

**Working by Design
New Ideas to Empower US and European Workers in TTIP
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Executive Summary

The US and the 28 EU member states have been negotiating the Trans-Atlantic Partnership (TTIP) since 2013. Government officials hope this trade agreement will stimulate trade and investment, and in so doing encourage more and better jobs on both sides of the Atlantic. They plan not only to negotiate new sectors (e-commerce) and new issues (anti-corruption) but to work towards greater regulatory coherence through mutual recognition, cooperation, and possibly harmonization. Because of its comprehensive scope, US and EU policymakers believe that the trade agreement could become the model for other agreements that will follow.

Although policymakers aim to promote employment with TTIP, TTIP is unlikely to say much about employment per se. As before, policymakers will build on their existing templates which focus on protecting labor rights. The EU and the US developed their templates over many years in trade talks with other FTA partners, mainly developing and middle income nations, where labor rights governance is often inadequate and citizens are not always able to demand their rights under law. However, these templates may not adequately address the labor rights and employment issues bedeviling the US and EU -- two advanced industrialized economies where many workers face unemployment, underemployment, and rising job insecurity. Moreover, because they rely on these set templates, policymakers may not be able to think creatively about these issues. Hence, the ILO Washington office asked me (Dr. Susan Ariel Aaronson of George Washington University) to engage other scholars and put forward some new ideas. I interviewed 23 eminent scholars of trade, labor, and employment for their ideas on how TTIP can address labor and employment issues. This paper represents our combined ideas on how TTIP can be designed to benefit workers and promote employment.

Key Takeaways

The experts agree that TTIP provides an opportunity to think differently about how policymakers in advanced industrialized economics can protect labor rights, encourage job creation, and empower workers. The participants stress:

- *Policymakers can advance both human rights and human welfare by focusing on policies to expand employment, empower workers, and improve labor rights;*
- *Trade negotiators should adopt a different mindset—instead of relegating labor issues to a separate chapter they should examine the impact of the agreement as a whole upon labor rights and employment;*

- *When drafting other chapters such as Investment or Regulatory Coherence, trade diplomats should ensure that these chapters do not undermine labor rights and/or employment objectives and instead create a dynamic of a regulatory race to the top;*
- *Policymakers can improve the dispute settlement process; and*
- *Trade diplomats should include provisions that encourage collaboration as well as learning from each government's different approaches.*

Recommendations:

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 labor 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.

To ensure that the agreement fully enhances labor rights and employment:

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

To ensure that other chapters do not undermine labor rights and/or 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 investor state dispute settlement provisions to challenge minimum wages, collective bargaining agreements, procurement standards or regulations meant to protect public health or welfare;
- Ask the ILO to examine whether domestic tax and/or monetary policies in one trade partner can affect the provision of public services and human welfare in another. Policymakers should then examine whether these provisions can and should be disciplined under trade agreements;

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 labor rights;

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 behavior and more on collaboration; and
- Encourage greater understanding of how EU nations use social dialogue.

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I. Trade Agreements and the New World of Work

The 21st century has not been the best of times for US and European workers. Americans and Europeans have been buffeted by job losses, underemployment, and economic insecurity. In the US and the EU 28, many workers, especially young workers, cannot find jobs suitable to their skills and training. Meanwhile many employed individuals toil without benefits or job security (this category includes free-lance or contingent workers as well as those in precarious work).¹ Although workers are increasingly productive, many workers earn less than they did twenty years ago.² Tables 1 and 2 illustrate this phenomenon.

Nonetheless the public is not convinced that trade will make workers more secure. A 2014 Pew Research poll found a majority of Italians (59%) and a plurality of the French (49%) think trade destroys jobs. Moreover, some 52% of Italians, 49% of the Greeks and 47% of the French say trade lowers wages. Meanwhile, some 50% of Americans share concerns about job losses and 45% are worried trade undermines wages.³

Scholars offer many reasons why the advanced industrialized economies are creating fewer good jobs at the same time that job insecurity and income inequality are increasing. First, globalization has made it easier for businesses to rely on workers from other countries who are willing to work for lower pay, while new technologies, such as computers, have rendered some jobs obsolete or helped to change the skill mix needed for many jobs.⁴ Trade agreements bear some responsibility for these effects because they facilitate globalization and technological change.

¹ Eurostat estimates that the euro area seasonally-adjusted employment rate was 11.5 % in November 2014 and youth unemployment at 21.9 % in the EU-28. See Eurostat, "Recent developments in unemployment at a European and Member State level," at http://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment_statistics#Recent_developments_in_unemployment_at_a_European_and_Member_State_level. The US Department of Labor reports that as of December 2014 the seasonally adjusted unemployment rate was 5.6% (See <http://data.bls.gov/timeseries/LNS14000000>). The youth unemployment rate was 14.3 percent in July 2014 (See <http://www.bls.gov/web/laus/laumstrk.htm> and <http://www.bls.gov/news.release/youth.nr0.htm>). In October 2010, Intuit, the Silicon Valley-based software company, estimated that more than 40% of the American workforce would be made up of "contingent workers" by 2020. Precarious workers are those who fill permanent job needs but are denied permanent employee rights. These workers often experience unstable employment, lower wages and more dangerous working conditions. All last searched 1/15/2015. See Jennifer Senior, "To the Office, With Love: What do we give up when we all become freedom-seeking, self-determining, autonomous entrepreneurs? A lot, actually," *NY Magazine*, 1/6/2015, <http://nymag.com/scienceofus/2014/12/what-we-give-up-when-we-become-entrepreneurs.html>

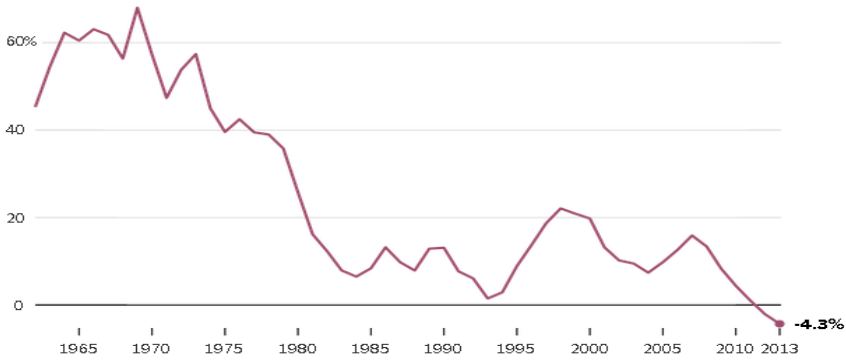
² ILO, Global Wage Report 2012/13: Wages and equitable growth," 2013, 62. Retrieved at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_194843.pdf. Eurozone countries cannot devalue their currency, so some have cut wages to increase investment and employment. As example, Greece reduced its minimum wage by 22 percent, with a further 10 percent cut for young workers, together with a reduction in non-wage costs (social security contributions) by 5 percentage points.

³ Bruce Stokes, "Is Europe on board for a new trade deal with the U.S.?" Pew Global Research, 1/29/2015; <http://www.pewresearch.org/fact-tank/2015/01/29/is-europe-on-board-for-a-new-trade-deal-with-the-u-s/> and Bruce Stokes, "Americans Agree on Trade: Good for the Country but Not Great for Jobs," Pew Global Research, 1/6/2015, <http://www.pewresearch.org/fact-tank/2015/01/08/americans-agree-on-trade-good-for-the-country-but-not-great-for-jobs/>

⁴ J. David Richardson, "Income Inequality and Trade: How to Think, What to Conclude." *Journal of Economic Perspectives*, 9(3): 33-55; Erhan Artuc and John McLaren, "Trade Policy and Wage Inequality: A Structural

