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CHALLENGES CONCERNING NEW GENERATION FTAS' LABOUR PROVISIONS: PERSPECTIVE FROM THAILAND

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Abstract

Thailand is under consideration whether to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) along with four other ASEAN member states namely Brunei, Malaysia, Singapore, and Vietnam. Moreover, the negotiation of a Free Trade Agreement (FTA) with the European Union (EU), despite its halt in 2013, is expected to resume.

This article aims to study the challenges regarding the labour provisions which form part of new generation FTAs to which Thailand may become a party. It will focus on the labour provisions in the CPTPP and the EU FTA model and examine the eventual impact on Thai labour law as well as suggest legal reforms in case Thailand decides to accede to the CPTPP and/or to conclude an FTA with the EU.

Keywords: *CPTPP, EU FTA, Labour provisions, Thailand*

The attempt to link labour standards and international trades through the integration of labour provisions into the World Trade Organization (WTO) legal framework in the early 1990s had not been successful,[1] due to the opposition from developing countries, who were in greater number, considering such linkage as a protectionist measure to reduce their low-wage competitive advantage.[2] The linkage between labour standards and international trades has been nonetheless developed and generalised through other channels, since the developed countries, with the United States and the European Union taking the lead, have promoted such linkage through their unilateral preference

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1 Harrison, J. (2019), 'The Labour Rights Agenda in Free Trade Agreements', *Journal of World Investment and Trade*, , 20, 705-725, p. 707

2 Arestoff-Izzo, F., Bazillier, R., Cremaschi, D., et al. (2008), *The Use, Scope and Effectiveness of Labour and Social Provisions and Sustainable Development Aspects in Bilateral and Regional Free Trade Agreements*, Singapore Ministerial Declaration, adopted on 13 December 1996, WT/MIN(96)/DEC, 18 December 1996

scheme as well as through the channel of free trade agreements.[3]

The mega-regional agreements as well as the new generation FTAs address increasingly non-trades issues concerning which the agreement has not yet been reached at the multilateral level. The issues include intellectual properties, competition law, environment protection as well as labour protection. The new generation, regional and bilateral, FTAs have become the tool for the major actors such as the US and the EU to elevate trade and investment standards along with other non-trades issues, influencing thus on labour standards of partner countries.

In February 2016, 12 member countries including the US, Canada, Chile, Mexico, Peru, Japan, Australia, New Zealand as well as four ASEAN member states namely Brunei, Malaysia, Singapore, and Vietnam, signed the Trans-Pacific Partnership Agreement (TPP). The TPP was to become the world's largest free trade deal, covering 40 per cent of the global economy. After the unexpected withdrawal of the US in 2017, the other 11 members decided to continue the cooperation under the renewed framework of the "Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)" which maintains the core of the TPP Agreement. Thailand has not joined the TPP or the CPTPP. Nonetheless, fearing being left out of trade advantages while other countries in ASEAN and the region are part of this regional trade deal, the Cabinet has recently resumed the consideration of whether to apply to join the CPTPP.[4]

On the other hand, the European Union (EU) started to negotiate a region-to-region free trade agreement with ASEAN in 2007. Nonetheless, due to the failure of the two sides to reach a common position, the negotiation was put on hold in 2009.[5] The EU then shifted its approach from regional to bilateral trade agreements with the ASEAN Member States individually and has concluded FTAs

3 Engen, L. (2017), *Labour Provisions in Asia Pacific Free Trade Agreements*: United Nations ESCAP Background paper No. 1/2017, 16; Ebert, F. C. and Posthuma, A. (2011), *Labour provisions in trade arrangements: current trends and perspectives*, Geneva: ILO, 7; Novitz, T. (2005), 'The European Union an International Labour Standards: The Dynamics of Dialogue between the EU and the ILO', in Alston, P. (eds.), *Labour Rights as Human Rights*, Oxford: Oxford University Press, 214-239

4 Thai Cabinet mandated the Committee to study the impact of joining the CPTPP and the Committee submitted the report in November 2020. The Cabinet has recently mandated eight Ministers to prepare a report by April 2021 about Thailand's readiness to join as well as the conditions of negotiation

5 Poranonond, P. and Aimsiranun, U. (2020), 'The Different Trade Approaches between China and the EU in the ASEAN', *International Business Law Journal*, 5, 747-762

with Singapore and Vietnam. The FTA with Singapore entered into force in November 2019[6] and the one with Vietnam in August 2020.[7] An FTA negotiation between the EU and Thailand started in 2013 but was put on hold due to a military coup in 2014,[8] nonetheless, the negotiation is expected to resume.

