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# From the EU-South Korea to the EU-New Zealand free trade agreements: A path leading to a breakthrough in the enforcement of labour rights\*

<http://dx.doi.org/10.12775/SIT.2023.013>

## 1. Introduction

On 30 June 2022, the EU concluded 4 years of difficult negotiations for a free trade agreement (FTA) with New Zealand. According to the European Commission's website, the agreement should deepen mutual trade and investment relations and provide new opportunities for business and farmers, *inter alia*, by eliminating tariffs on 100% of EU exports of goods and providing a level playing field for EU goods in the New Zealander market, which is expected to increase EU exports to New Zealand by up to 47 per cent over time, as well as by making it easier for EU companies

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\* The article results from the research conducted at the University of Lodz, Faculty of Law and Administration, and funded under the "Grants for Young Researchers" competition, decision number: 20/ML/2022 (subsidy received under the "Initiative of Excellence – Research University" programme).

to provide their services in New Zealand, including in delivery, telecommunications, maritime transport and financial services.<sup>1</sup> European Commission also identifies the following new business opportunities for big and small businesses: bilateral trade expected to increase by up to 30 per cent; tariff dismantling to save EU businesses around 140 million euro in duties per year; potential increase of EU investment flows of over 80 per cent into New Zealand; and predictable and transparent rules for digital trade with secure online environment for consumers.<sup>2</sup>

However, what is most important from the point of view of labour lawyers is the fact that the new FTA includes chapter 19 entitled “Trade and Sustainable Development” (TSD), which establishes – *inter alia* – labour provisions. The author of this article puts forward the thesis that the agreement includes some groundbreaking solutions that may qualify it as the first in the new, fifth, generation of the EU trade agreements. That is to say, it is the first time in the history that the possibility of using trade sanctions as a matter of last resort, in cases of serious infringements of the International Labour Organization (ILO) core labour conventions, is envisaged in the EU FTA. In the author’s opinion, such a mechanism should help make the commitments on workers’ rights protection enforceable.<sup>3</sup> However, it was a bumpy road to achieve the changes in the EU’s so-called “promotional approach.” The article recapitulates factors that contributed to these decisions. Besides, it aims to analyse the weaknesses of the agreement and to show what should be done to remove them.

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<sup>1</sup> [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement/agreement-explained\\_en#why](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement/agreement-explained_en#why) (access: 11.01.2023).

<sup>2</sup> European Commission, *EU-New Zealand Trade Agreement: A trade deal for green and just growth*, Luxembourg 2022.

<sup>3</sup> The new FTA may also contribute to gender equality for it includes some innovative and promising points in that area. However, a detailed examination of this topic goes beyond the scope of this article.

## 2. Problems with a promotional approach

Generally, labour provisions in trade agreements have proliferated over the last two decades – from only 4 in 1995, the number of trade agreements that include labour provisions increased to 21 in 2005, 58 in June 2013, 77 in 2016, 85 in 2019, and 116 in 2022.<sup>4</sup> But the question is always the same, namely how to increase their positive impact and make them guarantee effective enforcement of labour rights?

Focusing on dialogue and cooperation, the EU has so far presented a promotional approach to FTAs concluded with its partners. There were no provisions for sanctions, no comprehensive mechanism of a dispute resolution and for a long time no political will on the part of the EU to change that situation.

The EU-South Korea FTA, which was adopted in 2010 (and provisionally applied since July 2011 before it was formally ratified in December 2015) is a perfect example of a promotional approach and problems associated therewith. It has given rise to the EU's (fourth) generation of trade agreements containing a TSD chapter which aims at integrating labour provisions into them. The EU-South Korea FTA uses only soft, promotional formulations, e.g.:

- “respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights,”
- “the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the EU have ratified respectively,” and
- 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.”

When it comes to the institutional structures, according to the EU-Korea FTA, there is a Committee on Trade and Sustainable

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<sup>4</sup> Author's own elaboration based on data from: ILO, *ILO Labour Provisions in Trade Agreements Hub (LP Hub)*, Geneva 2022, <https://www.ilo.org/LPhub/> (access: 11.01.2023); ILO, *Labour Provisions in G7 Trade Agreements: A comparative perspective*, Geneva 2019, p. 15.

