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Labor Rights and Labor Standards in Transatlantic Trade and Investment Negotiations: An American Perspective

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I. Introduction

A new trade and investment agreement between the United States and the European Union should improve living and working conditions of peoples on both continents. To accomplish this, negotiators should sow high social standards in a transatlantic deal. Otherwise, bankers, investors, and corporations will harvest the benefits of expanded trade for themselves, while working people and their families reap the husks.

Supporters of the North American Free Trade Agreement and other trade pacts since NAFTA promised that increasing the volume of trade and investment would automatically improve wages, benefits and working conditions among trading partners. But NAFTA never delivered. When parties to an agreement have wide disparities, a race to the bottom becomes the path of least resistance for profit-minded investors.

The volume of North American trade expanded under NAFTA, but resulting benefits flowed to already-wealthy elites, not to workers, their families, and the general population in any trading partner. Wages stagnated, social protections declined, and violations of workers' organizing and collective bargaining rights continued unabated.

Other US trade agreements reproduced similar results. Many US trading partners such as Colombia, Guatemala, Honduras, Mexico, Bahrain, and Jordan have seen detention, persecution, exile and murder of trade union and human rights activists since the trade agreements were signed.

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EU-US trade negotiations create an opportunity to get it right. In theory, having very similar economic and social standards in both trading partners can block a "race to the bottom" on wages and working conditions. The challenge is to put theory into practice. To accomplish this, negotiators should not proceed on the false premise that the US and the EU already have high standards, so a pact can focus on commerce and investment without purposeful enhancement of social standards.

Conventional wisdom has it that both the US and member states of the EU have high wages, extensive social protection systems, good labor laws, and well-functioning legal systems to enforce them. Under this view, the transatlantic economic relationship starts with a strong social dimension as a default feature and avoids the messy complications of labor abuses that trade deals with developing countries failed to cure.

Reality belies such complacency. Many areas of labor law, labor rights, labor standards, and social protections in the transatlantic context have severe flaws. If negotiators do not address them, on the mistaken premise that more trade automatically advances labor standards, they invite transatlantic race-to-the-bottom competition instead of an upward-trending social dynamic.

EU and US trade negotiators have a choice. They can ignore labor rights and labor standards and open a wage-cutting, security-destroying, inequality-driving "low road" to more trade and investment. Or they can make labor rights and standards a centerpiece of a transatlantic agreement that pushes nations and firms to advance on a high road. On this path, trading partners will aim for improved education and training, research and development, design and marketing, technology and human resources, corporate governance and industrial relations and other productivity-enhancing measures, not labor cost cutting. In short, the United States and Europe must craft a trade agreement that encourages better public policies, better management, and higher labor standards, not more exploitation of workers and widening of social and economic inequality.

II. Challenges

The most important challenges regarding labor relations and standards in transatlantic trade talks are these:

- Addressing inequality without fear of investors' challenges
- Protecting the social safety net and harmonizing labor standards upward to prevent "low road" competition
- Correcting the "rights imbalance" on workers' freedom of association and collective bargaining.

A. Inequality and Investor-State Dispute Settlement

An important challenge for an EU-US trade agreement is to effectively address the worsening inequality on both continents resulting from a 20-year trend of gains from trade flowing to the top of the income pyramid.

In the United States, income inequality has risen dramatically. The top 10 percent of earners took more than half of the country's total income in 2012, the highest level recorded since the government began collecting the relevant data a century ago. The top 1 percent took more than one-fifth of the income earned by Americans.[2] Moreover, the new inequality risks becoming permanent.[3]

In Germany, the richest 10 percent accounted for 26 percent of total income in 1991, compared with 31 percent in 2010. Meanwhile, the lowest half of the population's share of national income fell from 22 percent in 1991 to 17 percent in 2010.[4] Similar "hollowing" of the income structure has occurred in much of the rest of Europe, too. An OECD paper concluded:

> Inequality in Europe has risen quite substantially since the mid-1980s. While the EU enlargement process has contributed to this, it is not the only explanation since inequality has also increased within a "core" of 8 European countries. Large income gains among the 10% top earners appear to be a main driver behind this evolution.[5]

The first question negotiators should ask themselves is not "How can a trade agreement grease the wheels of commerce?" but "How can a trade agreement reverse the growing inequality in all our societies?" This means that a transatlantic accord should focus on restoring and preserving good working class jobs and allowing ample space for governments at all levels to enact targeted measures to address inequality.

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[2] See Annie Lowrey, "The Rich Get Richer Through the Recovery," *New York Times*, September 10, 2013, citing Emmanuel Saez, "Striking it Richer: The Evolution of Top Incomes in the United States" (September 3, 2013, available at http://elsa.berkeley.edu/~saez/saez-UStopincomes-2012.pdf (visited December 23, 2013).

[3] See Vasia Panousi, Ivan Vidangos, Shanti Ramnath, Jason DeBacker and Bradley Heim, "Inequality Rising and Permanent Over Past Two Decades," Brookings Institution paper (Spring 2013), available at http://www.brookings.edu/about/projects/bpea/latest-conference/2013-spring-permanent-inequality-panousi (visited December 23, 2013).

[4] See Kai Daniel Schmid and Ulrike Stein, "Explaining Rising Income Inequality in Germany, 1991-2010," Macroeconomic Policy Institute (IMK), Hans Böckler Foundation (September 2013), SOEP paper No. 592, available at SSRN: http://ssrn.com/abstract=2339128 or http://dx.doi.org/10.2139/ssrn.2339128 (visited December 23, 2013).