Table 1: Declining Wages for US Workers

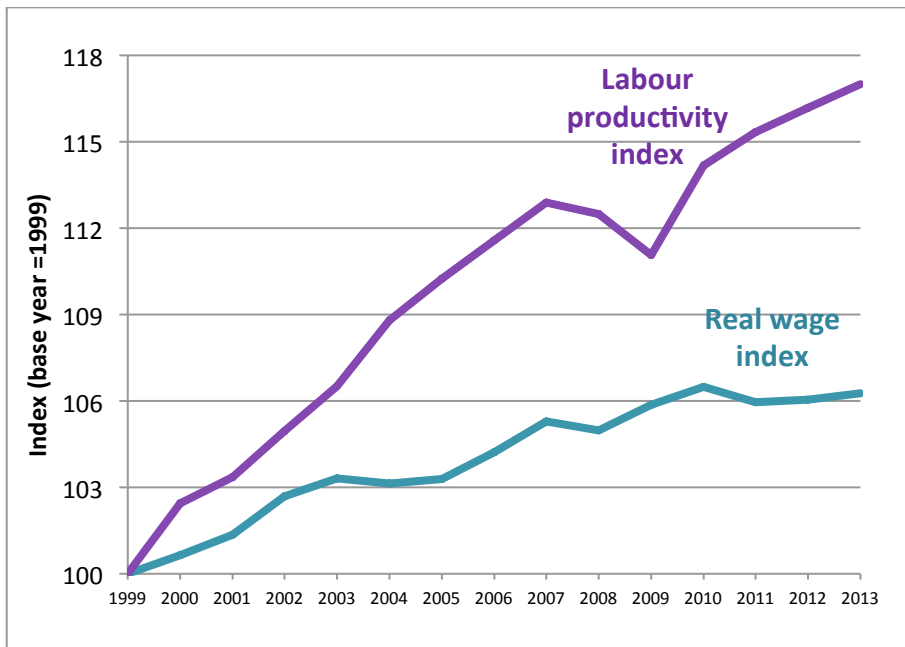
The Great 21st-Century Wage Slowdown
 Change in inflation-adjusted median family income, over previous 15 years



Source: Census Bureau

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Table 2: Trends in Growth in Average Wages and Labor Productivity in Developed Economies (index), 1999–2013⁶



Analysis with Occupational and Sectoral Mobility,” Presentation at the ITC, http://www.usitc.gov/research_and_analysis/documents/artuc_mclaren_feb2014_0.pdf; and Paul Krugman, Trade and Wages: Reconsidered, http://www.brookings.edu/~media/Projects/BPEA/Spring%202008/2008a_bpea_krugman.PDF skilled workers.

⁵ Provided by New York Times at <http://www.nytimes.com/2015/01/18/upshot/driving-the-obama-tax-plan-the-great-wage-slowdown.html> great-wage-slowdown.html.

⁶ ILO, Wage and Productivity Report at http://www.ilo.org/global/research/global-reports/global-wage-report/2014/Charts/WCMS_322713/lang--en/index.htm.

Second, policymakers made decisions that had the unintended effects of facilitating economic inequality and economic insecurity. For example, in recent years, some countries (and US states) have made it harder or less attractive for workers to organize and bargain collectively. These decisions, I argue, made it harder for workers to reap rising wages from increased productivity. When unions are able to set strong pay standards in particular occupations or industries through collective bargaining, generally employers are willing to raise the wages and benefits of nonunion workers toward standards set through collective bargaining. However, as unions have declined, both unionized and nonunionized workers found that despite rising productivity, they did not see rising wages.⁷ Further, some workers have turned against unions in the belief that they do not need to organize with others to protect their economic interests.

Third, shareholders and managers also bear some responsibility. As investors demand rising quarterly returns, many corporate officials have focused on quarterly results rather than investing in the skills, morale, and long term productivity of their employees.⁸ In the wake of these and other developments, union membership has declined in many nations, thus decreasing worker's bargaining power.⁹

While trade agreements have facilitated globalization, trade agreements such as TTIP cannot directly address issues such as income inequality and the decline in workers' bargaining power. But policymakers can design trade agreements so they do not exacerbate these problems. If trade diplomats adopt a different mindset, they can draft trade agreements to encourage job creation and further economic security.

⁷ Senate Committee on Health, Education, Labor and Pensions, "Rebuilding Economic Security: Empowering Workers to Restore the Middle Class, 111 Cong, 1st Session, 3/10/2009, <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg48040/html/CHRG-111shrg48040.htm>; Lawrence Mishel, "Congressional Testimony, "Policies that Do and Do Not Address the Challenges of Raising Wages and Creating Jobs," 2/4/2015,

<http://www.epi.org/publication/policies-that-do-and-do-not-address-the-challenges-of-raising-wages-and-creating-jobs/>; David Cooper and Lawrence Mishel, "Collective Bargaining's Erosion Expanded the Productivity-Pay Gap," 1/7/2015, <http://www.epi.org/publication/collective-bargainings-erosion-expanded-the-productivity-pay-gap-2/>

⁸ US Department of Labor, "Futurework - Trends and Challenges for Work in the 21st Century" <http://www.bls.gov/news.release/pdf/union2.pdf> future Summary,"

<http://www.dol.gov/dol/aboutdol/history/herman/reports/futurework/execsum.htm>. For the EU, see Isabelle Schomann, "Policy Brief: 'Collective labour law under attack: how anti-crisis measures dismantle workers' collective rights,'" <http://www.etui.org/Publications2/Policy-Briefs/European-Economic-Employment-and-Social-Policy/Collective-labour-law-under-attack-how-anti-crisis-measures-dismantle-workers-collective-rights>

⁹ In 2014, the US union membership rate—the percent of wage and salary workers who were members of unions was 11.1 percent, down 0.2 percentage point from 2013. BLS News Release, "Union Membership 2014," 1/23/2015, <http://www.bls.gov/news.release/pdf/union2.pdf>. I could not find comparative figures for EU 2014. However, for 2012, the average level of union membership across the whole of the European Union was 23%. The average is held down by relatively low levels of membership in some of the larger EU states, Germany with 18%, France with 8%, Spain with 19% and Poland with 12%. <http://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Trade-Unions2>

II. The US and EU Approach to Labor Rights: Philosophy, Political Context, and Templates

The US and the EU are the world's most prominent proponents of disseminating labor rights globally. Both aim to advance the ILO core labor standards of:

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

Each trade giant has different philosophies, political contexts affecting their strategies, and templates for promoting labor rights in the trade agreements.

a. *Underlying philosophy:*

The US and EU approaches to labor rights are rooted in distinct philosophical, economic and political differences. US regulation is based on the view that the market should determine labor market outcomes. In contrast, much of European employment regulation is historically based on the principle that unregulated markets create an imbalance of power between the employer and employee, so the government should empower workers, create counterweights to business, regulate appropriately, and protect labor rights.¹⁰

b. *Political context:*

The EU views labor rights as central to achieving sustainable development and part of a broad set of human rights that it seeks to advance through dialogue, cooperation and capacity building. Member states of the EU are generally supportive of this strategy. The EU has stated that it wants TTIP to “reiterate and build on the EU and US commitment to high levels of labor protection,” and to “ensure that increased trade does not come at the expenses of workers’ protection-but rather supports it.”¹¹ Specifically, the EU wants the US to agree to aspirational language to address child labor, prevent discrimination, and to bolster the ILO’s Decent Work Agenda. The ILO created the Decent Work Agenda to encourage its government partners to go beyond the core labor standards and adopt policies such as job creation strategies; policies that guarantee rights at work; regulations that extend social protection such as healthcare rules; and strategies that promote social dialogue between business, government, and labor.¹²

¹⁰ Block, Richard N., Peter Berg, and Karen Roberts, 2003. “Comparing and Quantifying Labour Standards in the United States and the European Union,” *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 19 (Winter), pp. 41-67.

¹¹ European Commission Issue Paper, “Roundtable on Labour Rights and civil Society TTIP,” 11/12/2014, 1-3, http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153014.1%20SD%20discussion%20paper%20-%20approach,%20issues,%20questions.pdf; and EU Position Paper, “Trade and Sustainable Development chapter/Labour and Environment: EU Paper Outlining Key Issues and Elements for Provisions in the TTIP,” http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153024.pdf

¹² On the Decent Work agenda, <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--de/index.htm>

In the US, policymakers view obligations on labor rights as a means of ensuring that trade agreements do not undermine the rights of workers at home or within US trade partners. Until 2007, US free trade agreements required signatories to enforce their own labor laws. In 2007, the Congress agreed that rather than simply asking trade partners to enforce their own laws, the US would require its trade agreement partners to commit themselves to the core ILO labor standards.¹³ However, some members of Congress (principally Republican legislators) believe that strong worker rights protections discourage investment abroad and at home. These legislators are likely to oppose any further expansion of labor rights (such as aspirational language on decent work).¹⁴

Moreover, US and European workers and unions have different abilities to influence the negotiation and hold different positions on TTIP. In general, EU workers have higher labor standards and stronger social protections than workers in the US. While union rates vary by country (as they do in US states), in general EU unions have many more members and higher unionization rates.¹⁵ In the EU, unions and corporations are experienced in productive collaboration and unions have significant political influence. In the US, while unions have significant political influence, their clout is declining as their membership declines.

