measures to which that provision, and the obligation which it might impose, applies.

6. **With reference to the question above, the claims raised by the EU in this dispute relate to provisions in the EU-Korea FTA that do not contain specific language of “trade effect” or “affecting trade”.**

- A. **Could Korea please explain the relevance of the United States-Guatemala dispute to the present dispute, as the former arising under CAFTA-DR concerned a provision containing the wording “measures affecting trade” specifically? Are there any difference to be noted between Article 13.2(1) of the FTA EU-Korea and Article 16.2.1(a) of the CAFTA agreement?**

Although it is not binding, the dispute between the United States and Guatemala is relevant to our dispute in the sense that a jurisdictional question, i.e., trade-relatedness, was discussed. Because the labour provisions are included in the sustainability chapter, both FTAs explicitly limit the scope of matter to be raised in the dispute. In this sense, CAFTA-DR FTA panel in the US-Guatemala dispute provides a guidance with respect to the limited jurisdiction of the labour dispute. The panel focused on the meaning of trade-relatedness and the misguided use of the

panel process to obtain a finding that a respondent's labour laws are inconsistent with fundamental labour standards. Those are central questions in the present dispute.

By referring to the report of the CAFTA-DR FTA panel, Korea did not suggest that that report binds this Panel or otherwise serves as precedent. However, given the similarity in issues raised, the decision provides a useful guidance.

Article 16.2.1(a) of the CAFTA Agreement which was at issue in that dispute states that: "[a] Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties". Although not identical to the provisions at issue in the present dispute, Korea considers that both the wording, context and the background to the dispute as described above are sufficiently similar for the Panel's interpretation of the term "affecting trade" to be relevant.

B. Likewise, what relevance would there be between *U.S.-FSC (21.5)* and the dispute at hand? That decision of the WTO seems to pronounce the meaning of "affect" or "affecting" in general.

As stated earlier, Korea does not suggest that the US-FSC (21.5) report binds this Panel or otherwise serves as precedent. However, given that it has given an interpretation of one of the terms that is at issue in the current dispute, Korea considers that this report could be a helpful element to take into account when interpreting the same term under the Korea-EU FTA.

7. The EU mentions legally binding nature of the principles of the ILO Constitution and Declarations. In its WS. Para. 5, the EU refers to "the commitments assumed by the Parties". In WS, para. 19, the EU also states that "that principle is binding on all members". Does Korea accept (or not accept) this characterization of the EU?

Korea's principal objection is that the European Union argues that the content of the principle of the freedom of association corresponds with the content of the obligations assumed by parties that have ratified fundamental ILO Conventions.

The principle of the freedom of association in essence articulates the rationale or purpose of the obligations assumed by parties that have ratified fundamental ILO Conventions. However, where a party has not ratified those conventions, the principle of the freedom of association cannot be used as a vehicle to nonetheless hold that party accountable for specific conduct that violates the obligations assumed by parties that have ratified fundamental ILO Conventions.

Furthermore, Korea strongly disagrees with the European Union's characterization of the principle of freedom of association as binding all ILO Members by virtue of being mentioned in the ILO Constitution and in the Declaration of Philadelphia.

First, declarations do not contain binding legal obligations.

Second, while the preamble to the ILO Constitution and the Philadelphia Declaration recognise the freedom of association as a principal objective, that principle is not mentioned in any of the substantive provisions of the ILO Constitution.

Substantive legal obligations are set out in Convention 87, which Korea has not ratified yet.

The European Union in essence uses the FTA dispute settlement proceedings as a vehicle for seeking to enforce non-binding opinions of the CFA and fundamental ILO Conventions which Korea has not ratified. That was not the intended purpose of the dispute settlement mechanism agreed to by the Parties under Chapter 13 of the Korea-EU FTA. In its arguments, the European Union directly subsumes the detailed rights and corresponding obligations articulated in Convention No. 87 into the “principle of freedom of association”. The European Union fails to offer any reason why “principles concerning the fundamental rights” such as the principle concerning the freedom of association, can be presumed to have the exact same meaning as the fundamental rights, and corresponding obligations, set out in fundamental ILO Convention no. 87. Should the European Union’s argument be accepted, it would mean that consent to be bound by a treaty, such as this ILO Convention, has lost all meaning.

8. Korea seems to try to differentiate “commit” and “shall”. But isn’t it true that according to general treaty practices, the two terms are used interchangeably in treaties and agreements?

The disagreement between the parties is on the specific content of any obligation assumed under the first sentence of Article 13.4.3.

Korea focused on the ordinary meaning of the verb “commit”, taking into account, in particular, the immediate context found in the phrase “commit to respecting, promoting and realizing” and the 1998 ILO Declaration to which Article 13.4.3 refers, the broader context found in other provisions that use the verb “shall”, as well as the overall object and purpose of the provision. All of those elements considered together form the basis for Korea’s interpretation that the phrase “commit to respecting, promoting and realizing” in Article 13.4.3 expresses a commitment to engage in good faith behavior towards the overall objective of respecting, promoting and realizing the principles concerning fundamental rights such as the freedom of association.

To the best of Korea’s knowledge, there are eight instances at which the verb “commit” appears in the English version of the Korea-EU FTA. Six of those instances are found in Chapter 13. In the English version of two other provisions, found in other chapters, the parties did not use the verb “commit” but used the

phrase “the Parties shall commit to”. The relevant provisions are Article 6.13.4 (on customs cooperation) and Article 2.2 of Annex 2-B (on electronics and standard-setting bodies). According to the European Union’s position, the use of “shall” in those provisions serves no purpose because “commit” is a sufficient expression of a strict obligation. However, the fact is that, in respect of provisions in other chapters, the Parties deemed it necessary to add “shall” so as to express a strict obligation. Korea submits that the phrase “the Parties commit to” in Chapter 13 cannot have the same meaning as phrase “the Parties shall commit to” in other provisions of the Korea-EU FTA or, for example, the phrase “the Parties shall respect, promote and realise”.

Korea therefore maintains that the phrase “commit to respecting, promoting, and realising” expresses merely a commitment to engage in good faith behavior towards the overall objective of respecting, promoting and realizing the principles concerning fundamental rights such as the freedom of association. Korea takes the view that this interpretation is also fully consistent with the customary principles of treaty interpretation because it takes into account the ordinary meaning of “commit” as well as relevant context and the object and purpose.

In Korea’s view, executive, judicial and legislative actions that aim to bring about the freedom of association can be evidence that a Party “commit[s] to realize” that freedom. For example, an individual decision of a national court extending the right to unionise to a particular type of worker can be relevant evidence.

- 9. The 1998 ILO Declaration also uses the term “obligation” (“all Members...have obligation...to respect, to promote and to realise...”). To the extent that the first sentence of Article 13.4.3 was originally derived from the 1998 ILO Declaration, would this mean that the term “commit” in the article was introduced to have the same meaning as “obligation”?**

The term “obligation” as used in the 1998 ILO Declaration is hortatory in nature and may not give rise to the legally enforceable obligations with regards to the freedom of association. Such obligations are contained ILO Convention No. 87, which Korea has not ratified.

In any event, both Parties expressly decided not to include in Chapter 13 the same wording used in the 1998 ILO Declaration. Korea asks the Panel to consider the specific wording used in Article 13.4.3. That wording offers no basis to impose obligations on Korea that are the same as those assumed by parties having ratified the fundamental ILO Conventions. The 1998 Declaration states “all Members, even if they have not ratified the Conventions in question, have an obligation ... to respect, to promote and to realize”. The first sentence of Article 13.4.3 imposes a weaker obligation because it contains the phrase “commit to respecting, promoting and realizing”. The use of the verb “commit” implies at best an obligation of means

towards the objective of respecting, promoting and realizing. The phrase used in the first sentence must also be contrasted with phrases such as “shall commit” in Article 6.11.4 or the use of “shall” in Article 13.12 of the Korea-EU FTA.

10. Wouldn't there be a difference between the failure to abide by terms of specific provisions of a convention on the one hand, and the failure to “respect, promote and realise” principles enshrined in the convention?

Yes, there is a difference between the obligation found in the first sentence of Article 13.4.3, which refers to “respecting, promoting and realizing [...] the principles concerning fundamental rights”, and the specific provisions of ILO Convention No. 87. However, the European Union continuously makes reference in its written submission to the text of ILO Convention No. 87 and the interpretations thereof issued by the CFA. The European Union thus conflates the distinction between, on the one hand, the recognition of the principle of the freedom of association set out in the preamble of the ILO Constitution and the Declaration of Philadelphia, and affirmed in the 1998 Declaration, and, on the other, the obligation to give effect to the need to protect the concrete rights laid down in fundamental ILO Convention No. 87.

11. How would Korea explain the contradiction between obligations of the 1998 ILO Declaration and “no binding” obligations of the declaration as stated in its written submission?

Korea disputes that there is a contradiction between those obligations.

The legal effects of the use of terms such as “obligation” or “undertaking” and the status of instruments in which those terms are found must be determined taking into account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise. For the reasons set out by Korea, it is well-established that the 1998 ILO Declaration, as a whole, is not legally binding and was not intended to produce legal effects.

12. The 1998 ILO Declaration may not be binding. But once it is incorporated into an FTA independently, would it then become legally binding at least to the FTA parties as a provision in the FTA *irrespective of the nature of the original source* (see EU OS, para. 58)? By way of example, the ILO Labour Office states, that their incorporation into an FTA manifests that general principles turn into legally binding and enforceable elements.

The first sentence of Article 13.4.3 does not state that the Parties are bound, by

virtue of the Korea-EU FTA, by the terms of 1998 ILO Declaration.

The content of any obligation assumed under the first sentence depends foremost on the interpretation of the phrase “the Parties ... commit to respecting, promoting and realizing, in their laws and practices, the principles concerning the fundamental rights”. The phrase is further qualified by the phrase “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 [the 1998 Declaration]”. The latter makes it clear that any obligation assumed under the first sentence cannot go beyond the legal consequences of ILO Membership and the 1998 ILO Declaration.

In any event, Korea notes that, at paragraph 55 of its Opening Statement, the European Union itself states that it “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”.

13. The EU discusses the Korean Supreme Court cases in regard to expanding worker status to self-employed persons including Supreme Court decision of 2006, for example in its WS, paras. 42-43. Korea does not seem to refute the EU’s discussion of the cases. Is there any update on or changes of these cases? Is the case law on this point still current in Korea?

Recognition “worker” status of self-employed persons has significantly widened after the 2006 Supreme Court’s ruling. The 2018 Supreme Court’s ruling, which recognized even broader recognition of the “worker” status of self-employed persons, has formed the legal principle in the interpretation of the “worker” status under the TULRAA.

As stated in the OS, after the Supreme Court ruled in 2006 that self-employed persons are not *per se* excluded from the “worker” status under TULRAA, the scope of “worker” under the TULRAA has been steadily expanded to the persons such as golf caddies, work-book tutors, KORAIL snack bar operators, car salesmen, delivery workers, water purifier repairmen and salesmen, jockeys, chauffeur service drivers, and after-school teachers, who provide labor based on (consigned) contract, instead of employment contract.

In particular, the 2018 Supreme Court’ ruling which tested the “worker” status under the TULRAA clarified that “worker” under the TULRAA may be recognized more broadly than “worker” under the Labor Standards Act. It also judged that although the nature of “subordination” is somewhat weaker, the “worker” status under the TULRAA shall not be denied against self-employed persons considering the need to protect their fundamental labor rights.

This shows EU's claim that Korea's Supreme Court views the existence of "subordinate relationship" as the absolute criterion of deciding whether a person is "worker" under the TULRAA is not true.

The Korean Government considers whether a person's employment type substantially requires protection of fundamental labor rights to be the most important factor for deciding "worker" status under the TULRAA and comprehensively examine other factors such as income dependency, contract type, methods of labor provision, and legal relationship between the parties.

In addition, the Government has been so striving to guarantee the freedom of association of workers as to receive trade union registration of chauffeur service drivers, deemed as typical platform workers (Jul 2020).

Whereas the ILO member states such as Germany and the UK regard the self-employed as a separate type of employment relationship and restrict their fundamental rights compared to ordinary workers.

Once again, Korea reiterates that it fully recognizes the fundamental labor rights of self-employed persons, once they are recognized as "worker" under TULRAA.