[5] See Kaja Bonesmo Fredriksen, "Income Inequality in the European Union," OECD Economics Department Working Paper No. 952 (April 16, 2012), available at http://www.oecd-ilibrary.org/economics/income-inequality-in-the-european-union_5k9bdt47q5zt-en (visited December 23, 2013).

A transatlantic trade agreement should not interfere in the name of free trade with national measures addressing inequality such as minimum wages, prevailing wage requirements, unemployment insurance, affirmative action for historically excluded groups, and other social protections. The same principle should apply to state and local governments in the United States, and member states and subordinate powers in the European Union, that want to take local and regional steps against inequality.

A key starting point is curtailing the contemplated investor-to-state dispute settlement (ISDS) clause of an agreement. ISDS should never interfere with governmental measures such as these:

- Setting minimum wages more favorable to workers than national minimum wages, as many states and municipalities in the United States have done.[6]

- Guaranteeing "prevailing wage" standards for publicly-funded projects.

- Setting health and safety standards higher than national standards, or enacting new standards in areas not covered by federal law.

- In the United States, establishing "project labor agreements" (PLAs) with construction sector trade unions to ensure good wages and benefits, high productivity, and no work stoppages to complete development projects.

- Ensuring that local employees have access to jobs created by public procurement projects.

- Setting out "good jobs" requirements in procurement programs to prevent low bids based on low wages and benefits for employees – and the inevitably resulting low quality. Firms should not tender bids based on cutting jobs or cutting workers' wages and benefits. Instead, public authorities should be able to make bidders comply with any present or future workplace standard on wages, hours and working conditions.

- Maintaining or expanding public services that also provide good jobs to employees. Public authorities must retain the power to provide essential services in areas such as education, communications, health, energy and other sectors without being pressured by a transatlantic trade pact to privatize them. Too often, privatization results in lower-quality jobs and lower-quality services when low bids are based on low wages, eliminating opportunities to retain or attract skilled, experienced employees.

[6] See William Selway and Jim Efstathiou, "States Moving Beyond U.S. Minimum Wage," Bloomberg News, November 12, 2013, available at http://www.bloomberg.com/news/2013-11-12/states-moving-beyond-u-s-minimum-wage-as-congress-stalls.html (visited December 21, 2013).

- Allowing governments at all levels to "debar" labor law violators from receiving procurement contracts. A recent exposé, for example, showed that the US federal government handed out tens of billions of dollars in contracts to companies that repeatedly violated laws on workplace health, safety, wages, and nondiscrimination requirements.[7]

Without sharp limits on foreign investors' ability to challenge such measures because they might affect future profits – an avenue of recourse closed to domestic employers – governmental authorities would be handcuffed in efforts to protect working people and their families. A national, state or local measure should be susceptible to investor-state challenge only when it is not meant for general application to all employers, but is demonstrably intended to discriminate against a particular foreign investor.

Trade and investment agreements often make declarations in a preamble about the "right to regulate." For example, the preamble to the General Agreement on Trade in Services (GATS) recognizes "the right of members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives." But such hortatory language can be overtaken by specific provisions in the agreement that bring services under its disciplines and blocks or punishes new regulations seen as harmful by investors.

The U.S. Trade Representative has issued a "no worries" statement about investors' ability to sue governments, boasting that the United States has never lost a case under other trade agreements. The statement concludes, "The United States has been a leader in developing ISDS provisions that protect the ability of governments to regulate, discourage frivolous claims, and ensure a high level of transparency. Through extensive work with stakeholders, legislators, and the public we will continue to ensure that the United States remains at the forefront of innovative trade policy."[8]

But only seventeen cases have been brought against the United States by investors mainly based in Mexico and Canada under NAFTA.[9] Whether European firms would use an ISDS chapter to challenge U.S. regulations, or U.S. firms would use it to fight new European standards (whether based on EU or member state measures) is a big unknown. A strong, sharp "No" must be built into a transatlantic agreement.

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[7] See Steven Greenhouse, "Study Finds Federal Contracts Given To Flagrant Violators of Labor Laws," *New York Times*, December 11, 2013, at B1. The full report is at http://www.harkin.senate.gov/documents/pdf/52a876b0e4d63.pdf (visited December 21, 2013).

[8] See Office of the United States Trade Representative, "The Facts on Investor-State Dispute Settlement: Safeguarding the Public Interest and Protecting Investors," March 27, 2014, available at http://www.ustr.gov/about-us/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors (visited June 16, 2014).

[9] See U.S. Department of State, "Cases Filed Against the United States of America," at http://www.state.gov/s/l/c3741.htm. (visited June 16, 2014). Some cases are still pending.

Example: The Living Wage Movement

Many European firms have entered the US retail market in recent years, opening stores where they pay employees the federal minimum wage of $7.25 per hour or slightly more. But in recent years, a growing "living wage" movement throughout the United States has won significant "living wage" increases in minimum wage laws.[10] Last year, several states and municipalities decided to raise their minimum wage to levels between $8 an hour and $15 an hour. Under typical investor-state provisions in trade agreements, European firms – but not American firms – could claim that these state and local actions deprive them of anticipated profits, and that taxpayers should make up the difference. Such claims should be explicitly precluded in a transatlantic trade agreement.

