The Fifth Fundamental Labour Right in EU Free Trade Agreements

Free trade agreements (FTAs) can negatively affect the right to a safe and healthy working environment (OHS). This article demonstrates that the European Union (EU) has long resisted explicitly linking trade concessions to OHS obligations in FTAs, contrary to the United States and Canada. In 2021, the European Commission claimed that the fact that OHS was not recognized as a fundamental principle and right at work at the time was experienced as an obstacle of doing so. This article assesses that the EU has, nevertheless, slowly been changing direction, even before the recognition of OHS as a fundamental principle and right at work in the International Labour Organization in 2022. The status of OHS in EU FTAs is traced by using diachronic and synchronic comparative methods.

I. Introduction

Article 7 of the International Covenant on Economic, Social and Cultural Rights (1966) sets out that its signatories recognize the human right of everyone to the enjoyment of just and favourable conditions of work including healthy and safe working conditions.[1] The eighth United Nations Sustainable Development Goal sets as a target to protect labour rights and promote safe and secure working environments for all.[2] There are thirty-seven International Labour Organisation (ILO) conventions and recommendations that deal with occupational health and safety, including the two fundamental labour rights conventions 155 and 187.[3]

Yet, the ILO estimates that occupational accidents kill 380,000 people every year, while work-related diseases cause the death of 2,4 million more people.[4] Significant risks are long working hours and exposure to particulate matter, gases and fumes at the workplace.[5] Despite automatization and scientific progress, new challenges – such as the steep rise of pesticide poisoning and the health impacts of nano-particles and other innovations – have increased health and safety risks. [6]

Free Trade Agreements have long been criticized for opening markets and liberalizing trade, without paying considerable attention to labour rights.[7] While neoliberal theory and practice dictate that FTAs can spark economic growth and create more jobs, the nature of such jobs has been insufficiently questioned. [8] Workers are frequently doing microtasks in

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[1] International Covenant on Economic, Social and Cultural Rights art 7(ii)(b), 16 December 1966, 993 U.N.T.S. 3. For further references to relevant international and regional legal frameworks, see George Politakis, *The Recognition of Occupational Safety and Health as a Fundamental Principle and Right at Work,* International and Comparative Law Quarterly (2022) 6-7.

[2] UNGA Res. 70/1, Goal 8 (21 October 2015).

[3] ILO, Convention C155: Occupational Health and Safety Convention (1981); ILO, Convention C187: Promotional Framework for Occupational Safety and Health Convention (2006). See Paul van der Heijden and Ruben Zandvliet, 'Enforcement of Fundamental Labor Rights' (2014) https://www.thehagueinstituteforglobaljustice.org/wp-content/uploads/2015/10/PB12-Enforcement-Labor-Rights.pdf (visited 7 April 2022), 12.

[4] ILO, 'ILO Head Calls for Global Coalition on Safety and Health at Work' (2017) https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_573118/lang--en/index.htm (visited 3 January 2021).

[5] ILO, 'WHO/ILO Joint Estimates of the Work-related Burden of Disease and Injury, 2000-2016' (2021) https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_819788.pdf (visited 7 December 2022), 11.

[6] UNGA, *Protection of the Rights of Workers Exposed to Hazardous Substances and Wastes,* U.N. Doc A/HRC/42/L.27 (23 September 2019), para 5.

[7] E.g. Andreas Dür and Dirk De Bièvre, *Inclusion Without Influence? NGOs in European Trade Policy* 27(1) Journal of Public Policy 79 (2007).

[8] Mary Beth Mills, 'Gendered Division in Labor' in L Disch and M Hawkesworth (eds), *The Oxford Handbook of Feminist Theory* (Oxford: Oxford University Press 2016) 283, 286; anonymized.

casual forms of low-paying labour, where they are exposed to substantial health and safety risks. Informal working arrangements effectively deprive workers of a social safety net, because the protections and benefits afforded by labour law are traditionally linked with labour contracts. [9] Vulnerable people are disproportionally represented in such jobs. [10] Also frequently overlooked in discourses on neoliberal theory as well in discourses on human rights us that respecting, promoting and realizing OHS does not only benefit workers but also increases productivity.[11] Occupational accidents and diseases are estimated to amount to 1,8 and 6 per cent of Gross Domestic Product in-country costs.[12]

This article aims to study to which extent the EU has considered binding obligations relating to OHS in its FTAs. Part II of this article summarizes the international perspective. It explains that the ILO has recently recognized OHS as the fifth fundamental labour right. Part III discusses that the EU has traditionally only included specific binding obligations relating to the four other fundamental labour rights in its FTAs, while it did not pay much attention to OHS. The exception is the Canada–EU Comprehensive and Economic Trade Agreement of 2014. The EU's approach is compared and contrasted with the approaches that have long been taken by Canada and the US in bi- and plurilateral trade agreements. In so doing, this article adds to the growing body of comparative public law studies by EU scholars.[13] Part IV argues that the European Commission's approach toward OHS in its FTAs has changed in the Trade and Cooperation Agreement with the UK and proposed texts of FTAs that have been developed since 2017.

A preliminary note on terminology needs to be made before starting the analysis. The comparative literature in the field of trade politics generally finds that any instrument that

[9] Judy Fudge, 'Revising Labour Law for Work' in M Chen and F Carré (eds), *The Informal Economy Revisited* (Abingdon: Routledge 2020) 105, 106; Kamala Sankaran, 'Realising Employer Liability for Informal Workers' in M Chen and F Carré (eds), *The Informal Economy Revisited* (Abingdon: Routledge 2020) 226, 227.
[10] Suzanne Bergeron. 'Formal, Informal and Care Economies' in L Disch and M Hawkesworth (eds), *The Oxford Handbook of Feminist Theory* (Oxford: Oxford University Press 2016) 179, 197. For an example, see (anonymized).
[11] Cf Samuel Moyn, *A Powerless Companion: Human Rights in the Age of Neoliberalism,* 77 Law & Contemporary Problems 147 (2014).
[12] Jukka Takala and others, *Global Estimates of the Burden of Injury and Illness at Work in 2012,* 11(5) Journal of Occupational and Environmental Hygiene 326 (2014).
[13] Armin von Bogdandy, Comparative Public Law for European Society, 83 Die Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (2023) 221.

cannot lead to a suspension in case of a violation is a 'soft' instrument. [14] However, this article is written from a public law perspective. The comparative literature in this field considers that the nature of the legal obligation determines whether an instrument is 'soft' or 'hard'. Provisions that are not enforceable with suspension can thus also be 'hard' instruments. This encompasses, for example, (mandatory) dialogue, such as a panel of experts.