- 14. Korea has provided examples of cases where the statutory definition of worker has been extended beyond employees to 'employee-like' contractors. These decisions, however, still define 'worker' by reference to subordinate relations (for example Supreme Court decision 2004Da29736), the supervision/direction of the worker by an employer (as in the Golf Caddies case), and the existence of an exclusive relationship between the worker and the engaging entity/employer encompassed in its notion of 'dependent self-employed'. Does Korea accept that even with the extensions in case law to employee-like workers, many self-employed workers will still not meet the statutory definition of worker? Does Korea agree that this means its domestic law will continue to include some self-employed workers?**

Korea's TULRAA broadly defines "worker" as any person who lives on wages, a salary, or any other income equivalent thereto, regardless of the person's occupation.

Deciding whether various types of worker fall within the definition of "worker" under the TULRAA may only be possible through individual and specific judgements, and this is also the case for the EU.

Thus, self-employed persons are not *per se* excluded from the "worker" status under the TULRAA and require individual and specific judgements.

Moreover, as mentioned earlier, the definition of "worker" under the TULRAA falls under more relaxed criteria than that of the Labor Standards Act in terms of

“subordination”, supervision or instruction, making easier to recognize the “worker” status of self-employed persons.

* (Article 2(1)-1 of the Labor Standards Act) The term "employee" means a person, regardless of the kind of occupation, who offers labor to business or a workplace for the purpose of earning wages.

* (Article 2(1) of the TULRAA) The term "worker" means any person who lives on wages, a salary, or any other income equivalent thereto, regardless of the person's occupations.

15. Does Korea accept that truly independent contractors (not those who are employee-like as defined above) have rights to freedom of association?

Though it is difficult to understand the exact meaning of “truly independent contractor”, Korea's TULRAA broadly defines “worker”, and any worker can exert the rights under the TULRAA, if he/she falls within the definition of “worker” under the TULRAA.

Apart from this fact, even if an association does not fall within the definition of “trade union” under the TULRAA, it can exert the freedom of association as an “association”, provided by the Constitution and Civil Law.

16. Does Korea agree that without legislation positively including the self-employed within the definition of ‘worker’ in the TULRAA, the extension of the principles of freedom of association to those workers will be piecemeal and slow?

We do not agree.

As the means of providing labor rapidly diversify, the term, “worker” the law should be defined broadly while its application relies on flexibility with regard to individual and specific cases.

Otherwise it is hard to deal with all types of employment, created by rapidly changing economic, social, and labor situations, and this may lead to insufficient protection of the labor rights of workers in various types. In this context, we understand that EU member states decide the “worker” status case by case, just like Korea.

In addition, the right to freedom of association can be fully protected under the Constitution, even if the self-employed aren't actively included in the TULRAA.

Under the Korean legal system, the freedom of association applies to general associations and trade unions, that benefit from special protection. Article 21 of the Constitution recognizes the freedom of association for all people, and accordingly, people can form associations and engage in activities of associations without any

restrictions. For instance, associations that are not a trade union, like the Federation of Micro-enterprise, comprised of members who are all self-employed persons, exercise significant influence.

Meanwhile, the status of a trade union guarantees the union stronger and more special protection than the protection provided to a general association, beyond the freedom of association to collective bargaining and collective action. This is why separate provisions exist in Article 33 of the Constitution and the TULRAA. As mentioned earlier, the scope of those recognized as “workers” under the TULRAA is continuously being expanded, protecting more and more workers.

17. Can Korea clarify the current legal status of the heavy goods vehicle drivers the subject of ILO Committee on Freedom of Association Case No 2606? In what ways, if any, will the proposed legislative changes to the TULRAA alter this status quo?

Individual CFA complaints are irrelevant to the TSD Chapter of the Korea-EU FTA and are not included in the matters for discussion by the Panel of Experts.

However, should Korea provide a short response, Korea’s TULRAA broadly defines “worker”, and any worker can exert the rights under the TULRAA, if he/she falls within the definition of “worker” under the TULRAA.

18. In relation to the proposed changes to the TULRAA appended to Korea’s OS, can Korea explain why it is necessary to retain paragraph (c) of TULRRA Article 2(4) in the amending Act designed to abolish Article 2(4)(d)? Article 2(4)(c) permits the dismissed worker to retain their ‘worker’ status under the Act until the NLRC has determined their unfair labor practices application. Can Korea please explain why is such protection necessary, if dismissed or unemployed workers will have the same rights to union membership as others?

If we may clarify the question, the amendment bill of the TULRAA moves Article 2(4)(d) of current TULRAA to Article 5(6) of amended TULRAA, thus irrelevant to Article 2(4)(c).

The reason why the Government had the dismissed to maintain worker status until a review decision is made by the National Labor Relations Commission, as it submitted the amendment bill, is to protect the labor activities of union members disputing their dismissal.

If a dismissed worker is immediately considered not currently employed member of trade union, he or she may experience certain inconveniences.

Therefore, to facilitate labor union activities, such dismissed workers are allowed to maintain their union membership until a review decision regarding the dismissal is made by the National Labor Relations Commission.

Why does amendment bill allow the dismissed maintain worker status? What would be the benefit of protecting the rights of the dismissed in this case?

If a dismissed worker is immediately considered not currently employed member of trade union, he or she may experience certain inconveniences, as a consultation with the employer is required in order for their entry to the workplace, pursuant to Article 5.3* of the TULRAA.

- * When a trade union member who is not an employee conducts trade union activities in a business or workplace pursuant to Article 2, he or she shall comply with the corporate rules of the workplace or the procedures agreed between labor and management regarding access to and use of facilities.

- 19. Can Korea explain the proposed provision which states that workers not employed at the enterprise may engage in industrial activity only to the extent that this does not ‘interfere with an efficient business operation’, and that access to the workplace and facilities may be limited by management fiat. These provisions do not seem to capture the principle of freedom of association as expressed in the ILO Committee on Freedom of Association Digest, particularly in relation to the right of union officials to have access to the workplace. As presented, that amended TULRAA seems not to specify the positive rights, only their limitation.**

Under Article 13.15.1, “[t]he Panel of Experts should seek information and advice from either Party, the Domestic Advisory Group(s) or international organisations as set out in Article 13.14, as it deems appropriate.

However, this provision is confined to the Panel’s terms of reference. This provision does not provide an opportunity to raise a new claim which is not within the Panel’s terms of reference.

As the Panel acknowledges, Exhibit EU-3 is quoted a couple of times in the EU’s Oral Statement, but Exhibit EU-3 is only cited in the subsection, “Self-employed workers,” paragraphs 84 – 93. EU cited Exhibit EU-3 for making its argument about self-employed workers, not access to the facilities. This is separate claim that the EU did not include in its panel request.

Therefore, Korea submits that Question 19 is not within the Panel’s terms of reference.

- 20. It appears that Korea does not intend to alter the TULRAA to give persons not employed at an enterprise the right to hold union office in an enterprise union. Is this correct, and how is this consistent with Korea’s intention to ratifying Convention 87 as on its face it is inconsistent with the principle of freedom of**

association?

The Korean government's amendment bill to the TULRAA was proposed to better comply with the fundamental principle(s) of the Conventions on freedom of association, and therefore we believe it is well aligned with the purpose of Convention No. 87.

Currently Article 23 of TULRAA stipulates that "officers of a trade union shall be elected from among its members." However, Article 23 of the amendment bill to the TULRAA stipulates that in principle, a trade union can freely elect its officers pursuant to its bylaws.

Meanwhile, with consideration for the specific characteristics of Korean industrial relations involving enterprise-based unions, the amendment bill to the TULRAA states that union officers for enterprise-based unions shall be elected from among union members who are incumbent workers.

* (Article 23.1 of the amendment to the TULRAA) The eligibility for union officers shall be determined through union bylaws, provided that the officers of unions organized for a business or place of business shall be elected from among union members who are incumbent workers of the business or place of business.

Understanding the specific characteristics of Korean industrial relations means understanding the predominance of enterprise-based unions in Korean industrial relations.

In Korea, unlike European countries, members of enterprise-based unions account for nearly half of all union members.

Enterprise-based union members, having contact with the management on a daily basis, are actively engaged in and committed to union activities.

The officers of enterprise-level unions, in particular, play an important role as the leaders of collective bargaining and industrial action.

Under the circumstances, anyone not currently employed and thus with little knowledge of the enterprise concerned being elected a union officer is likely to hamper a smooth collective bargaining process.

- 21. One of the reasons given by Korea for the prohibition on non-employees holding office in enterprise unions is that such 'outsiders' would not have the personal relationship which exists between workers and management at the enterprise level. In order for the Panel to understand this argument, can Korea inform the Panel in broad terms of the range of sizes of single enterprises? For example, it would be useful to know the size in number of employees of the biggest ten enterprises in Korea.**

The reason why the Korean government restricted the electoral eligibility to trade

union members who are not employees is because of the unique partnership in enterprise-based unions, not because they do not have personal relationship as an outsider.

Unlike European countries, Korea has a deep-rooted culture of enterprise-based unions.

Members of enterprise-level unions and the management have contact every day, and the union members are committed to and actively engaged in union activities.

The officers of enterprise-based unions, in particular, play a key role in leading collective bargaining and industrial action.

Against this background, anyone who is not an incumbent worker and does not know much about the enterprise concerned being elected a union officer is likely to undermine a smooth bargaining process.

Under the circumstances, Article 23 of the Korean administration's amendment to TULRAA is designed to allow unions to freely select union officers through their bylaws while for enterprise-based unions ensuring that union officers are elected from among union members who are incumbent workers.

* (Article 23.1 of the amendment to TULRAA) The eligibility for union officers shall be determined through union bylaws, provided that the officers of unions organized for a business or place of business shall be elected from among union members who are incumbent workers of the business or place of business.

22. In relation to the role of administrative authorities in certifying union registration, does Korea agree that these authorities make an assessment of whether or not the workers covered by the applicant organization are statutory workers under the TULRAA, and whether or not such organizations are inappropriately political in character?

Korea does not agree.

What the Korean administrative office does is simply to identify the purpose of union by examining documents, including bylaws, submitted by the union.

It includes a normal process of verifying the worker status under TULRAA, in which the self-employed is subject to less strict criteria than the Labor Standards Act regarding economic dependence on the employer and/or employer's supervision or instruction.

As Korea understands, European countries have similar processes.

23. Can Korea clarify whether or not the Migrants Union and the Youth Union were

refused certification on the grounds that they had inappropriate political goals? What is the current status of these unions?

This is not true.

Both unions have been registered as legitimate unions and they have been operating actively.

- 24. What happens if an administrative authority's decision to certify a union is appealed? Does the organization retain its union identity and legal rights until the appeal is heard? What does Korea say to the allegations in Exhibit EU-3 (EU OS) which claim that unions including the Home Study Teachers union have been unable to function while their certification is appealed, a process which the Exhibit states could take years?**

Where the administrative office decides to return a union registration, the organization concerned may file a lawsuit against that decision to the administrative court. If the court orders revocation of the decision, the administrative office is required to follow the court's definitive ruling.

Although the union concerned is not a union under the TULRAA that enjoys special legal protection until its claim is accepted by the court, it may continue to operate as an association protected by the Constitution.

In the case of workbook tutors, the administrative office has registered as a union, but the management, the other party in collective bargaining, have denied the worker status under the TULRAA, and collective bargaining between the labor and management have not taken place, which led to a lawsuit.

This is a dispute between labor and management which has nothing to do with the administrative office's registration of a union. Workbook Tutors Union, which was legitimately registered in accordance with the Korean law, even in conflict with the management, enjoys statutory rights such as the fundamental labor rights, remedy request against unfair labor practices, recognition of time-off, etc.

- 25. Korea states that the role of the administrative authorities in union certification is 'limited to verifying whether the required documents have been submitted and whether the autonomy of the union is guaranteed.' However, Exhibit EU 3 (EU OS) states that the insurance salespersons' union has waited almost a year and not heard back from the administrative agency in relation to an application for certification. Has there been such a delay, and what is the reason for it?**

Unlike the European countries, "any Korean national" is free to establish an association in accordance with Article 21 of the Korean Constitution, while Article

33 of the Constitution guarantees “workers’ rights” to collective bargaining and collective action in addition to right to organize freely.

The latter provision is to endow distinguished protection of right to organize to workers, meaning the recognition of their rights to association leads to rights to collective bargaining and collective action, as well as request for mediation, remedy request against unfair labor practice, incorporation, and tax exemptions even without any further measure.

This system is basically the same with the case of the UK, where a trade union is entitled to various protection and right to ask for a collective bargaining only after a certification officer completes verification process to check the autonomy of the union.

Therefore, it is necessary to decide the scope of workers who become entitled to this distinguished protection, and union registration system is the means to verify whether an association is autonomous union of workers.

The scope of worker under the TULRAA is quite comprehensive, and the court’s decisions are recognizing the worker status broadly. As a result, platform workers such as chauffeur service drivers are being recognized as workers under the TULRAA.

