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FREE TRADE AGREEMENTS BETWEEN THE EU AND NEW ZEALAND AND THE EU AND AUSTRALIA: AN ASSESSMENT OF LABOUR LAW PROVISIONS[1]

Abstract. In the first main part of the article, the author researches labour provisions included in the EU–New Zealand free trade agreement (FTA) of 2022. She explains why this FTA shall be perceived as a new, fifth generation FTA and what are the key changes the document offers compared to the fourth generation FTAs, e.g. the EU–Republic of Korea FTA. In her analysis, the author focuses on the possibility of imposing sanctions in the event of a serious violation of fundamental labour rights, as well as on "trade and gender equality" issues. She also highlights areas that need to be improved in future agreements concluded by the EU. In the second main part of the article, the author refers to the EU–Australia FTA, which is still under negotiation at the time of writing. She investigates the main factors influencing the bargaining process and pays attention to some of the most contentious issues between the EU and Australia.

Keywords: the EU–New Zealand free trade agreement, the EU–Australia free trade agreement, labour provisions, sanctions, negotiations

UMOWY O WOLNYM HANDLU POMIĘDZY UE A NOWĄ ZELANDIĄ I UE A AUSTRALIĄ: OCENA PRZEPISÓW Z ZAKRESU PRAWA PRACY

Streszczenie. W pierwszej, zasadniczej części artykułu autorka omawia przepisy z zakresu prawa pracy wprowadzone do umowy o wolnym handlu zawartej pomiędzy UE a Nową Zelandią w 2022 r. Wyjaśnia, dlaczego tę umowę należy postrzegać jako nową umowę handlową piątej generacji oraz jakie są kluczowe zmiany w stosunku do porozumień czwartej generacji, m.in. umowy o wolnym handlu między UE a Republiką Korei. W swojej analizie autorka skupia się na możliwości nałożenia sankcji w przypadku poważnego naruszenia podstawowych praw pracowniczych, a także na zagadnieniach „handlu i równości płci". Zwraca także uwagę na obszary, które wymagają poprawy w przyszłych umowach zawieranych przez UE. W drugiej, zasadniczej części artykułu

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autorka nawiązuje do umowy handlowej pomiędzy UE a Australią, która w chwili pisania tekstu jest jeszcze w fazie negocjacji. Bada główne czynniki wpływające na proces negocjacji i zwraca uwagę na niektóre z najbardziej spornych kwestii pomiędzy UE a Australią.

Słowa kluczowe: umowa o wolnym handlu pomiędzy UE i Nową Zelandią, umowa o wolnym handlu pomiędzy UE i Australią, przepisy z zakresu prawa pracy, sankcje, negocjacje

1. INTRODUCTION

The general aim of this article is to evaluate provisions on labour law included in the EU–New Zealand free trade agreement (FTA), as well as the (still-under-negotiation at the time of writing, namely on 1st August, 2023) EU–Australia FTA. On 30th June, 2022, the EU and New Zealand concluded their negotiations on a FTA. On 17th February, 2023, the Commission sent the document to Council for signature, on 9th July, 2023, it was signed by both partners and will be able to enter into force after approval by the European Parliament. The author of this study puts forward the thesis that the EU–New Zealand FTA – often perceived as a symbol of the continuation of the EU's neoliberal trading agenda (Kelly, Doidge 2023, 25) – is a groundbreaking deal that introduces significant novelties in the field of improving the effectiveness of labour rights and shall be treated as a fifth generation FTA (for the four earlier generations, see: Tyc 2021, 158–163). This article explains what are the key changes the new document offers compared to the fourth generation FTAs. Moreover, it identifies areas that still need to be improved in future agreements.

At the same time, we are currently waiting for a FTA between the EU and Australia. So far, the parties have held fifteen rounds of negotiations. The author of the article poses questions on elements influencing the bargaining process, given that "[h]istorically, the path of the Australia–EU economic relationship has not run smoothly" (Elijah, Kenyon, Hussey, van der Eng, 2017, 2 et seq.) She argues that the chapter on Trade and Sustainable Development (TSD) is one of the most contentious issues between the EU and Australia,[2] since both parties present a different approach towards including labour rights protection in their FTAs.

