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**Working by Design: New Ideas to Empower U.S. and European
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Working by Design: New Ideas to Empower U.S. and European Workers in TTIP

Susan Ariel Aaronson

The 21st century has not been the best of times for U.S. and European workers. They have been buffeted by job losses, underemployment, and economic insecurity. Many individuals toil without benefits or job security.¹ Although workers are increasingly productive, many of them earn less than they did 20 years ago.² EU and U.S. policy-makers argue that one way to create new or better jobs is to conclude a trade and investment agreement between the United States and the 28 EU member states: the Transatlantic Trade and Investment Partnership (TTIP).

The United States and the European Union rely on longstanding templates for their trade agreements, but these templates may not adequately address the labour rights and employment issues bedeviling the workers of both trade giants. Moreover, because they rely on these templates, policy-makers may not be able to think creatively about these issues. In recognition that the debate is stuck in a rut, the Washington Office of the International Labour Organization (ILO) asked me to engage other scholars and put forward some new ideas.

This paper is organized as follows: first, I discuss how the European Union and the United States promote labour rights in trade and investment agreements. Next, I warn that language in the investment and regulatory coherence chapters may contradict the language in the labour rights chapters. Finally, I suggest ways that TTIP can be redesigned to benefit workers and promote employment, based on interviews with 23 eminent scholars as well as my own ideas.³

1. EU and U.S. approaches to promote labour rights

The European Union and the United States are prominent proponents of disseminating labour rights in their bilateral and multilateral free trade agreements (FTAs). Their trade agreement templates are built on the ILO core labour standards of:

- freedom of association and the effective recognition of the right to collective bargaining;
- the elimination of all forms of forced or compulsory labour;
- the effective abolition of child labour; and
- the elimination of discrimination in respect of employment and occupation.

They also include a non-derogation clause that prevents either party from weakening its labour laws and lowering its labour standards in order to attract trade or investment. Both the European Union and the United States recognize that public participation and support are essential to the success of the negotiations and the final agreement. The United States encourages public participation in the development of the labour chapter as well as comments concerning matters related to the labour chapter once in force.⁴ The European Union recently adopted similar strategies in the Comprehensive Economic and Trade Agreement (CETA) it concluded with Canada.⁵

However, the European Union and the United States have different approaches to labour regulation. U.S. policy-makers believe that in general the market should determine labour market outcomes. European regulators generally believe that unregulated markets create an imbalance of power between employer and employee, so the government should regulate appropriately to empower workers, create counterweights to business, and protect labour rights.⁶ In the United States, policy-makers view obligations on labour rights as a means of ensuring that trade and investment agreements do not undermine the rights of workers at home or within U.S. trade partners. EU policy-makers view labour rights as central to achieving sustainable development and as part of a broad set of human rights that it seeks to advance through dialogue, cooperation, and capacity building. The EU and U.S. negotiating templates reflect these differences.

The two trade giants also have different strategies to encourage the dispersion of labour standards. The United States includes labour rights in a separate chapter and since May 2007 has made labour rights binding and disputable, while the European Union includes labour rights as part of its sustainable development chapter and requires both parties to effectively enforce their labour laws.⁷

The European Union–Canada CETA and the United States–Korea FTA, agreements in which both parties are advanced industrialized economies, provide insights into how the two trade giants will approach labour rights language in TTIP.

As before, CETA includes labour rights in its chapter on sustainable development; both parties agree to respect the ILO core conventions, and effectively implement the ILO conventions that each party has ratified. Finally, CETA sets up a panel of experts to review alleged violations of the trade agreement. However, this review panel can only issue recommendations to the signatory nations and does not require them to respond. Hence, it creates no direct accountability to remedy the alleged violation.