II. Is OHS a fundamental labour right?

During the 1996 World Trade Organization (WTO) Singapore Ministerial Conference, civil society tried to put labour rights on the agenda. But most developing and emerging states opposed linking trade concessions to labour rights because such a linkage can be used to undercut competition from products that are made with lower labour costs. [15] Ultimately, the Singapore Declaration (1996) indicated that the ILO is the relevant international forum to deal with labour standards.[16] This Declaration also determined that labour standards may not be used for protectionist purposes and that the comparative advantage of countries, particularly low-wage countries, may in no way be questioned.[17] The ILO Declaration on Fundamental Principles and Rights at Work – adopted during the 86th session of the International Labour Conference (ILC) in 1998 – and the follow-up ILO Declaration on Social Justice for a Fair Globalization (2008) echo this anti-protectionist stance.[18]

These two ILO declarations furthermore explain that all Members of the ILO have to respect, promote and realize 'fundamental' principles and rights at work.[19] These universal obligations arise from the very fact of membership and exist whether or not the Members have ratified the relevant Conventions. In 1998, only the following rights and principles – included in eight fundamental labour rights conventions – were recognized as fundamental by the ILO: the freedom of association and the effective recognition of collective bargaining, the

[14] Eg Adrian Smith, James Harrison, Liam Campling, Ben Richardson and Mirela Barbu, *Free Trade Agreements and Global Labour Governance* (Routledge 2020), p. 141; Jan Orbie, 'EU Trade Policy Meets Geopolitics: What about Trade Justice?' (2021) 26(2) European Foreign Affairs Review, p. 198.
[15] See Stefano Saluzzo, *The Best Interests of the Child in International Trade Policies: Some Remarks on Child Labour and Trade*, 89 Questions of International Law (2022) 55; (anonymized).
[16] WTO, Singapore Ministerial Declaration, 18 December 1996, WT/MIN(96)/DEC/W, 4.
[17] Ibid.
[18] ILO, Declaration on Fundamental Principles and Rights at Work (86th International Labour Conference (ILC) session Geneva 18 June 1998), para 5; ILO, Declaration on Social Justice for a Fair Globalization (97th ILC session Geneva 10 June 2008), 11.
[19] ILO Declaration 1998, ibid, para 2; ILO Declaration 2008, ibid, 6-7.

elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation.[20]

While OHS is the most mentioned labour right (after the four other fundamental labour rights) in codes of conduct of corporations, [21] it has not been generally recognized as a fundamental labour right for a long time. Only ILO fundamental Convention 182 on the Worst Forms of Child Labour stated that work that is 'likely to harm the health, safety or morals' of persons under the age of 18 is hazardous. [22] In its 2003 Global Strategy on Occupational Safety and Health, the ILO simply described OHS as 'a fundamental requirement for achieving the objectives of the Decent Work Agenda'.[23] The advancement of this agenda would help to provide the protection to informal workers that the labour contract traditionally granted,[24] but a strong legal instrument to support this agenda was rejected. [25] The 2008 ILO Declaration on Social Justice for a Fair Globalization stated that the commitments and efforts of the ILO and its Members should be based on four strategic objectives, through which the Decent Work Agenda is expressed. [26] One of the objectives explains that each party should develop and enhance measures of social protection which are sustainable and adapted to national circumstances, including healthy and safe working conditions.

For long, however, various commentators asked attention for the 'fundamental status' of OHS. Philip Alston warned that the four fundamental labour rights that were recognized

[20] ILO, Convention C029: Forced Labour Convention (1930); ILO Convention C087: Freedom of Association and Protection of the Right to Organise Convention (1948); ILO Convention C098: Right to Organise and Collective Bargaining (1949); ILO, Convention C100: Equal Remuneration Convention (1951); ILO, Convention C105: Abolition of Forced Labour Convention (1957); ILO, Convention C111: Discrimination (Employment and Occupation) (1958); ILO, Convention C138: Minimum Age Convention (1973); ILO, Convention C182: Worst Forms of Child Labour Convention (1999).
[21] Sarah Vandenbroucke and Jaroslaw Kantorowicz, Decoding Supplier Codes of Conduct with Content and Text as Data Approaches' (working paper).
[22] Article 3(d) ILO Convention C182 ibid. The Convention on the Rights of the Child Preamble art. 32, 20 November 1999, 1577 U.N.T.S. 3 recognizes the right of the child to be protected from performing any work that is likely to be hazardous or harmful to the child's health or physical development. But article 4(1) ILO Convention C182 leaves it up to national laws and regulations and competent authorities to determine which labour is harmful in this sense.
[23] ILO, 'Global Strategy on Occupational Safety and Health' (2003) https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/policy/wcms_107535.pdf (visited 8 April 2022) para 1.
[24] Bergeron, above n 10, at 200.
[25] Paul van der Heijden, *The ILO Stumbling Towards its Centenary Anniversary*, 15 International Organizations Law Review 203, at 207 (2018).
[26] ILO Declaration 2008, above n 18, 9-11.