2. THE EU–NEW ZEALAND FREE TRADE AGREEMENT

It has been a long and bumpy road from the EU's promotional approach to a sanctions-based approach towards labour rights violations. The former – typical of the EU's 4th-generation FTAs – means that labour provisions in FTAs "do not link compliance to economic consequences but provide a framework for dialogue, cooperation, and/or monitoring" (International Labour Organization

[2] Along with topics such as geographical indications or agriculture.

2013, 1). On the contrary, the latter approach provides for the possibility of imposing sanctions in the event of a serious violation of fundamental labour rights. The most important change in the point of view of the EU took place, among other things, against the backdrop of the EU–South Korea FTA (the EU's 4th generation FTA) and South Korea's failure to ratify four fundamental ILO conventions. A dispute between both parties resulted in the establishment of a Panel of Experts and its disappointing report of 20th January, 2021. The EU understood that "a greater effort to ensure the effective implementation and enforcement of sustainable development chapters in EU trade agreements" is needed and that "the possibility of sanctions for non-compliance" should be taken into consideration (e.g. the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions entitled "Trade Policy Review – An Open, Sustainable and Assertive Trade Policy" of 18th February, 2021).

The EU–New Zealand FTA has commenced "… a new generation of trade deal[s]" – said the executive Vice-President and Commissioner for Trade, Valdis Dombrovskis.[3] One of the key elements that distinguishes it from the EU's 4th generation FTAs is chapter 26 entitled "Dispute Settlement", which provides for the possibility of imposing sanctions in the event of serious violations of fundamental labour rights. According to its provisions, there are several phases that can lead to a resolution of the dispute, including consultations between the parties and the establishment of a panel. The latter body shall deliver its final report to the parties within 120 days (and under no circumstances later than 150 days) after the date of the establishment of the panel. The party complained against shall take any measure necessary to comply promptly with the findings and recommendations of the final report in order to bring itself in compliance with the covered provisions. It shall, no later than 30 days after the delivery of the final report, submit a notification to the complaining party[4] of the measures which it has taken or which it envisages to take to comply. The Trade and Sustainable Development Committee shall monitor the implementation of the compliance measures. The Domestic Advisory Groups may submit observations to the Trade and Sustainable Development Committee in this regard.

If immediate compliance is not possible, the party complained against shall submit a notification to the complaining party of the length of the reasonable period of time it will require for such compliance. In the event of difficulties, the original panel may determine the length of the reasonable period of time.

The EU–New Zealand FTA establishes so-called temporary remedies and specifies situations in which the party complained against shall, if requested by the complaining party, enter into consultations with a view to agreeing a mutually

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[3] https://ec.europa.eu/commission/presscorner/detail/en/IP_22_4158 (accessed: 1.08.2023).

[4] As well as inform its Domestic Advisory Groups and the contact point of the other party.

acceptable compensation. Importantly, if the complaining party chooses not to request consultations in relation to compensation, or the parties do not agree on compensation, the complaining party may deliver a written notification to the party complained against that it intends to suspend the application of obligations under the covered provisions. Such notification shall specify the level of intended suspension of obligations. The party complained against shall submit a notification to the complaining party of any measure it has taken to comply following the suspension of obligations or following the application of temporary compensation. Both the suspension of obligations and the compensation have been projected as temporary.

The EU–New Zealand FTA is the first FTA to incorporate a sanctions-based approach towards labour rights violations[5] announced in the above-mentioned Communication from the Commission of 18th February, 2021, and subsequently repeated in the Communication on "decent work worldwide for a global just transition and a sustainable recovery" (23rd February, 2022) and the Communication entitled "The power of trade partnerships: together for green and just economic growth" (22nd June, 2022). This is a good step towards improving the effectiveness of labour rights.

