

Washington International Law Journal

Volume 29 | Number 1

12-23-2019

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Recommended Citation

Ronald C. Brown, *China-EU BIT and FTA: Building a Bridge on the Silk Road Not Detoured by Labor Standard Provisions*, 29 Wash. L. Rev. 61 (2019).

Available at: <https://digitalcommons.law.uw.edu/wilj/vol29/iss1/4>

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CHINA-EU BIT AND FTA: BUILDING A BRIDGE ON THE SILK ROAD NOT DETOURED BY LABOR STANDARD PROVISIONS

Ronald C. Brown[†]

Abstract: It is time for European Union and Chinese leaders to build on the existing EU-China 2020 Strategic Agenda for Cooperation, quickly conclude on-going negotiations on their EU-China Bilateral Investment Treaty, and begin substantive negotiations on an EU-China Free Trade Agreement? China is now the European Union's second-biggest trading partner behind the United States, and the European Union is China's biggest trading partner. China is reaching to become the leader in globalism and is investing heavily to make it happen. One of the world's largest projects, the Belt and Road Initiative is a primary driver of China's larger development strategy. A key aim of the BRI is to promote economic connectivity among countries in Eurasia by recreating the historic Silk Road along several land corridors and sea routes. While the parts of the project fit together like a giant jigsaw puzzle, one of the most important corridors is the road between the European Union and China where China is the European Union's biggest source of imports and its second-biggest export market. China is motivated to address historic obstacles and seize the opportunities for growth. At the same time, China can develop its own mega-regional free trade agreement as other such agreements grow around them, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership and the Comprehensive Economic and Trade Agreement, while China's Regional Comprehensive Economic Partnership and European Union's Transatlantic Trade and Investment Partnership languish. China's first step might be an EU-China free trade agreement setting standards among the European Union's 28 countries and China and paving the Silk road with a model for the 68 countries touched by the BRI encompassing about two-thirds of the world's population and 40% of global GDP. This paper will compare and discuss the possible accommodations necessary to reconcile the different approaches in free trade agreements by the European Union and China, with a focus on labor standards and dispute resolution provisions in their existing free trade agreements, in the context of current global obligations, including the International Labour Organisation, Organisation for Economic Co-operation and Development, and others.

Cite as: Ronald C. Brown, *China-EU BIT and FTA: Building a Bridge on the Silk Road Not Detoured by Labor Standard Provisions*, 29 WASH. INT'L L.J. 61 (2019).

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I. INTRODUCTION

Background In 2014, Chinese President Xi Jinping called for the European Union and China to “actively explore” a bilateral free trade agreement:

“Together we make up one-third of the global economy. We must actively explore the possibility of a free trade area and the goal of bringing [annual] bilateral trade to one trillion dollars by 2020. . . . We must work to make China and the EU the twin engines for global economic growth.”¹

There are many reasons and opportunities why they should contemplate an EU-China Free Trade Agreement (“FTA”) at this time.

Against a background in which the United States is increasingly drawing into question its commitments to free trade and the global commons, and with the uncertainty resulting from Brexit, there clearly exists a need for China and the EU not only to increase the breadth and depth of their cooperation, but also to act more strategically in the way they relate to each other.²

There is increasing common interest and cooperation between the European Union and China. European Council President, Donald Tusk, has called for reform of the World Trade Organization, including new rules on industrial subsidies and intellectual property rights, as Europe tries to form a

¹ Shawn Donnan & Andrew Byrne, *China Courts EU on Bilateral Trade Agreement*, FIN. TIMES (April 1, 2014), <https://www.ft.com/content/77dc2efc-b9b4-11e3-a3ef-00144feabdc0>. See generally Theresa Fallon, *China's Pivot to Europe*, 36 AM. FOREIGN POL'Y INT. 175 (2014) (The author urges caution on understanding the many implications of such treaty arrangements).

² ALICIA GARCÍA-HERRERO ET AL., *EU-CHINA ECONOMIC RELATIONS TO 2025: BUILDING A COMMON FUTURE* iv (The Royal Institute of International Affairs, 2017). Britain (which may exit the EU under its Brexit plan) and China are also discussing trade agreements. “Speaking to reporters in Beijing after meeting British Foreign Secretary Jeremy Hunt, Chinese Foreign Minister Wang Yi said the two countries agreed to increase trade and investment. Hunt said Wang made an offer ‘to open discussions about a possible free-trade deal between Britain and China post Brexit.’” *China Open to Talks on Free-Trade Deal with Post-Brexit Britain, Visiting Foreign Minister Jeremy Hunt Says*, SOUTH CHINA MORNING POST (July 30, 2018), <https://www.scmp.com/news/china/diplomacy-defence/article/2157389/free-trade-agenda-britains-new-foreign-minister-trip>. See also ALICIA GARCIA-HERRERO & JIANWEI XU, *WHAT CONSEQUENCES WOULD A POST-BREXIT CHINA-UK TRADE DEAL HAVE FOR THE EU?*, (Bruegel, 2016), https://bruegel.org/wp-content/uploads/2016/10/PC_18_16-1.pdf.

common front with China against Washington's trade tariffs.³ Perhaps it is time for the European Union and China to build on the existing EU-China 2020 Strategic Agenda for Cooperation, quickly conclude on-going negotiations on their EU-China Bilateral Investment Treaty ("BIT"), and initiate and expedite formal substantive negotiations on an EU-China FTA. China is now the European Union's second-biggest trading partner behind the United States, and the European Union is China's biggest trading partner. The resulting FTA could enhance trade opportunities and contribute to China's employment opportunities and rising labor standards.⁴

There are recent precedents indicating China is open to substantive labor provisions in its FTAs and these provisions will not be an obstacle to completing an EU-China FTA.

After four years of negotiations, Switzerland has become the second European country [and first with labor provisions] to sign a free trade agreement with China. The importance of the FTA rests in the fact that China regards it as a significant trial run for further FTAs with industrialized countries and the European Union. . . . Right from the start, the Non-governmental Organizations and the trade unions successfully committed the Swiss negotiating party to the inclusion of a "durability chapter" in this FTA, which emphasizes human rights and labor rights as well as environmental standards.⁵

China is striving to become the leader in globalism⁶ and is investing heavily in making it happen. One of the world's largest projects, the Belt and

³ Lucy Hornby, *Tusk Calls for WTO Reform: Europe Seeks Common Front with China Against Tariff Threat*, FIN. TIMES, July 15, 2018, <https://www.ft.com/content/e683392c-88b8-11e8-bf9e-8771d5404543>.

⁴ James Harrison et al., *Governing Labor Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development Chapters*, 57 J. OF COMMON MKT. STUD. 260, 262 (2019), <https://onlinelibrary.wiley.com/doi/full/10.1111/jcms.12715> (studying "EU bilateral trade agreements in force prior to 2010, [and] concluding that those 'with labor provisions have a positive and statistically significant impact on workers' rights in signatory nations.'").

⁵ Vasco Pedrina & Zoltan Doka, *Switzerland-China Free Trade Agreement and Labor Rights*, GLOBAL LABOUR COLUMN (Oct. 2014), <http://column.global-labour-university.org/2014/10/switzerland-china-free-trade-agreement.html> (footnote omitted).

⁶ See Ronald C. Brown, *A New Leader in Asian Free Trade Agreements? Chinese Style Global Trade: New Rules, No Labor Protections*, 35 PAC. BASIN L. J. 1, 5 (2017).

Road Initiative (“BRI”),⁷ is a primary driver of China's development strategy. A key aim of the BRI is to promote economic connectivity among countries in Eurasia by recreating the historic Silk Road by land and sea routes along several corridors. The land corridors include “roads, railways, bridges, power plants—anything that makes it easier for Europe, Asia, and Africa to trade goods with China.”⁸ The BRI's sea route is “a chain of seaports from the South China Sea to the Indian Ocean that direct maritime trade to and from China.”⁹

While the parts of the project fit like a giant jigsaw puzzle, one of the most important corridors is the road between the EU and China—which has aided China as the European Union's biggest source of imports and second-biggest export market.¹⁰

While China's Regional Comprehensive Economic Partnership (“RCEP”) and the European Union's Transatlantic Trade and Investment Partnership (“TTIP”) languish, other FTAs around China, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership

⁷ *Full Text: Action Plan on The Belt and Road Initiative*, STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, http://english.www.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm [https://perma.cc/N657-4LXP]. China's State Council labels its “Silk Road Economic Belt and the 21st Century Maritime Silk Road Initiatives” as the Belt and Road Initiative. It is explained as follows: “The Belt and Road run through the continents of Asia, Europe and Africa, connecting the vibrant East Asia economic circle at one end and developed European economic circle at the other, and encompassing countries with huge potential for economic development. The Silk Road Economic Belt focuses on bringing together China, Central Asia, Russia and Europe (the Baltic); linking China with the Persian Gulf and the Mediterranean Sea through Central Asia and West Asia; and connecting China with Southeast Asia, South Asia and the Indian Ocean. The 21st-Century Maritime Silk Road is designed to go from China's coast to Europe through the South China Sea and the Indian Ocean in one route, and from China's coast through the South China Sea to the South Pacific in the other.” *Id.* See also Xi Jinping, President of People's Republic of China, Work Together to Build the Silk Road Economic Belt and the 21st Century Maritime Silk Road (May 14, 2017), in *Full Text of President Xi's Speech at Opening of Belt and Road Forum*, XINHUA (May 14, 2017), http://www.xinhuanet.com/english/2017-05/14/c_136282982.htm.

⁸ Sam Ellis, *China's Trillion-Dollar Plan to Dominate Global Trade*, VOX (April 6, 2018, 2:45 PM), <https://www.vox.com/2018/4/6/17206230/china-trade-belt-road-economy> (including a video visually describing the BRI. A negative aspect of China's development can occur where China's loans to finance the roads, e.g., in Sri Lanka, cannot be repaid, and China assumes control over property and key ports in the affected country).

⁹ *Id.*

¹⁰ *Countries and Regions: China*, EUROPEAN COMM'N (Aug. 2, 2019), <http://ec.europa.eu/trade/policy/countries-and-regions/countries/china/> (China and Europe trade on average over €1 billion a day).

("CPTPP") and the Comprehensive Economic and Trade Agreement ("CETA"), have grown. China's most significant step toward its own bilateral or eventual mega-regional FTA might be an EU-China BIT and FTA setting its own standards among the EU's 28 countries and China, which would pave the Silk Road with a model for the other five corridors and the 68 countries touched by the BRI encompassing about two-thirds of the world's population and account for more than 40% of global GDP.¹¹

Though there are many trade-related issues to resolve in the negotiation of any FTA, this article focuses on the obstacles surrounding the insertion of labor standards and their dispute resolution. Comparing provisions in China and the European Union's existing FTAs and BITs in the context of the parties' current global obligations, including to the International Labour Organization ("ILO"), WBO, and Organisation for Economic Cooperation and Development ("OECD"), this article questions whether labor provisions in BITs or FTAs will be an obstacle to reaching a final FTA. Following the Introduction, Part II discusses the economic opportunities and obstacles of an EU-China BIT and FTA and the status of the parties' current trade agreements. Part III compares the parties' respective approaches on labor standards and dispute resolution in FTAs and BITs. Part IV provides analyses on the comparisons of approaches, the possible influence of recent FTAs, and the possible labor provisions needing accommodation within international standards. Finally, Part V concludes that labor-standards provisions should not be an obstacle and suggests that the EU-China corridor of the new Silk Road could, and should, be paved with standards consistent with international labor standards and emanating from an EU-China FTA.

II. NON-LEGAL

A. *Opportunities and Obstacles for Growth and Elevated Standards*

The BRI is made up of six corridors that direct trade to and from China, and one of the most significant corridors is between China and the

¹¹ Charlie Campbell, *China Says It's Building the New Silk Road. Here Are Five Things to Know Ahead of a Key Summit*, TIME (May 12, 2017), <http://time.com/4776845/china-xi-jinping-belt-road-initiative-abor/>.

European Union.¹² The BRI offers the opportunity of complementary benefits for the European Union and China. “The EU has the potential to become the western ‘anchor’ of the BRI.”¹³

As free traders in Washington like to point out, it matters who will write the rules or commerce in the 21st century. If the United States isn’t interested anymore, why shouldn’t the EU shoulder this responsibility? An EU-China free trade agreement might not include everything the [Trans-Pacific Partnership]¹⁴ includes—there was a reason why China was never part of the TPP negotiations. But the EU could raise trade standards by asking China to put its money where its mouth is: the rhetoric coming out of Beijing in the past year has been vigorously globalist and pro-free trade. If Beijing wants to prove this isn’t just rhetoric, a free-trade agreement with Brussels holds the key. In return, China would receive greater access to the market of its largest trading partner and European recognition of its market economy status, which neither the EU nor the United States currently recognizes. This would entail compromise from Chinese leaders, but it would also bring benefits and these concessions would be made to the EU, not to China’s potential economic and strategic competitor, the United States.¹⁵

Even with the growing economic integration of the European Union and China there is still much room for growth, especially through foreign

¹² Jonathan E. Hillman, *The Rise of China-Europe Railways*, CTR. FOR STRATEGIC & INT’L STUDIES (Mar. 6, 2018), <https://www.csis.org/analysis/rise-china-europe-railways> (“Just 10 years ago, regular direct freight services from China to Europe did not exist. Today, they connect roughly 35 Chinese cities with 34 European cities. Rail services are considerably cheaper than air and faster than sea . . . and could provide a compelling middle option for more goods in the coming years. Rail’s share of cargo by value is already growing, increasing 144 percent during the first half of 2017, as compared to the same period in 2016. A study commissioned by the International Union of Railways estimates that China-Europe rail services could double their share of trade by volume over the next decade.”).

¹³ García-Herrero et al., *supra* note 2, at viii–ix.

¹⁴ The Trans-Pacific Partnership (“TPP”) was an FTA between twelve Asia-Pacific countries that contained strong labor provisions. Before the United States withdrew in 2017, the TPP was set to become the world’s largest free trade deal, covering 40 percent of the global economy. See James McBride & Andrew Chatzky, *What Is the Trans-Pacific Partnership (TPP)?*, COUNCIL ON FOREIGN RELATIONS (Jan. 4, 2019), <https://www.cfr.org/backgrounder/what-trans-pacific-partnership-tpp>.

¹⁵ Andrei Lungu, *A New G2: China and the EU?*, THE DIPLOMAT (August 17, 2017), <https://thediplomat.com/2017/08/a-new-g2-china-and-the-eu/>.

direct investment (“FDI”) and services.¹⁶ “Both EU and Chinese leaders believe that effective rules-based multilateralism should form the core of global governance.”¹⁷

The [European Union] and China have much in common. Their GDPs (€4.72 [\$16.23] [CP1] trillion [rb2] and €9.75 [\$10.75] trillion, respectively, in 2015) rank number two and number three in the world, behind the United States (€6.64 trillion). They are two of the most externally-integrated economies in the world, with annual international trade in goods and services of €15 trillion [\$16.54 trillion] (€5 trillion [\$5.51 trillion] if only trade external to the EU is considered) and €4.75 trillion [\$5.24 trillion], respectively, in 2015. Their annual bilateral trade in goods and services stood at €80 [\$640] billion in 2015, with each being the other’s largest source of imports and second-largest export destination. . . . [M]any areas of economic interaction remain under-developed, including trade in services, levels of foreign investment, cooperation on industrial and technological innovation, and financial market integration.¹⁸

Cogent reasons exist for an EU-China FTA:¹⁹ 1) the expanding trade potential;²⁰ 2) the growing and encroaching number of FTAs already setting the rules of trade (such as the CPTPP and CETA—with the RCEP and TTIP to follow) and the fact that the EU and China each have FTAs with some of

¹⁶ See *Countries and Regions: China*, *supra* note 10.

¹⁷ García-Herrero et al., *supra* note 2, at vi.

¹⁸ *Id.* (“Chinese imports of services grew at an average annual rate of more than 25 per cent between 2010 and 2015, and the EU’s trade surplus in services with China has been growing at an average annual rate of 37 per cent since 2010, reaching €1 billion in 2015. . . . Growing Chinese consumption, especially of services, has the potential to create new markets for European businesses, while rising Chinese investment in the EU, in addition to increasing EU GDP and employment, also provides Chinese companies with a platform to improve their global competitiveness”).

