

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

REPORT OF THE PANEL OF EXPERTS

Panel

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LIST OF ABBREVIATIONS

CAFTA-DR	The Dominican Republic – Central America – United States Free Trade Agreement
CFA	ILO Committee on Freedom of Association
CFA Compilation	<i>Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association</i> , 6 th edition, International Labour Office, Geneva, 2018
Convention 87	C87 Freedom of Association and Protection of the Right to Organise Convention, 1948
Convention 98	C98 Right to Organise and Collective Bargaining Convention, 1949
Convention 105	C105 Abolition of Forced Labour Convention, 1957
EU	European Union
EU-Korea Free Trade Agreement, EU-Korea FTA or the Agreement	Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJEU L127/68 of 14.5.2011
EU OS	EU's Opening (Oral) Statement, 1 October 2020
EU WS	EU's Written Submission, 20 January 2020
FTA	Free Trade Agreement
ILO	International Labour Organization
ILO Declaration 1998 or the 1998 Declaration	The ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its Eighty-Sixth Session, Geneva, 18 June 1998
Korea	Republic of Korea
Korea OS	Korea's Opening (Oral) Statement, 1 October 2020
Korea WS	Korea's Written Submission, 14 February 2020
KCTU	Korean Confederation of Trade Unions
KTU	The Korean Teachers and Education Workers' Union
Panel	Panel of Experts constituted under Article 13.15 of the EU-Korea FTA
TULRAA	<i>Trade Union and Labour Relations Adjustment Act</i> , Act No 5310, 13 March 1997 (Korea)
UDHR	Universal Declaration of Human Rights
VCLT	Vienna Convention on the Law of Treaties

I Introduction

A Panel's Note

1. The Panel conducted its work in 2020 during the global coronavirus pandemic, which necessitated unexpected changes in the format and timing of the proceedings in this matter. Unfortunately, it was not possible to hold the planned public hearings in Geneva, Switzerland as originally planned: instead, the hearings and the Panel's deliberations were all conducted virtually, across different time zones. No official transcript of the proceedings was available to the Panel: rather, the Panel received written answers to the questions posed by the Panel before and during the proceedings.¹ The Panel thanks the Parties for their technical assistance and co-operation in adapting to these challenges so that the Panel was able to examine the matters raised in the EU's letter of 4 July 2019 (hereafter 'the Panel Request') and prepare this Report in as timely a manner as permitted by the circumstances.

B Procedural history

a. Introduction

2. On 17 December 2018, the European Union (the 'EU') requested consultations with the Republic of Korea ('Korea') pursuant to Article 13.14.1 of the Free Trade Agreement between the European Union (EU), of the one part, and the Republic of Korea ('Korea'), of the other part, (the 'EU-Korea FTA' or the 'Agreement')² concerning certain measures, including provisions of the Trade Union and Labour Relations Adjustment Act (hereafter the 'TULRAA').³
3. Article 13.14.1 of the EU-Korea FTA provides:

1. A Party may request consultations with the other Party regarding any matter of mutual interest arising under this Chapter, including the communications of the Domestic Advisory Group(s) referred to in Article 13.12, by delivering a written request to the contact point of the other Party. Consultations shall commence promptly after a Party delivers a request for consultations.

¹ Consolidated Hearing Report prepared by the Parties, 6 November 2020 (the Consolidated Hearing Report).

² OJ EU L127/68 of 14 May.2011.

³ Trade Union and Labour Relations Adjustment Act, Act No 5310, 13 March 1997 (Korea), hereafter the TULRAA.

4. On 21 January 2019, the EU and Korea met in Seoul to reach a mutually satisfactory resolution of the matter. However, the consultations did not lead to the matters being satisfactorily addressed.
5. On 4 July 2019, the EU requested that a Panel of Experts to be convened pursuant to Article 13.15.1 of the EU-Korea FTA to examine the unresolved issues.

b. Establishment of the Panel of Experts

6. The EU appointed Professor Laurence Boisson de Chazournes, Professor of Law at University of Geneva, as an Expert.
7. Korea appointed Professor Jaemin Lee, Professor of Law at Seoul National University, as an Expert.
8. Together, the two Experts agreed to appoint Mr. Thomas Pinansky, an attorney at Barun Law LLC, as the Chairperson of the Panel of Experts.
9. On 30 December 2019, the Panel of Experts was formally established, with Mr. Rieu Kim, an attorney at Barun Law LLC, appointed as Secretary to the Panel of Experts.

c. First Organisational Meeting and Rules of Procedures

10. A draft Procedural Rules for the Panel of Experts prepared by the EU and Korea (the ‘Rules of Procedure’) was shared with the Panel of Experts.
11. On 17 December 2019, through the Panel Communication No. 1, the Panel of Experts agreed with the Parties that *amicus curiae* should submit their written submissions to a functional email set-up by the Panel Secretary by 10 January 2020.
12. The First Organisational Meeting was held on 9 January 2020.
13. On 11 February 2020, through the Panel Communication No. 5, the Panel of Experts invited the Parties to review the amended draft Rules of Procedure for their comments.
14. On 18 February 2020, through the Panel Communication No. 6, the Panel of Experts confirmed that based on the agreement among the Parties and the Panel of Experts, due to the ill-health of

the Chairperson, the Hearings would be delayed to 14 April 2020 to 15 April 2020 (plus 16 April 2020 reserved).

15. On 26 February 2020, through the Panel Communication No. 7, the Panel of Experts adopted the Rules of Procedures as the Parties had no comments.

d. Written Submissions of the Parties

16. On 20 January 2020, the EU submitted its initial submission according to Article 7 of the Rules of Procedure.
17. On 14 February 2020, Korea submitted its reply to EU's initial submission according to Article 7 of the Rules of Procedure.

e. Amicus Curiae Briefs

18. On 10 January 2020, *amicus curiae* submissions received at the Panel's email address were forwarded to the Panel and the Parties.

f. Hearing Protocols and Further Postponement of the Hearings due to the Covid-19 Pandemic

19. On 18 February 2020, through the Panel Communication No. 6, the Panel of Experts sent a draft document outlining the Hearing Protocol for the Parties' comments.
20. From 21 February 2020 to 9 March 2020, the Parties and the Panel of Experts consulted on the draft Hearing Protocol. On 9 March 2020, the Panel Secretary, on behalf of the Panel of Experts, circulated a revised draft Hearing Protocol reflecting the Parties' additional comments.
21. On 20 March 2020, the Panel of Experts invited the Parties' opinion on the further postponement of the Hearings scheduled for 14 April 2020 to 15 April 2020 (plus 16 April 2020 reserved) to a later date considering the unprecedented Covid-19 pandemic.
22. On 20 March 2020 and 24 March 2020 respectively, Korea and the EU agreed to postpone the Hearings to a later date in light of the Covid-19 pandemic.

g. Appointment of Dr. Jill Murray as new Chairperson of the Panel of Experts

23. Following the unfortunate death of Mr. Thomas Pinansky, the original Chairperson of the Panel of Experts, Dr. Jill Murray (Senior Fellow, Centre for Employment and Labour Relations Law, the University of Melbourne) was nominated by the two other Experts. Following the agreement of the Parties, she was appointed as the new Chairperson of the Panel of Experts on 29 April 2020.

h. Hearing Arrangements and Pre-Hearing Conference

24. On 21 July 2020 and 23 July 2020, Korea raised certain points about the conduct of the Hearings, including the Panel's questions before the Hearings and the form of interpretation.
25. On 30 July 2020, through Panel Communication No. 8, the Panel of Experts responded to Korea's points, as well as in relation to other features of the Hearings (including location, transcript services, virtual hearing platform, cyber security and confidentiality).
26. On 17 August 2020, the EU indicated that it remained available for the Hearings from 26 to 28 August 2020 and had a preference to hold the Hearings in virtual format. On 18 August 2020, the Panel indicated its preference to hold the hearings from 26 to 28 August 2020 as such period represented the only time all the Panel members are available in August and September 2020.
27. On 19 August 2020, Korea indicated that it was not available for the Hearings from 26 to 28 August 2020, and that it was favourably considering holding a virtual hearing in order to prevent further delays.
28. On 26 August 2020, through Panel Communication No. 9, the Panel of Experts communicated to the Parties, *inter alia* :
- (a) *in light of Korea's unavailability on 26 to 28 August 2020, the Panel of Experts decided that it had to postpone the Hearing dates from 26 to 28 August 2020 to a later date;*
 - (b) *taking into consideration the Covid-19 situation, the Panel of Experts considered that the forthcoming Hearings should be conducted in a virtual format;*
 - (c) *the Parties should make their very best efforts to make themselves available during one of the three following periods: (1) 8-11 October 2020, (2) 17-18 October 2020 or (3) 21-23 October 2020;*

(d) the Panel of Experts would require at least three days to formulate questions if the Parties agree to proceed with the proposal to exchange opening statements at least one week before the first date of the Hearings; and

(e) The Panel of Experts also asked the Parties to provide the Hearing Protocol as agreed by both Parties.

29. In the Panel Communication No. 9, the Panel of Experts reiterated that the Rules of Procedure (adopted on 26 February 2020 and sent on 18 August 2020) were the ones governing the present proceedings, with the possibility for the Parties to jointly agree to derogate from them in the Hearing Protocol.
30. On 3 September 2020, both Parties indicated to the Panel that they had agreed to hold the Hearings on 8 to 9 October 2020 in a virtual format, and that a revised draft Hearing Protocol agreed by the Parties had been sent to the Panel. In response, on 9 September 2020, the Panel of Experts provided its comments on the revised Hearing Protocol and invited the Parties to respond by 18 September 2020.
31. On 15 September 2020, the Parties provided to the Panel of Experts their comments and revisions on the draft Hearing Protocol and indicated that they were available for a test call for a virtual hearing during 24 to 25 September or 28 to 29 September 2020. In response, on 15 September 2020, the Panel of Experts confirmed that they were available for a test run on 24 September 2020.
32. On 17 September 2020, the Panel of Experts adopted the final version of the Hearing Protocol and on 20 September 2020, the Panel circulated a copy of the final version of the Hearing Protocol signed by the Chairperson on behalf of the Panel of Experts.
33. On 24 September 2020, the Panel of Experts and the Parties had a test call for the virtual hearings. The Panel then discussed with the Parties arrangements for the provision of a transcript of the hearings. In the end it was agreed that the Parties would provide a consolidated report of the hearings. On 2 October 2020, the EU and Korea submitted their respective Opening Statements.
34. On 4 October 2020, the Panel of Experts provided the Panel's written questions to the Parties.

i. Hearings

35. The Hearings were held on 8 October 2020 and 9 October 2020 in a virtual format, attended by the Panel of Experts, the Parties, the Parties' counsel and the Panel Secretary.
36. After the first day of the Hearings, held on 8 October 2020, the EU provided its provisional version of the replies to the Panel of Experts' questions, and Korea provided its speaker's notes to the Panel of Experts. Each Party also provided a list of attendees for the first day of the Hearings, as follows.

EU

Name	Role / Organization	Location / Point of Connection
Mr. Ramon Vidal Puig	Agent for the EU, Legal Service	Brussels, Belgium
Ms. Margarida Afonso	Agent for the EU, Legal Service	
Mr. Colin Brown	Acting Head of Unit, DG Trade	
Mr. Michael Fridrich	Legal officer, DG Trade	
Mr. Nuno Sousa	Policy officer, DG Trade	
Ms. Malgorzata Galar	Policy officer, DG Trade	
Mr. Guillaume Durand	Policy officer, DG Trade	
Ms. Patricia de Gray	Policy officer, DG Employment	
Mr. Benoit Lory	EU Delegation to Korea	Seoul, Korea
	EU Delegation to Korea	
	EU Delegation to Korea	

Korea

Name	Role / Organisation	Location / Point of Connection
Mr. Kiljun Noh	Ministry of Employment and Labor	Seoul, Korea
Mr. Haeyoung Chung	Ministry of Employment and Labor	
Ms. Sujin Kim	Ministry of Employment and Labor	
Mr. Gihun Heo	Ministry of Employment and Labor	
Ms. Soonji Kwon	Ministry of Employment and Labor	
Ms. Seyoung Kim	Ministry of Employment and Labor	
Ms. Jinhee Baek	Ministry of Foreign Affairs	
Mr. Sungjoon Park	Ministry of Foreign Affairs	
Mr. Joonsup Jung	Ministry of Foreign Affairs	
Mr. Yongkyun Pak	Ministry of Trade, Industry and Energy	
Mr. Kichang Chung	Lee&Ko	
Mr. Yongmoon Kim	Lee&Ko	
Ms. Hyesoo Kim	Lee&Ko	

37. After the second day of the Hearings, held on 9 October 2020, the EU provided its final version of the replies to the Panel of Experts' questions, and Korea provided its speaker's notes to the

Panel of Experts. Each Party also provided a list of attendees for the second day of the Hearings, as follows.

EU

Name	Role / Organization	Location / Point of Connection
Mr. Ramon Vidal Puig	Agent for the EU, Legal Service	Brussels, Belgium
Ms. Margarida Afonso	Agent for the EU, Legal Service	
Mr. Colin Brown	Acting Head of Unit, DG Trade	
Mr. Michael Fridrich	Legal officer, DG Trade	
Mr. Nuno Sousa	Policy officer, DG Trade	
Ms. Malgorzata Galar	Policy officer, DG Trade	
Mr. Guillaume Durand	Policy officer, DG Trade	
Ms. Patricia de Gray	Policy officer, DG Employment	
Mr. Benoit Lory	EU Delegation to Korea	Seoul, Korea
	EU Delegation to Korea	
	EU Delegation to Korea	

Korea

Name	Role / Organisation	Location / Point of Connection
Mr. Kiljun Noh	Ministry of Employment and Labor	Seoul, Korea
Mr. Haeyoung Chung	Ministry of Employment and Labor	
Ms. Sujin Kim	Ministry of Employment and Labor	
Mr. Gihun Heo	Ministry of Employment and Labor	
Ms. Soonji Kwon	Ministry of Employment and Labor	
Ms. Seyoung Kim	Ministry of Employment and Labor	
Ms. Jinhee Baek	Ministry of Foreign Affairs	
Mr. Sungjoon Park	Ministry of Foreign Affairs	
Mr. Joonup Jung	Ministry of Foreign Affairs	
Ms. Yunjee Kim	Ministry of Employment and Labor	
Mr. Kichang Chung	Lee&Ko	
Mr. Yongmoon Kim	Lee&Ko	
Ms. Hyesoo Kim	Lee&Ko	

38. During the Hearings, Korea submitted several new exhibits (Exhibits K-132 to K-135).

j. Post-Hearing Submissions

39. On 16 October 2020 and 20 October 2020 respectively, the EU and Korea provided their replies to the oral questions of the Panel of Experts.

40. On 6 November 2020, Korea and the EU submitted a consolidated report of the Hearings.

41. On 18 November 2020, Korea submitted a document which outlined its proposed legislative amendments. The Panel sought the view of the EU. On the same day, the EU requested the

Panel disregard the document submitted by Korea. On the issue of admission of this document, the Panel of Experts communicated to the Parties on 23 November 2020 that it determined that the document should be admitted as Exhibit K-136. The Panel also invited the EU to provide any comment it wished to make about that document by 27 November 2020. On 23 November 2020, the EU indicated that it had decided not to submit comments on the document.

C The Panel's interpretive framework

42. In addressing and analysing the Parties' arguments based on the relevant provisions of the EU-Korea FTA, the Panel follows and applies the general rules of treaty interpretation as set out in Articles 31 and 32 of the 1969 *Vienna Convention on the Law of Treaties* (the 'VCLT').⁴ This Panel of Experts is established under Article 13.15 of the EU-Korea FTA and is tasked with examining the matter arising under Chapter 13 of the Agreement as identified in the Panel Request,⁵ and is requested to offer its expertise in implementing the Chapter.⁶ The Chapter 13 procedures under which the Panel exercises its jurisdiction are in lieu of the arbitration procedures set out in Chapter 14 of the Agreement.⁷ To the extent that it is mandated to clarify and elucidate the meaning of relevant provisions of Chapter 13 of the EU-Korea FTA, the Panel is obligated to follow and apply the general rules of treaty interpretation in the VCLT.
43. Both Parties also agree that it is the rules of treaty interpretation as codified in Articles 31 to 32 of the VCLT that the Panel should apply to the present proceedings.⁸
44. The Panel reiterates this point because some of the provisions referred to in the Panel Request have some inherent ambiguities. In this regard, the Panel has not had the benefit of an agreed explanation of the background to the formation of these provisions during the negotiation of the Agreement, and the Parties are at odds in terms of their understanding of the meaning of Article 13.4.3. Under these circumstances, the Panel examines each provision of the Agreement in question and interprets it in accordance with the rules of treaty interpretation of the VCLT.
45. Article 31 of the VCLT, 'General Rule of Interpretation,' stipulates:
- 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
- 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*

⁴ Done at Vienna on 23 May 1969. Entered into force on 27 January 1980, 1155 United Nations Treaty Series (U.N.T.S.), 331.

⁵ See EU-Korea FTA, Article 13.15.1.

⁶ See EU-Korea FTA, Article 13.15.2.

⁷ See EU-Korea FTA, Article 13.16.

⁸ Consolidated Hearing Report, [3], [65].

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

46. The Panel is mindful of the prevailing jurisprudence on Article 31, which requires a holistic approach based on examining the ordinary meaning of the terms together with their context in light of the object and purpose of the treaty, all under the rubric of good faith.⁹ A disproportionate reliance on one particular element may yield a misplaced or inaccurate interpretation.
47. It follows, then, that in discharging its obligation the Panel should be cautious in addressing the interpretation or decision of any other entity or body having a bearing on the current proceedings. Nor is the Panel required to reach its determination in a particular way reflecting decisions of such other entities or bodies. The Panel's obligation is to interpret the provisions in Chapter 13 of the EU-Korea FTA in accordance with the general rules of treaty interpretation as set forth in Article 31 of the VCLT.

⁹ See, e.g., *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, *I.C.J. Reports* 1994, para.41; Appellate Body Report, *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (29 April 1996), 16-17, 23; Panel Report, *United States-Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (22 December 1999), [722]; Appellate Body Report, *United States- Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/R (2 January 2002), [338]; Appellate Body Report, *United States-Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS231/AB/R (28 November 2002), [213]; *Case Concerning the Audit of Accounts between the Netherlands and France in application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1986*, Reports of International Arbitral Awards, Volume XXV (12 March 2004), 269; Appellate Body Report, *European Communities-Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R (12 September 2005) [176]; Appellate Body Report, *United States-Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R (4 February 2009) [268] and [282]; Appellate Body Report, *China-Measures Affecting Trade Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (21 December 2009) [348], [352] and [399]; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, *I.C.J. Reports* 2018, para. 91; Panel Report, *United States – Tariff Measures on Certain Goods from China*, WT/DS543/R (15 September 2020) [7.156].