Another novelty compared to earlier generations of FTAs is Article 19.4 on "Trade and gender equality", included in Chapter 19 entitled "Trade and sustainable development". The EU and New Zealand have already highlighted in the preamble of their FTA "an effort to eliminate all forms of gender-based discrimination", and have stated gender equality to be one of the areas of their cooperation on trade-related aspects of labour measures and policies (Article 19.3 on "Multilateral labour standards and agreements"). However, Article 19.4 is more detailed in this regard. It states, *inter alia*, that the parties recognise the need to advance gender equality and women's economic empowerment and to promote a gender perspective in the Parties' trade and investment relationship. Each party shall also effectively implement its obligations under the United Nations conventions to which it is a party that address gender equality or women's rights. Moreover, each party shall respect, promote, and realise the principles concerning the fundamental rights at work which are the subject of the fundamental conventions of the ILO, including those regarding the effective implementation of the ILO conventions related to gender equality and the elimination of discrimination in respect of employment and occupation.

So far as the two latter provisions are concerned, in my opinion more emphasis should be placed on the Conventions which have already been ratified. Even if New Zealand ratified Convention no. 100 (Equal Remuneration) and no. 111 (Discrimination in Respect of Employment and Occupation), this absolutely does

[5] Except for the EU–United Kingdom Trade and Cooperation Agreement of 2021, which, however, is of a slightly different nature.

not mean that discrimination has been eliminated in this country. Unfortunately, the same remark applies to the EU countries (see more: Carby-Hall, Góral, Tyc 2023, 2024, both books).

An even bigger problem is the soft language used in the EU–New Zealand FTA in relation to the need for the ratification of the ILO's fundamental conventions. According to Article 19.3.5, "Each Party shall make continued and sustained efforts to ratify the fundamental conventions of the ILO if they have not yet done so". The case of South Korea has already shown that "making continued and sustained efforts" means nothing.

3. THE EU–AUSTRALIA FREE TRADE AGREEMENT

On 22nd May, 2018, the Council of the EU authorised opening negotiations for a FTA between the EU and Australia, and in June 2018, the partners launched rounds of dialogue (the first took place in Brussels, 2nd–6th July, 2018).[6] The EU initial proposal tabled for discussion with Australia was ambitious and, similarly to the EU–New Zealand FTA, embodied the idea of sanctions in case of non-compliance. However, it turns out that negotiations with Australia are more difficult than with New Zealand. According to Margherita Matera, Laura Allison-Reumann, and Philomena Murray (Matera, Allison-Reumann, Murray 2022, 248, 251, 263), this is mainly due to the fact that Australia focuses on its commercial interests, while the EU adds values in its new FTA's templates. In fact, as signalled above, there has been a lot of domestic pressure in Europe to strengthen the enforcement of TDS chapters.[7] This is not the case in Australia and it seems that contentions on this issue are the most difficult to overcome.

Australia's approach to TSD provisions has always been cautious. Initially, its FTAs did not cover these issues at all. For the first time, Australia included a chapter on "Labour" in its FTA with the United States, which entered into force in 2005. The agreement only embodied a "cooperative" approach (Velut et al. 2022, 14). According to Article 18.5 (Labour Cooperation), "the Parties shall cooperate on labour matters of mutual interest and explore ways to further advance labour standards on a bilateral, regional, and multilateral basis. To that end, the Parties hereby establish a consultative mechanism for such cooperation". Labour consultations were regulated in Article 18.6 and no other enforcement mechanisms were provided. Similar soft rhetoric was also used in subsequent FTAs, including the Korea–Australia FTA of 2014, according to which: "Neither

[6] https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and--regions/australia/eu-australia-agreement_en (accessed: 1.08.2023).

[7] Enforcing TSD chapters in FTAs, including the sanctions-based mechanism, appear even among 49 proposals formulated in the final report of the Conference on the Future of Europe (Conference on the Future of Europe 2022, 63).