Reflecting the US and the European recent approach, both the CPTPP and the EU FTA model, include the labour provisions which address the social dimension of trade. Considering the fact that Thailand is under consideration whether to join the CPTPP and is expected to resume an FTA negotiation with the EU, this article aims to study the challenge concerning the implementation of labour provisions that form part of the new generation FTAs to which Thailand may become a party. This article will examine the labour provisions in the CPTPP and the EU FTA model (especially the FTAs concluded with South Korea, Singapore, and Vietnam) and their potential impact on Thai labour law as well as suggest necessary legal reforms in case Thailand decides to join the CPTPP and/or to conclude an FTA with the EU.

1. The CPTPP Labour Chapter and the EU FTAs' TSD Chapter: Two approaches for the same goal

The United States and the European Union are among the major actors who promote the linkage of labour standards and trades not only through their unilateral trade measures but also through their regional and bilateral trade agreements. They adopt nonetheless distinctive approaches to address the issue; the US privileging the conditional approach while the EU opting for a promotional or soft approach.

The CPTPP reflects importantly the US approach since it keeps the core of the formerly US initiative TPP Agreement intact as far as labour standards are concerned. [9] The EU FTAs since the 2001 EU-Korea FTA include a Trade and Sustainable Development (TSD) Chapter

6 European Commission. Retrieved from: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6316 [accessed on 11 March 2011]

7 European Commission. Retrieved from: https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1412 [accessed on 11 March 2011]

8 European Commission. Retrieved from: https://ec.europa.eu/trade/policy/countries-and-regions/countries/thailand/ [accessed on 11 March 2011]

9 Allee. T, and Lugg, A. (2016), 'Who wrote the rules for the Trans-Pacific Partnership?', *Research and Politics*, July - September, 1-9

which addresses both labour standards and environmental protection.[10]

Like the majority of trade agreements that address labour standards, the CPTPP Labour Chapter and the EU FTAs' TSD Chapters refer to the 1998 ILO Declaration on fundamental principles and rights at work. The Declaration specifies core labour standards which are 1) freedom of association and collective bargaining 2) the elimination of all forms of forced or compulsory labour 3) the abolition of child labour and 4) the elimination of discrimination in respect of employment and occupation. The CPTPP Labour Chapter commits the parties to adopt and maintain in domestic laws and practices the four fundamental rights as stated in the 1998 ILO Declaration.[11] The CPTPP also requires the member countries to have laws governing "acceptable conditions of work" with respect to minimum wages, hours of work, and occupational safety and health.[12] The EU FTAs' TSD Chapters impose on the parties the obligation to respect, promote and implement in the laws and practices the principles concerning the fundamental rights as stated in the Declaration.[13] The reference by both Agreements to the same system of rules and standards also contributes to enhance the coherence of labour standards in trade relations among both developed and developing economies.

Eight ILO Conventions provide for more precise obligations related to the protection and implementation of four fundamental labour rights stated in the 1998 ILO Declaration. These core Conventions are 1) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and Right to Organise and Collective Bargaining Convention, 1948 (No. 98); 2) Forced Labour Convention, 1930 (No. 29) and Abolition of Forced Labour Convention, 1957 (No. 105); 3) Minimum Age Convention, 1973 (No. 138) and Worst Forms of Child Labour Convention, 1999 (No. 182) dealing with child labour; and 4) Equal Remuneration Convention, 1951 (No. 100) and Discrimination (Employment and Occupation) Convention, 1958 (No. 111) which provide for the elimination of discrimination in respect of employment and occupation.

10 Communication COM (2015), 497 of 14 October 2015 'Trade for All: Towards a more responsible trade and investment policy', p. 16

11 Article 19.3.2. and 19.4.b of the CPTPP (Labour Rights and Non Derogation)

12 Article 19.3.2 CPTPP

13 Article 13.4 EU-Korea FTA, Article 12.3 EU-Singapore FTA, Article 13.4 EU-Vietnam FTA

The CPTPP Labour Chapter does not require the formal ratification of the ILO fundamental Conventions, while the EU FTAs' TSD Chapters require the parties to make "the continued and sustained effort" to ratify ILO fundamental Conventions, without imposing nevertheless a hard obligation or a date limit for such ratification.[14] Nevertheless, the parties to both the CPTPP and the EU FTAs are committed to respecting the four fundamental rights and principles as affirmed in the 1998 Declaration, independently of the fact that they have ratified the relevant eight ILO fundamental Conventions or not,[15] and these conventions contribute to specifying the scope of obligations.