¹⁹ JACQUES PELKMANS ET AL., CTR. FOR EUR. POL’Y STUD., TOMORROW’S SILK ROAD: ASSESSING AN EU-CHINA FREE TRADE AGREEMENT 1–4 (2018) (outlining five arguments for an EU-China FTA: “greater economic potential, comparative market access, mega-regionals, the link between Chinese reforms and exposure to foreign competition, and strategic and geo-political advantages.”).

²⁰ *Id.* at 1 (providing 2014 EU-China economic and trade indicators, including: (1) GDP: €16,556.9 billion for the EU and €9,014.7 billion for China; (2) GDP per capita: €32,307.7 for the EU and €6,468.2 for China; (3) total bilateral trade in goods and services: €18.8 billion; (4) FDI-EU position with China (2013): outward €130 billion, inward €27 billion; (5) average applied tariffs in industry: 3.8% for the EU and 8% for China; and, (6) average applied tariffs in agro-food: 7.2% for the EU and 13.9% for China).

the same countries, e.g., South Korea;²¹ 3) China's continual economic reforms can adjust to the necessary accommodations for an FTA;²² and, 4) the coming EU-China corridor of the BRI portends the need for some certainty in the EU-twenty-eight "rules of the road" in trade, including the related issues of labor standards.²³

Even with such cogent reasons for an FTA, many other practical trade-related issues need to be addressed, such as differences in systems (e.g., legal²⁴ and political) and standards (e.g., labor), and consistency in law enforcement, not to mention substantive issues of intellectual property, industry topics, etc. Additional obstacles stem from China's reportedly non-transparent, exclusionary, and preferential trade practices.²⁵ Prior EU-China disputes highlight areas that negotiators would need to address.²⁶

In 2016, due to China's trading practices on dumping, the EU Parliament members voted against the granting of market economy status ("MES") to China.²⁷ An alliance of thirty European industrial associations,

²¹ See Brown, *A New Leader in Asian Free Trade Agreements?*, *supra* note 6, at 8–12. See also *Korea - Trade Agreements*, EXPORT.GOV (Aug. 29, 2019), <https://www.export.gov/article?id=Korea-Trade-Agreements>.

²² PELKMANS ET AL., *supra* note 19, at 2–3 ("The fundamental connection is the drive to stimulate productivity growth over a long period of time, after the current model of mass production based on low-skilled assembly and extreme export-led growth in such products has begun to run out of steam. Higher productivity growth trends also require better, more and higher-quality services, both domestically and as crucial elements in global value chains. Opening up the Chinese economy is therefore, in the mutual interest of both the EU and China, and a deep partnership in the form of an ambitious FTA seems the most expeditious way to achieve that aim.").

²³ See generally Mingha Zhao, *The Belt and Road Initiative and Its Implications for China-Europe Relations*, 51 THE INT'L SPECTATOR 109, 109–18 (2016).

²⁴ OFF. OF THE U.S. TRADE REPRESENTATIVE, 2017 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 94 (2017) (noting key areas that differ between the U.S. and China, including, "administrative licensing, competition policy, the treatment of [NGOs], commercial dispute resolution, labor laws and laws governing land use. Corruption among Chinese government officials, enabled in part by China's incomplete adoption of the rule of law, is also a key concern.").

²⁵ See Brown, *A New Leader in Asian Free Trade Agreements?*, *supra* note 6, at 17–21.

²⁶ See, e.g., Viktoria Dendrinou, *EU Files Complaint Versus China on Raw-Material Duties*, MARKETWATCH (July 19, 2016, 8:07 AM), <https://www.marketwatch.com/story/eu-files-complaint-vs-china-on-raw-material-duties-2016-07-19>. See also *EU Imposes Anti-Dumping Duties on Chinese Steel Products*, XINHUA (October 8, 2016, 10:20 AM), http://www.chinadaily.com.cn/business/2016-10/08/content_26988038.htm.

²⁷ *MEPs Vote Against Market Economy Status for China*, EU BUSINESS (May 13, 2016), <http://www.eubusiness.com/news-eu/china-mes.121ag> ("In a non-legislative resolution passed by 546 votes to 28, [the EU Parliament] said that until China fulfils the EU's five criteria for market economy status, its exports to the EU must be treated in a 'non-standard' way."). See also *What's Market Economy Status?*,

AEGIS Europe, said the European Parliament's signal could not be clearer: "a fair partnership is only possible if China plays by the rules of free and fair international trade, and honors its WTO obligations."²⁸

Another significant issue is the European Union's domestic political situation. Of the EU's twenty-eight states, those already with "good trade deals" with China will be hesitant to support an EU substitute FTA (even though the EU may have the legal authority sign one under the Lisbon Treaty). Divergences among Member States' interests are especially significant in the forging of the European Union's coherent external strategy,²⁹ and tensions between the European Union and its individual member states weaken the European Union's overall influence. In EU-China relations, these inconsistencies can be exploited.

Member States will not easily be convinced to alter their relationships with China; their lack of motivation thus far proves as much. The relationships between the Member States and China are almost entirely economic in nature, therefore only unambiguous economic incentives can coax the EU out of its current highly nationalized approach to China. A comprehensive EU-China FTA would offer these crucial incentives.³⁰

MANUFACTURERS FOR TRADE ENFORCEMENT (2016), <http://www.tradeenforcement.org/market-economy-status/> ("A 'non-market economy' is any foreign country that the U.S. Department of Commerce determines does not operate on market principles of cost or pricing structures. When this is the case, sales by the exporting country do not reflect fair value . . ."); *Why Doesn't China Qualify?*, MANUFACTURERS FOR TRADE ENFORCEMENT (2016), <http://www.tradeenforcement.org/why-china-doesnt-qualify/> ("China is still a Non-Market Economy. While China has made a number of economic reforms in recent years, the Chinese economy remains fundamentally a non-market economic system dominated by the Communist Party and the state.").

²⁸ Nick Prag, *MEPs Defend EU Industry Against China's Unfair Trade Practices*, EU BUSINESS (May 12, 2016, 10:25 PM), <http://www.eubusiness.com/Members/nickprag/china-trade-mes/>.

²⁹ See generally Jing Men, *The EU and China: Mismatched Partners?*, 21 J. OF CONTEMP. CHINA 333, 336 (2012).

³⁰ Zachary Haver, *Rebalancing EU-China Relations: The Case for an EU-China FTA*, WORLD ECON., TRADE AND FIN. (Feb. 9, 2017), <https://www.globalpolicyjournal.com/blog/09/02/2017/rebalancing-eu-china-relations-case-eu-china-fta> ("In general terms, given the enormous size of the EU-China economic relationship, any additional trade liberalization, especially reduction in non-tariff barriers, stands to benefit both parties. . . . In negotiating as a supranational bloc, the EU-28 would have a greater degree of leverage to win concessions, and in turn would be able to collectively offer concessions of their own to China."). See also Michael Smith, *EU Diplomacy and the EU-China Strategic Relationship: Framing, Negotiation and Management*, 29 CAMBRIDGE REV. OF INT'L AFF. 78, 80-82 (2016); Lucie Qian Xia, *So Far, So Close?*

Another political-legal issue raised by an EU-China BIT is what will be the legal effect on the Member States' BITs with China?

EU member states have since 1959 concluded 1,384 BITs with third countries. Regulation 1219/2012 foresees that in the long run all member state BITs are to be replaced by EU [International Investment Agreements] [(“IIAs”)] but does not set a specific time frame. The current EU negotiating agenda will replace a part of existing member states' BITs. . . . However, the ultimate replacement of all existing member states BITs with EU agreements will take time, and the high number of authorizations granted shows that member states remain active in negotiating BITs. . . . For all of these reasons, it can be expected that individual EU member states will continue to request to negotiate new treaties with third countries.³¹

It is reported that “Germany has practically stopped negotiating new BITs because of the transfer of competency for FDI to the level of the European Union.”³² More recently, the European Union's highest court, the

EU-China Network Diplomacy, THE DIPLOMAT (Jan. 17, 2016), <https://thediplomat.com/2016/01/so-far-so-close-eu-china-network-diplomacy/>.

³¹ Stefanie Schacherer, *Can EU Member States Still Negotiate BITs with Third Countries?*, INT'L INST. FOR SUSTAINABLE DEV. (Aug. 10, 2016), <https://www.iisd.org/itn/2016/08/10/can-eu-member-states-still-negotiate-bits-with-third-countries-stefanie-schacherer/> (“Since the entry into force of the Lisbon Treaty in 2009, foreign direct investment (FDI) falls within the common commercial policy of the European Union and, as such, became part of the sphere of exclusive competence of the European Union. The competence shift is evidenced by the negotiations of international investment agreements (IIAs) that the European Commission is conducting with a number of countries, including important economies, such as China and the United States. Against this background, third countries may be surprised when invited by individual EU member states to start bilateral investment treaty (BIT) negotiations. Does EU law allow member states to initiate BIT negotiations? Only the European Union may legislate and adopt legally binding acts concerning areas within its exclusive competence. EU member states may only do so themselves if empowered by the European Union. Accordingly, it falls to the European Union to decide whether to empower member states to conclude international treaties in fields of exclusive EU competence. This ‘re-empowerment’ is usually adopted through secondary EU law (for example, EU regulations) and is often used to provide for transitional arrangements concerning areas over which the European Union newly acquired exclusive competence.”).

³² Axel Berger, *Investment Treaties and the Search for Market Access in China*, INT'L INST. FOR SUSTAINABLE DEV. (June 26, 2013), at n.1, <https://www.iisd.org/itn/2013/06/26/investment-treaties-and-the-search-for-market-access-in-china/> (“As new European investment treaties will replace existing member state BITs the number of German BITs will even decrease in the years to come.”). Once it enters into force, the new agreement will streamline the existing BITs between China and 27 of the 28 EU member states (all, except Ireland). Chancellor Merkel recently stated her support of an EU-China BIT. *See China, Germany Agree to Speed Up Talks on China-EU Investment Agreement, Enrich Bilateral Ties*,

European Court of Justice (“ECJ”), struck down an arbitration agreement contained within a BIT between two EU Member States, the Netherlands and Slovakia, holding it was inconsistent with EU law.³³ Therefore, it is apparent the EU-China BIT will eventually displace the twenty-six existing bilateral agreements between China and EU Members.³⁴

Typical socio-economic issues are how FDI is used and the interaction between foreign owners and local workers. Chinese FDI and ownership in the European Union has raised concerns in some cases;³⁵ however, there are also positive results, as illustrated by Chinese FDI in Sweden (an EU Member State). Chinese investment has thus far been well received in Sweden, where government, business, labor and interest groups, and even the media have lauded Chinese investments for job creation and an increase in the production of Swedish goods and services.³⁶

XINHUA (June 2, 2017), http://www.xinhuanet.com/english/2017-06/02/c_136332689.htm (“Merkel said Germany attaches great attention to the EU-China investment treaty, adding that the signing of the treaty will be a good start of negotiations on an EU-China free trade agreement.”).

³³ See Ben J. Williams, *European Court of Justice Rules that Arbitration Agreement in Intra-EU Bilateral Investment Treaty Violates EU Law Calling into Question the Arbitrability of Energy Disputes Between EU Member States*, KING & SPALDING LLP (Apr. 9, 2018), <https://www.kslaw.com/blog-posts/european-court-of-justice-rules-that-arbitration-agreement-in-intra-eu-bilateral-investment-treaty-violates-eu-law-calling-into-question-the-arbitrability-of-energy-disputes-between-eu-member-states> (noting that the ramifications of this judicial decision are uncertain but likely to impact not only intra-EU BITs but also multilateral investment treaties involving the EU and its member states).

³⁴ *China-EU*, BILATERALS.ORG (July 2014), <https://www.bilaterals.org/?-china-eu->. See also Schacherer, *supra* note 31 (“Only the European Union may legislate and adopt legally binding acts concerning areas within its exclusive competence. EU member states may only do so themselves if empowered by the European Union. Accordingly, it falls to the European Union to decide whether to empower member states to conclude international treaties in fields of exclusive EU competence. This ‘re-empowerment’ is usually adopted through secondary EU law (for example, EU regulations) and is often used to provide for transitional arrangements concerning areas over which the European Union newly acquired exclusive competence.”); *FAQ on the EU Competences and the European Commission Powers*, EUROPEAN COMM’N, <http://ec.europa.eu/citizens-initiative/public/competences/faq> (last updated Oct. 30, 2019).

³⁵ See *Factbox: Chinese Investments in German Companies*, REUTERS (Feb. 26, 2018), <https://www.reuters.com/article/us-daimler-geely-factbox/factbox-chinese-investments-in-german-companies-idUSKCN1GA1RO>.

³⁶ EUROPEAN THINK-TANK NETWORK ON CHINA (ETNC), *CHINESE INVESTMENTS IN EUROPE: A COUNTRY LEVEL APPROACH*, 154–55 (John Seaman et al. eds., 2017) (“According to China’s ambassador to Sweden, Chen Yuming, investment in advanced manufacturing and technology can be linked to the ‘Made in China 2025’ initiative. Sweden can offer products, know-how, technology and innovation in areas that constitute challenges for China, such as the environment and sustainable development. Here, the main interests of Chinese investment in Sweden correspond to investment in Western Europe, with advanced technology and established brands being the main interests of investment.”).

China's interaction with European workers and labor unions is quickly increasing in scale, and by many accounts appears positive. By the end of 2016 in Italy, "more than 260 Chinese industrial and financial companies had invested in around 450 Italian businesses, which in total employ more than 25,000 workers."³⁷ In Norway,³⁸ national labor union representatives and some politicians initially resisted China Bluestar's (a.k.a., ChemChina) acquisition of Elkem (a Norwegian silicone producer). Those resisting worried that a Chinese company, based in an authoritarian political system, would not respect the rights of Norwegian laborers. Yet, since the takeover was completed in 2011, Elkem's representatives have appeared on television regularly praising the company's new owners.³⁹

B. *Pathway Agreements and Projects*

The clearest pathway to a successful bilateral FTA would build on the existing EU-China 2020 Strategic Agenda for Cooperation that places an EU-China BIT⁴⁰ as central to the European Union's long-term bilateral relations with China.⁴¹ The BIT would accelerate the process toward an FTA and create a more open and transparent environment for increased flows of investment. It would also improve investment for European and Chinese

³⁷ *Id.* at 84.

³⁸ See *Norway-European Union Relations*, WIKIPEDIA, https://en.wikipedia.org/wiki/Norway%E2%80%93European_Union_relations (last visited Dec. 1, 2019); *Konstruktionstraktor, Grävmaskin Bulldozer*, BLOGSPOT (July 29, 2015), <http://gravmaskinbulldozer.blogspot.com/2015/07/norway-eu.html> [https://perma.cc/82N6-CRJE] ("Although the Kingdom of Norway is not a member state of the European Union (EU), it is closely associated with the Union through its membership in the European Economic Area (EEA), by virtue of being a founding member of the European Free Trade Association (EFTA), one of the historically two dominant western European" associations).

³⁹ EUROPEAN THINK-TANK NETWORK ON CHINA, *supra* note 36, at 105.

⁴⁰ See Berger, *supra* note 32 (the EU-China BIT has also been referred to as the Comprehensive Agreement on Investment ("CAI") and the terms appear to have flexibility as the latter may omit some terms present in a BIT). For example, China has also negotiated preferential trade investment agreements ("PTIA"), of which four (with Pakistan, New Zealand, Peru, and ASEAN) included comprehensive rules on investment. The PTIA with Singapore incorporates the China-ASEAN investment agreement and the PTIA with Costa Rica (2010) reaffirms a previously-signed China-Costa Rica BIT (2007). The PTIA recently signed with Iceland follows this approach and recognizes the importance (Art. 92) of the China-Iceland BIT from 1994). See Iuliu Winkler, *EU-China Comprehensive Agreement on Investment (EU-China CAI)*, EUROPEAN PARLIAMENT (Oct. 20, 2019), <http://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-eu-china-investment-agreement>.