48. At the same time, the interpretations and decisions of other entities and bodies are highly informative and relevant to the matters at hand. As such, within the confines of Article 31 of the VCLT, the Panel will accord them appropriate weight in its consideration of the matters in the Panel Request.
49. The Panel also notes that, through its written submissions and oral argument, Korea has attempted to introduce a record of the negotiation of the EU-Korea FTA.¹⁰ By way of example, Korea relies on this purported record to argue that the Parties agreed at the time of negotiation that Chapter 13 is not legally binding.¹¹
50. The EU submits that the record submitted is Korea's own summary, not an official record agreed upon by the two Parties, and one which is not an accurate reflection of those discussions.
51. The Panel understands Korea is seeking to introduce the Parties' negotiating history in accordance with Article 32, 'Supplementary Means of Interpretation', of the VCLT, which states:
- Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:*
- (a) leaves the meaning ambiguous or obscure; or*
- (b) leads to a result which is manifestly absurd or unreasonable.*
52. As noted above, not only is there no agreed record of the negotiations for the EU-Korea FTA, but also one Party, the EU, challenges the accuracy of the notes provided by Korea. Furthermore, Article 32 only comes into play if the outcome of interpretation under Article 31 leaves the meaning of the provisions in question ambiguous, or leads to a manifestly absurd result, neither of which is the case in the present matter.
53. Taking all these issues into account, the Panel does not find it necessary to entertain Korea's argument based on the purported negotiating history of the Agreement.

¹⁰ See for example Exhibit K-9.

¹¹ See Korea WS, [29] and Exhibit K-9 ('the EU negotiator emphasized that [Chapter 13] was designed to promote an approach based on cooperation').

II Jurisdiction of the Panel

A Submissions

54. In its written submissions of 14 February 2020, Korea argues that the Panel has no jurisdiction to examine the matters raised in the EU's letter of 4 July 2019 requesting the establishment of a Panel of Experts under Chapter 13 of the EU-Korea FTA because the EU has failed to identify 'a matter arising under the EU-Korea FTA'.¹² The requirement that a Panel of Experts established under Chapter 13 of the EU-Korea FTA examine a matter 'arising under the Agreement' is found in Article 13.14, which sets out the procedure for Government-level consultations about 'any matter of mutual interest arising under the Agreement'. If 'the matter' so raised has not been 'satisfactorily addressed,' a Party may request that a Panel be established to deal with 'the matter' pursuant to Article 13.15.
55. The EU's Panel Request of 4 July 2019 makes two sets of claims. The first identifies four measures in the form of specific provisions of the TULRAA which the EU claims are inconsistent with the first sentence of Article 13.4.3 of the EU-Korea FTA. The second set of claims posits that Korea has not made sufficient efforts towards ratification of the core labour Conventions of the International Labour Organisation (ILO) to have acted consistently with its obligations pursuant to the last sentence of Article 13.4.3 of the EU-Korea FTA.
56. Korea argues that Article 13.2.1 ('Scope') of the Agreement limits the scope of Chapter 13 to 'trade-related aspects of labour' and that the EU has raised 'aspects relating to labour ... as such, without any established connection with trade between the EU and Korea...'.¹³ Korea further argues that the Parties 'did not intend, by agreeing to Chapter 13, to subject their labour laws and policies...to obligations that bear no connection to trade (or investment)'.¹⁴
57. The Panel notes that in describing what it sees as a requirement for a connection between trade and a matter raised by a Party pursuant to Articles 13.14 and 13.15, Korea refers not only to 'trade-related aspects of labour' (the term used in Article 13.2.1) but also to measures which are 'related to trade',¹⁵ 'which affect trade'¹⁶ or have a 'specific connection to trade'.¹⁷

¹² Written Submission by the Republic of Korea, 14 February 2020 (Korea WS), [2].

¹³ Korea WS, [17].

¹⁴ Korea WS, [27].

¹⁵ Korea WS, [22].

¹⁶ Oral Statement by the European Union, 1 October 2020 (EU OS), [6] says Korea refers to measures affecting trade in the following paragraphs - Korea WS, [20], [22], [24], [32] and [33].

¹⁷ Korea WS, [24].

58. In support of its contentions, Korea refers to the Report of a Panel established under the Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR)¹⁸ noting that ‘(t)hat panel in essence took the view that the failure to comply or enforce labour laws does not necessarily and automatically result in trade diversions or distortions or affect trade flows’.¹⁹
59. In reply to these submissions, the EU argues that Article 13.2.1 of the EU-Korea FTA contains the phrase ‘(e)xcept as otherwise provided in this Chapter’, and is therefore ‘residual’ in nature: ‘it comes into play only where the scope of application of another provision of Chapter 13 cannot be ascertained in accordance with customary rules of treaty interpretation’.²⁰
60. In the EU’s view, the meaning of Article 13.4.3, which provides the legal basis of its complaint against Korea, can be ‘properly established without resorting to the default rule in Article 13.2.1’.²¹ That is, the EU argues that Article 13.4.3 is not subject to a ‘trade affectation’ test however described, and that its Panel Request deals with matters arising under the Agreement, and is thus able to form the basis of the jurisdiction of this Panel.²²

B Analysis

a. Interpretation of Article 13.4.3

61. The starting point for the Panel’s analysis of Korea’s jurisdictional claim is Article 13.4.3, which is the legal basis for both sets of claims in the Panel Request. Article 13.4.3 states:

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

- a. Freedom of association and the effective recognition of the right to collective bargaining;*
- b. The elimination of all forms of forced or compulsory labour;*

¹⁸ CAFTA-DR Panel Report, *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR* (hereafter CAFTA-DR Panel Report), (Exhibit K-7).

¹⁹ Korea WS, [22].

²⁰ EU OS, [5].

²¹ EU OS, [5].

²² EU OS, [16] – [29].

- c. *The effective abolition of child labour; and*
- d. *The elimination of discrimination in respect of employment and occupation.*

The Parties reaffirm the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the European Union have ratified respectively. The Parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as “up-to-date” by the ILO.

- 62. It is also necessary to read Article 13.4.3 in the context of Article 13.2.1, which deals with the Scope of the Agreement. Article 13.2.1 states: ‘Except as otherwise provided in this Chapter, this Chapter applies 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.’
- 63. The Panel’s examination of Article 13.4.3 is based on the ordinary meaning of the terms, read in context and in light of the object and purpose of Chapter 13 (as required by Article 13.2) and the object and purpose of the Agreement as a whole. This examination reveals that an interpretation which suggests that its terms are limited to trade-related aspects of labour cannot be sustained. Rather the phrase in Article 13.2.1, ‘(e)xcept as otherwise provided...’, clearly applies to Article 13.4.3. The clear and unambiguous meaning of this paragraph is that Article 13.4.3 constitutes one of the instances of ‘except as otherwise provided’.
- 64. The focus in the first sentence of Article 13.4.3 is on the obligations which Korea and the member States of the EU have voluntarily undertaken by their decision to join the ILO. These obligations apply to every member State of the ILO and relate to purely domestic responsibilities in relation to fundamental principles and rights. The explicit references to the ILO Constitution and the ILO Declaration on Fundamental Principles and Rights at Work 1998 (the 1998 Declaration) and the specific identification of the principles concerning the fundamental rights in relation to freedom of association and effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation clearly indicate that any obligation arising from the first sentence has been defined by the Parties to the full extent of their internationally accepted meaning.
- 65. The language of ‘fundamental rights’ in the context of the ILO Constitution and 1998 Declaration directly conflicts with Korea’s contentions in relation to a ‘trade-relatedness’

limitation: '(u)niversality of its standards is a fundamental part of the ILO's approach'.²³ In replicating the language of the 1998 Declaration, the Parties give direct expression to this universality of principle. For example, the text of Article 13.4.3 refers to the 'elimination of *all* forms of forced or compulsory labour',²⁴ which is unequivocal in its universal scope. The key principle of the fundamental right of freedom of association is that every worker and employer has the right to join an association of their own choosing, with only limited exceptions as determined through the relevant processes of the ILO.²⁵ The Parties have drafted Article 13.4.3 in such a way as to exclude the possibility that this domestic commitment to achieve or work towards these key international labour principles and rights exists only in relation to trade-related aspects of labour.

66. One outcome, if Korea's position were correct, would be that Article 13.4.3 would permit a Party to institute a form of slavery or child labour for workers who were deemed not to fall within the category of 'trade-related labour.' This is clearly antithetical to the unambiguous meaning of the text of Article 13.4.3, which refers to elimination of such practices with no express exceptions.
67. Further, it is not legally possible for a Party to aim to ratify ILO Conventions only for a segment of their workers: the ILO does not permit ratification subject to reservations.²⁶ This fact means that progress towards ratification, in its ordinary meaning, must extend to the full scope of the relevant international instruments. It defies the clear logic of Article 13.4.3 to state otherwise.
68. For these reasons, the Panel agrees with the EU that the proper scope of Article 13.4.3 is established by its own terms, and thus falls within the '(e)xcept as otherwise provided' clause of Article 13.2.1. It is not appropriate, or even possible, to apply the limited scope bounded by 'trade-related labour' to the terms of Article 13.4.3, as proposed by Korea.

²³ Colin Fenwick, 'Minimum obligations with respect to Article 8 of the International Covenant on Economic, Social and Cultural Rights' in Audrey Chapman and Sage Russell (editors), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia, Antwerp, 2002, 60.

²⁴ Article 13.4.3 (emphasis added).

²⁵ The fundamental human right to freedom of association is recognised within the United Nations system, and is enshrined in Article 20 of the Universal Declaration of Human Rights, UN General Assembly Resolution 217 A(111) of 10 December 1948 (Universal Declaration of Human Rights); Article 22 of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171; and Article 8 of the International Covenant on Economic, Social and Cultural Rights.

²⁶ 'International Labour Conventions are adopted and enter into force by a procedure which differs from the procedure applicable to other international instruments. The special features of this procedure have always been regarded as making international labour Conventions intrinsically incapable of being ratified subject to any reservation.' *Memorandum by the International Labour Office on the Practice of Reservations to Multilateral Conventions to the International Court of Justice*, International Labour Organisation Official Bulletin, Vol. XXXIV, No. 3, 31 December 1951, 274.

69. The Panel's interpretation of Article 13.4.3 is supported by reference to the immediate context in which this paragraph sits. The preceding paragraph in Article 13.4.2 states:

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

70. This largely hortatory statement confirms the ethical framework within which the Parties have chosen to place their trading relationship. Central to that framework is the Decent Work agenda, which includes the promotion of the core labour standards of the ILO. The 2006 Ministerial Declaration itself makes clear that economic and social factors are necessarily intertwined in the project of achieving 'sustained economic growth and sustainable development of all nations, and a fully inclusive and equitable globalization'.²⁷
71. The Panel has also had regard to the context provided by Article 13.4.1, which establishes a forum for joint cooperation. Here, the Parties chose to explicitly limit the subject-matter to 'trade-related labour and employment issues'. It is significant that no such explicit limitation is placed on the content of Articles 13.4.2 and 13.4.3, again suggesting that the Parties did not intend their commitments and expectations in those paragraphs to be limited in this way.
72. There are several other places in Chapter 13 where the Parties have adopted an express limitation on the scope of the subject matter. Article 13.8 ('Scientific Information') relates to commitments to share information which only applies to matters 'that affect trade between the parties'. In Article 13.9 ('Transparency'), the Parties agree to be transparent with each other in relation to the development, introduction and implementation of domestic law, but this is also explicitly limited to laws 'that affect trade between the parties'. Each Party is required by Article 13.7 ('Application and Enforcement of Domestic Laws') 'not to fail to implement and enforce their domestic laws...in a manner affecting trade or investment between the Parties'.

²⁷United Nations, Economic and Social Council, Ministerial Declaration on 'Creating an environment at the national and international levels conducive to generating full and productive employment and decent work for all, and its impact on sustainable development,' 2006.

73. That is, throughout Chapter 13 the Parties have deliberately specified areas/activities which are to be limited in scope. It is therefore significant where the Chapter does not do this, as is the case with Article 13.4.3. This confirms the Panel's interpretation of the ordinary meaning of the terms of Article 13.4.3 in their context and in light of the object and purpose of the Agreement: Article 13.4.3 is covered by the 'otherwise provided' exception set out in Article 13.2.1.
74. In reaching its conclusion on the jurisdictional objection raised by Korea, the Panel has examined the ordinary meaning of the text of Article 13.2 ('Scope') read in context. Article 13.2 identifies the context within which it is to be read by making explicit reference to Article 13.1 (Context and Objectives). Article 13.1.1 states that the Parties commit to 'promoting the development of international trade in such a way as to contribute to the objective of sustainable development'. Article 13.1.2 further states that the Parties recognise 'that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development', and then refers to a number of international declarations and statements.
75. Thus, part of the context in which Article 13.4.3 and Article 13.2.1 must be seen includes Agenda 21 on Environment and Development of 1992, a multilateral plan of action adopted under the aegis of the United Nations following the United Nations Conference on Environmental Development held in Rio de Janeiro (the 'Earth Summit').²⁸ Agenda 21 outlines a broad range of interconnected social and economic aspirations and activities directed at sustainable development.²⁹ Its Article 29.4 ('Promoting Freedom of Association') states:

For workers and their trade unions to play a full and informed role in support of sustainable development, Governments and employers should promote the rights of individual workers to freedom of association and the protection of the right to organize as laid down in the ILO conventions. Governments should consider ratifying and implementing those conventions, if they have not already done so.

²⁸ Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN publications, Sales No E.93.I.8.

²⁹ Agenda 21 on Environment and Development of 1992 (hereafter Agenda 21), Chapter 23 Strengthening the Role of Major Groups, Preamble Article 23.2.

76. The 2002 Johannesburg Plan was adopted after the World Summit on Sustainable Development held to track progress a decade after the Rio Earth Summit. The Summit Political Declaration is expressed in broad terms and refers to the ‘indivisibility of human dignity’.³⁰
77. The references in the Agreement to these international declarations and statements do not themselves impose legal obligations on the Parties, nor do they alter the plain meaning of the terms of the Agreement. However, they are further indications of the framework of values identified by the Parties, including a recognition of the interconnectedness of economic, social and environmental matters.³¹ As we have seen in the discussion of the 2006 Ministerial Declaration above, inherent in this view of trade is the key role of fundamental human and labour rights as a foundation for sustainable development. The common essence of these statements is the broad aspiration that global trade should be carried out in a manner consistent with fundamental human rights and dignity.
78. The Panel’s understanding of Chapter 13 is also in accord with the preamble to the EU-Korea FTA. Here the Parties reaffirm their commitment to the Charter of the United Nations (UN Charter) and the Universal Declaration of Human Rights (UDHR). The UN Charter *inter alia* ‘promotes and encourages respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’.³² The UDHR in Article 23 states: ‘(e)veryone has the right to form and to join trade unions for the protection of his interests’.³³ The Parties’ decision to include references to these instruments in the Preamble to their Agreement is significant, and further supports the Panel’s interpretation of Article 13.4.3 and Article 13.2.1 as set out above.
79. The Preamble also provides some insight into another argument made by Korea in support of its jurisdictional case. The Parties in the Preamble reaffirm ‘their commitment to sustainable development and convinced of the contribution of international trade to sustainable development in its economic, social and environmental dimensions, including economic development, poverty reduction, full and productive employment and decent work for all...; desiring to strengthen the development and enforcement of labour and environmental laws and policies, promote basic workers’ rights and sustainable development and implement this

³⁰ UN Department of Economic and Social Affairs, Johannesburg Declaration on Sustainable Development, Plan of Implementation, Johannesburg, September 2002, 3.

³¹ Clair Gammage, ‘Social norms in EU free trade agreements: justiciable or not?’ in Clair Gammage and Tonia Novitz (editors), *Sustainable Trade, Investment and Finance: towards responsible and coherent regulatory frameworks*, Edward Elgar, Cheltenham, 2019, 64.

³² United Nations Charter, 1 U.N.T.S. XVI, 24 October 1945, Article 1.3.

³³ Universal Declaration of Human Rights, Article 23.

Agreement in a manner consistent with those objectives...’. This statement anticipates a distinction drawn in Chapter 13 between the development and enforcement of domestic labour laws and policies on one hand, and the promotion of fundamental workers’ rights, on the other. This distinction is important to the Panel’s response to Korea’s arguments relating to harmonisation of provisions and protectionism, to which we now turn.

b. Harmonisation of Labour Standards

80. In support of its jurisdictional argument, Korea also refers to Article 13.1.3 of the Agreement, which states that it is not the Parties’ intention to ‘harmonise the labour standards...of the Parties’. Korea implicitly argues that the EU’s Panel Request may tend in the direction of harmonisation, underscoring that:

*Such harmonisation would bear no connection with trade-related aspects of labour. Nor is a trade agreement an appropriate instrument for achieving harmonisation of the Parties’ labour laws.*³⁴

The EU responds that the Agreement leaves each Party ‘free to choose its own level of protection in its domestic labour laws, regulations and standards’.³⁵

81. In the Panel’s view, the EU’s Panel Request does not amount to a proposal to harmonise the labour laws or standards as implied in Korea’s submissions. The concept of harmonisation of labour standards suggests a bringing into alignment of actual standards such as minimum rates of pay, maximum hours of work, or access to job security procedures.³⁶ The fundamental principles and rights and core labour standards mentioned in Article 13.4.3 do not require harmonisation of domestic labour laws or outcomes. This can be seen in the fact that many of the member States which have ratified the relevant Conventions both comply with their international obligations and maintain disparate systems of industrial relations, with very different substantive outcomes in terms of levels of economic development.
82. The ILO has explained the modern relationship between trade and labour standards in the following terms: ‘...the aim is not for the ILO to achieve uniformity in the level of social protection’ because ‘differences in conditions and levels of protection are linked to a certain

³⁴ Korea WS [25].

³⁵ EU OS [22].