As for insurance salespersons, however, it takes significant amount of time to verify worker status of individual and specific cases since they work under various types of contracts, provide labor in many different ways, and have the characteristics of the self-employed as well as that of workers at the same time.

It should be noted, however, that insurance salespersons are free to establish an association regardless of operating a trade union under the relevant law.

26. Can Korea explain the amendments it proposes the Military Service Act and whether or not this will bring Korean domestic law into compliance with the both the core ILO Conventions on forced labour?

In Korea, all men over a certain age are subject to compulsory military service. For some men with physical grades incapable of performing active duty service, the compulsory military service is replaced by an alternative service where they serve as social service personnel.

Korea’s social service personnel system may be an issue as the Convention No. 29 views compulsory labor of a non-military character as forced labor. However, if the compulsory labor of a non-military character is a privilege granted to individuals on request, the ILO does not consider the non-military work to be inconsistent with Convention No. 29.

Against this background, the Korean government submitted an amendment to the Military Service Act to the National Assembly, which would give those who are selected for social service personnel a choice between serving as a social service personnel and an active duty serviceman.

27. TULRAA Article 12(2) regulates a situation where an application for the establishment of a trade union needs to be supplemented “because of any omission or other reasons”.

A. Could Korea please explain what the meaning of “other reasons” is? How has the term been interpreted so far?

“Et cetera (etc.)” in Article 12.2 of the TULRAA cannot be understood as “other reasons.”

Article 9 of the Enforcement Decree of the TULRAA stipulates that “etc.” will be applied only: 1. where the bylaws fail to be attached to the written report of establishment or where any omission or incorrect facts are found in the entries of the report or the bylaws; and 2. where the procedure for the election of executive members or for the enactment of the bylaws violates the law.

Thus there is no possibility that administrative offices’ discretion intervenes in the verifying process.

B. In particular, KCTU, KFSU and FKTU’s *amicus curiae* submissions present examples of refusals of certifications under TULRAA Article 12(2). Were these refusals based on “other reasons”?

Furthermore, the cases cited by the FKTU, the KCTU and the Korean Federation of Service Workers’ Union have nothing to do with the “et cetera (etc.)” of Article 12.2 of the TULRAA.

C. Can Korea provide us with some recent examples where administrative authorities used the ‘other reasons’ as a ground for refusing certification of a union?

There is no such case that union registration request was returned on the basis of “other reasons.”

28. Could Korea please provide updates on situations in regard to ratification motions and amendment bills at the National Assembly? being discussed in para. 83 of the EU’s WS? Also, for the Panel’s information could Korea describe the process of law-making and indicate whether or not the government can control the timing of legislation before the National Assembly?

The Korean legislature elects new members every four years. When a bill proposed by the administration or lawmakers is not passed within the term of four years, the

bill is to be automatically scrapped. Thus, the pending legal amendments and ratification motions were automatically scrapped with the termination of the 20th National Assembly on May 29, 2020. As such, the government swiftly submitted* the legal amendments and ratification motions again to the 21st National Assembly, to facilitate continued discussions.

- The MOEL submitted amendments to the TULRAA, the AEOPOTU, and the AEOTU on June 30, 2020 and amendments to the Military Service Act on July 2, 2020. It then submitted motions for ratification on July 14, 2020.

In Korea, there are 10 steps for amendments to the law to be followed, and it usually takes at least 110-170 days for an amendment to be drafted submitted to the National Assembly.

Yet, considering that the legal amendments and ratification motions have already been submitted to the previous National Assembly, the process was fast-tracked to enable them to be submitted again in just about 32-46 days, which is a very short period of time.

In light of the separation of powers that applies in Korea, it is not possible for the executive branch such as the Ministry of Employment and Labour can set a specific date for the passage of amendment and ratification bills by a legislative body.

Korea asks the Panel for permission to file, as a new exhibit in these proceedings, Korea's legislative procedures.

29. In Korea's view, what is the nature of the obligation to make "continued and sustained efforts"? Could Korea please explain how that obligation can be understood to mean a "commitment not to take measures which would run contrary to moving towards ratifying fundamental ILO conventions"?

Article 13.4.3 of the Korea-EU FTA requires the Parties to make "continued and sustained efforts towards" towards ratifying the fundamental ILO Conventions. This is an intention to engage in positive steady action. In Korea's view, this means that the Parties agreed to engage in concerted preparatory efforts towards the ratification of the ILO conventions.

By agreeing to make continued and sustained efforts towards ratifying the conventions, the Parties accepted not to roll back their efforts or take actions that would impede the preparatory steps towards ratification. In essence, the Parties agreed to refrain from taking measures that would defeat the purpose of moving towards ratifying the key ILO conventions.

30. Korea interprets the obligation to make "continued and sustained efforts" as "to continue to take steps". In Korea's view, would the term "to continue to take

steps” mean effectively the same thing as to make “persistent” efforts as the EU argues in its OS, para. 119?

Yes.

31. Korea explains the progress of the ratification of the four fundamental conventions. What is the current status of the ratification process as it stands now in the Korean National Assembly? Would Korea expect that the ratification proceedings will be completed this fall?

The previous legal amendments and ratification motions last year automatically expired with the termination of the 20th National Assembly on May 29, 2020.

As such, the government swiftly submitted* the legal amendments and ratification motions again to the 21st National Assembly, to facilitate continued discussions.

- The MOEL submitted amendments to the TULRAA, the AEOPOTU, and the AEOTU on June 30, 2020 and amendments to the Military Service Act on July 2, 2020. It then submitted motions for ratification on July 14, 2020.

The amendments to labor laws, including the TULRAA, were tabled at the National Assembly’s standing committee (Labour and Environment) on September 15, and motions for ratification were tabled at the relevant submitted (Foreign Affairs and Unification) on September 28, respectively.

Given that the ruling party, that holds favorable views towards ratification of the fundamental ILO conventions, have the majority in the National Assembly, The Ministry positively expects that in-depth discussion on ratification of the fundamental conventions and amendment of relevant laws will take place in the 100-day plenary session of the National Assembly that began on September 1.

The Ministry will make best of its efforts to get approval from the National Assembly on the legal amendments and ratification motions within this year, although it is difficult for the Ministry to pin down when the legislation will be completed. However, the MOEL will actively support discussion at the National Assembly to achieve the goal of passing all the amendments and ratification bills within this year.

32. Has the information regarding Korea’s efforts to ratify fundamental ILO Conventions been duly conveyed to the EU during the consultation stage?

The MOEL elaborated the progress of social dialogue which was going on as of January 2019, to the EU on the occasion of government consultations requested by the EU. The social dialogue itself was initiated to find ways to improve legislation and institutions to ratify fundamental ILO Conventions.

Korea also provided information that public interest members who participated in the dialogue proposed a list of legislative priorities, on which lawmakers also proposed amendment bills to ratify relevant ILO Conventions.

In addition, the MOEL elaborated that it held quite a number of briefing sessions to lawmakers so that discussion at the National Assembly could be facilitated, and mount a publicity campaign to raise awareness regarding the necessity of ratification.

As a response to the EU's inquiries, the MOEL explained in detail regarding due procedure for the ratification of an international treaty or convention which requires legal amendment.

33. Were the development in May 2019 and October 2019 regarding the preparation for the ratification of the four conventions a direct outcome of the bilateral consultation that took place in January 2019? Did the consultation make Korea adjust or change its policy stance or priority as regards ratifications of the four conventions?

The consultation between the Korean government and the European Commission had no impact on Korea's ratification process for the fundamental ILO conventions.

The Korean government has continued to make efforts to ratify the fundamental Conventions in order to faithfully fulfill the promises on the Korea-EU FTA, ever since it entered into force.

In particular, as the current administration put ratification of the fundamental Conventions on one of the top priorities of national agenda in 2017, the Korean government has been preparing for the ratification, even before consultation with the European Commission started, according to its own plan.

34. Could Korea give detailed information on the steps and efforts Korea made between 2011 and 2020 with respect to the ratification of the ILO conventions referred to in the Request for the establishment of a Panel of Experts by the EU?

A. Please list all proposed amendment bills to the National Assembly and explain their precise relationships with the requests made by the EU in the present case.

In total, 30 amendment proposals were submitted to the National Assembly related to the ratification of the fundamental ILO conventions since 2011.

Most of the submitted bills were proposed by lawmakers and the government upon determining that amendments to the law are necessary in order to ratify the ILO convention on Freedom of Association.

B. Could Korea give information about any potential step that will be taken in the near future with respect to these proposed amendment bills?

As explained earlier, amendments to the TULRAA and other labor laws were tabled to the National Assembly's standing committee on September 15, and motions for ratification were submitted on September 28.

The Ministry positively expects that in-depth discussion on ratification of the fundamental conventions and amendment of relevant laws will take place in the 100-day plenary session of the National Assembly that began on September 1.

The government, in order to provide support to facilitate discussions in the National Assembly to make amendments to labor laws and to ratify the fundamental ILO conventions, provided 15 briefings to lawmakers to make a case for legal amendments and for ratification of the conventions, and also partook in a discussion in the National Assembly.

35. Could Korea give details about when it thinks that ratification of Convention No 105 may proceed?

While pushing ahead with the ratification of the other three conventions first, the administration will continue to work on the ratification of the convention No.105 through building social consensus and thorough review on domestic legal system with regards to the convention No.105 after completing the ratification of the other three conventions.

36. Korea requests the Panel to “make[] no recommendation in respect of Korea’s implementation of Chapter 13 of the Korea-EU FTA, and its advice is limited to encourage both parties to find mutually beneficial solution, through continuous cooperation based on mutual respect”.

A. What would be the nature of “advice” that Korea is referring to?

Article 13.15.2 states that the Panel may give “advice or recommendations”. An advice can mean the same as a recommendation. But taking into account that the text distinguishes between an advice and a recommendation, it seems appropriate to interpret “advice” as meaning simply the opinion or assessment of the Panel regarding the matter.

B. Isn’t “finding mutually beneficial solution through cooperation and mutual respect” already an obligation existing in the bilateral FTA irrespective of the Panel proceeding? If so, in Korea’s view, what would be the additional value of such advice?

As Korea has already explained during this hearing, there is a disagreement between the European Union and Korea. However, that disagreement does not

concern a matter that is to be resolved by application of Chapter 13 or that may be resolved through the dispute settlement mechanism for which that Chapter provides. In those circumstances, Korea asks the Panel that its advice be limited to encouraging both parties to find a mutually beneficial solution, through continuous cooperation based on mutual respect, which is the common method for resolving disagreements in international relations.

QUESTIONS TO BOTH PARTIES

ANSWERS BY KOREA

1. **Chapter 13 of the EU-Korea FTA does not have a provision concerning the next step after the issuance of “advice or recommendation” of the Panel (except for the monitoring of implementation of recommendation in Article 13.15.2). If the Parties could explain to the Panel as to the possible next steps after the issuance of report, it would help the Panel discharge its obligation.**

In accordance with Article 13.15.2 of the Korea-EU FTA, the mandate of the Panel is to “provide its expertise in implementing” Chapter 13. To that effect, the Panel may give advice or make recommendations that do not bind the parties.

If the European Union does not establish, with persuasive arguments and evidence, the alleged errors in Korea’s implementation of Chapter 13, there is no cause for the Panel to make recommendations. In that circumstance, the Panel could limit itself to stating its opinion that no problem in implementing obligations under Chapter 13 has been established. In such a circumstance, there would also be no further need for monitoring by the Committee on Trade and Sustainable Development because Article 13.15.2 specifies that that Committee must monitor the “implementation of the recommendations of the Panel of Experts”. That provision does not refer to the advice of the Panel of Experts.

As Korea will explain, in response to another question of the Panel, an advice can mean the same as a recommendation. But taking into account that the text distinguishes between an advice and a recommendation, it seems appropriate to interpret “advice” as meaning simply the opinion or assessment of the Panel regarding the matter. A “recommendation” pertains to the something that must occur in the future and, at best, can relate to the need for either party to act so as to ensure compliance with its obligations under Chapter 13 without specifying what particular action is needed. That distinction appears to be confirmed by Article 13.15.2 which envisages a mandatory role for the Committee on Trade and Sustainable Development only in respect of monitoring the implementation of recommendations. In case of an advice, there is nothing to monitor.