US and EU unions in the US and EU have different concerns about TTIP. Some European unions fear that the trade agreement with the US could lead to lower labor standards for EU workers, while some US union leaders believe the agreement could improve US workplace standards. The European Trade Union Congress has expressed concerns that the US is unwilling to ratify many ILO conventions and notes that labor rights such as the right to organize and negotiate collectively are routinely violated in “Right to Work” states. They recommend that the EU address this concern explicitly in its draft mandate. Unions on both sides of the Atlantic are waiting to see the specific provisions, but no drafts have been made available or leaked as of May 2015.¹⁶

¹³ See Office of the US Trade Representative, “Bipartisan Agreement on Trade Policy, 5/2007, “Labor,” http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf.

¹⁴ We note the US has not ratified all key ILO conventions. On history of labor rights as US trade issue see Susan Ariel Aaronson and Jamie M. Zimmerman, *Trade Imbalance: The Struggle to Weigh Human Rights Concerns in Trade Policymaking*, (NY: Cambridge U Press, 2007, pp. 158-170; Thomas B. Edsall, “Republicans Sure Love to Hate Unions,” *New York Times*, 11/18/2014, http://www.nytimes.com/2014/11/19/opinion/republicans-sure-love-to-hate-unions.html?_r=0; and Mark Barenberg et al., “Labor Rights, Under Republican Attack,” *New York Times*, 10/13/2011, <http://www.nytimes.com/2011/10/13/opinion/labor-rights-under-republican-attack.html>.

¹⁵ See footnote 9. In countries such as Sweden, Finland and Iceland, union membership is over 50%. The OECD has country specific data at https://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN.

¹⁶ Kevin Bogardus and Vicki Needham, “Unions hope US-EU trade talks can be lever to change labor laws,” *The Hill*, 2/20/2103, <http://thehill.com/homenews/administration/283913-unions-hope-us-eu-trade-talks-can-be-lever-to-change-labor-laws>; <http://www.aflcio.org/Issues/Trade/U.S.-EU-Free-Trade-Agreement-TTIP>; and <http://www.etuc.org/documents/etuc-position-transatlantic-trade-and-investment-partnership#.VONkAy6M7tM>.

Almost half of US states are right to work states, where employers and employees are not allowed to negotiate an agreement – also known as a union security clause – that requires all workers who receive the benefits of a collective bargaining agreement to pay their share of the costs of representing them. Right to Work laws say that unions must represent every eligible employee, whether he or she pays dues or not.

See <http://www.mnafcio.org/news/right-work-laws-get-facts>; and <https://www.google.com/search?q=right+to+work+states&ie=utf-8&oe=utf-8>.

c. Templates:

The US and the EU templates have some important similarities. As noted above, both rely on core ILO labor standards as the foundation for labor provisions within their free trade agreements. Both also include a non-derogation clause that prevents either party from weakening its labor laws and lowering its labor standards in order to facilitate trade or encourage investment. Additionally, both governments recognize that public participation and support is essential to the success of the labor rights provisions. The US encourages public participation in the development of the labor chapter as well as comments concerning matters related to the labor chapters once in force. The EU recently adopted similar strategies to involve the public in developing and monitoring the sustainable development provisions of its agreements. For example, CETA includes a Civil Society Forum to review the sustainable development aspects of the agreement, but it has no responsibility other than to meet and discuss.¹⁷

However, the US and the EU have different strategies to encourage the dispersion of labor standards. The US includes labor rights in a separate chapter and since May 2007 has made labor rights binding and disputable, while the EU includes labor rights as part of its sustainable development chapter and requires both parties to effectively enforce their labor laws.¹⁸

Although the US is generally perceived as having a strong focus on labor rights, the US has rarely used trade agreement mechanisms to challenge other nations' labor practices. Moreover, the US sets limits to how and when a nation state can challenge the labor rights provisions of its trade partner. In defining a violation, the US requires its trade partners to show that non-enforcement of labor obligations occurred through a sustained or recurring course of action and affected trade or investment. Unions, firms, or individuals can initiate a trade dispute on labor rights, but the disputes are state to state (not investor to state). The US, like the EU, tries to work with its trade partners to improve labor rights enforcement. As a result, many labor rights activists find the dispute mechanism

The US and the EU have different strategies to encourage the dispersion of labor standards. The US includes labor rights in a separate chapter and has made labor rights binding and disputable, while the EU includes labor rights as part of its sustainable development chapter and requires parties to effectively enforce their labor laws.

¹⁷ Americans as well as the public in America's FTA partners can submit documents concerning FTA partners' commitments or obligations arising under the labor chapters to the U.S. Department of Labor's [Office of Trade and Labor Affairs \(OTLA\), Division of Trade Agreement Administration and Technical Cooperation \(TAATC\)](https://ustr.gov/issue-areas/labor/public-submission-process). See <https://ustr.gov/issue-areas/labor/public-submission-process>. On CETA, see Aaron Cosbey, "Inside CETA: Unpacking the EU-Canada free trade deal," 11/3/2014, <http://www.ictsd.org/bridges-news/biores/news/inside-ceta-unpacking-the-eu-canada-free-trade-deal>

¹⁸ Canada, "Opening New Markets in Europe: Creating Jobs and Opportunities for Canadians: Technical Summary of Final Negotiated Outcomes-Canada European Union Comprehensive Economic and Trade Agreement," and "Agreement in Principle," See <http://international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/korea-coree/overview-apercu.aspx?lang=eng#seven>. CETA says, "Each Party shall ensure that its labour law and practices embody and provide protection for the fundamental principles and rights at work, and reaffirm its commitment to respecting, promoting and realizing such principles and rights in accordance with its obligations as member of the ILO and its commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998."

inadequate because it is convoluted, time-consuming, and does not really punish labor rights violations or prevent future problems.¹⁹

III. How the Two Economies May Build on Recent Labor Rights Language in TTIP

The EU/Canada Free Trade Agreement (CETA-2014), the US/Korea FTA, and the Trans-Pacific Partnership (still in negotiations) provide insights into how the two trade giants will approach labor rights language in an agreement with an advanced industrialized economy. CETA includes labor rights in its chapter on sustainable development labor rights; it includes commitments to ensure that national labor laws and policies in Canada and the EU respect the ILO's 1998 Declaration on Fundamental Principles and Rights at Work. The EU and Canada are also supposed to 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 state how they will respond. Hence, it creates no direct accountability to remedy the alleged violation.

The US, like the EU, adhered to its template in negotiating the labor rights provisions in the US Korea FTA (2012), the most recent US negotiation with an industrialized partner. The agreement includes the same core labor rights as those with Peru (2009), Colombia (2012), and Panama (2012).²⁰ Although Korea has a strong and vibrant democracy, and high levels of unionization, the US Government has expressed concerns about labor conditions.²¹ Moreover, the U.N.'s Special Rapporteur on the Situation of Human Rights Defenders in 2013 said that the government curtails Korean workers' rights to collective bargaining and to strike. Korean law also bars specific groups from unionizing, including many public employees. The Special Rapporteur also noted that public assembly requires prior notification to police, for which violation is punishable by a maximum two years' imprisonment or a fine.²² These laws were in

¹⁹ As example, in 2011, after complaints from worker rights and human rights organizations as well as members of Congress, the United States requested an arbitral panel under the CAFTA-DR dispute settlement chapter to address Guatemala's failure to effectively enforce its labor laws. The United States and Guatemala agreed to suspend the arbitral panel pending the negotiation and implementation of the Enforcement Plan. The United States and Guatemala signed the Enforcement Plan in April 2013. However, although Guatemala has taken several steps to implement the Enforcement Plan, it did not make significant progress. Thus, the US initiated a trade dispute under CAFTA in September 2014. See USTR, "United States Proceeds with Labor Enforcement Case against Guatemala," 8/2014, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/September/United-States-Proceeds-with-Labor-Enforcement-Case-Against-Guatemala>. The US is also expressing concerns about Honduras. See <http://www.dol.gov/opa/media/press/ilab/ILAB20150066.htm>.

²⁰ US Department of Labor and USTR, "Special Report: Standing Up for Workers: Promoting Labor Rights through Trade", February 2015, pp 49.

<https://ustr.gov/sites/default/files/USTR%20DOL%20Trade%20-%20Labor%20Report%20-%20Final.pdf>

²¹ The Labor Department noted that the government uses criminal law to suppress union activity and migrant and freelance workers can also be mistreated. Department of Labor, "Republic of Korea Labor Rights Report," September 2011, pp. 1-2, http://www.dol.gov/ilab/reports/pdf/southkorea_LRR.pdf.

²² Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, Addendum: Mission to the Republic of Korea, AHRC, Human Rights Council Twenty-fifth session, Agenda item 3, 12/23/2013, pp. 13-15, # 69-74, <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/CountryVisits.aspx>

effect as the US and Korea negotiated, yet the US stuck to its template and missed an opportunity to collaborate with the Korean government to further advance labor rights.