³⁶ Jill Murray, *Transnational Labour Regulation: the ILO and EC Compared*, Kluwer Law International, 2001, 27.

extent to differences in levels of development.’ Rather, there should be ‘universal recognition of certain basic rights....respect of certain common rules of the game....’ including those fundamental rights and principles included in Article 13.4.3.³⁷ This is akin to the idea of the core labour standards as the ‘floor’ underpinning the concept of Decent Work.³⁸ The fundamental principles and rights in the 1998 Declaration and the core labour standards are seen as enabling rights, a pre-condition to the attainment of some of the aspirational goals enumerated in the multilateral declarations and statements referred to by the Parties. Once the rules of the game are set, domestic labour law may then be set in accordance with local economic and social conditions, norms and cultures. The EU’s Panel Request is, speaking broadly, directed at the former (the rules of the game as they are given effect in domestic law), not the latter (the domestic labour law regime and practices as a whole).

83. This distinction is present within Chapter 13 itself. Whereas Article 13.4.3 refers to the fundamental labour rights, Article 13.3 (‘Right to Regulate and Levels of Protection’) recognises the right of each Party ‘to establish its own levels of ...labour protection’, while seeking to ensure ‘high levels of protection’, which the Parties should ‘strive to continue to improve’. This sphere of domestic endeavour in relation to labour laws and policies is, however, to be ‘consistent with the internationally recognised standards or agreements referred to in Article(s) 13.4...’. In other words, while it is a matter of national sovereignty (subject to the aspirations towards high standards and continued improvement) to determine the level, scope and character of national labour laws and policies, these should conform to the bedrock of the fundamental rights and principles referred to in Article 13.4. The two spheres are distinct in the way they are dealt with in the Agreement.
84. Therefore, in the view of the Panel, nothing in the EU’s Panel Request calls into question the rights of the parties to regulate and set levels of protection in accordance with Article 13.3. Nor does the EU’s Panel Request, in the Panel’s opinion, attempt to impose or promote the harmonisation of labour standards between the Parties contrary to Article 13.1.3. The Panel Request is targeted at the particular legislative provisions which give effect, or attempt to do so, to the obligations and expectations referred to in Article 13.4.3.

³⁷ ILO, Director General’s Report, ‘ILO Standard Setting and Globalization,’ Report to the 85th International Labour Conference, 1997, Geneva.

³⁸ Francis Maupain, ‘Revitalization Not Retreat: The Real Potential of the 1998 Declaration for the Universal Protection of Workers’ Rights’ (2005) 16(3) *European Journal of International Law*, 439, 461, footnote 101, Exhibit EU-4.

c. Protectionist Trade Purposes and Comparative Advantage

85. Article 13.2.2 states that ‘labour standards should not be used for protectionist trade purposes....comparative advantage should in no way be called into question’.
86. Korea argues that this Article confirms that ‘the Parties did not intend Chapter 13 to subject their labour laws or policies as they existed at time of entry into force of the FTA to obligations that bear no connection to trade or investment’.³⁹
87. The language used in Article 13.2.2 reflects the Declaration of the 1996 World Trade Organisation (WTO) Ministerial Conference held in Singapore in 1996, which accepted that the promotion of core ILO labour standards should not be construed as protectionism *per se*. The Declaration states:

*We renew our commitment to the observance of internationally recognised core labour standards. The ILO is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them....We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question.*⁴⁰

88. Empirical research conducted in 1996 by the Organisation for Economic Co-operation and Development demonstrated that:

*Any fears that the application of these standards [the core labour standards and fundamental principles and rights referred to in Article 13.4.3] might influence the competitive positioning of these countries in the context of [trade] liberalization are unfounded. On the contrary, they might even in the long term tend to strengthen the economic performance of all countries.*⁴¹

More recent research by the ILO confirms these findings.⁴²

³⁹ Korea WS, [27].

⁴⁰ Singapore World Trade Organisation Ministerial Declaration, WT/MIN(96)/DEC, 18 December 1996.

⁴¹ Organisation of Economic Cooperation and Development (OECD), *Trade, Employment and Labour Standards: a Study of Core Workers' Rights and International Trade*, OECD, Paris, 1996.

⁴² ILO, *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements*, Geneva, 2017, 18.

89. In the Panel's view, the EU's Panel Request does not seek to use Chapter 13 for protectionist purposes as that phrase is meant in Article 13.2.2, for the reasons set out above.

d. The CAFTA-DR Panel Decision

90. The CAFTA-DR Panel Report does not assist the Panel in interpreting and applying Chapter 13 of the EU-Korea FTA. The CAFTA-DR Panel dealt with a dispute about Article 16.2 of the CAFTA-DR Agreement. That provision states: '(a) Party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties...'.⁴³
91. The EU-Korea FTA contains a similar provision in Article 13.7 ('Upholding Levels of Protection in the Application and Enforcement of Laws, Regulations and Standards'), paragraph 1 of which states: '(a) Party shall not fail to effectively enforce its environmental and labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties'.
92. However, the EU Panel Request does not mention EU-Korea FTA Article 13.7, as it does not allege that Korea has failed to enforce its labour laws. The CAFTA-DR Panel's interpretation of 'in a manner affecting trade' in relation to Article 16.2 of CAFTA-DR Agreement is therefore not relevant to the present proceedings. To the extent that Korea's submissions generalise a requirement that matters raised by a Party under Articles 13.14 and 13.15 are required to demonstrate 'a manner affecting trade', they are misconceived. The phrase 'in a manner affecting trade' does not mean the same thing as 'measures affecting trade-related aspects of labour' as set out in Article 13.2.1 of the EU-Korea FTA.
93. Even if the matters raised before the CAFTA-DR Panel were identical to those in the EU's Panel Request, the Panel notes that there are important differences between the texts of the CAFTA-DR Agreement and the EU-Korea FTA which would require careful examination. Most notably, the CAFTA-DR Agreement's Chapter 16, which contains the provision upon which the United States of America made its complaint against Guatemala, does not have the same contextual setting of sustainable development as the EU-Korea FTA, nor does it refer to the range of multilateral and international agreements and declarations which the Parties have included in the EU-Korea FTA.

⁴³ CAFTA-DR, Article 16.2.

e. The Relationship Between Chapter 13 and Trade

94. The Panel's finding that complaints about measures based on Article 13.4.3 are not limited to trade-related aspects of labour does not mean that the Panel has concluded that the EU's Panel Request refers to matters which have no connection to trade.
95. The Panel notes that the Parties have drafted the Agreement in such a way as to create a strong connection between the promotion and attainment of fundamental labour principles and rights and trade. The various international declarations and statements referred to in the EU-Korea FTA, discussed above, have been referenced by the Parties to show that decent work is at the heart of their aspirations for trade and sustainable development, with the 'floor' of labour rights an integral component of the system they commit to maintaining and developing. In the Panel's view, national measures implementing such rights are therefore inherently related to trade as it is conceived in the EU-Korea FTA.

C The Panel's Decision

96. After carefully considering the Parties' written submissions, oral statements and responses to questions from the Panel, the Panel finds that the EU's Panel Request dealing with several provisions of the TULRAA is based on matters arising under the EU-Korea FTA.
97. The jurisdiction of the Panel therefore extends to the terms of reference of the Panel Request, and is bounded by those matters.
98. For all the reasons set out above, Korea's jurisdictional objection is not sustained.
99. Taking the above into consideration, the Panel notes that, within its jurisdiction, it has had full regard to all the submissions, arguments, answers to questions and exhibits presented by the Parties, and to all the *amicus curiae* submissions duly submitted. This is so even if there is no explicit reference to those arguments or submissions in the text of this Report. Where the Panel has been unable to determine the factual circumstances, due to conflicting accounts or lack of detail, and this impacts upon our findings and decisions, this is noted in the relevant section of the Panel Report.

III Panel Request – Substantive issues - First Sentence of Article 13.4.3

A Legal Standard

a. Introduction

100. The EU's Panel Request identifies a number of measures in Korean law which the EU argues are not consistent with the relevant terms of the EU-Korea FTA.

101. The measures identified are described in the Panel Request in the following terms:

(1) Article 2(1) of the Korean Trade Union Act [the TULRAA] defining a 'worker' as a person who lives on wages, salary, or equivalent form of income earned in pursuit of any type of job. This definition, as interpreted by the Korean courts, excludes some categories of self-employed persons such as heavy goods vehicle drivers, as well as dismissed and unemployed persons from the scope of freedom of association.

(2) Article 2(4)(d) of the Korean Trade Union Act stating that an organisation shall not be considered as a trade union in cases where persons who do not fall under the definition of 'worker' are allowed to join the organisation.

(3) Article 23 (1) of the Korean Trade Union Act stating that trade union officials may only be elected from among the members of the trade union.

(4) Article 12(1)-(3) of the Korean Trade Union Act, in connection with Article 2(4) and Article 10, providing for a discretionary certification procedure for the establishment of trade unions.

102. The legal basis for these complaints is Article 13.4.3, the first sentence of which states:

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

- (a) Freedom of association and the effective recognition of the right to collective bargaining;*
- (b) The elimination of all forms of forced or compulsory labour;*
- (c) The effective abolition of child labour; and*
- (d) The elimination of discrimination in respect of employment and occupation.*

b. Submissions

103. In its Panel Request, the EU explains why it believes the measures in Korean law identified in the Panel Request are not consistent with the terms of Article 13.4.3. The Panel Request states:

The EU considers that the restrictive definition and interpretation of the notion of ‘worker’ operated by the measures identified under (1) and (2), as well as the requirement that trade union officials be elected from amongst trade union members stipulated by the measure identified under (3), are inconsistent with the above-mentioned principles of freedom of association and, therefore with Article 13.4.3 of the EU-Korea FTA.

The EU further considers that the discretion accorded by the measures identified under (4) to the administrative authorities when certifying trade unions is also inconsistent with the above- mentioned principles of freedom of association and, therefore, with Article 13.4.3 of the EU-Korea FTA.

104. The Panel notes that the four measures in the TULRAA identified in the Panel Request all relate to the first of the ‘principles concerning the fundamental rights’, ‘(a) Freedom of association and the effective recognition of the right to collective bargaining’. The Panel’s decision in relation to this aspect of the Panel Request will be limited accordingly, and for ease of reference the Panel will refer to ‘principles of freedom of association’ to encompass ‘freedom of association and the effective recognition of the right to collective bargaining’.

c. Analysis

- (i) ‘in accordance with the obligations deriving from membership of the ILO’

105. The EU submits that ‘when a State decides to become a Member of the ILO, it accepts the fundamental principles embodied in the Constitution of the ILO and the Declaration of Philadelphia (which is annexed to the Constitution), both of which refer expressly to the

‘recognition of the principle of freedom of association’.⁴⁴ The EU refers to the ILO Governing Body Committee on Freedom of Association (CFA)⁴⁵ and argues that the CFA has found that freedom of association ‘entails various rights’, three of which the ILO says are relevant to the measures raised in its Panel Request: ‘the right of workers, without distinction, to establish or join organisations; the right of workers to establish organisations without prior authorisation; and the right of organisations to elect their representatives in full freedom’.⁴⁶ The EU argues that Korea is in breach of a legally binding obligation to comply with these rights.

106. Korea rejects the EU’s interpretation of ‘the obligations deriving from membership of the ILO’. It argues that the obligations of member States of the ILO are limited to those *expressly* referred to as State obligations in the ILO Constitution,⁴⁷ and that States by joining the ILO ‘do not assume an obligation to give effect to freedom of association in their own domestic laws for the breach of which they may be held responsible under international law’. Any finding to the contrary, Korea argues, would be tantamount to requiring Korea’s adherence to the core labour Conventions on Freedom of Association (Conventions 87⁴⁸ and 98⁴⁹), ratification of which are solely a matter for the Korean government. To date Korea has not chosen to ratify Conventions 87 and 98.
107. Having considered all the arguments and submissions on this point, the Panel decides that the phrase ‘the obligations deriving from membership of the ILO’ in the context of the first sentence of Article 13.4.3 has the effect of creating a legally binding commitment on both Parties in relation to respecting, promoting and realising the principles of freedom of association as they are understood in the context of the ILO Constitution. The EU-Korea FTA reaffirms the existing obligations of the Parties under the ILO Constitution, and has incorporated these obligations, as they are defined within the ILO system, as separate and independent obligations under Chapter 13 of the Agreement.
108. Membership of the ILO is regarded as creating an obligation to adhere to the principles of freedom of association:

⁴⁴ First Written Submission by the European Union, 20 January 2020 (EU WS), [13].

⁴⁵ EU WS, [19]-[22].

⁴⁶ EU WS, [22], footnotes omitted.

⁴⁷ Korea WS, [48].

⁴⁸ C 87 – Freedom of Association and Protection of the Right to Organisation Convention, 1948 (No 87), 68 U.N.T.S. 17, (Convention 87).

⁴⁹ C 98 – Right to Organise and Collective Bargaining Convention, 1949 (No 98), 96 U.N.T.S. 257, (Convention 98).

*Since the establishment of (the ILO's) Governing Body Committee on Freedom of Association in 1951, all ILO members have been obliged to observe the principles of freedom of association spelled out in Conventions 87 and 98. This obligation inheres in ILO members regardless of whether they have ratified the instruments concerned [that is, Conventions 87 and 98]: it is an incident of membership, which implies subscription to the values proclaimed in the ILO Constitution. It will be instantly apparent that this is a highly unusual situation in international law: States are bound to respect principles contained in human rights instruments whether or not they have ratified them.*⁵⁰

109. The International Court of Justice (ICJ) is the only body authorised to interpret the ILO Constitution,⁵¹ and it has not considered the juridical character of this Constitutional obligation for member States to adhere to the principles of freedom of association. This Panel's role is to interpret and apply the legal standard in Article 13.4.3 of the Agreement to the instances of Korean law identified in the Panel Request.
110. The substantive content of the ILO Constitutional obligation in relation to freedom of association has been explicated by the ILO supervisory bodies over the years. The CFA was created to hear complaints about compliance with the Constitutional principles, whether or not a member State had ratified Conventions 87 and 98. The Panel decides that it is appropriate to refer to the general statements of the CFA - the 'body of principles' - it has derived concerning the right to freedom of association.⁵²
111. The CFA has dealt with a number of complaints against Korea in relation to alleged failures to follow the principles of freedom of association deriving from the ILO Constitution, and the terms of Conventions 87 and 98 amongst other instruments.⁵³ The Korean government has participated in these proceedings, including by submitting its defences to the various allegations made. The Panel is not aware of any occasion on which Korea has challenged the capacity of

⁵⁰ Fenwick, 59, emphasis in original, footnotes omitted. See generally Lammy Betton, *International Labour Law – Selected Issues*, Kluwer, 1993, 68,69; C W Jenks, 'International Protection of Trade Union Rights' in E Luard (ed.), *The International Protection of Human Rights*, London, 1967, 212 – 214; Geraldo Von Potobsky, 'Protection of Trade Union Rights: 20 Years Work by the CFA' (1972) 105 *International Labour Review* 69; and Lee Sweptson "Supervision of ILO Standards' (1997) *International Journal of Comparative Labour Law and Industrial Relations* 327; Geraldo Von Potobsky, 'Freedom of Association: the Impact of C 87 and ILO Action' (1998) 13 *International Labour Review* 195.

⁵¹ ILO Constitution, Article 37(1).

⁵² Jean-Michel Servais, 'ILO Standards on Freedom of Association and their Implementation' (1984) 123(6) *International Labour Review* 765.

⁵³ For example, in CFA Case 2707 (complaint received 8 April 2009) the complainants referred to the Preamble of the ILO Constitution, the Declaration of Philadelphia, Conventions 87, 98 and 151 and the ILO Declaration 1998. Source: ILO Normlex Freedom of Association Cases (Korea).

the CFA to examine complaints and make recommendations about its compliance with the principles of freedom of association.

112. Korea objects to the EU's Panel Request because it argues the EU's complaint has the effect of requiring Korea to abide by the terms of Conventions 87 and 98.⁵⁴ The Panel rejects this argument. Ratification of ILO Conventions brings with it both substantive and procedural obligations of reporting and compliance which are simply not at issue in these proceedings. For example, if Korea ratified Convention 87 it would have reporting requirements and be subject to the oversight of the Committee of Experts on the Application of Conventions and Recommendations. The Panel does not have the jurisdiction nor the capacity to require Korea to ratify the core ILO Conventions.
113. To the extent that Korea complains of a requirement that it adheres to a principle which is both a principle concerning the fundamental right of freedom of association under the ILO Constitution, and a provision in ILO Convention 87, the Panel also rejects the argument that this is an imposition of ratification by stealth. The Panel notes that there is some commonality between the CFA principles as expressed in the CFA *Compilation of Decisions*,⁵⁵ and the terms of Convention 87. This is not surprising, given that 'in cases involving countries which have not ratified (either Convention 87 or 98), the CFA has considered it appropriate that it should, in discharging its responsibility to promote the principles with whose protection it has been entrusted, be guided in its task, among other things, by the provisions of these Conventions'.⁵⁶
114. One of the principles relied on by the EU in its complaint about the Korean law is both a general principle recognised by the CFA, and a provision of Convention 87. This principle gives expression to freedom of association as a right to form and join trade unions which is widely available to 'all workers...without distinction.' This facet of the right to freedom of association is one of the most commonly expressed principles of freedom of association in human rights instruments, and gives expression to the general principle of non-discrimination at the

⁵⁴ Korea WS, [54].

⁵⁵ International Labour Office, *Committee on Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association*, 6th Edition, Geneva, 2018 (the CFA Compilation).