buried OHS in 2004.[27] Jukka Takala, former ILO Director of the In Focus Programme on Safety and Health, said that OHS should be recognized as a fundamental human right in 2002.[28] This position has been supported by various labour ministries and corporations at two World Congresses on Safety and Health at Work, which are jointly organized every three years by the ILO and the International Social Security Association. The Seoul Declaration on Safety and Health at Work adopted in 2008 has been signed by six labour ministries (including the ministries of Iraq and Mauritania), and various corporations (including Samsung and Du Pont).[29] The Istanbul Declaration on Safety and Health at Work (2011) has been signed by 33 labour ministries (including the ministries of Bangladesh, India and Nigeria).[30] The European Parliament and the European Agency for Safety and Work signed the Seoul Declaration, but the Finnish Ministry of Social Affairs and Health was the only national ministry of an EU Member State that signed the Seoul and Istanbul declarations. In 2017, the government of Malta, however, speaking on behalf of the EU and its Member States requested to explore the suitability and feasibility of including OHS in the fundamental principles and rights at work.[31] At the ILO's 100-year anniversary in 2019, a 27-member Global Commission that was appointed to undertake an in-depth examination for the delivery of social justice in the 21st century also recommended recognizing OHS as a fundamental labour right that should be part of a 'universal labour guarantee' for all workers regardless of their contract or employment status.[32] The government of Ireland, speaking on behalf of the EU and its Member States and the government of Mali, speaking on behalf of the Africa group, and various other governments, including the governments of New Zealand and

[27] Philip Alston, '*Core Labour Standards' and the Transformation of the International Labour Rights Regime* 15(3) European Journal of International Law 457, at 504 (2004). See also Jeffrey Hilgert, 'A New Frontier for Industrial Relations: Workplace Health and Safety as a Human Rights' in L Compa and J Gross (eds), *Human Rights in Labor and Employment Relations: International and Domestic Perspectives* (Cornell: Cornell University Press 2009) 43; Tonia Novitz, 'Labour Standards and Trade: Need We Choose Between "Human Rights" and "Sustainable Development' in H Gött (ed), *Labour Standards in International Economic Law* (Cham: Springer : 2018) 115.

[28] Jukka Takala, 'Life and Health are Fundamental Rights for Workers' in *Health and Safety at Work: a Trade Union Priority* (Geneva: ILO 2002) 1.

[29] Seoul Declaration on Safety and Health at Work (XVIIIth World Congress on Safety and Health at Work Seoul 29 June 2008). Note that both Samsung and Du Pont have violated OHS and engaged in 'green-washing' in the past. See anonymized; anonymized; Stephanie Soechtig and Jeremy Seifert, The Devil We Know (Cinetic Media 2018).

[30] Istanbul Declaration on Safety and Health at Work (XIXth World Congress on Safety and Health at Work Istanbul 11 September 2011).

[31] ILO, Provisional Record Sixth Item on the Agenda: a Recurrent Discussion on the Strategic Objective of Fundamental Principles and Rights at Work (108th ILC session Geneva 7 August 2017) 11-2(Rev.), 331.

[32] Global Commission on the Future of Work, *Work for a Brighter Future* (Geneva: ILO 2019) 39.

Norway supported this line of thinking.[33] Such calls were echoed by a number of UN experts, including Philip Alston, then UN Special Rapporteur on Extreme Poverty and Human Rights and Baskut Tuncak, then UN Special Rapporteur on Human Rights and Toxics Wastes. [34] They asked the ILO to recognize OHS as a fundamental labour right to end 'the exploitation of workers who are forced to choose between a paycheque and their health'.[35] They were reportedly provoked by an employers' representative who insisted that OHS was not a human right.[36] Employers organizations insisted that OHS was not a fundamental right, and tried to limit its scope to the promotion of occupational safety and health as an 'important foundation of decent work'.[37]

The Declaration adopted at the centenary session of the International Labour Conference (2019) did ultimately not yet recognize OHS as a fundamental labour right.[38] The compromise was to include in the Centenary Declaration a statement that safe and healthy working conditions are fundamental to decent work, whereas the accompanying resolution would request the ILO Governing Body 'to consider, as soon as possible, proposals for including safe and healthy working conditions in the ILO's framework of fundamental principles and rights at work'.[39] The visibility and importance of OHS increased considerably during the pandemic. It became a concern for every person around the world. The pandemic showed the extent of interdependence in global chains where any node can become a 'choke point'. [40]

[33] ILO, Provisional Record Fourth Item on the Agenda: ILO Centenary Outcome Document (108th ILC session Geneva June 2019) 6B(Rev.), 989, 1005, 1009 and 1010.
[34] UNGA, Rep. of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, *Principles on Human Rights and the Protection of Workers from Exposure to Toxic Substances*, U.N. Doc. A/HRC/42/41 (17 July 2015), para 13; UN OHCHR**,** 'UN Experts Urge ILO to Back Safe and Healthy Work Conditions as a 'Fundamental' Right' (2019) https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24695&LangID=E (visited 3 January 2021).
[35] UN OHCHR ibid.
[36] UNGA, above n 34, para 13.
[37] ILO, above n 33, 986.
[38] ILO, Centenary Declaration on the Future of Work (108th ILC session Geneva 26 June 2019). Section II.d.
[39] Ibid; ILO, Resolution on the ILO Centenary Declaration on the Future of Work (108th ILC session 21 June 2019), 1.
[40] Valerie Bryson, *The Futures of Feminism* (Manchester: Manchester University Press 2021) 148.

The right to a safe and healthy working environment was ultimately recognized as a fundamental labour right during the 110th ILC session in June 2022.[41] Thereto, the 1998 ILO Declaration on Fundamental Principles and Rights at Work was amended. In addition, ILO Conventions 155 and 187 were identified as fundamental labour conventions.[42] Both conventions underline the importance of progressively establishing the goal of a preventative safety and health culture and of applying a systems approach to OHS management.[43] There were considerable – but legally largely unfounded – concerns that this development would have an impact on any obligations relating to 'fundamental principles and rights at work' or 'core labour standards' in bi- and plurilateral trade agreements.[44] To exclude any doubts that an evolutive or dynamic interpretation would create new obligations relating to OHS, it was explicitly stated that existing trade and investment agreements between States would not be affected in any unintended manner.[45]

