American Federation of Labor and Congress of Industrial Organizations

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May 10, 2013

Douglas Bell
Chair, Trade Policy Staff Committee
United States Trade Representative
1724 F Street NW
Washington, DC 20508

Dear Chairman Bell:

Please accept this request to testify at the TPSC hearing to be held on May 29 and 30, 2013 on the topic of the "Trans-Atlantic Trade and Investment Partnership" (Docket No. USTR-2013-0019) as announced in the Federal Register on April 1, 2013.

Name and Contact Information:

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Summary of Testimony:

The AFL-CIO recommends that the USTR incorporate a new approach to trade policy in the TTIP, one that prioritizes benefits for working families, not simply benefits for multi-national or global enterprises (MNEs). To successfully exit the global recession and create a long-term approach to foster growth with equity, the U.S. and the European Union (EU) must pursue a trade model that includes the promotion of fundamental labor rights included in the International Labor Organization core conventions; the creation of high-wage, high-benefit jobs; and the

preservation of domestic policy space so that nations can conserve their natural resources, stabilize their financial markets, ensure food and product safety, and otherwise promote the public interest without fear of investor-state lawsuits. If instead, the TTIP continues the low-road, neoliberal model and substitutes MNE interests for national interests, workers in the U.S. and the EU will continue to pay a high price in the form of suppressed wages, a more difficult organizing environment, and general regulatory erosion, even as MNEs will continue to benefit.

Thank you.

Sincerely,

Celeste Drake

AFL-CIO Response to
Request for Comments on the "Trans-Atlantic Trade and Investment Partnership"
Federal Register (April 1, 2013), Docket Number USTR-2013-0019

The AFL-CIO appreciates this opportunity to comment on impending negotiations for a Trans-Atlantic Trade and Investment Partnership (TTIP or agreement). These comments include our general concerns as well as specific recommendations.

The AFL-CIO believes that increasing trade between the United States (U.S.) and the European Union (EU) *could* have positive impacts on job creation and income growth for America's workers, but is unlikely to have such impacts unless the United States Trade Representative (USTR) fundamentally alters its approach to trade agreement negotiation to focus on the creation of good, family-supportive jobs and broadly shared prosperity, instead of simply reducing "behind the border barriers" for the primary benefit of business interests that fail to share increasing profits with the workers whose efforts produce those profits.

The TTIP provides the opportunity to advance a new model for trade negotiations that measures success by the results that workers receive rather than the number of countries with whom the agreements are reached. The overall standard of living and level of development of many of the countries in the EU provides an opportunity to craft a 21st century trade agreement. Negotiators should seek to understand the real impact of past trade agreements and learn from mistakes rather than rush to recreate them.

As a general matter, the AFL-CIO supports the use of positive lists for any commitments made under the TTIP. Positive lists are less likely to create confusion regarding intended commitments and less likely to subject newly conceived laws and regulations to "necessity tests," "regulatory impact analyses," and other similar barriers. The AFL-CIO is concerned that the USTR's preference for negative lists is likely to lead to mistakes such as those made regarding international gambling in the General Agreement on Trade in Services (GATS).[1]

Discussions Should Remain Disciplined and Focused On Efforts to Create and Maintain Good Jobs

The focus of the TTIP should be the creation of decent work for all workers in the U.S. and the EU.

Trade agreements must advance domestic economic development and create level playing fields in each market, increasing employment for America's workers and improving our prospects for future sustainable growth whose benefits are broadly shared—otherwise, why pursue them? Unfortunately, it has not been the practice of the USTR or other federal agencies to perform or publish *comprehensive* economic evaluations of proposed trade agreements until after an agreement is finished. Only when the text is complete do the American people learn of its potential to harm particular industries and their employees or to increase our global trade deficit.

[1] *See, e.g.*, United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm.

By contrast, it is the practice of the EU to perform and publish such evaluations (analyzing sectoral, environmental, and social impacts) and to base negotiating goals and compensatory strategies on the results.[2] This failure to perform and disseminate a *comprehensive* (and unbiased) economic analysis leaves USTR (and the working families whose interests it is supposed to represent) at a disadvantage in negotiations, because USTR remains unsure exactly how the agreement might help or hurt our job creation or regulatory policy, or bolster America's working families—and working people lack sufficient information to act as effective advocates on their own behalf. As a result, it is unclear how any trade agreement negotiated under this closed system can ever really maximize job creation or prevent permanent harm to workers. We cannot continue to allow outdated ideological constructs rather than hard facts to guide our economic policy.

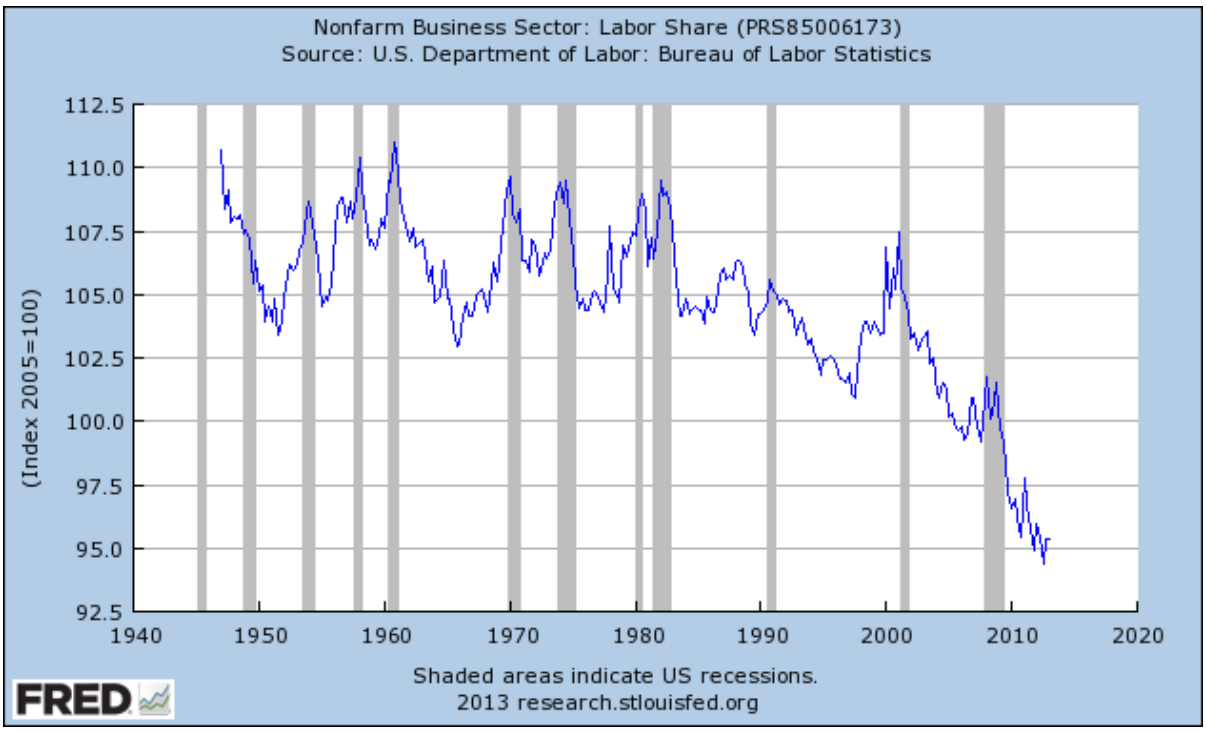
Unfortunately, USTR's approach, largely based on the neoclassical theory of comparative advantage, specialization, and mutual gains from trade, relies on a set of assumptions that do not accurately describe today's global trading system (if indeed they ever did). In the 1990s, Ralph Gomory and William Baumol demonstrated how adversarial relationships, economies of scale, technological innovation, foreign direct investment, and indeed, even government policy, undermine the predicted Ricardian outcome of mutual gains from trade.[3] Under today's globalized system, there are winners and losers, instead of winners and winners. It is the workers in the U.S. and in many of our trading partners who have been the losers—especially in the most recent decade, while global capital has taken an ever increasing share of the world's wealth.