Development which oversees the implementation of TSD chapter and a Domestic Advisory Group(s) on sustainable development (environment and labour) with the task of advising on the implementation of TSD chapter. It consists of independent representative organisations of civil society in a balanced representation of environment, labour and business organisations as well as other relevant stakeholders. Moreover, members of Domestic Advisory Group(s) of each party meet at a Civil Society Forum with the aim of conducting a dialogue encompassing sustainable development aspects of trade relations between the parties.

In the light of Article 13.14 of the EU-Korea FTA, if any matter of mutual interest arises under TSD chapter, government consultations may be organised and the parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter. However, if a party considers that the matter needs further discussion, that party may request that the Committee on Trade and Sustainable Development be convened to consider the matter. Importantly, a party may also request that a Panel of Experts be convened to examine the matter that has not been satisfactorily addressed through government consultations (Article 13.15). The latter body shall provide its expertise in implementing TSD chapter and present a report to the parties.

The key point about a report issued by a Panel of Experts is that it is a non-binding document. As explicitly stated in the EU-Korea FTA, the parties shall make their best efforts to accommodate advice or recommendations of the Panel of Experts on the implementation of TSD chapter. It should be added that the Committee on Trade and Sustainable Development is a body responsible for monitoring of the implementation of the recommendations of the Panel of Experts and the parties do not have recourse to any other procedure.

Given this context, it should be highlighted that the EU-Korea FTA was the first on the basis of which a Panel of Experts was convened. The dispute over workers' rights arose in particular against the background of the lack of ratification by Korea of 4 out of 8 (then) fundamental ILO conventions. On 20 January 2020,

the EU made its first submission in the dispute, requesting for findings and recommendations. What was the result?

### 3. Report of the Panel of Experts and its follow-up

The Panel of Experts was established and started its work on 30 December 2019. It was supposed to present its report to the parties by the end of March 2020, however, in light of COVID-19 travel restrictions, parties and Panel have agreed to postpone the hearing on the EU–Korea dispute on workers’ rights in Korea. Finally, the report was issued on 20 January 2021. The soft language used in the FTA resulted in the fact that the report itself also used only promotional formulations. Additionally, taking into consideration that any Panel’s recommendations were non-binding, the result of the work of the Panel of Experts was disappointing.

The report highlights that 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. The Panel also points out that Korea’s efforts are less than optimal, and that there is still much to be done. Nevertheless, in the view of the Panel, the less-than-optimal effort of Korea does not fall below the legal standard set out in the last sentence of Article 13.4.3 of the EU-Korea FTA, namely “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.”

Remarkably, taking into consideration Korea’s efforts, the Panel found that Korea had not acted inconsistently with the last sentence of Article 13.4.3 by failing to “make continued and sustained efforts” towards ratification of the fundamental ILO Conventions. For the purpose of assessing compliance with the last sentence of Article 13.4.3, the fact that Korea had yet to ratify four core ILO Conventions did 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 and not for a result.

The EU's claim is not about Korea's failure to "attain the desired outcome." 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.

After that, the situation was developing and we cannot say that no progress has been made. On the contrary, in 2021, Korea ratified Conventions Nos. 29, 87 and 98<sup>5</sup>. Thus, the dispute between the EU and Korea may, *prima facie*, give the impression of the effectiveness of the EU solutions and the effectiveness of a promotional approach. However, according to the opinion of the European Economic and Social Committee entitled "Next Generation Trade and Sustainable Development – Reviewing the 15-point action plan" (2021), the vague terminology "continued and sustained efforts" grants Parties too much margin for manoeuvre. While Korea did ratify three out of four missing ILO Conventions (not C105 on abolition of forced labour), questions do remain on whether the Korean legislation amendments fully implement the provisions of C29, C87 and C98." In fact, on 30 November 2022, Executive Vice-President and Commissioner for Trade Valdis Dombrovskis and Korean Minister for Trade Ahn Dukgeun signed "Digital Trade Principles." They agreed to deepen their ongoing engagement on TSD issues. When it comes to labour-related matters, the parties discussed "Korea's efforts to expedite efforts" to ratify the ILO Convention No. 105 and the need to make further changes to legislation on the freedom of association.<sup>6</sup>

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<sup>5</sup> Aleydis Nissen writes about obstacles for Korea as regards ratification of Convention No. 105: A. Nissen, *Nuclear threats prevent South Korea from ratifying the abolition of Forced Labour Convention*, <https://www.leidenlawblog.nl/articles/nuclear-threats-prevent-south-korea-from-ratifying-the-abolition-of-forced-labour-convention> (access: 11.01.2023).