⁴¹ See *EU-China 2020 Strategic Agenda for Cooperation*, EUROPEAN UNION (Nov. 23, 2013), http://eeas.europa.eu/archives/docs/china/docs/eu-china_2020_strategic_agenda_en.pdf.

investors by creating investment rights and guaranteeing non-discrimination, improving transparency, and providing investment rules on environmental- and labor-related aspects of foreign investment, as all are potential obstacles to agreement of an FTA.⁴²

As the BIT will likely replace existing bilateral agreements between China and EU member states, the groundwork for an eventual EU-China FTA will already exist and could be integrated as was done in CETA and in the EU-Vietnam FTA.⁴³ In 2013, the European Union carried out a “Sustainability Impact Assessment” to assess the potential economic, social, environmental, and human rights impact of the BIT agreement and, among a number of conclusions, determined that forward FDI from the European Union into China has a positive impact on employment and labor conditions in China.⁴⁴

In 2014, China, supported by the European Union, joined the U.S.-led, on-going negotiations towards a global Trade in Services Agreement (“TiSA”) that seeks to open markets and improve rules.⁴⁵

The [TiSA] is a trade agreement currently being negotiated by 23 members of the [WTO], including the EU. Together, the participating countries account for 70% of world trade in services. TiSA is based on the WTO's General Agreement on Trade in Services (GATS), which involves all WTO members. The key provisions of the GATS—scope, definitions, market access, national treatment and exemptions—are also found in TiSA. TiSA aims at opening markets and improving rules in areas such as licensing, financial services, telecoms, e-commerce, maritime transport, and professionals moving abroad temporarily to provide services. There is no formally set deadline for ending the negotiations.⁴⁶

⁴² *Id.* See also *Countries and Regions: China*, *supra* note 10.

⁴³ PELKMANS ET AL., *supra* note 19, at 5.

⁴⁴ See *Impact Assessment Report on the EU-China Investment Relations*, EUROPEAN COMM’N (May 23, 2013), at 45–46, http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2013/swd_2013_0185_en.pdf.

⁴⁵ *Trade in Services Agreement*, EUROPEAN COMM’N, <http://ec.europa.eu/trade/policy/in-focus/tisa/> (last updated July 14, 2017). See also Donnan & Byrne, *supra* note 1.

⁴⁶ *Trade in Services Agreement*, *supra* note 45; see also Donnan & Byrne, *supra* note 1. See also Berger, *supra* note 32, at n. 7; THE WORLD BANK, CHINA 2030: BUILDING A MODERN, HARMONIOUS, AND

And, there is a working group from high levels of both governments, underscoring the seriousness of the work; the EU-China Trade Project II (“EUCTP II”), works on the many substantive issues of an EU-China FTA and suggests appropriate positions and accommodations to support China's continued integration into the global trading system.⁴⁷ EUCTP II will hold approximately 400 individual activities, organized under five linked components covering 40 technical files: (1) trade in services; (2) quality infrastructure and technical barriers to trade; (3) agriculture and SPS; (4) customs and trade related regulatory systems; and, (5) cross-cutting policies.⁴⁸ This is the third project since 2000 that seeks to create a more open EU-China pathway. However, this program expands on previous attempts by promoting fair competition and value for consumers; facilitating harmonization with international standards and promoting safe products; improving food safety and quality; modernizing customs; and encouraging a more transparent legal environment with work towards transparency, good governance, and sustainable development.⁴⁹

C. *EU and Chinese Labor Standards and Dispute Resolution*

To the surprise of many, a recent study suggests that there may not be so many differences between Chinese labor standards of workers and those of some EU States.⁵⁰ A study of Foxconn in the Czech Republic shows that the practices of using temporary workers, maintaining low labor costs, and restricting trade unions resemble Chinese practices.⁵¹ Of course, this is a

CREATIVE SOCIETY 389 (2013) (The report “China 2030” published by the World Bank together with the Development Research Center of the State Council, one of the most influential Chinese think tanks on economic policy issues, calls for a further liberalization of investment restrictions, and especially highlights the importance of market access provisions to be included in future Chinese investment treaties).

⁴⁷ See Carl Hayward, *Trading Places: The EU-China Trade Project*, EUROBIZ (May 30, 2014), <https://www.eurobiz.com.cn/trading-places-eu-china-trade-project>.

⁴⁸ See Project Overview, *EU-China Trade Project II*, EUROPEAN COMM’N, http://www.eeas.europa.eu/archives/delegations/china/documents/news/20110324_01_en.pdf (last visited Dec. 1, 2019); Hayward, *supra* note 47. See also GARCÍA-HERRERO ET AL., *supra* note 2, at 59–67.

⁴⁹ See Project Overview, *EU-China Trade Project II*, *supra* note 48.

⁵⁰ Rutvica Andrijasevic, *Made Within/Outside the EU: What’s the Difference?*, UNI. LEICESTER SCH. OF BUS. BLOG (June 11, 2014), <https://staffblogs.le.ac.uk/management/2014/06/11/made-withinoutside-the-eu-whats-the-difference/>.

⁵¹ See *id.* (In 2015, “in the Czech Republic, the firm achieves flexibility by employing 40 percent of its workforce through temporary work agencies. These indirectly employed laborers—primarily EU migrants from Slovakia, Poland, Romania and Bulgaria—work 12-hour shifts during the peak production periods and are transported back to their countries of origin when work is scarce. They are hired on short-term contracts and are given notice of their shifts a week in advance at best, but often learn if they have

mere snapshot and there is a much larger picture of employment profiles and legal standards and approaches regulating labor that show wide gulfs within the EU Member States and between EU Member States and China.⁵² A recent publication finds that electronics firms in Eastern European countries often use employment practices resembling those in mainland China—a so-called “China-isation” of labor conditions in some EU Member States.⁵³ This evolution of Chinese investment in Eastern Europe has had an impact on working rights and conditions of European workers employed in the electronics sector, especially in Eastern Europe.

Beijing was beginning to pour money and political capital into Eastern and Central Europe as part of a broad bid to increase its heft in Europe. China’s leaders see the region as potentially fertile ground. . . . Looking for further inroads, China started what came to be called the 16+1 initiative, an effort to expand cooperation with more than a dozen Eastern and Central European nations. It became a forum for China to show off what it could offer the region, like access to technology for a high-speed rail system. Mr. Xi later included Eastern and Central Europe in his Belt and Road Initiative, an ambitious plan to develop economic and diplomatic ties through infrastructure projects around the world.⁵⁴

work on the same day. Furthermore, they are paid €2-2.5 per hour compared to directly employed workers who are paid €3-3.5 per hour In the Czech Republic, where trade unions are plant-based, the union tends to only be concerned with issues concerning directly employed workers, the majority of whom are Czech nationals. This de facto exclusion is done to protect the interests of the domestic workers, who benefit from the presence of temporary EU migrants because the latter group absorbs fluctuations in the demand for labor.”).

⁵² See Agnès Parent-Thirion, et al., Eurofound, Sixth European Working Conditions Survey (2017); see also John Hurley, et al., Eurofound & European Comm’n Joint Research Ctr., European Jobs Monitor 2019: Shifts in the Employment Structure at Regional Level (2019).

⁵³ European Trade Union Institute (ETUI), *China-isation of Working Conditions and Workers’ Rights in Europe*, MEDIUM (Oct. 7, 2016), https://medium.com/@ETUI_org/electronicineurope-f413df96297b (listing comprehensive comparative wages and benefits for workers in the electronics industries in Hungary, Czechia, and Turkey, working for Foxconn, Flextronics, Nokia, and Samsung; they are all similarly low).

⁵⁴ David Barboza et. al., *China Seeks Influence in Europe, One Business Deal at a Time*, N.Y. TIMES (Aug. 12, 2018), <https://nyti.ms/2MmEm9w>. The 16+1 format is an initiative by the People’s Republic of China aimed at intensifying and expanding cooperation with 11 EU member states and 5 Balkan countries: Albania, Bosnia, and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Macedonia, Montenegro, Poland, Romania, Serbia, Slovakia, and Slovenia. See “16+1” Summit Has Concluded, COOPERATION BETWEEN CHINA AND CENTRAL AND EASTERN EUROPEAN COUNTRIES

Notwithstanding the above regional wage disparities, the general wage gap between Chinese and European workforces in recent years has narrowed and diminished the competitive cost advantage that China has enjoyed in the past. To better compete, China seeks to mitigate losing its competitive edge due to its rising wages by developing automation and using robots in many economic sectors under its Made in China 2025 robotization/digitalization initiative.⁵⁵ Still, in 2017, the following was reported:

China's median net salary is now equal to parts of Europe, and higher than some Eastern European countries, due to its new minimum wage standards. Factory workers in China are earning more than ever as average hourly wages have gone up a significant 64% since 2011. The trend is expected to continue as salaries for both blue and white-collar workers are expected to grow by 7% this year alone. Wage increases are beneficial for Chinese workers as they rise to the level of various European countries. Median wages in Shanghai (\$1,135) are now comparable to Hungary (\$1,139), Prague (\$1,400) and Poland (\$1,569). Yet China's status as a global manufacturing hub—due in most part to its cheap labor—will likely be impacted. The improved wages for workers may result in a loss of the

(Nov. 11, 2016), http://www.china-ceec.org/eng/ldrhw_1/2016lj/hdxw4/t1414327.htm. Moreover, the China-Europe express railway route has become a key channel of land transportation in the global logistics market and is an important link between China and CEEC. *See also* "16+1" Mechanism Set to Bolster China-Europe Ties, COOPERATION BETWEEN CHINA AND CENTRAL AND EASTERN EUROPEAN COUNTRIES (Jul. 10, 2018) http://www.china-ceec.org/eng/zdogjhz_1/t1575579.htm. Guided by previous China-CEEC summits, the 16+1 mechanism has developed into an important channel for trans-regional cooperation and an eye-catching platform of open multilateral cooperation, which is widely seen as conducive to collaboration between China and the EU. In recent years, there has been steady growth in economic cooperation and trade between China and CEE countries, with two-way trade reaching \$67.98 billion in 2017, up 15.9 percent from the previous year, according to the Chinese Ministry of Commerce. Premier Li also said China expects to strive for pragmatic results in advancing China-EU bilateral investment treaty ("BIT") negotiations and dealing with climate change so as to jointly uphold multilateralism, promote liberalization and facilitation of trade and investment and safeguard world peace, stability and development. *Id.*

⁵⁵ See Ronald C. Brown, *Made in China 2025: Implications of Robotization and Digitalization on MNC Labor Supply Chains and Workers' Labor Rights in China*, 9 *TSINGHUA CHINA L. REV.* 186, 186 (2017).

country's competitive edge to labor pools in Eastern Europe and other Asian countries.⁵⁶

The parity and diversity between the European Union and China suggest there is common ground to discuss FTA rules affecting labor issues. It also reinforces the need to understand the diversity of labor standards in China and within the EU Member States.

Labor unions of course have much interest in international trade not undermining labor rights and opportunities. In 2013, Switzerland became the first European economy (though not an EU Member) to sign an FTA with China, which contained labor provisions and demonstrates China is open to including such terms.⁵⁷ It is reported that interesting political controversy accompanied the negotiation process in that the “Swiss Business Federation and the ‘political right’ were [anxious] to secure privileged access to the massive Chinese market ahead of all the competitors in the EU countries”⁵⁸ and advocated disregarding human and labor rights to obtain that competitive edge.⁵⁹ Ultimately, though the final agreement contains a weak monitoring system with no penalties the “political right” lost the argument to exclude labor standard protections.⁶⁰ There was sentiment that the labor provision did not go far enough and only delivered a glass “half-empty[.]”⁶¹ However, while Swiss labor unions initially opposed the weak labor standards, they later reversed their position and supported the FTA (even though labor accommodations were lacking) when they determined advantages were gained. Swiss trade unions decided that the official linkages under the agreement to facilitate cooperation between unions in Switzerland

⁵⁶ *China's Wages are Catching up to Europe*, GLOBAL UPSIDE (Sept. 4, 2017), <http://www.globalupside.com/chinas-wages-are-catching-up-to-europe/> (“Over the last decade, the European Union (EU) has taken steps to integrate this pool of cheap labor into the global workforce. However, as the Eastern European and Chinese workforces compete, a low-wage ceiling has formed; these two labor pools have come to determine the cost of low-skill labor worldwide. Despite Croatia becoming the newest EU member, the median net salary in Shenzhen, Beijing and Shanghai are all higher than Croatia.”).

⁵⁷ Pedrina & Doka, *supra* note 5. Iceland followed as a second European state to sign an FTA with China. See *Europe FTAs*, BILATERALS.ORG, <https://www.bilaterals.org/?-europe-ftas> (last updated May 2012) (Iceland is not an EU Member but is a member of EFTA).

⁵⁸ Pedrina & Doka, *supra* note 5.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

and China, as well as the opportunity to educate the companies and workers regarding labor standards, were worthy of their support.⁶² The unions perceived the gains as follows:

[T]he preamble to the FTA cites the protocol of understanding reached between Switzerland and China in 2007 on what is termed a “human rights dialogue”. In addition, both sides confirm their commitment to upholding the UN Charter, which is the basis for the subsequently elaborated UN human rights instruments. Regarding ILO core standards, both countries commit to respecting those that have been ratified; China has ratified only 4 (excluding the standards protecting freedom of association and prohibiting forced labor). This is highly problematic. However, the agreement does contain a reference to both parties’ obligations arising from membership of the ILO and from the major ILO declarations on labor rights and social justice, observing all 8 core standards.⁶³

In further support of labor cooperation, a recent joint study on Europe’s and China’s future employment challenges by the Chinese Academy of Social Sciences (“CASS”) and the Directorate General for Employment, Social Affairs and Equal Opportunities of the European Commission concluded there is a shared need to upgrade the labor skills of existing workers.⁶⁴

It is also noteworthy that the EU-China 2020 Strategic Agenda for Cooperation, in its EU-China BIT negotiations, set a goal to negotiate “rules on environmental and *labor-related aspects* of foreign investment.”⁶⁵ Certainly issues of trade unions and workers’ organizational rights under the ILO core labor standards will need to be addressed, along with decisions

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See CAI FANG & XAVIER PRATS MONNÉ, EUROPEAN COMM’N, NEW SKILLS FOR NEW JOBS: CHINA AND THE EU 25–26 (2012) (“Both China and the EU share a common aim to upskill the labor force and recognize that the majority of those that need upskilling are already in work. It is a challenging task to ensure that individuals have access to and actually take up training and that the relevant stakeholders understand the need to provide accessible training to existing workers.”)

⁶⁵ *Countries and Regions: China*, *supra* note 10 (emphasis added).

made about including those rights in a Social Dimension provision in an EU-China FTA.⁶⁶

III. LEGAL: CURRENT LABOR OBLIGATIONS

This section will address the labor obligations, or lack thereof, China and EU members have formed through BITs and FTAs.

A. *China*

While Chinese BITs have not addressed labor concerns, several FTAs with attached MOUs do, though the substance and enforcement are weak. This section will outline and analyze the current labor standard agreements China has made with other countries.

1. *BITs*

Current China BITs,⁶⁷ generally, and specifically those with EU Member States do not contain labor protections or references to ILO standards.⁶⁸ It is not uncommon for a BIT to precede an FTA, and BITs often are incorporated into later FTAs. It was recently noted that as “a precursor to their [FTA] negotiations, which launched in March 2013, China, Japan, and Korea (“CJK”) signed a trilateral investment agreement in May 2012.”⁶⁹

The agreement aims to set the ground-work for greater regulatory transparency, a more predictable policy environment, and a liberalized investment regime in order to facilitate

⁶⁶ INT’L LABOR ORG., SOCIAL DIMENSIONS OF FREE TRADE AGREEMENTS 4 (rev. ed. 2015) (social dimension provisions in FTAs include ILO labor standards).

⁶⁷ See *UN Investment Policy Hub: Terminology*, INV. POLICY HUB, <http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu> (click on drop-down “Terminology+” in left-hand menu) (“International investment agreements (IIAs) are divided into two types: (1) bilateral investment treaties and (2) treaties with investment provisions). A bilateral investment treaty is an agreement between two countries regarding promotion and protection of investments made by investors from respective countries in each other’s territory. The great majority of IIAs are BITs.