⁵⁶ Geraldo von Potobsky, 'Protection of Trade Union Rights: Twenty Years Work by the CFA' (1972) *International Labour Review* 105, 69, 71.

international,⁵⁷ regional⁵⁸ and national⁵⁹ levels.⁶⁰ It is inherent in the ILO Constitutional expression of freedom of association and therefore relevant to the Panel's deliberations insofar as it is engaged by the particulars of the Panel Request. That is, the Panel determines that it is not precluded from applying an authoritative principle concerning the fundamental right of freedom of association in its examination of the Korean law, as set out in the Panel Request, simply because that principle is also given expression in Convention 87.⁶¹

115. Korea also objects to what it says is the EU's attempt to 'enforce recommendations made by the CFA' through the EU-Korea FTA.⁶² The Panel has not based its decisions in this Report on the CFA findings in relation to individual complaints against Korea. The Panel's role is to examine the legislative provisions of the TULRAA complained of in the Panel Request against the legal standard in the first sentence of Article 13.4.3. This has been done on the basis of the evidence and submissions provided to the Panel in this case only, and with appropriate weight given to the general principles set out in the CFA's *Compilation of Decisions*.⁶³
116. The Panel's reference to the CFA general principles is appropriate, in the Panel's view, for a number of reasons. First, the Panel believes that an interpretation of the EU-Korea FTA in good faith requires it to have regard to the meaning ascribed to the principles relating to the fundamental right of freedom of association within the ILO. If the Parties had not wanted to

⁵⁷ See, for example, the *Joint Statement on Freedom of Association, Including the Right to Form and Join Trade Unions*, issued by the UN Committee on Economic, Social and Cultural Rights and the Human Rights Committee, the supervisory bodies for the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights respectively. The Joint Statement identifies 'basic principles' of freedom of association, and states '(f)reedom of association includes the right of individuals, without distinction, to form and join trade unions for the protection of their interests' [3]. E/C.12/66/5-CCPR/C/127/4, 6 December 2019. Novitz points out that the ILO instruments on freedom of association are 'incorporated into the international human rights architecture: both UN Covenants state 'nothing in this article shall authorise State Parties to the ILO Convention of 1948 [Convention 87] to take legislative measures which would prejudice or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.' Tonia Novitz, 'Freedom of Association: its emergence and the case for prevention of its decline', in Janice R Bellace and Beryl Ter Haar, *Research Handbook on Labour, Business and Human Rights*, Edward Elgar, 2019.

⁵⁸ For example, Article 11 of the European Convention on Human Rights states 'Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions...'; Article 10 of the African Charter of Rights and Responsibilities states 'Every individual shall have the right to free association...'; Article 16 of the American Convention on Human Rights, 'Everyone has the right to associate freely...'

⁵⁹ For example, the Canadian Charter of Rights and Freedoms, Section 2(d) states that 'Everyone has the following fundamental freedoms: ... (d) freedom of association.'

⁶⁰ Lee Swepston, 'Human Rights Law and Freedom of Association: Development through ILO Supervision' (1988) 137(2) *International Labour Review* 137.

⁶¹ In this regard, the Panel notes that ILO Convention 87 was originally drafted to reflect 'essential principles', rather than a detailed code regulating more concrete aspects of freedom of association. Janice R Bellace, 'The ILO and the Right to Strike' (2014) 153(1) *International Labour Review* 29, 42.

⁶² Korea WS, [36].

⁶³ Tonia Novitz, *International and European Protection of the Right to Strike*, Oxford University Press, Oxford, 2003, 191.

refer to this context, then they would not have included Article 13.4.3 in its current terms in the Agreement. As pointed out above, Korea was familiar with the substantive content of the ILO's principle of freedom of association as it is given expression in the ILO Constitution at the time the EU-Korea FTA was drafted. It would be a perverse interpretation of the Agreement to find that the Panel should altogether ignore the CFA explication of the principles of freedom of association.⁶⁴

117. Secondly, the CFA's body of general principles has been recognised as persuasive and authoritative by some national,⁶⁵ regional⁶⁶ and international courts and supervisory bodies when interpreting the principle of freedom of association in their legal context.⁶⁷

118. Thirdly, the Panel notes that the principles concerning the right to freedom of association in this case are largely uncontentious: not only are the principles and correlative rights identified by the EU widely accepted across human rights jurisdictions as well as within the ILO system, Korea does not contest the EU's submissions on the relevant substantive content of the principles concerning the fundamental right of freedom of association.⁶⁸ The Panel accepts that these principles establish clear and specific legal standards against which the Panel will examine the elements of the Korean law outlined in the Panel Request.

(ii) 'the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up'

119. The EU refers to the 1998 ILO Declaration in its submissions:

⁶⁴ Creighton notes that the Constitutional principles of freedom of association 'are generally interpreted by reference to Conventions 87 and 98, which means that even countries which have not ratified those instruments are required to respect the guarantees they enshrine.' Breen Creighton, 'The ILO and Protection of Fundamental Human Rights in Australia' [1998] 22(2) *Melbourne University Law Review*, 239.

⁶⁵ For example, *National Union of Metalworkers of South Africa v Bader Pop (Pty Ltd)* [2002] ZACC 30 (Constitutional Court of South Africa). The Court noted that the CFA 'has developed a complex jurisprudence on freedom of association...Its decisions are therefore an authoritative development of the principles contained in the ILO Conventions. [The CFA] will be an important resource in developing the labour rights contained in [the South African] Constitution,' [30]. *Saskatchewan Federation of Labour v Saskatchewan* [2015] SCR 245 (Supreme Court of Canada). 'The relevant and persuasive nature of the CFA jurisprudence has developed over time through custom and practice and, within the ILO, it has been the leading interpreter of the contours of the right to strike.' [67].

⁶⁶ *Demir and Baykara v Turkey* [2008] ECHR 1345 [100], [102].

⁶⁷ The ILO CFA's decisions (with the other ILO supervisory bodies) may be used as a source to 'flesh out' the terms of the right to freedom of association under the Covenant on Economic, Cultural and Social Rights: '(i)n short, the ILO principles on freedom of association can and should be referred to as the touchstone to interpret and apply Article 8 of the Covenant.' Colin Fenwick, 'Minimum Obligations with respect to Article 8 of the International Covenant on Economic, Social and Cultural Rights, A Chapman and S Russell (editors), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia, Antwerp, 61/62.

⁶⁸ The EU sets out what it says are the relevant principles of freedom of association in EU WS, [22].

*The 1998 ILO Declaration recalls that all Members of the ILO are bound by the rights and principles set out in the ILO Constitution and the Declaration of Philadelphia. On that basis, it goes on to declare that all Members of the ILO have an obligation to respect, promote and realise in their laws and practices the principles concerning the fundamental rights which are the subject of the ILO fundamental conventions, including freedom of association, regardless of whether they have ratified the relevant convention.*⁶⁹

120. Korea's submits that the EU is arguing that ILO Members, because of the 1998 ILO Declaration, must comply with the 'concrete rights laid down' in the fundamental Conventions, including Conventions 87 and 98.⁷⁰ Korea's position is that the ILO Declaration 1998 'may not, as a matter of law, impose any binding obligations on ILO members'⁷¹ and points to evidence from the ILO drafting process as confirming the non-legally binding character of the Declaration.⁷²
121. In fact, there is no difference between the Parties as to the legal character of the 1998 ILO Declaration: as the EU confirmed, it has not put to the Panel that the Declaration is, in itself, legally binding.⁷³
122. The Panel finds that the Parties assumed new obligations when they concluded the EU-Korea FTA. A new obligation is the commitment in Article 13.4.3 to respecting, promoting and realising the principles concerning the fundamental rights, including the right to freedom of association. The EU's Panel Request is based on the legal obligation arising from Article 13.4.3, not the 1998 ILO Declaration *per se*.

(iii) 'commit to'

123. As discussed above, the first sentence of Article 13.4.3 states '(t)he Parties, in accordance with the obligations deriving from the membership of the ILO and the (1998 ILO Declaration)...*commit to* respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights', (emphasis added) including freedom of

⁶⁹ EU WS, [16]. The 1998 ILO Declaration is quoted in EU WS, [17].

⁷⁰ Korea WS, [54].

⁷¹ Korea WS, [55].

⁷² Korea WS, [57].

⁷³ EU OS, [54].

association. This section deals with the Panel's interpretation of the phrase 'commit to' in Article 13.4.3.

124. The EU's initial submission does not discuss the meaning of 'commit to' and treats the phrase as unproblematic. The EU states:

*As provided expressly in the introductory phrase of Article 13.4.3, the scope and content of the commitments assumed by the Parties with regard to the freedom of association are to be determined in accordance with the obligations deriving from their membership of the ILO and with the 1998 ILO Declaration.*⁷⁴

125. Korea submits that 'the ordinary meaning of 'commit' thus appears to imply an aspiration, at best an obligation of means (sic) towards the objective of respecting, promoting and realising'.⁷⁵ In fact, one aspect of the definition of 'commit' provided by Korea ('to obligate or bind to a particular course of action') suggests the opposite of an aspirational meaning.⁷⁶

126. Korea compares the use of 'commit' with the use of 'shall' in Article 13.7 ('shall not fail to effectively enforce'), and 'shall' in Article 13.12 ('shall designate an office...which shall serve as a contact point'). Korea argues that 'commit to respecting, promoting and realising' means something less than 'shall respect, promote and realise': it concludes that 'the Parties merely undertook a commitment to engage in good faith behaviour toward the overall objective of respecting, promoting and realising the principles concerning fundamental rights such as the freedom of association'.⁷⁷

127. The Panel finds that the ordinary meaning of 'commit to', as Korea itself acknowledges, is 'to bind oneself to a course of action'.⁷⁸ In the immediate context of Article 13.4.3, this represents a legally binding obligation of commitment to respecting, promoting and realising the obligations arising from membership of the ILO and the 1998 ILO Declaration in relation to the principles concerning the fundamental rights. The construction 'commit to respecting' etc. (rather than, for example, 'will respect') is appropriate given that the Parties have chosen to refer to an external, pre-existing source of obligation, which is then made legally binding by the terms of their Agreement.

⁷⁴ EU WS, [12].

⁷⁵ Korea WS, [39].

⁷⁶ Korea WS, [39].

⁷⁷ Korea WS, [41].

⁷⁸ *Shorter Oxford English Dictionary*, 5th Edition, Oxford University Press, Oxford, 2002.

(iv) ‘respecting, promoting, and realising’

128. Korea draws attention to the fact that the 1998 ILO Declaration states, *inter alia*: ‘...all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions’. Korea argues ‘(b)y qualifying ‘respecting, promoting, and realising’ by the verb ‘commit to’, Article 13.4.3 of the Korea/EU FTA establishes a weaker obligation than the obligation under the 1998 ILO Declaration which does not include that qualification’.⁷⁹
129. The Panel does not accept Korea’s argument. The phrase ‘commit to’ does not qualify or limit ‘respecting, promoting, and realising’ in any way. Rather, it provides the binding link between the actions referred to in the 1998 ILO Declaration and the new obligations the Parties place upon themselves in their FTA. There is therefore no material difference between respect/respecting, promote/promoting and realise/realising in this linguistic context, other than the use of a different grammatical part of speech reflecting the new context of the EU-Korea FTA. As stated above, the phrase in Article 13.4.3 ‘commit to respecting, promoting, and realising’ creates a legally binding obligation on the Parties to respect, promote and realise the principles of the fundamental rights including freedom of association.
130. It is therefore necessary for the Panel to define what is meant by a binding commitment to respect, promote and realise: each will be considered in turn.

(v) ‘respecting’

131. The relevant ordinary meaning of ‘respect’ is to ‘show respect for...refrain from injuring, harming, insulting, interfering with, or interrupting’,⁸⁰ so a commitment to respecting the principles relating to the right to freedom of association refers to the negative obligation not to injure, harm, insult, interfere with or interrupt freedom of association. It is also appropriate to have regard to the meaning of ‘respect’ in international human rights law. The UN Covenant on Economic, Social and Cultural Rights places an obligation on States to respect the rights

⁷⁹ Korea WS, [39], Opening Statement by the Republic of Korea, 1 October 2020 (Korea OS), [34].

⁸⁰ *Shorter Oxford English Dictionary*, 5th Edition, Oxford University Press, Oxford, 2002.

contained in the Covenant, and this has been held to mean States must ‘refrain from interfering with the enjoyment’ of the rights.⁸¹

(vi) ‘promoting’

132. The ordinary meaning of ‘promote’ means to ‘further the development, progress, or establishment of (a thing), encourage, help forward, or support activity’.⁸² This implies a positive obligation on States, which in human rights statements on the content of the freedom of association means that States should ensure third parties do not disrupt workers engaging in their right to freedom of association. Further, States should create a ‘climate’ in which the civil rights of workers and employers allow them to freely exercise their rights to freedom of association. As the UN Special Rapporteur on Freedom of Peaceful Assembly and Association notes:

*International human rights law...imposes upon States a duty to actively promote, encourage and facilitate the enjoyment of fundamental rights, including labour rights.*⁸³

(vii) ‘realising’

133. A commitment to realise is a commitment to attain or ‘make real’⁸⁴ the principles concerning the fundamental right of freedom of association. Korea argues that the EU is effectively requiring that Korea comply with the Conventions 87 and 98. The Panel distinguishes between a binding requirement involving a commitment to realising the principles concerning the fundamental right of freedom of association, and a binding requirement that a Party comply with the terms of Conventions 87 and 98. What the Parties have done in drafting Article 13.4.3 is to commit to realising the relevant principles concerning the fundamental rights, not ratification of the Conventions 87 and 98. As Korea correctly points out, the Parties’ agreement in relation to ratification of the fundamental ILO Conventions is contained in the last sentence of Article 13.4.3, considered in detail below.

⁸¹ ‘Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’ (1998) 20 Human Rights Quarterly 691. See too the Report of the UN Special Rapporteur on Peaceful Assembly and Freedom of Association, 71st session, UN General Assembly, 14 September 2016, A/71/385 [63].

⁸² Shorter Oxford English Dictionary, 5th Edition, Oxford University Press, Oxford, 2002.

⁸³ UN General Assembly, 71st Session, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, A/71/385, 14 September 2016, [55].

⁸⁴ Shorter Oxford Dictionary, 5th Edition, Oxford University Press, Oxford, 2002.

(viii) ‘the principles concerning the fundamental rights’

134. Article 13.4.3 of the Agreement states that ‘the Parties, in accordance with the obligation deriving from membership of the ILO and the ILO Declaration 1998...commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely: (a) freedom of association and the effective recognition of the right to collective bargaining...’. This section examines the meaning of the phrase ‘the principles concerning the fundamental right’ of freedom of association.
135. Essentially, Korea makes two arguments in relation to the phrase ‘the principles concerning the fundamental rights’. The first argument is that the principles concerning the fundamental rights are not binding because both the ILO Constitution and the ILO Declaration 1998 do not create legally binding obligations in relation to the principles concerning the right to freedom of association. This argument was rejected for the reasons given above.
136. The second argument is that ‘the principles concerning the fundamental rights’ are not sufficiently clear and ‘concrete’ to enable the Panel to use such principles to determine those matters raised by the EU. In doing so, Korea contrasts the ‘principles’ with the ‘concrete rights’ in the Conventions, arguing that the EU has conflated the two.⁸⁵
137. In making its second argument, Korea refers to a document entitled ‘Labour Provisions in Free Trade Agreements: Fostering their Consistency with the ILO Standards System.’⁸⁶ The Panel notes at the outset that the authors of this paper (two of whom are ILO employees) are writing in a personal capacity only.⁸⁷ As the authors are engaged in an academic discussion on a personal basis of many different free trade agreements with widely varying terms, any legal implications drawn by Korea from the authors’ comments are of little assistance to the Panel.
138. The Panel also notes that in another version of their article published in an academic journal, the authors state that it ‘may be difficult for States to obtain guidance on the precise legal implications of the fundamental principles’, but this is qualified as follows: ‘(o)ne exception is the principle of freedom of association, which, as a constitutional principle, has long been

⁸⁵ Korea WS, [62].

⁸⁶ Korea WS, [59] – [61].

⁸⁷ J Agusti-Panareda, F C Ebert and D LeClercq, ‘Labour Provisions in Free Trade Agreements: Fostering their Consistency with the ILO Standard System,’ International Labour Office Background Paper, Social Dimensions of Free Trade Agreements, March 2014, footnote 1, which states ‘the views expressed in this paper are those of the authors and do not necessarily reflect the views of the aforesaid institutions’ (the ILO and the Max Planck Institute for Comparative Public Law and International Law).

examined by the ILO supervisory system, even absent ratification of the relevant Conventions.’⁸⁸ This statement tends to affirm the Panel’s approach to take appropriate note of the general principles elaborated by the CFA as necessary.

139. The relationship between the ILO Constitutional principles of freedom of association and the terms of the Conventions are explained in the following terms:

*[Paragraph 2 of the ILO Declaration 1998] recognizes on one hand that there are fundamental obligations based on the principles of the Constitution which exist for all members independently of the specific (substantive and procedural) obligations to which countries which have ratified the conventions concerned are subject; and on the other hand that there are fundamental rights whose specific scope and content have been elaborated in relevant conventions but which exist for all workers even when they cannot claim the benefit of specific provisions of the conventions. And, to conclude, it would seem obvious that without this distinction, the ‘revolution’ accomplished by the Declaration would have been plain legal nonsense as it would have made ratification simply meaningless.*⁸⁹

140. The history of the creation of Convention 87 shows that it was determined that, rather than create a detailed regulatory code, the Convention should state essential principles.⁹⁰ As explained above, the CFA and the other ILO supervisory bodies have explicated *both* the terms of Conventions 87 and 98 including provisions in the form of general statements of the principle *and* the principles which arise under the ILO Constitution and are referred to in the ILO Declaration 1998.⁹¹
141. The Panel considers that the principles concerned with the right to freedom of association are sufficiently clear and commonly understood to provide a basis for the examination of the TULRAA provisions identified in the Panel Request.

⁸⁸ Jordi Agusti-Panareda, Franz Christian Ebert and Desiree LeClercq, ‘ILO Standards and Trade Agreements: A Case for Consistency’ (2015) 36 *Comparative Labor Law and Policy Journal* 347, 365, footnote 104.

⁸⁹ Francis Maupain, ‘Revitalisation not Retreat: the Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights’ (2005) 16(3) *The European Journal of International Law*, 439, 451 (Exhibit EU-4).

⁹⁰ Janice R Bellace, ‘The ILO and the Right to Strike’ (2014) 153(1) *International Labour Review* 29.

⁹¹ CFA Compilation, 1.

B Panel Request (1) TULRAA Article 2(1) ‘self-employed, dismissed, unemployed’

142. Because the Parties directed different arguments to the self-employed on one hand, and the dismissed and unemployed on the other, the Panel will consider each in turn.

a. ‘Self-employed’

(i) Introduction

143. The first measure at issue in the EU’s complaint is set out in the Panel Request as follows:

Article 2 paragraph 1 of the Korean Trade Union Act defining a ‘worker’ as a person who lives on wages, salary or equivalent form of income earned in pursuit of any type of job. This definition, as interpreted by Korean courts, excludes some categories of self-employed persons such as heavy goods vehicle drivers, as well as dismissed and unemployed persons from the scope of the freedom of association.