<sup>6</sup> [https://policy.trade.ec.europa.eu/news/eu-and-korea-sign-digital-trade-principles-2022-11-30\\_en](https://policy.trade.ec.europa.eu/news/eu-and-korea-sign-digital-trade-principles-2022-11-30_en) (access: 11.01.2023).

## 4. A breakthrough in thinking about trade policy

Recently, the European Commission itself has admitted that the adopted approach needs improvement. The Commission began to suggest in its documents that more enforceability of labour rights was needed. Tellingly, it even started to suggest the possibility of introducing sanctions for non-compliance with fundamental ILO Conventions.

For example, in 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” (18 February 2021), the Commission highlighted that negotiating FTAs has been an important tool when it comes to creating economic opportunities and promoting sustainability. At the same time, it stated that implementing FTAs and enforcing the rights and obligations included in them will be much more significant. It implies not only a better protection of workers and businesses from unfair practices, but also a greater effort to ensure the effective implementation and enforcement of TSD chapters in FTAs, to level-up social, labour and environmental standards globally. Last but not least, the Commission mentioned the fact that further actions would be considered taking into account an early review in 2021 of the 15-point action plan on the effective implementation and enforcement of TSD Chapters in FTAs. The review would cover all aspects of TSD implementation and enforcement, in particular the scope of commitments, monitoring mechanisms, the possibility of sanctions for non-compliance, the essential elements clause as well as the institutional set-up and resources required.

The Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on “decent work worldwide for a global just transition and a sustainable recovery” (23 February 2022) was the second important document mentioning sanctions. The Commission gave significant attention to the ongoing review of the 15-point Action

Plan on Trade and Sustainable Development and its use to assess the implementation and enforcement of labour provisions in FTAs. The Commission pointed out that “This will include the scope of commitments, monitoring mechanisms, the possibility of sanctions for non-compliance, the essential element clause, the institutional set-up, working with civil society, and the resources required.”

Finally, the crucial document was issued on 22 June 2022, namely the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions titled “The power of trade partnerships: together for green and just economic growth.” The Commission acknowledged that the EU’s approach to TSD did not contemplate the use of sanctions in the case of non compliance with the panel report. However, the Commission clearly signaled the change in this field. It explicitly (and rightly) proposed the possibility of trade sanctions as a matter of last resort, in instances of serious infringements of core TSD commitments, *inter alia*, the ILO fundamental principles and rights at work. The Commission explained that in such instances trade sanctions would be appropriate as a means to foster compliance. “In relation to the ILO fundamental principles and rights at work, trade sanctions would be warranted in serious instances of non compliance with the principles, and rely on the fact that the ILO monitors developments in all members. This approach will build on and reinforce the respect of core labour rights [...] as essential elements of our trade agreements.” Notably, the Communication entitled “The power of trade partnerships: together for green and just economic growth” presented a more detailed outline of the Commission’s proposals. As envisaged by this document, the imposition of trade sanctions for the breach of dedicated TSD provisions will be the result of the general dispute settlement rules. It is worth stressing that trade sanctions shall be designed to take the form of suspension of trade concessions and shall be temporary and proportionate. Their application will be possible only when a panel discovers a violation of a party’s TSD commitments and the latter does not



bring itself into compliance within a certain period of time.<sup>7</sup> Moreover, the Commission expressed confidence that “introducing for the first time in EU trade agreements trade sanctions for core TSD commitments, in conjunction with the cooperation based approach will enable the EU to carry out a more assertive enforcement of its TSD chapters.”

