EU-Korea dispute settlement on labour under article 13.4 of the EU- Korea Free Trade Agreement

Amicus curiae for the attention of the Panel of Experts assessing the Republic of Korea's adherence to the sustainability chapter

International Trade Union Confederation

European Trade Union Confederation

International Federation for Human Rights

Submitting Organisations

The International Trade Union Confederation (ITUC) represents 200 million workers in 163 countries and territories and has 332 national affiliates, including in the EU and in the Republic of Korea. The ITUC's primary mission is the promotion and defence of workers' rights and interests, through international cooperation between trade unions, global campaigning and advocacy within the multilateral institutions. Its main areas of activity include the following: human and labour rights; economic and social policy; equality and non-discrimination; and international solidarity.

The European Trade Union Confederation (ETUC) represents 45 million members from 90 trade union organisations in 38 European countries, plus 10 European Trade Union Federations. The ETUC speaks with a single voice on behalf of European workers to have a stronger say in EU decision-making. The ETUC defends fundamental social values such as solidarity, equality, democracy, social justice and cohesion.

The International Federation for Human Rights (FIDH) is an international human rights NGO federating 184 organisations from 112 countries. Since 1922, FIDH has been defending all civil, political, economic, social and cultural rights as set out in the Universal Declaration of Human Rights. Its actions are founded on three strategic pillars: securing the freedom and capacity to act for human rights defenders, the universality of rights and their effectiveness.

I. Introduction

The submitting organisations welcome the opportunity to make an amicus curiae submission to the Panel of Experts set up at the request of the EU pursuant to Article 13.15 (1) of the EU – Korea Free Trade Agreement (FTA). Under chapter 13 of the agreement, both Parties have committed to effectively implement ILO Conventions that Korea and the Member States of the European Union have ratified in addition to making 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.

While more than eight years have passed since the adoption of the FTA and despite prior consultations under Article 13.4 of the FTA, Korea has failed to fulfill its labour rights obligations under the agreement.

Our submission will focus on the following areas corresponding to those submitted by the EU for the review of the Panel of Expert with respect to the adequacy of measures undertaken by Korea to honour its obligations under multilateral labour standards and agreements within the framework of the EU-Korea FTA.

- *The Government of Korea has failed to make continued and sustained efforts to ratify fundamental ILO Conventions and those Conventions classified as up to date by the ILO.*
- *There has been a continued denial of the right to freedom of association in law and in practice, in particular when it comes to the following aspects: the right of all workers without distinction to join or form trade unions of their own choosing; the right to establish trade unions without the requirement to obtain previous authorisation; and the freedom to set the rules for the internal functioning of trade unions.*
- *Labour law proposals tabled by Korea run counter to the substantial obligations under the fundamental Conventions of the ILO exposing the government's lack of willingness to advance the implementation of these Conventions.*

We would like to record, however, that there are numerous additional legislative provisions and violations of the right to freedom of association, which the ILO Committee on Freedom of Association has requested Korea to rectify over several decades with no avail.

II. Ratification of fundamental and up-to-date ILO Conventions

Article 13.4 (3) of the EU-Korea FTA requires the Parties to make continued and sustained efforts towards ratifying fundamental ILO Conventions as well as the other Conventions that are classified as 'up-to-date' by the ILO.

In addition, Korea is also expected to respect, promote and realise "in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions:"[1]

- freedom of association and the 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.

In addition, respect for the principles of freedom of association, as set out in the relevant Conventions, is a constitutional obligation the Government of Korea has taken by virtue of having become a member of the ILO in 1991. Irrespective of the type of the Convention, article 19.5 of the ILO Constitution also requires member States to take necessary measures in order to bring adopted Conventions before the national legislature for consideration within 18 months of their adoption. The objective of this obligation is to promote the ratification of adopted instruments and measures for their implementation. While there is no obligation on the government to propose ratification, it must provide an opportunity for the legislature to debate and decide on the matter.[2]

While all EU member States are party to all ILO fundamental Conventions, the Republic of Korea has still not ratified the fundamental Conventions let alone Conventions classified as "up-to-date" by the ILO. Overall, Korea has only ratified 22 out of 79 up-to-date Conventions (including Protocols). The last time Korea ratified an ILO Convention was six years ago. The government

[1] 1998 ILO Declaration on Fundamental Principles and Rights at Work, para. 2.d. (https://www.ilo.org/declaration/lang--en/index.htm)
[2] ILO, Memorandum Concerning the Obligation to Submit Conventions and Recommendations to the Competent Authorities, 2005 (https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/questionnaire/wcms_087324.pdf). Valticos, N., & Potobsky, G. (1995). International labour law. Deventer: Kluwer Law and Taxation Publishers.

has not ratified any fundamental Conventions since it made this commitment under the FTA.[3] Four out of the eight fundamental Conventions have not been ratified:

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

According to article 60 (1) of the Constitution of the Republic of Korea, the competent body for the ratification of international treaties is the National Assembly. However, the Government of Korea did not take the initiative to propose the ratification of the Convention No. 87, No. 98 and No. 29 until September 2019. And even after the submission of the initial motion, the possible ratification of these Conventions has neither been debated in the Standing Committee nor the Plenary and is stalling due to the government's lack of willingness to advance on ratification.