American workers have seen nearly 700,000 jobs displaced by growing trade deficits with our NAFTA partners and 2.7 million jobs displaced due to trade with China since its accession to the WTO. High and rising trade deficits sap our nation's economic strength, are a significant drag on economic growth and job creation and have turned the U.S. into the world's largest debtor nation.

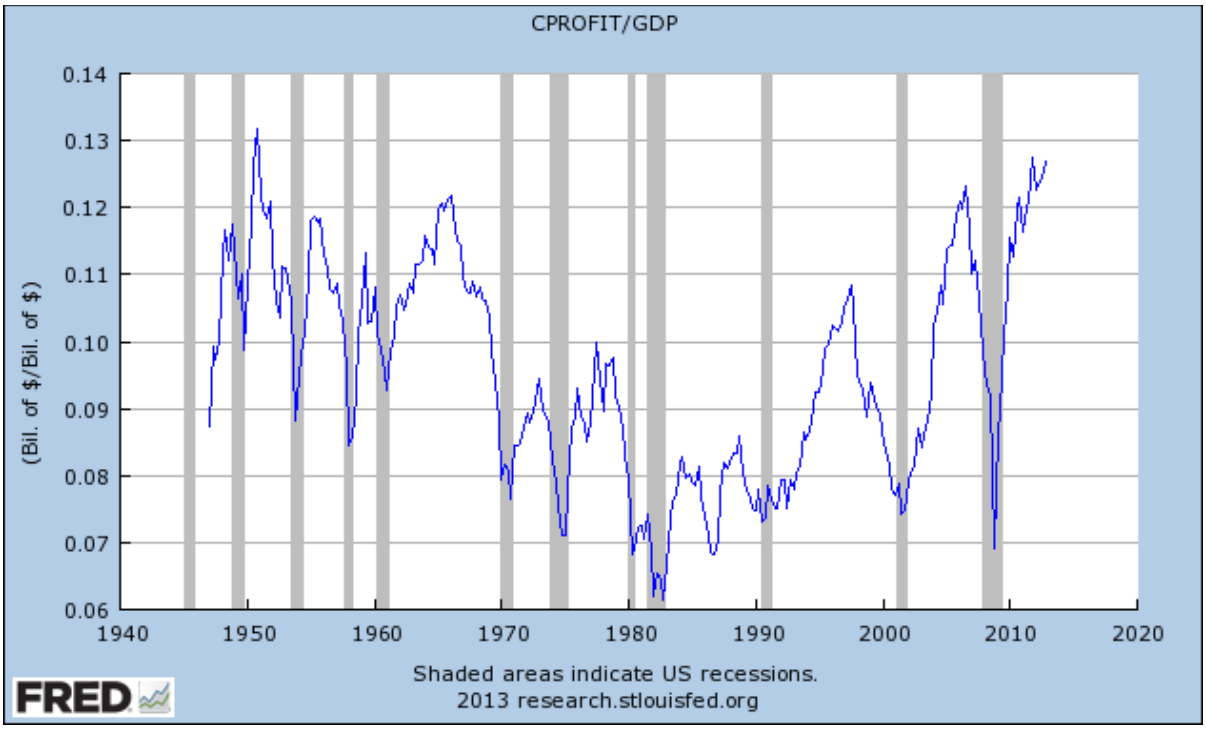
Meanwhile, workers in the territories of FTA partners Colombia, Guatemala, Honduras, Mexico, Bahrain, and Jordan, among others, have experienced varying levels of labor repression, including the detention, persecution, and murder of union and human rights activists. This repression has kept workers from sharing fairly in any gains from trade—and has seen global corporations keeping larger and larger shares of the gains from our trade agreements.

[2] *See, e.g.*, "Impact Assessment Report on the Future of EU-US Trade Relations, published by the European Commission, March 12, 2013, available at: http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150759.pdf.
[3] *See, e.g.*, Ralph E. Gomory and William J. Baumol, *Global Trade and Conflicting National Interests*, Massachusetts Institute of Technology, 2000.

U.S. workers' share of national income is at its lowest level since the 1940s and is plunging:



On the other hand, the share of corporate profits has reached its highest level since 1952:



Source: FRED Graphs/St. Louis Federal Reserve Bank, available at https://research.stlouisfed.org/fred2/.

To serve as a net benefit for any but the 1%, the TTIP must change course—more of the same will only promote the status quo, which is unacceptable.[4]

Negotiators Must Ensure that the TTIP Does Not Endanger The Provision of Critical Public Services

Replacing state provision with private provision of public services has often demonstrably lowered quality of services, worsened working conditions and wages for service workers, and excluded the poorest—as well as those geographically isolated and too remote from access to services to make service delivery profitable. When provided by the state, services provision is subject to democratic control and is sensitive to social goals determined by the locality, state, or nation. Most importantly, state provision has a role to play in achieving universal access to public services, in poverty alleviation, and in addressing economic inequality. Therefore, the TTIP must protect and promote public services.

Public services also play a major role in sustaining economic growth. Reducing inequality is increasingly understood to contribute to economic growth[5]; the public sector continues to be an important avenue for tackling income inequality. Providing transparent and accountable legal and regulatory systems free from corruption and private interest are essential to economic development. Education, health, and infrastructure address important market failures and externalities. Public sector provision, not market competition, is the most efficient way to provide most of these services. Not only are many public services critical for national security, but public sector spending has always provided important automatic stabilizers in times of economic downturn.

The TTIP should not promulgate regulatory restraints and disciplines that would lower the quality of services, reduce access, or affect working conditions adversely.[6] Public services, designed by the society to provide a minimum level of services for all, **must not be undermined** by the TTIP.

As such, repeating the language of GATS and prior U.S. "free trade agreements" (FTAs) is extremely problematic. GATS Article I:3 provides an extremely narrow definition of public services as "*any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers*." In both the U.S. and EU, essential public services such as water and wastewater services, health services, education, and public transportation are commonly provided on a commercial basis *even when provided by the state*—and therefore inadequately

[4] *See, e.g.*, Jacob S. Hacker and Nate Loewentheil, "Prosperity Economics: Building an Economy for All," 2012, available at: http://www.prosperityforamerica.org/wp-content/uploads/2012/09/prosperity-for-all.pdf.
[5] *See, e.g.*, Joseph E. Stiglitz, *The Price of Inequality*, W. W. Norton & Company, 2012.
[6] To be clear, the AFL-CIO does **not** consider the provision of public services to be a commercial exercise. "Competitive neutrality" and similar principles that the U.S. and EU might consider including in the TTIP as pertains to state-owned and state-supported *commercial* enterprises (collectively, SOEs) should ***not*** apply to the provision of public services. Please see the State-Owned Enterprise section of this document for the AFL-CIO's comments regarding SOEs that compete commercially against private sector goods and services providers.

protected against the deregulatory effects of the TTIP unless a better public services exception is incorporated.[7]

A public services definition that is too narrow could limit the breadth of services that can be excluded from the agreement's regulatory "disciplines," market access commitments, and other requirements. The U.S. must not make market opening commitments or agree to new disciplines in *any* public services sectors, including education and healthcare. The TTIP should not include any disciplines, barriers, or disincentives to prevent or deter national or sub-national governments from reversing privatization decisions and returning the direct delivery of public services to the public sector.

Finally, **the AFL-CIO opposes the proposed use of negative lists for any service commitments under the TTIP**. Negative lists have the impact of committing to the rules of a trade agreement laws, regulations, and public services that were not even conceived of by either party at the time of the agreement. As such, they can create a chilling effect on the future provision of public services. The AFL-CIO understands the U.S.'s desire for a comprehensive agreement, but a better approach would be a positive list, with periodic re-openings, either regularly scheduled or upon request of either party to the agreement.

Negotiators Must Ensure that the TTIP's Financial Services Rules Do Not Impede or Deter Financial Services Laws or Regulations

The AFL-CIO opposes further liberalization in trade in financial services. The GATS already provides sufficient market openings (and even that text could be improved to promote, rather than simply allow, prudential regulations).