⁶⁸ See *Overview of FTA and Other Trade Negotiations*, EUROPEAN COMM’N (Nov. 2019), http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf; see also *UN Investment Policy Hub: Terminology*, *supra* note 66.

⁶⁹ Jeffrey J. Schott & Cathleen Cimino, *The China-Japan-Korea Trilateral Investment Agreement: Implications for US Policy and the US-China Bilateral Investment Treaty*, TOWARD A US-CHINA INVESTMENT TREATY 6, 6 (Peterson Inst. Int’l Economics 2015) (ebook).

intraregional [FDI] (CJK Joint Study Committee 2011).⁷⁰ German Chancellor Merkel recently stated her support of an EU-China BIT; “Germany attaches great attention to the EU-China investment treaty, adding that the signing of the treaty will be a good start of negotiations on an EU-China free trade agreement.”⁷¹

The European Union, itself, has a number of BITs, none of which include labor provisions (though, as discussed below, several EU members’ agreements include labor terms). As the European Union and Chinese trade relationship continues to grow, it is also expected that FDI will increase for both parties. This will result in greater interaction with workers and foreign labor unions and increase the need for attention to labor issues and labor union cooperation.⁷² Meanwhile, the negotiations for an EU-China BIT continue.⁷³ It will replace the twenty-six existing Bilateral Investment Treaties between the twenty-seven individual EU member states and China with a single comprehensive investment agreement.⁷⁴

⁷⁰ See Agreement Among the Government of Japan, the Government of the Republic of Korea and the Government of the People’s Republic of China for the Promotion, Facilitation and Protection of Investment, May 13, 2012, Japanese Ministry of Economy, Trade and Industry, https://www.mofa.go.jp/announce/announce/2012/5/pdfs/0513_01_01.pdf. See also *Significantly Enhanced Protection for Korean Investors Achieved Through Amendment of Korean-China Investment Protection and Promotion Agreement*, S. KOR. MINISTRY OF FOREIGN AFFAIRS AND TRADE (Apr. 13, 2007), http://www.mofa.go.kr/eng/brd/m_5676/view.do?seq=296267&srchFr=&srchTo=&srchWord=&srchTp=&multi_itm_seq=0&itm_seq_1=0&itm_seq_2=0&company_cd=&company_nm= [<https://perma.cc/8SQ3-K7K4>].

⁷¹ *Talks on China-EU Investment Agreement to Speed Up*, BILATERALS.ORG (June 2, 2017), <https://www.bilaterals.org/?talks-on-china-eu-investment>.

⁷² EUROPEAN THINK-TANK NETWORK ON CHINA, *supra* note 36, at 154–55.

⁷³ *Overview of the FTA and Other Trade Negotiations*, *supra* note 68 (the 18th round of negotiations took place in Brussels on July 12–13, 2018).

⁷⁴ *Id.* (In 2016 the EU and China negotiators reached clear conclusions on an ambitious and comprehensive scope for the EU-China investment agreement and established a joint negotiating text).

2. FTAs⁷⁵

a. Past Practice

One survey reveals that in mid-2015 “there were 13 [Chinese] FTAs,” of which eight lack labor protection provisions (ASEAN, Asia-Pacific, Costa Rica, Hong Kong, Macau, Pakistan, Singapore, and Taiwan) while five include labor protection *standards* (Chile, Iceland, New Zealand, Peru, and Switzerland).⁷⁶ Of these latter five FTAs, substantive labor provisions can

⁷⁵ See generally Brown, *A New Leader in Asian Free Trade Agreements?*, *supra* note 6. See also Jay Chittooran, *What Do Chinese Rules Mean for Worker Rights?*, THIRD WAY (Apr. 14, 2015), <https://www.thirdway.org/report/what-do-chinese-rules-mean-for-worker-rights>. (Arguably, there are 16 FTAs, as China had three other FTAs negotiated and in effect (with Taiwan, South Korea and Thailand) but they have not yet been notified to the WTO. None of these three contain a Social Dimension provision with labor protections); *Free Trade Agreements (China)*, ASIAN REG’L INTEGRATION CTR., <https://aric.adb.org/fta-country> (the agreement with Taipei is an Economic Cooperation Agreement); *People’s Republic of China-Taipei, China Economic Cooperation Framework Agreement*, ASIAN REG’L INTEGRATION CTR., https://aric.adb.org/fta/peoples_republic_of_china-taipeichina_economic_cooperation_framework_agreement (signed and in effect, not yet notified to WTO); *People’s Republic of China-Thailand Free Trade Agreement*, ASIAN REG’L INTEGRATION CTR., <https://aric.adb.org/fta/peoples-republic-of-china-thailand-free-trade-agreement> (signed and in effect but not yet notified to the WTO); *People’s Republic of China-Republic of Korea Free Trade Agreement*, ASIAN REG’L INTEGRATION CTR., <https://aric.adb.org/fta/peoples-republic-of-china-japan-korea-free-trade-agreement> (signed and in effect but not yet notified to the WTO); Free Trade Agreement Between the Government of the People’s Republic of China and the Government of the Republic of Korea, June 1, 2015, China-S. Kor., Ministry of Commerce of the People’s Republic of China, http://fta.mofcom.gov.cn/korea/annex/xdzw_en.pdf [hereinafter China-Korea FTA].

⁷⁶ See *China FTA Network*, MINISTRY OF COMMERCE OF THE PEOPLE’S REPUBLIC OF CHINA, <http://fta.mofcom.gov.cn/topic/enperu.shtml> (many sections in Chinese only). The 13 agreements are: Asia-Pacific Trade Agreement, Nov. 2, 2005, Ministry of Commerce of the People’s Republic of China, http://fta.mofcom.gov.cn/yatai/xieyiwenben_en.pdf [<https://perma.cc/Y82T-9M2Y>]; Mainland and Hong Kong Closer Economic Partnership Arrangement (“CEPA”), June 29, 2003, China-H.K., Hong Kong Special Admin. Region Trade and Indus. Dep’t, https://www.tid.gov.hk/english/cepa/files/main_e.pdf; Mainland and Macao Closer Economic Partnership Arrangement, Dec. 18, 2014, China-Mac., Gov’t of the Mac. Special Admin. Region Econ. Servs., https://www.economia.gov.mo/public/docs/CEPA_ACBLCS/index/en/main_text.pdf [<https://perma.cc/5QJB-G2F3>]; Agreement On Trade in Goods of the Framework Agreement on Comprehensive Economic Co-Operation Between the People’s Republic Of China and the Association Of Southeast Asian Nations, Jan. 14, 2007, China-ASEAN, Ministry of Commerce of the People’s Republic of China, <http://fta.mofcom.gov.cn/dongmeng/annex/xieyi2004en.pdf> [<https://perma.cc/QHG8-BQ951>]; Free Trade Agreement Between the Government of the People’s Republic of China and the Government of the Republic of Chile, Nov. 18, 2005, art. 108, China-Chile, Ministry of Commerce of the People’s Republic of China, <http://fta.mofcom.gov.cn/chile/xieyi/freetradexieding2.pdf> [<https://perma.cc/E9LR-ASZ2>] [hereinafter China-Chile FTA]; People’s Republic of China-Costa Rica Free Trade Agreement, Apr. 8, 2010, China-Costa Rica, Org. of Am. States Foreign Trade Info. Sys., http://www.sice.oas.org/Trade/CRI_CHN_FTA/Texts_Apr2010_e/CRI_CHN_Core_text_en.pdf?bcsi_scan_7823DFCE46415F3E=0&bcsi_scan_filename=CRI_CHN_Core_text_en.pdf [<https://perma.cc/2JGD->

only be found in the Memoranda of Understanding (“MOU”), not in the texts of the FTAs. These provisions’ levels of protection range widely. In the China-Iceland FTA the parties agree to enhanced labor communication and cooperation.⁷⁷ In other agreements, such as those with New Zealand and Switzerland, the parties reaffirm their obligations under the ILO, recognize that it is inappropriate to encourage trade or investment by weakening or failing to enforce labor laws, and that it is inappropriate to set or use labor laws, regulations, policies and practices for trade protectionist purposes (though there is no enforcement mechanism).⁷⁸ Thus, in essence, the parties agreed that they had ratified some ILO conventions and agreed to cooperate and consult if they disagree on their respective implementations of obligations. This type of provision is arguably comparable with the “soft law” approaches of corporate social responsibility and codes of conduct, where parties are under no enforceable legal obligations.⁷⁹

b. EU Member States

Currently, there are no FTAs between EU states and China.

4JAY]; Free Trade Agreement Between the Government of the People's Republic of China and the Government of New Zealand, Apr. 7, 2008, China-N.Z., N.Z. Ministry of Foreign Affairs & Trade, <https://www.mfat.govt.nz/assets/FTAs/agreements-in-force/China-FTA/NZ-ChinaFTA-Agreement-text.pdf> [<https://perma.cc/Q8JL-GBP6>] [hereinafter China-New Zealand FTA]; Free Trade Agreement Between the Government of the Islamic Republic of Pakistan and the Government of the People's Republic of China, Nov. 24, 2006, China-Pak., United Nations Conference on Trade & Dev., <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2738> [<https://perma.cc/8MEX-D6V3>]; Free Trade Agreement Between the Government of the People's Republic of China and the Government of the Republic of Singapore Trade Agreement, Oct. 28, 2008, China-Sing., Ministry of Commerce of the People's Republic of China, <http://fta.mofcom.gov.cn/topic/ensingapore.shtml> [<https://perma.cc/S6EP-6SAQ>]; Free Trade Agreement Between the Government of the People's Republic of China and the Government of Peru, Apr. 28, 2009, art. 161, China-Peru, Ministry of Commerce of the People's Republic of China, http://fta.mofcom.gov.cn/bilu/annex/bilu_xdwb_en.pdf [<https://perma.cc/X3PC-A244>]; Cross-Straits Economic Cooperation Framework Agreement, June 29, 2010, China-Taiwan, World Treaty Org. Reg'l Trade Agreements Info. Sys., <https://www.bilaterals.org/IMG/pdf/ECFA.pdf> [<https://perma.cc/G6ZD-VLLB>]; Free Trade Agreement Between the Government of the People's Republic of China and the Government of Iceland, Apr. 15, 2013, art. 96, China-Ice., Ministry of Commerce of the People's Republic of China, <http://fta.mofcom.gov.cn/iceland/xieyi/2013-4-17-en.pdf> [<https://perma.cc/PY5F-35DA>] [hereinafter China-Iceland FTA]; Free Trade Agreement Between the People's Republic of China and the Swiss Confederation, July 6, 2013, China-Switz., Ministry of Commerce of the People's Republic of China, <http://fta.mofcom.gov.cn/topic/enswiss.shtml> [<https://perma.cc/2J4R-3YPC>] [hereinafter China-Swiss FTA].

⁷⁷ See China-Iceland FTA, *supra* note 76.

⁷⁸ See, e.g., China-New Zealand FTA, *supra* note 76.

⁷⁹ Brown, A New Leader in Asian Free Trade Agreements?, *supra* note 6, at 14–17.

c. *Non-EU-Member States*⁸⁰

i) *China-Switzerland FTA*⁸¹

The 2013 Switzerland-China FTA contains minimal language regarding labor standards. Chapter 13.5, Economic and Technical Cooperation, refers to the 2011 and the 2013 China-Swiss Memoranda of Understanding on Labor.⁸² The labor provisions in the 2013 MOU are summarized as follows:

1. Source of standards:

- a. Parties reaffirm the obligations of China and Switzerland as members of the ILO, including their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up.⁸³
- b. Parties reaffirm the obligations Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work of 2006, to recognizing full and productive employment and decent work for all as a key element of sustainable development.⁸⁴
- c. The Parties reaffirm the ILO Declaration on Social Justice for a Fair Globalization adopted by the International Labor Conference at its 97th session in 2008.⁸⁵

2. Obligations:

- a. The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the

⁸⁰ See Ronald C. Brown, *Asian and U.S. Perspectives on Labor Rights under International Trade Agreements Compared*, in GLOBAL GOVERNANCE OF LABOUR RIGHTS 83, 96–112 (Axel Marx, Jan Wouters, Glenn Rayp & Laura Beke, eds., 2015) (discussing differences of approach in the use of labor provisions by Asian countries and many developed western countries).

⁸¹ See China-Swiss FTA, *supra* note 76.

⁸² See Agreement on Labour and Employment Cooperation Between the Federal Department of Economic Affairs, Education and Research of the Swiss Confederation and the Ministry Of Human Resources and Social Security of the People's Republic Of China, July 6, 2013, Swiss-China, ChinaGoAbroad Limited, <http://files.chinagoabroad.com/Public/uploads/v2/uploaded/attachments/1402/Agreement+on+Labour+and+Employment.pdf> (the 2013 MOU also referenced an earlier more generally-worded 2011 MOU).

⁸³ *Id.* art. 2(1).

⁸⁴ *Id.* art. 2(2).

⁸⁵ *Id.* art. 2(4).

- protections afforded in domestic labor laws, regulations, policies and practices in China and Switzerland.⁸⁶
- b. The Parties recognize that it is inappropriate to set or use domestic labor laws, regulations, policies and practices for trade protectionist purposes.⁸⁷
 - c. The Parties will effectively enforce their respective domestic labor laws.⁸⁸
 - d. Article 3(2) of 2013 MOU refers to 2011 MOU Cooperative activities that shall be conducted and may, inter alia, be implemented through:
 - i. Dialogue, exchange of information and best practices
 - ii. Meetings, visits, and workshops of experts
 - iii. Joint studies
 - iv. Joint initiatives in multilateral organizations
 - v. Cooperation projects and capacity building
 - e. Each Party shall appoint a coordinator as contact point for implementation of the MOU⁸⁹
3. Dispute resolution
- a. “Should any issue arise over the interpretation or application of this Agreement, a Party may request consultations with the other Party through the contact points. The Parties will make every effort to reach consensus on the matter through cooperation, consultation and dialogue.”⁹⁰
 - b. “This Agreement shall enter into force on the sixtieth day upon the issue of the latter notification. It shall remain in force indefinitely unless either Party gives notification of termination to the other Party with six months’ notice.”⁹¹

⁸⁶ *Id.* art. 2(5).

⁸⁷ *Id.* art. 2(6).

⁸⁸ *Id.* art. 2(7).

⁸⁹ *Id.* art. 4(1).

⁹⁰ *Id.* art. 4(2).

⁹¹ *Id.* art. 5.

ii) *China-Iceland FTA*⁹²

Iceland is not technically an EU Member though it does share many common undertakings.⁹³ The 2013 Iceland-China FTA has no substantive labor standards. The only reference to labor is found in Chapter 9, Article 96, Labor and Environment Cooperation, where the parties agree to enhance communication and cooperation on labor matters.⁹⁴

“1. The Parties shall enhance their communication and co-operation on labor matters. 2. The Parties will further enhance communication and co-operation in accordance with the Memorandum of Understanding on Environmental Protection Cooperation between the State Environmental Protection Administration of the People’s Republic of China and the Ministry for the Environment of Iceland.”⁹⁵

⁹² See China-Iceland FTA, *supra* note 76.

⁹³ See Agreement on the European Economic Area, May 2, 1992, 1994 O.J. (L 1) 3 (entered into force Jan. 1, 1994). “The Agreement on the European Economic Area, which entered into force on 1 January 1994, brings together the EU Member States and the three EEA EFTA States — Iceland, Liechtenstein and Norway — in a single market, referred to as the ‘Internal Market.’” *EEA Agreement*, EUROPEAN FREE TRADE ASSOCIATION (EFTA), <https://www.efta.int/eea/eea-agreement> (last visited Dec. 1, 2019). In March 2015 Iceland’s government requested that “Iceland should not be regarded as a candidate country for EU membership.” *Iceland*, EUROPEAN COMM’N, https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/iceland_en (last updated Nov. 22, 2017). The Agreement includes close cooperation in areas such as research and development, education, social policy, the environment, consumer protection, enterprise, tourism and culture. Iceland and the EU. *EEA Agreement*, *supra* note 93.