Both US and EU officials have promised to take a different approach to labor rights in TTIP, but they have very different strategies, objectives, and priorities. DG Trade asserts “The EU considers that ILO core labor standards... are an essential element to be integrated in the context of a trade agreement, and could be further complemented by other ILO standards/conventions... The overarching aim of the...chapter should be to ensure that trade and economic activity can expand without undermining the pursuit of social... policies.”²³ Reading between the lines, the EU is saying its priority is to maintain the policies EU member states have long adopted to ensure that international economic integration does not lead to domestic social disintegration.²⁴ Meanwhile USTR states, “We seek to obtain appropriate commitments by the EU with respect to internationally recognized labor rights and effective enforcement of labor laws concerning those rights, consistent with U.S. priorities and objectives. Our trade agreements are designed to prevent a race to the bottom on labor protections. ...The United States and Europe already maintain high levels of protection for their workers. TTIP should reflect this shared commitment, which may become a model for others to follow, and encourage even greater transatlantic cooperation.”²⁵ Reading between these lines, the USG seems to be approaching negotiations with the EU in the same way it has approached its other FTA partners. To design a shared strategy, the US will need to “hear” European concerns; that the agreement is not just about preventing a race to the bottom, but also about cushioning citizens from the adverse impact of trade liberalization while simultaneously allowing individuals to reap trade liberalization’s benefits.

IV. The Foundation of a New Approach: Asking and Answering Key Questions

As of this writing, the two trade giants have not negotiated labor rights and thus can experiment with the process. I suggest that policymakers begin by asking and answering several key questions before they begin negotiations on labor rights and employment:

- US and EU policymakers rely on labor rights language designed for North/South trade agreements where policymakers aim to prevent a race to the bottom regarding labor rights. Is this language the best starting point for labor and employment negotiations between the two governments?
- Because employment, underemployment, and economic insecurity bedevil both the US and the EU, can these issues be addressed within the agreement, and if so, how?

²³ European Commission, “EU-US Transatlantic Trade and Investment Partnership, Trade and Sustainable Development, Initial EU Trade Position Paper, July 2013, http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151626.pdf.

²⁴ See Dani Rodrik, *Has Globalization Gone too Far?* (Washington: Peterson Institute for International Economics, 1997).

²⁵ US Department of Labor and USTR, “Special Report: Standing Up for Workers: Promoting Labor Rights through Trade”, February 2015, pp. 51-53. <https://ustr.gov/sites/default/files/USTR%20DOL%20Trade%20-%20Labor%20Report%20-%20Final.pdf>; and Fact-Sheet, “U.S. Objectives, U.S. Benefits In the Transatlantic Trade and Investment Partnership: A Detailed View,” <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/March/US-Objectives-US-Benefits-In-the-TTIP-a-Detailed-View>.

- In their templates, both the US and EU focus on policymaker behavior and say little about empowering workers and/or unions (a bottom-up approach). Can trade diplomats develop language that empowers workers?
- Although the EU now makes public its negotiating positions, the US does not, and the actual negotiations will be conducted in secret. Is such secrecy necessary to maintain trust between negotiators? Could public trust in the agreement increase if trade diplomats shared more information about their positions and the negotiating progress with their citizens?
- The ILO has long experience in researching and monitoring labor rights issues. For example, the ILO has significant understanding about how best to use social dialogue to build better relations between labor, business, civil society and government. How can the US and EU make better use of ILO expertise to build trust and credibility? Both governments relegate issues of labor to one chapter (labor rights or sustainable development), but other trade agreement chapters can have significant effects upon workers' rights and employment. Can labor rights and employment be mainstreamed throughout the agreement?

In the section that follows, I expand upon the idea of agreement coherence to show how US and EU negotiators might benefit from a new approach towards thinking about labor rights and employment issues.

V. Why Labor Rights Must be Protected Throughout the Agreement: The Potential Benefits and Costs to Workers in the Services, Regulatory Coherence and Investment Chapters

Trade officials from both countries argue that the labor rights and sustainable development chapters illuminate their commitment to labor rights issues. However, both governments have included services, regulatory coherence, and investment chapters in recent trade agreements that have labor rights and employment side effects.²⁶ Depending on how trade diplomats draft these chapters, TTIP could advance labor rights and increase employment, or they could also have negative effects, as discussed below.

a. The Services Chapter

Trade negotiators use the services chapter to make it easier for companies and individuals to trade services across borders. Policymakers want to ensure that US and EU service companies can compete effectively in both markets while safeguarding essential public services such as health, education, social services and water (the EU will not negotiate these services). The chapter will also include language on new growing sectors such as e-commerce, financial services, postal and courier services, and maritime transport. The US appears more willing than the EU to open up sectors such as construction, communication, and commercial services.

²⁶ On January 30, the EU released a draft of the regulatory affairs chapter noting, "This draft covers regulatory acts at "central" level, understood as EU-level and US Federal acts. The draft also includes placeholders for regulatory acts of US States and of the central national authorities of EU Member States.

Many of the arguments over the services chapter reflect divisions about who should provide public services and how they should be provided. Some argue that the current language does not clearly exclude key public services, such as energy and water, at all levels of government; they fear that the two sides could open these services to privatization or to a trade dispute. Many labor rights advocates are concerned about the increased privatization of services because they believe good jobs could be lost, the costs of providing public services could rise, and the quality of services could decline.²⁷ As of May 2015, neither the US nor the EU has tabled a services text. Thus, we do not know how these different approaches to the role of governments in providing public goods will play out.²⁸

The services chapters also include provisions that allow some workers to temporarily work overseas.²⁹ In a World Bank review of FTAs, scholars found that these chapters generally address the temporary mobility of professionals such as architects, lawyers, bankers, management consultants and accountants, who often “serve” multinational business. However, policymakers have rarely included provisions facilitating the temporary mobility of less skilled and unskilled workers.³⁰ Although such provisions could create opportunities for workers, governments have been reluctant to expand these provisions, fearing that critics will view their efforts as immigration policies rather than as trade liberalization policies.³¹

b. Regulatory Coherence

Trade negotiators will use the regulatory coherence chapter to ensure that domestic regulations, such as environmental regulations, health and safety standards, or workplace regulations, do not distort trade. Policymakers 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. Thus, both US and EU regulators say they will use these negotiations to eliminate unnecessary or costly regulations while limiting specific regulations that can distort trade. EU officials also argue that the chapter would set a process allowing regulators to collaborate, swap information, and consult so that regulations on both

²⁷ The EU has supposedly asked for language “It will be important to strive as far as possible for coherence and consistency between the approaches and solutions embodied in the sectoral provisions, on the one hand, and those in other parts of TTIP to ensure that the approaches and solutions embodied in the sectoral provisions are not duplicative or incoherent with other parts of TTIP.” See General Notes, “Initial provisions for Chapter, Regulatory Cooperation,” prepared for 8th round of TTIP negotiations. 1/30/2015 <https://stop-ttip.org/wp-content/uploads/2015/01/TTIP-EC-text-regulatory-cooperation-28.01.2015.pdf>.

²⁸ J. Robert Vastine, J. Bradford Jensen, and Hosuk Lee Makiyama, “The Transatlantic Trade and Investment Partnership: An Accident Report,” ECIPE Policy Briefs, No. 1/2015, <http://www.ecipe.org/app/uploads/2015/01/PB012015.pdf>. On EU position on services, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>.

²⁹ See as example, Article 6 of CETA, Temporary Entry Text,” pp. 200-206.

³⁰ See Sherry Stephenson and Gary Hufbauer, Labor Mobility, Chapter 13 in Jean-Pierre Chauffour and Jean-Christophe Maur, *Preferential Trade Agreement Policies for Development A Handbook*, Washington, World Bank Group, 2011, pp. 275-306.

³¹ The EU does not have authority from member states to regulate immigration, while the US Congress requires the following language: “Nothing in this Chapter or any other provision of this Agreement shall be construed to impose any obligation on a Party regarding its immigration measures, including admission or conditions of admission for temporary entry.” See as example, Article 1; 7 in the US/Korea FTA, <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>. Also see Stephenson and Hufbauer, “Labor Mobility,” pp. 275-306.

sides of the Atlantic would be more comparable. Further, if the US and the EU can achieve regulatory coherence, their regulations would become the global norm adhered to by the bulk of the world's companies and supported by some 1 billion Americans and Europeans.³²

TTIP negotiators are already struggling with regulatory coherence because the US and the EU have very different approaches to regulating: the US tends to weigh costs versus benefits, whereas the EU tends to focus on risks. In the EU, technocrats play a major role in developing appropriate regulations, whereas the US focuses more on process and involving public experts—business, civil society—to shape regulation.