A trade agreement's ISDS chapter could also open up the risk of corporate challenges to regulations meant to protect public health and welfare, or to control health care costs. At the very least, existing regulations should stand. But this should not mean that future reform efforts could be blocked on grounds that they jeopardize investors' returns. Instead of results like these, a transatlantic agreement should guarantee policy space for governments at all levels to regulate for the common good through universally applicable measures. Only a reform or regulation shown to be discriminatorily aimed at a specific foreign investor should be open to challenge.

Example: Health Services in the UK

US-based health care insurance and provider corporations have penetrated many privatized systems and services of the UK National Health Service (NHS).[11] For example, United Health Group boasts, "In Britain**,** we support the government-funded National Health Service in its need to harness the opportunities provided by patient choice, payment by results and clinical commissioning . . . We provide support, analytical tools, training and consultancy services, develop bespoke programs . . . and work in partnership with Primary Care Trusts to manage parts of the commissioning process on either an interim or long-term basis. We currently serve approximately 138

[10] See Paul Sonn and Stephanie Luce , "New directions for the living wage movement," in Annette Bernhardt, Heather Boushey, Laura Dresser, and Chris Tilly, eds., *The Gloves-Off Economy: Workplace Standards at the Bottom of America's Labor Market* (Ithaca: Cornell University Press, 2008).
[11] See Jane Lethbridge, "A global review of the expansion of multinational healthcare companies," University of Greenwich, Public Services International Research Unit (2007), available at www.psiru.org/reports/2008-3-H-GlobalhealthcareMNCs.doc (visited December 27, 2013).

NHS Primary Care Trusts and more than 6,500 physician practices. . . . We provide decision support tools to more than 60 percent of all National Health Service Primary Care organizations"[12]

Multinational health care corporations look to a transatlantic trade agreement opening up systems throughout Europe to the US market-based model. Under this model, health care is not a right but a commodity available only to those who can pay for it – and pay enough to guarantee profits for the corporate investor. United Health Group cautions that return on investment could be affected by "the potential impact that new laws or regulations, or changes in existing laws or regulations, or their enforcement of application could have on our results of operations, financial position and cash flows."[13]

If health care is not excluded from a transatlantic pact, future UK governments might be blocked or constrained from enacting measures to control costs and regulate privatized health services by claims from investors that such measures harm their interests in violation of the trade agreement. Similarly, governments could be blocked from bringing services back into the public sector if privatization fails to control costs and deliver high-quality services, as they often do.[14]

B. Preserving the social safety net and harmonizing upward

Another challenge is to prevent US insistence on a deregulated labor market from overwhelming the European social democratic tradition of protecting societies' most vulnerable and excluded people. In the 2014 farm bill, the Republican party-controlled US House of Representatives brutally cut off food assistance to millions of struggling, impoverished Americans. Then it added a *coup de grace* by ending extended unemployment insurance benefits for millions more. These measures were driven by US politicians who argued openly and shamelessly that poor people and unemployment people have only themselves to blame for their plight.[15] The way these politicians see it, making people more desperate will make them find jobs, and this will solve the unemployment problem.

This attitude should not be allowed to seep into transatlantic trade talks. The EU has already allowed severe fraying of the social safety net in its misguided, austerity-pushing policies since the economic crisis of 2008. Moderate pre-crisis steps such as German

[12] See United Health Group, *United Health Group Around the World* (2012), available at http://www.unitedhealthgroup.com/~/media/UHG/PDF/Services/UNH-Global-Brochure.ashx (visited December 27, 2013).

[13] Ibid.

[14] See Germà Bel, Robert Hebdon and Mildred Warner, "Local Government Reform: Privatization and Its Alternatives," 33 *Local Government Studies* 4 (2007).

[15] See Timothy Egan, "Good Poor, Bad Poor: In Congress, a view that the poor are morally inferior," New York Times Sunday Review, December 22, 2013, at 11.

labor market reforms and Northern European "flexicurity" initiatives were one thing. Deep cuts in wages, pensions, unemployment benefits and basic social welfare programs in the rest of Europe are something else.

Belt-tightening at a time of deep economic recession only kills aggregate demand and worsens the recession instead of lifting an economy out of one.[16] It is battered and bruised by the Europeans' own neoliberal ideologues, but the European social model should not be further assaulted in a transatlantic trade agreement that fails to block "downward harmonization" toward elimination of social protection "*à l'américaine*."

To ensure preservation of the safety net, a transatlantic trade agreement must keep social protections off the negotiating table. Publicly-funded benefit programs addressing unemployment, disability, job-related workers' compensation, family/maternity/ paternity leave and pay, health insurance, retirement and other programs must be insulated from downward pressure by multinational investors using an investor-state dispute settlement chapter to claim that subsidies supporting such programs violate trade rules under the agreement.

The pressure of the economic crisis since 2008 has eroded labor and employment law standards in much of Europe. Still, the core of such social protections, absent in the United States, remains in place in Europe.

A transatlantic trade arrangement should not enshrine US-style labor market deregulation. In Europe, for example, employers must demonstrate 'just cause' to dismiss an employee. But the prevailing doctrine in U.S. law is the "at-will" rule allowing employers to dismiss staff or to cut pay and benefits at any moment and for any reason – including "a good reason, a bad reason, or no reason at all" – as long as it is not a reason prohibited by law.