To ensure compliance with the labour standards, the CPTPP opts for a conditional approach. The Labour Chapter provides for a labour consultation mechanism that should be initiated prior to the use of dispute settlement provisions of CPTPP. If the consulting parties fail to resolve the matter, the requesting party can request, within 60 days of submitting its request for consultations, the establishment of a panel under the Agreement's dispute settlement procedures, which can result in the imposition of trade sanctions if the panel confirms the non-compliance. [16] As such, in addition to cooperative activities and as a last resort, the CPTPP Labour Chapter provides for the possibility to subject unresolved labour disputes to the use of a general dispute settlement chapter as a result of which trade sanctions may be imposed on the non-compliant party.[17]

14 EU-Korea FTA requires the Parties 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*" (Article 13.4.3)
EU-Singapore FTA states that "*the Parties will also consider the ratification and effective implementation of other ILO conventions, taking into account domestic circumstances*" (Article 12.3.4)
EU-Vietnam FTA specifies that "*Each Party shall make continued and sustained efforts towards ratifying the fundamental ILO Conventions*" (Article 13.4.3)

15 Article 2 of ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up "*Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:*
(a) freedom of association and the effective recognition of the right to collective bargaining;
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation"
A Follow-up procedure requires that member states who have not ratified one or more of the core Conventions report on the status of the relevant rights and principles within their countries as well as the impediments to ratification. ILO (2022), 'ILO Declaration on Fundamental Principles and Rights at Work', (online), 11 January. Retrieved from: https://www.ilo.org/declaration/lang--en/index.htm [accessed 1 January 2022]

16 Article 19.15 of the CPTPP

17 Article 19.15 of the CPTPP (Labour Consultation)

The EU prefers a soft approach incentivising trade partners to work with the EU on labour-related issues through government-to-government consultation and cooperation, while foreseeing a non-legally binding mechanism of a panel of experts to resolve the disputes.[18] Despite the soft approach, the practice has illustrated that coupled with the EU institution's willingness to ensure effective enforcement of the TSD Chapter, the chosen dispute resolution mechanism can lead to concrete action in view of the enforcement of labour standards. The EU's request for consultations with Korea in December 2018 concerning the insufficient action to implement the ILO fundamental principles of freedom of association and the right to collective bargaining[19] has led to the establishment of the Panel of experts who found that Korea was in breach of its labour commitments under the EU-Korea FTA.[20] In April 2021, Korea ratified three fundamental Conventions namely Convention No.29 on Forced Labour, Convention No.87 on Freedom of Association and Protection of the Right to Organise Convention and Convention No.98 on Right to Organise and Collective Bargaining Convention. The next phase requires the follow up to ensure that the panel of experts' report led to concrete actions toward effective implementation of labour rights by Korea.[21]

2. Thailand's current labour law and challenges concerning the implementation of the FTA's labour provision

Thailand was one of the founding members of the ILO. As of 1 January 2022, Thailand has ratified six out of eight ILO fundamental Conventions. The remaining conventions are ILO Convention No. 87 concerning freedom of association and ILO Convention No. 98 on the right to organise and collective bargaining.

18 Article 13.15 of the EU-Korea FTA, Article 12.17 of the EU-Singapore FTA, Article 13.17 of the EU-Vietnam FTA

19 European Commission (2018), 'EU steps up engagement with Republic of Korea over labour commitments under the trade agreement' (online), 17 December 2018. Retrieved from: https://policy.trade.ec.europa.eu/news/eu-steps-engagement-republic-korea-over-labour-commitments-under-trade-agreement-2018-12-17_en [accessed 2 January 2022]

20 Panel of experts constituted under Article 13.15 of the Eu-Korea FTA, 'Report of the panel of experts' (online), 20 January 2021, Retrieved from: https://trade.ec.europa. eu/doclib/docs/2021/january/tradoc_159358.pdf [accessed 2 January 2022]

21 European Commission (2021), 'EU-Korea DAG follows the developments in South Korea subsequent to the Report of the Panel of Experts and South Korea's ratification of ILO conventions' (online), 24 November 2021, Retrieved from: https://www.eesc.europa.eu/nl/news-media/news/eu-korea-dag-follows-developments-south-koreasubsequent-report-panel-experts-and-south-koreas-ratification-ilo [accessed 2 January 2022]