Both governments insist that democratically determined regulation will not be undermined by the trade agreement.³³ However, some critics argue that regulatory coherence efforts will inevitably lead to a race to the bottom.³⁴ These critics believe that efforts to re-regulate domestic regulations in a trade agreement are a 21st century strategy to internationalize deregulation.³⁵

Unfortunately, policymakers have not clarified whether labor-related regulations such as workplace health and safety regulations will be excluded from the negotiations. Moreover, the US has not ratified the same ILO conventions related to health and safety as has the EU. Further, US workers generally have fewer protections and employers have relatively lower costs despite an appreciating dollar. Since the US and EU have similar labor costs and productivity, some trade critics assert that US and EU manufacturing firms may move their operations to venues with fewer or less costly labor related regulations. For example, European firms could move investment to “right to work” US states and US firms could move to countries such as Romania where the government is less effective or willing to protect labor rights than in other European countries.³⁶

³² European Commission, “Regulatory cooperation in TTIP : Cutting red tape for EU firms – without cutting corners,” http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153002.1%20RegCo.pdf.

³³ Lionel Fontagné, Sébastien Jean, “TTIP is about regulatory coherence,” VoxEU, 11/16/2014, <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%.

³⁴ European Commission, “The Top Ten Myths About TTIP,” March 26, 2015, http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153266.pdf.

³⁵ Susan Ariel Aaronson, *Taking Trade to the Streets: The Lost History of Public Efforts to Shape Globalization* (Ann Arbor: University of Michigan Press, 2001), pp. 7-11.

³⁶ See Aida Maria Ponce del Castillo, “EUI Policy Brief: European Economic, Employment and Social Policy, No 1, 2015, “TTIP: Fast Track to Deregulation and lower health and Safety Protection for Workers,” <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 US Department of State, Country Reports on Human Rights Practices for 2013, Romania, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper>. State found, “Although the law permits strikes by most workers, lengthy and cumbersome requirements made it difficult to hold strikes legally....The law provides no legal basis for national umbrella collective labor contracts. The law provides for employers and unions to negotiate collective bargaining agreements at “lower levels” (local), although the law had not defined these levels by year’s end. Employers do not need to consult with unions on such problems as granting employees leave without pay or reducing the workweek due to economic reasons. ...On the enforcement side, unions also complained that they must submit their grievances to government-sponsored arbitration before initiating a strike and that the courts had a propensity to declare strikes illegal. Trade unions continue to raise concerns pertaining to the division of trade union assets, lengthy procedures for registering trade unions and modifying union statutes or executive committees, and excessive control of trade union finances.”

The US and the EU have not clarified how they will achieve regulatory coherence given different approaches and levels of regulations, nor have they explained how higher standards can be maintained in the venues that have such high standards. A draft was leaked in April 2015, but we do not know if it is correct and up to date. The leaked draft states that this chapter does not cover public policy objectives, such as acts determining the principles of competition, consumer protection, IPR protection, the conditions for setting up and registering a company, the protection of personal data, or the protection of the environment. The leaked draft also includes obligations to report on new and potential regulation in a transparent manner, to hold regular stakeholder consultations, to implement a strategy to achieve mutual recognition of regulations, and to create a regulatory cooperation body.³⁷

There is precedent for a more holistic approach; in 1947-1948, policymakers embedded rules related to employment as well as fair labor standards in the ITO Charter. While that language is outdated, the architects of the ITO understood that trade is a means to the end of enhancing human welfare and not the end goal.

c. The investment chapter

Trade negotiators use the investment chapter to encourage and protect cross-border investment. Nonetheless, the proposed investment chapter also raises concerns about investor challenges to government-sanctioned worker protections. In general, only states can initiate trade disputes and such disputes are between states as the parties of the agreement. However, both the US and EU FTA models include language on investment that allows investors to ask for an independent tribunal of arbitrators to weigh whether or not a state has breached its obligations. If the tribunal decides yes, it has the power to determine just compensation for the firm (this process is called investor-state dispute settlement or ISDS).

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. Thus, some investors have challenged government regulatory or budgetary policies that reduce the value of their investments as “indirect expropriations” or “regulatory takings.”³⁸ For example, in 2000, the delivery giant UPS sued the Canadian government under NAFTA’s investment provisions. The company alleged that Canada Post (a government-owned company that provides mail and courier services but acts as a private company) engaged in anti-competitive practices because it provided “its courier products with advantages that were not provided to

³⁷ This is based on a April 2015 leak by Corporate Europe Observatory (which may or may not be correct and up to date. http://insidetrade.com/sites/insidetrade.com/files/documents/apr2015/wto2015_1260a.pdf

³⁸ OECD, “Investor-State Dispute Settlement: Public Consultation, 5/16—7/12/2012, #3, p. 5; OECD, “Indirect Expropriation and the Right to Regulate in International Investment Law,” OECD Working Papers on International Investment 2004/04, <http://www.oecd-ilibrary.org/docserver/download/5lgsjhvj76kd.pdf?expires=1369358232&id=id&accname=guest&checksum=4541798FDEE214C473CD88E27DF9F809>; and “UNCTAD World Investment Report 2012,” UNCTAD, p. 139, <http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf>.

UPS Canada.” In addition, UPS alleged that the Canada Border Services Agency provided less favorable treatment to UPS Canada than to Canada Post's courier services.³⁹ In 2005, the parties established an investment tribunal to weigh UPS's allegations. The Tribunal rejected all of UPS' claims, arguing that certain activities of Canada Post were “arms-length” from the Canadian government and, therefore, not subject to challenge by the investor. Leaving its merits aside, the case raised important questions about how far investors could go in using investment treaties to challenge government policies.⁴⁰

Although the US and the EU have clearly stated in their models that government regulatory policies cannot be challenged as regulatory takings some critics still express concern that these regulations will be challenged as a means of testing the limits of government policy space. Policymakers have yet to clarify whether government policy space includes collective bargaining agreements or other worker protections.⁴¹

Moreover, we see growing evidence that some foreign investors are willing to challenge workers' rights regulations as a form of regulatory taking. As 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 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.⁴² No investor has won an investment dispute based on such a claim as of this writing.

In sum, if the US and the EU want to expand employment and advance labor rights, then policymakers should ensure that the language in the other chapters is consistent with the chapter relating to labor and employment. In fact, there is precedent for a more holistic approach; in 1947-1948, policymakers embedded rules related to employment as well as fair labor standards in the ITO Charter.⁴³ While that language is outdated and aspirational, the architects of the ITO understood that trade is a means to enhancing human welfare and not an end in itself.

³⁹ Canadian Encyclopedia, “Canada Post Corporation,” <http://www.thecanadianencyclopedia.com/articles/canada-post-corporation>The Canadian government established the Canadian Post in 1859 to provide mail and parcel services throughout the land rich but sparsely populated nation. After a series of strikes and management problems, the government converted the firm into a crown corporation in 1981. Since that time, the Canada Post Corporation acts as a private company, although it reports to the Parliament, is owned by the Canadian government, and provides a public service.

⁴⁰ <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/MeritsAward24May2007.pdf>; http://www.naftalaw.org/disputes_canada_ups.htm; and Marc Lalonde, “When Investor Rights Go Too Far,” Toronto Star, 5/2/2002, <http://www.iatp.org/news/when-investor-rights-go-too-far>

⁴¹ Susan Ariel Aaronson, “A Fresh Approach to International Investment Rules,” Progressive Policy Institute, 2014.

⁴² For a good overview of recent opposition to investor-state, see European Commission, 1/13, 2015, “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. On ISDS and minimum wages, K Karadelis, Can Veolia trash Egypt at ICSID?, [Global Arbitration Review](http://globalarbitrationreview.com/news/article/30644/can-veolia-trash-egypt-icsid), 6/28/2013, <http://globalarbitrationreview.com/news/article/30644/can-veolia-trash-egypt-icsid>. On right to strike and other investor-state cases related to labor rights, see Jeff Vogt, “Trade and Investment Arrangements and Labor Rights, Chapter 5 in Lara Blechner, *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (Chicago: American Bar Association, 2015), Chapter in possession of author, pp. 171-172.

⁴³ The first lines of the ITO Charter 1948 state, “RECOGNIZING the determination of the United Nations to create conditions of stability THE PARTIES to this Charter undertake in the fields of trade and employment to co-operate with one another ... For the Purpose of REALIZING... attainment of the higher standards of living, full employment

VI. Expert Interviews & Key Findings

Methodology

In December 2014-February 2015, Aaronson interviewed 23 experts from academia and think tanks in the US, EU, Canada, Mexico, South Africa, Australia, and New Zealand. We selected these individuals from a larger list of widely respected scholars who had published on trade and/or labor rights. We asked them a set of questions about the US and EU labor rights templates as well as potential provisions in TTIP. We also inquired if they preferred the US or EU model of dispute resolution and if they had suggestions to improve the process. Finally, we asked them to make recommendations which might advance labor rights, improve economic security, and facilitate the creation of more and better jobs. Aaronson also provided some recommendations. We selected the most promising of these recommendations to move forward to policymakers.