A last word is also needed here about the final report of the Conference on the Future of Europe. It is important to note that following up and enforcing TSD chapters in FTAs, including the sanctions-based mechanism appear among its 49 proposals.<sup>8</sup>

## 5. Historic moment – sanctions in the EU-New Zealand FTA

The EU concluded negotiations for a trade agreement with New Zealand on 30 June 2022.<sup>9</sup> Chapter 19 entitled “Trade and Sustainable Development” concerns – *inter alia* – trade-labour matters. Significantly, there is also an important chapter 26 entitled “Dispute Settlement” which provides for the possibility of imposing sanctions in the event of a serious violation of fundamental labour rights. Therefore, there is a crucial difference between this agreement and the fourth generation agreements. It is then true, as executive Vice-President and Commissioner for Trade, Valdis Dombrovskis, said that “This is a new generation of trade deal.”

Already at the beginning of the chapter we can read that its objective is to “establish an effective and efficient mechanism for avoiding and settling any dispute between the Parties concerning

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<sup>7</sup> At the margin, it was planned that the parties may also reach a mutually agreed solution to the dispute at any time.

<sup>8</sup> *Conference on the Future of Europe – Report on the Final Outcome*, May 2022, Proposal No. 19(4), p. 63, <https://www.europarl.europa.eu/resources/library/media/20220509RES29121/20220509RES29121.pdf> (access: 1.06.2023).

<sup>9</sup> [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement/text-agreement\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement/text-agreement_en) (access: 11.01.2023).

the interpretation and application” of the agreement “with a view to reaching, where possible, a mutually agreed solution.”

There are several phases here that can lead to a resolution of the dispute. Article 26.3 regulates the first one, namely the consultation phase. It puts pressure on the parties to enter into consultations in good faith and with the aim of finding a mutually agreed solution. There is also a separate paragraph 6 related to disputes concerning the provisions of TSD Chapter. It is important to note that the parties shall take into account information from the ILO in order to promote coherence between their work and the work of the ILO. Where appropriate, the parties shall also seek advice from the ILO or any other expert or body. Moreover, they may seek the views of the Domestic Advisory Groups or other expert advice.

The second phase begins with the initiation of panel procedures (Article 26.4). The party that launched consultations may request the establishment of a panel (composed of three panelists), if:

- the party complained against does not respond to the request for consultations within 10 days after the date of its delivery;
- consultations are not held within the time periods set out in the FTA;
- the parties agree not to have consultations; or
- consultations have been concluded and no mutually agreed solution has been reached.

Overall, there are two kinds of the panel’s reports: interim and final. The former shall be delivered to the parties within 90 days after the date of establishment of the panel. If the panel considers that this deadline cannot be met, the chairperson of the panel shall notify the parties in writing, stating the reasons for the delay and the date on which the panel plans to deliver its interim report. The panel shall, under no circumstances, deliver its interim report later than 120 days after the date of establishment of the panel. It should be pointed out that each party may deliver to the panel a written request to review precise aspects of the interim

report within 10 days after its delivery. A party may comment on the other party's request within six days after the delivery of the request (Article 26.11).

On the other hand, the final report is governed by Article 26.12. In the light of this provision, the panel shall deliver its final report to the parties within 120 days after the date of establishment of the panel. If the panel considers that such deadline cannot be met, the chairperson of the panel shall notify the parties in writing, stating the reasons for the delay and the date on which the panel plans to deliver its final report. The panel shall, under no circumstances, deliver its final report later than 150 days after the date of establishment of the panel. Importantly, the final report shall include a discussion of any written request by the parties on the interim report and clearly address the comments of the parties.

To fully understand the new FTA we need to analyse compliance measures (Article 26.13). First of all, the party complained against shall take any measure necessary to comply promptly with the findings and recommendations in the final report in order to bring itself in compliance with the covered provisions. Thus, the party complained against shall, no later than 30 days after delivery of the final report, deliver a notification to the complaining party of the measures which it has taken or which it envisages to take to comply. There are some specific requirements relevant to TSD Chapter. The EU-New Zealand FTA provides that the party complained against shall, no later than 30 days after delivery of the final report, inform its Domestic Advisory Groups and the contact point of the other party of the measures which it has taken or which it envisages to take to comply. There is also a special provision regarding the Trade and Sustainable Development Committee, which 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.