Table 1 Thailand's ratification of ILO fundamental Conventions[22]

Fundamental rights and principles	Related conventions	Thailand's ratification
Freedom of association and effective recognition of the right to collective bargaining	ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organize (1948)	-
	ILO Convention No. 98 concerning Right to Organize and Collective Bargaining (1949)	-
Elimination of all forms of forced or compulsory labour	ILO Convention No. 29 on Forced Labour (1930)	26 Feb 1969
	ILO Convention No. 105 on Abolition of Forced Labour (1957)	2 Dec 1969
Effective abolition of child labour	ILO Convention No. 138 on Minimum Age (1973)	11 May 2004
	ILO Convention No. 182 on Worst Forms of Child Labour (1999)	16 Feb 2001
Elimination of discrimination in respect of employment and occupation	ILO Convention No. 100 on Equal Remuneration (1951)	8 Feb 1999
	ILO Convention No. 111 on Discrimination (Employment and occupation) (1958)	13 Jun 2017

Taking into account the possibility of Thailand's application for accession to the CPTPP and/or conclusion of an FTA with the EU, this Section assesses Thailand's labour laws and practice by referring to the four fundamental rights at work as stipulated in the 1998 ILO Declaration and specified by the ILO fundamental Conventions. The four main issues are set out in the ILO Declaration on the Fundamental

22 ILO (2022), Ratification by country, Thailand. Retrieved from: https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102843 [accessed 1 January 2022]

Principles and Rights at Work and its Follow up 1998[23] and enshrined in the ILO's core conventions as follows: 1) freedom of association and the right to collective bargaining (ILO Convention No.87 and No.98) 2) the elimination of all forms of forced or compulsory labour (ILO Convention No.29 and No.105) 3) the effective abolition of child labour (ILO Convention No.138 and No.182) 4) the elimination of discrimination in respect of employment and occupation (ILO Convention No.100 and No.111). Among the four fundamental rights, the article will give particular importance to freedom of association and collective bargaining, the area in which Thailand has not yet ratified the relevant Conventions.

2.1. Forced or compulsory labour

Thailand ratified ILO Convention No. 29 on Forced Labour (1930) and ILO Convention No. 105 on Abolition of Forced Labour (1957) in 1969**.** Nevertheless, the problem of forced labour and rights abuses in the Thai fishing and seafood industry has been one of Thailand's major challenges, especially concerning the refusal of labour protection towards migrant fishers mainly from neighbouring countries. In April 2015, the EU issued to Thailand a "yellow card" as a formal notice because of Thailand's shortcomings in its fisheries monitoring, control and sanctioning systems, including the problem of forced labour, contrary to the IUU regulations (Illegal, Unreported, and Unregulated fishing). In case of inaction, Thailand risked facing a ban on exporting seafood to the EU.

In order to address the problem of forced labour, Thailand has taken various actions. Thailand ratified in June 2018 the Protocol of 2014 to the Forced Labour Convention (P29)[24] which requires an appropriate and effective compensation for "*all victims of forced or compulsory labour, irrespective of their presence or legal status in the national territory*". In view of implementing the Protocol, Thailand adopted the Emergency Decree Amending the Anti-Human Trafficking Act B.E. 2551(2008), B.E. 2562 (2019) in April 2019 to penalise specifically the practice of forced labour or services while ensuring the protection

23 ILO, Declaration on the Fundamental Principles and Rights at Work and its Follow up, 18 June 1998 (Annex revised 15 June 2010).

24 ILO (2019), 'Combatting Forced Labour in the Thai Fishing and Seafood Industry' (online), 8 October 2019, Retrieved from: https://www.ilo.org/asia/media-centre/multimedia/WCMS_723269/lang--en/index.htm [accessed 2 January 2022]

of the rights and the remedies for the victims of forced labour. The Emergency Decree sets severe penalties to deter and eliminate forced labour or service and in case forced labour leads to the death of the victim, the penalty includes life imprisonment or the death penalty. The Emergency Decree grants victims of forced labour the same rights and protections as those granted to victims of human trafficking.[25]

In its effort to tackle illegal, unreported, and unregulated fishing, Thailand ratified in January 2019 the ILO Work in Fishing Convention 2007 (No. 188) and adopted the Protection of workers in the fishery sector Act to implement the Convention. The Act provides decent working conditions and protection of the rights of fishery labour. The Act imposes to vessel owners the duties to comply with labour standards, protection and welfare as provided in the law on labour protection, the law on job procurement and protection of job seekers, the law on navigation in Thai waters, the law on foreigners' working management, the law on fisheries, the law on compensation and the law on labour relations.[26]