In fact, in the follow-up to the 1998 Declaration on Fundamental Principles and Rights at Work, the Government of Korea for years declared that it did not intend to ratify Conventions No.87 and 98 and that instead it was still "studying" the Conventions.[4] It is only in its most recent report that the government indicated a likeliness of ratification.[5]

However, the government has conditioned the ratification of fundamental Conventions on the amendment of its legislation, claiming that compliance with the requirements of these Conventions prior to ratification is necessary. The government has repeatedly used this excuse to delay the ratification misleadingly claiming consultations on labour law reforms constituted a sustained effort to ratify the Conventions. However, taking into account the fact that the ILO supervisory mechanisms issue recommendations precisely to support ratifying Member States to achieve a compliant legislative framework, actually means that the government would be able to take a better-informed decision on necessary labour law reforms subsequent to ratification.

[3] ILO Normlex, Korea country profile (https://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID:103123)
[4] ILO Country Baseline under the ILO Declaration Annual Review, Republic of Korea 2011-2017 (https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_629730.pdf)
[5] ILO GB.335/INS/4, Review of annual reports under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work (https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_673394.pdf)

Indeed, the amendments proposed by the government do not only fall short of the amendments requested by the ILO Committee on Freedom of Association on numerous occasions, they would, if adopted, actually bring the country's legal framework further out of compliance with its obligations.

- The revision bill does not address the restrictive definition of a workers under article 2 (1) and thus self-employed workers remain excluded from the scope of the law (further developed below).
- The definition of an employer under article 2 (2) remains unchanged with the consequence of the exclusion of subcontracted workers from the scope of the law.
- The prohibition of trade union membership for unemployed and dismissed workers as well as jobseekers under article 2 (4) (d) is not lifted (further developed below).
- Amendments to article 5 introduce new restrictions on trade union activities. For example, article 5 (2) establishes that trade union officials may only access workplaces on the condition that the efficient operation of the relevant undertaking concerned is not impaired. Trade union officials not employed by the workplace (e.g. union officials from federations or confederations) must notify the purpose, time, specific place and number of persons according to a presidential decree. While the ILO supervisory bodies have pointed at the need to respect the functioning of the establishment, the specific arrangements to that effect should be decided by the union and management at enterprise level. The requirements set out by the law are excessive for the intended purpose and may allow for employer interference in trade union activities. For example, the purpose of the meeting should be at the full discretion of the trade union and must not become subject to management approval.
- Article 10 and 12 provide public authorities with discretionary powers in the registration process for trade unions remain unchanged.
- Article 17 and 23 remain unchanged and continue to bar non-union members and dismissed workers from standing in union elections.
- Amendments to Article 32 would extend the maximum period of validity of collective agreements from 2 years to 3 years.
- Amendments to Article 42.2 would introduce a blanket prohibition of workplace occupations.

Convention No.105 was not part of the motion formulated by the government in September 2019. It remains the government's position that it will not ratify the Convention due to inconsistencies between the Convention and national legislation with regard to its criminal punishment system. This particularly concerns two provisions the government wishes to maintain. However, both provisions are not only out of line with Convention No.105 but also the International Covenant on Civil and Political Rights (ICCPR) and Convention No.87.

(a) The National Security Law stipulates a prison sentence involving prison labour for expressing political opinions favourable towards North Korea. In its 2015 observations on the fourth periodic report of the Republic of Korea, the UN Human Rights Committee expressed concern that article 7 of the Act could have a chilling effect on public dialogue and was reported to have unnecessarily and disproportionately interfered with freedom of opinion and expression in a number of cases. The Committee also noted with concern that the Act is increasingly used for censorship purposes in breach of the ICCPR. It requested the abrogation of the provision.[6]

(b) Under Article 314 of the Criminal Code, trade unions and their officers may be fined or imprisoned for "obstruction of business". The use of the obstruction of business law for the criminalisation of peaceful trade union activity has been repeatedly criticised by the ILO Committee on Freedom of Association as exposing workers to the risk of arrest and detention in serious violations of the right to freedom of association. The Committee therefore requested the government to review the provision.