The United States also did not think differently about how to address labour rights problems in Korea. The U.S. agreement with Korea includes the same core labour rights as those with Peru (2009), Colombia (2012), and Panama (2012).⁸ But Korea is very different from those nations; although it has a strong and vibrant democracy, and high levels of unionization, the U.S. Government⁹ and international organizations have expressed concerns about labour conditions and government willingness to effectively enforce labour rights.¹⁰

But the two trade giants seem unwilling to move beyond their templates. In fact, they may be talking past each other on labour rights. The European Union says its priority regarding labour rights is to maintain the policies EU member states have long adopted to ensure that international economic integration does not lead to domestic social disintegration. Meanwhile, the U.S. Trade Representative (USTR) states: “Our trade agreements are designed to prevent a race to the bottom on labor protections.”¹¹ The United States does not seem to be hearing European concerns that TTIP should not just prevent a race to the bottom, but it should also cushion workers from the adverse impact of trade and investment liberalization. Neither the European Union nor the United States seems to be encouraging new ideas that can help workers who feel threatened not just by globalization but also by wage stagnation, income inequality, and technologies such as robotics.

2. Incoherence within TTIP could undermine labour rights

Officials from both negotiating partners argue that the labour rights and sustainable development chapters illuminate their commitment to labour rights and employment issues in TTIP. But these goals cannot be successful if they are only confined to one chapter rather than embedded throughout the document as a whole. Both governments have included regulatory coherence and investment chapters in recent trade agreements that could have negative labor rights and employment side effects. The next section explains why negotiators must examine each chapter for coherence--to ensure that it in no way undermines or contradicts the goals of advancing labour rights and employment.

2.1. The regulatory coherence chapter

EU and U.S. policy-makers have long understood that domestic regulations designed to protect public health, safety, and the environment could distort trade because foreign producers may find it harder to comply with such regulations. Both negotiating partners insist that democratically determined regulation will not be undermined by TTIP.¹² However, some critics argue that regulatory coherence efforts will inevitably lead to a race to the bottom¹³ and that efforts to re-regulate domestic regulations in a trade and investment agreement are a 21st century strategy to internationalize deregulation.¹⁴

Unfortunately, policy-makers have not clarified whether labour-related regulations such as workplace health and safety regulations will be included in or excluded from the negotiations. Moreover, the United States has not ratified the same ILO conventions related to health and safety as has the European Union. U.S. workers generally have fewer protections than in much of Europe. Since the European Union and the United States have similar labour costs and productivity, some trade critics assert that EU and U.S. manufacturing firms may move their operations to venues with fewer or less costly labour-related regulations. For example, European firms could move investment to “right to work” U.S. states (where it is hard for workers to unionize), and U.S. firms could move to countries such as Romania, where labour rights are considered inadequately protected.¹⁵

2.2. The investment chapter

Negotiators from the United States and the European Commission want to include investor–state dispute settlement (ISDS) provisions in TTIP. These provisions are designed to encourage investment by giving investors the right to sue for compensation if their investments are expropriated by a participating government. Most investment agreements define expropriation as the direct or indirect seizure of property. However, when governments regulate, cut subsidies or slash budgets, investors may see their investments losing value, directly or indirectly as the result of such government action (“a regulatory taking”). Although the European Union and the United States have clearly stated that government regulatory policies cannot be challenged as regulatory takings, critics are not reassured.¹⁶

For example, foreign investors in Egypt challenged the establishment of minimum wages as a regulatory taking because these requirements were not in place at the time of the original investment contract. In Romania and Bulgaria, foreign investors initiated investment disputes arguing that the governments had failed to quell frequent strikes, thereby depriving the claimants of their full investment.¹⁷ No investor has

so far won an investment dispute on labour issues. But policy-makers have yet to clarify whether investors can challenge collective bargaining agreements or other worker protections.¹⁸ Until they do, the investment chapter could pose a threat to labour rights.

3. Key takeaways and recommendations

The experts I interviewed felt strongly that TTIP could provide an opportunity to think differently about how policy-makers in advanced industrialized economies can protect labour rights, encourage job creation, and empower workers. The recommendations below deserve policymaker and public attention; they are designed to ensure that TTIP works for workers.¹⁹

i. To enhance human welfare and empower workers:

- Empower workers with broader human rights language and specifically expand coverage to workers in the informal sector as well as workers who are trafficked;
- Ensure that signatories are obligated to meet ILO core labour standards as a minimum;
- Encourage unions to offer cross border services such as collective representation, benefits, training, and other workplace services; and
- Experiment with allowing less skilled workers to offer services across borders.