Nonetheless, as reflected in part by the US Trafficking in Person Report 2020 on Thailand's situation, the enforcement of the progressive law has been hindered in practice by a lack of understanding of labour trafficking and forced labour among government authorities, unwillingness and inconsistency of labour inspectors in referring the cases to the police for criminal prosecution in the absence of standard procedure, the insufficient effort of the police and labour inspectors to investigate migrant workers' reports of exploitation as well as corruption and official complicity in trafficking. [27]

2.2. Child labour

Thailand has become party to the UN Convention on the Rights of the Child in 1992, to the ILO Convention No. 182 in 2001 and No. 138 in 2004. In accordance with the ILO Conventions, the Thai Labour Protection Act sets the minimum age for employment at 15 years old. The law sets 18 years old as the minimum age for dangerous

25 Jayangakula, K. (2019), 'State Practice of Asian Countries in International Law, Thailand', *Asian Yearbook of International Law*, 25, 302-308

26 Section 6 Protection of workers in fishery sector Act B.E. 2562 (2019)

27 US Department of State (2021), '2020 Trafficking in Persons Report: Thailand' (online). Retrieved from: https://www.state.gov/reports/2020-trafficking-in-persons-report/thailand/ [accessed 1 January 2022]

and hazardous work[28] and prohibits workers below 18 years of age from working overtime, working on holidays and from 10 p.m. to 6 a.m.[29]

Nonetheless, the problem of child labour remains in Thailand. A study conducted by the Department of Labour Protection and Welfare with collaboration from the ILO in 2018 revealed that about 400,000 children were obliged to work and almost one-fourth of them abandoned their education. Child workers also engage in dangerous work, such as carrying heavy items, handling hazardous chemicals, being exposed while working to extremely hot or cold temperatures, heavy noise pollution or working during rest hours between 10 p.m. and 6 a.m.[30] Migrant children from neighbouring countries are the most vulnerable to be subject to the worst form of child labour.[31]

The Government of US's 2020 Findings on the Worst Forms of Child Labour in Thailand[32] considered that international standards for the minimum age for work were not met. Children in the informal employment relationship did not receive adequate labour protection and there was lack of enforcement of child labour law due to insufficient labour inspectors and resources. Challenges consist in extending the scope of legal protection to the children in informal sectors and doing hazardous work as well as ensuring effective law enforcement, especially concerning migrant children.[33]

2.3. Employment discrimination

Thailand ratified ILO Convention No. 100 on Equal Remuneration in 1999 and ILO Convention No. 111 on Discrimination (Employment and occupation) in 2017. The main legislation which stipulates minimum standards regarding the treatment of employees such as minimum wages, working and resting

28 Section 49, 50 Labour Protection Act 1998 (modified in 2019)

29 Section 47, 48 Labour Protection Act

30 'Survey finds 400,000 Thai children are at work', *The Nation,* 13 June 2019

31 The research report 'Assessing the Worst Forms of Child Labour in Selected Provinces of Thailand: Chiang Rai, Tak, Udon Thani, Samut Sakhon, Songkla and Pattani' published in 2006. See ILO (n.d.), 'Overview of Child Labour in Thailand' (online). Retrieved from: https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_098336.pdf [accessed 3 January 2022]

32 US Government (2020), '2020 Findings on the Worst Forms of Child Labor' (online), 25 January 2022. Retrieved from: https://www.dol.gov/agencies/ilab/resources/reports/child-labor/thailand [accessed 1 January 2022]

33 *Ibid*.

periods, holidays and working conditions is the Labour Protection Act B.E. 2541 (1998) (updated in 2019).

The Labour Protection Act B.E. 2541 recognises the equal treatment and remuneration between men and women in employment. It imposes equal treatment for male and female workers unless such treatment is not possible due to the characteristics or the nature of the work as well as requires the employer to fix equal wages, overtime pay, holiday pay and holiday overtime pay for the work of the same nature, quality and quantity or work of the same value, notwithstanding that the worker is male or female.