144. As outlined above, the legal standard against which this claim will be examined by the Panel is the first sentence of Article 13.4.3 of the EU-Korea FTA, in which the Parties commit to respecting, promoting and realising the principles concerning the fundamental rights, including the right to freedom of association.

145. For the reasons set out above, the Panel has determined that the content of the ILO Constitution principle of freedom of association, and the principles concerning the fundamental right of freedom of association include the correlative rights and principles developed within the ILO and the relevant supervisory body, the CFA. The Panel is not precluded from utilising terms of Conventions 87 and 98, where relevant, in line with the ILO’s elaboration of the right to freedom of association.

146. In essence, the EU argues that TULRAA Article 2(1) creates a definition of ‘worker’ which excludes self-employed persons, those dismissed from employment and unemployed persons, contrary to Korea’s obligations under Article 13.4.3. The Panel Request and the EU submissions refer explicitly to the category of heavy goods vehicle drivers which was also considered in a complaint against Korea at the CFA. As outlined above, the Panel will examine the Panel Request, based on the submissions and evidence presented in this case, and not the findings or submissions in the CFA proceedings.

147. It is necessary to consider separately each category referred to in the Panel Request (self-employed, dismissed, and unemployed).

(ii) Submissions

148. The EU argues that ‘the freedom of association of workers implies, first and foremost, the right of workers, without distinction, to establish and join trade unions’.⁹² It alludes to Article 2 of Convention 87 and the relevant CFA general principles and notes that the CFA states that the words ‘without distinction’ mean that freedom of association should be guaranteed without discrimination ‘of any kind’.⁹³ The EU also notes that the CFA states that the right to establish or join a trade union is not limited to employees (that is, those with an employment contract):⁹⁴

*(t)he criterion for determining the persons covered by the right to organise is not based on the existence of an employment relationship. Workers who do not have employment contracts should have the right to form organisations of their choosing if they so wish.*⁹⁵

The EU points out that the CFA general principles explicitly state that self-employed workers have the right to freedom of association:

*By virtue of the principles of freedom of association, all workers with the sole exception of members of the armed forces and the police should have the right to establish and join organisations of their own choosing. The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which is often non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organize.*⁹⁶

149. The EU then considers the definition of ‘worker’ in TULRAA Article 2(1).

150. Article 5 of TULRAA provides that ‘(w)orkers are free to organise a trade union or to join it, except for public servants or teachers who are subject to other enactments’.

151. Article 2(1) of TULRAA defines ‘worker’ as ‘a person who lives on wages, salary or other equivalent form of income earned in pursuit of any kind of job’.

⁹² EU WS, [2].

⁹³ CFA Compilation, [315].

⁹⁴ EU WS, [26].

⁹⁵ CFA Compilation, [330].

⁹⁶ CFA Compilation, [387].

152. The EU draws attention to a decision of the Supreme Court of Korea, which interprets the TULRAA definition of ‘worker.’ During the Panel hearings in these proceedings, Korea confirmed that this definition reflects the current law in Korea. The Supreme Court states:

‘Worker’ under the TULRAA refers to any person who provides labour to another party based on a subordinate relationship and receives wage, etc in return. Determination as to whether a person may be deemed a ‘worker’ as prescribed by TULRAA ought to consider the following: (i) whether a worker’s source of income is mainly dependent upon a specific employer; (ii) whether an employer unilaterally decides the terms of a contract, including wage, that it concludes with a worker who provides the necessary labour; (iii) whether a worker gains market access by way of providing the essential labour to perform an employer’s business; (iv) whether the legal relationship between the worker and an employer is of a substantially continuous and exclusive nature; (v) whether there exists a certain degree of supervisory/managerial relationship between an employer and a worker; and (vi) whether income, such as wage or salary, that a worker receives from his/her employer is a consideration for provision of labour...⁹⁷

153. Korea argues that the EU has failed to substantiate its claims that the TULRAA provisions are not consistent with Article 13.4.3, first sentence. In relation to TULRAA Article 2(1), Korea argues self-employed workers are not excluded from the category of ‘worker’ *per se*,⁹⁸ and that a number of categories of self-employed workers have been recognised as ‘workers.’⁹⁹
154. In summary, Korea argues that it is ‘fully committed to respecting, promoting, and realizing the freedom of association for self-employed persons (dependent self-employed persons)’.¹⁰⁰ In support of this contention, Korea has provided the Panel with a very full discussion of its legal and administrative actions to achieve freedom of association.¹⁰¹ The Panel has duly taken all this information into account in reaching its conclusions in this matter.

⁹⁷ Supreme Court Decision (Korea) 2014Du12598, 12604 decided 15 June 2018 (hereafter the 2018 Supreme Court decision), extract from translation provided in EU Exhibit E-2, EU WS [42].

⁹⁸ Korea WS, [135].

⁹⁹ This includes golf caddies in 2014, workbook teachers in 2018, KORAIL snack bar operators in 2019 and car salesmen in 2019, Korea WS, [135].

¹⁰⁰ Korea WS, [137].

¹⁰¹ Korea WS, [79] – [119].

155. Korea informs the Panel that the Seoul Administrative Court of Korea ‘has also accepted that the “worker” status under the TULRAA extends to delivery workers who personally own heavy cargo trucks and have signed transportation contracts with delivery companies’.¹⁰²

156. Korea states that the Government, in light of the evolving case law on ‘worker,’ ‘started to issue certificates for establishment of unions for dependent self-employed persons. For example, the Government has issued certificates of trade union establishment to National Delivery Workers Union (in 2017) and COWAY CS Workers’ Union (in 2019)’.¹⁰³

157. The submission continues:

*Korea stresses that, in today’s economy, it is often not possible to ascertain in the abstract whether or not a person works in a relationship of subordination. Therefore... deciding on whether or not self-employed persons can be defined as a ‘worker’ according to Article 2(1) of the TULRAA ...has become much more complex and categorical statements, such as those found in the EU’s written submission [at para 43], should be avoided.*¹⁰⁴

158. Korea argues ‘a number of EU Member States are facing the same difficulty’ in defining the scope of employment legislation. Korea refers to Germany’s Collective Agreement Act, Article 12a, which it argues shows that Germany ‘applies its labour laws to some self-employed persons after comprehensively considering factors including economic dependence and the need for similar protections as those for workers’.¹⁰⁵

159. In response, the EU argues that the cases of recognition of unions for the self-employed in Korea’s submissions are ‘very narrow’, and notes that the Seoul Administrative Court’s recognition of ‘couriers’ as ‘workers’ under TULRAA has been appealed to the Seoul High Court. In conclusion, the EU states:

The EU notes with interest these factual developments, which appear to go in the right direction towards the recognition of freedom of association for all self-employed workers. Nevertheless, the EU remains concerned that the TULRAA, as interpreted by Korea’s

¹⁰² Korea WS, [135].

¹⁰³ Korea WS, [136].

¹⁰⁴ Korea WS, [138].

¹⁰⁵ Korea WS, [139].

*courts and administrative authorities, still remains incompatible with the principles of freedom of association.*¹⁰⁶

160. The EU referred to *amicus curiae* submissions from the Korean Confederation of Trade Unions (KCTU) relating to the question of ‘worker’ under TULRAA and the self-employed.¹⁰⁷ The Panel notes that some elements of these submissions were included in the EU’s own submissions and are therefore outlined above. Other parts of the submission go to the alleged difficulties ‘on the ground’ of achieving collective bargaining rights in the face of employer opposition, and delays in certification while court proceedings and administrative processes play out. To the extent that these submissions fall within the jurisdiction of the Panel, the Panel has taken note of them in reaching its conclusions in this matter.
161. The Panel also had the benefit of a joint submission from the International Trade Union Confederation, the European Trade Union Confederation and the International Federation for Human Rights. The Panel has carefully considered the materials presented in this submission, except for those parts which fall outside the scope of the Panel Request which forms the basis of the Panel’s jurisdiction.
162. The Panel has also considered the submissions of the Federation of Korean Trade Unions, which chiefly deal with the proposed legislative changes to the TULRAA. To the extent that these are relevant to the Panel’s deliberations, they have been taken into account by the Panel.

(iii) Analysis

163. The Panel notes that the principles concerning the fundamental right of freedom of association extend the scope of the right to include *all workers, without distinction of any kind*. ‘Worker’ is said by the CFA to include both employees and the self-employed. In relation to the self-employed, the CFA indicates that even members of the ‘liberal professions’ (lawyers, doctors, architects etc) should be accorded the right to form and join organisations of their own choosing, in accordance with the principles of freedom of association.¹⁰⁸
164. The provisions of TULRAA Article 2(1) are clearly more limited than this definition. The TULRAA definition envisages a binary relationship between a ‘worker’ as defined and their ‘employer.’ The TULRAA definition of ‘employer’ includes: ‘business owner, a person

¹⁰⁶ EU OS, [88].

¹⁰⁷ Exhibit EU-3.

¹⁰⁸ CFA Compilation, [387].

responsible for management of a business, or a person who works on behalf of a business owner with respect to matters relating to workers in the business’.¹⁰⁹ This definition of ‘employer’ is founded upon a binary relationship between ‘worker’ and the single person authorised to engage them (and the trappings of wages, management control etc associated with the traditional employment contract), an arrangement which does not necessarily apply to the self-employed.

165. The Court’s criteria upon which the test for ‘worker’ are based must derive from this legislative foundation, limiting the extent to which the Court’s jurisprudence may develop. The first element identified by the Court (dependence for most of the wage on a specific employer) reflects the binary relationship set out in the TULRAA definitions of ‘worker’ and ‘employer’. This requirement would exclude self-employed workers with numerous different clients, and so-called platform workers whose tasks are delivered to them via automated means and who may be legally defined as entrepreneurs. Contrary to ILO CFA principles, liberal professionals’ source of income is unlikely to be ‘mainly dependent upon a specific employer’,¹¹⁰ unless they are engaged as employees through an organisational structure.
166. The second element in the definition also clearly limits the category of ‘worker’ to those who can show they are in a subordinate relationship with an ‘employer’ as defined in the TULRAA. This is echoed in the above-mentioned Supreme Court decision when referring to (iv), where the criterion is that the relationship between the ‘worker’ and ‘employer’ should be ‘substantially continuous and exclusive’. The criterion that salary should be consideration for the labour, again, is indicative of a traditional employment relationship, and would tend to exclude those paid by task (eg a pay structure based around completion of a task, such as the delivery of a certain volume of goods).
167. The fifth criterion of the Supreme Court decision refers to a ‘certain degree’ of managerial/supervisory relationship, which is unlikely to be present in many forms of self-employed categories of work.
168. The criterion to do with gaining market access is limited to those who are doing so in order to pursue *the employer’s* business. The true self-employed are working in their own business, and are unlikely to meet this definition, while dependent contractors may be badged as entrepreneurs due to an ostensible lack of managerial supervision, despite the underlying

¹⁰⁹ TULRAA Article 2(2), Exhibit E-1.

¹¹⁰ Supreme Court Decision 2014Du12598, 12604, Decided June 15, 2018, [1], Exhibit E-2.

character of their engagement. Many self-employed workers would not meet the definition in Article 2(1).

169. Of course, the Court's criteria are characterised as matters to be taken into account when considering the specific facts of a particular case, rather than a hard and fast set of rules. The evolution of the Court's response to non-standard employment over time is evidence of this capacity for change. As Korea submits, there is some evidence that the Court's jurisprudence is taking a more expansive view of the scope of the 'worker' category, within the legislative confines of the TULRAA. Some of the individual criteria contain flexibility to permit such developments, such as the criterion identifying a 'certain degree' of managerial/supervisory oversight in the employment relationship.
170. However, the key features of the TULRAA 'worker' definition in Article 2(1) are that a binary relationship between worker and employer is generally required, and that it is expected that this relationship is *continuing* and *exclusive*. The Supreme Court's criteria, overall, represent a significant limitation in the scope of TULRAA's 'worker' definition: it is not possible for all self-employed workers to meet the definition as the Panel has understood it. The Panel regards it as significant that the TULRAA definition limits itself to the language of the employment relationship.
171. The Panel has taken careful note of Korea's arguments that it is not alone in dealing with the question of trade union rights for the self-employed in this way. In particular, Korea refers to Germany as an example of an EU Member State where self-employed workers may gain access to a category of 'dependent self-employed' if they meet certain legislative criteria.¹¹¹ That system has been described in the following terms:

Collective bargaining on behalf of freelancers and dependent self-employed people is very rare [in Germany]. In principle antitrust law (Kartellrecht) prohibits self-employed workers without employees – as well as companies – from seeking arrangements on prices. According to article 12a of the German Collective Agreement Act (Tarifvertragsgesetz), however, it is possible to conclude collective agreements for those persons who are considered by law to be “similar to an employee.” This covers those freelancers who are economically dependent and usually work exclusively for one client or more than 50% (30% in the media sector) of their income is paid by one client. Based on this article there

¹¹¹ Korea WS, [139].

*are a number of company-level agreements in public broadcasting concluded between trade unions and several public broadcasting companies.*¹¹²

172. In the Panel's view, there are two things of note here. First, while Korea identifies the German law as akin to the TULRAA in terms of a process, the substantive content is very different. The criteria for 'dependent self-employed' is broader in Germany than it is in Korea, given that those who earn as little as 30% of their income from a single client are able to meet the German definition of dependent contractor, as outlined above. Unlike the TULRAA, the stated purpose of this law is to provide rights to certain dependent contractors, and the language of 'contractor' and 'client' is used throughout, thus avoiding the heavy reliance on the binary employment relationship of 'worker' and 'employer' in the TULRAA.
173. The second issue of note is the fact that a major EU Member State also excludes some self-employed from full access to the enjoyment of freedom of association.¹¹³
174. Korea has brought a number of matters to do with EU Member States' laws and practices to the Panel's attention. While these issues are outside the Panel's jurisdiction, which is limited by the Panel Request as explained above, the Panel considers that these matters may assist in interpreting the notions at stake and notes that they may be the subject of discussions between the Parties in the future.
175. The Panel finds that the TULRAA definition of 'worker' in Article 2(1) is not consistent with the principles concerning the fundamental right of freedom of association, which Korea is legally obliged to respect, promote and realise by Article 13.4.3 of the EU-Korea FTA. The definition as it stands is too narrowly based on a rigid binary relationship between a 'worker' and an 'employer' as defined and therefore has the effect of excluding many classes of self-employed, including some dependent contractors, from full enjoyment of the principles concerning the right to freedom of association.
176. Korea's maintenance of Article 2(1) in its present form does not 'respect' the principles concerning the right to freedom of association, as it permits the exclusion of many of the self-

¹¹² <https://www.eurofound.europa.eu/publications/report/2009/germany-self-employed-workers> accessed 20 December 2020.

¹¹³ See, too, the decision of the Court of Justice of the European Union, *FNV Kunsten Informatie en Media v the Netherlands Government*, Case C-413/13, which holds that self-employed workers, who collectively bargain, are subject to the prohibitions of European competition law in relation to cartel behaviour, price fixing etc. The decision recognises that the 'false-self-employed', that is those who are dependent contractors, are not subject to these prohibitions.

employed persons from access to the principles and correlative rights associated with freedom of association. The maintenance of Article 2(1) in its present form does not meet Korea's requirement to 'promote' the principles in connection with freedom of association, which requires the creation of a legal environment in which the right can flourish for all without distinction.

177. The Panel's recommendation in relation to 'self-employed' in the context of the TULRAA Article 2(1) is set out below.

b. 'dismissed and unemployed persons'

(i) Introduction

178. This section deals with the other groups mentioned in paragraph (1) of the Panel Request, those who are dismissed or unemployed. The Panel Request states that Article 2(1) of the TULRAA is inconsistent with the first sentence of Article 13.4.3:

*(1) Article 2(1) of the Korean Trade Union Act defining a 'worker' as a person who lives on wages, salary, or other equivalent forms of income earned in pursuit of any type of job. This definition, as interpreted by the Korean courts, excludes some categories of self-employed persons such as heavy goods vehicle drivers, as well as **dismissed and unemployed persons** from the scope of freedom of association.*¹¹⁴

179. As outlined above, the Panel has found that the Parties are legally bound by their commitment to respecting, promoting and realising the principles concerning the fundamental right to freedom of association as provided in Article 13.4.3. This section considers whether or not that obligation extends to those who are dismissed and/or the unemployed. The Panel notes at the outset that these two groups are not necessarily mutually exclusive: a dismissed worker who has not gained new employment may also be unemployed.

(ii) Submissions

180. The general arguments about the dismissed and unemployed are set out in Part A(1) of the EU submission. The EU points to the fact that the CFA has held that:

¹¹⁴ Emphasis added.

*The criterion for determining the persons covered by the right to organise is not based on the existence of an employment relationship. Workers who do not have employment contracts should have the right to form the organizations of their choosing if they so wish.*¹¹⁵

181. The EU also refers to the following principle of the CFA:

*A provision depriving dismissed workers of the right to union membership is incompatible with the principles of freedom of association since it deprives the persons concerned of joining the organization of their choice. Such a provision entails the risk of acts of anti-union discrimination being carried out to the extent that the dismissal of trade union activists would prevent them from continuing their trade union activities within their organization.*¹¹⁶

182. In the view of the Panel, the above quotation is strongly suggestive of the fact that the CFA regards dismissed workers as workers for the purposes of the principles concerning freedom of association.

183. The EU submissions in relation to the rights of unemployed persons refer to a decision of the CFA about a complaint against Korea which found that the unemployed should enjoy the right to freedom of association.¹¹⁷ The EU asserts that Korea has been pressed by the ILO since 1997 to amend this aspect of the TULRAA.

184. The CFA Compilation decision relating to the unemployed states:

*The Committee does not find that granting unemployed persons solely the right to join a trade union and participate in its functioning subject to the rules of the organization concerned is contrary to the principles of freedom of association.*¹¹⁸

185. The EU notes that on the basis of Korea's own submissions in this matter, Korea accepts that its law currently does not permit dismissed and unemployed persons to form and join trade unions of their choice under TULRAA Article 2(1), other than in relation to non-enterprise unions. The EU argues that the ILO principles concerning freedom of association do not permit

¹¹⁵ CFA Compilation, [330].

¹¹⁶ CFA Compilation, [410], Exhibit K-18.

¹¹⁷ EU OS [91], [92].