⁹⁴ China-Iceland FTA *supra* note 76.

⁹⁵ *Id.* Regarding the MOU, a communication, dated 5 September 2016, was circulated at the request of the delegations of Iceland and China. The communication included questions to the parties and their answers, including one that read: “In 2005, China and Iceland have signed the Memorandum of Understanding on Environmental Protection Cooperation (MOU). In the China and Iceland FTA, both parties have reiterated the willingness to further promote communication and cooperation according the MOU. All these actions have facilitated the personnel exchanges and information communication between parties. China and Iceland are willing to promote the cooperation of labor and environment under the China-Iceland FTA, especially in the area of nature resource protection, environmental industry and technics, etc.” *Free Trade Agreement Between Iceland and China (Goods and Services) Questions and Replies*,

WORLD TRADE ORG., https://docsonline.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=230995,229840,127699&CurrentCatalogueIdIndex=0&FullTextH ash= (last visited Dec. 1, 2019).

iii) *China-Chile FTA*⁹⁶

The labor provisions are contained in a 2005 MOU, which can be seen to be somewhat strong in substantive obligations, but very weak in enforcement.⁹⁷

1. Source of standards: The Parties shall carry out mutually agreed co-operation activities, more particularly in the following fields:
 - a. employment and labor policies and social dialogue, including decent work, labor laws and labor inspection;
 - b. improvement of working conditions and workers training;
 - c. globalization and its impact on employment, the working environment, industrial relations and governance, social security.⁹⁸
2. Obligations: Co-operation between the Parties shall more particularly be carried out by means of:
 - a. exchanges of information and expertise in the fields covered by the Memorandum;
 - b. reciprocal visits of experts and delegations;
 - c. joint organization of seminars, workshops and meetings for experts, regulatory authorities and other persons concerned;
 - d. consultations within the framework of multilateral discussions on employment, training, labor and social security issues.⁹⁹

⁹⁶ See China-Chile FTA, *supra* note 76 (“The Parties shall enhance their communication and cooperation on labor, social security and environment through both the Memorandum of Understanding on Labor and Social Security Cooperation, and the Environmental Cooperation Agreement between the Parties.”).

⁹⁷ Memorandum of Understanding on Labour and Social Security Cooperation between the Ministry of Labour and Social Security of the People’s Republic of China and the Ministry of Labour and Social Security of The Republic of Chile, Nov. 2, 2005, China-Chile, Org. of Am. States Foreign Trade Info. Sys., http://www.sice.oas.org/TPD/CHL_CHN/Negotiations/MOU_e.pdf [hereinafter China-Chile MOU on Labour and Social Security Cooperation].

⁹⁸ *Id.* art. 1.

⁹⁹ *Id.* art. 2.

“Each of the Parties shall seek to secure the funds required to support co-operation activities and shall undertake the co-ordination of the departments responsible for the implementation of this Memorandum.”¹⁰⁰

3. Dispute Resolutions:

- a. Nothing in this Agreement shall affect in any way the rights and obligations of the Parties resulting from any international legal instrument.¹⁰¹

iv) *China-New Zealand FTA*¹⁰²

The labor provisions are contained in a 2008 MOU, which has good substantive obligations but weak enforcement.¹⁰³

1. Source of Standards: “The Parties reaffirm their obligations as members of the ILO, including their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up.”¹⁰⁴

2. Obligations:

- a. “The Parties recognize that it is inappropriate to set or use their labor laws, regulations, policies and practices for trade protectionist purposes.”¹⁰⁵
- b. “The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labor laws, regulations, policies and practices.”¹⁰⁶
- c. “Each Party may, as appropriate, invite the participation of its unions and employers and/or other persons and

¹⁰⁰ *Id.* art. 4.

¹⁰¹ *Id.* art. 5

¹⁰² China-New Zealand FTA, *supra* note 78, art. 177.

¹⁰³ See Memorandum of Understanding on Labour Cooperation, 2008, N.Z.-China, N.Z. Ministry of Foreign Affairs & Trade, <https://www.mfat.govt.nz/assets/FTAs-agreements-in-force/China-FTA/NZ-China-FTA-Labour-MOU.pdf> [hereinafter N.Z.-China MOU on Labour Cooperation]. The factor of an Asian country negotiating with a Western developed country is discussed in Brown, *Asian and U.S. Perspectives on Labor Rights Under International Trade Agreements Compare, in Protecting Labor Rights in a Globalizing World*, *supra* note 80, at 96–112.

¹⁰⁴ N.Z.-China MOU on Labour Cooperation, art. 1(1).

¹⁰⁵ *Id.* art. 1(3).

¹⁰⁶ *Id.* art. 1(4).

organizations of their countries in identifying potential areas for cooperation and in undertaking cooperative activities.”¹⁰⁷

d. Each of the Parties shall seek to secure the funds required to support cooperation activities and shall undertake the coordination for the implementation of this Memorandum of Understanding.¹⁰⁸

3. Dispute Resolution:

a. “Should any issue arise over the interpretation or application of this Memorandum of Understanding, a Party may request consultation with the other Party, through the coordinator. The Parties will make every effort to reach a consensus on the matter through cooperation, consultation and dialogue.”¹⁰⁹

v) *China-Peru FTA*

The labor provisions are contained in Article 161, Labor Cooperation, of the 2009 MOU: “[t]he Parties shall enhance their communication and cooperation on labor, social security and environment issues through Memorandum of Understanding on Labor Cooperation between the Government of the People’s Republic of China and the Government of the Republic of Peru.”¹¹⁰

B. *The European Union*

The European Union currently has no FTA or BIT with China, though, as discussed above, it is negotiating with China for a BIT and planning for an FTA.¹¹¹ The new EU-China BIT “will replace the 26 existing Bilateral Investment Treaties between 27 individual EU Member States and China by

¹⁰⁷ *Id.* art. 2(4).

¹⁰⁸ *Id.* art. 3(3).

¹⁰⁹ *Id.* art. 4(1).

¹¹⁰ See China-Chile FTA, *supra* note 76. The author was unable to locate a separate Labor Cooperation MOU. See *Trade Policy Developments: Peru-China*, ORG. OF AM. STATES FOREIGN TRADE INFO. SYS., http://www.sice.oas.org/TPD/PER_CHN/PER_CHN_e.ASP (last visited Dec. 1, 2019). The author was unable to locate a separate Labor Cooperation MOU for Peru-China.

¹¹¹ See also *Overview of FTA and Other Trade Negotiations*, *supra* note 68, at 9 (the 18th round of negotiations took place in Brussels from July 12–13, 2018).

one single comprehensive investment Agreement.”¹¹² In addition to BITs and FTAs, the European Union also negotiates treaties called Association Agreements that can also contain commitments regarding labor protections, as discussed below.

I. Association Agreements

The European Union has more than twenty Association Agreements (“AA”),¹¹³ including with Ukraine, Georgia, and Moldova.¹¹⁴ An AA has been defined as follows:

a treaty between the European Union and a non-EU country that creates a framework for co-operation between them. Its legal basis is defined in Article 217 of the Treaty of the Functioning of the European Union (TFEU), which provides for “an association involving reciprocal rights and obligations, common action and special procedures.”¹¹⁵

Under treaty powers, the European Union is authorized “to conclude with one or more third countries or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.”¹¹⁶ Article 217 states they are

¹¹² *Overview of FTA and Other Trade Negotiations*, *supra* note 68, at 10 (in 2016 the EU and China negotiators reached clear conclusions on an ambitious and comprehensive scope for the EU-China investment agreement and established a joint negotiating text).

¹¹³ See *Association Agreements*, INST. FOR GOV'T (Mar. 22, 2018), <https://www.instituteforgovernment.org.uk/explainers/association-agreements> (“Association agreements were originally created by the EU to prepare non-member countries for accession. The very first such agreement was signed by Greece in 1961. But the EU has since used these agreements for far wider reasons, from improving trade with non-member countries such as Morocco, to developing deeper, long-term political relations with countries who are not candidates for accession such as Ukraine.”).

¹¹⁴ See Association Agreement Between the European Union and its Member States, of the One Part, and Ukraine, of the Other Part, Mar. 21, 2014, 2014 O.J. (L 161) 3 [hereinafter EU-Ukraine Association Agreement]; Association Agreement Between the European Union and the European Atomic Energy Community and their Member States, of the One Part, and Georgia, of the Other Part, June 27, 2014, 2014 O.J. (L 261) 4 [hereinafter EU-Georgia Association Agreement]; Association Agreement Between the European Union and the European Atomic Energy Community and their Member States, of the One Part, and the Republic of Moldova, of the Other Part, June 27, 2014, 2014 O.J. (L 260) 4 [hereinafter EU-Moldova Association Agreement].

¹¹⁵ *Association Agreements*, *supra* note 113.

¹¹⁶ Consolidated Version of the Treaty on the Functioning of the European Union art. 217, June 7, 2016, 2016 O.J. (C 202) 13.

generally characterized by a number of principles, including “a clause on the respect of human rights and democratic principles.”¹¹⁷

These Association Agreements are relevant in that they have labor standards and dispute settlement mechanisms consistent with EU FTAs. For example, the EU-Ukraine AA states the parties shall promote the ILO core labor standards, and implement ratified ILO conventions, shall not use labor laws for protectionist purposes, or lower labor standards for trade advantage, and shall enforce the labor laws.¹¹⁸ The dispute settlement provisions are like those of the EU FTAs in that they provide for consultation and use of a panel of experts.¹¹⁹

2. *BITs*

Currently, the European Union does not have a BIT with China,¹²⁰ though some EU members do (with labor provisions). It now appears the European Union itself will have the lead in negotiating external BITs.¹²¹ It also appears the European Union is moving toward including “better practices”¹²² into its BITs, which arguably can include labor rights.¹²³ Since

¹¹⁷ *Association Agreements*, *supra* note 113.

¹¹⁸ See EU-Ukraine Association Agreement, *supra* note 114, art. 291(2-4).

¹¹⁹ See *id.* art. 300(7). See also EU-Georgia Association Agreement, *supra* note 114, art. 378(1); EU-Moldova Association Agreement, *supra* note 114, art. 242(1).

¹²⁰ *The EU-China Investment Treaty*, FED’N OF GERMAN INDUS. (BDI) (Mar. 21, 2019), <https://english.bdi.eu/article/news/the-eu-china-investment-treaty/>.

¹²¹ See Peter Turner & Christian Nitsch, Freshfields Bruckhaus Deringer LLP, *EU Reveals the Future of BITs Between European States and the Rest of the World*, LEXOLOGY (Jan. 10, 2013), <https://www.lexology.com/library/detail.aspx?g=dac2e673-ce20-48c0-a589-2dd934ca190b> (“When the Lisbon Treaty entered into force in December 2009, the European Union (EU) was granted exclusive competence over its member states for dealing with ‘foreign direct investment’. This competence, part of the EU’s common commercial policy, extended to bilateral investment treaties concluded between EU member states and third countries (Extra-EU BITs). At the time, there were already over 1,000 Extra-EU BITs in existence, whose future status required clarification. On 9 January 2013, a new European regulation dealing with the status of Extra-EU BITs comes into force—Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member states and third countries—(the Regulation) The default position is that Extra-EU BITs signed prior to December 2009 will remain in force until they are replaced by new treaties between the EU itself and the relevant third countries (the EU BITs). Extra-EU BITs signed after December 2009 will need to be reviewed by the Commission in order to ensure their compliance with EU law.”).

¹²² See Catharine Titi, *International Investment Law and the European Union: Towards a New Generation of International Investment Agreements*, 26 EUR. J. INT’L L. 639, 641 (2015) (“We are witnessing the decline of the old EU member state ‘good practices’ and the dawning of a new era, that of the EU’s ‘better practices.’”). The EU is moving from member-state-centric BITs to an inclusive EU-wide

2016, the European Union and China have indicated that their BIT “will also include rules on environmental and labor-related dimensions of foreign investment.”¹²⁴

a. EU BITs with Labor Standards

Three EU members have entered into four BITs that include labor provisions, including Austria, which has entered into three separate BITs.

i) Austria-Tajikistan 2010 BIT

The 2010 Austria-Tajikistan BIT’s Article 5, Investment and Labor, includes the following provisions:

1. The Contracting Parties recognize that it is inappropriate to encourage an investment by weakening domestic labor laws.
2. For the purposes of this Article, “labor laws” means each Contracting Party’s statutes or regulations, that are directly related to the following internationally recognized labor rights:
 - a. the right of association;
 - b. the right to organize and to bargain collectively;

template for BITs that will create a uniform approach to investment protection. EU members states’ “established BIT practice is referred to as their ‘best practices.’ Member state bilateral investment treaties, which are liberal instruments strongly protective of investor interests, have remained relatively unchanged over the years, in contrast with their North American counterparts, which have come to represent a new type of investment treaty, cognizant for the first time of the contracting parties’ right to regulate. With the entry into force of the Treaty of Lisbon and the exercise of the EU’s new competence over the conclusion of treaties covering foreign direct investment, Europe marks its distances with the old approach of the member states and appears eager to set its own ‘model’. While broadly in harmony with the new generation of North American investment treaties, the new EU policy aims to improve international investment law in innovative ways, targeting both substantive and procedural protections, and leading to a yet newer generation of international investment treaties.” *Id.* at 639.

¹²³ *See id.* at 643. (“[T]he EU Minimum Platform on Investment served as a basis for the negotiation of a number of FTAs, such as the 2008 EU–CARIFORUM Economic Partnership Agreement (EPA) and the 2010 EU–South Korea FTA. Indeed, these treaties contain provisions on the non-lowering of environmental, safety, and labour standards, [and] references to the fight against corruption and the International Labour Organization . . .”).

¹²⁴ *EU and China Agree on Scope of the Future Investment Deal*, EUROPEAN COMM’N (Jan. 15, 2016), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1435> (In January 2016, the EU Commission reported: “Meeting this week in Beijing, the EU and China negotiators reached clear conclusions on an ambitious and comprehensive scope of the upcoming EU-China investment agreement and moved into a phase of specific text-based negotiations.”).

- c. a prohibition on the use of any form of forced or compulsory labor;
- d. labor protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor;
- e. acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.
- f. elimination of discrimination in employment and occupation.¹²⁵

The labor provisions in the Austria-Nigeria 2013 BIT¹²⁶ and the Austria- Kyrgyz 2016 BIT¹²⁷ are identical with that in the above Tajikistan BIT.

ii) Belgium-Luxembourg-Montenegro 2010 BIT

Belgium and Luxembourg, both EU Members, together entered into a BIT agreement with Montenegro,¹²⁸ which also included a labor provision. Under Article 1(6), the agreement defined key terms:

[t]he terms “labor legislation” shall mean legislation of the Kingdom of Belgium, of the Grand-Duchy of Luxembourg or

¹²⁵ See ABKOMMEN ZWISCHEN DER REPUBLIK ÖSTERREICH UND DER REPUBLIK TADSCHIKISTAN ÜBER DIE FÖRDERUNG UND DEN SCHUTZ VON INVESTITIONEN [AGREEMENT FOR THE PROMOTION AND PROTECTION OF INVESTMENT BETWEEN THE REPUBLIC OF AUSTRIA AND THE REPUBLIC OF TAJIKISTAN] BUNDESGESETZBLATT III [BGBl III] No. 18/2012, <https://www.ris.bka.gv.at/eli/bgbl/III/2012/18/20120125> (Austria).

¹²⁶ See Nationalrat [NR] [National Council] Gesetzgebungsperiode [GP] 24 Beilage [Blg] No. 2301, <https://www.parlament.gv.at/PAKT/VHG/XXIV/II/02301/index.shtml> (Austria) (Agreement for the Promotion and Protection of Investment between the Republic of Austria and the Federal Republic of Nigeria).

¹²⁷ See ABKOMMEN ZWISCHEN DER REGIERUNG DER REPUBLIK ÖSTERREICH UND DER REGIERUNG DER KIRGISISCHEN REPUBLIK ÜBER DIE FÖRDERUNG UND DEN SCHUTZ VON INVESTITIONEN [AGREEMENT FOR THE PROMOTION AND PROTECTION OF INVESTMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF AUSTRIA AND THE GOVERNMENT OF THE KYRGYZ REPUBLIC] BUNDESGESETZBLATT III [BGBl III] No. 120/2017, <https://www.ris.bka.gv.at/eli/bgbl/III/2017/120/20170727> (Austria).