Summary Findings

Our respondents wanted TTIP to go beyond the core labor rights that the US requires in its most recent FTAs. They recognize that human rights essential to labor rights (freedom of expression, freedom of association, the rights to organize and political participation) are instrumental to democracy as well as to workers' rights. They believe that if TTIP is to serve as a model for other trade agreements, it should apply

Some 65% of those surveyed felt that TTIP should address more than core labor rights though interviewees were divided as to how.

to all workers, including those not protected by contracts or unions. TTIP should create a dynamic of a race to the top.

If TTIP is to serve as a model for other trade agreements, it should apply to all workers, including those not protected by contracts or unions. TTIP should create a dynamic of a race to the top.

Question 1: Should TTIP address labor issues broadly (such as employment)? Some 65% of those surveyed felt that TTIP should address more than core labor rights though interviewees were divided as to how. Some called for a

and conditions of economic and social progress and development, envisaged in Article 55 of that Charter. TO THIS END they pledge...to promote national and international action designed to attain the following objectives: To assure a large and steadily growing volume of real income and effective demand, to increase the production, consumption and exchange of goods, and thus to contribute to a balanced and expanding world economy.To enable countries, by increasing the opportunities for their trade and economic development, to abstain from measures which would disrupt world commerce, reduce productive employment or retard economic progress. To facilitate through the promotion of mutual understanding, consultation and co-operation the solution of problems relating to international trade in the fields of employment, economic development, commercial policy, business practices and commodity policies." ITO Charter, http://www.wto.org/english/docs_e/legal_e/havana_e.pdf. The ITO failed because of its many exceptions and not because of its strong provisions on labor standards and employment. On why and how it failed, see Susan Ariel Aaronson, *Trade and the American Dream: A Social History of Postwar Trade Policy* (Lexington: University of Kentucky, 1996).

Secretariat to give advice, do research, and rank nations and states on how they promoted employment and addressed a wide range of issues related to work including employment, education and public health. Our interviewees were also divided as to how far to go, given potential political costs of expanding the purview of TTIP. Several of our subjects noted that containing labor rights in a sustainable development chapter weakened the import of labor rights. They argued that labor rights should be embedded throughout the agreement as well as in its own chapter.

Question 2: Should TTIP include language on the ILO's Decent Work Agenda? The Decent Work Agenda is designed to encourage governments to adopt policies designed to create jobs, guarantee rights at work, extend social protection (disability insurance, family leave policies), and promote dialogue among business, labor and government (social dialogue). The EU has included aspirational language on the Decent Work Agenda in recent FTAs. We found that although some 89% of those surveyed want to include language on Decent Work, 78% of those polled believe that language should be aspirational.

Question 3: Should TTIP include language to treat vulnerable workers such as those in informal work, unprotected by longstanding forms of worker protections such as contracts or minimum wages? Seventy-four percent of those surveyed said TTIP should include language on vulnerable workers, but fifty-four percent thought the only way to do so was to use aspirational language. Many of the individuals we surveyed felt that this is an issue for domestic policy, but others argued that the trade agreement could delineate ways to improve the plight of informal workers. We found little consensus as to how to address this issue.

Question 4: Which model, the US binding approach or the EU consultative and non-binding approach, would be better for dispute settlement? Our interviewees had different perspectives on the best approach to dispute settlement and whether governments should use fines or sanctions to encourage change. Some 43% of the experts we surveyed thought the US model, which is binding, was the best; some 35% had no comment; 9% named the EU; 9% named the Canadian model; and 4% said neither model works effectively. Many of our interviewees felt that despite the US model's stronger enforcement mechanisms, the US model was rarely effective. Advocates of reform called for union representatives on dispute settlement panels and greater accountability in the process—for example if after 90 days there is no resolution, policymakers must go onto the next phase of the process. Some felt that the US and EU should learn from the experience of the NAALC, the labor secretariat that was established under NAFTA. The NAALC has been criticized by activists and scholars because it had weak enforcement mechanisms.⁴⁴ They wanted to establish a Secretariat like that under the NAALC which would be independent, have a cooperation/dialogue function, and the authority to make nonbinding recommendations to the governments as to how to improve labor rights. Others disagree; they want to build on the European approach which uses dialogue and exchange rather than sanctions to induce changes in policymakers' respect for labor rights.

⁴⁴ For an evaluation of the NAALC, see Frank H. Bieszczat, "Labor Provisions in Trade Agreements: From the NAALC to Now," 83 *Chicago Kent Law Review*, 1387 (2008), scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=3695&context... and John H. Knox, Separated at Birth: The North American Agreements on Labor and the Environment, 26 *Loyola LA International and Comparative Law Review*, 359, 377 (2004)

Question 5: Should TTIP include language on social dialogue? 64% said yes but they also recognized social dialogues cannot be mandated especially in the US system, where unions and business tend to take adversarial positions. Many of those surveyed felt that the US could learn by visiting the EU and learning about how business, government and labor collaborate.

Question 6: We asked all of our interviewees what they would recommend for TTIP.

Our interviewees focused on a wide range of topics, including:

- 35% called for a Secretariat to monitor, advisory and do research; 13% wanted the ILO to take this role; 8% others wanted a civil society labor body to review related labor issues;
- 26% wanted a different approach to dispute settlement which gave individuals greater clout to make and monitor complaints;
- 17% wanted a greater focus on migrant and informal workers in the agreement;
- 13% wanted the ILO to monitor the two parties' adherence to core labor rights;
- 13% wanted a separate labor rights chapter;
- 13% wanted language in the services agreement to allow greater temporary labor mobility;
- 13% wanted changes made to the Investor State provisions.⁴⁵

VII. Key Takeaways and Selected Recommendations

The TTIP negotiations provide policymakers with an opportunity to think differently about how policymakers in advanced industrialized economies can protect labor rights, encourage job creation, and empower workers. The scholars we surveyed put forward a wide range of ideas on these topics. They developed ideas on the negotiating process, labor rights provisions, other chapters of trade agreements that intersect with labor rights, as well as management of the trade agreement. We have attached their names and published these ideas in the hope some of these ideas can be useful.

1. Trade and investment liberalization can be a means to the end of enhancing human welfare. Hence expanding employment, empowering workers, and improving labor rights should be a core goal of any agreement;

Rationale: To enhance human welfare, policymakers should refine, expand, and clarify human rights and labor rights language throughout the agreement so that individuals can be empowered as workers as well as consumers, investors, producers, and citizens.

Recommendation: *Language related to freedom of expression, right to organize (freedom of association) can also empower individuals who are engaged in informal work and not formally recognized by contracts or protected by the state. Policymakers should include language to this effect and ensure that public awareness efforts (such as those required in Article 19.4 of US agreements (Procedural Guarantees and Public Awareness) focus on labor rights as human rights applicable to all workers, including those in the informal sector. Signatories should also include language reiterating their human rights responsibilities under key covenants,*

⁴⁵These statistics do not include Aaronson; survey refers to those topics with 3 or more supporters.

agreements or treaties such as the UN Declaration and its two Covenants and the EU Charter of Fundamental Rights. —Lorand Bartels, Cambridge University; Tonia Novitz, University of Bristol; James Harrison, University of Warwick; Adrian Smith, Queen Mary University; Susan Ariel Aaronson, GWU

Recommendation: *TTIP should have language encouraging cooperation between the US and EU to stop human trafficking.* —Tequila Brooks, Independent Attorney and Consultant

Recommendation: *Exceptions have been the traditional way to address problems nations encounter with trade agreements, but in recent years trade negotiators have focused on delineating obligations. However, when protecting human rights such as labor rights, the two trade giants should use the exceptions (also known as safeguards) rather than obligations. The two nations should consider returning to the use of exceptions language regarding labor rights.* —Lorand Bartels, Cambridge University; Kimberley Ann Elliott, CGDEV; Jean-Baptiste Velut, Sorbonne Nouvelle University.