2. **Article 13.15.2 seems to differentiate between “advice” and “recommendation” of the Panel.**
 - A. **Recommendation appears to be subject to implementation and thus monitoring, but advice does not. Could the Parties clarify or confirm whether this understanding is accurate?**

Yes

B. How would the Parties distinguish advice and recommendation?

An advice can mean the same as a recommendation. But taking into account that the text distinguishes between an advice and a recommendation, it seems appropriate to interpret “advice” as meaning simply the opinion or assessment of the Panel regarding the matter. For example, an advice of the Panel in this case could consist of the opinion that there is no evidence before the Panel to doubt Korea’s commitment to making continued and sustained efforts towards ratification of the fundamental ILO Conventions and that the Panel supports Korea in continuing those efforts.

A “recommendation” pertains to the future and, at best, can relate to the need for either party to act so as to ensure compliance with its obligations under Chapter 13 without specifying what particular action is needed. That distinction appears to be confirmed by Article 13.15.2 which envisages a mandatory role for the Committee on Trade and Sustainable Development only in respect of monitoring the implementation of recommendations.

3. The Panel would like the Parties to both identify the rules of interpretation governing the interpretation of the EU-Korea FTA? Korea has referred to Articles 31 to 33 of the Vienna Convention on the Law of Treaties, but may want to complement its argument.

The Korea-EU FTA is a treaty and therefore it is to be interpreted in light of the customary principles of treaty interpretation in international law. It is well-recognised that Articles 31 to 33 of the Vienna Convention on the Law of Treaties have the status of customary international law.

4. Article 13.4 (3) of the EU-Korea FTA states that the parties commit “to respecting, promoting and realizing, in their laws and practices, the principles concerning the fundamental rights, (...)”. The Panel would like to have clarification on the interpretation of the word “realizing”. The Panel would also like the parties to identify which legal effects should be given to the words “principles concerning the fundamental rights”.

The interpretation of the word “realizing”

The phrase “respecting, promoting, and realizing” is taken directly from the 1998 ILO Declaration which uses the phrase “to respect, to promote and to realise”. However, there is an important distinction between the first sentence of Article 13.4(3) and paragraph 2 of the 1998 ILO Declaration. Paragraph 2 uses the phrase “have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize”. By contrast, the first sentence of Article 13.4.3 states that the parties “commit to respecting, promoting and realizing”.

The negotiating history of the 1998 ILO Declaration confirms that the word “realize” does not mean “apply”. Contrary to what is stated at paragraph 46 of the European Union’s Opening statement, Korea provided the relevant reference to that negotiating history. As already referred, paragraph 199 of the ILO Report of the Committee on the Declaration of Principles which states: “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 use of “aplicar” in the official Spanish translation of the Declaration was subsequently changed to “hacer realidad”, in line with the opinion of the Government of Mexico. This demonstrates that ILO Members did not consider “realize” and “apply” to be synonymous.

Therefore, a commitment to “realize” the principles in the Declaration does not mean that States undertook to give full effect, in law and in fact, to the obligations in respect of the protection of concrete rights laid down in fundamental ILO Conventions which they have not yet ratified.

Interpretation of the phrase “principles concerning fundamental rights”

Article 13.4.3 uses the phrase “principles concerning fundamental rights” and not simply “fundamental rights” or “principles and fundamental rights”. Therefore, it cannot be understood as referring to the specific rights, and corresponding obligations, set out in the fundamental ILO Conventions, such as ILO Convention No. 87.

Article 2 of the 1998 Declaration, to which the first sentence of Article 13.4.3 also refers, uses the same phrase “the principles concerning the fundamental rights” but explains that the fundamental rights are those “which are the subject of those Conventions”. Thus “principles” and “the fundamental rights” cannot have the same meaning.

Korea submits that the term “principles” is used to refer to the general and political aims underlying the freedom of association. Such principles may also form the basis for the fundamental rights that must be protected by parties that have ratified the fundamental ILO Conventions. However, Parties that have not ratified those conventions cannot be held responsible for breach of those obligations in respect of those fundamental rights.

The preamble of the ILO Constitution refers to the “principle of freedom of association”. Likewise, Article I of the 1944 Declaration of Philadelphia “reaffirms the fundamental principles on which the Organization is based” and that “freedom of expression and of association are essential to sustained progress”. Furthermore, Article V “affirms that the principles set forth in this Declaration are fully applicable to all peoples everywhere”. The 1998 ILO Declaration restates the ILO Members’ commitments to the principles concerning fundamental rights but does not impose concrete obligations.

As a result, “principles” are generally understood to establish objectives and values that can impact legal decisions and form the basis for more specific norms, such as rights laid out in conventions.

5. Are the obligations as defined in the first sentence and final sentence of Article 13.4(3) obligations of conduct or obligations of result? How does the standard of due diligence find place in the satisfaction of these two obligations?

Whether the obligations in the first sentence and final sentence of Article 13.4.3 are obligations of conduct or of result is to be determined based on an interpretation of those provisions in light of customary principles of treaty interpretation in international law.

Korea submits that the obligation under the first sentence of Article 13.4.3 is limited to a commitment to engage in good faith behavior towards the overall objective of respecting, promoting and realizing the principles concerning fundamental rights such as the freedom of association. The obligation under the final sentence of that provision focuses on the type of efforts to be made towards ratification and not the result of achieving ratification.

Therefore, neither obligation is concerned with achieving a defined result. In this regard Korea notes for the EU’s answers from yesterday that it agreed on the nature of obligation as that of a conduct.

6. Please provide analysis on the legal contours of the principle of freedom of association and the legal effects deriving it, in the context of the ILO and in the international legal order more generally?

Under ILO law, the affirmation of general principles and values set out in ILO Declarations can be contrasted with the more specific and legally enforceable rights protected by the fundamental ILO Conventions. As explained by the ILO Legal Adviser during the drafting of the 1998 Declaration (ILO, Report of the Committee on the Declaration of Principles, 86th Session, 1998, para. 73):

“[A]s for ‘values’, the intention had been to refer to concepts of moral order which were widely shared, of which three examples were in the Constitution and Declaration of Philadelphia: freedom, equality of opportunity, and solidarity. ‘Principles’ could be viewed as the translation or manifestation of those values into action in a concrete context: for example, the principle of freedom of association was a concrete manifestation of freedom.”

This understanding is confirmed by former deputy director of the ILO Kari Tapiola, discussing the drafting history of the 1998 Declaration in his short book “The Teeth of the ILO: The Impact of the 1998 ILO Declaration on Fundamental Principles and

Rights at Work”, published by the ILO in 2018 (pp. 33-34):

“The question of the title determined the main concepts. [...] The word ‘principles’ was used to make a distinction with the more specific ‘rights’. Principles came first in the title to emphasize that they were constitutional aims that all member States should strive to realize. Rights denoted the obligations of enforcement that individual States had assumed through the ratification of Conventions. [...] For the Employers, a key question was the link between Conventions and principles – again, the binding nature of the principles was not a way of promoting the legal aspects of Conventions. Accepting the principles of the Conventions would not mean accepting all of the rich jurisprudence produced over decades by the standards supervisory mechanism.”

Furthermore, one of the main sources of inspiration for the 1998 Declaration was the 1995 Report of the UN World Summit for Social Development. That report also distinguishes between rights and corresponding obligations laid down in Conventions on the one hand, and principles, on the other. Paragraph 54(b) of the 1995 Report urges governments to “fully [implement] the conventions of the [ILO] in the case of States parties to those conventions, and [take] into account the principles embodied in those conventions in the case of those countries that are not States parties”.

Korea maintains its position that the European Union seeks, through these proceedings, to obtain a report of the Panel that states that Korea has not complied with the first sentence of Article 13.4.3 because the CFA has found that Korea does not respect the rights set out in fundamental ILO Conventions which Korea has not ratified.

7. What is the value added of Article 13.4(3) in comparison to ILO membership for Conventions which have been ratified? And for conventions which have not been ratified by one of the parties to the FTA?

Korea understands the Panel’s question to concern both the first sentence and the final sentence of Article 13.4.3

The first sentence of Article 13.4(3)

Korea considers that the obligation under the first sentence of Article 13.4.3 cannot go beyond the obligations resulting from ILO Membership and the 1998 ILO Declaration and, for parties having ratified a fundamental ILO Convention, cannot serve as a basis for enforcing obligations assumed under those conventions.

The final sentence of Article 13.4(3)

The European Union suggests, at paragraph 116 of its Opening Statement, that the obligation under the final sentence of Article 13.4.3 goes further than that under

Article 19.5 of the ILO Constitution. Under 19.5(b), ILO Members undertake to “bring the Convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action”. That provision expresses the principle that ratification is to occur in accordance with each State’s domestic constitutional processes. Article 19.5(e) of the ILO Constitution states that if consent for ratification is not obtained, “no further obligation shall rest upon the Member except that it shall report [...] 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”. That provision reflects the principle that a State should not be bound by an international agreement that it has not ratified in accordance with its domestic constitutional processes.

Whilst paragraph (b) refers to the start of the ratification process, paragraph (e) explains the consequence where no ratification can take place.

There is nothing in the final sentence of Article 13.4.3 that opposes the two principles expressed in Articles 19.5(b) and 19.5(e) of the ILO Constitution.

If a party has not ratified one of the ILO Conventions, the final sentence of Article 13.4.3 expresses its intention to make efforts, as part of a process, towards ratification of the fundamental ILO Conventions. The focus is on the intention to make efforts that are continuing and sustained. There is no obligation to ratify those conventions.

Obviously, where a party has already ratified all of the fundamental ILO Conventions, it has delivered on the intention to make continued and sustained efforts towards ratification and there is no further cause to consider that party’s conduct in light of the final sentence of Article 13.4.3.

ORAL QUESTIONS FOR KOREA

QUESTION 1

The first question is about the issue of “commit to.” Korea tried to distinguish “commit to” from “shall” by examining other instances of the FTA where the similar term “commit” is used in the Korea-EU FTA. However, there are a couple of instances where the term “commitments” are used, “commitments for services trade, schedules for commitments by both parties,” and it is understood the term “commitments” as used in Chapter 7 seem to indicate clearly binding nature of the obligation of the both parties. Could Korea explain the terms “commitments” and “commit to” in that regard?

We were constant on saying that the general interpretation on ensuring the implementation of FTA provisions imposing legally enforceable obligations, the verb “shall” should be used in specific content, and this was evidenced in other provisions of the Korea-EU FTA which contains “shall make commitment” or “shall commit to.” Article 13.4.3 does not use the term “shall,” it only uses “commit to,” which is additional

phrase added in front of “respect, promote, and realize,” does not stipulate any specific means to “respect, promote, and realize,” therefore it is promotional, at best it contains best efforts obligations, regarding the example used in Chapter 7 “commitment,” that chapter must be interpreted differently because it deals with a specific commitment in the schedules of concession in the services trade, so the “commitment” in that Chapter, and “commitment” in Chapter 13 is clearly different term in its magnitude.

We agree with you, but Chapter 13, particularly Article 13.4.3 misses specific points as to how that obligation must be achieved, so it is different from Chapter 7 in terms of specifying those specificities.

QUESTION 2

In regard to Convention No.105, the Panel is still not clear about why Convention No.105 has been left out in Korea’s effort to bring fundamental Conventions through the Korean National Assembly.

It is not our intention to leave out that Convention and do nothing about it. Initially, when we were tackling the issue of the ratification of fundamental Conventions, we started with the four fundamental Conventions at first, but in the idea of accelerating the process of ratification, we chose to take this strategy to go for the freedom of association Conventions and forced labour Convention, No.29, those three packages first, then if circumstances develop, then we will tackle on remaining No.105.

The reason why we decided to think about No.105 after we ratify those three Conventions first, is that it is necessary for us to repeal the provision of imprisonment with labour or to convert the imprisonments with labour into imprisonment without labour all at once. However, this repeal or conversion is difficult and complicated task for us because it relates with the overall penal system of the national legislation in Korea and with public’s sentiment to law, since the issue is intertwined with the division of Korea into North and South. Thus, social consensus should be built first before any change. In any event, we are not taking this part aside.

QUESTION 3

The third question relates to the issue of the term “except as otherwise provided” in Article 13.2.1. When we simply look at the plain language of “except as otherwise provided,” it seems to us that if there are provisions in Chapter 13, which stipulates other requirements, then those other requirements in other provisions in Chapter 13 should apply regardless of “trade effect,” “trade affectation,” “affecting trade,” “affecting trade-related matters.” Could Korea elaborate on this particular interpretation, since we are struggling to understand how Korea’ explanation can make any meaningful difference from the EU?

This provision in Article 13.2.1. is an umbrella provision that applies universally throughout Chapter 13. Technically speaking, every single article is covered, that is the baseline. If this is interpreted otherwise for example, Article 13.4.3 should have explicitly mentioned the term such as “notwithstanding with the provisions in 13.2.1,” then that becomes exception to the rules set out in Article 13.2.1. However, Article 13.4.3. does not mention anything about that at all. According to the umbrella provision of 13.2.1., the scope of application is decided automatically by that Article.