¹¹⁸ CFA Compilation, [395]; Exhibit K-18.

this distinction between enterprise and non-enterprise unions in relation to the principles concerning the fundamental right of freedom of association.¹¹⁹

186. Korea provides a detailed account of the legal guarantees of freedom of association in the Korean Constitution and several pieces of legislation including the TULRAA. The Panel has taken account of all the relevant information provided to it by Korea.
187. Korea argues that a decision of the Supreme Court rules that the definition of ‘worker’ under TULRAA includes ‘persons who are temporarily unemployed or are searching for work’.¹²⁰ Following that decision, Korea says the Government has certified the registration of some non-enterprise unions which include unemployed or dismissed persons as members.¹²¹
188. In relation to enterprise unions, Korea states that it is ‘taking active steps, involving also a consensus-building process with social partners, to guarantee that membership of enterprise-level unions is open to the unemployed and the dismissed’.¹²²
189. On 18 November 2020, after the hearings, the Panel received a document from Korea entitled ‘Introduction to Korean Government’s Labour Law Revision Proposal’.¹²³ The Panel agreed to receive the document, which was labelled Exhibit K-136. The document includes a table entitled ‘Main Points of Gov’t (sic) amendment bills’, which states, *inter alia*, as follows:

Subject	Current	Amendment Proposal
Union membership of the unemployed and the dismissed	Union membership eligibility is limited to workers of the enterprise. The unemployed and the dismissed may join a multi-enterprise union (by industry, region or occupation)	Regardless of the unemployed or the dismissed, the union membership will be set by the union by-laws.

¹¹⁹ EU OS, [96].

¹²⁰ Supreme Court Decision 2011Du15404 Decided on 27 September 2013 (Exhibit Korea K-46); Korea WS, [125].

¹²¹ Korea WS, [126].

¹²² Korea WS, [128].

¹²³ Exhibit K-136.

190. It is difficult to tell from this document what precise changes are now being proposed to the TULRAA. The phrase ‘(r)egardless of the unemployed or the dismissed, the union membership eligibility will be set by the union by-laws’ does not explicitly state that the current law in relation to enterprise unions will be changed. And there is no mention of whether or not unions will have difficulty receiving certification if their by-laws include a provision permitting the dismissed and the unemployed to join and remain members.
191. Korea also points out that union members who are dismissed are still given the opportunity to challenge their dismissal if they can show it was undertaken for reasons of the worker’s trade union membership or activity. In this respect, Korea also refers to the criminal penalty applicable to violation of the freedom of association in this way. Article 81 of the TULRAA (‘Unfair Labour Practices’) provides a remedy for dismissal on the grounds of trade union membership or activity, with ‘criminal sanctions for employers who disregard the freedom of association’.¹²⁴

(iii) Analysis

192. The Panel notes that dismissed and unemployed workers are recognised by the ILO as falling within the scope of ‘all workers without distinction whatsoever’ who are to be afforded the freedom of association, which Korea has undertaken to respect, promote and realise pursuant to Article 13.4.3 of the Agreement.
193. Indeed, Korea’s submissions appear to accept that the dismissed and unemployed are entitled to enjoy the principles concerning freedom of association. The key differences between the Parties go to the extent to which the right is already afforded to workers, and the efficacy of the steps which are being planned to extend the right further.
194. The Panel does not believe that the protections against dismissal on the grounds of unfair labour practices under Article 81 of the TULRAA accord sufficient safeguards to ensure that union members are not dismissed because of their union membership or activity. It would be very difficult to prove the reasons for the employer’s actions in these circumstances, especially as even lawful union activities in the workplace may give rise to objective grounds for dismissal if it is not protected by statute.

¹²⁴ Article 81 of the TULRAA prohibits employers from undertaking ‘any act falling under any of the following sub-paragraphs’, and Article 81(1) states ‘Dismissal or unfavourable treatment of a worker on grounds that he has joined or intends to join a trade union, or have attempted to organize a trade union, or have performed any other lawful act for the operation of a trade union.’ (Exhibit K-22), Korea WS, [83].

195. In relation to the communication from Korea, dated 18 November 2020, concerning planned amendments to the TULRAA, the Panel notes that Korea appears to have accepted that it is necessary for it to bring its domestic laws into alignment with the obligations it has under Article 13.4.3 in respect of the unemployed and dismissed person. However, the material on the planned amendment appears too vague and opaque in meaning for the Panel to rely on. The Parties have not advised the Panel of any changes to the TULRAA since the hearings. For these reasons, the Panel's decision refers to the law as it was on 25 November 2020, which was the date of the last Panel communication with the Parties on the final Korean Exhibit K-136.

c. The Panel's Decision – 'self-employed, dismissed, unemployed'

196. The Panel finds that the TULRAA definition of 'worker' in Article 2(1) is not consistent with the principles concerning the fundamental right of freedom of association, which Korea is obliged to respect, promote and realise by Article 13.4.3 of the EU-Korea FTA.
197. The Panel recommends that Korea brings the TULRAA provision into conformity with the principles concerning freedom of association, so that all workers, including the self-employed, dismissed and unemployed, are included in the TULRAA's definition of 'worker' in Article 2(1).

C Panel Request (2) TULRAA Article 2(4)(d)

a. Introduction

198. The second paragraph of the Panel Request identifies as a measure at issue in these proceedings as follows:

Article 2 paragraph 4(d) of the TULRAA stating that an organisation shall not be considered as a trade union in cases where persons who do not fall under the definition of 'worker' are allowed to join the organisation.

199. As outlined above, the legal standard against which this claim will be examined by the Panel is the first sentence of Article 13.4.3 of the EU-Korea FTA, in which the Parties commit to respecting, promoting and realising the principles concerning the fundamental rights, including the right to freedom of association.

200. Article 2(4) of the TULRAA sets out the definition of a trade union in the following terms:

The term ‘trade union’ means an organisation or associated organisation of workers which is formed in voluntary and collective manner upon the workers initiative for the purpose of maintaining and improving working conditions, or improving the economic and social status of workers. In cases where an organisation falls into one of the following categories, however, the organisation shall not be regarded as a trade union.

[...]

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

b. Submissions

201. The EU’s submissions on this specific provision were succinct, and raised the issue that unions had difficulty gaining registration, if the union rules permitted dismissed and unemployed workers to join the union. By way of example, the EU refers to the 2013, 2018 and 2019 unsuccessful attempts at registration by the Korean Teachers and Education Workers Union.¹²⁵
202. Korea’s submissions on this specific provision are also brief. Korea argues that the Korean Government ‘has issued certificates of report on the establishment of unions, including for unions that included...unemployed or dismissed persons, allowing them to freely join non-enterprise level unions and engage in union activity’.¹²⁶ This occurred after a Supreme Court decision held that ‘the definition of ‘worker’ could extend to those temporarily unemployed or searching for work’.¹²⁷
203. Given that the Panel has held that the commitments voluntarily made by Korea under the EU-Korea FTA mean that it is obliged to respect, promote and realise the principles of freedom of association, which means in turn that it must permit the unemployed and dismissed workers the right to join and maintain union membership, it follows that union by-laws should be permitted to include these categories of membership. Without a change to Article 2(4)(d), unions seeking

¹²⁵ EU WS [45], footnote 37.

¹²⁶ Korea WS, [126].

¹²⁷ Korea WS, [125], Exhibit K-46.

to recruit or maintain membership of self-employed, dismissed or unemployed workers would be unable to function under the TULRAA. In the view of the Panel, therefore, maintenance of Article 2(4)(d) is not consistent with Korea's obligation to respect, promote and realise the principles of freedom of association.

204. The *amicus curiae* submissions provide an example which demonstrates the seriousness of the practical impact of Article 2(4)(d): an already registered trade union can lose its legal status under the TULRAA if it permits dismissed or unemployed workers to be or remain members of the union:

*The Korean Teachers and Education Workers' Union (KTU) was informed of its decertification on 24 October 2013, because nine out of its 60 000 members were dismissed workers.*¹²⁸

c. Analysis

205. The ILO's CFA has identified the vulnerability of unions to deregistration in the event that their officials or members are dismissed or unemployed as a serious risk to the principles concerning freedom of association. As noted in the previous section of this Report, the right to challenge a dismissal as unfair via the National Labour Relations Commission appears to fall short of a guarantee against anti-union actions by an employer. The CFA states the general principle that:

*A provision depriving dismissed workers of the right to union membership is incompatible with the principles of freedom of association since it deprives the persons concerned of joining the organisation of their choice. **Such a provision entails the risk of acts of anti-union discrimination being carried out to the extent that the dismissal of trade union activists would prevent them from continuing their trade union activities with their organisation.***¹²⁹

206. The Panel notes that the current combined effect of the TULRAA Article 2(1) and Article 2(4)(d) is that it is not only the freedom of association of the dismissed union members which

¹²⁸ Submission from International Trade Union Confederation, European Trade Union Confederation, International Federation of Human Rights, 9. The UN Special Rapporteur on Freedom of Peaceful Assembly and Association confirms this factual account, stating 'In the KTU case, approximately 60,000 teachers are denied their rights to freedom of association because of the inclusion of nine dismissed teachers.' UN, Human Rights Council, Thirty-second session, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association on his mission to the Republic of Korea, 20 to 29 January 2016, A/HRC/32/36/Add.2, [58].

¹²⁹ CFA [410], emphasis added.

is impaired by the TULRAA, but also that of every other member of a union which risks de-certification by permitting such workers to become and stay members.

207. The Panel acknowledges Korea's submission that non-enterprise unions may be certified if they permit the dismissed and unemployed to join, but we have not found any basis in the relevant principles concerning freedom of association to make a distinction between non-enterprise and enterprise unions for this purpose. Korea's submissions do not contest that enterprise unions are not permitted to cover dismissed or unemployed workers.

d. The Panel's Decision

208. The Panel finds that Article 2(4)(d) of TULRAA is not consistent with the principles concerning freedom of association, which Korea is obliged to respect, promote and realise by Article 13.4.3 of the EU-Korea FTA.
209. The Panel recommends that Korea bring the TULRAA provision into conformity with the principles concerning freedom of association, so that Article 2(4)(d)'s definition of 'trade union' extends to those unions at both enterprise and non-enterprise levels which permit the dismissed, unemployed and self-employed to join and remain members.

D Panel Request (3) TULRAA Article 23(1)

a. Introduction

210. The third paragraph of the Panel Request identifies as a measure at issue in these proceedings:

Article 23(1) of the TULRAA stating that trade union officials may only be elected from among the members of the trade union.

211. As outlined above, the legal standard against which this claim will be examined by the Panel is the first sentence of Article 13.4.3 of the EU-Korea FTA, in which the Parties commit to respecting, promoting and realising the principles concerning the fundamental rights, including the right to freedom of association.
212. Article 23 of TULRAA states:

- (1) *Union officials shall be elected from the union members.*
- (2) *The tenure of union officials shall be determined by the union by-laws, and shall not exceed three years.*

b. Submissions

213. The EU submits that TULRAA Article 23(1) is incompatible ‘with the right of unions to elect their representatives in full freedom, as expressed in Article 3 of the Convention 98’.¹³⁰ It argues that the CFA has examined the issues arising in the Panel Request since 1995 and has repeatedly stated that ‘the determination of conditions of eligibility of union membership or union office is a matter that should be left to the discretion of union by-laws’.¹³¹ The CFA has urged Korea to repeal Article 23(1).¹³²

214. In response, Korea argues that Article 23(1) ‘does not restrict unions’ autonomy,’ and

*(r)ather it accords with the principles of union autonomy and democracy, given the reality of industrial relations in Korea where enterprise-level unions play a major role.*¹³³

215. Korea argues that allowing non-enterprise workers to be elected officials of an enterprise union

*(w)ould necessarily create serious risks that the union might be used not in the interests of the workers but for promoting personal profit or political motives. In other words, there would be a risk of serious prejudice to the autonomy of the trade union.*¹³⁴

This position is supported by the submission from the Korean businesses, coordinated by the Korean Employers Federation.¹³⁵

216. Further, Korea explains that:

In contrast to what is the case in the EU Member States, collective bargaining between labour and management in Korea typically occurs at enterprise level. This means that decisions on wages, working hours and other employment conditions are typically made

¹³⁰ EU WS, [63].

¹³¹ EU OS, [113], and footnote 82.

¹³² EU OS, [114].

¹³³ Korea WS, [48].

¹³⁴ Korea WS, [156].

¹³⁵ *Position Paper by Korean Business on the Implementation of the Trade and Sustainable Development Chapter of the Korea/EU FTA.*

*through enterprise-level collective bargaining. In the case of enterprise-based unions, labour and management regularly come into contact with each other in the workplace, union members actively participate and have a high interests in union activities, and union officers commonly take a leading role in initiating collective bargaining and industrial action.*¹³⁶

*Having persons unrelated to an enterprise act on behalf of specifically workers at that enterprise could undermine the latter's full enjoyment of the freedom of association. This risk is particular to countries, such as Korea, where enterprise-level unions play a significant role in the social model. Therefore the EU is wrong to allege that Korea is not committed to respecting, promoting, and realising freedom of association. In fact, the Korean laws about which the EU complains serve to protect the interests of workers of enterprise-level unions. They certainly do not go against those workers' freedom of association*¹³⁷

217. Korea then argues that in non-enterprise unions, the unemployed and dismissed are eligible to become officers.¹³⁸ Korea further states that 'some EU Member States have similar requirements in place, limiting eligibility for officer positions in enterprise-level unions to employees of the specific enterprise...'.¹³⁹
218. Finally, Korea states that the Government of Korea had proposed to 'abolish' Article 23(1) of TULRAA in its 2019 tranche of legislative changes, and this proposal was later abandoned.¹⁴⁰
219. In order to better understand Korea's arguments outlined above, the Panel asked Korea the following question:

*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 (OS [62]). 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.*¹⁴¹

¹³⁶ Korea OS, [62].

¹³⁷ Korea OS, [64].

¹³⁸ Korea WS, [158].

¹³⁹ Korea WS, [159].

¹⁴⁰ Korea OS, [160].

¹⁴¹ Panel Questions to Korea, question no 25.

220. Korea's answer to this question is as follows:

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 by-laws while for enterprise-based unions ensuring that union officers are elected from among union members who are incumbent workers.

The eligibility for union officers shall be determined through union by-laws, 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.¹⁴²

c. Analysis

221. The Panel notes that the above answer to the Panel's question states that the proposed amendments to the TULRAA as at October 2020 do not extend the right to elect any person to a union office in an enterprise union. In relation to Korea's arguments about the enterprise-level union, the Panel notes that, as a matter of logic, the alleged evils identified in 'third parties' standing for election in enterprise unions could equally apply in the case of non-enterprise unions. The Panel's understanding of the right to elect union officials in full freedom, a

¹⁴² Korea's answer to written question 21, Consolidated Hearing Report, 17-18.

correlative right and principle concerning freedom of association, means that it is a matter for members of the union to determine who they wish to lead their union.

222. The Panel also notes that the EU rejects Korea's arguments in relation to the trade union law of France.¹⁴³ As stated earlier in this decision, the Panel's jurisdiction does not extend to the laws of the Member States of the EU.

223. The task of the Panel is to determine whether or not Korea meets the obligations it has undertaken in Article 13.4.3 in relation to its commitment to respecting, promoting and realising the principles concerning freedom of association. As explained above, the Panel has appropriate regard to the statements made by the CFA when explicating these principles, which are broadly reflected in the other international human rights instruments. The Panel notes at the outset that the CFA states:

*The Committee always takes account of national circumstances, such as the history of labour relations and the social and economic context, but the freedom of association principles apply uniformly and consistently among countries.*¹⁴⁴

224. The CFA identifies as a 'general principle' concerning freedom of association the following:

*Freedom of association implies the right of workers and employers to elect their representatives in full freedom.*¹⁴⁵

225. Further, the CFA states:

*The right of workers' organisations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any intervention which might impair the exercise of this right, whether it be in determining the conditions of eligibility of leaders or in the conduct of the elections themselves.*¹⁴⁶

¹⁴³ EU's answer to question 3, Korea and the EU, Consolidated Hearing Report.

¹⁴⁴ CFA Compilation, [16].

¹⁴⁵ CFA Compilation, [585].

¹⁴⁶ CFA Compilation [589].

226. The CFA explicitly states that a requirement that union officials work in the enterprise of the enterprise union is contrary to freedom of association.¹⁴⁷ The CFA notes that one danger inherent in the current Korean law is that the dismissal of a union official of an enterprise union means their union role is also at an end:

*Given that workers' organisations are entitled to elect their representatives in full freedom, the dismissal of a trade union leader, or simply the fact that a trade union leader leaves the work that he or she was carrying out in a given undertaking, should not affect his or her trade union status or functions unless stipulated otherwise by the constitution of the trade union in question.*¹⁴⁸

d. The Panel's Decision

227. The Panel finds that Article 23(1) of the TULRAA is not consistent with the principles concerning freedom of association, which Korea is obliged to respect, promote and realise by Article 13.4.3 of the EU-Korea FTA.
228. The Panel recommends that Korea bring the TULRAA into conformity with the principles of freedom of association by removing the requirement in Article 23(1) of the TULRAA that union officials must be selected from amongst members of the union, ensuring that the members of enterprise and non-enterprise unions may elect officials in full freedom as required by Article 13.4.3.

E Panel Request (4) TULRAA Articles 12(1)-(3), in connection with Article 2(4) and Article 10

a. Introduction

229. The fourth paragraph of the Panel Request identifies as an issue

Article 12 paragraphs 1 to 3 of the Korean Trade Union Act, in connection with Article 2(4) and Article 10, providing for a discretionary certification procedure for the establishment of trade unions.

230. As outlined above, the legal standard against which this claim will be examined by the Panel is the first sentence of Article 13.4.3 of the EU-Korea FTA, in which the Parties commit to

¹⁴⁷ CFA Compilation [609].

¹⁴⁸ CFA Compilation [613].

respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, including the right to freedom of association.

231. Paragraphs 1 to 3 of Article 12 of the TULRAA state:

- (1) The Minister of Employment and Labour, the Special City Mayor, Metropolitan City Mayors, Governors of Self-Governing Provinces or heads of Sis/Guns/Gus (hereinafter referred to as “administrative authorities) shall issue a certificate within three days after receiving the report on establishment under paragraph (1) of Article 10, except for cases prescribed in paragraphs (2) and (3).*
- (2) In cases where a report or by-laws needs to be supplemented because of any omission or other reasons, the administrative authorities shall order a supplement thereof by designating a submission period up to twenty days in accordance with the Presidential Decree. Upon receiving the supplemented report or by-laws, a certificate shall be issued within three days.*
- (3) The administrative authorities shall return a report filed in cases where a trade union which made the report falls under any of the following sub-paragraphs:*
 - 1. Where a trade union falls within the categories of each sub-paragraph 4 of Article 2;*
 - 2. Where supplements are not submitted within the designated period in spite of the order to supplement a report in accordance with the provisions of paragraph 2.*

232. Article 2(4) of the TULRAA in turn stipulates:

The term “trade union” means an organisation or associated organisation of workers which is formed in voluntary and collective manner upon the workers’ initiative for the purpose of maintaining and improving working conditions, or improving the economic and social status of workers. In cases where an organisation falls into one of the following categories, however, the organisation shall not be regarded as a trade union.