It may well happen that immediate compliance is not possible. In such a situation, the party complained against shall, no later than 30 days after the date of delivery of the final report, deliver a notification to the complaining party of the length of the reason-

able period of time it will require for such compliance. The parties shall endeavour to agree on the length of the reasonable period of time to comply. Of course, a possible scenario is one where the parties have not agreed on the length of the reasonable period of time. Then the complaining party may, at the earliest 20 days after the date of delivery of the above-mentioned notification, request in writing the original panel to determine the length of the reasonable period of time. The panel shall deliver its decision to the parties within 20 days after the date of delivery of such request. It should not be bypassed that the party complained against shall deliver a written notification of its progress in complying with the final report to the complaining party no later than 30 days before the expiry of the reasonable period of time. The parties may also agree to extend the reasonable period of time (Article 26.14).

A very important phase consists of compliance review. According to the EU-New Zealand FTA, the party complained against shall, no later than at the date of expiry of the reasonable period of time, deliver a notification to the complaining party of any measure that it has taken to comply with the final report. A possible scenario assumes that the parties disagree on the existence or the consistency with the covered provisions of any measure taken to comply. There is then an option that the complaining party delivers a request, in writing, to the original panel to decide on the matter. Such request not only shall identify any measure at issue, but also explain how that measure constitutes a breach of the covered provisions in a manner sufficient to present the legal basis for the complaint clearly. Importantly, the panel shall deliver its decision to the parties within 54 days after the date of delivery of such request.

Going further, the EU-New Zealand FTA establishes so-called temporary remedies in Article 26.16. There are four situations in which the party complained against shall, if requested by the complaining party, enter into consultations with a view to agreeing a mutually acceptable compensation. These are the following:

- the party complained against delivers a notification to the complaining party that it is not possible to comply with the final report;

- the party complained against fails to deliver a notification of any measure taken to comply within the deadline referred to in Article 26.13 on compliance measures or before the date of expiry of the reasonable period of time;
- the panel finds that no measure taken to comply exists; or
- the panel finds that the measure taken to comply is inconsistent with the covered provisions.

For labour disputes under TSD Chapter, Article 26.16 applies if:

- a situation set out in first three points mentioned above arises and the final report pursuant to Article 26.12 (Final report) finds a violation of Article 19.3(3) (Multilateral labour standards and agreements); or
- a situation set out in the fourth point arises and the decision of the compliance panel pursuant to Article 26.15 (Compliance review) finds a violation of Article 19.3(3) (Multilateral labour standards and agreements) (Article 26.16 paragraph 2).

If in the above-mentioned circumstances, the complaining party chooses not to request consultations in relation to compensation, or the parties do not agree on compensation within 20 days after entering into consultations 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 FTA also states that the complaining party may suspend the obligations<sup>10</sup> 10 days after the date of delivery of the written notification, unless the party complained against delivers a written request under paragraph 6 according to which: if the party complained against considers that the notified level of suspension of obligations exceeds the level equivalent to the nullification or impairment caused by the violation or that the conditions set out in Article 26.16 paragraph 2 are not fulfilled, it may deliver a written request to the original panel before the expiry of the 10 day period

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<sup>10</sup> The suspension of obligations shall not exceed the level equivalent to the nullification or impairment caused by the violation.

to decide on the matter. The panel shall deliver its decision on the level of the suspension of obligations or on whether the conditions set out in Article 26.16 paragraph 2 are not fulfilled, to the parties within 30 days after the date of that request. Obligations shall not be suspended until the panel has delivered its decision. The suspension of obligations shall be consistent with that decision.

As expected, the suspension of obligations or the compensation has been projected as temporary. Moreover, such a suspension shall not be applied after:

- the parties (at any time) have reached a mutually agreed solution pursuant to Article 26.26;
- the parties have agreed that the measure taken to comply brings the party complained against into conformity with the covered provisions; or
- any measure taken to comply which the panel has found to be inconsistent with the covered provisions has been withdrawn or amended so as to bring the party complained against into compliance with those provisions.