Recommendation: *The agreement should clearly state that signatories “shall ensure” rather than “strive to ensure” to meet ILO core labor standards as defined in the agreement.* —Kimberley Nolan Garcia, CIDE; Professor Loran Bartels, Cambridge University; Professor Jan Orbie, Ferdi de Ville and Lore Van den Putte, Ghent University

Rationale: Policymakers can use trade agreements to encourage union membership and impact by including provisions designed to encourage unions to sell their services overseas. By competing across borders, unions could encourage innovation in worker agency services, lower their costs, and enhance their quality and variety. This approach is consistent with existing trade agreements, would not infringe on national sovereignty, and would maintain county leverage to regulate collective bargaining, determine conditions for strikes, and regulate work conditions.⁴⁶

Recommendation: *Unions should be able to offer cross-border union services to encourage more cross-border union relationships. These unions could provide worker agency services such as collective representation and bargaining over wages, benefits and working conditions; grievance and dispute settlement; workplace safety monitoring; training, apprenticeship and employee assistance; financial counsel; and management of other work related benefits such as child care.*⁴⁷ —Kimberley Ann Elliot, CG Dev; Kimberley Nolan Garcia, CIDE

Rationale: Past trade agreements have only allowed skilled workers to export services. The two trade giants should experiment with language allowing less skilled workers to export services.

*Recommendation: TTIP should have language allowing self-employed and less-skilled workers to offer services and work temporarily abroad.*⁴⁸ *Along with this language, the host state must provide such workers with the same domestic employment and labor rights rules as other*

⁴⁶ This idea comes from Kimberly Ann Elliott and J. David Richardson, “Free Trade in Worker Agency Services,” Institute for International Economics, never published 2001; and J. David Richardson, “the WTO and Market-Supportive Regulation: A Way Forward on New Competition, Technological and Labor Issues,” Federal Reserve Bank of St. Louis Bulletin, July/August 2000, pp. 121-123.

⁴⁷ Richardson, “The WTO and Market-Supportive,” pp. 122-123.

⁴⁸ This idea builds on Sherry Stephenson and Gary Hufbauer, “Labor Mobility,” pp. 291-292.

domestic workers as delineated in the labor rights/sustainable development chapter.

—Susan Ariel Aaronson, GWU and Tonia Novitz, University of Bristol

2: Trade negotiators can adopt a different mindset—instead of relegating labor issues to a separate chapter they should examine the impact of the agreement as a whole upon labor rights and employment;

Rationale: Labor rights and employment issues should be addressed in a consistent manner throughout the agreement.

Recommendation: *Before initialing the agreement, policymakers and advisors should carefully review the other chapters of the trade agreement, in particular the regulatory, investment, and services chapter, to ensure that these chapters do not contradict the obligations in the labor/sustainable development chapter. They should adopt a mindset of asking: will these provisions both individually and collectively, enhance trade, employment and worker protection?*

—Susan Ariel Aaronson, GWU, Adrian Smith, Queen Mary University

3: When they draft other chapters such as Investment or Regulatory Coherence, trade diplomats should ensure that these chapters create a dynamic of a regulatory race to the top.

Rationale: Neither the US nor the EU includes language that ensures that efforts to achieve regulatory coherence will not undermine the rights of workers. The EU includes language that notes that each party has the right to set its labor priorities, to establish its labor protection levels and to modify or change its laws and policies compatible with its international labor commitments. The US includes language saying that neither party should waive or derogate from its statutes or regulations to attract trade.

Recommendation: *The regulatory cooperation chapter should include specific language that signatories cannot use these provisions to reduce worker protections.* —Jeff Vogt, ITUC; Tonia Novitz, University of Bristol; Susan Ariel Aaronson, GWU; Christoph Scherer, University of Kassel

Rationale: Without clear language, investors could use ISDS to challenge labor rights regulations.

Recommendation: *The trade agreement should clearly delineate that foreign investors cannot use ISDS to challenge minimum or living wage, collective bargaining agreements, public procurement standards, or regulations meant to protect public health or welfare or to control health care costs.* — Lance Compa, Cornell; Jeff Vogt, ICFTU; Lorand Bartels, Cambridge University; and Tonia Novitz, University of Bristol

Rationale: The ILO and the G-20 among other bodies have noted that domestic tax and monetary policies can have negative effects upon trade and employment. But we know little about the nature of these effects. We need more information about negative effects in order to develop effective policy coordination strategies.⁴⁹

⁴⁹ ILO, Global Wage Report, 2012/13, pp. 62-63 and Russia G-20 Vision Statement, September 2013, https://g20.org/wp-content/uploads/2014/12/G20_5th_Anniversary_Vision_Statement.pdf.

Recommendation: *Although signatories have the right to adopt any domestic tax or monetary strategies they chose, they recognize that these strategies can have unintended effects upon the provision of public services and the well-being of citizens in other countries. Every two years, the EU and the US will ask the ILO to examine and prepare a publicly available report on these potential negative effects. The parties should be required to review these reports and delineate how they will respond.⁵⁰ The ILO should also evaluate and report on best practices for these policies. With this information, policymakers will be better positioned to decide whether these provisions should be disciplined under trade agreements.* —Susan Ariel Aaronson, GWU, Kevin Kolben, Rutgers.

4: Policymakers can improve the dispute settlement process.

Rationale: To broaden and clarify why, how, and when the two parties can engage in a trade dispute and consider other nations' approaches to investigating and improving labor rights.

Recommendation: *The US and EU need a better understanding of how trade disputes can be used to change the behavior of governments. The two parties shall support research as to the effects of trade disputes upon government practices as well whether these disputes can help workers as individuals as well as in unions to demand their rights under domestic law.*

—Susan Ariel Aaronson, GWU and Tequila Brooks, Independent Attorney and Consultant

Recommendation: *The dispute settlement review body should accept labor complaints based on potential violations of the labor chapter of the trade agreement. The body should investigate the complaint and interview all involved parties. If one party to the agreement is found in violation of the agreement, the governments involved should develop an action plan with timelines and benchmarks. Dispute settlement panels should include at least one expert on labor rights or from labor. If the guidelines and action plans are not implemented, the same panel of arbitrators should determine if the party failed to meet the action plan. This panel should weigh the facts and authorize suspension of benefits in the sectors where the labor violation occurred.⁵¹*

—Jeff Vogt, International Trade Union Confederation, Lance Compa, Cornell U, Nigel Haworth, University of Auckland, NZ; Lorand Bartels, Cambridge University; Tonia Novitz, University of Bristol; Jean-Baptiste Velut, Sorbonne Nouvelle University, Tequila Brooks, Independent Attorney and Consultant.

Recommendation: *The US and EU should consider creative models for community dialogue and dispute resolution developed by other countries and international bodies in addition to utilizing trade sanctions mechanisms. Labor provisions of Canadian FTAs, for example, call upon independent labor experts (rather than international trade arbitrators) to examine the evidence, write a report and make recommendations to its partner governments on how to improve labor rights. These experts make nonbinding recommendations, but at the same time, the government under review must engage in a discussion with the petitioners and other relevant civil society, business and government group about the recommendations. In particular, the North American Commission for Environmental Cooperation's tri-national Joint Public*

⁵⁰ See as example, James Kanter and Mark Scott, "Amazon's Tax Deal with Luxembourg May Break Rules, E. U. Regulator Says," *New York Times*, 1/17/2015, <http://www.nytimes.com/2015/01/17/business/amazon-luxembourg-european-commission.html>.

⁵¹ Based on suggestion of Jeff Vogt, "Testimony Regarding the Proposed United States-Trans-Pacific Partnership Trade Agreement, 1/25/2010.

Advisory Committee is an example of an effective mechanism for involving a wide range of social actors in developing creative methods to address common cross-border issues.

—Tequila Brooks, Independent Attorney and Consultant

5: Parties should encourage learning and collaboration from each other.

Rationale: Both USTR and DG Trade need to build trust among their respective publics that they will enforce labor rights and collaborate effectively by creating a Secretariat to monitor the agreement.

Recommendation: *USTR, DG Trade, the US Department of Labor and DG Employment should develop a coordinated approach to monitor and examine problems or inconsistencies with the labor and employment provisions in the trade agreement.⁵² One way to do this is to create a Secretariat under the trade agreement; it could house both the dispute settlement body and a reporting/research body. The Secretariat could also examine how well US states and localities as well as EU member states and localities are achieving key metrics such as rising standards of living, average wages, productivity levels, and trade related employment, among other factors. The Secretariat would collect data and make it public and would use transparency to encourage experimentation and improvements in labor and employment conditions. The ILO could do research for the Secretariat, as well as at the behest of the EU or the US. The Secretariat should focus on trade related employment problems including education, public health, protection of minorities, and human welfare policies.* —Kevin Banks, Queens University; Tequila Brooks, Independent Attorney; Jean-Baptiste Velut, Sorbonne Nouvelle University; Christian Barry, Australian National University; Kimberly Ann Elliott, CG Development; and Kevin Kolben, Rutgers University.