In principle, the Labour Protection Act covers all employees, whether full or part-time, seasonal, casual, occasional or contract. Nonetheless, some sectors were excluded from the scope of application of the Act such as domestic workers or were subjected to specific/ different regimes of protection such as agriculture,[34] fishery sector,[35] or home workers.[36]

The 1998 Ministerial Regulation excluded domestic workers from the scope of application of the Labour Protection Act. In 2012, Ministerial Regulation No. 14 implementing the Labour Protection Act increases the protection of domestic workers concerning a weekly holiday, holidays, sick leave, overtime payment as well as fixes the minimum age of domestic work at 15 years of age. Nevertheless, domestic workers do not benefit from full protection contrary to other workers, for instance, the Act does not recognise domestic workers the rights to minimum daily wages, the limit of working hours at 8 hours per day, the right to maternity leave, the protection from termination of employment due to pregnancy nor the right to social security.

Ministerial Regulation on Labour protection in Agriculture sector B.E.2557 (2013) concerns workers in agricultural work.[37] The 2013 Ministerial regulation regulates the right to holidays, overtime pay, sick leave, welfare for workers such as clean water and proper accommodation, protection of female or child workers including the

34 Ministerial Regulation on Labour protection in Agriculture sector B.E.2557 (2013)
35 Protection of workers in fishery sector Act B.E. 2562 (2019)
36 Home Workers Protection Act B.E.2553 (2010)
37 Defined as work concerning plantation, animal raising, forestry, sea salt farming and fishing rather than sea fishing, where employees are not employed all year long and not employed in continuing industry.

limit of weight to carry for each category of the worker as well as protection from termination of employment due to pregnancy.

Concerning elimination of discrimination in employment and occupation, Thai legislations apply in principle to all workers, irrespective of their nationality or their migration status. The adoption of specific legislation to protect workers in the sectors, where migrant workers are largely employed, such as seasonal work in the agriculture sector, fishery sector and domestic work, contributes to better protection of workers in these sectors and benefit both national and migrant workers. The challenge to address is to ensure that the protection granted to workers in these sectors is not least in comparison with workers under the general regime.

2.4. Freedom of association and collective bargaining

Among the four fundamental freedoms, the freedom of association and collective bargaining has been the most sensitive issues for Thailand as it has delayed the ratification of the relevant ILO Conventions despite having reported its intention for ratification.[38]

Current Thai legislation in relation to freedom of association and collective bargaining are the Labour Relation Act B.E. 2518 (1975) and the State Enterprise Labour Relations Act B.E. 2543 (2000). The right to freedom of association and collective bargaining is recognised by law but strictly regulated.[39] The State Enterprise Labour Relations Act B.E. 2543 (2000) regulates the right to freedom of association to employees of state enterprises and excludes employees of state enterprises who occupy management posts from the right to establish a state enterprise labour union.[40] The Labour Relation Act B.E. 2518 (1975) subjects the establishment of employers' associations (Section 55) and labour unions (Section 87) to prior government authorization, requiring compulsory registration of employers' associations and labour unions by the Registrar. Even if the Labour Relation Act does not prohibit foreign workers to join a labour union, it grants the right

38 ILO (2019), *Country Baseline under the ILO Declaration Annual Review: Thailand (2000-2019) Freedom of Association and the Effective Recognition of The Right to Collective Bargaining*

39 International Trade Union Confederation (2021), 'Global Rights Index 2021' (online), 15 November 2021. Retrieved from: https://www.globalrightsindex.org/en/2021/countries/tha [accessed 1 January 2022]

40 Section 41, State Enterprise Labour Relations Act B.E. 2543 (2000)

to form and manage a labour union solely to Thai workers.[41]

Table 2 Assessment of the Labour Relation Act B.E. 2518 (1975) with the principle of freedom of association and collective bargaining[42]

Issues	**Labour Relation Act B.E. 2518 (1975)**	**Recommended amendments**
Right to establish employers' organisations and labour unions without previous authorisation (Art. 2 Convention No.87)	Section 55 and Section 87 require, respectively, compulsory registration of employers' association and of labour unions by the Registrar	Replace prior government authorization with obligation of the competent authority to issue the certificate of establishment after reception of complete justifying documents
Right to establish labour unions without distinction (Art. 2 Convention No.87)	Section 88 and 89 limit the right to establish a labour union to Thai nationals.	Removal of condition of nationality, with the possibility to require a reasonable period of residency
Right to elect the representatives in full freedom without interference by public authorities (Art. 3 Convention No.87)	Section 101 requires "being of Thai nationality by birth" as one of the qualifications of the persons eligible for being elected or appointed as a member of the labour union's committee or sub-committee.	Removal of condition of nationality, with the possibility to require a reasonable period of residency.