Here is how one prominent US law firm describes the difference:

> Employment-at-will offers American employers broad freedom to cut their staff's terms and conditions of employment, work hours, employee benefits—even compensation . . . Indeed, American bosses exercise this freedom regularly. . . . These cuts are perfectly legal . . . because . . . US law imposes no doctrine of *vested employment rights*. Outside the United States, by contrast, laws impose vested (sometimes called implied or "acquired") rights that constrain employers from unilaterally cutting employment terms, conditions, work hours, benefits and pay.[17]

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[16] See Marc Lavoie and Engelbert Stockhammer, eds., *Wage-led Growth: An equitable strategy for economic recovery*, ILO and Palgrove Publishers (November 2013).

[17] White & Case law firm, " How to Cut *(or "Restructure")* Employment Terms, Work Hours, Benefits and Pay Outside the United States," *HR Global Hot Topic* (December 2013), available at http://news.whitecase.com/141/3094/downloads/09028-december-global-hot-topics-denhart-4.pdf (visited December 20, 2013).

In addition to no law requiring just cause for dismissal or protection for acquired rights, no US law requires severance pay for dismissed workers based on their length of service. No law requires employers to provide pension benefits or health insurance. No law limits the power of companies to abruptly close workplaces.[18]

No US law limits the amount of overtime work that employers can impose on workers. No law requires employers to provide vacation or holidays, or prohibits employers from forcing employees to cancel their vacations or to work on holidays. Only seven states have laws requiring rest breaks or meal breaks; no federal law does so.

These and other deregulatory features of US labor and employment law should not be a magnet for European investors under a new commercial agreement. A transatlantic trade agreement should ensure best practices in employment relations. In fact, it should reverse a trend already begun of introducing US-style labor and employment regimes in Europe, where an ominous "Americanization" is starting to take shape.[19] A new trade agreement should prevent governments and firms from exploiting US-style deregulation to gain competitive advantage in trade.

Example: Amazon in Germany

In Germany, the US distribution company Amazon has provoked widespread protests with its imposition of US-style management that treats employees like machine parts reminiscent of Charlie Chaplin in *Modern Times*, with no consideration for their personal dignity.[20] Asked about workers' concerns, Amazon's German manager suggested that they have no qualifications, have long been unemployed, and are lucky to have a job.[21] A transatlantic trade agreement should not sanctify these affronts to workers' dignity in the name of harmonized conditions of commerce. Instead, transatlantic trade negotiators should identify high standards and best practices that should be *required* in firms taking advantage of benefits under the agreement.

C. Rights imbalance

[18] US law only requires a modest 60 days' advance notice of workplace closure, which can easily be evaded by claims of a sudden change in business conditions.

[19] See Eduardo Porter, "Labor Protections Ebb as Americanized Policy Spreads in Europe, *New York Times*, December 4, 2013, at B1.

[20] See Jack Ewing, "Amazon's Labor Relations Under Scrutiny in Germany," *New York Times*, March 3, 2013, at B1.

[21] See Emma Thomasson and Nadine Schimroszik, "Amazon Germany says more worried about snow than strikes," *Reuters News*, November 29, 2013.

Another challenge is to overcome the "rights imbalance" between Europe and the United States in workers' freedom of association. European labor law and practice generally comply with core labor standards of the International Labor Organization. The European Convention on Human Rights and the EU's charter strongly protect freedom of association and collective bargaining. However, European compliance with core labor standards can be undermined by American practices contrary to these norms.

When it comes to workers' organizing and collective bargaining rights, the United States is the bastion of 'union-free' management philosophy and refusal to accept international standards on freedom of association. In contrast to the EU, where every country has ratified ILO Conventions 87 and 98 on freedom of association, the right to organize and collective bargaining, the United States has not ratified them.

In its latest generation of trade agreements with Korea, Panama, Colombia and Peru, the United States insisted that trading partners "adopt and maintain" – and effectively enforce – labor and employment laws consistent with ILO core standards. On paper, the US undertook the same commitment.[22]

But contrary to ILO core labor standards, U.S. law allows employers to permanently replace workers who exercise the right to strike. It also allows employers to mount one-sided, aggressive workplace pressure campaigns against workers' organizing efforts, marked by mandatory 'captive-audience' meetings and one-on-one supervisor-employee meetings scripted by anti-union consultants. Trade unions have no comparable opportunities at the workplace for employees to hear from union representatives or for pro-union workers to convey their views to fellow workers.

Equally contrary to international standards, U.S. law excludes millions of workers from labor law protection – farmworkers, household domestic workers, low-level supervisors, so-called 'independent contractors' who are actually dependent on a single employer for their livelihood, and many more. The ILO's Committee on Freedom of Association has found further violations in the U.S. labor law system because of weak and unavailable remedies for workers alongside unbalanced remedies favoring employers.

In large part as a result of weaknesses in U.S. law and practice, many American employers respond to workers' organizing and bargaining efforts with aggressive campaigns of interference, intimidation, and coercion to break them. Such campaigns are commonplace among U.S. companies that operate in a corporate culture imbued with strong anti-union beliefs and practices. Unfortunately, some European companies operating in the United States have adopted a "When in Rome" approach to labor relations. They allow their US managers to engage in the same severe union-busting practices that many American companies do.[23]

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[22] See texts of these trade agreements at the website of the United States Trade Representative, available at http://www.ustr.gov/trade-agreements/free-trade-agreements (visited June 16, 2014).

[23] See Human Rights Watch, *A Strange Case: Violations of Workers' Freedom of Association in the United States by European Multinational Corporations* (2010).