¹²⁸ See Agreement between the Belgium-Luxembourg Economic Union, on the One Hand, and Montenegro, on the Other Hand, on the Reciprocal Promotion and Protection of Investment, Belg.-Lux.-Montenegro, Feb. 16, 2010, Inv. Policy Hub, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/389/download>.

of Montenegro, or provisions thereof, that are directly related to the following internationally recognized labor rights: a) the right of association; b) the right to organize and bargain collectively; c) a prohibition on the use of any form of forced or compulsory labor; d) a minimum age for the employment of children; e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.¹²⁹

And, the following provisions under Article 6:

1. Recognizing the right of each Contracting Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor legislation, each Contracting Party shall strive to ensure that its legislation provide for labor standards consistent with the internationally recognized labor rights set forth in paragraph 6 of Article I and shall strive to improve those labor standards in that light.
2. The Contracting Parties recognize that it is inappropriate to encourage investment by relaxing domestic labor legislation. Accordingly, each Contracting Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or derogate from, such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an investment.
3. The Contracting Parties reaffirm their obligations as members of the International Labor Organization and their commitments under the International Labor Organization Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Contracting Parties shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in paragraph 6 of Article I are recognized and protected by domestic legislation.
4. The Contracting Parties recognize that co-operation between them provides enhanced opportunities to improve labor standards. Upon request by either Contracting Party, the other Contracting Party shall accept to hold expert

¹²⁹ *Id.* art. 1(6).

consultations on any matter falling under the purpose of this Article.¹³⁰

Interestingly, besides the recent promotion of “best practices” by the European Union, and the inclusion of labor provisions in the four BITs by Austria and Belgium-Luxembourg, it seems only the U.S. has heretofore included labor provisions in its BITs;¹³¹ and in that regard, the U.S. continues negotiations for a BIT with China that include some labor provisions which call for tougher standards.¹³² It appears the European Union and China in their new BIT will join the U.S., *albeit* with only consultation as its means of enforceability and not with possible sanctions as allowed by U.S. labor provisions.

¹³⁰ *Id.* art. 6.

¹³¹ See Schott & Cimino, *supra* note 69, at 8. Before 2005, there was no U.S. BIT with labor provisions, except for those with Uruguay and Rwanda. See Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., Nov. 4, 2005, T.I.A.S. 06-110 1; Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Rwanda, Feb. 19, 2008, T.I.A.S. 12-101.

¹³² See Ronald C. Brown, *International Influences and Obligations Arising from Bilateral Investment Treaties (BITS) and Free Trade Agreements (FTAs) and ILO Standards*, in FUNDAMENTAL LABOUR RIGHTS IN CHINA—LEGAL IMPLEMENTATION AND CULTURAL LOGIC 169, 174–78 (Ulla Liukkunen & Yifeng Chen eds., 2016). The Obama administration issued a revised U.S. model BIT in early 2012. See U.S. DEP’T OF STATE & OFFICE OF THE U.S. TRADE REP., 2012 U.S. MODEL BILATERAL INVESTMENT TREATY (2012), <https://2009-2017.state.gov/documents/organization/188371.pdf> [hereinafter U.S. MODEL BIT]. These revisions will undoubtedly complicate ongoing discussions between the United States and China and other emerging markets. The major changes of the latest revision include: strong transparency obligations on regulations and other matters affecting investment and commitments to increase stakeholder and public participation; expanded labor and environmental standards with commitments not to “waive or derogate” from domestic labor and environmental laws, to “effectively enforce” such laws, and to recognize international commitments under the International Labor Organization and other multilateral agreements; and clarified specifications for state-owned enterprises (“SOEs”) and commitments not to impose technology transfer requirements and to encourage investor participation in the development of standards and regulations. See also Titi, *supra* note 104, at 643.

3. *Free Trade Agreements*

a. *Background*

The evolution of labor provisions in FTAs by the European Union has transformed in recent years and their usefulness continues to grow, as discussed below.¹³³

FTAs are the most economically significant aspect of EU trade policy. They could cover as much as two thirds of EU trade if all current negotiations are successfully concluded. They are also the most important legally binding instruments that the EU can use in its external policy. Labor provisions within EU FTAs have “widened and deepened” over the past decade. This is linked in part to the 2007 Lisbon Treaty which accorded greater influence in trade policy-making to the European Parliament; an institution which has emphasized the labor and human rights dimensions of trade policy.¹³⁴

A significant point of departure for labor provisions in EU FTAs was the 2008 CARIFORUM Economic Partnership Agreement (EPA). Unlike its predecessors, this agreement contained more references to social policy norms and core labor standards. It also allowed for disputes on social issues to be referred to independent experts, and institutionalized dialogue about the trade agreement within a civil society mechanism (CSM). Since the negotiation of the 2011 EU-Korea FTA such provisions have been packaged . . . in a Trade and Sustainable Development (TSD) chapter. TSD chapters have become an integral part of the EU's ‘new generation’ trade agreements. Such chapters were present in finalized agreements with a further 18 countries as of July 2017, with bold claims made about their efficacy. TSD chapters are meant to ensure that economic growth goes hand in hand with higher labor

¹³³ See generally Lina Lorenzoni Escobar, *Sustainable Development and International Investment: A Legal Analysis of the EU's Policy from FTAs to CETA*, 136 BEITRÄGE ZUM TRANSNATIONALEN WIRTSCHAFTSRECHT (2015).

¹³⁴ Harrison et al., *supra* note 4, at 260.

standards, making trade policy “not just about interests but also about values.”¹³⁵

The TSD chapters in EU FTAs have a tripartite format. First, there are substantive standards committing to ILO core labor standards and the Decent Work Agenda; second, there are obligations and procedural commitments relating to implementation; and third, there are institutional mechanisms to resolve disputes.

All agreements since the EU-Korea FTA have a tripartite format. Committees of state/EU officials from the two parties are established to oversee the implementation of the TSD chapter. These are advised by a CSM that takes the form of a Domestic Advisory Group (DAG) including representatives of business, trade unions, non-governmental organizations (NGOs) and occasionally academia, with the DAGs of the two parties meeting together on an annual basis. Finally, there is an expert panel that investigates complaints made by the parties and makes recommendations on them. The implication of the agreement text is that these institutions will interact to effectively implement the TSD chapter.¹³⁶

b. Japan, CETA, and South Korea

For purposes of comparison, the European Union’s recent FTAs with Japan, Canada, and South Korea are discussed below.

i) EU-Japan Economic Partnership Agreement (FTA)

On July 17, 2018, the EU-Japan Economic Partnership Agreement (“EPA”, also called FTA) was signed by the parties.¹³⁷

Japan’s Prime Minister Shinzo Abe stated that the agreement “shows the world the unshaken political will of Japan and the European Union to lead the world as the champions of free trade at a time when protectionism

¹³⁵ *Id.* at 261.

¹³⁶ *Id.*

¹³⁷ See Agreement Between the European Union and Japan for an Economic Partnership, July 17, 2018, 2018 O.J. (L 330) 3 [hereinafter EU-Japan EPA].

has spread.”¹³⁸ The trade agreement is the biggest ever negotiated by the European Union and will create an open trade zone covering over 600 million people. President of the European Commission Jean-Claude Juncker stated:

The document we signed today is much more than a trade agreement. It is of course a tool that will create opportunities for our companies, our workers and our citizens and that will boost the European and Japanese economies. But it is also a statement. For its content, its scope and also its timing. It is a statement by two likeminded partners that together represent nearly a third of the world's GDP and reiterate their commitment to uphold the highest standards in areas such as labor, safety, environmental or consumer protection.¹³⁹

The labor standard and dispute resolution provisions of Chapter 16 are highlighted below in summary form.¹⁴⁰

1. Source of labor standards:
 - a. ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998¹⁴¹
 - b. ILO Decent Work Agenda in accordance with the ILO Declaration on Social Justice for a Fair Globalization of 2008¹⁴²
2. Obligations:
 - a. the four core labor rights¹⁴³

¹³⁸ Hiroshi Hiyama, *EU, Japan Sign Major Trade Deal in “Message Against Protectionism”*, YAHOO! NEWS (July 17, 2018), <https://sg.news.yahoo.com/eu-japan-sign-massive-trade-deal-us-puts-062523433--finance.html> (Abe continued, saying that “Japan and the EU will form a united front against a US threat to impose tariffs on key products such as cars.”).

¹³⁹ *EU and Japan Sign Economic Partnership Agreement*, EUROPEAN COMM’N (July 16, 2018), https://europa.eu/rapid/press-release_IP-18-4526_en.htm.

¹⁴⁰ See EU-Japan EPA, *supra* note 117. A year earlier a summary document was sent to Member States and the European Parliament for information and which labor provisions mirror the 2018 final agreement. See also *EU and Japan Sign Economic Partnership Agreement*, *supra* note 119.

¹⁴¹ See EU-Japan EPA, *supra* note 117, art. 16.1.

¹⁴² *Id.*

¹⁴³ *Id.* art. 16.3(2).

- b. Parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions each Party considers appropriate.¹⁴⁴
 - c. shall not encourage trade or investment by relaxing or lowering the level of protection provided by their respective environmental or labor laws and regulations. To that effect, the Parties shall not waive or otherwise derogate from those laws and regulations or fail to effectively enforce them through a sustained or recurring course of action or inaction¹⁴⁵
 - d. effectively implement its law and practices¹⁴⁶
 - e. not encourage trade or investment by weakening or reducing the levels of protection in their labor law¹⁴⁷
3. Labor Dispute Resolution
- a. Disputes for labor violations: “In the event of disagreement between the Parties on any matter regarding the interpretation or application of this Chapter, the Parties shall only have recourse to the procedures set out in this Article and Article 16.18. The provisions of this Chapter shall not be subject to dispute settlement under Chapter 21.”¹⁴⁸
 - b. Filing party: “Parties”¹⁴⁹
 - c. Procedures: Joint dialogue between civil societies, government consult, then mediation by panel of experts¹⁵⁰
 - d. Decision-Maker: Panel of Experts: “Each Party is responsible for ensuring a balanced representation of independent economic, social and environmental stakeholders, including employers’ and workers’

¹⁴⁴ *Id.* art. 16.3(3).

¹⁴⁵ *Id.* art. 16.2(3).

¹⁴⁶ *Id.* art. 16.3(5).

¹⁴⁷ *Id.* art. 16.3(6).

¹⁴⁸ *Id.* art. 16.17(1).

¹⁴⁹ *Id.* art. 16.3(1).

¹⁵⁰ *Id.* arts. 16.16, 16.17, & 16.18.

organizations and environmental groups, in the advisory group or groups.”¹⁵¹

- e. Upon determination of violation: “A Party may request in writing consultations with the other Party on any matter concerning the interpretation and application of this Chapter. The Party requesting consultations shall set out the reasons for the request, including identification of the matter and an indication of its factual and legal basis, specifying the relevant provisions of this Chapter.”¹⁵²
- f. Decision made public: “The Parties shall ensure that the solutions reached through the consultations under this Article will be jointly made publicly available, unless the Parties agree otherwise.”¹⁵³
- g. Sanctions: No penalty, only persuasion, not coercion. “The Parties shall discuss actions or measures to resolve the matter in question, taking into account the panel’s final report and its suggestions. Each Party shall inform the other Party and its own domestic advisory group or groups of any follow-up actions or measures no later than three months after the date of issuance of the final report. The follow-up actions or measures shall be monitored by the Committee. The domestic advisory group or groups and the Joint Dialogue may submit their observations in this regard to the Committee.”¹⁵⁴

ii) *Canada-EU and its Member States (“CETA”)*¹⁵⁵

The labor standard and dispute resolution provisions of Chapter 23 are highlighted below in summary form.¹⁵⁶

1. Source of Labor Standards:

¹⁵¹ *Id.* 16.15 (2).

¹⁵² *Id.* 16.17(2).

¹⁵³ *Id.* art. 16.18.

¹⁵⁴ *Id.* art. 16.18(6).

¹⁵⁵ Comprehensive Economic and Trade Agreement Between Canada, of the One Part, and the European Union and its Member States, of the Other Part, Oct. 30, 2016, 2017 O.J. (L 11) 23 [hereinafter CETA].

¹⁵⁶ *Id.* art. 23.3(1)(a)–(d).

- a. ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998¹⁵⁷
 - b. ILO Decent Work Agenda in accordance with the ILO Declaration on Social Justice for a Fair Globalization of 2008¹⁵⁸
2. Obligations:
- a. To legally protect the four core labor rights¹⁵⁹
 - b. To promote the objectives of the ILO Decent Work Agenda in accordance with the 2008 ILO Declaration on Social Justice for a Fair Globalization:¹⁶⁰ (a) health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness; (b) establishment of acceptable minimum employment standards for wage earners, including those not covered by a collective agreement; and, (c) non-discrimination in respect of working conditions, including for migrant workers.¹⁶¹
 - c. Parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as “up-to-date” by the ILO¹⁶²
 - d. Effectively implement its laws and practices¹⁶³
 - e. Not encourage trade or investment by weakening or reducing the levels of protection in their labor law¹⁶⁴
3. Labor Dispute Resolution:
- a. Disputes for labor violations: “For any dispute that arises under this Chapter, the Parties shall only have recourse to the rules and procedures provided in this Chapter.”¹⁶⁵
 - b. Filing party: “Parties means, on the one hand, the European Union or its Member States or the European

¹⁵⁷ *Id.* art. 23.3(1).

¹⁵⁸ *Id.* art. 23.3(2).

¹⁵⁹ *Id.* art. 23.3(1)(a)–(d).

¹⁶⁰ *Id.* art. 23.3(2).

¹⁶¹ *Id.*

¹⁶² *Id.* art. 23.3(4).

¹⁶³ *Id.* art. 23.4(1)–(2).

¹⁶⁴ *Id.* art. 23.4(2)–(3).

¹⁶⁵ *Id.* art. 23.11(1).

Union and its Member States within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as the ‘EU Party’), and on the other hand, Canada.”¹⁶⁶

- c. Procedures: Consultation between governments, then mediation by a panel of experts [selected as part of the FTA procedures]¹⁶⁷
- d. Decision-Maker: the terms of reference of the Panel of Experts are as follows: “to examine, in the light of the relevant provisions of Chapter Twenty-Three (Trade and Labour), the matter referred to in the request for the establishment of the Panel of Experts, and to deliver a report, in accordance with Article 23.10 (Panel of Experts) of Chapter Twenty-Three (Trade and Labour), that makes recommendations for the resolution of the matter.”¹⁶⁸ Each Party shall convene a new or consult its domestic labor or sustainable development advisory groups, to seek views and advice on issues relating to this Chapter. Those groups shall comprise independent representative organizations of civil society in a balanced representation of employers, unions, labor and business organizations, as well as other relevant stakeholders as appropriate. They may submit opinions and make recommendations on any matter related to this Chapter on their own initiative.¹⁶⁹
- e. Upon determination of violation: If the final report of the Panel of Experts determines that a Party has not conformed with its obligations under this Chapter, the Parties shall engage in discussions and shall endeavor, within three months of the delivery of the final report, to identify appropriate measures or, if appropriate, to decide upon a mutually satisfactory action plan.¹⁷⁰

¹⁶⁶ *Id.* art. 1.1.

¹⁶⁷ *Id.* arts. 23.9 & 23.10.

¹⁶⁸ *Id.* art. 23.10 (8).

¹⁶⁹ *Id.* art. 23.8 (4).

¹⁷⁰ *Id.* art. 23.10 (12).

- f. Decision made public: Each Party shall make the final report publicly available within 30 days of its delivery.¹⁷¹
- g. Sanctions: No penalty, only persuasion, not coercion¹⁷²

iii) *The EU FTA with South Korea*¹⁷³

The EU-South Korea FTA has been provisionally applied since July 2011 and was formally ratified in December 2015.¹⁷⁴ Chapter thirteen contains the labor standard provisions, highlighted below in summary form.