These provisions are therefore not only inconsistent with Convention No.105 but also Convention No.87 and the ICCPR. The government's insistence on upholding these provisions is therefore a clear breach of the FTA – as is the delaying of the ratification of Convention No.105 itself.

[6] Human Rights Committee, Concluding observations on the fourth periodic report of the Republic of Korea CCPR/C/KOR/CO/4, 3 December 2015 (http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhshdNp32UdW56DA%2fSBtN4MHy9iuSMtUiNSvrbV9%2bJuD7JMLvy0Ju%2fXKLNHlCvzsdHK1rJtIsosm9tfQBiOl2kvBgjNYQMFXBklPP6Cl8vcuw0)

III. Failure to amend the trade union act in compliance with international labour standards

The Trade Union and Labour Relations Adjustment Act (Act No. 5310) as amended (TULRAA) is not in compliance with Convention No. 87 and Convention No.98.

(1) Categories of workers excluded from the right to freedom of association

The definition of "worker" under the TULRAA excludes categories of workers from the scope of the right to freedom of association. A fundamental tenet of Convention No.87 is that all workers have the right to freely associate. Article 2 of Convention No.87 stipulates that "workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation." The Convention only permits narrow exceptions with respect to the armed forces and the police under its article 9 (1), which stipulates that "the extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations."

The right to freedom of association in Korea is regulated under the TULRAA. Article 5 states that "workers are free to organise a trade union or to join, except for public servants and teachers who are subject to other enactments." The term "worker" is defined as a "person who lives on wages, salary, or other equivalent form of income earned in pursuit of any type of job" under article 2 (1). This definition does not include self-employed, dismissed and unemployed persons who therefore do not enjoy the right to freedom of association. It is estimated that at least 2.3 million workers in Korea are affected by this exclusion.

In its examination of Case 2602 against the Republic of Korea, the ILO Committee on Freedom of Association determined that by virtue of the principles of freedom of association, all workers- with the sole exception of the armed forces and the police- should have the right to establish and join organisations of their own choosing. The Committee stated that the criterion for determining the persons covered by that right, therefore, was not based on the existence of an employment relationship, which might be non-existent, for example in the case of agricultural, self-employed workers in general or those who practice liberal professions, who should nevertheless enjoy the right to organise.

Despite these clear recommendations from the ILO, the government did not seek to amend article 2.1 of the TULRAA in order to bring it into compliance with Convention No.87. The government instead argues that certain recent court judgments have interpreted the provision more widely.

However, judicial decisions on this question have been inconsistent. For example, in a case concerning truck drivers, the Supreme Court ruled that due to their employment status as "self-employed", the drivers did not enjoy the right to freedom of association.

In a more recent case concerning a group of home visiting tutors working for Jaeneung Education Institute, the Supreme Court did rule in favour of the workers' quest to exercise their right to freedom of association. However, this was on the basis of a test that the court developed to determine whether the home visiting tutors were indeed misclassified as self-employed persons while they were factually dependent workers. Finding that the tutors were not genuinely self-employed, the Supreme Court decided that they did have the right to freedom of association.[7]

However, there has not been a court decision that confirmed the right of self-employed persons to form trade unions. The judicial decision concerning the home visiting tutors working for Jaeneung Education Institute has had no bearing on the recognition of the right to freely associate for self-employed persons.

Indeed, the Ministry of Labour has not change its policies and procedures with regard to the right to freedom of association of self-employed persons. When another group of home visiting tutors, working for the company Gyowon Gumon, requested to form a trade union, the Ministry declined this request based on the decision of the Seoul Regional Labour Relation Commission's determination that the home visiting tutors could not be considered as dependent workers. This decision was then also upheld by the National Labour Relation Commission. Clearly, Korea continues to exclude categories of workers from the right to freedom of association in its legislation and practices.

(2) Decertification of trade unions

The decertification of trade unions in Korea on the basis of their bylaws and membership breaches article 3 of Convention No.87, which guarantees the right of workers and employers to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

Article 2 (4) (d) of the TULRAA states 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. Dismissed and unemployed workers as well as jobseekers are therefore excluded from the right to join a trade union. Trade unions allowing these categories of workers into their

[7] http://www.law.go.kr/precInfoP.do?mode=0&precSeq=84477

membership, as guaranteed under ILO standards, may be dissolved depriving their entire membership of representation.

Since 1997, the ILO has been requesting Korea to take the necessary measures to amend or repeal this provision in the TULRAA prohibiting dismissed workers from being union members urging the government to lift restrictions on trade union membership. The government has not addressed this longstanding infringement and instead continued to vigorously apply it in practice.

