International Labor Rights Case Law_Template for Commentaries

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Decision-making body:	ILO Committee on Freedom of Association
Date of Decision:	March 2018
Case/Decision name:	Complaint against the Government of South Korea presented by the International Union of Food Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers Association (IUF), Case No. 3262, Definitive Report – Report No. 384
Primary legal issues:	Issues surrounding minority unions and the single-channel enterprise-level collective bargaining mechanism; anti-union discrimination.
Applicable legal provisions:	Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). Trade Union and Labor Relations Adjustment Act (TULRAA) https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/46398/98328/F1771693212/KOR46398%202014.pdf
Hyperlink to case:	https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3949814
Related cases, if any:	ILO Committee on the Freedom of Association, Case No. 1865 (Korea, Republic of), Effect given to the recommendations of the committee and the Governing Body – Report No. 363 (2012) https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3057041 ILO Committee on the Freedom of Association, Case No. 2927 (Guatemala), Definitive Report – Report No. 381 (2017) https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3327341 ILO Committee on the Freedom of Association, Case No. 3186 (South Africa), Definitive Report – Report No. 381 (2017) https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3327416 ILO Committee on the Freedom of Association, Case No. 3178 (Venezuela, Bolivarian Republic of), Definitive Report – Report No. 381 (2017) https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3327407 ILO Committee on the Freedom of Association, Case No. 2911 (Peru), Definitive Report – Report No. 367 (2013) https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3112098 ILO Committee on the Freedom of Association, Case No. 3109 (Switzerland), Definitive Report – Report No. 380 (2016) https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3302032

Paragraph/page numbers to be	289, 302, 319-328

extracted from decision/case:	

Summary of decision: facts/arguments of the parties/ final decision/ motivation (approx. 250 words; opinions about the judgment must be avoided):	The International Union of Food Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association (IUF) filed a complaint against the government of the Republic of Korea at the Committee of the Freedom of Association (CFA) of the International Labour Organization (ILO) regarding multiple enterprise-led unions and the prevention of the discrimination of minority unions. The IUF alleges that amendments to the Trade Union and Labour Relations Adjustment Act granted employers with the powers to discriminate against minority unions and their members, and that no enforcement mechanisms guarantee effective representation and bargaining rights. The IUF and its affiliate, the Sejong Hotel Labor Union (SHLU) also alleges anti-union actions against SHLU, the termination of ongoing negotiations between the company and the minority union, and unfair dismissal of its members. The government disputes the facts presented by IUF and emphasizes its efforts to respect freedom of association and collective bargaining rights. The CFA notes that the actions of the Republic of Korea are in conformity with the principles of freedom of association and collective bargaining. It requests the government to examine preventative steps to ensure that minority trade unions are permitted to perform their activities.
Title of Commentary:	Freedom of association and collective bargaining in minority trade unions

Body of Commentary (max 1,700 words):

Introduction

In 2010, the Republic of Korea passed an amendment to its Trade Union and Labour Relations Adjustment Act (TULRAA). The amendment, enacted in 2011, introduced a single collective bargaining channel in workplaces consisting of multiple trade union partners.[1] The case at hand was brought to the ILO Committee of Freedom of Association (the Committee) by the International Union of Food Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers Association (IUF), which alleges that the implementation of the revised act in 2011 resulted in various discriminatory actions by the employer, Sejong Hotel, against a minority union, the Sejong Hotel Labor Union (SHLU). The Committee did not determine that the right to freedom of association and collective bargaining was violated but recommends that the government look toward preventive measures against adverse effects of the revised TULRAA.

Article 29 of the amended TULRAA stipulates that "the bargaining representative trade union … shall have the authority to conduct bargaining and conclude a collective agreement with the employer on behalf of all trade unions or union members that demand bargaining."[2] According to Article 29-2, the procedure for determining a bargaining representative union, if two or more trade unions are in the business or workplace, lies with the trade unions, with the consent of the employer.[3] In the absence of autonomous determination among the trade unions or employer consent, the majority union becomes

[1] Trade Union and Labor Relations Adjustment Act, Act no. 5310 (1997), Article 29 (Authority of Bargaining and Making Agreements)
[2] TULRAA, Article 29, para 1. Enacted through Act no. 9930 on 1 January 1 2010, this amendment came into effect in July 2011.
[3] TULRAA, Article 29-2, para 2.