To my mind, it is correctly set out in Article 26.17 paragraph 1 that the party complained against shall deliver 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. The complaining party shall terminate (with the exception of cases specified in paragraph 2) the suspension of obligations within 30 days after the date of delivery of the notification. In cases where compensation has been applied (and with the exception of cases under paragraph 2), the party complained against may terminate the application of such compensation within 30 days after delivery of its notification that it has complied. According to paragraph 2 of Article 26.17, if the parties do not reach an agreement on whether the notified measure brings the party complained against into compliance with the covered provisions within 30 days after the date of delivery of the notification, either party may deliver a written request to the original panel to decide on the matter, failing which the suspension of obligations or the compensation, as the case may be, shall be terminated. The panel shall deliver its decision to the parties within

46 days after the date of the delivery of the request. If the panel finds that the measure taken to comply is in conformity with the covered provisions, the suspension of obligations or compensation, as the case may be, shall be terminated. Where relevant, the complaining party shall adjust the level of suspension of obligations or of compensation in light of the panel decision.<sup>11</sup>

There are also some detailed and important provisions concerning reports and decisions of the panel (Article 26.23). The EU-New Zealand FTA stipulates that the deliberations of the panel shall be kept confidential. The panel shall make every effort to draft reports and take decisions by consensus. If this is not possible, the panel shall decide by majority vote. In no case shall separate opinions of panellists be disclosed. The FTA also provides that the decisions and reports of the panel shall be accepted unconditionally by the parties. They shall not create any rights or obligations with respect to natural or legal persons. Besides, each party shall make the reports and decisions of the panel and its submissions publicly available, subject to the protection of confidential information.<sup>12</sup>

Never before have there been such strong sanctions in a EU FTA. It is worth appreciating that the new provisions have been constructed in the right way and are certainly a breakthrough when it comes to improving the effectiveness of labour rights. They can certainly be used as a model for concluding other FTAs.

## 6. Conclusions and further postulates

The findings presented indicate that the new EU FTA concluded with New Zealand introduces temporary remedies, according to

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<sup>11</sup> If the party complained against considers that the level of suspension of obligations implemented by the complaining party exceeds the level equivalent to the nullification or impairment caused by the violation, it may deliver a written request to the original panel to decide on the matter.

<sup>12</sup> In addition, the panel and the parties shall treat as confidential any information submitted by a party to the panel in accordance with Rules 34 to 36 of Annex 26-A (Rules of procedure).

which if non-respect of core labour rights is found by the panel, a “mutually acceptable compensation” may be developed by the parties. Besides, the suspension of “the application of obligations under the covered provisions” has been envisaged. In my opinion, this was a welcome step toward achieving better effectiveness of labour rights.

However, the agreement 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.” This language should be stronger considering that New Zealand has not ratified ILO Convention No. 87 (Freedom of Association and Protection of the Right to Organise), Convention No. 138 (Minimum Age) and No. 187 (Occupational Safety and Health). In addition, more emphasis should be placed on the Conventions which have already been ratified. For example, even if New Zealand ratified Convention No. 100 (Equal Remuneration) and No. 111 (Discrimination in Respect of Employment and Occupation), this absolutely does not mean that discrimination has been eliminated in these countries.

In this context, the EU model should be compared with the US one. The latter involves FTAs that use a conditional approach. This amounts to the fact that FTAs contain labour provisions that make the conclusion of a FTA conditional upon respect for particular labour standards (pre-ratification conditionality) and/or provisions in the concluded FTAs that authorise sanctions if labour standards are infringed (post-ratification conditionality). A comparative legal analysis leads to the conclusion that the EU may draw some lessons from the conditionality-based model in place in the US. A new FTA between the US, Mexico and Canada (USMCA) may serve as an example. It effectively required Mexico to carry out very serious reforms of labour law (in 2019) and to ratify all the fundamental ILO Conventions.<sup>13</sup> Another example is given by

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<sup>13</sup> Moreover, the USMCA introduces other important solutions, e.g. considerably stronger language as regards labour rights, “facility-specific rapid response labor mechanism”, “Labor Value Content” requirements or “greater certainty” clauses, each of which encourages us to perceive the USMCA as a model agreement that could be used when concluding a new treaty.