Party shall have recourse to dispute settlement under this Agreement for any matter arising under this Chapter [Labour]" (Article 17.6: Dispute Settlement), as well as the Peru–Australia FTA of 2020, which was limited to designating a contact point for labour matters by each party (Article 18.6) and cooperation on labour issues (Article 18.7).

Margherita Matera, Laura Allison-Reumann, and Philomena Murray also consider "a fraught history" of the EU–Australia trade relationship, including diplomatic quarrels referring to the EU's Common Agricultural Policy, as one of the crucial factors influencing the negotiations (Elijah, Kenyon, Hussey, van der Eng 2017, 2). However, the authors are able to acknowledge the positive aspect of such tensions: "The historical nature of the relationship and conflict provide a context to current negotiations. Historical memory helps to explain certain characteristics of current relations, including partner selection and preference formation within negotiations, and the potential for coordination, cooperation, conflict and competition" (Matera, Allison-Reumann, Murray 2022, 249).

Furthermore, the authors identify some other important elements influencing the negotiations between the EU and Australia. They emphasise "power dynamics" and the parties' other FTAs. The former factor would at first glance suggest a power asymmetry, given the discrepancies in population and GDP. However, certain circumstances reduce these disparities in bargaining power. One of them is Brexit, which decreases the EU's negotiating potential, and the other is related to the large number of FTAs concluded by Australia, especially with its Asian partners (Matera, Allison-Reumann, Murray 2022, 249–251). In fact, Andrew D. Mitchell, Elizabeth Sheargold, and Tania Voon present detailed data and describe Australia as "extremely active" in concluding FTAs (Mitchell, Sheargold, Voon 2017, 335). This circumstance is working in its favour and at the same time it shall contribute to more effective negotiations with the EU. The same effect is obviously produced by the EU's need to cut its dependency on some countries. As rightly pointed out in BNN Bloomberg News, "Europe works to expand its trade relations to reduce dependencies from certain countries including China and cement alliances amid Russia's ongoing invasion of Ukraine" (Valero, Nardelli, Pronina, Westcott 2023). However, we will see if the positive factors prevail and overcome the obstacles to reaching a consensus on an ambitious TSD chapter.

4. CONCLUSION

The purpose of this paper was to explore labour provisions included in the EU–New Zealand FTA and to outline Australia's approach to labour provisions in its FTAs, especially in the context of a deal currently negotiated with the EU.

The findings provide evidence supporting the hypothesis of the EU–New Zealand FTA being a groundbreaking deal and a new, fifth generation FTA. It is

mainly due to its sanctions-based approach towards labour rights violations, as well as provisions aiming at eliminating all forms of gender-based discrimination. Such solutions shall meet with acceptance, but there are still some problems to be ironed out in future agreements. The EU–New Zealand FTA still uses only soft, promotional formulations, e.g. "Each Party shall make continued and sustained efforts to ratify the fundamental ILO Conventions if they have not yet done so" (Article 19.3.5). This language should be stronger considering that New Zealand has not ratified Convention no. 87 (Freedom of Association and Protection of the Right to Organise), Convention no. 138 (Minimum Age), and Convention No. 187 (Promotional Framework for Occupational Safety and Health Convention). A greater emphasis should be also put on the Conventions which have already been ratified.

This article highlights the main factors that influence the negotiation process between Australia and the EU, including a history of their relations, "power dynamics", the other FTAs of the parties, as well as the need for the EU to reduce its dependency on some countries. Furthermore, the findings in this article show that Australia has always been wary of labour provisions in trade agreements, initially excluding them altogether. However, the first EU proposal tabled for discussion with Australia embraced an ambitious TSD chapter and a sanctions-based approach to labour rights violations. According to the report of the 15th round of negotiations for a trade agreement between the EU and Australia (24th–28th April, 2023, Brussels), "negotiators discussed the calibration of the scope and ambition of the TSD provisions, with a view to achieve the high level of ambition for the TSD chapter that both sides aim at". This means that an agreement on this matter has not yet been reached. If it is finally reached in the next round(s), TSD will be one of the last issues on which consensus will be built.[8] Therefore, the hypothesis that TSD is one of the most contentious areas is clearly confirmed. As Lachlan McKenzie points out, "As a founding member of the ILO, it can be anticipated that Australia is unlikely to perceive a chapter on labour protections that does not exceed reaffirmation of commitments to the ILO as a major concession" (McKenzie 2018, 264). However, is Australia ready to take a step forward and accept the sanctions-based model? Very soon we shall learn that, and further study should embrace the analysis of labour provisions in the EU–Australia FTA.