In March, Attorney General Eric Holder admitted that certain financial institutions are not just "too big to fail," they are essentially "too big to jail."[8] Specifically, Holder testified that "I am concerned that the size of some of these institutions becomes so large that it does become difficult for us to prosecute them when we are hit with indications that if we do prosecute—if we do bring a criminal charge—it will have a negative impact on the national economy, perhaps even the world economy. I think that is a function of the fact that some of these institutions have become too large." The TTIP should not just allow, but **promote,** the development of new laws, regulations, policies, practices, and directives to address this concern. Such promotion is not consistent with the past practice of the USTR, which is to draft financial services provisions that promote deregulation, rather than regulation. The TTIP must reverse this practice. We need to learn from the economic disaster we are still recuperating from, rather than recreate the conditions that brought us to this point.

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[7] In the past, the USTR has exempted some existing laws and regulations from the rules of the services and investment chapters of FTAs, but left the majority of existing measures as well as all future measures open to challenge. In particular, the exemptions taken in past agreements for public services have been inadequate—failing to exempt a number of important public services, such as energy services, water services, sanitation services, and public transportation services, from coverage.

[8] "Transcript: Attorney General Eric Holder on 'Too Big to Jail,'" *American Banker.com*, March 6, 2013, available at: http://www.americanbanker.com/issues/178_45/transcript-attorney-general-eric-holder-on-too-big-to-jail-1057295-1.html?zkPrintable=1&nopagination=1.

We urge the Administration to carefully consider the 111 million American households (93% of the population), whose wealth plummeted between 2009-2011 as a result of the financial crisis.[9] It is middle class Americans who have borne the brunt of the financial crisis—primarily through lost home values. Working Americans can afford neither another financial crisis not another round of financial deregulation.

Given the size of the American and European financial sectors, should financial services disciplines be included in the TTIP, negotiators must pay special attention to the potential for unintended consequences of adopting industry-recommended language. Unlike past U.S. FTAs, the TTIP should not repeat and incorporate GATS provisions. Instead, negotiators should work together with academics, consumer advocates, national regulators, and other financial services policy experts to ensure adequate policy space, flexibility, and authority to effectively regulate: mergers and acquisitions; effective application of antitrust law; effective application of criminal and civil penalties; and prevention of systemic financial failures. There must be room for stronger regulations, instead of pressure to cut back on existing regulations.

In addition, we suggest that the USTR improve upon the language used in the U.S.-Peru FTA with regard to other trade agreements (in the Trans-Pacific Partnership and International Services Agreements, for example).

In theory, Article 12.10 of the U.S.-Peru FTA aims to protect from trade challenges government actions that aim to secure the integrity and stability of a nation's financial system. However, the final sentence of that provision is unclear and could be interpreted in a manner that would undermine the overall prudential exception:[10]

> 1. Notwithstanding any other provision of this Chapter or Chapter Ten (Investment), Fourteen (Telecommunications), or Fifteen (Electronic Commerce), including specifically Articles 14.16 (Relationship to Other Chapters) and 11.1 (Scope and Coverage) with respect to the supply of financial services in the territory of a Party by a covered investment, a Party shall not be prevented from adopting or maintaining measures for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial institution or cross-border financial service supplier, or to ensure the integrity and stability of the financial system. *Where such measures do not conform with the provisions of this Agreement referred to in this paragraph, they shall not be used as a means of avoiding the Party's commitments or obligations under such provisions.* (italics added)

The fact that this sentence borrows language from the GATS is not a strong argument for repeating it in any new agreement. Although this sentence is absent from an otherwise similar section of North American Free Trade Agreement (Article 1410.1), even the NAFTA provision

[9] "What Recovery? US Rich Get Richer, Middleclass Treading Water," *RT.com*, April 24, 2013, available at: http://rt.com/usa/us-financial-crisis-wealth-occupy-wall-street-307/.

[10] The concern here is about the breadth and clarity of the prudential measures exception itself, and not about any particular existing or proposed U.S. financial services law or regulation, all of which the AFL-CIO believes are consistent with existing international commitments.

has been interpreted as permitting tribunals to review financial measures to determine whether they are "reasonable" or "arbitrary."[11] Accordingly, we are concerned that the second sentence of Article 12.10 (italicized above) may create confusion regarding the scope of the prudential exception.

Further, given the shift in global thinking with respect to capital controls, including the IMF's recent formalization of its policy endorsing the use of capital controls in certain circumstances,[12] the parties should not include language that inhibits the use of capital controls (see, e.g., Article 10.8 of the U.S.-Peru FTA).

The AFL-CIO, therefore, recommends that the U.S. government consider new text that would promote the adoption of new laws, regulations, and practices to protect consumers and depositors and ensure the stability of the financial system as a whole. The U.S. government should also eliminate or modify the capital controls restrictions and avoid confusion in the prudential measures exception. To further strengthen the existing exception, the USTR may also wish to consider including language indicating that the prudential measures exception is self-judging (similar to the language in the essential security provisions of recent FTAs).

The Agreement Must Not Include An Investor-to-State Dispute Settlement Mechanism

The AFL-CIO recommends the use of state-to-state dispute settlement instead of investor-to-state dispute settlement (ISDS) in the TTIP. We strongly oppose ISDS, which privileges a single type of economic actor—foreign investors—to bring cases against sovereign governments to challenge democratically enacted laws as well as regulations and judicial and administrative decisions. The process places the narrow, private interests of a single enterprise on an ***equal*** footing with the public interest of an entire nation, as determined democratically by the citizens thereof—an equality of private and public interests that is wholly unjustified. Given the advanced judicial systems of both the U.S. and the EU, ISDS is an unwarranted risk to domestic policy-making at the local, state, and federal levels.

However, we recognize that there is a reasonable likelihood that ISDS will be included in the TTIP, and therefore offer numerous specific recommendations for improvement.

As a preliminary matter, we believe it imperative that investors who wish to avail themselves of the ISDS process take on added responsibilities commensurate with the expanded legal rights they seek. For example, the TTIP must include a provision in the investment chapter that requires foreign investors that seek to avail themselves of the extraordinary legal rights provided in ISDS to have taken on heightened responsibilities to the people from whose government they seek remuneration. At a minimum, these additional responsibilities must include:

[11] *See Fireman's Fund Insurance v. United Mexican States*, ICSID Case No. ARB(AF)/02/01 (Award), July 17, 2006 at 73-77.

[12] "The Liberalization and Management of Capital Flows: An Institutional View," International Monetary Fund, November 14, 2012 (http://www.imf.org/external/np/pp/eng/2012/111412.pdf).

A. Foreign investors must agree to remain neutral in union organizing drives (e.g., by entering into global framework agreements).

B. Foreign investors must agree to abide by the laws and regulations of the U.S. as well as the state and locality of their operation. To bring a suit, the investor must show it has "clean hands," meaning it has no outstanding tax liabilities; has no open investigations, complaints, or violations under the National Labor Relations Act, the Occupational Safety and Health Administration, the Environmental Protection Agency, the Securities and Exchange Commission, or any state or local equivalent; is not facing criminal charges; and has no open OECD Specific Instances filed with any National Contact Point on the basis of its operations in the United States.

C. Foreign investors should exhaust domestic remedies before resorting to the ISDS process. Failure to do so would provide "greater rights" to foreign investors—who could bypass city council hearings, meetings with elected officials, federal rulemaking procedures, Fifth Amendment taking claims in federal courts, and other procedures and remedies that similarly situated domestic investors would be obligated to use, depending on the nature of the measure complained of.

In addition, we wish to repeat here many of the numerous recommendations we have previously provided:[13]

1. To avoid uncertainly about demonstrating a purported principle of customary international law (CIL), the TTIP should codify the State Department's position in *Glamis Gold Ltd. v. U.S. (Glamis)* regarding the standard of proof for identifying principles of CIL. [14]

2. To clarify the minimum standard of treatment with regard to foreign investors and ensure that the investment obligations provide no greater rights to foreign investors than to domestic investors, the TTIP should codify the State Department's position in *Glamis* regarding the content of the minimum standard of treatment.[15]

3. The TTIP should clarify that an "indirect expropriation" occurs only when a host state seizes or appropriates property for its own use or the use of a third party, and that regulatory measures that adversely affect the value of an investment but do not transfer ownership of the investment or negate its *entire* economic value do not constitute acts of indirect expropriation.