QUESTION 4

Next question is in regard to passage of amendment bill and ratification bills at the National Assembly this fall. When we could know for sure this fall, whether this will happen?

Amendment bills and ratification motions are pending at the standing committee of the National Assembly. What the National Assembly normally do at this moment is conducting parliamentary inspection to government affairs and every single ministry is involved with that matters at this moment. Right after that, around November, sessions for reviewing legal matters will start. But the schedule within the National Assembly will be decided by themselves and no administrative body will interfere with that.

As soon as legal review session begins, we are going to approach lawmakers and explain our intentions on amendment bills individually. And we are planning to organize various seminars and meetings with the National Assembly to promote this process. At any rate, our ultimate goal is to achieve this goal of ratification faster and complete all the necessary measures or process by the end of this year.

QUESTION 5

The EU said yesterday that there will be still elements that put Korea into continuing breach of principle on freedom of Association regardless of the passage of the amendment bills, which Korea is currently pursuing. Could Korea express its views on this?

We don't agree with the EU's claim. Korea's amendment bills to labour laws are outcome of deliberation to guarantee the principle of freedom of association and reflect special character of Korean industrial relations at the same time. The ILO also recognizes the specific circumstances each country is facing within the context of complying the principle on freedom of association. Thus, Korea takes the view that the current amendment bills can fully guarantee the gist of principle on freedom of association.

In particular, by allowing unions to decide their membership eligibility by their own bylaws, and repealing the provision which prohibits wage payment to the union officers and penal sanctions when not complied, Korea's amendment bills accommodated the CFA's continuous recommendations. As regards the right to organize of the self-employed, which was raised by the EU, Korea is guaranteeing freedom of association protected by the Constitution of Korea and expanding the scope of worker under the TULRAA.

QUESTION 6

In regard to amicus curiae submissions by KCTU, FKTU, and KFTU, which provide important information, the Panel's difficulty lies in the uncertainty about the contents included in those amicus curiae submissions and the contents included or to be included in Korea's amendment bills. Please explain the consistency or inconsistency between the points included in amicus curiae submissions of those entities.

There are uncertainties and discrepancies between the government's positions and amicus curiae briefs' contents. However, Korea is not sure whether it can provide the Panel with the analysis of their arguments and say that this is wrong or right.

Rather, Korea takes the view that it is not proper for the government to do so. So Korea would please ask the panel to examine the submissions as it is submitted by social partners.

QUESTION 7

What is the understanding of Korea in terms of due diligence? What does that mean?

Due diligence is occurring as a result of inclusion in the Article 13.4.3. in the FTA. The Parties to this agreement should engage in good faith behavior towards the overall objectives of respecting, promoting, and realizing the principles concerning fundamental rights such as freedom of association.

Even if it had not ratified the fundamental ILO Convention No.87, the particular element of its conduct could be formed to have breached a specific obligation assumed under that Convention.

QUESTION 8

In relation to Convention No.105, what is the status of the Convention? Are the principles and obligations enshrined in it covered by the obligation in the first sentence of or third sentence of Article 13.4.3?

Convention No.105 is one of the fundamental Conventions of ILO, just like Conventions on freedom of association, No.87 and 98, so this Convention is also related with the fundamental rights at work and fundamental rights recognized by ILO Declaration of 1998.

It has relevance with both the first and last sentence, the only difference is the category of the obligation. The fundamental rights at question the EU raises mostly, is regarding the fundamental rights regarding freedom of association, while the Convention No.105 is a forced labour Convention.

QUESTION 9

In regard to the Convention No.105, Korea explained that there is a need to continue building social consensus. What is the meaning of “building social consensus”? What stakeholders are involved in building this social consensus?

Convention No.105 is actually related to the overall Korean penal system which is related to imprisonment with labour as a punishment to the expression of political

opinions. Technically speaking, there is not much complicated issues or disagreements between the labour and management. This convention is rather related with the national situation where the North and South is divided depending on the ideology. Therefore, it requires a consensus within the whole population of Korea, and that is why it requires a larger consensus-building efforts, and more time than the rest of other Conventions.

More specifically, it requires the amendment of whole penal system, as well as the change in the national security system.

QUESTION 10

According to Korea, the government has been striving to guarantee the freedom of association of workers as to receive trade union registration of the chauffeur service drivers deemed as typical platform workers. Please elaborate Korea's position more clearly. And what does the government do given that the matter is before the administrative authority?

In 2006, there was the Supreme Court ruling on self-employed persons and since then there have been significant improvements regarding the worker status of self-employed persons. First of all, as we mentioned in the opening statement, self-employed persons are not per se excluded from the worker status from the 2006 Supreme Court decision. And the Korean government, regardless of an employment contract, as long as self-employed persons are providing labour, the worker status of for example, golf caddies, jockeys, delivery workers, water purifier repairmen and salesmen, after-school teachers was recognized, and the government is continuously expanding the scope of worker status.

In particular, in 2018, the Supreme Court ruled regarding actors and after-school teachers. It clarified that their status can be recognized broadly, and even if their subordination is not that strong, considering the protecting of the fundamental rights, it said that we cannot deny their worker status. So, for the Korean government, based on this ruling, when deciding the worker status of self-employed persons, the most important factor is to decide whether their fundamental rights should be protected. Other than that, income dependency, contract types and the methods of labour provision, these factors are all considered when deciding their worker status.

The Korean government mentioned chauffeur service drivers because in Korea they can provide labour through online platforms without being under an employment contract, so they are deemed as a typical type of platform service workers. And the Korean government issued the certificate on trade union establishment in July this year. Considering these developments, the worker status under the TULRAA is being expanded, so the freedom of association of these people is being expanded. That's what we're working on.

QUESTION 11

The information contained in EU Exhibit 3 attached to their opening statement seems to be out of date because the chauffeurs' union has been recognized. Is that correct?

Yes, correct.

QUESTION 12

What is the current legal status of heavy goods vehicle drivers, on whom the Committee on Freedom of Association made a reference? The ILO's CFA made a finding that Korea should take steps to amend its legislation to ensure that those workers could be recognized as workers under the TULRAA in 2012. The Panel notes that heavy cargo vehicle drivers are explicitly referred to in the EU's panel request at Point 1 as an example of group of workers who fall outside the current definition of worker under the TULRAA, and the para 50 of the EU's WS again refers to this category of workers. And the submission of the EU states that the factual matters that was presented to the CFA as relevant to these proceedings. The Panel would like to know whether or not heavy cargo vehicle drivers are currently classified as workers under the TULRAA.

The TULRAA does not classify workers based on individual occupations. Regardless of the workers' occupation, it broadly defines workers as persons who live on wages, a salary or any other equivalent income. Thus it is necessary to examine individual and specific cases before deciding whether or not the persons who provide various types of labour including heavy-duty vehicle drivers are subject to the TULRAA. And the final decision in this regard will be made at the Supreme Court.

However, it can be said that the current test to decide worker status under the TULRAA, which takes necessity to protect fundamental labor rights into account, is significantly relaxed in comparison with that of the Labor Standards Act.

QUESTION 13

Is there a certified trade union for heavy duty cargo drivers in Korea?

It is hard to provide a uniform answer since there are various types of heavy duty cargo trucks. A union of parcel delivery workers has been registered and is engaging in union activities. A ready-mix cement truckers' union is operating as an affiliate of the Korean Construction Workers Union(KCWU).

QUESTION 14

As regards the test that the courts have devised for understanding who is to be worker under the TULRAA, what is the most current decision of Korea's Supreme Court? The EU provided Exhibit EU 2 which is one of the cases. Am I right in saying that that exhibit contains the up-to-date test of the Korean court system?

Korea confirms that the Exhibit EU-2 is the most recent one in regard to test to decide worker status.

WRITTEN QUESTIONS FOR THE EUROPEAN UNION

QUESTION 1

In the WS of the EU, there does not seem to be a mention or discussion of “affecting trade” between the two countries. (*see, e.g.*, EU WS, para. 4). In the OS, the EU does not purport to show “trade effect” between the two countries, and argues that non-observance of labour standards in and of itself, without more, would constitute a violation of the EU-Korea FTA. Could the Panel understand the EU position to be that existence or absence of trade effect is not essential in the analysis of issues arising under Chapter 13, at least for those provisions where specific mentions of trade effect do not exist?

1. The application of Chapter 13 of the FTA is not subject to a horizontal “trade affectation” threshold condition, which would apply across the board in respect of all the provisions of Chapter 13.
2. All the claims submitted by the European Union before this Panel are based on provisions of Article 13.4(3). For the reasons explained in our OS, the European Union considers that, in order to establish a violation of the provisions included in Article 13.4(3), the claimant is not required to show that the measures “affect trade” between the parties.
3. The situation may be different as regards other provisions of Chapter 13, which are not at issue in this dispute, and which incorporate a “trade affectation” condition. For example, Article 13.7 concerns the application and enforcement of domestic laws, regulations and standards “in a manner affecting trade or investment between the Parties”.

QUESTION 2

Korea argues that “there is nothing in the panel request linking that strictly labor matter to trade” (GOK WS, para. 32). Could the EU please respond to this point?

Could the EU guide the Panel to the trade-related aspect in the EU’s request of the establishment of the Panel? In the alternative, again, is the EU’s position that trade relevance is not required in presenting the current claim?

4. As just explained, in order to show a violation of the provisions included in Article 13.4(3), the claimant is not required to show that the measures “affect trade” between the parties. Therefore, there was no reason for the European Union to address that issue in the Panel request.
5. Even if trade affectation were a necessary condition for finding a breach of Article 13.4(3), a claimant would not be required to allege explicitly, let alone argue, in the panel request that the challenged measure affects trade between the parties. Rather, that allegation would be inherent in the claim that the measure violates Article 13.4(3).
6. Since Korea relies on the case-law of the WTO Appellate Body concerning the adequacy of panel requests, the European Union would like to recall that the same case-law stresses that the principles of due process and good faith require that “responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member [...] so that corrections, if needed, can be made to resolve disputes [...]”.¹

QUESTION 3

Can it be said that in the context of the trade relations between Korea and the EU as governed by the EU-Korea FTA, labour conditions as referred to in Article 13.4 may not affect trade? If yes, in which circumstances (see KOR WS, para 30; KOR OS, para. 19)? Which are the legal effects deriving from the fact that Chapter 13 is one of the chapters as contained in the EU-Korea FTA?

7. The present dispute is concerned exclusively with claims under Article 13.4(3). As just explained, in order to show a violation of the provisions included in Article 13.4(3), the claimant is not required to show that the measures “affect trade” between the parties.
8. This is not saying, however, that the internationally recognised labour standards referred to in Article 13.4(3) are unrelated to trade. As explained in

¹ Appellate Body Report, *United States – FSC*, footnote 24, para. 166. See also Appellate Body Report, *Korea – Dairy Safeguard*, footnote 19, paras. 127-131; Appellate Body Report, *United States – 1916 Act*, footnote 32, para. 54; and Appellate Body Report, *Mexico – HFCS*, Article 21.5, paras. 49-50.

our OS, 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.

9. Again, the situation may be different as regards other provisions of Chapter 13, which incorporate a “trade affectation” condition, such as Article 13.7. It may well be that in some instances the lack of adequate enforcement by one of the parties of provisions of its own domestic labour laws and regulations does not “affect trade” between the parties within the meaning of Article 13.7. That issue, however, does not arise in this dispute, because the application of Article 13.4(3) is not conditional upon trade affectation.

QUESTION 4

In many places of its WS, the EU repeats Korea’s non-compliance of CFA recommendations. (see EU WS, paras. 48-49, 52, 65). Does the EU challenge, in essence, Korea’s non-compliance of the CFA recommendations via the current proceeding?

10. The European Union does not challenge as such Korea’s non-compliance of the CFA recommendations. Rather, the European Union challenges Korea’s non-compliance of its obligation under Article 13.4(3) of the FTA to respect, promote and realise the principles of the freedom of association.
11. The Parties to the FTA are required to comply the obligation imposed by Article 13.4(3) “in accordance with” their obligations deriving from membership of the ILO and the 1998 ILO Declaration. The CFA has been mandated to “examin[e] alleged infringements” of the principles of freedom of association enshrined in the Constitution of the ILO and in the Declaration of Philadelphia. In practice, the CFA decisions 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 sense”. Furthermore, the CFA’s decisions have been cited by international courts, such as the European Court of Human Rights, in support of its own decisions.