the bargaining representative union.[4] If these procedures fail, all unions may decide to organize a "joint bargaining representative team." If this effort fails, the Labor Relations Commission may determine such a representative.[5]

This case is relevant to debates on how the Committee addresses the status of minority trade unions. In some cases, allegations concern discrimination-related allegations when company-friendly or government-friendly minority unions are considered bargaining agents over majority elected unions.[6] In such cases, the Committee has recommended that the will of the most representative trade union, determined by objective assessment, be respected.[7] Some cases refer to alleged acts of violence and harassment against members of majority trade unions. [8] Others regard the status of minority union members either the members' coverage by collective bargaining agreements[9] or the legitimacy of the minority union representation, as collective bargaining agents.[10]

The case at hand is important in relation how the Committee addresses the dual goal of maintaining trade union pluralism while establishing an effective system for collective bargaining.[11] Debates in the literature have considered tensions between the pursuit of trade union pluralism under a system in which the "most representative" union is able to extend its collective agreements within the same sector or from one branch of an industry to another.[12] The case at hand reflects how the Committee responds to varied governmental rules and practices around the world to align it with international labor standards.

Key Issues

The Committee has observed previously that the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) does not explicitly express support for trade union unity or for trade union pluralism. [13] However, the Convention does require trade union diversity to remain possible, but not mandatory.[14] Discussions on the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) includes a distinction between unions based on their representativeness. The Committee does not see the mere distinction as a matter for criticism.[15] The distinction, however, should not grant privileges to the most representative organizations beyond priority in representation for collective bargaining, and minority unions should not be deprived of their "essential means for defending the occupational interests of their members, for organizing their administration and activities and formulating their programmes, as provided for in Convention No. 87."[16]

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[4] Ibid, para 3.
[5] Ibid, para. 4.
[6] See, among others, ILO CFA, Case No. 2927 (Guatemala), Definitive Report – Report No. 381 (2017); ILO CFA, Case No. 3186 (South Africa), Definitive Report – Report No. 381 (2017); ILO CFA, Case No. 3178 (Venezuela, Bolivarian Republic of), Definitive Report – Report No. 381 (2017).
[7] ILO CFA, Case No. 3178 (Venezuela, Bolivarian Republic of), Definitive Report – Report No. 381 (2017).
[8] For example, cited in para 632, Case No. 3178 (Venezuela, Bolivarian Republic of); para 88, Case No. 3186 (South Africa).
[9] ILO CFA, Case No. 2911 (Peru), Definitive Report – Report No. 367 (2013).
[10] For example, the Committee decided to dismiss one case because the minority union in question did not meet the criteria of the Swiss Federal Court. ILOCFA, Case No. 3109 (Switzerland), Definitive Report – Report No. 380 (2016).
[11] Digest of decisions and principles of the Freedom of Association Committee, 6th (revised) edition, 2018, paras. 1387–93.
[12] M. Forde, "Trade Union Pluralism and Labour Law in France," *International and Comparative Law Quarterly* 33, no. 1 (January 1984): 134-57; Adrian Goldin, "A Supreme Court Challenge to Argentina's Trade Union Model," *International Labour Review* 148, no. 1-2 (2009): 163–68.
[13] Digest of decisions and principles, paras. 478, 479, 480, 481, 482, 483.
[14] G. Von Potobsky, "Protection of Trade Union Rights: Twenty Years' Work by the Committee on Freedom of Association," *International Labour Review* 105, no. 1 (January 1972): 73.
[15] Digest of decisions and principles, para 525.
[16] Ibid.

The Committee acknowledges that the amended system of bargaining rights in TULRAA, which grants exclusive collective bargaining rights to a representative union, is compatible with the principles of freedom of association.[17] Systems that grant exclusive bargaining rights to the most representative union and those that allow for multiple collective agreements to be concluded by a number of trade unions are both also compatible with the principles of freedom of association.[18] The Committee refers to its 2012 comment regarding TULRAA, in which it welcomed "the long-awaited introduction of trade union pluralism at the enterprise level" and recognized "that consultations have taken place with the social partners for over a decade on the type of system to be introduced."[19] The statement emphasized that minority trade unions without the right to negotiate collectively should be permitted to perform their activities and represent individual workers during grievances.[20]