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[13] For additional detail on these recommendation, please see "The New U.S. Model Bilateral Investment Treaty: A Public Interest Critique," May 9, 2012, available at: http://www.ase.tufts.edu/gdae/Pubs/rp/BITResponseMay12.pdf; Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty, Annex B, Sept. 30, 2009, available at: http://www.state.gov/e/eb/rls/othr/2009/131118.htm; and AFL-CIO, Testimony Regarding the Proposed United States-Trans-Pacific Partnership Trade Agreement, Jan. 25, 2010, available at: http://www.regulations.gov/#!documentDetail;D=USTR-2009-0041-0100.

[14] *See* U.S. Counter-Memorial, Sept. 19, 2006, at 218-34, available at: http://www.state.gov/documents/organization/73686.pdf.

[15] *Id.*

4. The TTIP should narrow the definition of investment to include only the kinds of property that are protected by the U.S. Constitution. This would mean excluding the expectation of gain or profit and the assumption of risk. We also recommend excluding sovereign debt, derivatives, and carbon offset contracts from the protections of the definition of covered investment.

5. The TTIP should ensure that foreign investors may not use the most favored nation (MFN) principle to assert rights provided by other investment agreements or treaties. If ISDS is to be included in the TTIP, it should specifically supersede older, less well drafted bilateral investment agreements between the U.S. and any European Union member states.

6. The TTIP should explicitly limit national treatment to instances in which a regulatory measure is enacted for a discriminatory purpose.

7. The TTIP should ensure that foreign subsidiaries cannot bring investment claims against a nation that is the home of their parent company.

8. For egregious ISDS decisions—such as the recent *Occidental Petroleum v. Ecuador* decision,[16] in which Ecuador was ordered to pay $1.77 billion *plus* interest to a company that had breached both its contract with the Government of Ecuador as well as Ecuadorean law, the TTIP should include some form of appellate process.

9. To protect the public purse, the TTIP should include a vehicle to quickly dispose of frivolous claims.

10. The TTIP should modify the restriction on capital controls (used for example in the U.S.-Korea FTA, Art. 11.7.1(a)) so that it allows the use of such controls—at least with regard to circumstances consistent with recent IMF guidance.[17]

11. The TTIP must include a strong exception protecting challenges against *all* non-discriminatory public interest measures (including but not limited to labor, the environment, public and workplace health and safety, food and product safety, and financial stability).

12. As arms of the state, state-owned, state-sponsored, and state-influenced commercial enterprises (collectively, SOEs) should be required to use state-to-state dispute settlement, rather than ISDS.

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[16] Tai-Heng Cheng & Lucas Bento, "ICSID's Largest Award in History: An Overview of Occidental Petroleum Corporation v the Republic of Ecuador," *Kluwer Arbitration Blog*, Dec. 19, 2012, available at: http://kluwerarbitrationblog.com/blog/2012/12/19/icsids-largest-award-in-history-an-overview-of-occidental-petroleum-corporation-v-the-republic-of-ecuador/.

[17] *Supra* note 12.

The Agreement Must Not Interfere with Immigration Reform Efforts

The AFL-CIO is committed to comprehensive immigration reform. We are concerned that immigration commitments in the TTIP could usurp Congressional authority to make and adjust immigration law and prevent Congress or the Administration from acting in response to actual labor market conditions. The AFL-CIO strongly recommends omission of immigration commitments in the TTIP. Workers represented by AFL-CIO affiliates in the transportation, maritime, and construction sectors in particular may be harmed by a broad-brush approach to Mode IV commitments.

Dramatic fluctuations in employment in the "Construction and Engineering" category, in particular, make it virtually impossible to respond in real-time to changes in labor market conditions when inflexible commitments have previously been made in international trade agreements. Workers—whether citizen or immigrant—could be seriously harmed if current flexibility to adjust annual limits on visas is abandoned in favor of such inflexible standards.

The American construction sector reached depression-era levels of unemployment during the last five years. In February 2010, the unemployment rate in construction exceeded 27%. Even now, at over 13%, it remains far higher than the national rate. Permanent international agreements simply cannot anticipate the kind of cyclical fluctuations that occur in the construction sector, leaving open the potential of importing workers into already devastated labor markets—reducing income tax revenues while raising costs for federal state, and local governments for safety net programs including unemployment insurance, SNAP food assistance, Medicaid, housing assistance, and job retraining and placement programs.

Moreover, at this critical time, when the Administration and the U.S. Congress are considering fixing America's broken immigration system, it is critical that trade negotiators who frankly lack expertise in immigration and labor market policies not damage reform efforts. It would be a tragedy to undermine attempts to bring undocumented workers out of the shadows, which will benefit all workers by ensuring that unscrupulous employers can no longer get away with a variety of worker abuses including paying below minimum wage, outright wage theft, and even forced labor.

Among the immigration reforms being contemplated that inclusion of Mode IV commitments could also impinge upon are clearer requirements for visas for both skilled and unskilled foreign workers so that employers do not use these programs to import workers simply to undercut wage levels for ***all*** workers. The AFL-CIO strongly believes that if there is a worker shortage in a particular field, such a shortage will be demonstrated by rising, not decreasing, wages in that field, and that visas should be tied to actual labor market conditions. When employers cannot show that they are responding to a market shortage by offering higher wages—they should not have the privilege of distorting the labor market by keeping wages artificially low by relying on TTIP-guaranteed immigrants who will be forced to accept below-market rates.

The TTIP Must Secure Fundamental Labor Rights

It is imperative that the USTR address economic justice and the societal infrastructure that can promote it, not as an adjunct goal, but as a central part of its trade and economic development efforts. Freedom of association and the existence of free civil society organizations, including trade unions, are essential to a democracy. These institutions provide a venue for ordinary citizens to raise their voices collectively, claim their rights, advocate for policies that serve their constituents and the broader public interest, and hold government accountable. As large membership-based institutions advocating for social and economic justice for workers and citizens, independent trade unions are among the most important of these institutions.

Unlike trade with many other regions, increased trade with the EU offers the opportunity to trade with nations that, for the most part, have active labor market policies and strong social safety nets. In many EU countries, the commitment to worker-employer dialogue is so strong that the laws even require worker representation on corporate boards. USTR must seek labor provisions that will allow the strengthening and expansion of these social and labor market protections.[18]

Given the generally high level of worker protections in the EU, the TTIP must expand on the typical labor rights approach in other U.S. FTAs by improving upon the basic commitment to adopt, enforce and maintain core labor rights as laid out in the International Labor Organization (ILO) Declaration on Fundamental Principles and Rights at Work (e.g., by referencing ILO Conventions and their jurisprudence). Beyond that important step, the U.S. and EU should explore adopting mechanisms to provide for consultation and information disclosure between workers and trans-national corporations (as outlined in the existing EU directive on European Works Councils[19]); stronger protections for workplace safety and health; or even requirements to ensure "temp" workers (such as those employed by third-party staffing companies) receive equal treatment with regard to pay, overtime, breaks, rest periods, night work, holidays and the like, as provided for in the EU directive on temporary agency work. A trade agreement with Europe presents an opportunity for the U.S. government to go beyond the "lowest common denominator" approach to labor rights and create people-centered trade rules.

To achieve these goals, the AFL-CIO recommends that the TTIP build upon the changes achieved in the U.S.-Peru FTA in 2007 (also known as the "May 10" provisions). In other words, the labor provisions in the TTIP must be stronger than those achieved in any prior agreement. The USTR should fulfill the promise that the "May 10" provisions will serve as a floor, not a ceiling, on labor rights. These provisions represented an important step forward for labor rights, but did not contain all of the essential elements of an effective labor chapter.

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[18] The interaction with the Investment Chapter here is clear: foreign investors must not be able to use the ISDS process to challenge improvements in labor laws or increased social protections.