12. The CFA decisions relating to the Korean measures at issue in this dispute are particularly relevant and authoritative because they concern the same facts. For that reason, the European Union has based its legal arguments, whenever possible, on CFA decisions relating to the Korean measures in dispute in this case.

QUESTION 5

Could the EU please elaborate its view on the difference between “relating to trade” and “affecting trade” as indicated in its OS, para. 6?

13. Article 13.2(1) refers in relevant part to measures “affecting trade-related aspects of labour”², and not to measures “affecting trade”³. Since the drafters choose to use each of those phrases in different provisions of Chapter 13, it cannot be assumed that they are synonymous and interchangeable.
14. The category of measures affecting “trade-related aspects of labour” is different from, and broader in scope than, the category of measures “affecting trade”. It may be understood as encompassing any “aspect of labour” which is rationally connected to international trade in the specific context of the EU-Korea FTA. The scope of that category is potentially very broad. Hence the drafters’ decision to require “trade affectation” with regard to certain provisions, including in particular Article 13.7.

QUESTION 6

In its OS, the EU states that “[t]he 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” (EU OS, para. 88). A similar statement to that effect is also found in in other parts of OS (see, e.g., EU OS, para. 112).

- A. Could these statements be interpreted as indicating that EU’s concerns identified in its WS and OS might possibly be addressed or allayed over time, if the current “direction” is maintained by Korea?**

² Emphasis supplied.

³ Emphasis supplied.

15. Please see below reply to Question 18.
- B. The EU uses the term “inadequate” as regards Korea’s failure to ratify the four fundamental conventions. (see EU WS, paras. 5, 77, 94; EU OS, paras. 1, 120). Could the EU please elaborate how “inadequacy” lead s to violation of Article 13.4.3, the last sentence?**
- C. EU’s statements in its WS and OS may read that after all it is not satisfied with the outcome of the Korea’s effort to ratify the four fundamental conventions. Is it not true that best endeavor provisions do not necessarily guarantee a particular outcome? Could the EU’s argument regarding Korea’s ratification of four conventions be summarized as “right direction but poor result”?**
- D. The final sentence of Article 13.4.3 does not set forth a specific target date or a milestone for the ratification process but speaks of “continued and sustained efforts towards ratifying (...)”. Could the EU please elaborate its rationale for making assertions for demanding specific results (that is, ratification of four conventions)?**
16. The EU uses the term “inadequate” not in respect of Korea’s failure to ratify the four outstanding fundamental ILO Conventions but in respect of the efforts deployed by Korea towards that end since the start of application of the EU-Korea FTA in 1 July 2011. The EU refers the Panel to paras. 77 and 94 of its Written Submission and paras. 120 of its Oral Statement where the term “inadequate” has been used. The EU’s contention is that such efforts have fallen short of the standard of “continued and sustained efforts” required by the last sentence of Article 13.4.3 because Korea has not resorted to all the appropriate measures that could allow it to attain the desired objective (EU WS, para. 91). In particular, the EU considers that Korea has failed to act with the determination required to comply with its specific commitment under the FTA. The fact that Korea’s efforts have been “inadequate”, in the sense that they have neither been continued nor sustained, leads to the conclusion that there is a violation of Article 13.4.3, last sentence.
17. The EU agrees that the last sentence of Article 13.4.3 is a “best endeavours” provision. Best endeavours provisions, however, are not less binding than provisions containing obligations of result. And the States bound by an obligation of conduct are indeed required to make their best endeavours

towards the specified goal or outcome. In *Pulp Mills on the River Uruguay*, the International Court of Justice considered that obligations of conduct are nonetheless substantive obligations. The responsibility of a State would therefore be engaged if it was shown that it had failed to act diligently and take all appropriate measures to comply with those obligations (see paras. 187, 188, 197).

18. Thus, the claim raised by the EU under Article 13.4.3, last sentence, is not that Korea failed to attain the desired outcome, i.e. the ratification of the four outstanding ILO fundamental conventions. The EU claim is rather that Korea, despite certain positive steps in the right direction since 2017, failed to act with the required due diligence and take all appropriate measures within its power to reach the objective agreed between the Parties to the FTA. From 2011 until 2017, Korea did not take any significant steps towards the ratification of the ILO fundamental conventions. This period amounts to two-thirds of the full period of 9 years for which the relevant provision has been in application. Therefore, Korea's efforts have neither been continued nor sustained over that period.

QUESTION 7

The EU acknowledges new efforts of Korea since 2017 in paras. 79, 80, 81, 93 of its WS.

- A. Could the EU please explain why these efforts are not sufficient in allaying its concerns?**
 - B. What specific development would suit the EU in this regard? Could the EU please provide some examples?**
 - C. In para. 78 of the WS, the EU states that “no significant steps” have been taken by Korea for ratification of the four fundamental conventions. Have Korea's explanations in its WS (as regards its efforts being made for the purpose of ratification) affected the EU's assessment as such?**
19. The efforts made so far by Korea are not sufficient because, the legislative amendments that the Korean Government considers necessary for the

ratification of the ILO fundamental conventions were only proposed to the National Assembly in October 2019 and, due to the term of the parliamentary session, had to be resubmitted in July 2020. Moreover, according to Korea, the proposal for the ratification of ILO Conventions Nos. 29, 87 and 98 was submitted only in July 2020, and there are currently no plans to propose ratification of ILO Convention No. 105. Taking into account that the provision requiring the Parties to make continued and sustained efforts towards ratifying the fundamental ILO conventions applies since 1 July 2011, the first observation that can be made is that the responsible Korean authorities have not acted with due diligence in this matter.

20. While the EU understands that the Korean authorities preferred course of action is to try to build beforehand a consensus among stakeholders through a tripartite dialogue, the EU also understands that this consensus-building process has so far not been fruitful and has significantly delayed the legislative action that is the responsibility of the elected representatives of the Korean people.
21. Therefore, the specific developments that, from the perspective of the EU, are necessary for compliance with Korea's obligations under the last sentence of Article 13.4.3 are a more proactive stance of the Korean authorities in steering the legislative process through the National Assembly, taking all the measures within their power to reach a positive conclusion.
22. The Korean Government's explanation of the efforts it has been making for several years outside the realm of the National Assembly do not change the EU's assessment that those efforts lack in due diligence and do not meet the standard required under the last sentence of Article 13.4.3.

QUESTION 8

Korea claims that certain EU Member States are experiencing difficulties in implementing ILO Conventions. In EU's view, is this assertion of Korea relevant to the current proceeding?

23. The unspecified difficulties experienced by EU Member States in implementing ILO Conventions asserted by Korea are, in any event, not relevant for the current proceedings. The effective implementation of ILO Conventions by EU Member States is not within the terms of reference of this Panel. The effective implementation by Korea of the ILO Conventions that it has ratified is, likewise, outside the terms of reference of this Panel.

QUESTION 9

The text of the EU-Korea FTA (Article 13.4.3, first sentence) places an emphasis on the 1998 Declarations as an instrument of setting forth key principles of the ILO Constitution and the Philadelphia Declaration. The WS of the EU also seems to place an emphasis on it as a key instrument stipulating principles that ILO members should respect, promote, and realise regardless of ratifications of specific conventions. In its OS, however, the EU appears to distinguish this instrument on the one hand, and ILO Constitution and the Philadelphia Declaration on the other (see EU OS, paras. 54-57).

- A. Could the EU please explain the different approaches/nuances between the two submissions?**
- B. In other words, would “an obligation deriving from membership of the ILO” not concern the 1998 Declaration?**
- C. The EU mentions “obligations” as regards the 1998 Declaration in the same OS (see EU OS, paras. 60, 62, 76). In light of the responses above, could the EU please elaborate on this point?**
24. The EU’s OS addresses this issue in more detail than the EU’s written submission. But there is no difference in approach between the two EU submissions. The European Union has nowhere argued that the 1998 ILO Declaration imposes, in and of itself, new obligations upon the ILO Members.
25. Rather, the 1998 ILO Declaration is highly relevant because it recognises in an unequivocal manner that all ILO Members have a pre-existing, legally binding, 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”⁴ and pre-exists the 1998 ILO Declaration. More precisely, those principles are embedded in the ILO Constitution and the Declaration of Philadelphia, which all ILO Members have endorsed when joining the ILO.

26. Paragraphs 60, 62 and 76 of the EU’s OS refer to the fact that the 1998 ILO Declaration “recognises” that the ILO Members have a pre-existing “obligation” resulting from their ILO membership to respect the principles of freedom of association. But, to repeat, such “obligation” was not created *ex novo* by the 1998 ILO Declaration.

QUESTION 10

If ‘principles’ are distinguished (or distinguishable) from ‘rules’ as the EU argues (see EU OS, paras. 63, 65), would that mean that “obligations relating to principles” could also be different from “obligations relating to rules”?

27. As noted in the EU’s OS, generally speaking, “principles” may be distinguished from “rules” in that “principles” describe obligations in more abstract terms than “rules”. Principles may be the source of more specific rules. But principles may also entail by themselves obligations ready for direct application.
28. The European Union understands that the Panel’s question alludes to the situation where a “principle” of the freedom of association has been further specified by “rules” in Convention No 87. In that situation, the obligations imposed by the rules may indeed be “different” from the obligations imposed by the principle. But there is no conflict between the two sets of obligations, because compliance with the rules will always ensure compliance with the principle.

QUESTION 11

Article 13.4.3 of the bilateral FTA sets forth three different elements in three sentences. If the EU’s position (regarding commitment to respecting, promoting and real

⁴ 1998 ILO Declaration, point 2.

ising the principles concerning the fundamental labor rights) holds true, what specific value would there be in having second and third sentences separately in the same article?

29. The first sentence of Article 13.4(3) restates an obligation of all ILO Members. That obligation applies regardless of whether the Parties have ratified the Fundamental Conventions cited in the third sentence, including Convention No 87 on the freedom of association.
30. The second sentence requires each Party to implement effectively all the ILO Conventions which it has ratified, whether or not they are among the Fundamental Conventions or other ILO Conventions referred to in the third sentence.
31. In turn, the third sentence imposes upon the Parties the obligation to make continued and sustained efforts towards ratifying the Fundamental Conventions, including Convention No 87, as well as the other Conventions that are classified as ‘up-to-date’ by the ILO
32. When a Party to the FTA has ratified a Fundamental Convention cited in the third sentence, it is required by the second sentence to implement it effectively.
33. The 1998 ILO Declaration clarifies that the principles and rights mentioned therein, included the freedom of association, have been “expressed and developed in the form of specific rights and obligations”⁵ in the Fundamental Conventions.
34. Where a Party has ratified Convention No 87 pursuant to the third sentence of Article 13.4(3), its obligation under the first sentence to respect the principles of freedom of association may become effectively subsumed within its obligation under the second sentence of Article 13.4(3) to implement effectively Convention No 87, to the extent that the latter “expresses” and “develops” the principles of the freedom of association.

⁵ 1998 ILO Declaration, point 1(b).

35. Nevertheless, as illustrated by the present case, this does not render the first sentence superfluous. As long as a Party has not ratified Convention No 87 pursuant to the third sentence, the first sentence is the only source of substantive obligations for that Party with regard to the freedom of association under the FTA.

QUESTION 12

The EU describes the Korean authority’s return of an application for the establishment of a trade union upon finding “false” or “incorrect” information (see EU OS, para. 102). One might think that a return of an application in such instances would be a natural response from an agency in charge in similar circumstances (particularly if the submitted information is false or incorrect). Could the EU please explain how and why the return in such cases could amount to a “full-fledged inquiry” engaging “a discretionary power” of the agency concerned? (see EU OS, para. 103).

36. According to the Committee on Freedom of Association (CFA), notably in the follow-up to Case 1865 concerning a complaint filed in 1995 against Korea, a national legislation providing that an organisation must deposit its rules should lay down a mere formality to ensure that those rules are made public (EU’s WS para. 34, EU’s OS, para. 104).
37. The main problem with the relevant national provisions is that Article 2, paragraph 4, of the TULRAA sets out 5 broad, vague or imprecise grounds for disqualifying trade unions. The application of these broad, vague and imprecise disqualification grounds by the administrative authorities necessarily requires them to exercise a considerable amount of discretion when examining the request for registration submitted by a trade union.
38. To give one simple example, the application of ground B in Article 2(4), (“where most of the expenditure is supported by the employer”) inherently requires the administrative authorities to look closely into the finances of the new trade union, so as to ascertain to what extent the employer participates or contributes to supporting its activities. The application of this ground also requires administrative authorities to decide whether any advantage in kind provided by the employer – such as allowing the trade union to meet within the company’s premises, or allowing trade union officials to take time off

from their normal duties as employees – amounts to financial support. If this is considered to be the case, next the administrative authorities must decide what is the monetary value of any such advantage and whether it constitutes “most of the expenditure” of the trade union.