III. How the EU used to approach OHS in FTAs

1. General clauses relating to OHS

The EU has systematically included human rights clauses in its trade agreements since 1995.[46] While such clauses have – in principle – the potential to cover a range of 'human rights' including OHS, they have to date mainly been applied in situations of major political instability, such as coups d'état, flawed elections and grave crimes. [47] Furthermore, the recognition of four fundamental labour rights in the 1998 ILO declaration was helpful for the EU to move on from the in part II described controversy on a social clause. Gradually, the EU's FTAs started referring to core labour standards, beyond non-discrimination against migrant workers. The trade agreement with South Africa (1999) referred to the parties' recognition of the responsibility to guarantee the core labour rights, while the trade agreement with Chile (2002) referred to the importance of the promotion of conventions with

[41] ILO, Resolution on the Inclusion of a Safe and Healthy Working Environment in the ILO's Framework of Fundamental Principles and Rights at Work, 10 June 2022, ILC.110/Resolution I, 1.
[42] Ibid, 3.
[43] ILO, above n 33, 1002.
[44] For a discussion, see Politakis, above n 1, 11-12 and 16-17
[45] ILO, above n 41, 5.
[46] See generally Peter van Elsuwege and Joyce De Coninck, 'The Effectiveness of Human Rights Clauses in EU Trade Agreements: Challenges and Opportunities' (forthcoming) https://www.europarl.europa.eu, 14-15.
[47] Lorand Bartels, 'Human Rights, Labour Standards and Environmental Standards in CETA' in S Griller, W Obwexer and E Vranes (eds), *Mega-Regional Trade Agreements: CETA, TTIP and TISA: New Orientations for EU External Economic Relations* (Oxford: Oxford University Press 2008) 202, 210.

core labour standards. [48] The EU's position on trade and labour was outlined in the Council Conclusions of October 1999. [49] The first sentence of these conclusions reads 'the EU should strongly support the protection of fundamental labour rights'. The European Commission also pledged to include specific provisions on the (four then recognized) fundamental labour standards in trade agreements in 2001.[50] This body held that the EU should seek to strengthen international and European instruments for promoting the universal application of these standards and reinforce global social governance through an integrated and multi-disciplinary approach, while firmly rejecting protectionist or sanction-based approaches. In 2006, the European Commission announced that it would broaden its approach to include not only the fundamental labour standards but also the promotion of 'decent work' in the world.[51] In particular, the CARIFORUM States (Caribbean community states and the Dominican Republic) and the EU Member States recognized 'the beneficial role that fundamental labour standards and decent work can have on economic efficiency' in their Economic Partnership Agreement (2008).[52] The entry into force of the Lisbon Treaty in 2009 led to an increase of labour provisions in trade agreements.[53]

As of 2011, all EU FTAs contain chapters dedicated to 'trade and sustainable development' (TSD). The EU has to date successfully negotiated such chapters in eleven FTAs.[54] All these chapters contain soft obligations, such as the recognition of the importance of considering scientific information (in some cases only with respect to measures that affect trade.[55] They also comprise a number of binding environmental and labour obligations that

[48] Article 86.2 Trade Development and Cooperation Agreement EU – South Africa, 1999; Article 44.1 Chile – EU Association Agreement, 2002.
[49] *Council Conclusions on Trade and Labour* cited in *Commission Communication on Promoting fundamental Labor Standards and Improving Social Governance in the Context of Globalisation*, at 24, COM (2001) 416 final (Jul. 18, 2001).
[50] *Commission*, ibid, 18.
[51] *Commission Communication on Promoting Decent Work for All: The EU Contribution to the Implementation of the Decent Work Agenda in the World*, COM (2006) 249 final (May 24, 2006), 2.
[52] Article 191.3 Economic Partnership Agreement between the CARIFORUM States and the European Community, 2008.
[53] Articles 9 and 207(1) Consolidated Version of the Treaty on the Functioning of the European Union (2012) OJ C 326.
[54] Commission**,** 'Sustainable Development' (2021) https://ec.europa.eu/trade/policy/policy-making/sustainable-development/#tsd-review-2021 (visited 13 April 2022).
[55] E.g, 356.3 Trade and Cooperation Agreement between the EU and the European Atomic Energy Community, on the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, 2021 (EU–UK Trade and Cooperation Agreement); Article 13.11 FTA between the EU and the Socialist Republic of Viet Nam (EU–Viet Nam FTA), 2020. See Ionel Zamfir, 'Labour Rights in EU Trade Agreements Towards Stronger Enforcement' (2022)

relate to OHS. Marco Bronckers and Giovanni Gruni have analysed such chapters. [56] They concluded that there are two categories of binding obligations. Both categories are relevant to OHS.

On the one hand, there are obligations with an international focus in the TSD chapters of EU FTAs. There are three types of international obligations. [57] First, there are obligations regarding the ratification of international labour and environmental conventions. [58] In particular in respect of labour standards, FTAs may mandate the parties to ratify specific international conventions (if they have not done so yet). [59] For example, the EU agreement in principle with Mercosur (Argentina, Brazil, Paraguay and Uruguay) determines that 'Each Party shall make continued and sustained efforts towards ratifying the fundamental ILO Conventions, Protocols and other relevant ILO Conventions to which it is not yet Party and that are classified as up-to-date by the ILO'.[60] This can be interpreted as an obligation to ratify the various ILO Conventions that contain references to OHS, including ILO Conventions 155 and 187. However, such obligations will have limited impact for two reasons. On the one hand, an ad-hoc Panel of Experts has interpreted that the continued and sustained efforts may be interrupted when it interpreted a similar obligation in the FTA between the EU and the Republic of Korea (EU–Korea FTA).[61] On the other hand, most ratification obligations in FTAs use softer or more limited language than the language used in the EU–Mercosur FTA in principle and the EU–Korea FTA. For example, the EU–Japan Economic Partnership Agreement stresses that parties shall make continued and sustained efforts to pursue ratification of 'the fundamental ILO Conventions and other ILO Conventions *which each Party considers appropriate to ratify*'.[62] Second, there are

https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)698800 (visited 8 December 2022), 8.

[56] Marco Bronckers and Giovanni Gruni, *Retooling the Sustainability Standards in EU Trade Agreements* 24(1) Journal of International Economic Law (2021) 25.

[57] Ibid, 26-32.

[58] Ibid, 26.

[59] Ibid.