[19] Here, we emphasize that we are referring only to Works Councils formed pursuant to the Works Council Directives of the EU, in which around 10 million workers across the EU have the right to information and consultation on company decisions at the European level through their Works Councils. The Works Council Directives apply to companies with 1,000 or more employees, including at least 150 in two or more Member States. It does not provide bargaining rights, nor does it interfere with or reduce the bargaining rights of unionized employees. This structure should be protected and enhanced to include companies with operations in the US and at least one EU Member State who otherwise meet the requirements. In this document, "Works Councils" does not refer to any kind of employer-sponsored effort to avoid or weaken unionization of workers.

Beyond reference to the ILO core conventions elimination of Footnote 2 from the Peru text to clarify that ILO jurisprudence will help give meaning to each party's labor rights obligations (already referenced *supra*), the AFL-CIO has several additional recommendations. The labor provisions should also apply to ***all*** workers, regardless of sector or industry. Limiting available redress solely to violations that are "sustained or recurring" and "in a manner affecting trade or investment," as is the case in the Peru agreement, is too narrow. The text should be broadened because these limitations potentially exclude too many workers from coverage and make it exceedingly difficult to effectively pressure recalcitrant governments to do the right thing and protect their own workers. In addition, the TTIP should include enforceable standards for acceptable conditions of work and the treatment and recruitment of migrant workers.

The labor chapter's enforcement mechanism must be timely, accessible, and reliable. The TTIP's labor provisions must ensure that meritorious petitions proceed in a timely manner to the next step of the process until they are resolved (including through dispute settlement if necessary). Workers' livelihoods depend on swift justice; workers do not have the luxury of time. Should countries fail to resolve their differences during the consultation stage and proceed to the dispute settlement stage, the process must be at least as strong and swift as that available to business interests, and penalties should, where possible, be directly related to the sectors in which violations occur (in order to leverage to political power of employers) and high enough to encourage parties to engage seriously at the initial stages. Token fines unrelated to the economic sectors where the violations occur will do little to encourage private sector compliance or deter future violations. Finally, wage and hour, health and safety, labor relations, and any other labor measures must not be subject to investor-to-state dispute settlement.

The TTIP Must Protect Domestic Procurement and Other Domestic Economic Development, National Security, Environmental Protection, And Social Justice Policies

The TTIP must not surrender or limit the application of domestic economic development, national security, environmental protection, or social justice policies, including policies related to Buy America/Buy American.

The AFL-CIO has long maintained that trade agreements should not constrain federal and sub-federal procurement rules that serve important public policy aims such as local economic development and job creation, environmental protection and social justice—including respect for human and workers' rights. Maintaining this policy space is not an academic issue. In 2008, procurement policy became part of the debate over the American Recovery and Reinvestment Act, the largest domestic economic stimulus program since the Great Depression. Even after the U.S. reiterated its intention to fully adhere to its procurement obligations under the WTO Agreement on Government Procurement and various FTAs, foreign firms were not satisfied that they had sufficient access to U.S. federally-funded projects. USTR must be more responsive to America's working families than it is to the complaints of enterprises that do not operate in the U.S.

After the current record-slow recovery ends, the U.S. government must carefully consider the diminished impact of fiscal stimulus caused by procurement commitments (which decrease the ability of lawmakers to direct funds toward domestic job creation). Thus, USTR should negotiate language that would carve out all procurement projects funded by stimulus funds appropriated in response to a verified recession.

While access to foreign procurement does create opportunities for U.S. firms, some of which ***may*** support jobs in the United States, the question remains open whether the jobs potentially lost to opening U.S. procurement to foreign bidders are greater than the jobs potentially gained by U.S. firms' access to foreign procurement markets. Also important are the kinds of jobs at stake. The AFL-CIO has repeatedly asked the USTR to provide figures for jobs created and lost due to prior procurement commitments, but has yet to receive a response.

These questions deserve careful, comprehensive analysis. Only ***after*** careful analysis of the potential job impacts of procurement liberalization, and extensive consultation with the private sector and Congress, should the USTR make its offers and requests.

Additionally, the AFL-CIO still has concerns left unaddressed by the May 10, 2007 compromise. For many years, the AFL-CIO has raised concerns about technical specifications in procurement chapters. The procurement chapter of the U.S.-Peru FTA took a good step forward by providing that a procuring entity is not precluded from preparing, adopting, or applying technical specifications:

> (b) to require a supplier to comply with generally applicable laws regarding
> (i) fundamental principles and rights at work; and
> (ii) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health

However, the TTIP must expand the language above to include living wage laws and, for the sake of clarity, prevailing wage laws. It must also leave room for the bidding process for non-discriminatory but potentially innovative policies such as providing a better score for employers with better on-the-job safety records or excluding bidders that do not have "clean hands" (e.g., firms that have failed to pay taxes, have outstanding unfair labor practice charges, OSHA violations, or outstanding violations of other national, state, or local laws).

We also urge that any procurement negotiations proceed on a "positive list" approach whereby only entities that are specifically listed are covered by the agreement's procurement rules.

Finally, but importantly, the AFL-CIO expects that no sub-federal entities will be bound to the procurement provisions of the TTIP without their express consent or that any of the exemptions or exceptions taken from obligations undertaken in the WTO GPA will be deleted or altered in any manner (e.g., highway and transit projects).

The TTIP Must Not Simply Be a Tool to Undermine Public Interest Laws and Regulations

The TTIP will be primarily about so-called "behind-the-border" barriers, more so than tariff reductions. While the AFL-CIO agrees that in certain areas, regulatory cooperation could increase trade and efficiency in ways that benefit workers and consumers, we also caution against any efforts to use the negotiation process as a backdoor route to attack important worker, consumer, and food safety protections, such as those included in the EU's REACH chemical safety initiative or labeling requirements for genetically modified foods.

Even though some big businesses have tried to make "regulation" a dirty word in recent years, the AFL-CIO and other working family organizations are challenging their exaggerated statistics and bogus arguments, which are merely a smokescreen for an anti-family agenda—one that puts profits ahead of on-the-job safety, clean air and water, and even healthy food. The TTIP must not make it easier to avoid or block services regulations meant to secure the health and safety of the public—whether that means on-the-job health and safety regulations; licensing and certification requirements that protect consumers from bogus practitioners of medicine or law; bonding or deposit requirements to ensure the ability to pay customers' claims; building codes; or any other public interest measure. Working families should not have to give up the regulatory gains made in the 20th century nor the right to needed future protections in the name of "free trade." In this regard, the TTIP should not require either party to engage in "Regulatory Impact Analysis" in order to justify particular public interest measures.

Indeed, the AFL-CIO believes that the goal of the TTIP should be to increase the level of protection for workers and the public in both the U.S. and Europe. To the extent that harmonization is useful to enhance trade, the TTIP should call for the adoption of the strongest protections. Moreover, the U.S. and Europe have been world leaders in developing and implementing laws and regulations to improve workplace safety, regulate toxic chemicals and to protect consumers and the environment. The TTIP should establish a framework for the U.S. and EU to draw and build upon their respective regulatory experiences to enhance protections. For example, the EU is much further ahead than the United States in the area of chemical regulation, particularly with respect to requiring the testing and registration of chemicals through its REACH legislation. The agreement should call for U.S. to adopt chemical legislation and regulations similar to REACH.

The TTIP Should Exclude New Market Access in the Maritime and Air Transport Sectors

We understand that the EU has asked that the ownership and control rules that pertain to airlines, the right of the carriers of two sides to operate in each other's domestic markets ("cabotage operations"), and maritime transport services be included as topics in the TTIP negotiations. For the purposes of air transport services, the AFL-CIO's comments here are limited to whether or not air traffic rights and services directly related to those rights should be included in TTIP. The AFL-CIO strongly believes that they should not. Likewise, the AFL-CIO believes that maritime transport services and U.S. maritime laws such as the Jones Act should not be included in these negotiations.