The Committee remarks on the complainant's allegations, that the hotel management had promoted the majority union, the Sejong United Union (SUU), and pressured SHLU members—through transfers, pay cuts, and dismissals—to change their union affiliation. The complainant claims that this has led to the decline of union membership and the management's refusal to bargain collectively with the SHLU.[21] According to the Committee of Experts on the Application of Conventions and Recommendations (CEACR), anti-union discrimination based on minority union status is contradictory to the principles of freedom of association. CEACR holds that minority unions should have the right to make representation on behalf of members and to represent them in cases of individual grievances.[22] The Committee notes that although the government has not commented on these allegations, the case has been rejected by the Court of the Republic of Korea and the Labour Relations Commission. In the absence of additional information, the Committee will not pursue the matter.[23]

The Committee acknowledges the allegations of unfair labor practices and notes that harassment and intimidation might both discourage workers to join organizations of their choosing and violate the right to organize.[24] However, the Committee does not consider that it has enough information to ascertain that whether trade union rights of SHUL members have been violated.[25] It also notes that the government is aware of difficulties that a single bargaining channel system might introduce, and that the government should take measures to prevent risks to the freedom of association and the right to bargain collectively. This is in line with the Committee's previous comments requesting the government of Korea to legalize trade union pluralism at the enterprise level to ensure that workers have the right to establish and join the organization of their choosing.[26] Thus the Committee encourages the government to examine any adverse effects to freedom of association that might result from the current bargaining system[27]

Implications

The Committee has made numerous comments to the Republic of Korea on the revisions to the TULRAA, specifically on the issue of trade union pluralism in enterprise-level bargaining.[28] In Case 1865, the Korean Confederation of Trade Unions (KCTU) and the Korean Government Employees'

[17] ILO CFA, Case No. 3262 (Korea, Republic of), Definitive Report – Report No.384. (2017), para. 321.
[18] Digest, op. cit., para. 1351
[19] ILO CFA, Case No. 1865 (Korea, Republic of), Effect given to the recommendations of the committee and the Governing Body – Report No. 363 (2012), para. 115.
[20] Ibid.
[21] Ibid., para. 322.
[22] Digest of decisions and principles, para. 1387
[23] ILO CFA, Case No. 3262 (Korea, Republic of), Definitive Report – Report No. 384. (2017). para. 323.
[24] Ibid., para. 323; Digest, op. cit., para. 1098.
[25] ILO CFA, Case No. 3262 (Korea, Republic of), para. 327.
[26] ILO CFA, Case No. 1865 (Korea, Republic of), para. 115.
[27] ILO CFA, Case No. 3262 (Korea, Republic of), para. 328.
[28] ILO CFA, Case No.1865 (Korea, Republic of).

Union (KGEU) alleged that "the Government has allowed union pluralism under the pressure from the international community, but has done so in a way that minority unions in practice will not be able to exercise their fundamental labour rights."[29] In light of the long-standing discussions of the TULRAA amendments, the Committee emphasizes that the amendments are consistent with ILO Conventions 87 and 98. At the same time, it is concerned over possible discriminatory effects of a single bargaining channel introduced under the amended law and recommends that the government take preventative measures. The Committee has previously noted the concerns raised by trade unions on the right of minority unions.[30] In response, the Committee has recalled that exclusive bargaining rights for the "most representative" union is compatible with the principles of freedom of association, recognizing that minority unions should be allowed to perform their activities without discrimination.[31] This view is fully reflected in the case at hand.

Compared with cases that have focused on the definition of representativeness of minority unions as a bargaining agent,[32] the present case indicates the Committee's recognition that single bargaining channels may introduce discrimination against minority unions. The Committee report reflects debates on trade union pluralism and a single bargaining channel that have been raised in different national bargaining systems, such as in France[33] and Argentina,[34] or even at the supra-national level, in Europe.[35] This case contributes to the literature by providing a case study in the Republic of Korea.

[29] Ibid., para. 65.
[30] Ibid., para. 112.
[31] Ibid., para. 115.
[32] See, among others, ILO CFA, Case No. 2927 (Guatemala); ILO CFA, Case No. 3186 (South Africa); ILO CFA, Case No. 3178 (Venezuela, Bolivarian Republic of).
[33] Forde, "Trade Union Pluralism."
[34] Goldin, "Supreme Court Challenge."
[35] Wolfgang Streeck and Philippe Schmitter, "From National Corporatism to Transnational Pluralism: Organized Interests in the Single European Market," *Politics and Society* 19, no. 2 (1991): 133–64.