[60] Article 4.4, Trade and Sustainable Development Chapter, Association Agreement between EU and Mercosur in Principle, 2019 (EU – Mercosur Association Agreement in Principle) (Mauro Pucheta, César Álvarez Alonso and Carlos Ruiz have called upon the EU to only ratify this agreement after Brazil has ratified ILO Convention C087, above n 20).

[61] Article 13.4.3 FTA between the EU and its Member States, of the one part, and the Republic of Korea, 2010 (EU – Korea FTA); Panel of Experts, 'Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement' (2021) https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf (visited 13 April 2022), paras 270 and 273; anonymized.

[62] Article 16.3.3 EU – Japan Economic Partnership Agreement, 2018 (emphasis added) (EU – Japan EPA).

obligations 'to effectively implement the multilateral labour and environmental conventions which they did ratify'.[63] This can be interpreted as an obligation to implement conventions that contain references to OHS. Third, there are obligations to respect, promote, and realize fundamental labour principles, 'even if a Party has not ratified the convention that elaborates on a particular principle'.[64] For FTAs adopted before June 2022, when OHS was recognized as 'fundamental', this category of obligations does not relate to OHS but they can, as detailed at the end of Part III, have an indirect impact on OHS.

On the other hand, there are TSD obligations that relate to existing domestic legislation in the EU's FTAs.[65] Each party keeps its right to determine its levels of labour and environmental protection in domestic laws and policies, as long as they are consistent with its international commitments. But, each party is obliged to uphold the level of domestic labour and environmental protection. This is expressed in two ways. First, the parties shall not fail to enforce their laws. The enforcement clause normally implies a sustained or recurring course of action or inaction. Second, the parties shall not weaken or reduce the achieved protection in their laws. This non-regression clause is usually characterized as a waiver or derogation from environmental or labour laws. Both obligations are conditioned on intended or actual effects on trade and investment between the parties. Clearly, both obligations relate to laws that protect OHS.

2. Clauses specifically relating to OHS

Chapter 23 of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) (2014) was the first TSD chapter in an EU FTA that also contains specific binding OHS obligations.[66] Three provisions need to be discussed. First, Article 23.3.3 requires that each of the parties '*shall ensure* that its labour law and practices *embody and provide protection* for working conditions that respect the health and safety of workers'.[67] This is a hard obligation.[68] It is, amongst others, required to include 'formulating policies that promote basic principles aimed at preventing accidents and injuries that arise out of or in the course of

[63] Bronckers and Gruni, above n 56, 28. In article 292.3 EU – Ukraine Association Agreement such obligations are limited to fundamental and priority conventions. Two out of four priority conventions relate to labour inspection: Labour Inspection Convention, 1947 (No 81) and Labour Inspection (Agriculture) Convention, 1969 (No 129).
[64] Bronckers and Gruni, above n 56, 28 (emphasis omitted).
[65] Ibid, 30.
[66] Canada – EU Comprehensive and Economic Trade Agreement, 2014 (CETA).
[67] (emphasis added)
[68] Bartels, above n 47, 204.

work and that are aimed at developing a preventative safety and health culture where the principle of prevention is accorded the highest priority'.[69] If the measures may affect trade or investment between the parties, then each party 'shall take into account existing relevant and technical information and related international standards, guidelines or recommendations'.[70] But 'in case of existing or potential hazards or conditions that could reasonably be expected to cause injury or illness to a natural person, a Party shall not use the lack of full scientific certainty as a reason to postpone' adopting measures.[71] Furthermore, Article 23.3.2 of this agreement explains that each party shall ensure that its labour law and practices promote health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness. This article refers to the ILO Decent Work Agenda and the 2008 ILO Delcaration. While this article is part of a legally binding agreement, it is open to discussion whether this is a hard obligation. It is difficult to determine 'how much the state is promoting or trying to promote these initiatives'.[72] Finally, article 23.5.1.a CETA sets out that each party shall promote compliance with and shall effectively enforce its labour law, including by maintaining a system of labour inspection and providing access to justice remedies. It is again open to discussion whether this is a hard obligation.

For much longer than the EU, Canada has referred explicitly to OHS in its FTAs.[73] Canada already paid attention to OHS in its trade agreement and labour side agreement with Mexico and the US in the early 1990s.[74] There were particular concerns that hard-fought health and safety laws in Canada would be lowered by this trade agreement.[75] Therefore, the North American Agreement on Labour Cooperation (NAALC) contained eleven guiding labour principles, including compensation and prevention of occupational injuries and

[69] Article 23.3.3 CETA.
[70] Ibid.
[71] Ibid.
[72] Cf Rafael Peels and others, 'Corporate Social Responsibility in International Trade and Investment Agreements' (2016) https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_476193.pdf (visited 13 April 2022).
[73] ILO, 'Assessment of Labour Provisions in Trade and Investment Arrangements' (2016) https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_498944.pdf (visited 3 January 2021), 3.
[74] North America FTA, 1992; North American Agreement on Labor Cooperation, 1993 (NAALC).
[75] Cathy Walker, *NAFTA and Occupational Health: a Canadian Perspective* 18(3) Journal of Public Health Policy (1997) 325, 327. The US, from its side, put OHS on the same footing as trade union rights and the prohibition of forced labour and child labour in an amendment of Section 502(a)(4) Trade Act (1984). This act contains model business principles for US firms doing business around the world.

illnesses. [76] The particular importance of OHS in NAALC is evidenced by the fact that this right is one of the only three principles that was enforceable by sanctions, alongside child labour and minimum wage technical labour standards.[77] Any party could bring a complaint against another party for not effectively enforcing its own OHS, child labour, and minimum wage laws, where the failure is trade-related and is covered by mutually-recognized labour laws.