Air transport services have historically been excluded from general trade agreements such as GATS and bilateral and multilateral free trade agreements. Rather, such services have been subject to a separate administrative regime, under which the U.S. has negotiated air service specific agreements with foreign countries. These negotiations have been led by the Department of State and the Department of Transportation, two agencies with dedicated experts on air transport services. This regime has led to the steady and dramatic removal of barriers to trade in the air transport services sector and since 1993 the U.S. has entered into "open skies" agreements with 107 countries – agreements that have eliminated virtually all restrictions on the ability of carriers to select routes, to establish frequencies and to set prices.

The U.S. and the EU have recently entered into such an open skies Agreement ("Agreement"). During the comprehensive discussions that resulted in the Agreement, the EU sought the exchange of cabotage rights and the elimination of restrictions on the ownership and control of airlines by the nationals of the parties. In fact, it is fair to say that consideration of altering the ownership and control rules was one of the central topics in the negotiations. Ultimately, the Agreement left in place the restrictions on cabotage. With respect to ownership and control, the Agreement left in place the statutory restrictions but did establish a Joint Committee (consisting of representatives of the two sides) that meets on a regular basis and is tasked, among other things, with considering possible ways of enhancing the access of U.S. and EU airlines to global capital markets. The existing administrative framework has been successful in opening markets and liberalizing trade in air transport services while at the same time taking into account the legitimate concerns of airline labor.

While restrictions on cabotage and on ownership and control in the air transport sector remain, there are good reasons for this. With respect to cabotage, the operation of foreign airlines in U.S. domestic markets would be at odds with a host of U.S. laws, including visa and labor laws. It would also be inconsistent with the treatment of other business sectors. For example, if a foreign automobile company wishes to set up a manufacturing operation in the U.S., that facility and its workforce are subject to U.S. laws and regulations. Granting cabotage rights to EU airlines, however, would allow these airlines to operate in the U.S. domestic market with a workforce that remains technically based in their home country and subject to that country's laws. This would allow the airlines to bypass U.S. laws and displace U.S. aviation employees. Additionally, given that the U.S. represents about half of the world's aviation market, it is unreasonable to argue that opening the U.S. domestic point-to-point market to foreign carriers would represent an even exchange of benefits with our EU trading partners.

The request to eliminate the ownership and control restrictions raises its own set of difficult issues. If an EU airline were able to own a U.S. airline, it would be able to place the air crew of the U.S. carrier in competition with the air crew of the EU airline for the international routes flown by the previously U.S-owned carriers. If the foreign owner sought to eliminate U.S. jobs and move this work to a foreign crew, it is unlikely that U.S. labor laws would provide an adequate remedy or protection for these workers. This is a very real threat, and the consequences of a similar arrangement are currently being felt by aviation workers in Europe where several airlines have taken advantage of the lack of a comprehensive labor law in the European common aviation area to undermine the ability of European flight crews to bargain over the flying done by their companies.

Changes to our ownership and control laws would have a negative impact on U.S. aircraft maintenance workers as well. If foreign carriers are allowed to take over U.S. airlines, the practice of outsourcing aircraft maintenance to foreign countries will only accelerate. This is already a problem that has cost thousands of skilled U.S. jobs and lowered safety standards. And, while there is currently a congressionally mandated moratorium on certifying new foreign repair stations, we are still awaiting long overdue security rules governing contract repair stations and drug and alcohol testing at foreign repair stations. Any actions that would further promote the outsourcing of aircraft maintenance work, particularly without adequate rules governing the oversight of these foreign repair stations, should be rejected. The U.S. government should be pursuing market-opening aviation trade opportunities that create and sustain U.S. jobs both in the air and on the ground, not those that leave the future of U.S. aviation to foreign carriers (and their respective governments) that may have different economic agendas.

In addition to the problems that relaxing foreign ownership and control rules would cause for our domestic aviation workforce, this proposal would strain our government's ability to mandate and enforce critical security standards. Moreover, the ability of our government to manage the Civil Reserve Air Fleet (CRAF) program, which assures U.S. air carrier capacity for our military's air transport needs during wars and conflicts, would be undermined. Under relaxed foreign ownership and control rules we question how a foreign executive that controls the commercial aspects of a U.S. carrier but does not support our military strategy would be compelled to provide CRAF air transport services during a war or conflict.

The same principles noted above apply to any consideration of U.S. maritime transport laws and policies. The Jones Act has been a successful part of our nation's national security and economic policy since 1922, and serves a critical economic role for our nation, sustaining over 500,000 good-paying American jobs and generating $100 billion in total annual economic output. This law has ensured that the U.S. continues to have a reliable source of domestically built ships and competent American crews to operate them. Overall, the U.S.-flag maritime industry has played a vital role in supporting our armed forces, our trade objectives, food and other aid to other countries, and our national security. We should be promoting the growth of the U.S. merchant marine, not pursuing trade policies that weaken this vital segment of our transportation system.

Any limitation of the Jones Act would harm American mariners, jeopardize jobs for America's workers, accelerate the decline of U.S.-flag operators and seriously damage our economic recovery and national security. This would also permit foreign entities that do not employ U.S. workers and do not pay taxes to our treasury to operate with impunity on our inland waterways and along our coasts. Any efforts to include maritime transport services in these negotiations or to otherwise weaken or infringe upon the Jones Act should be rejected by U.S. negotiators.

The TTIP Should Consider the Elimination
Of Market Distorting Mechanisms Such as Offsets and Offset-like Transactions

Offsets involve the transfer of technology and/or production from a U.S. company to a company in another country in return for a sale. They cost U.S. workers thousands of jobs. While offsets

are virtually unregulated in the US, over 20 European countries have well established policies that are feeding the development of their own industries and bringing U.S. productive capacity and technology to their shores.[20]

Efforts to eliminate offsets were contemplated by the short-lived Presidential Commission on Offsets. That Commission, created by President Clinton, perished during the Bush Administration before it could issue a final report. Although prohibitions against offsets were reflected in the now-defunct U.S.-EU 1992 Agreement on Large Commercial Aircraft, that language was narrow, weak and, rarely (if ever) enforced.

A high-level dialogue with the EU on jobs presents a tremendous opportunity to adopt new language that is robust and that will effectively eliminate EU's use of offsets and offset-like activities. This effort could also assist U.S. and European companies that are constantly being pitted against one another by China. If both the U.S. and the EU were to agree bilaterally not to engage in offsets with each other—or when competing with one another for sales to China—jobs that would have been lost due to offsets could be avoided.

The TTIP Should Include Disciplines on State-Owned Commercial Enterprises To Level the Playing Field with Non-Subsidized Enterprises

State-owned, state-sponsored, or state-influenced commercial enterprises (collectively, SOEs) have become an important trade issue over the past decade. Some SOEs consistently operate in a manner that gains them market share—rather than profits. A private enterprise would not long remain in business if it failed to respond to the market, but, because state resources (such as low- or no-cost loans; subsidized inputs; regulatory favoritism) prop them up, SOEs not only can, but do. While losing money by selling goods at below-market prices, they can force U.S. competitors out of business, unfairly gaining market share that can disadvantage workers (for instance by gaining oligopsony power in the industry's labor market).

The AFL-CIO recommends that the TTIP require SOE transactions to be based on commercial considerations. The AFL-CIO has also recommended that domestic laws be updated to ensure that an effective remedy is readily available to the private sector to fight for its interests when SOE behavior on U.S. soil injures U.S. businesses and their employees. We have also recommended increased transparency, the creation of a rebuttable presumption that an SOE is acting on its home country's behalf, not the interests of our workers, if it seeks to block action to protect an injured party in the U.S., and the consideration of a screening mechanism for SOE investments.

An effective approach to SOE issues would:

- Include coverage for "greenfield" investments as well as for mergers and acquisitions;
- Not require petitioners to suffer grievous injury before raising an inquiry;

[20] See Owen Herrnstadt, "Offsets and the Lack of a Comprehensive U.S. Policy: What Do Other Countries Know That We Don't?," Economic Policy Institute, 2008.