39. It is clear that in order for the administrative authorities to apply this relatively simple ground of disqualification they will need to scrutinize in detail the request for registration submitted by the trade union and its prospective finances. If the trade union does not provide all the information that the authorities consider necessary to conduct this assessment, any alleged omission could in itself become a reason to return the request for registration or ask for supplementary information.
40. The scope for exercising discretion appears even wider when administrative authorities apply disqualification grounds which require them to scrutinize the supposed ultimate objectives of a trade union, such as those described in grounds C (“welfare undertakings”) and E (“political movements”). The application of such grounds is not similar to the straightforward verification of certain required formalities, such as those specified in Article 10(1) of the TULRAA. It entails a full-fledged inquiry into the circumstances of the creation of a particular trade union and involves a great deal of speculation about the motives and goals of its founding members. Moreover, since ground E only disqualifies organisations “*mainly* directed at political movements”, the administrative authorities must also exercise discretion to decide which degree of political engagement is still acceptable.

QUESTION 13

Can the EU inform the Panel of its view on the Constitutional Court decision that the nature of the administrative agencies’ decision-making ‘is not a matter of discretion but [the application of] a requirement’ (KOR WS para.151, Exhibit K-64)?

41. The EU respectfully disagrees with the views of the Constitutional Court expressed in that decision, as they seem to reflect a misunderstanding of the implications of the principle of freedom of association as enshrined in the ILO Constitution and in the Declaration of Philadelphia. That principle does

not allow the authorities who are required to register a trade union to verify whether such trade union is “independent” or otherwise meets any substantive requirements laid down in the national legislation. According to the CFA, the requirements that may be imposed by national legislation, without infringing the principle of freedom of association, must be of a purely formal nature.

42. Since the TULRAA does impose certain substantive requirements for registration in its Article 2(4), the EU can understand why the Constitutional Court refers to the application of a requirement, in the sense that the authorities do not exercise unbound discretion in deciding whether to issue the certificate of registration. However, for the reasons already explained in the reply to Question 12, the EU again respectfully disagrees with the view that the application of the disqualification grounds set out in Article 2(4) of the TULRAA would not involve the exercise of a significant degree of discretion by the competent authorities. That discretion is conferred by the broad, vague or imprecise language used in those grounds for disqualifying a trade union when it submits a request for registration.

QUESTION 14

Section IV. B. 2. c~e of the Korea’s WS seems to detail the efforts that the Government of Korea has made and the resulting improvements. Could the EU please explain the problems or shortcomings of these efforts or improvements?

43. The European Union has already provided a comprehensive rebuttal to the arguments made in the various sections of Korea’s written submission mentioned in the Panel’s question in section III.B of its own Oral Statement, to which the Panel is referred. The European Union stands ready to reply to any follow-up questions that the Panel may have.

QUESTION 15

Korea claims that “some EU Member States have requirements in place to limit eligibility for officer positions in enterprise-level unions to employees of specific enterprise at issue”? (KOR WS, para. 159). Could the EU please explain whether this assertion is or should be relevant to the Panel’s analysis?

44. Korea's assertions are unsubstantiated and, in any event irrelevant. The labour laws and regulations of the EU Member States are not part of the matter before the Panel.

QUESTION 16

Could the EU please explain the reason, as it understands, why the Parties chose the term “will” as opposed to “shall” in the final sentence of Article 13.4.3?

45. In the view of the European Union, the use of the term “will” does not diminish the binding force of the commitment that is undertaken by the Parties in the final sentence of Article 13.4.3. If the term “shall” had been used, as for instance in Article 13.6.2, which is another obligation of conduct contained in the same Chapter 13 of the FTA, there would have been no appreciable difference in the nature or force of the obligation of conduct in question. The term “will” is well suited to the expression “make continued and sustained efforts”, while the term “shall” is better suited to the expression “strive to facilitate and promote”. The EU draws the Panel's attention to the fact that in other linguistic versions of the FTA, published in EU's official journal, two different but equivalent expressions for an obligation of conduct are also used.
46. Thus, for instance the French version of Article 13.4.3, last sentence, uses the expression “Les parties consentent des efforts continus et soutenus”, while in Article 13.6.2 the expression “Les parties s'efforcent de faciliter et promouvoir” is used.

QUESTION 17

The EU seems to acknowledge the effort of Korea to ratify the four fundamental conventions. (see EU WS, paras. 93-94).

- A. Could we understand then that Korea has made efforts but tangible outcome has not been brought about yet?**
- B. In EU's view, does the obligation for “continued and sustained effort” mean producing a result? If that is the case, could the EU please elaborate its rationale?**

- C. As regards the requirement of “continued and sustained effort”, the EU’s own definition in para. 90 of its WS does not seem to suggest an outcome-oriented approach. If so, how would the EU reconcile this definition with its argument that Korea has not produced a tangible result (i.e., ratification) despite its effort?**
- D. The EU’s seems to argue that efforts should be “persistent” to be “continued and sustained” (EU OS, para. 119). Could it please elaborate the point and provide further explanation?**

47. As regards the specific sub-questions in A to C above, the EU would refer the Panel to the replies it has already provided to Question 6, sub-questions B to D, as well as to Question 7. In short, the EU considers that Korea has not acted with the required diligence to comply with the obligation of conduct laid down in the final sentence of Article 13.4.3. Thus, even if the EU acknowledges the efforts made by Korea towards ratifying the four outstanding ILO fundamental conventions, in particular since 2017, it still considers that such efforts are inadequate to attain the desired and agreed objective.

48. Regarding sub-question D, the EU considers that the term “sustained efforts” require Korea to persist in ratification efforts even if there is considerable opposition among certain stakeholders and a consensus has not yet developed in Korean society. Thus, even if ratification proposals for any of the 4 outstanding fundamental ILO conventions should face temporary setbacks within the National Assembly, this would not dispense Korean authorities from their obligation to renew and persist in their efforts to achieve ratification of all those fundamental conventions.

QUESTION 18

Korea states that a bill is currently pending in its National Assembly to amend TULRAA, which aims to cover most of the issues raised in the current proceeding and the amendment bill can be passed as early as this fall.

- A. Assuming that the EU’s concerns on specific issues stem from various provisions of TULRAA, would the passage of the pending bill to amend it then address those concerns, as indicated by the EU in its OS (see EU OS,**

para. 108)?

- B. Would a specific plan of the passage on the part of Korea be sufficient to address the EU's concerns? To the contrary, would such passage or plans of passage not be sufficient? If so, the Panel would like to ask what types of plans or promises the EU has in mind in this regard.**

49. The status of the document provided by Korea as Exhibit K-121 is unclear to the EU. That document suggests that, even if the bill were adopted, it would fail to address all the concerns raised by the European Union.
50. The bill proposes to delete the proviso under Article 2(4)(d), which denies the status of worker to unemployed and dismissed workers. In its Opening Statement, Korea has said that “when passed, unemployed and dismissed people may freely join an enterprise based union based on the terms of that union’s bylaws”. However, the document provided as Exhibit K-121 states that:

Union members who are not engaged in a business or a place of business may participate in trade union activities to the extent that it does not interfere with an efficient business operation of the employer. In this case, they shall comply with the procedures agreed between labor and management and the internal rules regarding access

51. The proviso “to the extent that it does not interfere with an efficient business operation of the employer” could be inconsistent with the freedom of association.
52. In addition, according to the document provided as Exhibit K-121, the bill proposes to insert a new provision on the qualifications for trade union officials stating that:

Qualifications for trade union officials may be determined by its bylaws. In this case, officials for an enterprise-based union shall be selected among its members engaged at the business or the place of business.

53. While the reference to the bylaws of the unions in the first sentence is a positive development, the second sentence appears to continue to exclude, in

the case of enterprise-based unions, the eligibility as union officials of workers not employed by the enterprise concerned.

54. The bill does not change the definition of “worker” in Article 2(1) of TURLAA and, therefore, does not address the EU concerns with regard to the exclusion of “self-employed” workers from the freedom of association. As mentioned in our OS⁶, while the developments mentioned in Korea’s OS suggest that the case-law and administrative practice have become more flexible, the EU remains concerned that Korean law still 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. The submissions and evidence provided by Korea’s trade unions confirms this assessment⁷.
55. Finally, the bill makes no changes to the certification procedure in Article 12 of TURLAA and, therefore, also fails to address the EU concerns with regard to that provision.
56. To the limited extent that the bill appears to address the EU’s claims, the European Union would not regard a mere “plan of specific passage” of the bill as sufficient to comply with Korea’s obligations under the first sentence of Article 13.4(3).

QUESTIONS TO BOTH PARTIES

Answers by the European Union

QUESTION 1

Chapter 13 of the EU-Korea FTA does not have a provision concerning the next step after the issuance of “advice or recommendation” of the Panel (except for the

⁶ EU’s Oral Statement, para. 89.

⁷ EU’s Oral Statement, para. 90.

monitoring of implementation of recommendation in Article 13.15.2). If the Parties could explain to the Panel as to the possible next steps after the issuance of report, it would help the Panel discharge its obligation.

57. The European Union has requested the Panel to find that Korea has breached the obligations specified in the Panel request and to recommend that Korea takes the necessary measures to fully implement those obligations.
58. If the Panel makes the findings and recommendations requested by the European Union, the European Union expects that Korea will implement timely and in good faith the Panel's recommendations.
59. If there was a disagreement between the Parties as to whether Korea has properly implemented the Panel's recommendations, either Party may raise the matter in accordance with Articles 13.14 and 13.15 of the EU-Korea FTA.
60. In addition, Article 13.15(2) provides that the implementation of the recommendations of the Panel shall be monitored by the Committee on Trade and Sustainable Development.
61. Unlike the dispute settlement procedures in Chapter 14, Article 13 does not allow the claimant to suspend trade concessions under the FTA in the event that the respondent fails to comply with the Panel's recommendations. This is without prejudice to the possibility for the Parties to adopt other appropriate counter-measures in accordance with international law.

QUESTION 2

Article 13.15.2 seems to differentiate between “advice” and “recommendation” of the Panel.

- A. Recommendation appears to be subject to implementation and thus monitoring, but advice does not. Could the Parties clarify or confirm whether this understanding is accurate?**
- B. How would the Parties distinguish advice and recommendation?**

62. The European Union confirms the Panel's understanding under letter A.
63. If the Panel finds that the respondent has breached one of its obligations under Chapter 13, it must “recommend” that Party to take all the necessary

measures to comply with that obligation. Additionally, the Panel may suggest specific ways to implement that “recommendation”.

64. In turn, the Panel may provide “advice” with regard to any other matter arising in the dispute not relating to compliance with the Panel’s findings of violation of Chapter 13. For example, the Panel could advise the Parties to engage in negotiations or discussions, to seek the assistance of technical experts on certain matters, to take certain measures with a view to preventing future disputes, etc.

QUESTION 3

The Panel would like the Parties to both identify the rules of interpretation governing the interpretation of the EU-Korea FTA? Korea has referred to Articles 31 to 33 of the Vienna Convention on the Law of Treaties in its OS (para. 25), but may want to complement its argument.

65. The provisions of the FTA, including the provisions of Chapter 13, must be interpreted in accordance with customary rules of interpretation of public international, including those codified in Articles 31 to 33 of the Vienna Convention on the Law of the Treaties.
66. This is expressly provided for, with regard to dispute settlement under Chapter 14, in Article 14.16. But the same applies to the interpretation of any other provisions of the FTA.

QUESTION 4

Article 13.4 (3) of the EU-Korea FTA states that the parties commit “to respecting, promoting and realizing, in their laws and practices, the principles concerning the fundamental rights, (...)”. The Panel would like to have clarification on the interpretation of the word “realizing”. The Panel would also like the parties to identify which legal effects should be given to the words “principles concerning the fundamental rights”.

67. The European Union has addressed the interpretation of the term “realize” at paragraphs 44-47 of its OS, to which the Panel is referred.
68. The European Union has explained in detail the legal effects of the “principles concerning fundamental rights” mentioned in the 1998 ILO

Declaration and in the first sentence of Article 13.4(3) at paragraphs 59-66 of its OS, as well as in the replies to Questions 14 and 15.