[8] "…11 chapters and sub-chapters and 5 annexes were provisionally concluded during the [15th] round… This adds to … 13 chapters, sub-chapters and annexes that had already been provisionally concluded in earlier rounds…" (the report of the 15th round of negotiations).

BIBLIOGRAPHY

Carby-Hall, Jo. Zbigniew Góral. Aneta Tyc. Eds. 2023. *Discrimination and Employment Law: International Legal Perspectives*. London–New York: Routledge.

Carby-Hall, Jo. Zbigniew Góral. Aneta Tyc. Eds. 2024. *International Workplace Discrimination Law*. London–New York: Routledge.

Conference. 2022. "Conference on the Future of Europe – Report on the Final Outcome". May 2022. Proposal no. 19(4).

Elijah, Annmarie. Donald Kenyon. Karen Hussey. Pierre van der Eng. 2017. "Introduction: Australia, the European Union and the New Trade Agenda." In *Australia, the European Union and the New Trade Agenda*. 1–16. Edited by Annmarie Elijah, Donald Kenyon, Karen Hussey, Pierre van der Eng. Acton: The Australian National University Press.

ILO. 2013. "Social Dimensions of Free Trade Agreements: Studies on Growth with Equity." Geneva: International Labour Organization.

Kelly, Serena. Mathew Doidge. 2023. "Beyond trade: The European Union-New Zealand Free Trade Agreement." *Australian and New Zealand Journal of European Studies* 15(1): 23–32. https://doi.org/10.30722/anzjes.vol15.iss1.17363

Matera, Margherita. Laura Allison-Reumann. Philomena Murray. 2022. "Australia and the EU: From Trade Tensions to FTA Negotiations." In *A Geo-Economic Turn in Trade Policy? The European Union in International Affairs.* 247–271. Edited by Johan Adriaensen, Evgeny Postnikov. Cham: Palgrave Macmillan. https://doi.org/10.1007/978-3-030-81281-2_11

McKenzie, Lachlan. 2018. "Overcoming legacies of foreign policy (dis)interests in the negotiation of the European Union–Australia free trade agreement." *Australian Journal of International Affairs* 72(3): 255–271. https://doi.org/10.1080/10357718.2018.1453480

Mitchell, Andrew D. Elizabeth Sheargold. Tania Voon. 2017. "Australia and International Trade Law." In *International Law in Australia.* 317–341. Edited by Donald R. Rothwell, Emily Crawford. Sydney: Thomson Reuters.

Tyc, Aneta. 2021. *Global Trade, Labour Rights and International Law: A Multilevel Approach*. London–New York: Routledge.

Valero, Jorge. Alberto Nardelli. Lyubov Pronina. Ben Westcott. 2023. "EU and Australia Deadlock in Push for a Free-Trade Agreement." *BNN Bloomberg News*, July 11, 2023. https://www.bnnbloomberg.ca/eu-and-australia-deadlock-in-push-for-a-free-trade-agreement-1.1944184

Velut, Jean-Baptiste et al. 2022. *Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements*. London: London School of Economics and Political Science.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Trade Policy Review – An Open, Sustainable and Assertive Trade Policy" of 18th February 2021.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "The power of trade partnerships: together for green and just economic growth" of 22nd June 2022.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee on decent work worldwide for a global just transition and a sustainable recovery 23rd February 2022.