- Ensure that workers, their unions, and their local and state governments can act even when private employers do not;
- Include a rebuttable presumption that SOEs operating in the U.S. are acting as agents of the state (i.e., are a related party) and, thus, cannot block trade cases from moving forward unless they can prove that they are not acting on the state's behalf;
- Not permit SOEs to avail themselves of the investor-to-state dispute settlement process (a state-to-state process would be more appropriate for investment complaints raised by SOEs);
- Include coverage for sovereign wealth funds; and
- Include a process to address SOE activities in our domestic market that may have an anti-competitive impact on production and jobs, but are not otherwise reachable under current trade law.

Some of these recommendations may require changes in domestic trade remedy law and involve broader interests than simply those raised by TTIP participants. Thus, some of these changes should occur outside of the context of TTIP negotiations.

To be clear, the AFL-CIO emphasizes that it does *not* oppose SOEs *per se,* nor does it desire that the TTIP require or encourage countries to privatize their SOEs or treat public service providers as SOEs.[21] Our concern does not center around a nation's choice about how much or how little to involve the government in a country's industrial development, but rather whether that involvement harms American working families by giving an additional financial boost to enterprises that compete in commercial sectors.

The TTIP Must Contain Intellectual Property Rules that Support American Innovation While Promoting Access to Affordable Medicines

Intellectual property (IP) protections—designed to promote innovation and serve the public interest—are critical to creating and maintaining domestic jobs, as well as to increasing exports. The U.S. economy produces many products for which IP is critical, from movies and music to software and medicines. Therefore, the TTIP should ensure that the creators of such intellectual property are protected from intellectual property theft—whether in the form of illegal streaming and downloads, counterfeit products, or inadequate protections against infringement. The IP provisions of past U.S. FTAs have not effectively deterred rampant counterfeiting of CDs, DVDs, clothing, accessories, and other consumer products, a failure that resulted in lost jobs and reduced incomes for many workers.

To effectively promote U.S. jobs, however, strong and effective IP protections must be balanced enough to also *promote <u>legitimate</u> generic competition*—particularly in the area of medicines. Rules that prevent fair competition from generic producers not only fail to create as many jobs as they might, they also jeopardize public health both here and abroad, by ensuring that life-saving medicines are priced out of reach of many working people—in the U.S. and elsewhere.

[21] The AFL-CIO does not consider the provision of public services to be a commercial exercise that would be covered by SOE disciplines. Please refer to the Public Services section of this document for more information about public services.

Past U.S. FTAs have provided excessive protections for the producers of brand-name pharmaceuticals. Indeed, these agreements far exceeded the international standards for patent protection established in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The AFL-CIO opposes TRIPS "plus" provisions because they jeopardize access to affordable medicines, particularly in developing countries.

The May 10, 2007 compromise took a significant step forward in cutting back the most onerous requirements for the IP protection of pharmaceuticals in U.S. FTAs. However, harmful language on data exclusivity remains in the Peru FTA agreement.[22]

Data exclusivity precludes use of clinical trial data of an originator company by a drug regulatory authority, even to establish marketing approval, normally for a defined period (five years in past U.S. FTAs). As a result, a generic producer cannot secure pre-approval for a generic version of a patented medicine until after the data exclusivity period has expired (unless that producer runs its own tests—a costly and ethically dubious proposition). This limitation can delay legitimate generic drugs from reaching consumers in a timely fashion.

Data exclusivity can thus impose unnecessary costs—in financial and human health terms—on public health systems, which are forced to purchase brand-name pharmaceuticals at elevated prices when cheaper generic medicines would otherwise be available, but for the FTA. For example, a 2007 study by Oxfam found that the IP provisions of the U.S.-Jordan FTA, especially the data exclusivity provisions, prevented generic competition for 79 percent of medicines launched by 21 multinational pharmaceutical companies in the first five years the agreement was in effect. Further, the study found that medicine prices in Jordan rose 20 percent, costing the government between $6.3 and $22 million in additional expenditures for medicines with no generic competitor as a result of enforcement of data exclusivity.

Despite progress in the U.S.-Peru FTA to roll back TRIPS-plus requirements, U.S. trade policy has since taken a turn for the worse with regard to access to affordable medicines.

For example, the AFL-CIO opposes efforts (such as those included in the U.S.-Korea FTA) to increase the power and influence of private sector drugmakers over the pricing decisions of public health systems and pharmaceutical benefit plans. The TTIP must not include such provisions. Instead, it must not only protect current government-supported health care programs in the U.S. (including but not limited to Medicaid, Medicare, and Community Health Centers) and in Europe, but also ensure that countries retain the policy space to expand and improve such programs.

Further, the U.S.-Korea FTA requires patent term extensions for new methods of use and manufacture of a pharmaceutical product.[23] It also effectively eliminates "pre-grant opposition,"[24] which allows the validity of a pharmaceutical patent to be challenged *before* a

[22] The data exclusivity provisions are found in Article 16.10, sub-sections 2 (b) and (c) of the Peru FTA.
[23] Free Trade Agreement between the United States of America and the Republic of Korea, Art. 18.8.6 (b), available at: http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file273_12717.pdf.
[24] *Id.*, Art. 18.8.4.

patent is granted, a process which makes it cheaper and quicker to dispose of bad patent applications than *after* a patent has been granted to an undeserving application. These provisions should not be repeated in the TTIP because they further delay legitimate generic competition that plays a role in increasing access to medicines for working families.[25]

The AFL-CIO strongly supports governmental efforts to control costs of medicines so as to be able to provide affordable medicines to the public. We oppose efforts to further enrich brand-name drug producers at the expense of working families and encourage negotiators to consider whether their negotiating goals will have the primary effect of raising drug costs or reducing access to affordable medicines to workers in any country, and, if so, to adjust those goals appropriately.

The TTIP Must Protect the Environment

Environmental protections, including obligations for countries to enforce domestic environmental laws and adopt, maintain, and enforce policies and commitments under multilateral environmental agreements, must be included, using the U.S.-Peru FTA as a floor, not a ceiling. Moreover, the agreement should require parties to adopt, maintain, and enforce measures to restrict and eliminate trade in illegally taken wildlife and illegally harvested wood and wood products (e.g., Lacey Act-type provisions). The TTIP parties should also agree to prohibit derogation from national, sub-national, and local laws and regulations that establish environmental standards or aim to protect the environment and public health. Environmental provisions must be subject to dispute settlement at least as strong and effective as that provided for other commercial commitments of the TTIP (again using the U.S.-Peru FTA as a floor). Moreover, environmental and public health protection measures must be exempt from ISDS challenges.

Telecom and Related Services Commitments Must Not Devastate Communities or Jeopardize Privacy and Data Security

As employers move call center operations overseas, they leave social safety net costs (including increased unemployment insurance payments, food assistance, etc.) in their wake, while simultaneously lowering their tax payments to the U.S. government. The TTIP should not make market access commitments that would exacerbate this problem in which those companies imposing greater costs on U.S. communities by eliminating jobs contribute fewer (or even no) taxes to help solve the problems they create.

This call center off-shoring trend also jeopardizes privacy and data security for all Americans. The offshoring trend has evolved into a crisis for consumers, with fraud and identity theft becoming a multi-million dollar business. For example, in one widely reported swindle, criminals used foreign call center workers to make 2.7 million calls and collect some $5.2

[25] For additional information, see Ruth Lopert and Deborah Gleeson, "The High Price of "Free" Trade: U.S. Trade Agreements and Access to Medicines," *The Journal of Law, Medicine & Ethics*, Vol. 41, Iss. 1, Apr. 12, 2013, available at: http://onlinelibrary.wiley.com/doi/10.1111/jlme.12014/pdf.

million through threats and intimidation, alleging that innocent consumers owed money for past loans.[26]

Threats to consumers' private data are not new. For at least a decade, the U.S. and European press have been reporting security breaches in overseas call centers. Foreign call center workers have peddled customers' financial and medical information to criminals, defrauded consumers of millions of dollars by posing as debt collectors, and stolen hundreds of thousands of dollars from bank customers.