James Harrison who points out that pressure from US authorities resulted in changes to labour law in partner countries before FTAs with Bahrain, Columbia, Morocco, Oman and Panama came into force.<sup>14</sup> Further research might focus on these issues.

## SUMMARY

### From the EU-South Korea to the EU-New Zealand free trade agreements: A path leading to a breakthrough in the enforcement of labour rights

The analysis of the path that led to a breakthrough in the European Commission's thinking about trade policy in the context of enforcing labour rights turns out to be crucial for formulating further proposals regarding the content of new free trade agreements (FTAs). The arguments contained in the article focus on the problem of the lack of sanctions in FTAs of the fourth generation. The author discusses the EU-South Korea FTA, as it resulted in convening a Panel of Experts whose report contributed to the ratification of ILO Conventions nos. 29, 87 and 98 by South Korea. However, the amendment to Korean legislation has not fully implemented these Conventions. This has resulted in a breakthrough in thinking about trade policy. The revision of views on the promotional approach presented by the European Commission was visible in the content of the new FTA concluded in 2022 with New Zealand. It rightly provides for the possibility of sanctions in the event of a serious violation of labour rights, which, according to the author, qualifies it as a FTA of the fifth generation. However, it does not mean that the FTA is perfect. Comparative legal research has led the author to formulate *de lege ferenda* postulates in this regard.

**Keywords:** labour rights; labour provisions; sanctions; Panel of Experts; EU-South Korea free trade agreement; EU-New Zealand free trade agreement

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<sup>14</sup> J. Harrison, *The Labour Rights Agenda in Free Trade Agreements*, "The Journal of World Investment & Trade" 2019, Vol. 20, 10.1163/22119000-12340153, [https://brill.com/view/journals/jwit/20/5/article-p705\\_5.xml?language=en#FN000057](https://brill.com/view/journals/jwit/20/5/article-p705_5.xml?language=en#FN000057) (access: 11.01.2023) (see the cited literature). See also: J.B. Velut, D. Baeza-Breinbauer, M. De Bruijne, E. Garnizova, M. Jones, K. Kolben, L. Oules, V. Rouas, F. Tigere Pittet, T. Zamparutti, *Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements*, London 2022, p. 30.

## STRESZCZENIE

Od umowy o wolnym handlu między UE a Koreą Południową  
do umowy między UE a Nową Zelandią:  
droga do przełomu w egzekwowaniu praw pracowniczych

Analiza ścieżki, która doprowadziła do przełomu w myśleniu Komisji Europejskiej o polityce handlowej w kontekście egzekwowania praw pracowniczych, okazuje się kluczowa dla formułowania dalszych postulatów pod adresem treści nowych umów handlowych. Zamieszczone w artykule wywody koncentrują się wokół problemu braku możliwości nałożenia sankcji na partnera handlowego w umowach handlowych czwartej generacji. Autorka artykułu skupia się na omówieniu umowy o wolnym handlu między UE a Koreą Południową, ponieważ zaowocowała ona powołaniem panelu ekspertów, którego raport przyczynił się do ratyfikowania przez Koreę Południową konwencji MOP nr 29, 87 i 98. Jednakże nowelizacja koreańskich przepisów nie w pełni wdrożyła postanowienia tych konwencji. Spowodowało to przełom w myśleniu o polityce handlowej. Rewizja poglądów dotyczących podejścia promocyjnego prezentowanego przez Komisję Europejską uwidoczniła się w treści nowej umowy o wolnym handlu zawartej w 2022 r. z Nową Zelandią. Słusznie przewiduje ona możliwość nałożenia sankcji w przypadku poważnego naruszenia praw pracowniczych, co zdaniem autorki artykułu kwalifikuje ją jako umowę piątej generacji. Nie oznacza to jednak, że umowa ta jest idealna. Badania prawnoporównawcze prowadzą autorkę do sformułowania wniosków *de lege ferenda* w tym zakresie.

**Słowa kluczowe:** prawa pracownicze; postanowienia z zakresu prawa pracy; sankcje; panel ekspertów; umowa o wolnym handlu między UE a Koreą Południową; umowa o wolnym handlu między UE a Nową Zelandią

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