69. More generally, the European Union would like to draw the Panel's attention to a semantic misunderstanding that is revealed in Korea's Statement. In several instances, Korea insists in using a construction of the verb "to commit" that does not correspond to the construction used in the first sentence of Article 13.4.3. Korea asserts that it is committed to respecting, promoting and realising the freedom of association. The expression "being committed to" weakens the meaning of the verb "to commit" and arguably purports to express that Korea considers the respect, promotion and realisation of the freedom of association has one of its objectives, goals or priorities.
70. By contrast, in the first sentence of Article 13.4.3 of the EU-Korea FTA the Parties state that they "commit to respecting, promoting and realising ...the principles concerning the fundamental rights, namely...freedom of association". The Parties have therefore committed to respecting, promoting and realising the specified principles, which means that they have assumed a firm commitment to act accordingly.
71. The EU respectfully requests the Panel to dispel the semantic misunderstanding suggested by Korea in its OS. The persistence in that mistake would seriously affect the interpretation of the first sentence of Article 13.4.3 in a manner that undermines its intended legally binding force.

QUESTION 5

Are the obligations as defined in Article 13.4(3) and in Article 13.14(3) obligations of conduct or obligations of result? How does the standard of due diligence find place in the satisfaction of these two obligations?

72. The reference to Article 13.14 (3) appears to be a typographical mistake.
73. The first and second sentence of Article 13.4(3) impose obligations of result. The mere fact that a party has acted diligently to achieve the prescribed result does not avoid a violation if that result is not achieved.

74. The last sentence of Article 13.4.3 imposes an obligation of conduct. In that case, has already stated by the EU in its reply to Question 10, the legally binding obligation is breached only if the Party has not acted with due diligence.

QUESTION 6

How should the concept of discretion and its scope be understood in the context of Article 12 of TULRAA and in its Enforcement Decree?

75. The EU kindly refers to the replies already provided to Questions 12 and 13 as regards the concept of discretion in the context of Article 2(4) of the TULRAA and the application of the grounds for disqualifying trade unions from registration on that basis.
76. As regards the scope of the concept of discretion in the context of Article 12 of the TULRAA and in its Enforcement Decree, the EU considers that the power of the competent authorities to refuse or delay registration for “any omission or other reasons” pertaining to the documents submitted by a trade union strengthens and reinforces the substantive requirements laid down in Article 2(4).
77. Moreover, as noted by the EU in paras. 102 and 103 of its Oral Statement, the Enforcement Decree also empowers the administrative authorities to scrutinize the “the procedure for the election of executives or for the enactment of the bylaws” with respect to their compliance with “Article 16(2) through (4) or 23(1) of the Act”, as specified in Article 9(2) of the Enforcement Decree.
78. Thus, the EU concludes that the authorities are afforded considerable discretion to question the extent to which the documents submitted by a trade union comply with a wide range of substantive requirements imposed by the TULRAA. This level of scrutiny is not compatible with the principles of freedom of association, as interpreted by the CFA.

QUESTION 7

Please provide analysis on the legal contours of the principle of freedom of association

and the legal effects deriving it, in the context of the ILO and in the international legal order more generally?

79. The principles of the freedom of association have been developed in the ILO, which therefore provides the most relevant context for examining its contours and effects.
80. The notion of freedom of association has various aspects or components, which may be gleaned from the CFA's compilation of decisions. In its written submissions, the European Union has described the contours of those aspects or components of the freedom of association which are relevant in view of the specific claims made in this dispute. The European Union stands ready to answer any specific follow-up questions from the Panel.
81. The European Union has explained the legal effects of the principles of the freedom of association in the context of the ILO in its OS (see in particular paragraphs 59-66), and the replies above to Questions 14 and 15. Again, the European Union stands ready to answer any follow-up questions from the Panel.

QUESTION 8

What is the value added of Article 13.4(3) in comparison to ILO membership for Conventions which have been ratified? And for conventions which have not been ratified by one of the parties to the FTA?

82. The value added of the provisions in Article 13.4.3 is precisely the fact that the compliance with the obligations laid down therein become subject to the dispute settlement procedures in Articles 13.14 and 13.15 of the EU-Korea FTA, thereby enhancing their binding force on the Parties to the FTA.

Oral Questions for the European Union

QUESTION 1

How does the European Union explain the fact that it only launched proceedings to require Korea's compliance with its obligation under the last sentence of Article 13.4.3 recently, when it recognizes that Korea has stepped up its efforts towards ra

tification of the outstanding ILO fundamental conventions since 2017?

The European Union did not launch proceedings concerning Korea's lack of "continued and sustained efforts" towards ratification before 2017 because it acknowledged that, like any other process requiring the intervention of the legislative branch, this is not an instant process and that Korea should be afforded a reasonable period of time to comply with its obligation. However, as time went by, and it became clear that a consensus on ratification would not emerge from the tripartite dialogue which was pursued over several years, the European Union realized that these efforts were inadequate and would not produce the desired results. As confirmed by Korea during the hearing, although the Government in place since 2017 holds favourable views on the ratification of the ILO fundamental conventions, it still pursued the same approach of trying to foster a consensus among stakeholders outside the National Assembly. The European Union considered that a more forceful action was needed and therefore decided to request consultations on this matter.

QUESTION 2

Prof. Lee outlines his understanding of the EU's position with regard to the legal value of the 1998 ILO Declaration and seeks confirmation from the European Union.

The European Union confirms that understanding. The 1998 ILO Declaration does not impose new legally binding obligations on the Parties. Rather, the 1998 ILO Declaration recognises expressly, and unequivocally, that all ILO Members have, by virtue of their ILO Membership, a legally binding obligation to respect, promote and realise *inter alia* the principles of the freedom of association. That legally binding obligation arises from the ILO Constitution and the Declaration of Philadelphia and pre-exists the 1998 ILO Declaration. The contours of that obligation have been comprehensively and authoritatively interpreted by the ILO Committee on Freedom of Association (CFA).

Article 13.4(3) of the EU-Korea FTA imposes upon Korea and the European Union a legally binding obligation to respect, promote and realise the principles of the freedom of association, in accordance with their pre-existing legal obligation arising from the ILO Constitution and the Declaration of Philadelphia and subsequently recognised by the 1998 ILO Declaration.

The obligation imposed by Article 13.4(3) of the EU-Korea FTA is formally distinct from the pre-existing legally binding obligation of each Party arising from the ILO Constitution and the Declaration of Philadelphia, and recognised by the 1998 ILO Declaration, but has the same substantive content. For that reason, the interpretations of the principles of freedom of association made by the CFA are relevant also for the interpretation and application of Article 13.4(3) of the EU-Korea FTA

QUESTION 3

Could the European Union comment on the measures of the EU Member States referred to in the Korea's written submission?

Paragraph 159 of Korea's written submission states that "in France only the employees of the enterprise are eligible for designation or election in the enterprise-level union". Korea also refers to Article L2143-1 of the French Labour Code, which states in relevant part that the union delegate must have worked in the enterprise since at least one year ("*le délégué syndical doit ... travailler dans l'entreprise depuis un an ...*")

Korea's position reflects a misunderstanding. Under French law, unions enjoy complete freedom to choose their own leaders and officers. A *délégué syndical* is not a union leader or officer. Rather, a *délégué syndical* is a person designated to represent the workers in collective bargaining. The position of *délégué syndical* is not an internal position within the union, but rather an official position created by law with a view to facilitating collective bargaining within the enterprise (imposing also obligations on the employer in view of facilitating this objective). The functions, conditions of eligibility, and duration of the mandate of the *délégué syndical* are defined by law. In contrast, the functions, conditions of eligibility and duration of the mandate of the union leaders and officers are a union's internal matter, which is freely decided by each union. A *délégué syndical* may or may not be at the same time a union leader or officer.

QUESTION 4

Can the European Union explain and elaborate on its practice as regards the use of the terms "shall" and "will" in its own legislation and in international agreements?

The European Union can confirm that in its drafting practice, both of domestic legislation and of the international agreements it concludes, the two terms “shall” and “will” are used indistinctly in legally binding provisions. It cannot be said that one or the other term is reserved for specific types of provisions, it all depends on the context and the content of each individual provision and on which term appears more appropriate in that context.

In order to illustrate that there is no difference in the meaning and use of both terms, in its reply to Written Question No. 22 of the Panel the European Union has given the example of Article 13.6.2 which uses the term “shall”. This is also an obligation of conduct that is found in the same Chapter 13 of the EU-Korea FTA. It shows that the use of the term “shall” does not denote a stronger binding force than the use of the term “will” in the last sentence of Article 13.4(3). In the European Union’s practice, the terms “shall”, “will”, “commit to” can all be used in legally binding provisions, the choice of term varying in accordance with their specific content and context.

A term that the European Union tends to avoid when drafting legally binding provisions is the term “should”.

QUESTION 5:

This morning Korea has indicated that there is agreement between the Parties as to the nature of the obligations in Article 13.4(3) of the EU-Korea FTA. Can the European Union confirm that agreement?

The European Union considers that the two first sentences of Article 13.4(3) contain obligations of result. A violation of those provisions can be found if the agreed result is not attained.

As regards the last sentence, the European Union agrees with Korea that it contains an obligation of conduct. Compliance with this obligation requires the Parties to act with due diligence, taking all the appropriate measures within their power towards ratifying the ILO fundamental convention. The European Union considers that Korea has failed to act with the diligence required by this provision.

QUESTION 6

Interpretation of art 13.15 of the FTA EU-Korea. What should be the “outcome” of these proceedings?

If the Panel finds that the respondent has breached one of its obligations under Chapter 13, it must “recommend” that Party to take all the necessary measures to comply with that obligation.

Additionally, the Panel may, but is not required to, suggest specific ways to implement that “recommendation”. Although this possibility is not expressly mentioned in Article 13.15, the term “advice” is broad enough to cover it.

QUESTION 7

Will the proposed amendments to Korea’s Military Service Act bring it into compliance with ILO Convention No 29?

The European Union has not examined this question. The claim brought by the European Union in this dispute concerns Korea’s failure to make adequate efforts to ratify Convention No 29, rather than the incompatibility of Korea’s domestic law with that Convention.

QUESTION 8

The first sentence of Article 13.2(1) takes the form: “unless x is provided y applies”. Article Chapter 13 is drafted the other way round: there is not explicit statement of “x being provided”. Does the EU say that Article 13.4(3) provides otherwise implicitly? Why is the “trade-related aspects” provision in Article 13.2(1) necessary?

The introductory sentence of Article 13.2(1) states “Except as otherwise provided in this Chapter...”. This is not the same as saying “Except as otherwise *explicitly* provided in this Chapter...”⁸ There is no single provision in Chapter 13 that provides *explicitly* that it derogates from the default rule contained in Article 13.2(1). Requiring, as Korea does, that other provisions of Chapter 13 must provide for an *explicit*

⁸ For comparison, see Article 15.5(1) of the FTA EU-Korea (“This Agreement shall apply, on the one hand, to the territories in which the Treaty on European Union and the Treaty on the Functioning of the European Union are applied and under the conditions laid down in those Treaties, and, on the other hand, to the territory of Korea. References to ‘territory’ in this Agreement shall be understood in this sense, unless explicitly stated otherwise”)

derogation from Article 13.2(1), would render superfluous the introductory sentence of Article 13.2(1).

The introductory sentence of Article 13.2(1) must be understood as meaning that the default rule stipulated in Article 13(2)(1) does not apply whenever a different scope of application can be inferred from the terms of another provision included in Chapter 13. That is the case, for example, when a provision of Chapter, such as Article 13.7, states that it applies to measures “affecting trade”, since that condition is different and stricter than the condition to affect trade-related aspects of labour mentioned in Article 13.2(1).

As explained in the EU’s OS⁹, 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 Parties as Members of the ILO¹⁰ and to certain ILO Conventions¹¹. By doing so Article 13.4(3) “provides otherwise” within the meaning of the introductory sentence of Article 13.2(1).

Unlike Article 13.4(3), which defines precisely its scope of application, certain provisions of Chapter 13, including in particular some cooperation and institutional provisions, are potentially very broad in scope. For example, Articles 13.3, 13.10, 13.13 or 13.14. The default rule in Article 13.2(1) serves to circumscribe the scope of those provisions. At the same time, the condition imposed by Article 13.2(1) is not meant to be particularly demanding. In order to show that a measure affects “trade-related aspects of labour” it is enough to show that it is rationally connected to trade and that the link is not too indirect and remote. As explained by the European Union, the notion of “trade-related aspects of labour” is different and broader than the notion of “trade affectation”. When the drafters intended to subject the application of a provision of Chapter 13 to a “trade effects” condition they did so expressly, as in Article 13.7.

⁹ EU OS, at para. 16 ff.

¹⁰ Cf. first sentence of Article 13.4(3) of the FTA EU-Korea.

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