41 Section 88 and 89 of the Labour Relation Act provide that the minimum ten workers required to establish and register a trade union must have Thai nationality, are the employees of the same employer or the same business irrespective of the number of the employers. In addition, Section 101 of the Labour Relation Act requires "being of Thai nationality by birth" as one of the qualifications of the persons eligible for being elected or appointed as a member of the labour union's committee or sub-committee.

42 Aimsiranun, U. and Duong, T. T. T. (2022), 'Comparative Study on Labour Provisions in FTAs: Vietnam's and Thailand's Perspective', p. 124

Issues	Labour Relation Act B.E. 2518 (1975)	Recommended amendments
Right to lawful organise their administration and activities and to formulate their programmes without the public authorities' interference (Art. 3 Convention No.87)	Section 105 and 106 allow the Registrar to control the functioning of labour unions and to vacate a member of committee of labour union from the office	Removal of such power

Table 3 Assessment of Thai State Enterprise Labour Relation Act B.E. 2543 (2000) with the principle of freedom of association and collective bargaining[43]

Issues	State Enterprise Labour Relation Act B.E. 2543 (2000)	Recommended amendments
Right to establish and to join labour unions (Art. 2 Convention No.87)	Section 40 limits that each State enterprise shall only have one labour union	Removal of the limitation which is contrary to the right of workers to establish and to join the organizations of their choice.
	Section 41 forbids employees who are management of the State enterprise and non-nationals to form a labour union	Removal of such conditionality. For non-nationals there is the possibility to require a reasonable period of residency
	Section 43 requires registration of labour union with the Registrar	Replace prior government authorization with the obligation of competent authority to issue the certificate of establishment after reception of complete justifying documents

43 Aimsiranun, U. and Duong, T. T. T. (2022), *supra* note 42, p. 125

Issues	State Enterprise Labour Relation Act B.E. 2543 (2000)	Recommended amendments
Right to lawful organise their administration and activities and to formulate their programmes without the public authorities' interference (Art. 3 Convention No.87)	Section 62 and 63 allow the Registrar to control the functioning of labour unions and to vacate a member of committee of labour union from the office.	Removal of such power
Protection from administrative suspension or dissolution (Art. 4 Convention No.87)	Section 65 allow the Registrar to order the dissolution of a labour union in the specified conditions	Removal of such power or transfer such power to Labour Court and precisely define the conditions of dissolution.

In order to promote the freedom of association and to bring the regulations in conformity with the ILO Conventions, the revision of the Labour Relations Act and the State Enterprises Labour Relations Act is in process. The most recent draft of the Labour Relations Act and the State Enterprise Labour Relations Act were proposed for public consultation by the Council of State in January 2022.[44]

The draft Labour Relations Act and the draft of the State Enterprise Labour Relations Act as proposed for public opinion in January 2022 have brought some changes which are in line with the ILO Conventions. The draft Labour Relations Act limits the interference of the public authority with the establishment and the functioning of the workers' and employers' organisations. It replaces the requirement of registration with the Registrar with the obligation of the competent authority to issue the certificate if the request and the justifying documents are complete, and in case of refusal to

44 Draft of Labour Relation Act... published for public opinion during 6-20 January 2022. Retrieved from: http://www.krisdika.go.th/detail-law-draft-under-consideration-by-the-office-of-the-council-of-state?billCode=316&type=billMain [accessed 1 January 2022]. Draft of State Enterprise Labour Relations Act...published for public opinion during 6-20 January 2022. Retrieved from: http://www.krisdika.go.th/detail-law-draft-under-consideration-by-the-office-of-the-council-of-state?billCode=317&lawdraftType=between [accessed 1 January 2022]

issue the certificate, employers[45] or workers[46] are entitled to file the case before the Labour Court. While the draft subjects the right to set up an employers' or a workers' organisation to the condition of having Thai nationality,[47] it allows migrant workers to join as committee members of labour unions in case the labour union includes non-Thai nationals members[48].

Concerning the draft of the State Enterprise Labour Relations Act, some welcoming changes have been proposed such as the removal of the limitation that there can only be one labour union per state enterprise[49] and that management of a state enterprise cannot establish a labour union[50] as well as the requirement that employees have Thai nationality to set up state enterprise labour union.[51] The Director-General is bound to issue a certificate of establishment of state enterprises labour unions within seven days after the reception of the request and all justifying documents and provides for the possibility to contest the refusal before the Labour Court.[52] The draft also removes the possibility of the Registrar ordering the dissolution of a labour union.[53]

Further amendment of the Labour Relation Act may include recognising the right of foreign workers to establish a labour union, with the possibility to subject such right to conditions such as a reasonable period of residency. Recognition to migrant workers of the right to form and join labour unions and to bargain collectively with other workers will allow the establishment of labour unions that represent and defend truly the interest of migrant workers and such labour unions can be considered necessary since migrant workers are in general more vulnerable and more susceptible to exploitation.