Example 1: De-unionizing for Competitive Advantage

In September 2009, management at a Boeing Corp. factory in Spartanburg, South Carolina dangled before employees the prospect of putting new production lines into the factory during the run-up to a vote on whether to decertify the union as workers' bargaining agent. State officials and statewide media took up the call, hammering a message that if employees failed to decertify the union, the new production might instead likely go to the company's main plant in Seattle, Washington – a plant known to have a strong union.

In the intense anti-union climate of South Carolina, one of the southern "right-to-work" states with a deeply rooted culture of harsh opposition to trade unions, coupled with the implicit promise of getting the new production line, workers voted to surrender bargaining rights.[24] In light of its longstanding rivalry with Europe's Airbus, Boeing's action raised a new form of unfair trade practice: de-unionizing to gain competitive advantage.

Example 2: Deutsche Telekom and T-Mobile

When the German telecommunications giant Deutsche Telekom joined the UN Global Compact in 2000, it said "This voluntary commitment is based not only on the values of the Global Compact but on the internationally recognized conventions, guidelines and standards of the International Labor Organization (ILO) and the Organization for Economic Cooperation and Development (OECD)." But in the United States, Deutsche Telekom's T-Mobile wireless telephone operation engages in practices directly contrary to these international standards.

T-Mobile management routinely holds mandatory captive-audience meetings at call centers around the country forcing workers to listen to anti-union speeches and watch anti-union films predicting dire consequences, including possible closures, if they form a union. The company has repeatedly run afoul of US labor law, settling charges with enforcement authorities in cases involving threats, coercion, interference, spying and other violations of workers' organizing rights. In effect, T-Mobile is violating workers' rights in pursuit of competitive advantage in the American mobile phone market.[25]

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[24] See Dominic Gates, "Boeing Charleston decertifies Machinists union," *Seattle Times*, September 11, 2009, at 1A.

[25] See John Logan, *Lowering the Bar or Setting the Standard: Deutsche Telekom's U.S. Labor Practices*, American Rights at Work (2009).

Most recently, in November 2013, the National Labor Relations Board found merit in charges that T-Mobile unlawfully dismissed one employee and disciplined another at the company's Wichita, Kansas call center because of their union activities. The Board ordered the case to go forward to trial before an administrative law judge.[26]

Just as distressing as interference with workers' rights by European firms in the United States is the ominous spread of US management-style anti-unionism in Europe. In September 2007, management at a Kettle Chips factory in Norwich, England engaged a US-based anti-union consulting firm to mount a vicious campaign against workers seeking collective bargaining representation with the British union Unite. The consultants held mandatory 'captive-audience' meetings for workers with anti-union speeches and videos, and trained supervisors to meet with workers to warn of possible closure, strikes and other fear-mongering messages. Swayed by these threats, workers voted against union representation.[27]

US-based anti-union consultants carried out similar campaigns in the UK against workers at Amazon UK, Virgin Atlantic, Honeywell, GE Caledonian, Eaton Corporation, Calor Gas, Silberline Ltd, FlyBe, Cable & Wireless and others. In Germany, American-style anti-union activity has taken the form of interfering with works council formation and operations.[28]

To stop such abuses, a transatlantic trade and investment pact should require multinational firms benefiting from it to apply the highest standards of industrial relations and workplace conditions in all their operations, wherever they are located. To begin, before concluding a transatlantic trade deal, the United States and EU member countries should undertake a mutual review of each other's labor laws and practice to identify those that do not comply with ILO core standards. The agreement should set out a procedure for countries to bring their laws into compliance and to ensure that practice is consistent with legislation, as a condition of multinational firms availing themselves of benefits under the agreement.

Another way to ensure "best practices" is to have EU Directives on company works councils apply to European firms in their US operations. This would give American

[26] See National Labor Relations Board, Office of the General Counsel, Decision on appeal *Re: T-Mobile USA*, Cases nos. 14-CA 104731 et. al., November 1, 2013 (on file with author).

[27] See John Logan, "U.S. Anti-Union Consultants: A Threat to the Rights of British Workers," Trades Union Congress report (2008) available at http://www.newunionism.net/library/organizing/TUC%20-%20US%20Anti-Union%20Consultants%20-%202008.pdf (visited December 22, 2013).

[28] See Martin Behrens and Heiner Dribbusch, "Employer Resistance to Works Councils: New Challenges for Workplace Industrial Relations?" (Paper presented at the 10th European Conference of the International Labour and Employment Relations Association (ILERA), 20-22 June 2013, Amsterdam); see also Behrens and Dribbusch, "How companies keep works councils out," Hans Böckler Stiftung, *Magazin Mitbestimmung*, June 2012, available at http://www.boeckler.de/36196_42116.htm. (visited June 20, 2014).

employees to have the same rights to information and consultation as their European counterparts. Similarly, American companies operating in Europe should accept participation of US employee representatives in works council meetings and consultations in Europe.

Example: Volkswagen and a Works Council in the United States

A promising move by a European multinational company to apply its freedom of association principles in an US setting involved a Volkswagen factory and its 2,000 employees in Chattanooga, Tennessee. At the Tennessee factory which began operating in 2011, Volkswagen management indicated a willingness to implement a US version of the company's European Works Council system. Volkswagen and its employees created the works council system in 1992, predating European Union requirements. It is considered a model of a well-functioning employee participation system.[29] But works councils' activities are financially supported by employers, and US labor law prohibits employer financial support for organizations that represent workers. This law reflects the widespread phenomenon of 'company unions' in the 1920s and 1930s designed to prevent genuine union formation.[30] As a result, VW can only implement its works council in tandem with trade union representation.