- A. Where an employer or other persons who always act in their employer’s interests are allowed to join the organisation;*
- B. In cases where most of the expenditure is supported by the employer;*
- C. Where activities of an organisation are aimed at mutual benefits, moral culture and other welfare undertakings;*
- D. Where those who are not workers are allowed to join the organisation, Provided that a dismissed person shall not be regarded as a person who is not a worker, until a review*

decision is made by the National Labour Relations Commission when he/she has made an application to the Labour Relations Commission for remedies for unfair labour practices.

E. Where the aims of the organisation are mainly directed at political movements.

233. Article 10 of the TULRAA also provides:

(1) A person who intends to establish a trade union shall prepare a report containing the matters described in the following sub-paragraphs, attached by the by-laws under Article 11 and submit it to the Minister of Employment and Labour in cases of a trade union taking the form of an associated organisation or a unit trade union spanning not less than two areas among the Special City, Metropolitan Cities, Special Self-Governing Provinces; to the Special City Mayor, Metropolitan City Mayors and Provincial Governors in cases of a unit trade union spanning not less than two areas among Sis/Guns/Gus (referring to autonomous Gus); and to the Special Self-Governing City Mayors, Governors of Special Self-Governing Provinces and heads of Sis/Guns/Gus (referring to heads of autonomous Gus; hereinafter the same shall apply in Article 12(1) in cases of any other trade union:

- 1. Name of the trade union;*
- 2. Location of the main office/headquarters;*
- 3. Number of union members;*
- 4. Names and addresses of union officials;*
- 5. Name of the associated organisation to which it belongs;*
- 6. In cases of a trade union in the form of an associated organisation, the name of its constituent organisations, the number of union members, the address of its main office/headquarters, and the names and addresses of its officials.*

(2) A trade union which is an associated organisation under paragraph (1) means an industrial level organisation comprised of unit trade unions in the same industry and a federation comprised of industry-level organisations or nationwide industry-level unit trade unions.

b. Submissions

234. Of these provisions, the EU submits that taken together they represent an impermissible constraint on the free formation of trade unions because the administrative agencies empowered

to certify trade unions exercise discretionary powers over such registration.¹⁴⁹ In essence, the EU argues that Article 2(4) of the TULRAA

*[...] sets out five 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.*¹⁵⁰

235. In relation to Article 12(2) and (3), the EU alleged ‘the competent Korean administrative authorities have in the past delayed or refused the certification of trade unions.’¹⁵¹ The EU argues:

*The power granted to these authorities to order a supplement of the report required by Article 10 has a discretionary nature, because it may be exercised not only in the case of omissions, but also for “other reasons”, which are not specified in the TULRAA.*¹⁵²

236. The EU refers to a number of the *amicus curiae* submissions which discuss not just the text of the legislation, but the way in which the system is implemented.¹⁵³ These submissions refer to delays in granting certification and outright rejections in a number of cases.
237. The EU also highlights Article 12(3), which allows the administrative authorities to refuse certification if the union falls within one of the categories of Article 2(4), the latter including the ground that ‘the aims of the organisation are mainly directed at political movements’.¹⁵⁴ The EU refers to a number of statements by the CFA to support its contention that these provisions amount to a failure to adhere to the principles concerning freedom of association.¹⁵⁵
238. The EU submits that Article 12(2) and (3) allow the administrative authorities to refuse or delay registration where the initial report needs to be supplemented ‘because of any omission or other reasons’.

¹⁴⁹ EU WS, [61].

¹⁵⁰ EU answer to an oral question during the hearing, Consolidated Hearing Report, question 12, 49.

¹⁵¹ EU WS, [57].

¹⁵² EU WS, [57].

¹⁵³ EU WS, [57], footnote 41.

¹⁵⁴ EU WS, [58].

¹⁵⁵ See EU WS, [59],[60] referring to CFA Compilation [154], [451]; EU OS, [106].

*The EU submits that this detailed and in-depth examination by the authorities of the documents submitted by a trade union for the purpose of its registration...shows that the submission of such documents is not a mere formality. The competent authorities are required to pursue a fully-fledged inquiry as to the extent to which the composition of the trade union and the contents of its by-laws comply or not with any other applicable rules. While carrying out this task, and when deciding that the submitted documents must be corrected or supplemented, the TULRAA and its Enforcement Decree grant those authorities a discretionary power to delay or prevent registration.*¹⁵⁶

239. The EU argues that the fact that administrative and judicial review of the decisions of the administrative authorities in relation to union certification

*[...]is not sufficient to eliminate the inconsistency with the principles of freedom of association. For as long as the relevant provisions of the TULRAA continue to allow the administrative authorities to scrutinise the requests for registration and apply various criteria disqualifying trade unions, any administrative or judicial review is likely to acknowledge that the authorities have acted in accordance with the legislation in force.*¹⁵⁷

240. In response, Korea submits that the EU has not made out its case in relation to the fourth paragraph of the Panel Request, and that ‘no discretionary authorisation is required to establish a trade union’.¹⁵⁸

241. Korea notes at the outset that ‘requiring registration of trade unions is not as such contrary to freedom of association’.¹⁵⁹ It refers to the CFA criteria, arguing it is relevant for the Panel to consider whether

(i) the system grants the right to official recognition through legal registration;
(ii) the government has discretion in granting authorisation for union registration, in which case the system is in violation of the principles of freedom of association; and
*(iii) the system allows organisations to file an appeal to the court against administrative decisions on their registration.*¹⁶⁰

¹⁵⁶ EU OS, [103].

¹⁵⁷ EU OS, [108].

¹⁵⁸ Korea WS, [140].

¹⁵⁹ Korea WS, [144].

¹⁶⁰ Korea WS, [144] referring to CFA Compilation of Decisions [449], [421], [456].

242. Korea argues its system of union certification is compliant with the principles of freedom of association because the system of applying to certify the union has statutory time limits on the processing of requests,¹⁶¹ and the task of the administrative authorities is ‘limited to verifying whether the required documents have been submitted and whether there is a ground for disqualification’.¹⁶² These grounds ‘do not fall within the discretion’ of the administrative bodies ‘but are defined by Article 2(4) of the TULRAA’.¹⁶³ The role of the administrative authority ‘is limited to verifying whether the required documents have been submitted and whether the autonomy of a union is guaranteed’.¹⁶⁴
243. Korea states that in practice, the sub-paragraphs of Article 2(4) ‘rarely’ result in refusal of certification.¹⁶⁵
244. Korea further disputes the EU’s understanding of ‘any omission or other reasons’ in Article 12(2).
245. In this regard, Korea refers to a decision of the Korean Constitutional Court which states that the provisions of the TULRAA are not a matter of discretion, but a requirement which, once met, the administrative authority must certify the union.¹⁶⁶
246. Korea also notes that judicial review is available of the administrative authority’s decision to return an application for more and better particulars, which Korea contends means that there is a remedy if the administrative authority acts arbitrarily.¹⁶⁷ Responding to a question asked by the Panel, Korea explained that unions whose reports are returned (that is, in a situation where the administrative authority seeks more information) are not recognised under TULRAA, unless and until there is a definitive ruling from a superior court, and the administrative authority grants certification.¹⁶⁸
247. In response to a question from the Panel concerning a year-long delay in receiving a decision on certification of a union covering insurance salespersons, outlined in Exhibit EU-3, Korea states *inter alia*:

¹⁶¹ Korea WS, [146].

¹⁶² Korea WS, [147].

¹⁶³ Korea WS, [147].

¹⁶⁴ Korea OS, [57].

¹⁶⁵ Korea further notes that the ground in Article 2(4) relating to the dismissed and unemployed is the subject of Government proposals for legislative change. Korea WS, [147].

¹⁶⁶ Korea WS [151]. Extracts from the Court’s decision in Decision 2011Hunba53 decided 29 March 2012 (Exhibit K-64).

¹⁶⁷ Korea WS, [152].

¹⁶⁸ Consolidated Hearing Report, question 24, 19.

As for insurance salesperson, 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 labour in different ways, and have the characteristics of the self-employed as well as that of workers at the same time. ¹⁶⁹

c. Analysis

248. The Panel's task is to assess the provisions identified in paragraph 4 of the Panel Request against the legal standard in Article 13.4.3 of the EU-Korea FTA, which we have found requires the Parties to respect, promote and realise the principles concerning freedom of association.
249. In this case, the Panel has taken note of the decision of the Korean Constitutional Court which examined whether or not Article 12(1) of the TULRAA was unconstitutional when considered in the light of Article 21 (2) of the Constitution of Korea. The Korean Constitution provides for a right to freedom of association, and Article 21(2) of the Constitution provides that 'licensing or censorship of speech and the press, and licensing of assembly and association shall not be recognised'. The Court held that 'licensing of...association' refers to systems of 'pre-screening', akin to 'prior censorship' of speech. When applied to TULRAA Article 12(1), the Court found that the system of certification under TULRAA is not a form of licensing, and thus is not unconstitutional under Korean Law. It reasoned:

If a trade union which submitted a report on establishment falls into the disqualification category including where most of its expenditure is supported by the employer or where those who are not workers are allowed to join it, the administrative agencies shall return the report on establishment they received. The Instant Provision (i.e. Article 12(1)) does not allow a trade union to be established by simply submitting an application for a trade union establishment report. Rather, it only permits a trade union to be established under the TULRAA after administrative authorities review the application to verify if the trade union meets the requirements such as independence....[I]t is only natural that a trade union protected under Article 33 of the Constitution, as an organisation which was formed and has evolved in voluntary and collective manner..., should be able to obtain independence from the state and employers. Guaranteeing the independence of trade unions is one of the essential elements necessary for a trade union....Accordingly, it is deemed necessary to have a system that allows a pre-screening of report on trade union establishment as a

¹⁶⁹ Consolidated Hearing Report, question 25, 20.

*substantive review is required to see if a trade union meets the requirement such as independence at its inception.*¹⁷⁰

250. The Court continues:

*[The current system] conceptually sets itself apart from the licensing system that lifts a general ban for selected cases. **Therefore, the decision on whether or not to accept an application of report on trade union establishment is not discretionary, but mandatory, meaning that the relevant administrative body shall accept the application and issue the certificate on trade union establishment as long as the application meets the requirements.***¹⁷¹

251. The CFA principles on this point make clear that it is consistent with the principles concerning freedom of association that unions may be subject to some requirements before they are registered or certified:

*However, such requirements must not be such as to be equivalent in practice to previous authorisation, or as to constitute such an obstacle to the establishment of an organisation that they amount in practice to outright prohibition.*¹⁷²

252. The Parties differ as to the meaning of the Constitutional Court's decision *vis-à-vis* the principles concerning freedom of association enumerated by the CFA. Korea argues that the fact that the TULRAA system of certification is not regarded as a licensing system of pre-screening within Korean law means that it must be compliant with the principles concerning freedom of association. The EU differs, and argues that the Constitutional Court decision, and the TULRAA certification system itself, in fact disclose something more like a system of prior authorisation in the sense used by the CFA. The EU points to the Court's finding that the administrative authorities involve a 'substantive review' based on complex concepts such as independence, political motivations etc, which goes beyond the permitted 'formalities' as outlined in the jurisprudence of the ILO.¹⁷³

¹⁷⁰Constitutional Court of Korea, Decision 2011Hun-Ba53, Exhibit K-64(1), no page numbers provided.

¹⁷¹ As above, emphasis added.

¹⁷² CFA Compilation, [419].

¹⁷³ See EU answer to question 13, Consolidated Hearing Report, 50, 51.

253. The Panel agrees with the EU that there is ‘broad, vague or imprecise language used in those grounds for disqualifying a trade union’ in the registration process.¹⁷⁴ During the hearings, Korea did not provide a definitive answer as to how this provision actually applies in relation to individual applications.
254. However, the Panel takes note of the decision of one of the highest judicial entities of a Party, the Constitutional Court of Korea, which is authorised to pronounce a final decision on constitutional law matters in Korea.¹⁷⁵
255. Furthermore, the Parties have submitted competing pieces of evidence as to how the provisions of the TULRAA certification system are applied in practice. Some of this evidence was conflicting or inconsistent, and some of it provided only scant details. The Panel is unable to conclude that the application of the disqualification grounds set out in Article 12(3) of the TULRAA would or would not involve the unpermitted exercise of a discretion on the part of the competent authorities in a way that is not consistent with the requirement to respect, promote and realise the principles of freedom of association.
256. Article 13.4.3 requires the Parties to commit to respecting, promoting and realising, in their laws and practice, the principles concerning freedom of association. The Constitutional Court’s decision sets out the state of the *de jure* position in Korean law, but the *de facto* practice of the Korean government and its administrative agencies in implementing the law may or may not accord with the principles of freedom of association. The CFA has stated:

*The formalities prescribed by law for the establishment of a trade union should not be applied in such a manner as to delay or prevent the establishment of trade union organisations*¹⁷⁶

and Korea is bound by its obligations under Article 13.4.3 to respect, promote and realise this principle in its law and practice.

¹⁷⁴ Consolidated Hearing Report, [42].

¹⁷⁵ See Constitution of the Republic of Korea, Art. 111.

¹⁷⁶ CFA Compilation, [427].

d. The Panel's Decision

257. The Panel finds that the EU has failed to establish that the TULRAA Articles 12(1)(3), in connection with Article 2(4) and Article 10, are contrary to Korea's obligations under Article 13.4.3 of the EU-Korea FTA.
258. The Panel notes that the Parties are, *inter alia*, bound by Article 13.4.3 to respect, promote and realise the principles concerning freedom of association in their laws and practices, and recommends that Panel Request (4) be referred to the consultative bodies established under Article 13.12 of the EU-Korea FTA for continued consultation.

IV Panel Request – Substantive issues - Last Sentence of Article 13.4.3

A Legal Standard

a. Introduction

259. The last sentence of Article 13.4.3 of the EU-Korea FTA states:

The Parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as “up-to-date” by the ILO.

260. There are currently eight fundamental ILO conventions: Forced Labour Convention, 1930 (No. 29); Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Equal Remuneration Convention, 1951 (No. 100); Abolition of Forced Labour Convention, 1957 (No. 105); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Minimum Age Convention, 1973 (No. 138); A; Worst Forms of Child Labour Convention, 1999 (No. 182). Article 13.4.3 thus requires the Parties to ‘make continued and sustained efforts towards ratifying’ these eight conventions. Among the eight conventions, Korea has yet to ratify four (Nos. 29, 87, 98 and 105).

b. Submissions

261. The EU argues that:

*The obligation to make continued and sustained efforts towards ratifying the fundamental ILO Conventions is a key element in the balance of rights and obligations arising from the EU-Korea FTA. As recalled in the 1998 ILO Declaration, these Conventions express and develop the core principles and rights that all ILO Members have endorsed when they freely joined the ILO*¹⁷⁷

262. Korea argues that the term ‘will’ in the last sentence of Article 13.4.3 should be contrasted with ‘shall’ or ‘must’, and is ‘more akin to a declaration of intent than an obligation’.¹⁷⁸ Korea further argues that the ordinary meaning of ‘will’ is defined as ‘desire, wish for, have a mind to, ‘want’ (something); sometimes implying ‘intend, purpose’ or ‘to wish, desire; sometimes with implication of intention’.¹⁷⁹
263. On the other hand, the EU submits that the term ‘will’ does not diminish the binding force of the commitment under the last sentence of Article 13.4.3.¹⁸⁰ The EU states that its treaty drafting practice does not distinguish ‘will’ and ‘shall’, which are used interchangeably to express legally binding provisions, and that a choice thus largely ‘depends on the context and the content of each individual provision’.¹⁸¹
264. The EU’s contention is that while Korea has made some efforts to ratify the four outstanding Conventions, they have fallen short of the standard of ‘continued and sustained efforts’ required by the last sentence of Article 13.4.3 of the Agreement, because Korea has not resorted to all the appropriate measures that could allow it to attain the objective.¹⁸²
265. The EU acknowledges that this is a ‘best endeavours’ provision¹⁸³ but that it nonetheless imposes a specific legal obligation against which a Party’s action or inaction may be measured under the EU-Korea FTA.¹⁸⁴
266. As regards the nature of the obligation arising under the provision, the two Parties submit different views. Korea understands the provision to require the Parties ‘not to roll back their efforts or take actions that would impede the preparatory steps towards ratification’ and ‘to

¹⁷⁷ EU WS, [72].

¹⁷⁸ Korea WS, [167],[169].

¹⁷⁹ Korea WS, [167].

¹⁸⁰ Consolidated Hearing Report, [45], 52 (EU’s responses to Panel questions).

¹⁸¹ Consolidated Hearing Report, [62] (EU’s Response to Panel Oral Question No. 4).

¹⁸² See EU WS, para. 91; Consolidated Hearing Report, [16].

¹⁸³ Consolidated Document, [17], 43.

¹⁸⁴ See EU WS [72], [73], [74]; Consolidated Hearing Report [17], 43 (EU Response to Panel Written Question).

refrain from taking measures that would defeat the purpose of moving towards ratifying the key ILO conventions'.¹⁸⁵

267. On its part, the EU argues for a higher standard of obligation, referring to the decision of the ICJ in *Pulp Mills on the River Uruguay*¹⁸⁶ to underscore that obligations of conduct are nonetheless substantive ones where a state should act diligently and take all appropriate measures.¹⁸⁷

c. Analysis

(i) 'will'

268. Korea's contention that the word 'will' means, *inter alia*, 'desire, wish for...' refers to a meaning which is not supported by the ordinary meaning of the term in its context in Article 13.4.3 in light of the object and purpose of the Agreement. To the contrary, the Panel finds that the term 'will' purveys an intention, and is largely indistinguishable from 'shall' in the specific context of the last sentence of Article 13.4.3.
269. The Panel notes that states, in formulating their treaties, sometimes use the term 'will' as opposed to 'shall' to connote a lower level of legal obligation.¹⁸⁸ However, in the absence of specific evidence showing the agreement of the Parties to convey such a meaning, the Panel should examine the provision in accordance with the general rules of treaty interpretation under Article 31 of the VCLT. In the Panel's view, the interpretation of the provision leads the Panel to conclude that the provision (even with the term 'will') sets forth the Parties' commitment to undertake something specific and concrete; that is, it establishes a binding legal obligation, as we have found regarding the first sentence of Article 13.4.3.