ii. To ensure that the agreement fully enhances labour rights and employment:

- Consider each chapter as part of a coherent whole: review each chapter for coherence with labour and employment objectives.

iii. To ensure that other chapters do not undermine labour rights and employment, therefore creating a dynamic of a regulatory race to the top:

- Include specific language stating that signatories cannot use regulatory coherence chapters to reduce worker protections;
- Clarify that investors cannot use ISDS provisions to challenge minimum wages, collective bargaining agreements, procurement standards, or regulations meant to protect public health or welfare; and
- Ask the ILO to examine whether domestic tax or monetary policies in one trade partner can affect the provision of public services and human welfare in another. Policy-makers should then examine whether these provisions can and should be disciplined under trade agreements.

iv. To improve the dispute settlement process:

- Broaden and clarify why, how, and when signatories can engage in a trade dispute and consider other nations' approaches to investigating and improving labour rights.

v. To develop strategies that encourage cooperative learning and collaboration:

- Create a secretariat to research and monitor the trade agreement; provide periodic reports on how it is affecting workers and worker rights; and delineate best practices to mitigate negative effects;
- Build trust in the negotiating process with increased transparency and collaboration;
- Focus less on enforcement as a means of changing behaviour and more on collaboration; and

- Encourage greater understanding of how EU member states use social dialogue.

Author

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¹ Eurostat estimates that in April 2015 the seasonally adjusted employment rate in the Euro area was 11.1 per cent and that youth unemployment was 20.7 per cent in the EU-28. See Eurostat. (2015). *Recent developments in unemployment at a European and member state level*. Retrieved from http://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment_statistics#Recent_developments_in_unemployment_at_a_European_and_Member_State_level. The U.S. Department of Labour reports that as of May 2015 the seasonally adjusted unemployment rate was 5.5 per cent. See United States Department of Labour, Bureau of Labour Statistics. (2015). *Databases, tables & calculators by subject*. Retrieved from <http://data.bls.gov/timeseries/LNS14000000>. In July 2014, the youth unemployment rate was 14.3 per cent. See United States Department of Labour, Bureau of Labour Statistics. (2015). *Employment and unemployment among youth summary*. Retrieved from <http://www.bls.gov/news.release/youth.nr0.htm>.

² International Labour Organization (ILO). (2013). *Global wage report 2012/13: Wages and equitable growth*. Geneva: International Labour Office, p. 62. Retrieved from http://www.ilo.org/wcmsp5/groups/public/---dgreports/--dcomm/---publ/documents/publication/wcms_194843.pdf.

³ For the full report prepared for the ILO Washington Office, see Aaronson, S.A. (2015). *Working by design: New ideas to empower U.S. and European workers in TTIP*. Washington, DC: George Washington University. Retrieved from http://www.gwu.edu/~iiep/events/Working_for_All/summary.pdf.

⁴ Americans as well as the public in FTA partners of the United States can submit documents concerning FTA partners' commitments or obligations arising under the labour chapters to the U.S. Department of Labour. See U.S. Trade Representative (USTR). (2015). *Public submission process*. Retrieved from <https://ustr.gov/issue-areas/labor/public-submission-process>.

⁵ On CETA, see Cosbey, A. (2014, November 3). *Inside CETA: Unpacking the EU–Canada free trade deal*. Retrieved from <http://www.ictsd.org/bridges-news/biores/news/inside-ceta-unpacking-the-eu-canada-free-trade-deal>.

⁶ Block, R. N., Berg, P., & Roberts, K. (2003). Comparing and quantifying labour standards in the United States and the European Union. *International Journal of Comparative Labour Law and Industrial Relations*, 19(4), pp. 441–468.

⁷ See Article 3.1 of Chapter 24, Trade and Labour, of the current text of the CETA, available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

⁸ U.S. Department of Labour & USTR. (2015, February). *Standing up for workers: Promoting labor rights through trade*, p. 49. Retrieved from <https://ustr.gov/sites/default/files/USTR%20DOL%20Trade%20-%20Labor%20Report%20-%20Final.pdf>

⁹ See U.S. Department of Labour. (2011, September). *Republic of Korea labour rights report*, pp. 1–2. Retrieved from http://www.dol.gov/ilab/reports/pdf/southkorea_LRR.pdf.