Volkswagen agreed with the United Auto Workers union (UAW) to remain neutral while workers decided on UAW representation. However, the company ran into a firestorm of opposition from anti-union Tennessee politicians. Senator Robert Corker issued a statement saying that VW would be a 'laughingstock' if it accepted UAW representation.[31] Tennessee governor William Haslam says that other firms will refuse to invest in the state if Volkswagen recognizes the UAW.[32] State legislators threatened to

[29] See European Foundation for the Improvement of Living and Working Conditions, "European Works Councils in practice: Key research findings," *Background Paper* (2008), available at: http://www.eurofound.europa.eu/pubdocs/2008/28/en/1/ef0828en.pdf (visited December 23, 2013).

[30]See Thomas Kohler, Models of Worker Participation: The Uncertain Significance of Section 8(a)(2), 27 *Boston College Law Review* 499 (1986).

[31] See Erik Schelzig, "Corker calls VW talks with UAW 'incomprehensible'," Associated Press, September 10, 2013, available at: http://bigstory.ap.org/article/corker-calls-vw-talks-uaw-incomprehensible (visited December 23, 2013).

[32]See Jeff Bennett, "Tennessee Governor Sees Harm if UAW Succeeds at Chattanooga," *Wall Street Journal,* October 14, 2013, available at: http://online.wsj.com/news/articles/SB10001424052702304106704579135491683186048 (visited December 23, 2013).

cut financial support for a new product line if workers voted in favor of the union.[33] Under this onslaught of political pressure, employees voted 53-47 percent against UAW representation.[34]

III. Other Models

A. Recent US Agreements

The experience of labor chapters in US and EU trade agreements with other countries offers lessons on what not to do, and what might be done, in a transatlantic accord. US agreements have evolved since NAFTA's "enforce your own laws, they don't have to meet international standards" approach in its labor supplemental agreement, the North American Agreement on Labor Cooperation (NAALC).

NAFTA's labor agreement only recognized laws on child labor, minimum wage, and occupational safety and health as binding under the agreement. It left untouched laws and practices on freedom of association and industrial relations, workplace discrimination, migrant workers' rights, and other matters covered by the NAALC but not included in its enforcement regime.

The latest US agreements with Peru, Colombia, and Korea go farther. They require parties to "adopt and maintain" labor laws that comply with ILO core standards and provide "acceptable" wages, hours and health and safety conditions – and to effectively enforce such laws. They further subject labor obligations to the same dispute settlement procedures as commercial obligations, with both fines and trade sanctions as available remedies.

This is a good starting point for US and EU negotiators. But they must go farther, especially making enforcement procedures more rapid and effective.

B. Recent EU Agreements

The EU has also evolved in its approach to the trade-labor linkage. In its 1990s trade agreements with Chile, Argentina and Mexico, labor rights as such were absent. Instead, they were subsumed under a general human rights rubric and a mutual commitment in Article 1 that "Respect for democratic principles and fundamental human rights, proclaimed by the Universal Declaration of Human Rights, underpins the domestic and external policies of both Parties and constitutes an essential element of this Agreement."

[33] See Mike Pare, "State incentives for Volkswagen may depend on UAW vote, legislators say," *Chattanooga Times-Free Press*, February 10, 2014, at 1A.

[34] See Stephen Greenhouse, "Volkswagen Vote is Defeat for Labor in South," *New York Times*, February 15, 2014, at B1.

The EU now insists on this "democracy clause" in all its trade agreements.[35] There is no reason it should not be part of an EU-US agreement, especially in light of important expressions of labor rights in the Universal Declaration and evidence of continued human rights abuses in the United States in such areas as child labor, criminal justice, abuses against immigrants, workplace health and safety, and freedom of association.[36]

Violations of the democracy clause could trigger "appropriate measures" under the EU's agreements, but they have never been tested. Instead, the agreements focus on dialogue, consultations, cooperative activities, joint projects, education, training, information, promotion and other soft measures.

Fast-forward to the recent major trade agreement negotiated by the EU with Korea in 2010. It contains extensive language on labor rights and labor standards, starting with the objective "to promote foreign direct investment without lowering or reducing environmental, labor or occupational health and safety standards in the application and enforcement of environmental and labor laws of the Parties."

Labor rights are addressed in Chapter 13 of the EU-Korea agreement titled "Trade and Sustainable Development." While they recognize that economic development and social development "are interdependent and mutually reinforcing components of sustainable development," the EU and Korea pointedly add that "it is not their intention in this Chapter to harmonize the labor or environment standards of the Parties" and "The Parties stress that environmental and labor standards should not be used for protectionist trade purposes. The Parties note that their comparative advantage should in no way be called into question."

The EU-Korea agreement contains a soft commitment to international labor standards that recalls earlier US agreements: the parties will "seek to ensure" that their laws and policies meet international norms and "strive to continue to improve" labor laws and policies, compared with the US approach of requiring parties to "adopt and maintain" labor laws consistent with ILO core labor standards.

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[35] See Marcela Szymanski and Michael E. Smith, "Coherence and Conditionality in European Foreign Policy: Negotiating the EU-Mexico Global Agreement," *Journal of Common Market Studies* , vol 43 , no. 1 pp. 171-192 (March 2005), available at http://aura.abdn.ac.uk/handle/2164/2067 (visited December 23, 2013).