In a 2021 Staff Working Document on OHS, the European Commission claimed that the fact that 'OHS [was] not one of the *fundamental* principles and rights at work [was] seen by some as an obstacle to ensuring a more active approach to push for implementation' in its trade agreements.[78] Yet, if this is correct, it has only been true in the European context. Canadian and US FTAs have continued to attach particular importance to OHS after the recognition of the first four fundamental labour rights in 1998. Concluded two years after the adoption of the ILO Declaration 1998, the agreement between the US and Jordan left out references to NAALC's eleven labour principles, but contained binding obligations, including enforcement and non-regressions clauses, relating to 'internationally recognized labor rights'. [79] Such rights included acceptable work conditions with respect to OHS, hours of work and minimum wages) and three of the four fundamental labour rights, excluding the anti-discrimination standard.[80] The new trade agreement between Canada, Mexico and the US (2020) also treats OHS like the four (other) fundamental labour rights, including the anti-discrimination standard.[81] The US trade agreements with various countries – including Australia, Bahrain, Chile, Morocco, Oman and Panama – contain binding obligations that explicitly refer to OHS.[82] Similarly, Canada paid attention to OHS in the labour side

[76] Article 49.1 and Annex 1 NAALC; Mary Jane Bolle, 'Overview of Labour Enforcement Issues in Free Trade Agreements' (2016) https://fas.org/sgp/crs/misc/RS22823.pdf (visited 13 April 2022), 3.
[77] Articles 27 and 29 NAALC.
[78] *Commission Staff Working Document accompanying the EU strategic Framework on Health and Safety at Work 2021-2027,* SWD (2021) 148 final (28 June 2021) (emphasis added), 39.
[79] Article 6 Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, 2000; ILO, above 73, 43.
[80] Ibid.
[81] Article 23.1 Agreement between the United States of America, the United Mexican States, and Canada, 2020.
[82] Article 18 Australia – United States FTA, 2004; Article 15 Bahrain – United States FTA, 2004; Article 18 Chile – United States FTA, 2003; Article 16 Morocco – United States FTA, 2004; Article 16 between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area, 2006; Article 16 Panama – United States Trade Promotion Agreement, 2007.

agreements that it negotiated in parallel with its FTAs with Colombia and Peru.[83] These agreements determine, amongst others, that the parties shall ensure that their statutes and regulation, and practices thereunder, embody and provide protection for 'internationally recognized labour principles and rights', covering the four fundamental rights, acceptable conditions of work with respect to OHS, hours of work, minimum wages, and providing migrant workers with the same legal protections as the party's nationals in respect of working conditions. The mega-regional Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018) to which Canada is a party contains binding obligations relating to OHS, including the obligation to maintain statutes and regulations, and practices thereunder, governing acceptable conditions of work with respect to OHS, hours of work and minimum wages.[84] Canada's labour side agreements with Honduras, Jordan, Panama and the FTA with the Republic of Korea contain even more specific binding provisions relating to prevention of and compensation for occupational injuries and illnesses.[85] For example, the last mentioned agreement provides that each party shall ensure that its labour law embodies and provides protection for a limited number of 'principles concerning' 'internationally recognised labour rights', covering the four fundamental labour rights, the prevention and compensation of occupational injuries and illnesses, acceptable minimum employment standards, and non-discrimination in repress of working conditions of migrant workers.[86] This obligation stretches much further than similar obligations in FTAs negotiated by the EU which were – as noted above – certainly until June 2022 limited to the fundamental labour rights bar OHS.[87]

The analysis in this part focuses exclusively on OHS obligations in FTAs. It is useful to note, nevertheless, that the EU has tried to advance OHS via multiple other transnational channels. For example, the provisions relating to the fundamental labour rights and the environment in EU FTAs have led to some innovations in the advancement of OHS indirectly. When the fundamental trade union rights are better protected, OHS is better

[83] Article 1 Canada – Colombia Agreement on Labour Cooperation, 2008; Article 1 Canada – Peru Agreement on Labour Cooperation, 2008.
[84] Article 19 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 2018.
[85] Article 1 Agreement on Labour Cooperation Canada – Hasmemite Kingdom of Jordan, 2009; Article 1 Agreement on Labour Cooperation Canada – the Republic of Honduras, 2013; Article 1 Agreement on Labour Cooperation Canada – Republic of Panama, 2010; Article 18.2 FTA Canada – the Republic of Korea, 2014 (Canada – Korea FTA).
[86] Article 18.2 Canada – Korea FTA.
[87] See (anonymized).

protected.[88] Trade unions are better placed than individual workers to demand that information about toxic substances and diseases is available, accessible and accurate. Stakeholders in institutionalized stakeholder mechanisms – such as members of the EU Domestic Advisory Groups that monitor labour and environmental provisions in FTAs – have also explicitly linked the freedom of association to OHS. [89] Similarly, measures to slow down ecological destruction appeared in connection with hazards for workers. Regulation relating to OHS in the EU has affected regulatory development in other countries. Katja Biedenkopf demonstrated, for example, that the EU Regulation on the Registration, Evaluation, Authorisation and Restriction of Chemicals had effects on policy and legal developments in the Republic of Korea.[90] The South Korean Act on the Registration and Evaluation of Chemicals (2013) was amended in 2018 to mirror the EU's Regulation more closely. These developments allow authorities in the EU and the Republic of Korea to share and compare chemical data and the results of risks assessments for OHS.[91]

IV. How the EU considers OHS in FTAs now

Following renewed protests regarding the impact of the EU's trade liberalisation in various agreements, the European Commission said that it would 'become more responsible' in its Trade for all Strategy (2015).[92] This strategy has nevertheless been vehemently criticized as a case of 'old wine in new bottles', because the promotion of values continues to be embedded in and subjugated to neoliberal logics.[93] In response, the Commission issued a 'non-paper' on its TSD chapters (2017).[94] The Commission produced a second non-paper (2018) with a set

[88] UNGA, above n 34, principle 10.
[89] E.g. Plataforma Europa Perú, 'Complaint against the Peruvian Government for Failing to Fulfil its Labour and Environmental Commitments under the Trade Agreement between Peru and the European Union' (2017) https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=12295 (visited 3 January 2021), 3.
[90] European Parliament and Council Regulation 1907/2006 OJ L 396; Katja Biedenkopf, 'Assessing Possibilities for Enhanced EU–South Korea Cooperation on Chemical Regulation' in A Marx and others (eds), *EU–Korea relations in a Changing World* (Leuven Centre for Global Governance Studies 2013) 167.
[91] Biedenkopf ibid, 187-8.
[92] Commission, 'Trade for all: Towards a More Responsible Trade and Investment Policy' (2015) https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf (visited 14 April 2022), 5.
[93] E.g. Lotte Drieghe and Diana Potjomkina, *EU's Value-based Approach in Trade Policy: (Free) Trade for All?* 5(1) Global Affairs (2019), 63.
[94] Commission, 'Non-paper of the Commission Services: Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements (FTAs)' (2017) https://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf (visited 13 April 2022).