Recommendation: *TTIP should include language requiring both parties to prepare a publicly available report (due every five years) to survey the impact of the agreement upon their citizens' realization of ILO core labor rights. The US and the EU would formally ask the ILO to engage in a tripartite dialogue with its European and US counterparts in labor, business and government to examine the effects of TTIP upon workers. The ILO should publish findings from the dialogue. The EU and the US will organize a webcast public forum where they delineate how they will respond to the ILO's findings.* — Lorenzo Fioramonti, University of Pretoria and Susan Ariel Aaronson, GWU

Rationale: To encourage greater understanding of social dialogue.

Recommendation: *DG Trade, in cooperation with DG Employment, should further initiate discussions on relevant aspects of TTIP in all existing sectoral social dialogue committees and create fora for discussions between social partners where such committees do not exist. The two parties should also create an annual report on social dialogue initiatives and encourage US labor relations officials and legislators to travel to Europe to gain a better understanding and*

⁵² The congressional agency GAO examined US policy coordination and found it lacking. GAO, "Free Trade Agreements: U.S. Partners Are Addressing Labor Commitments, but More Monitoring and Enforcement Are Needed," June 2014, p. 40, <http://www.gao.gov/products/GAO-15-160>; and GAO, Results - Oriented Government: Practices That Can Help Enhance and Sustain Collaboration among Federal Agencies, GAO-06-15, 2005. http://www.gao.gov/key_issues/leading_practices_collaboration/issue_summary.

practical utilization of social dialogue. — Lance Compa, Cornell; Kevin Kolben, Rutgers; and Kimberley Ann Elliott, CG Dev.

Rationale: Many of our interviewees noted that the secretive process of negotiating TTIP could undermine public trust in the outcome. Policymakers must find ways to conduct the negotiations that build trust and understanding. We note that US and EU negotiators already recognize that they cannot negotiate democratically determined regulations in secret without undermining the outcome of those negotiations.⁵³

Recommendation: *In drafting the agreement, both parties should delineate their objectives and to the extent possible, the language they will propose to expand employment and protect labor rights. With such transparency, they will facilitate dialogue on how best to collaborate to address these issues. The EU has already moved in this direction, the US should follow.*

—Michael Gadbow, Georgetown Law; Susan Ariel Aaronson, GWU.

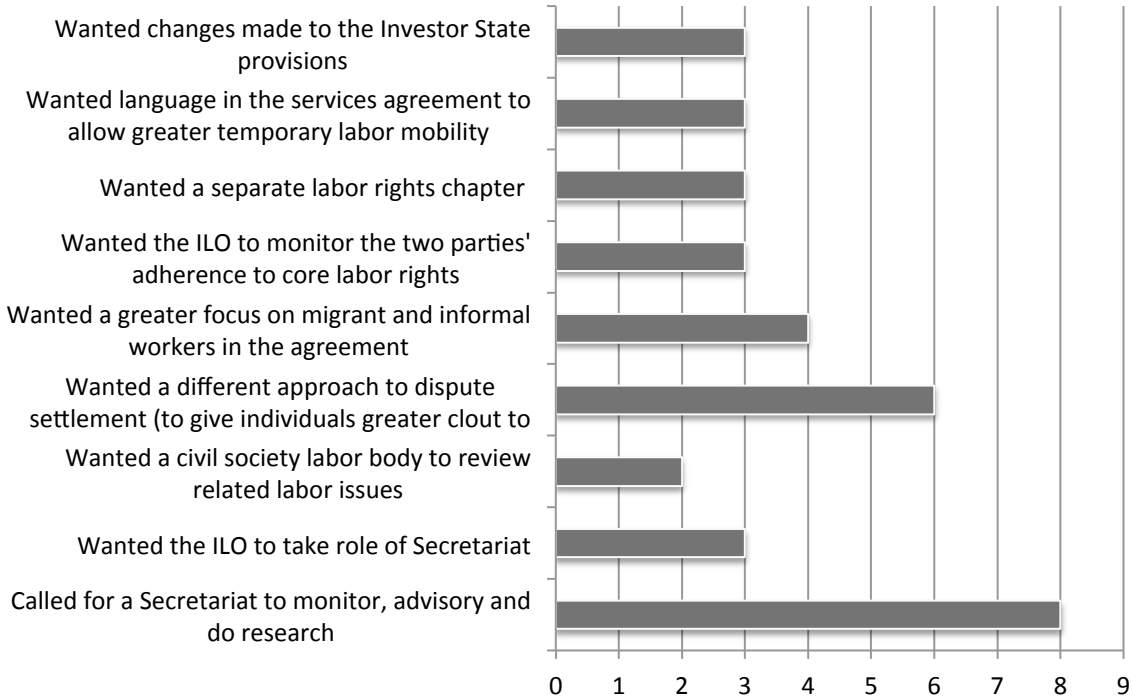
*The US and the EU should focus less on enforcement as a means of changing behavior and more on incentives and strategies for collaboration to attain higher and more effective standards of governance.*⁵⁴ —Christoph Scherer, University of Kassel; Kevin Kolben, Rutgers; Tequila Brooks, Independent Attorney

⁵³ The chief EU negotiator made this point in February, 2015. “As you know the regulatory work we are conducting in TTIP is fundamentally different from our classical trade negotiations. This is essentially framed in a process of cooperation and engagement between regulators from both sides rather than led purely by trade negotiators.” TTIP Round 8, Final Day Press Conference Comments by EU Chief Negotiator Ignacio Garcia Bercero, Brussels, 5 February 2015, http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153110.pdf.

⁵⁴ Ignacio Garcia Bercero said “As you know the regulatory work we are conducting in TTIP is fundamentally different from our classical trade negotiations. This is essentially framed in a process of cooperation and engagement between regulators from both sides rather than led purely by trade negotiators.” TTIP Round 8, Final Day Press Conference Comments by EU Chief Negotiator Ignacio Garcia Bercero, Brussels, 5 February 2015, http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153110.pdf.

Appendix 1: Summary of Suggestions

Summary of suggestions by 23 experts interviewed



Appendix 2: List of Experts Interviewed by Aaronson for the ILO

	Family Name	Surname	University /Organization	Location
1	Anner	Mark	Penn State University	USA
2	Banks	Kevin	Queen's University	Canada
3	Barry	Christian	Australian National University	Australia
4	Bartels	Lorand	University of Cambridge	UK
5	Brooks	Tequila J.	Independent Attorney	USA
6	Compa	Lance	Cornell University	USA
7	de Ville	Dr. Ferdi	University of Ghent	Belgium
8	Elliott	Kimberly Anne	Center for Global Development	USA
9	Fioramonti	Lorenzo	University of Pretoria	South Africa
10	Gadbaw	Mike	Georgetown University	USA
11	Gopalakrishnan	Badri Narayanan	Purdue University	USA
12	Harrison	James	University of Warwick	UK
13	Haworth	Nigel	University of Auckland	New Zealand
14	Kolben	Kevin	Rutgers University	USA
15	Marx	Axel	University Catholique de Louvain	Belgium
16	Nolan Garcia	Kimberly	CIDE	Mexico
17	Novitz	Tonia	University of Bristol	UK
18	Orbie	Jan	University of Ghent	Belgium
19	Scherrer	Christoph	Kassel University	Germany
20	Smith	Adrian	Queen Mary U	UK
21	Van den Putte	Lore	University of Ghent	Belgium
22	Velut	Jean-Baptiste	Sorbonne Nouvelle University	France
23	Vogt	Jeff	International Trade Union Confederation	USA

About the Author

Susan Ariel Aaronson is a Professor at George Washington University's Elliott School of International Affairs and the former Minerva Chair at the National War College. Aaronson's research examines the relationship between economic growth and human rights. Her work has been funded by major international foundations including MacArthur, Ford, and Rockefeller; governments such as the Dutch, Swiss, US, and Canadian governments, the UN, ILO, and World Bank; and US corporations including eBay, Microsoft, Ford Motor and Levi-Strauss. Dr. Aaronson is the author of six books and numerous articles on trade, human rights, digital trade, public private partnerships, globalization, corporate social responsibility, and public understanding of economic change. Dr. Aaronson serves on the Advisory Board for Business-Human Rights and is a member of Working Group 2 of the Freedom Online Coalition (24 governments working on digital rights). See <http://elliott.gwu.edu/aaronson>.

About the ILO

The International Labour Organization (ILO) is devoted to promoting social justice and internationally recognized human and labor rights, pursuing its founding mission that labor peace is essential to prosperity. Today, the ILO helps advance the creation of decent work and the economic and working conditions that give working people and business people a stake in lasting peace, prosperity and progress. Its tripartite structure provides a unique platform for promoting decent work. Its main aims are to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues. See <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm>.