1. Source of Labor Standards:

- a. ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998¹⁷⁵
- b. 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work¹⁷⁶

2. Obligations:

- a. to protect the four core labor rights ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998¹⁷⁷
- b. to promote the objectives ILO Decent Work Agenda in accordance with the ILO Declaration on Social Justice for a Fair Globalization of 2008¹⁷⁸

¹⁷¹ *Id.* art. 23.10 (11).

¹⁷² *Id.* art. 23.11. *See also id.* arts. 1.1, 23.1–23.4, 23.8–23.10, & 8.1 (Treatment of Investors and Covered Investments). In contrast to CETA’s binding investment court system designed to protect foreign investors, the labor chapter’s compliance mechanism relies on a non-binding process of cooperation, dialog and recommendations to address labor rights violations. *See Investment Provisions in the EU-Canada Free Trade Agreement (CETA)*, EUROPEAN COMM’N (Feb. 26, 2019), http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf.

¹⁷³ *Countries and Regions: South Korea*, EUROPEAN COMM’N (May 7, 2019), <http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/>. For an assessment of that agreement, *see generally* Giovanni Gruni, *Labor Standards in the EU-South Korea Free Trade Agreement Pushing Labor Standards into Global Trade Law?*, 5 KOREAN J. INT’L COMP. L. 100, 100–19 (2017).

¹⁷⁴ *Countries and Regions: South Korea*, *supra* note 153. *See* Free Trade Agreement Between the European Union and its Member States, of the One Part, and the Republic of Korea, of the Other Part, Sep. 16, 2010, 2011 O.J. (L 127) 6 [hereinafter EU-South Korea FTA].

¹⁷⁵ EU-South Korea FTA, *supra* note 174, at art. 13.4(3).

¹⁷⁶ *Id.* art. 13.4(2).

¹⁷⁷ *Id.* art. 13.4(3).

¹⁷⁸ *Id.* art. 13.4(2).

- c. to ensure that its labor law and practices embody and provide protection for the above [core labor] obligations¹⁷⁹
- d. to recognize and promote the 2006 Ministerial Declaration of the UN Economic and Social Council on Full Employment and Decent Work¹⁸⁰
- e. parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as ‘up-to-date’ by the ILO¹⁸¹
- f. effectively implement its law and practices¹⁸²
- g. not encourage trade or investment by weakening or reducing the levels of protection in their labor law¹⁸³

3. Labor Dispute Resolution:

- a. Disputes for labor violations: “For any matter arising under this Chapter, the Parties shall only have recourse to the procedures provided for in Articles 13.14 and 13.15”¹⁸⁴
- b. Filing Party: “Parties”¹⁸⁵
- c. Procedures: Consultation between governments, then mediation by a panel of experts [selected as part of the FTA procedures]¹⁸⁶
- d. Decision-maker: “The Domestic Advisory Group(s) comprise(s) independent representative organizations of civil society in a balanced representation of environment, labor and business organizations as well as other relevant stakeholders.”¹⁸⁷
- e. Panel of Experts: “The experts shall be independent of, and not be affiliated with or take instructions from, either

¹⁷⁹ *Id.* art. 13.4(3).

¹⁸⁰ *Id.* art. 13.4(2)

¹⁸¹ *Id.* art. 13.4(3).

¹⁸² *Id.* art. 13.7(1).

¹⁸³ *Id.* art. 13.7(2).

¹⁸⁴ *Id.* art. 13.16.

¹⁸⁵ *Id.* art. 13.2(1).

¹⁸⁶ *Id.* arts. 13.4 & 13.5.

¹⁸⁷ *Id.* art. 13.12(5).

Party or organizations represented in the Domestic Advisory Group(s).”¹⁸⁸

- f. Upon Determination of Violation: “If a Party considers that the matter needs further discussion, that Party may request that the Committee on Trade and Sustainable Development be convened to consider the matter by delivering a written request to the contact point of the other Party.”¹⁸⁹
- g. Decision Made Public: the report of the Panel of Experts shall be made available to the Domestic Advisory Group(s) of the Parties.¹⁹⁰
- h. Sanctions: No penalty, only persuasion, not coercion. “Recognizing the importance of cooperating on trade-related aspects of social and environmental policies in order to achieve the objectives of this Agreement.”¹⁹¹

4. *International Standards*

a. *ILO*

As a member of the ILO, China has ratified four of the eight core labor conventions,¹⁹² while all EU Members have ratified all eight core labor conventions.¹⁹³ A distinction can be made between an FTA commitment to honor the ILO Declaration, which incorporates all the conventions¹⁹⁴ and honors specific convention (but is interpreted as providing only general obligations), with a non-FTA commitment. Commitments to specific conventions are interpreted as forming more precise obligations.

¹⁸⁸ *Id.* art. 13.15(3).

¹⁸⁹ *Id.* art. 13.14(3).

¹⁹⁰ *Id.* art. 13.15(2).

¹⁹¹ *Id.* art. 13.11.

¹⁹² See *Ratifications for China*, ILO, https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103404 (last visited Dec. 1, 2019).

¹⁹³ See INT’L TRADE UNION CONFEDERATION, INTERNATIONALLY RECOGNIZED CORE LABOUR STANDARDS IN THE EUROPEAN UNION 1 (2011), https://www.ituc-csi.org/IMG/pdf/Final_draft_ICLS_in_the_European_Union_-_6_and_8_July_2011_2_.pdf. See also *Ratifications by Convention*, *supra* note 192; ILO, THE ILO AND THE EU, PARTNERS FOR DECENT WORK AND SOCIAL JUSTICE 8 (2012), https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-brussels/documents/publication/wcms_195135.pdf.

¹⁹⁴ Brown, *China-U.S. Implementation of ILO Standards by BITs and Pieces (FTAs)*, *supra* note 112, at 171–73.

b. OECD

The OECD consists of thirty-six member countries¹⁹⁵ and assists these countries to foster prosperity and fight poverty through data collection, review, standards setting, and agreements for cooperation, ranging from agriculture to taxation.¹⁹⁶ China was invited by the OECD in 2007 as a “Key Partner” (not a Member) to strengthen cooperation through OECD “Enhanced Engagement” programs.¹⁹⁷ As an active Key Partner, China participates in eleven significant OECD bodies and projects. Likewise, the European Union, as an organization (not a state), is not a Member; nor does it have the right to vote or officially take part in the adoption of legal instruments submitted to the Council for adoption. Nonetheless, “its participation goes well beyond that of an observer.”¹⁹⁸

OECD Guidelines for Multinational Enterprises (“MNCs”)¹⁹⁹ were issued to guide governmental and business conduct through implementing

¹⁹⁵ See *Member Countries*, *supra* note 175. (member countries include Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States).

¹⁹⁶ Bill Witherell, Director for Financial, Fiscal and Enterprise Affairs, OECD, Remarks at the CFO Strategies: Corporate Accountability Forum (May 17, 2004), <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/32034047.pdf> (“Reflecting the great heterogeneity in both OECD and non-OECD countries, the new Principles retain their non-binding, principles-based approach, which recognizes the need to adapt implementation to varying legal, economic and cultural circumstances.”). See generally *Organisational Structure*, OECD, <http://www.oecd.org/about/structure/> (last visited Dec. 1, 2019). The OECD uses information on various topics to fight poverty, help governments prosper, and prevent financial instability. The organization monitors the economies of member and non-member nations, and the Secretariat collects and analyzes information on different aspects of society. See generally *What is the OECD?*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/knowledge/economics/oecd/> (last visited Nov. 27, 2019).

¹⁹⁷ See *People's Republic of China*, ORG. FOR ECON. CO-OPERATION AND DEV., <http://www.oecd.org/china/> (last visited Dec. 1, 2019).

¹⁹⁸ *European Union and the OECD*, OECD, <https://www.oecd.org/eu/european-union-and-oecd.htm> (last visited Nov. 27, 2019).

¹⁹⁹ See generally OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011). Beginning in 1976, the OECD developed working relationships with the ILO, the International Organization for Standardization, the World Bank, the UN Working Group on Business and Human Rights, the UN Global Compact, UN Finance Initiative, the Global Reporting Initiative, and the International Coordinating Committee of Human Rights Institutions. See OECD, 2013 ANNUAL REPORT ON THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 11 (2013).

procedures. “National Contact Points”²⁰⁰ hold Member states and MNCs, and their contractors,²⁰¹ responsible to meet certain labor standards for their workers. Under OECD standards, Article V Employment and Industrial Relations states workers should have labor rights that mirror the ILO’s core labor rights, which also require enterprises to use “due diligence”²⁰² in effectuating those rights.²⁰³ While there are numbers of successful resolution of labor disputes through the OECD consultation, mediation, investigation, and recommendation procedures, the Guidelines remain *voluntary*. Under the Guidelines, enterprises should carry out due diligence to identify, prevent and mitigate actual and potential adverse impacts on human rights, industrial issues including labor standards, etc. Enterprises should also carry out “due diligence” in relation to their suppliers and other business relations, to seek to prevent or mitigate adverse impact that is directly linked to their operations, products or services. However, due diligence without consequences for failure seem ill-considered and some countries, such as France, have instituted legislative consequences.²⁰⁴

c. *WBO*

The World Bank’s Environmental and Social Framework (ESF) launched on October 1, 2018 and provides detailed labor and working condition requirements for loan recipients, including grievance mechanisms.²⁰⁵ The 2018 Framework, which will gradually replace the

²⁰⁰ See *National Contact Points for the OECD Guidelines for Multinational Enterprises*, OECD, <http://www.oecd.org/investment/mne/ncps.htm> (last visited Dec. 1, 2019).

²⁰¹ See generally OECD, *OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES*, *supra* note 199, at 35 (Chapter V. Employment and Industrial Relations). See also generally Ronald C. Brown, *OECD National Contact Point, Denmark: Specific Instance Notified by Clean Clothes Campaign Denmark and Active Consumers Regarding the Activities of the PWT Group, Final Statement, 17 October 2016*, 3 INT’L LABOR RIGHTS CASE L. 233 (2017).

²⁰² OECD, *OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT* 15–19 (2018), <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf> (outlining practical application and discussing due diligence obligation).

²⁰³ See OECD, *OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES*, *supra* note 199, at 35–37.

²⁰⁴ See Ronald C. Brown, *Due Diligence “Hard Law” Remedies for MNC Labor Chain Workers*, 22 UCLA J. INT’L L. & FOREIGN AFF. 119, 120, 154 (2018).

²⁰⁵ THE WORLD BANK, *THE WORLD BANK ENVIRONMENTAL AND SOCIAL FRAMEWORK* 31–36 (2017), <http://pubdocs.worldbank.org/en/837721522762050108/Environmental-and-Social-Framework.pdf> (“Where national law restricts workers’ organizations, the project will not restrict project workers from developing alternative mechanisms to express their grievances and protect their rights regarding working conditions and terms of employment. The Borrower should not seek to influence or control these alternative mechanisms.”).

Safeguard policies, provides improved protections for the most vulnerable people, and for the environment.

These requirements are applicable to China in that as of June 30, 2018, the bank's cumulative lending to China was nearly \$62 billion for more than 400 projects.²⁰⁶ The portfolio is concentrated in environment, transportation, urban development, rural development, energy, water resources management, and human development.²⁰⁷ The detailed labor and working condition requirements cover:²⁰⁸

1. Working conditions and management of worker relationships
 - a. Terms and conditions of employment
 - b. Nondiscrimination and equal opportunity
 - c. Worker's organizations
2. Protecting the workplace
 - a. Child labor and minimum wage
 - b. Forced labor
3. Grievance mechanism²⁰⁹
4. Occupational Health and Safety ("OHS")
5. Contracted workers
6. Community workers
7. Primary supply workers²¹⁰

²⁰⁶ Emel Akan, *World Bank Will Cut Loans to China, Bank's New President Says*, THE EPOCH TIMES (Apr. 11, 2019), https://www.theepochtimes.com/world-bank-will-cut-loans-to-china-says-banks-new-president_2875974.html.

²⁰⁷ See *Projects & Programs: China*, THE WORLD BANK, <https://projects.worldbank.org/en/projects-operations/projects-list?searchTerm=china> [<https://perma.cc/NZE9-6VUC>] (last visited Dec. 1, 2019) (the first twenty projects listed are those in China).

²⁰⁸ See THE WORLD BANK, THE WORLD BANK ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 205, at 32–36 (Labor and Working Conditions). Some are concerned about the efficacy of enforcement of these standards.

²⁰⁹ See THE WORLD BANK, THE WORLD BANK ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 205, at 34.

²¹⁰ See THE WORLD BANK, THE WORLD BANK ENVIRONMENTAL AND SOCIAL FRAMEWORK, *supra* note 205, at 31–36. See also THE WORLD BANK, ESS2: LABOUR AND WORKING CONDITIONS, <http://pubdocs.worldbank.org/en/149761530216793411/ESF-GN2-June-2018.pdf>. Public comment by the International Trade Union Confederation/Global Unions regarding the draft Guidance Note for ESS2: Labour and Working Conditions was made in December 2017, and suggested modifications were offered. These included, for example, adding confidentiality and anti-retaliation provisions to the grievance procedures. ITUC, PUBLIC COMMENT DECEMBER 2017 BY THE INTERNATIONAL TRADE UNION

The enforcement process over prior years seems to have been to improve labor systems as opposed to redressing individuals' grievances; it is not yet clear whether the 2018 procedures will be different.²¹¹

IV. ANALYSIS

A. *Time for an EU-China BIT and FTA with Labor Provisions?*

The current opportunities and timing for growth and mutual benefit flowing to the European Union and China—and their workers—from a BIT and an FTA may have never been better geopolitically and economically. Developments, described above, suggest it is time to move forward and accelerate the commercial traffic along a key corridor of China's Old Silk Road and better harness the EU-China billion dollar per day trade and its expanding FDI. The apparent obstacles of China's trade practices and European Union's diverse political makeup can be seen as challenges to overcome. Beginning with completion of the EU-China BIT or its absorption into an EU-China FTA, the parties with renewed efforts can reach accommodations on an FTA. It is clear from the foregoing discussion that the inclusion of labor protection provisions will not be an obstacle as the parties reportedly are now drafting it in their new BIT; and, their current labor provisions do not significantly differ. This result is also supported by a number of international labor obligations emanating from the ILO, OECD, WBO, and prior FTAs.

Already, China is engaged in TiSA and OECD discussions dealing with fairness and transparency in trade. Both the European Union and China

CONFEDERATION/GLOBAL UNIONS REGARDING THE DRAFT GUIDANCE NOTE FOR ESS2: LABOUR AND WORKING CONDITIONS 9, <http://pubdocs.worldbank.org/en/338031515447125004/ESFGuidanceNoteCommentsonESS1ESS2ESS10byITUCandGlobalUnionspartnerorganizationsDec152017.pdf>.

²¹¹ There is no reported consensus yet on the effect of the new Guidance. *See World Bank Leaves Door Open to Slavery in Paraguay*, ITUC (Aug. 1, 2018), <https://www.ituc-csi.org/world-bank-leaves-door-open-to> (“Questions have arisen regarding WBO enforcement. The World Bank’s private lending arm claimed that its investment in Minerva would help improve conditions in the Chaco. However, five years later the problems of modern slavery and environmental destruction persist, and little progress has been made on supply chain responsibility. As part of the investment package, Minerva agreed to an “Environmental and Social Action Plan”. Among other actions, it included the undertaking of a “supply chain verification system” as well as of a mapping exercise to identify those regions and suppliers more likely to allow child and forced labor. However, the company missed the deadline to meet these commitments. Today, it is unclear whether the IFC is holding Minerva accountable and ensuring the implementation of the measures necessary to prevent forced and child labor in the beef supply chain.”).

have had for some years, high-level committees working on the issues of the FTA. Many new regional FTAs (such as CPTTP, RCEP, and TTIP) are raising the issue of who will write the rules of commerce for the future years. While differences in domestic labor standards can be described,²¹² it is argued that labor provisions in an FTA or BIT can enhance and elevate labor protections. At the same time, they will not thwart accommodation and agreement on an EU-China FTA or BIT, as for better or worse, from past practice, these treaties are general obligations with only dialogue and cooperation used for their enforcement. Additionally, some of the EU Members' labor practices and standards are quite like those in parts of China, both positively and negatively. Other more controversial areas of trade could be accommodated by a gradual phase-in, such as in the recent EU-Japan FTA where some provisions are phased in over 15 years.²¹³

Comparing past BITs of China and the European Union, respectively, neither includes labor provisions. However, three EU Members, Austria and Belgium-Luxembourg (in tandem), have concluded BITs containing labor provisions that are quite like those in the recent EU FTAs and China's FTA-related MOUs regarding labor standards and dispute resolution. Currently, the European Union is moving toward a new protocol for BITs that include "best practices," though it is not labor specific.²¹⁴ Recently in CETA, the European Union has included investment provisions in the FTA itself.²¹⁵

²¹² See generally CATHERINE BARNARD, *EU EMPLOYMENT LAW* (4th ed. 2012) (for information regarding the EU).