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.

The KTU sought a temporary injunction to suspend the government's decision to cancel its certification. The injunction was granted by the Seoul Administrative Court on 13 November 2013; however, when the case was heard on merits, the Seoul Administrative Court dismissed the union's case and upheld the decision to cancel the certification on 19 June 2014. Two hours after the decision was rendered, the Ministry of Labour and Employment announced a series of enforcement measures, including: the cancellation for leave of absence of 72 full-time union officials, which were ordered to be reinstated to work; a request to the KTU to move out of the offices provided to the union or to return the subsidies for the offices; the suspension of the ongoing collective bargaining negotiation with the KTU and termination of existing collective bargaining agreements; the suspension of the check-off of union dues; and the discreditation of members from the KTU in various committees established under the collective bargaining agreements.

On 19 June 2014, the Seoul Administrative Court dismissed the KTU's request of revocation of the decertification decision. On 28 May 2015, the Constitutional Court affirmed the constitutionality of section 2 of the Act on the Establishment, Operation, Etc. of Teachers' Unions. Based on this decision, the Seoul High Court upheld the decertification of the KTU on 21 January 2016.

The ILO Committee on Freedom of Association, in relation to this case, stated that a provision depriving dismissed workers of the right to union membership was incompatible with the principles of freedom of association since it deprived the persons concerned of joining the organisation of their choice. Such a provision entailed 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 organisation.

This principle applied to all workers without distinction, including public servants and teachers. The Committee determined that the registration conditions imposed on the KTU to amend their by-laws and exclude the membership of dismissed workers constituted an infringement of the right of those organisations to draw up their constitutions and rules.[8]

(3) Election of trade union officials

Korea does not allow workers to elect their representatives in full freedom as required under article 3 of Convention No.87. It is a well-established principle that 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.

However, the TULRAA limits the right of Korean workers to elect their representatives by stipulating that trade union officials may only be elected from among the members of the trade union (article 23 (1)). Given that numerous categories of workers are excluded from the right to join trade unions and may lose their trade union membership on dismissal, this is a wide-reaching disqualification of workers from the eligibility for election. In numerous instances, including in a case against Korea, the Committee on Freedom of Association stated that, 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. The ILO has therefore called on the government to amend or remove article 23 (1) of the TULRAA.[9]

(4) Discretionary refusal of union registration

Korean legislation allows for the denial to certify a trade union on the basis of its bylaws (Article 12 (1) and (3) TULRAA). Read together with the limitations imposed on the bylaws of trade unions concerning the eligibility of workers falling outside of the scope of Article 2 (4), this provision implies the registration of trade union is subject to previous authorisation on the basis of the substantive provisions of its bylaws.

[8] ILO CFA, Case 1865 against Korea (https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3329802)
[9] ILO CFA Cases 1865 and 2829

The ILO has established that the principle of freedom of association would remain a dead letter if workers and employers were required to obtain any kind of previous authorisation to enable them to establish an organisation. Such authorisation could concern the formation of the trade union itself, the need to obtain discretionary approval of the constitution or rules of the organisation, or, again, authorisation for taking steps prior to the establishment of the organisation. In the case of Korea, public authorities clearly have the discretion to disapprove the application of registration on the basis of the rules of the organisation. The Ministry of Labour has widely used this discretion in order to deny registration in numerous instances in the past (including the migrant workers' union, the young persons' union, the rent-a-drivers' union, the construction machine workers' union). The right to official recognition through legal registration is an essential facet of the right to organise since that is the first step that trade unions must take in order to be able to function efficiently and represent their members adequately.

IV. Conclusions

The submitting organisations therefore call on the Panel of Experts to determine that the Government of Korea has breached Article 13.4.3 of EU-Korea FTA. Korea does not respect, promote or realise the fundamental rights in its laws and practices and has failed to 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. Korea should be requested to take urgent steps to ratify and effectively implement core ILO Conventions No. 29, 87, 98 and 105, in line with their substantive provisions and relevant recommendations of the ILO supervisory bodies and take steps to ratify as soon as possible the remaining up-to-date ILO Conventions. The national legislation, and in particular the TULRAA, should be amended to ensure full compliance with the recommendations of the ILO Committee on Freedom of Association. These amendments should include but not be limited to articles 2 (1), 2 (4) (d), 23 (1) and 10 and 12 (1) and (3) of the TULRAA. In addition, we call on the Panel of Experts to warn the Government of Korea that the adoption of labour law amendments, which are inconsistent with fundamental Conventions of the ILO, would constitute a further breach of the EU-Korea FTA.