[36] See, for example, Human Rights Watch, *Tobacco's Hidden Children: Hazardous Child Labor in US Tobacco Farming*, May 14, 2014, available at http://www.hrw.org/news/2014/05/14/us-child-workers-danger-tobacco-farms; *Nation Behind Bars: A Human Rights Solution*, May 6, 2014, available at http://www.hrw.org/news/2014/05/06/us-nation-behind-bars; *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment*, May 16, 2012, available at http://www.hrw.org/reports/2012/05/15/cultivating-fear; Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Plants, January 25, 2005, available at http://www.hrw.org/reports/2005/01/24/blood-sweat-and-fear.

At the same time, the EU and Korea went farther than the United States in commitment to ratification of ILO Conventions. The Parties "reaffirm the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the European Union have ratified respectively. The Parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as 'up-to-date' by the ILO."

When it comes to binding expectations, the EU and Korea take the same "effective enforcement" and "no derogation" formulas contained in Korea's trade agreement with the United States:

> 1. A Party shall not fail to effectively enforce its environmental and labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the Parties.
>
> 2. A Party shall not weaken or reduce the environmental or labor protections afforded in its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws, regulations or standards, in a manner affecting trade or investment between the Parties.

But in the end, the EU and Korea flinched when it came to enforcement. Instead of a solid enforcement mechanism for labor rights and standards, they called only for consultations between themselves and with civil society advisory groups of business, labor and environmental representatives. In contrast to trade disputes that can yield hard enforcement measures, labor-related disputes that go to an arbitral panel can only result in non-binding recommendations, namely:

> The Parties shall make their best efforts to accommodate advice or recommendations of the Panel of Experts on the implementation of this Chapter. The implementation of the recommendations of the Panel of Experts shall be monitored by the Committee on Trade and Sustainable Development. The report of the Panel of Experts shall be made available to the Domestic Advisory Group(s) of the Parties.

In the same way, EU agreements with countries in Central and South America have the parties "strive to ensure" high labor protections alongside an obligation to effectively enforce labor legislation.[37] A novel clause in the EU-Colombia/Peru agreement states that "the Parties agree to promote best business practices related to corporate social responsibility."[38] These agreements focus exclusively on dialogue and cooperation, and do not link labor to any dispute settlement mechanisms.

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[37] See, for example, EU-Colombia/Peru Free Trade Agreement (2012), Article 268, available at http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147704.pdf.

[38] Ibid., Article 271.

These EU agreements provide for consultation with civil society, but do not provide a complaint mechanism allowing trade unions or NGOs to allege violations. For labor advocates, however, the agreements fail to make the final leap. EU agreements with developing countries in the Americas clearly specify that no Party may have recourse to dispute settlement with respect to any issue arising under the Sustainable Development Chapter, which includes labor standards.[39] The ultimate consequence for failure to comply with the commitments of these chapters is unclear, other than increased public pressure and scrutiny.

With great fanfare, the EU and Canada announced in October 2013 that they had reached a Canada-Europe Trade Agreement (CETA).[40] But a wall of silence has descended on developments since then, and the agreement remains unconsummated. [41]

The text of a labor chapter has not been made public. However, by all accounts the parties are replicating what the EU did with Korea, making general statements of support for ILO core labor standards and promising not to fail to enforce relevant laws. For disputes involving labor rights violations, it apparently provides only soft consultative measures with civil society advisory groups and non-binding arbitral panel recommendations to back them up.[42] This failure of EU and Canadian negotiators to advance a strong social dimension in their trade agreement – should it ever be completed – should not be a model for EU and American talks.

IV. The Multilateral Trade Dimension

If the United States and the European Union fail to build a strong social dimension into transatlantic trade and investment, they would send a signal to the rest of the world that they are not serious about labor rights and standards and that other countries and regions can ignore them, too. Conversely, strong protections for labor rights and standards will confirm their importance in the global trade system.

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[39] EU-Colombia/Peru Free Trade Agreement, Article 285 (5).

[40] See Ian Austin, "Canada and Europe Reach Tentative Trade Agreement," *New York Times*, October 18, 2013, at B1.

[41] See Barrie McKenna, "Canada-EU trade deal continues to be hampered by lengthy logistics," *Toronto Globe & Mail*, May 25, 2014, at A1 (noting "Here we are, eight months since Canada and the EU reached an 'agreement in principle,' and still nothing").

[42] See, for example, a report from an employer-side Canadian labor law firm presumably privy to the agreement (as with US trade negotiations, corporations have an inside track to developments not available to labor and civil society organizations): Yasmin Askari, "Canada - EU Free Trade Agreement: Cheese, meat, with a side of labour market integration," Canadian Employment Law Today, briefing from the Sherrard Kuzz LLP law firm (December 2, 2013), available at http://sherrardkuzz.com/pdf/kuzz_CELT_dec_2_freetrade.pdf (visited December 23, 2013).

In the US, much attention now is turning to a proposed free trade agreement in a Trans-Pacific Partnership (TPP). But the United States and Brunei and New Zealand and Vietnam are not going to create a leadership dynamic for the global economy. Neither will having Japan's participation, or re-baking NAFTA with Canada and Mexico joining TPP talks. In contrast, the United States and Europe can create a model that combines economic dynamism and social justice. Ultimately, expanding commitment to a social dimension in US-EU trade will inspire public support for global trade and investment on a sustainable human rights foundation.