of 15 concrete and practicable actions to be taken to revamp the TSD chapters.[95] In 2022, the Commission adopted its Communication on the power of trade partnerships 'together for green and just economic growth'. [96] The main innovation in this communication is the strengthened enforcement by means of trade sanctions as a measure of last resort for violations of fundamental labour rights and the Paris Agreement on Climate Change (2015). [97]

To begin, the Trade for all Strategy and the 2018 non-paper attach unprecedented significance to the right to health and safety at work. To begin, the Trade for all Strategy pledged that trade liberalization has to go 'hand in hand with social justice, respect for human rights, high labour and environmental standards, and health and safety protection'. [98] While this strategy was not particularly innovative, it makes explicit the importance of OHS. The Commission pledged that it would 'prioritise' OHS (alongside the four other fundamental labour rights) in the implementation of FTAs. [99] Specific commitments regarding OHS were made in relation to the Transatlantic Trade and Investment Partnership with the US. The Commission held that this agreement – which has later been aborted by the Donald Trump Administration – should contain far-reaching commitments on ensuring high levels of occupational health and safety and decent working conditions (alongside the four other fundamental labour rights) in accordance with the ILO Decent Work Agenda.[100] A group of scholars based in Belgium, Germany and the UK criticized the 2017 non-paper for not referring to a number of labour standards.[101] They singled out OHS (alongside standards relating to living wage, hours of work, migrant workers' rights, social protection and informal work). In the 2018 non-paper, the Commission proposed to separately 'identify, consider and address priorities' for each trade partner in relation to sustainable

[95] Commission, 'Non-paper of the Commission Services: Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements' (2018) https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf (visited 7 April 2022).
[96] *Commission Communication on the Power of Trade Partnerships: Together for Green and Just Economic Growth*, COM (2022) 409 final (June 22, 2014).
[97] Marco Bronckers, 'The EU's Inconsistent Approach Towards Sustainability Treaties: Due Diligence Legislation v. Trade Policy' (2022) EJIL:Talk!.
[98] Commission, above n 92, 22.
[99] Ibid, 24.
[100] Ibid.
[101] Mirela Barbu and others, 'A Response to the Non-Paper of the European Commission on Trade and Sustainable Development (TSD) Chapters in EU Free Trade Agreements' (2017) https://www.qmul.ac.uk/geog/media/geography/docs/research/working-beyond-the-border/A-Response-to-the-Nonpaper-26.09.17.pdf (visited 13 April 2022), 6.

development.[102] It noted that this involved moving from the current one-size fits all approach regarding labour and environmental obligations, but OHS would get a particular role in all FTAs. [103] Building on CETA, the Commission promised that the EU will include commitments on the effective occupational health and safety and labour inspection system in line with international standards in its FTAs. [104]

Furthermore, the Commission stressed in its 2022 communication that the TSD chapters in its trade agreements should 'reflect' the recognition of OHS as a fundamental labour right.[105] The proposed sanctions for violations of fundamental labour rights would thus also include sanctions for the violation of OHS. Various stakeholders urged the Commission to keep OHS high on the agenda in the consultations that preceded its 2022 paper.[106] For example, trade confederations called on the EU to ensure that the ratification and implementation of the ILO fundamental labour standards including OHS is a pre-condition for concluding trade negotiations. If a partner country has not ratified or properly implemented these conventions, it must demonstrate through a binding roadmap in the TSD chapter how this will be achieved in a timely manner. In addition, trade confederations held that compliance of up-to-date ILO conventions and instruments such as the Forced Labour Protocol and ILO Conventions on OHS, are a pre-condition for entering in trade negotiations. The think thank Europe Jacques Delors agreed, and added a much-needed gender perspective. It noted that 'the lack of protection of women is too often regarded as an economic advantage' by industries that import in the EU. The think thank explained that compliance with ILO Convention 183 on Maternity Protection Convention should be made 'a pre-condition to enter into trade negotiations between the EU and third countries'.[107] It emphasized that this convention provides protection for pregnancy, the shared responsibility of government and society, in order to further promote equality of all women in the workforce, including the health and safety of mothers and children.

[102] Commission, above n 95, 7.
[103] Ibid, 11.
[104] Ibid.
[105] Commission, above n 96, 3.
[106] Commission, 'Open Public Consultation on the Trade and Sustainable Development (TSD) Review' (2021) https://trade.ec.europa.eu/consultations/index.cfm?consul_id=301 (visited 18 April 2022).
[107] ILO, Convention C183: Maternity Protection Convention (2000). The think-thank Jacques Delors also refers to ILO, Convention C190: Violence and Harassment Convention (2019), which contains various references to OHS.

The Commission's documents that are specifically dedicated to OHS contain similar promises. To begin, the 2014-2020 Framework on Health and Safety Strategy was the first edition of this Strategy that aimed to 'contribute to implementing the sustainable development chapter of EU free-trade and investment agreements regarding [OHS] and working conditions'. [108] In the 2021-2027 edition of the strategy, the EU said that it aimed to ensure that OHS standards are properly taken into account as part of binding commitments on labour and social standards. [109] In tandem, it supported the integration of OHS into the ILO framework of fundamental rights and aimed to resume bilateral cooperation with the US under a revisited and updated joint OHS agenda, and to launch new collaborations, in particular with Canada.[110] The EU emphasized its commitment to strengthen engagement with partner countries, regional and international organisations and other international fora to raise OHS standards globally.[111] Furthermore, in the 2021 Staff Working Document on OHS, the Commission promised to ensure that the Memorandum of Understanding with the ILO reflects OHS policy.[112]