¹⁸⁵ Consolidated Hearing Report, [29].

¹⁸⁶ *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, 14.

¹⁸⁷ Consolidated Hearing Report, [17], 44 (EU's Response to Panel Written Questions); *Pulp Mills on the River Uruguay*, [187], [188], [197].

¹⁸⁸ See, e.g., Anthony Aust, *Modern Treaty Law and Practice* Cambridge University Press, Cambridge, 2013, 30-31; Treaty Section Legal Directorate of United Kingdom, *Treaties and Memoranda of Understanding: Guidance on Practice and Procedures*, 2013, 16-17; Directorate of International Law, Federal Department of Foreign Affairs of Switzerland, *Practical Guide to International Treaties: Edition 2015*, 2015, 46; New Zealand Foreign Affairs & Trade, *Guidance for government agencies on practice and procedures for concluding international treaties and arrangements*, September 2020, 34, 36.

(ii) ‘will make continued and sustained efforts towards ratifying’

270. The Panel notes that both Parties agree that to make ‘continued and sustained efforts’ means to make ‘persistent’ efforts.¹⁸⁹ On its part, the EU further argues that the obligation to make ‘continued and sustained efforts’ means efforts being made ‘without interruption’.¹⁹⁰
271. The Panel agrees with the EU that the last sentence of Article 13.4.3 creates a legally binding obligation, as it is found in paragraphs 268 and 269 above, and that the Parties should make such efforts as are required by the terms of the sentence.
272. Korea’s argument that the last sentence of Article 13.4.3 means that a Party is permitted to simply maintain the *status quo* or only to make minimal efforts is difficult to reconcile with the ordinary meaning of the terms of the provision. In the Panel’s opinion, to ‘make continued and sustained efforts’ means to take steps forward: standing still, or something akin to that, is not to be countenanced.
273. The Panel also does not read the last sentence as imposing an obligation to make efforts ‘without interruption’. To the extent that the term ‘without interruption’ means continuation of action in the absence of any cessation or suspension, it is hard to read such a meaning into the last sentence of Article 13.4.3. Given the significance of such obligation, one would expect a more specific language to that effect in the provision at issue if the parties intended so.
274. In the view of the Panel, the appreciation of the nature of the obligation arising from a treaty is contextual and its satisfaction depends on the content of the obligation as contained in the treaty in question.¹⁹¹ Viewed from this perspective, the obligation raised in *Pulp Mills on the River Uruguay*, invoked by the EU in its submissions, is distinguishable from the obligation arising under Article 13.4.3, last sentence. Notably, the Panel is reminded that Article 13.4.3, last sentence, does not stipulate specific forms or contents of efforts being required, but instead mentions a general obligation to make continued and sustained efforts. This textual language accords the Parties a certain level of leeway in selecting specific ways of making such required efforts.

¹⁸⁹ EU OS, [119]; Korea’s answer to written question 30, Consolidated Hearing Report, 22.

¹⁹⁰ EU WS, [90].

¹⁹¹ See *Pulp Mills on the River Uruguay*, paras. 64-65, 173-175, 186-189; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, [109]-[110]; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019, [70].

275. Accordingly, the Panel does not accept the argument advanced by the EU to the effect that the last sentence of Article 13.4.3 requires a Party to explore and mobilise all available measures in a similar manner and with similar intensity at all times in order to ratify the core ILO Conventions. Without a clear language to that effect, the Panel does not agree that the EU and Korea assumed such obligations from the last sentence of Article 13.4.3.
276. The Panel finds it significant that the last sentence of Article 13.4.3 does not set a specific target date or a particular milestone for the ratification process: the provision merely states that the Parties should make ‘continued and sustained efforts towards ratification’. Nor have the Parties referred to any specific target dates or discernible schedules that they have agreed, which may help guide the Panel’s analysis.

d. The Panel’s Decision

277. The Panel finds that the last sentence of Article 13.4.3 imposes a legally binding obligation on the Parties to make ‘continued and sustained efforts towards ratification’ of the core ILO Conventions. This is an obligation of ‘best endeavours’: the standard against which the Parties are to be measured is higher than undertaking merely minimal steps or none at all, and lower than a requirement to explore and mobilise all measures available at all times.
278. In the absence of explicit targets or at least any informal understanding on expected milestones towards ratification, the Panel regards the last sentence of Article 13.4.3 of the EU-Korea FTA as imposing an on-going obligation for the Parties, affording leeway for the Parties to select specific ways to make continued and sustained efforts. This requires the Panel to take into account the overall process of a Party’s efforts toward the ratification in question: a snapshot of a particular period may not yield an accurate portrayal of the overall process towards ratification.
279. The documents examined during the proceedings also indicate the on-going nature of the obligation.¹⁹² As a matter of fact, the EU and Korea seemed to have been engaged in an on-going discussion between themselves over the past several years.

¹⁹² See Korea OS [67]-[73]; EU WS [79]-[82] (discussing the effort of Korea during the nine-year period since 2011 followed by the Parties different assessment of the adequacy of such efforts.) See also Consolidated Hearing Report 63 (EU response to Panel Oral Question No 5), [47]-[48], 53 (EU response to Panel Written Questions); Exhibit K 134.

280. It follows that, for the purpose of assessing compliance with the last sentence of Article 13.4.3, the fact that Korea has yet to ratify four fundamental ILO Conventions does not in itself serve as evidence of its failure to comply with the EU-Korea FTA. The EU has also confirmed that it is the provision aiming for an effort, not result.¹⁹³ The EU's claim is not about Korea's failure to 'attain the desired outcome'.¹⁹⁴ Rather, its claim is directed at Korea's 'fail[ure] to act with the required due diligence and take all appropriate measures within its power' to ratify the four outstanding Conventions.¹⁹⁵

B Panel Request

a. Introduction

281. For this claim, the EU's Panel Request states:

The EU considers that Korea's efforts towards ratifying the following fundamental ILO Conventions are inadequate:

C87 Freedom of Association and Protection of the Right to Organise Convention, 1948

C98 Right to Organise and Collective Bargaining Convention, 1949

C 29 Forced Labour Convention, 1930 and

C105 Abolition of Forced Labour Convention, 1957.

Indeed, eight years after the entry into force of the EU-Korea FTA, Korea has still not ratified the aforementioned four fundamental Conventions. Moreover, Korea has not been making efforts towards ratification of the abovementioned fundamental Conventions that could be qualified as sustained and continuous over this period. Thus, Korea appears to have acted inconsistently with Article 13.4.3 last sentence of the EU-Korea FTA.

b. Submissions

282. The EU's contention is that while Korea has made some efforts, they have fallen short of the standard of 'continued and sustained efforts' required by the last sentence of Article 13.4.3 of the EU-Korea FTA, because Korea has not resorted to all the appropriate measures that could allow it to attain the objective.¹⁹⁶

¹⁹³ See Consolidated Hearing Report, [74], 58 (EU's Response to Panel Questions to Both Parties): 'The last sentence of Article 13.4.3 imposes an obligation of conduct;' Consolidated Hearing Report, 63 (EU's Response to Panel Oral Question No. 5).

¹⁹⁴ Consolidated Hearing Report, [18], 44 (EU's Response to Panel Questions).

¹⁹⁵ Consolidated Hearing Report, [18], 44 (EU's Response to Panel Questions).

¹⁹⁶ See EU WS, [91]; Consolidated Hearing Report, [16].

283. In the course of the present proceedings, Korea has attempted to explain in detail the efforts it has undertaken since 2011.¹⁹⁷ It reports that 30 amendment bills have been tabled since 2011, when the EU-Korea FTA commenced,¹⁹⁸ as well as a range of other activities including the consultation with the social partners and the commissioning of relevant research.¹⁹⁹

284. However, both Korea and the EU seem to agree that few, if any, activities took place during the period of 2011 to 2017. At the same time, the two Parties also seem to agree that tangible efforts have been made since 2017. Indeed, the EU refers to development since 2017.²⁰⁰

285. The following statement of the EU summarizes the essence of the EU claim in this regard:

*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.*²⁰¹

c. Analysis

286. The Panel has taken careful note of all the materials supplied by Korea as evidence of its efforts towards ratifying the core ILO Conventions. In the Panel's view, Korea has certainly made efforts towards ratification since at least 2017. According to Korea, the official announcement by the Korean Government that it would submit bills for the ratification of the ILO Conventions Nos. 87, 98 and 29 to the National Assembly was made in May 2019,²⁰² followed by actual submission of bills in October 2019.²⁰³

287. What has happened for the past three years seems to indicate tangible, though slow, efforts by Korea with respect to the ratification of the ILO Conventions at issue.

288. To the extent that the last sentence of Article 13.4.3 does not impose an obligation of result but of effort, and that it suggests the nature of on-going obligation without a specific target date or schedule, the Panel is of the view that Korea's efforts for the past three years satisfy the legal threshold of the provision.

¹⁹⁷ See Korea WS, [186]-[197].

¹⁹⁸ See Consolidated Hearing Report, [34].

¹⁹⁹ See Korea OS, [68]-[71].

²⁰⁰ Consolidated Hearing Report, [18], 44 (EU's Response to Panel Questions) ('despite certain positive steps in the right direction since 2017'; 'From 2011 until 2017, Korea did not take any significant steps'); EU WS, [93]-[94].

²⁰¹ Consolidated Hearing Report, [47], 53 (EU's Response to Panel Questions).

²⁰² Korea WS, [192].

²⁰³ Korea WS, [193].

289. Korea acknowledges that Convention 105 is being treated separately,²⁰⁴ and is not included in the package of outstanding ratification bills before the Korea's National Assembly. Korea submits that an additional review of Korea's penal system and social consensus building process are needed before the Convention is ratified. Korea also refers to research papers analysing domestic penal system issues. The Panel duly notes the position of Korea. However, Korea's efforts in relation to Convention 105 clearly lag behind those for other three Conventions.
290. The Panel has duly taken into account the reasons for the different approaches to Convention 105 as explained by Korea: most notably, changes in the penal system take longer domestic discussions with more groundwork research and preparation. Article 13.4.3, last sentence, stipulates an obligation to 'make continued and sustained efforts' for all the outstanding Conventions. It is true, as Korea argues, that duration of a ratification process is not a determinative factor for establishing whether continued and sustained efforts towards ratification are made in accordance with the last sentence of Article 13.4.3,²⁰⁵ but it is certainly a relevant factor. The Panel expects that the ratification process of Convention 105 will be completed in an expeditious manner.

d. The Panel's Decision

291. Overall, the Panel is mindful of the fact that Korea has not committed to a specific timeframe for the ratification of the four outstanding ILO Conventions.²⁰⁶ The Panel also finds that Korea's efforts are less than optimal, and that there is still much to be done.
292. Nonetheless, it is the view of the Panel that the less-than-optimal effort of Korea, in and of itself, does not fall below the legal standard set out in the last sentence of Article 13.4.3 of the EU-Korea FTA.
293. Taking account of Korea's efforts in this regard, particularly those taken since 2017 as acknowledged by the EU, the Panel finds that Korea has not acted inconsistently with the last sentence of Article 13.4.3 by failing to 'make continued and sustained efforts' towards ratification of the core ILO Conventions.

²⁰⁴ Consolidated Hearing Report, [35].

²⁰⁵ Korea OS, [72].

²⁰⁶ See Consolidated Document, para. 31.

Summary of Findings and Recommendations

Jurisdiction

The Panel finds that the EU's Panel Request dealing with several provisions of the Trade Union and Labour Relations Adjustment Act (hereafter the TULRAA) is based on matters arising under the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ EU L127/68 of 14.5.2011 (hereafter the EU-Korea Free Trade Agreement (FTA)).

Panel Request – Substantive issues - First Sentence of Article 13.4.3

- **Panel Request (1) TULRAA Article 2(1) 'self-employed, dismissed and unemployed persons'**

The Panel finds that the TULRAA definition of 'worker' in Article 2(1) is not consistent with the principles concerning the fundamental right of freedom of association, which Korea is obliged to respect, promote and realise by Article 13.4.3 of the EU-Korea Free Trade Agreement.

The Panel recommends that Korea brings the TULRAA provision into conformity with the principles concerning freedom of association, so that all workers, including the self-employed, dismissed and unemployed, are included in the TULRAA's definition of 'worker' in Article 2(1).

- **Panel Request (2) TULRAA Article 2(4)(d)**

The Panel finds that Article 2(4)(d) is not consistent with the principles concerning freedom of association, which Korea is obliged to respect, promote and realise by Article 13.4.3 of the EU-Korea FTA.

The Panel recommends that Korea bring the TULRAA provision into conformity with the principles concerning freedom of association, so that Article 2(4)(d)'s definition of 'trade union' extends to those unions at both enterprise and non-enterprise levels which permit the dismissed, unemployed and self-employed to join and remain members.

- Panel Request (3) TULRAA Article 23(1)

The Panel finds that Article 23(1) of the TULRAA is not consistent with the principles concerning freedom of association, which Korea is obliged to respect, promote and realise by Article 13.4.3 of the EU-Korea FTA.

The Panel recommends that Korea bring the TULRAA into conformity with the principles of freedom of association by removing the requirement in Article 23(1) of the TULRAA that union officials must be selected from amongst members of the union, ensuring that the members of enterprise and non-enterprise unions may elect officials in full freedom as required by Article 13.4.3.

- Panel Request (4) TULRAA Article 12(1)-(3), in connection with Article 2(4) and Article 10

The Panel finds that the EU has failed to establish that the TULRAA Articles 12(1)-(3), in connection with Article 2(4) and Article 10 are contrary to Korea's obligations under Article 13.4.3.

The Panel notes that the Parties are, *inter alia*, bound by Article 13.4.3 to promote the principles concerning freedom of association in their law and practice, and recommends that Panel Request (4) be referred to the consultative bodies, established under the EU-Korea FTA Article 13.12 for continued consultation.

Panel Request – Substantive issues - Last Sentence of Article 13.4.3

Taking account of Korea's efforts in this regard, particularly those taken since 2017 as acknowledged by the EU, the Panel finds that Korea has not acted inconsistently with the last sentence of Article 13.4.3 by failing to '*make continued and sustained efforts*' towards ratification of the core ILO Conventions.

Appendix

List of Submissions and Exhibits

A. Written Submissions by the Parties

EU

1. First Written Submission by the European Union dated 20 January 2020
2. Exhibit E-1 and Exhibit E-2

Korea

1. Written Submission by the Republic of Korea dated 14 February 2020
2. Exhibit K-1 to Exhibit K-116-2

B. *Amicus Curiae* Briefs

Institutions

1. *Amicus Curiae* Brief submitted on 11 January 2020 by International Trade Union Confederation, European Trade Union Confederation and International Federation for Human Rights
2. *Amicus Curiae* Brief regarding freedom of association of self-employed submitted on 11 January 2020 by Korean Confederation of Trade Unions
3. *Amicus Curiae* Brief submitted on 10 January 2020 by Korean Confederation of Trade Unions
4. Position Paper submitted on 10 January 2020 by Korea Enterprise Federation
5. *Amicus Curiae* Brief submitted on 10 January 2020 by Federation of Korean Trade Unions
6. *Amicus Curiae* Brief submitted on 10 January 2020 by Korean Fixed-term Teachers Union

Individuals

1. *Amicus Curiae* Brief submitted on 11 January 2020 by Lee Da Hoon; *Amicus Curiae* Brief submitted on 9 January 2020 by Lee Da Hoon
2. Statement of the Opinion submitted on 10 January 2020 by Lee Ju-seok
3. E-mail comments submitted on 10 January 2020 by an anonymous person
4. Brief submitted on 10 January 2020 by June Namgoong (Associate Research Fellow, Korea Labor Institute)
5. E-mail comments submitted on 1 January 2020 by an anonymous person
6. E-mail comments submitted on 31 December 2019 by Yu Hwan Lee
7. E-mail comments submitted on 29 December 2019 by an anonymous person
8. E-mail comments submitted on 29 December 2019 by Jum Sook Lee
9. E-mail comments submitted on 29 December 2019 by an anonymous person

10. E-mail comments submitted on 29 December 2019 by an anonymous person
11. E-mail comments submitted on 29 December 2019 by Young Jae Lee
12. Petition re South Korea's forced labor pay submitted on 28 December 2019 by an anonymous person
13. E-mail comments submitted on 28 December 2019 by an anonymous person
14. E-mail comments submitted on 28 December 2019 by an anonymous person
15. E-mail comments submitted on 28 December 2019 by an anonymous person
16. E-mail comments submitted on 25 December 2019 by an anonymous person
17. E-mail comments submitted on 23 December 2019 by an anonymous person
18. E-mail comments submitted on 22 December 2019 by Hyeonbi Kim
19. E-mail comments submitted on 22 December 2019 by Gye Joon Lee
20. E-mail comments submitted on 22 December 2019 by Jong Seong Park
21. E-mail comments submitted on 22 December 2019 by an anonymous person
22. E-mail comments submitted on 20 December 2019 by Yu Hwan Lee

C. Opening Statement

EU

1. Opening Statement by the E dated 1 October 2020
2. Exhibit E-3 to Exhibit E-6

Korea

1. Opening Statement by the Republic of Korea dated 1 October 2020
2. Exhibit K-117 to Exhibit K-131

D. Replies to Questions of the Panel

EU

1. Replies to Oral Questions from the Panel dated 9 October 2020
2. Replies to Oral Questions from the Panel dated 16 October 2020
3. Exhibit E-7 to Exhibit E-10

Korea

1. Speaker's note for the First Day of the Hearing dated 8 October 2020
2. Exhibit K-132 to Exhibit K-135

E. Post-Hearing Submission

The Consolidated Hearing Report prepared by the Parties, 6 November 2020

Korea Exhibit 136



Professor Laurence Boisson de Chazournes

Date: 20 January 2021



Professor Jaemin Lee

Date: 20 January 2021



Dr. Jill Murray

Chairperson

Date: 20 January 2021



Mr. Rieu Kim

Secretary to the Panel

Date: 20 January 2021