The U.S. Federal Trade Commission has been investigating a variety of schemes to defraud Americans through offshore call centers. For example, Citibank customers in the United States lost more than $400,000 to Indian call center scams.[27] British bank customers have also lost hundreds of thousands of pounds; and investigatory journalists have demonstrated how easy it is for interested parties to gain access to private bank account records.[28]

The TTIP must go further than any previous trade deal in protecting the privacy and security of American and European families' electronic information. In particular, it should not be used to weaken the strong privacy protections that already exist in Europe. Unenforceable declarations of parties' respect for privacy are clearly insufficient in the case of global data theft schemes. Working families must be able to hold accountable—and receive compensation from—those who expose their data, no matter where the culprits operate. Otherwise, the TTIP will simply be a tool to promote more identity thieves who steal from working families while hiding behind international borders. If privacy cannot be enforced no matter where data is located, the TTIP should not agree to liberalize data markets.

Public Participation in the TTIP is Critical to Its Social and Democratic Legitimacy

The TTIP negotiating process should be accountable and transparent, allowing for a high degree of public participation as well as regular consultation with Congress, state and local elected officials, labor, civil society groups, and business interests. USTR will not fulfill its consultation requirements by sharing information solely with the chairs and ranking members of the Senate Finance and House Ways and Means Committees. Legislatures and social partners should be integrated deeply in the negotiating and planning process, as well as the monitoring process after the TTIP is in place.

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[26] Federal Trade Commission News, "Court Halts Alleged Fake Debt Collector Calls from India, Grants FTC Request to Stop Defendants Who Posed as Law Enforcers," Apr. 11, 2012, available at: http://www.ftc.gov/opa/2012/04/broadway.shtm.

[27] "2 Indian Americans held in U.S. for defrauding hundreds of $400,000," The Indian Express, Jun. 9, 2012, available at: http://www.indianexpress.com/news/2-indian-americans-held-in-us-for--defrauding--hundreds-of--400000/959783/.

[28] Chirtra Somayaji, "HSBC Worker in India Charged for Assisting Fraud," Bloomberg News, Jun. 28, 2006, available at: http://www.bloomberg.com/apps/news?pid=newsarchive&sid=anmGQS5neXDk&refer=uk; Soutik Biswas, "How Secure Are India's Call Centres" BBC News Jun. 24, 2005, available at: http://news.bbc.co.uk/2/hi/south_asia/4619859.stm.

The monitoring process should focus on potential social and ecological impacts and the enforcement of rules laid down in the labor and environment chapters (and/or a sustainable development chapter, if included), but also on other parts of the agreement. The monitoring could be executed by a bilateral parliamentary commission (consisting of Members of the U.S. Congress and the European Parliament), in cooperation with social partners. Furthermore, a monitoring mechanism involving trade union representatives should also be included. Breaches of the agreement's labor or environmental standards, if not resolved through consultative or cooperative means, must be resolved by imposing penalties up to and including the potential loss of trade privileges (consistent with violations of the commercial provisions of the agreement).

The U.S. Must Adopt a Sound Industrial and Investment Policy

The U.S. should abandon its hands-off approach to industrial policies and instead promote infrastructure investment, public and private-sector research and investment, worker education and training, and other policies that promote good jobs for all workers—including those without a four-year college education. Developed countries whose manufacturing sectors are successfully competing in the globalized economy are not those in which the manufacturing sector is left to fend for itself—they are countries like Germany, Sweden, Norway, and Finland that have a plan to promote good jobs for their working men and women.

In addition, to ensure a level-playing field for American private enterprise, the U.S. should ensure that the TTIP allows a stronger review of foreign investments than is provided under Committee on Foreign Investment in the United States (CFIUS)—particularly those made by SOEs. Canada and Australia both have in place screening mechanisms that ensure that there is an open investment climate but that allow for questions to be asked about the economic benefits that will accrue from potential investments. These screening mechanisms are particularly important where investing entities are acting as agents of a state, rather than on market considerations. The AFL-CIO notes that, in contrast to the arguments of those opposed to screening for economic security, neither policy has prevented foreign investments from proceeding at a rapid pace in each country—both countries remain attractive destinations for such investments. The Administration should review these policies in an effort to improve CFIUS.

Foreign investment should promote decent work rather than be allowed to undermine domestic production. Without a sound industrial policy, including job creation targets, the negotiation of the TTIP will only exacerbate the status quo—wild success for some sectors of the economy, dismal failures for others, and a grossly unequal distribution of any gains away from America's working families.

The TTIP Should Not Weaken or Undermine U.S. Trade Remedy Laws in Any Manner

Americans working in tradable goods sectors, such as manufacturing, have been disproportionately harmed by unfairly traded imports and have suffered millions of job losses and thousands of facility closures as the U.S. has entered into more and more trade agreements over the last two decades. While many unfairly traded imports come from developing countries, often they have entered from EU member countries, as well. Thus, it is imperative that the TTIP

not weaken or undermine U.S. trade remedy law in any way. The U.S. government must continue to uphold antidumping (AD) and countervailing duty laws (CVD) and enforce them to the fullest extent possible and not trade them off for the benefit of some other sector of the economy, which has happened in past trade negotiations, most notably the multi-lateral negotiations leading to the formation of the WTO.

Our AD /CVD laws are one of the few WTO-sanctioned tools available to America's workers and companies who have been harmed by dumped and subsidized imports. While the creation of the WTO and later WTO rulings have weakened trade remedies, these still remain one of the most useful self-help remedies available and are consequently much-needed to counter the adverse impacts of unfairly traded imports. Without such trade remedy laws, workers and domestic industries could be wiped out entirely, leading to another cycle of greater job losses, plant closures, disinvestment and lost revenues—all of which have been so devastating to the standard of living for working Americans, their families, and communities.

Many exporting nations, in particular EU nations, have attempted over the years to weaken U.S. trade remedies (even as they build up their exporting prowess). If successful, the EU would reap an enormous benefit (as little would then stand in the way of exporting dumped or subsidized goods to the U.S. market, their largest export market), but at the expense of U.S. workers and their employers. USTR must ensure that throughout the TTIP negotiations AD/CVD laws are maintained (if anything, these laws should be strengthened, for example, by permitting the use of "zeroing" in dumping cases—a practice that the EU itself formerly engaged in).

U.S. trade remedy laws have saved American jobs and helped domestic industries to remain in the U.S., investing and creating more jobs in America. The TTIP negotiation should not undermine these vital laws or the President's goal of growing American manufacturing and jobs.

The TTIP Must Include Rules of Origin
That Maximize Job Creation Among the TTIP Countries

Rules of origin provide the framework that governs whether a product will receive the benefits attributable to any TTIP agreement. Past U.S. trade agreements have often been insufficient in requiring the maximum amount of production and product transformation within the signatory nations so as to maximize employment gains for workers in those countries. The allowance of significant levels of production in non-signatory nations can lead to forms of "venue shopping" in which corporations can directly invest, or use indirect suppliers, operating in countries with weak labor standards. Low rule of origin levels encourage the exploitation of oftentimes deplorable working or environmental conditions in non-signatory nations.

The USTR should evaluate existing rules of origin and seek to apply stricter rules to guard against non-signatory country products being eligible for derivative benefits under the TTIP. These standards should specifically seek levels at or above those established in the North American Free Trade Agreement (NAFTA).

Conclusion

Recent history has shown that employers worldwide are accelerating their efforts to scour the globe to find the lowest cost locations to produce, unconcerned with the standards that may be undermined and the effect on working people whose jobs they are outsourcing and offshoring. The result has been the loss of millions of good, family-supporting jobs in the U.S.—many of them in the manufacturing sector but millions more in supporting industries. We must not allow the TTIP to jeopardize more American and European families through a poorly crafted agreement that only promotes more deregulation and downward pressure on wages and benefits. Prevailing wages, labor and other standards, privacy, and other critical interests may be at risk.

As always, the AFL-CIO will be unable to support any trade agreement unless it is well balanced, encourages the creation of good jobs, protects the rights and interests of working people, and promotes a healthy environment. We also note that to work, trade agreements must be fairly and consistently enforced. Further, trade agreements, without complementary policies such as infrastructure development, export promotion strategies, and active labor market policies, will not produce positive gains for workers.