The US and EU need to take the lead in promoting high-road labor policies as a strategic component of their economic relationship. The transatlantic economic partnership is the biggest and arguably still the most important one in the world. Comprising roughly 800 million people, the United States and the European Union account for about half of world GDP, a third of global trade in goods, and an even higher portion of trade in services.

Another important economic factor is consumption. Although consumption is likely to grow faster in the emerging economies in Asia and elsewhere, the combined consumer demand of the EU and US will remain crucial for the world economy in the foreseeable future. Many emerging economies still pursue their development with strategies based on strong exports into the North American and European markets, especially in apparel, footwear, electronics, and other labor-intensive sectors. To create a global climate of respect for labor rights, labor standards, and other international human rights norms, the US and EU should harmonize their GSP and other preferential trade policies for developing countries' exports to ensure that neither is granting preference to countries that fail to halt labor abuses.

Example: GSP in Bangladesh and Guatemala

The United States placed Bangladesh on a "continuing review" of its beneficiary status under the US Generalized System of Preferences after the 2012 torture and murder of union leader Aminul Islam – a reflection of widespread suppression of trade union organizing in the apparel sector. The review intensified after a deadly fire later the same year at the Tazreen Fashions factory in Dhaka that killed over a hundred workers. In the wake of the April 2013 Rana Plaza building collapse and the death of more than a thousand workers, the United States suspended GSP trade preferences for Bangladesh.[43] In contrast, the EU decided to keep Bangladesh's duty-free access to the European market under its GSP program.[44]

[43] See Doug Palmer, "U.S. suspends trade benefits for Bangladesh over safety," *Reuters*, June 27, 2013, available at http://www.reuters.com/article/2013/06/27/us-obama-trade-bangladesh-idUSBRE95Q15720130627 .

[44] See *Dhaka Herald*, "Exporters cheer EU GSO assurances," January 21, 2014, available at http://www.dhakaherald.com/news/headlines/exporters-cheer-eu-gsp-assurances/.

The EU has granted duty-free treatment for Guatemala's exports under the EU-Central America Association Agreement, which requires countries to "strive to ensure" high labor protections and compliance with ILO core labor standards. This gives an EU 'stamp of approval' for Guatemala's performance on workers' rights despite widespread and longstanding violations of ILO core labor standards, including assassinations of trade union activists, discrimination against women workers in garment factories, and widespread child labor. At the same time, the US is reviewing complaints by trade unions and NGOs about such violations, and whether Guatemala's continued preferential trade treatment under the US-Central America Free Trade Agreement (CAFTA) should be maintained. In sum, the two main markets for Bangladeshi and Guatemalan exports are sending conflicting signals to the government and to employers in those countries about their compliance with international labor standards.

V. Recommendations:

Europe and the United States should bring the social dimension of a trade agreement to new, higher standards of both substance and process that go beyond their latest iterations:

- The EU should urge and the United States should accept the EU's "democracy clause" and its adherence to the Universal Declaration of Human Rights.

- Negotiators should incorporate labor provisions of the OECD Guidelines and the UN Guiding Principles into a transatlantic trade and investment agreement to hold multilateral companies, not just governments, to compliance with international labor standards.

- The US should urge and the EU should accept the US formulation to "adopt and maintain" laws consistent with ILO core labor standards. Negotiators should build on that by requiring full compliance in law and practice with the eight ILO Conventions that comprise the core labor standards. Next, they should set mutually acceptable conditions on minimum wages, working hours, and health and safety conditions.

- Transatlantic trade negotiators should also recapture one of the signal provisions of the NAALC that the United States dropped in post-NAFTA agreements: protection of migrant workers' rights. Negotiators need to ensure protection that no country allows a permanent underclass of migrant workers with substandard wages and benefits to gain an advantage in trade. One thing US and EU member countries can do is to submit a country "Action Plan" with specific measures to guarantee that migrant workers have the same workplace rights and standards as those of all workers.

- As it has in all its trade agreements, the EU should insist on US ratification of ILO core labor conventions. But ratification is a lengthy, complex procedure in the United States. Rather than insist on ratification as a precondition, negotiators

should set out a timetable for US action on ratification. Then, if the United States fails to fulfil the action plan for ratification, trade measures should be permitted against companies or sectors seeking beneficial treatment for products made or services provided under conditions that violate ILO core conventions.

- Negotiators should construct an accessible, transparent, and fast enforcement mechanism allowing trade unions and other civil society organizations to file complaints against government and firms that violate a transatlantic agreement's social provisions and to participate fully as parties in the dispute resolution and enforcement process.

- The United States and the EU should coordinate their GSP policies on labor rights and labor standards to ensure consistent treatment of developing countries where severe violations occur.

- The EU and the US should back up a commitment to a strong social dimension by establishing a permanent secretariat or observatory (the name does not matter) to monitor and report on labor developments in the United States and Europe. Such a body can:

    - review and evaluate multinational companies' internal systems of due diligence, communication and management of the firm's social performance;

    - conduct an annual Labor Information Audit on the state of labor rights and labor standards in firms involved in transatlantic trade and investment (noting, for example, whether firms have been found in violation of national labor laws or international labor standards);

    - conduct investigations and issue findings and recommendations on alleged violations of international labor standards;

    - undertake research to produce an annual "addressing inequality" report on transatlantic trade's effect, and whether it is positive or negative, on inequality in states of the United States and member states of the European Union;

    - assess labor conditions in countries outside the United States and the European Union to help with coordination of GSP policies and application of labor chapters in UE and EU trade agreements with those countries.