45 Section 68 Draft of Labour Relation Act... published for public opinion during 6-20 January 2022

46 Section 92 Draft of Labour Relation Act... published for public opinion during 6-20 January 2022

47 Section 66 concerning employers' association and Section 90 concerning labour union

48 Section 100, paragraph 3 of the draft Labour Relations Act allows a maximum of one-fifth of the members of the committee of a labour union to be non-national employees in case the labour union includes non-Thai nationals' members.

49 Section 40 State Enterprise Labour relations Act B.E. 2543

50 Nonetheless, Section 63 Draft of State Enterprise Labour relations Act... forbids employees who are also management of state enterprise to join state enterprise labour union established or joined by other employees and forbids other employees to join labour union established or joined by employees who are also management of state enterprise.

51 Section 58 Draft of State Enterprise Labour relations Act... published for public opinion during 6-20 January 2022

52 Section 60 Draft of State Enterprise Labour relations Act... published for public opinion during 6-20 January 2022

53 Section 80 and 81 Draft of State Enterprise Labour relations Act... published for public opinion during 6-20 January 2022

3. Conclusion and recommendations

Thailand's accession to the CPTPP will not create a formal obligation for Thailand to ratify the remaining ILO fundamental Conventions not yet ratified by Thailand, namely Conventions No.87 and 98. However, the conclusion of an FTA with the EU is very likely to create an obligation for Thailand to "make the continued and sustained effort" towards ratification of the relevant Conventions. Nevertheless, becoming the party to either the CPTPP or to an FTA with the EU will commit Thailand to respect all four fundamental freedoms stated in the 1998 ILO Declaration including the freedom of association and collective bargaining.

Thailand has already ratified six out of the eight ILO fundamental Conventions on labour standards. These Conventions cover the elimination of forced or compulsory labour, child labour and employment discrimination. Thailand has thus already expressed its commitment to uphold and implement these fundamental freedoms in its laws and practices. The challenges remain to ensure effective implementation of the principles not only in the law but also and very importantly in practice.

The area which will require the most change at least at the legislation level concerns freedom of association and collective bargaining and thus the amendment of relevant Thai legislation in order to conform with the international standards as enshrined in Conventions No. 87 and 98. The ongoing process of revision of the Labour Relation Act and State Enterprise Labour Relations Act has revealed some improvement in aligning Thai legislation with the principles enshrined in the ILO Conventions, especially concerning the limitation of public authority interference with the establishment of organisations and the right of organisations to elect their representatives in full freedom. However, as reflected in the most recent Draft of Labour Relations Act and State enterprise labour Relations Act under consideration, there remains the distinction between national and migrant workers concerning the right to establish workers' organisations.

In general, adhesion to the CPTPP and/or inclusion of an FTA with the EU will create an important and required push for Thailand to elevate its labour standards and protection. It should be recognised that many positive changes in Thai laws and practices concerning labour standards and protection have been influenced, to quite an extensive extent, by the external pressure from the major actors in international trades; whether

from the EU concerning the elimination of the IUU fishing or from the US reports concerning the trafficking in persons or the worst forms of child labour.

Thailand's accession to the CPTPP and conclusion of an FTA with the EU can be viewed as an opportunity for Thailand to improve domestic labour standards for the benefit of all workers, national or non-national, in conformity with its obligations as a member of the ILO. Moreover, the conditionality imposed under the framework of the labour chapter of the CPTPP, and the EU TSD chapter contribute to more effective implementation of the principles laid down in the ILO core Conventions.

Certain reforms to bring Thai law into conformity with the international labour standards can be recommended as follows:

- Amend the Labour Relation Act to allow non-nationals to set up the union and to be members of the board of the trade union under specified conditions such as a minimum period of residency or work in Thailand and the capacity to effectively communicate in Thai.

- Ensure effective enforcement of the Prevention and Elimination of Human Trafficking Act to combat and penalize the practice of forced labour and child labour.

- Extend the scope and the same level of labour protection to the sectors such as agriculture, fisheries, transport, and domestic work, and ensure, for the sectors already covered, the effective enforcement of the law, especially towards migrant workers who are more vulnerable. ●

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