The shift is already noticeable in the EU's negotiations with some countries. The language in the EU's proposed texts for the Australia–EU and EU–New Zealand FTAs and in the modernized EU–Chile Association Agreement, the EU–Chile Advanced Framework Agreement. explains that 'Consistent with its commitments under the ILO, each Party shall: (a) adopt and implement measures and policies regarding occupational health and safety, including compensation in case of occupational injury or illness; (b) maintain an effective labour inspection system'.[113] The proposed language in the future EU–Indonesia Free Trade Agreement (2019) and the EU-Mercosur Agreement in principle (2019) is less strong.[114] The EU's proposal notes that particular attention shall be paid by each party to developing and enhancing measures for OHS, compensation in case of occupational injury or illness, and to

[108] *Commission Communication on an EU Strategic Framework on Health and Safety at Work 2014-2020,* COM (2014) 332 final (June 6, 2014), 12.
[109] *Commission Communication EU Strategic Framework on Health and Safety at Work 2021-2027 Occupational Safety and Health in a Changing World of Work,* COM (2021) 323 final (June 28, 2021), 20. See also Commission, above n 78, 38
[110] Commission, above n 109, 20-21.
[111] Ibid.
[112] Commission, above n 78, 38.
[113] EU, Proposed texts for the Chile – EU Modernised Association Agreement (2018), Article 3.7; EU, Proposed texts for the Australia – EU FTA (2019), Article X.3.8; EU, Proposed texts for the New Zealand – EU FTA (2019), Article X.3.8.
[114] EU, Proposed texts for the EU – Indonesia FTA (2017); EU – Mercosur Association Agreement in Principle.

prevention (as defined in the relevant ILO Conventions and other international commitments).[115] (Note that the proposed language for the agreement with Indonesia also explicitly refers to 'prevention of occupational injury or illness'.) According to both agreements, particular attention shall also be paid to labour inspection (in particular through effective implementation of relevant ILO standards on labour inspection aimed at securing the enforcement of legal provisions relating to working conditions and the protection of workers).[116] Finally, the EU-UK Trade and Cooperation agreement contains various obligations in order to maintain a level playing field across the UK and the EU after Brexit.[117] Two chapters are particularly relevant for labour rights. Chapter 6 on labour and social standards contains domestic enforcement and non-regression clauses that explicitly refer to the fundamental labour rights, occupational health and safety standards and a number of other rights.[118] The enforcement provision draws, in particular, inspiration from Article 23.5.a CETA.[119] Each Party shall have in place and maintain a system for effective domestic enforcement and, in particular, an effective system of labour inspections. Chapter 8 on 'other instruments for trade and sustainable development' contains a provision that is similar to Article 23.3.2 CETA. It provides that the parties shall continue to promote, through their laws and practices, the ILO Decent Work Agenda, in particular with regard to health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness.[120]

Nevertheless, various other recent FTAs do not contain such strong language relating to OHS. The FTA between the EU and Viet Nam does not contain specific binding obligations relating to OHS.[121] The European Ombudsman has called the Commission's failure for not conducting a specific human rights impact assessment a case of

[115] Article X.3.8.a EU, Proposed texts for the EU – Indonesia FTA (2017); Article 4.10.a TSD Chapter EU – Mercosur Association Agreement in Principle.
[116] Article X.3.8.c EU, Proposed texts for the EU – Indonesia FTA (2017); Article 4.10.a.c TSD Chapter EU – Mercosur Association Agreement in Principle. Both texts set out that each party shall promote decent work as provided by the 2008 ILO Declaration including OHS (Articles X.3.7 and X.10.2.a of the former agreement and Article 12.1.a. TSD Chapter of the latter agreement).
[117] Article 386.1 etc EU – UK Trade and Cooperation Agreement. See K.D. Ewing, *The EU-UK Trade and Cooperation Agreement: Implications for ILO Standards and the European Charter in the United Kingdom.*, 32(2) King's Law Journal 306 (2021).
[118] Articles 387 and 388 EU–UK Trade and Cooperation Agreement.
[119] Article 388 ibid.
[120] Article 399.6 ibid.
[121] Free Trade Agreement Between the European Union and the Socialist Republic of Viet Nam, 2019.

maladministration. [122] The EU–Mexico Association Agreement in principle (2018) simply notes that the parties shall promote decent work as provided by the 2008 ILO Declaration including OHS.[123] It furthermore notes that particular attention shall be paid by each party to developing and enhancing measures for OHS and maintaining an effective labour inspection system, but only 'according to national conditions and priorities'.[124]

V. Conclusion

This article chronicled the EU's approach toward the right to occupational safety and health in its free trade agreements' trade and sustainable development chapters. While some general provisions have covered this right, the EU has long resisted including explicit binding obligations relating to OHS in its FTAs. Until recently, the EU focused its efforts mainly on the other four fundamental labour rights, reportedly because of the controversial history of a social clause. While trade and sustainable development chapters in agreements that envision far-reaching marketisation will always have a paradoxical flavour, it is particularly hard to keep ignoring OHS in these pandemic times. Moreover, Canada and the US have never stopped treating OHS at least as important as three of the fundamental labour rights in their free trade agreements. This article demonstrates that the EU has gradually been paying more attention to binding OHS obligations in some recent free trade negotiation, even before it was recognized to be a fundamental labour right. The EU will be able to build upon this experience in future FTAs, since it has promised in June 2022 that the 'trade and sustainable development' chapters in its FTAs should reflect the recognition of OHS as a fundamental labour right. For example, the EU FTAs with Canada and the UK refer to obligations relating labour inspection systems, just as the newly recognised fundamental labour rights conventions do (article 9.1 Convention 155; article 2.c Convention 187).

[122] European Ombudsman, Decision European Commission's Failure to Carry Out a Prior Human Rights Impact Assessment of the EU-Vietnam Free Trade Agreement (2016) 1409/2014/MHZ. (The author of this article advocates for a gender-neutral title of this EU body, such as 'European Ombudsperson'.)
[123] Article 10.2.a, Trade and Sustainable Development Chapter, EU-Mexico Association Agreement in Principle, 2018.
[124] Article 3.8 ibid.