²¹³ EUROPEAN COMM'N, *EU-JAPAN EPA – THE AGREEMENT IN PRINCIPLE* (2017), http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155693.doc.pdf (stating tariffs of up to 28.9% will be eliminated over fifteen years). See also Jim Brunsten & Valentina Romei, *Why the EU's Agreement with Japan Is A Big Deal*, *FIN. TIMES* (July 6, 2017), <https://www.ft.com/content/572fef42-6260-11e7-91a7-502f7ee26895>.

²¹⁴ See Titi, *supra* note 104, at 41 (discussing how the European Commission urged that the EU should follow the available "best practices" to ensure that no EU investor would be worse off than they would be under Member States' BITs).

²¹⁵ See CETA, *supra* note 135; *CETA Chapter Summaries*, *GLOB. AFFAIRS CAN.* (July 14, 2017), http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/chapter_summary-resume_chapitre.aspx?lang=eng#a8 (explaining how since the Lisbon Treaty the EU has begun negotiating EU-wide bilateral investment agreements, including in form of investment provisions in its free trade agreements. CETA was the first EU agreement signed by the EU containing investment protection provisions. CETA established a new investment court system ("ICS")). See also RODERICK EDWARD & LAURA PUCCIO, EUROPEAN PARLIAMENT, *FROM ARBITRATION TO THE INVESTMENT COURT SYSTEM (ICS): THE EVOLUTION OF CETA RULES 13–28* (2017), [http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/607251/EPRS_IDA\(2017\)607251_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/607251/EPRS_IDA(2017)607251_EN.pdf)

Eventually, as negotiators in an EU-China BIT and FTA attempt to reach an accommodation, including on labor provisions, China falls in the camp of leaving such social issues outside the commercial aspects of a trade agreement, such as is done with the WTO, and by Asian countries generally.²¹⁶ This is reflected in China having no labor provisions in 8 of its 13 FTAs.²¹⁷ Of China's five FTA-MOU agreements with labor provisions, two have labor standards and enforcement watered down;²¹⁸ while the other three agreements have labor provisions like those in EU FTAs.²¹⁹ So, in sum, both the European Union and China have labor provisions wherein they agree to obligations under ILO standards, agree to cooperate and consult if they disagree, and to use consultation as an enforcement mechanism.

1. *China*

China's use of labor protections in FTAs has varied over recent years. While its labor provisions with Chile and Iceland are vague, where the parties merely agree to cooperate on mutual labor matters of interest,²²⁰ another somewhat progressive labor provision is found in the 2008 China-New Zealand MOU,²²¹ where China clearly commits to ILO core labor standards and both parties explicitly agree to enable unions and other organizations to participate in identifying and undertaking cooperative activities.

(discussing how concerns were raised regarding the differences between ISDS and domestic court. These relate both to the different treatment of foreign and domestic investors and to uncertainty regarding the compatibility of the ICS system with the principle of autonomy of the EU legal order).

²¹⁶ See Brown, *supra* note 80, at 96–112 (noting an exception when Asian countries negotiate an agreement with a non-Asian developed country, such as the U.S., Australia, or the EU).

²¹⁷ See Brown, *A New Leader in Asian Free Trade Agreements?*, *supra* note 6, at 14–17.

²¹⁸ China-Iceland FTA, *supra* note 76, art. 108 (the Iceland Agreement with China enhances labor communication and cooperation); see also China-Chile FTA, *supra* note 76 (the China-Chile FTA's MOU agrees to cooperation).

²¹⁹ See N.Z.-China MOU on Labour Cooperation, *supra* note 103 (the New Zealand-China Agreement reaffirms ILO obligations and recognizes that it is inappropriate to encourage trade or investment by weakening or failing to enforce labor laws, and that it is or use labor laws, regulations, policies and practices for trade protectionist purposes. Like the EU, the enforcement mechanism is consultation).

²²⁰ China-Iceland FTA, *supra* note 76, art. 108; see also China-Chile MOU on Labour and Social Security Cooperation, *supra* note 97; China-Chile FTA *supra* note 76, art. 2.

²²¹ See N.Z.-China MOU on Labour Cooperation, *supra* note 103.

China's one FTA and MOU on labor with a European economy, Switzerland in 2013, may reflect the likely future accommodation with European Union in an EU-China FTA or BIT. It contains a commitment to the ILO Declaration and its core labor standards and, also, reaffirms the Social Council on Full Employment and Decent Work of 2006 and the ILO Declaration on Social Justice for a Fair Globalization.²²² The Parties also agree to a broad range of obligations to enforce their labor laws, to not encourage trade by reducing labor standards, and to not use domestic labor laws to further trade protectionism. Issues over its implementation are to be resolved through cooperation, consultation, and dialogue—a dispute resolution scheme similarly embraced by EU FTA labor provisions.

2. *European Union*

Labor provisions in the Social Dimension (Trade and Sustainable Development (“TSD”) provisions in EU FTAs have developed and changed over the years.

The 2008 CARIFORUM Economic Partnership Agreement (EPA) contained more references to social policy norms and core labor standards than EU's prior FTAs. It provided for labor issues to be referred to independent experts, and dialogue within a civil society mechanism (CSM) ... and it embodied EU's ‘new generation’ trade agreements to be found in 18 countries by 2017, with bold claims made about their efficacy.²²³

Typically, they include three primary provisions: first, commitments and obligations to labor standards tied to the ILO; second, a process to monitor the agreement, using cooperation, dialogue, and transparency; and thirdly, procedures and mechanisms for resolving labor disputes. Dispute resolution provisions are separate and different for labor than for trade, and since the EU-Korea FTA,²²⁴ all EU FTAs have that tripartite format.²²⁵

²²² See China-Swiss FTA, *supra* note 76.

²²³ Harrison et al., *supra* note 4, at 261.

²²⁴ See *id.* Committees of state/EU officials from the two parties are established to oversee the implementation of the TSD chapter. These are advised by a CSM that takes the form of a Domestic Advisory Group (“DAG”) including representatives of business, trade unions, NGOs, and occasionally academia, with the DAGs of the two parties meeting together on an annual basis. Finally, there is an expert

Perhaps the most comprehensive labor provisions are found in the 2016 CETA agreement.²²⁶ The parties committed to the ILO Declaration and core labor standards, the Decent Work Agenda (covering health and safety standards), and obligated themselves to enforce ILO core labor standards and their labor laws, promote the Decent Work Agenda, make sustained efforts to ratify the ILO core labor standards and other Conventions classified as “up-to-date” by the ILO, and not to reduce labor protections or use labor laws to encourage trade or investment. The labor dispute resolution process authorizes either Party to initiate the processes of consultation, to consult with its domestic advisory group, including labor unions, and to have mediation by a panel of experts. Decisions are made public and no sanctions or penalties are provided. This differs from U.S. FTAs, which have a unified dispute resolution process for trade and labor and provide for penalties for violations.²²⁷

The Parties in the 2011 EU-South Korea FTA²²⁸ and the 2018 EU-Japan FTA have labor obligations and dispute resolution procedures like those in CETA above.²²⁹

panel that investigates complaints made by the parties and makes recommendations on them. The implication of the agreement text is that these institutions will interact to effectively implement the TSD chapter.

²²⁵ See CETA, *supra* note 135. European Commission Dispute resolution for trade disputes has the Investor-State Dispute Settlement (“ISDS”), where rights are vested in by corporations and obligations are binding for states and enforceable by the investors; labor dispute resolution is left for consultation. Likewise, investment disputes have an enforceable remedy. See also Michele Faioli, *Atlantic Transitions for Law and Labor: CETA First and TTIP Second?*, in SUSTAINABLE DEVELOPMENT, GLOBAL TRADE AND SOCIAL RIGHTS STUDIES IN EMPLOYMENT AND SOCIAL POLICY 71, 88 (Adalberto Perulli & Tiziano Treu eds., 2018).

²²⁶ See generally CETA, *supra* note 135.

²²⁷ Brown, *supra* note 112, at 176. This also contrasts to CETA’s binding investment court system designed to protect foreign investors, the labor chapter’s compliance mechanism relies on a non-binding process of cooperation, dialog and recommendations to address labor rights violations. See CETA, *supra* note 135, art. 8.10.

²²⁸ For example, see discussion on South Korea in Gruni, *supra* note 153. A common argument is that the labor clause does include several innovative features which entrench the presence of labor law in international trade agreements. However, the clause remains mainly about political cooperation and struggles to define enforceable legal obligations on states. This is so because of the exceptions in the first part of the clause, the vagueness of the labor rights obligations and the lack of an enforcement mechanism.

²²⁹ See EU-Japan EPA, *supra* 117, art. 21.

The easiest way for the European Union and China to move forward on trade and investment talks is to finalize their BIT negotiations. Certainly, the inclusion of labor provisions should not be an obstacle as China already has embraced them in its FTA-MOU with Switzerland and several other countries. While the European Union has not yet included them solely in a BIT, though three Members of the European Union have included them, it has included them in their FTAs and both China and the European Union have indicated they will include labor provisions in its EU-China BIT.

B. Significance of Labor Provisions in FTAs

There are many studies and diverse points of view on the practical usefulness of labor provisions in trade agreements. One such study concluded that for EU bilateral trade agreements in force prior to 2010 those “with labor provisions have a positive and statistically significant impact on workers’ rights in signatory nations.”²³⁰ It further reported that “what causes this positive effect is the way state officials are educated about, and normalized into, upholding labor standards.”²³¹ Swiss unions state they look forward to their educational interaction with Chinese employers.

Other studies within that study challenge these conclusions. Reports of serious shortcomings under the labor provisions of individual FTAs, where individual states claimed standards were lowered, were treated as “window dressing, were under-funded, and were “watered-down.”²³² Interestingly, they also note the lack of enforceability is also raised as problematic by the *other party* to the EU FTAs. “[A]t the 2017 civil society forum of the EU-Korea FTA some participants turned the discussion toward

²³⁰ Harrison et al., *supra* note 4, at 262. See also generally Damian Raess & Dora Sari, *Labor Provisions in Trade Agreements (LABPTA): Introducing a New Dataset*, 9 GLOBAL POL’Y 451 (2018) (comparing types of labor provisions); Damian Raess, Andreas Dür, & Dora Sari, *Protecting Labor Rights in Preferential Trade Agreements*, 13 REV. INT’L ORG. 143 (2018).

²³¹ Harrison et al., *supra* note 4, at 262.

²³² See *id.* at 263. A report ultimately critical of the value of EU’s TSD provisions concluded, “[O]verall, we found no evidence that the existence of TSD chapters have led to improvements in labor standards governance in any of our case studies, nor did we find any evidence that the institutionalization of opportunities for learning and socialization between the parties was creating a significant prospect of longer-term change” *Id.* at 273. Should the EU therefore seek to put more of its market power behind its labor governance strategy? Such an approach could in part be realized by the most common suggestion for reform from European interviewees involved in the labor movement; namely, increasing the enforceability of the TSD chapter by giving the EU the ability to withdraw preferential access to its market if labor standards are violated.

inadequate protection of workers *within the European Union*, complicating the assumption that such provisions are essentially externally orientated.”²³³ This could prove prescient on an EU-China FTA, as labor conditions in some EU Member states are not dissimilar to some areas in China. In fact, the European Trade Union Confederation (“ETUC”) agrees with the shortcoming of the lack of enforcement and urges penalties be added.²³⁴

Of course, changes could be made to improve enforceability of the labor provisions, such as looking to a modified dispute system allowing direct access to both trade and labor issues that would allow third-parties, such as labor unions, direct access to dispute procedures. In addition, allowing penalties for violations, empowering an outside panel or court (like CETA Investment provisions) to decide cases, or perhaps empowering NCPs as in OECD to make recommendations following investigations, would strengthen the enforcement mechanism.²³⁵ However, to be clear, there are two separate questions: 1) whether current enforcement procedures are sufficient and need modification; and 2) the question raised in this paper, whether current practices of European Union and China regarding inclusion of labor provisions in a BIT or FTA would be an obstacle to finding an accommodation so as to finalize the agreements. The conclusion is a clear—there is no obstacle.

C. *The European Union and China: Reaching Accommodation on an EU-China Labor Provision*

Considering the European Union’s 2016 CETA and China-Switzerland’s 2013 FTA and 2013 MOU are the most comprehensive labor protection treaties for each, a brief comparison shows there is much in

²³³ *Id.* at 274. See also generally James Harrison et al., *Labour Standards in EU Free Trade Agreements: Working Towards What End?*, 5 GREAT INSIGHTS MAG. 6 (2016), <https://ecdpm.org/wp-content/uploads/Great-Insights-Vol5-Issue6-December-2016.pdf>.

²³⁴ See ETUC, ETUC ASSESSMENT ON COMMISSION’S NON PAPER ON TRADE AND SUSTAINABLE DEVELOPMENT (TSD) CHAPTERS IN EU FREE TRADE AGREEMENTS (2018), <https://www.etuc.org/en/document/etuc-assessment-commissions-non-paper-trade-and-sustainable-development-tsd-chapters-eu> (it did so in its urging of inclusion in CETA). See also Angela Pfisterand & Éva Deseffffy, *Labour Rights*, in MAKING SENSE OF CETA 65–68 (2d ed. 2016).

²³⁵ See Axel Marx, Franz Ebert, & Nicolas Hachez, *Dispute Settlement for Labour Provisions in EU Free Trade Agreements*, 5 POL. & GOVERNANCE 49, 52 (2017) (arguing that there is a need to rethink the dispute settlement mechanisms related to labor provisions if their effectiveness is to be increased).

common, and accommodation of an agreeable labor provision is completely feasible. Most of the provisions are the same, except as outlined below.

The China-Switzerland MOU has an additional provision stating that labor laws will not be used for trade protectionist purposes,²³⁶ it has a detailed list of possible cooperative activities, and it has fewer express procedures for dispute resolution provisions, but likewise authorizes consultation for alleged violations or disagreements.²³⁷

CETA has a more detailed step procedure within which consultation and mediation take place²³⁸ and it explicitly authorizes use of a domestic labor development advisory group that can include labor unions.²³⁹ A recommended decision is made by an internal panel of experts.²⁴⁰ There are no enforcement or penalty provisions. Either Party shall make the decision public within thirty days of its delivery.²⁴¹ With such similar provisions, accommodation would likely only need to find the right language to express their common interests, already reflected in their prior agreements.

V. CONCLUSION

The opportunity for closer economic relations between China and the European Union is now. The reasons are economic, geopolitical, and for the benefit of employers and workers on both sides. The opportunity must be boldly seized through a negotiated BIT or its inclusion within an EU-China FTA.

While both sides will have their domestic political hurdles to surmount, this article shows that one potential political and economic obstacle, labor provisions in the Social Dimension provisions, is largely non-existent under the current practices of European Union and China.

²³⁶ China-Swiss MOU, *supra* note 82, art. 2(6).

²³⁷ *Id.* art. 4(2).

²³⁸ CETA, *supra* note 135, arts. 23.9 & 23.10.

²³⁹ *Id.* art. 23.8(4).

²⁴⁰ *Id.* art. 23.10.

²⁴¹ *Id.* art. 23.10(11).

The EU-China BIT and FTA can pave the silk road with a model for others to follow.