¹⁰ See Human Rights Council, Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, Addendum, Mission to the Republic of Korea, pp. 13–15, paras. 69–74. U.N. Doc. A/HRC/55/Add.1 (December 23, 2013). Retrieved from http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Documents/A-HRC-25-55-Add1_en.doc.

¹¹ U.S. Department of Labour & USTR (2015), *supra* note 8; and USTR. (2014, March). *U.S. objectives, U.S. benefits in the Transatlantic Trade and Investment Partnership: A detailed view*. Retrieved from <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/March/US-Objectives-US-Benefits-In-the-TTIP-a-Detailed-View>.

¹² Fontagné, L., & Jean, S. (2014, November 16). TTIP is about regulatory coherence. *VoxEU*. Retrieved from <http://www.voxeu.org/article/ttip-about-regulatory-coherence>. The two economists estimate that if the two could achieve regulatory coherence, they will increase trade by some 50 per cent.

¹³ European Commission. (2015, March 26). *The top ten myths about TTIP*. Retrieved from http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153266.pdf.

¹⁴ Aaronson, S. A. (2001). *Taking trade to the streets: The lost history of public efforts to shape globalization*. Ann Arbor: University of Michigan Press, pp. 7–11.

¹⁵ See Ponce del Castillo, A. M. (2015, January). TTIP: Fast track to deregulation and lower health and safety protection for workers. *ETUI Policy Brief: European Economic, Employment and Social Policy*, No. 1. Retrieved from <http://www.etui.org/Publications2/Policy-Briefs/European-Economic-Employment-and-Social-Policy/TTIP-fast-track-to-deregulation-and-lower-health-and-safety-protection-for-EU-workers>. On Romania, see U.S. Department of State. (2014, March 5). *Country reports on human rights practices for 2013: Romania*. Retrieved from <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dliid=220323>.

¹⁶ Organisation for Economic Co-operation and Development (OECD). (2012), “Investor-State Dispute Settlement: Public Consultation, 5/16—7/12/2012, #3, p. 5; http://www.oecd.org/investment/internationalinvestmentagreements/ISDSconsultationcomm ents_web.pdf; OECD. (2004). “Indirect expropriation” and the “right to regulate” in international investment law. *OECD Working Papers on International Investment*, No. 2004/04, Paris: OECD. Retrieved from <http://dx.doi.org/10.1787/780155872321>; and United Nations Conference on Trade and Development (UNCTAD). (2012). *World investment report 2012*, p. 139. Retrieved from <http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf>.

¹⁷ European Commission. (2015, January 13). *Commission staff working document: Report: Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, SWD(2015) 3 final, pp. 15–30. Retrieved from http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf. On ISDS and minimum wages, see Karadelis, K. (2013, June 28). Can Veolia trash Egypt at ICSID? *Global Arbitration Review*. Retrieved from <http://globalarbitrationreview.com/news/article/30644/can-veolia-trash-egypt-icsid>. On right to strike and other investor–state cases related to labour rights, see Vogt, J. S. (2014). Trade and investment arrangements and labor rights. In L. Blecher, N. K. Stafford, & G. C. Bellamy. *Corporate responsibility for human rights impacts: New expectations and paradigms* (pp. 121–175). Chicago: American Bar Association, pp. 171–172. For more on the case against Egypt, see Peterson, L. E. (2012, June 27). French company, Veolia, launches claim against Egypt over terminated waste contract and labor wage stabilization promises. *Investment Arbitration Reporter*. For the case against Romania, see *Noble Ventures Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (October 25, 2005). Retrieved from <http://italaw.com/documents/Noble.pdf>. For the case against Bulgaria, see *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB 03/24, Award (August 27, 2008). Retrieved from <http://italaw.com/documents/PlamaBulgariaAward.pdf>.

¹⁸ Aaronson, S. A. (2014). *A fresh approach to international investment rules*. Washington: Progressive Policy Institute.

¹⁹ For further detail on the specific recommendations, see the full report by Aaronson (2015), *supra* note 3.