

23 October 2013

H.E. Karel De Gucht  
Member of the European Commission  
BE-1049 Brussels  
BELGIUM

H.E. Michael Froman  
United States Trade Representative  
Washington, DC 20503  
USA

Dear Commissioner De Gucht and Ambassador Froman:

The U.S.-EU Transatlantic Trade and Investment Partnership (TTIP) negotiations present a unique opportunity to enhance the global protection of trade secrets. Trade secrets are becoming increasingly important in the transatlantic economy and are critical intangible assets to complement registered intellectual property (IP) rights.

Trade secrets are owned by many U.S. and EU companies, large and small, across a multitude of industries. Studies indicate that trade secrets can comprise up to 80 percent of the value of a company's information and know-how portfolio. Small businesses in particular rely on trade secrets to protect their innovations because they are less expensive to retain and enforce than patents. According to one estimate, publicly traded U.S. companies own some \$5 trillion worth of trade secrets.<sup>1</sup>

Despite their high value for companies, trade secrets remain highly vulnerable because they are often subject to much weaker legal protection when compared to other intangible assets. Once trade secrets are disclosed, their value cannot be recovered. Misappropriation of trade secrets has significantly increased due to greater workforce mobility, increasing global competitiveness, and the proliferation of digital devices that multiplies opportunities for cyber theft.

Indeed, a recent survey conducted for the European Commission demonstrates the increasing vulnerability of trade secrets. According to the survey, over the last 10 years, approximately one in five respondents experienced at least one attempt or act of misappropriation within EU countries and nearly 40 percent of respondents believe the risk has increased in the last decade.<sup>2</sup> With regard to the U.S., the head of the National Security Agency and U.S. Cyber Command, has estimated that American companies now lose \$250 billion per year due to theft.<sup>3</sup>

For many of the foregoing reasons, both the U.S. and EU are reviewing their respective trade secret laws. A coordinated approach through TTIP to develop a gold standard trade secret protection approach, and jointly promoting it globally, could significantly advance the worldwide protection of trade secrets.

In order to achieve this goal, we call on the U.S. and on the EU and its Member States to ensure that their respective trade secret laws contain the following core elements that make up a model and modern trade secret law relevant to the digital economy:

---

<sup>1</sup> John P. Hutchins, *The Corporation's Valuable Assets: IP Rights Under Sox*, 26th Annual Institute on Computer & Internet Law 289, 291.

<sup>2</sup> European Commission, *Study on Trade Secrets and Confidential Business Information in the Internal Market* (April 2013), 13, available at [http://ec.europa.eu/internal\\_market/iprenforcement/docs/20130711/final\\_study\\_en.pdf](http://ec.europa.eu/internal_market/iprenforcement/docs/20130711/final_study_en.pdf).

<sup>3</sup> Josh Rogin, *NSA Chief: Cybercrime Constitutes the "Greatest Transfer of Wealth in History"*, *The Cable*, July 9, 2012, available at [http://thecable.foreignpolicy.com/posts/2012/07/09/nsa\\_chief\\_cybercrime\\_constitutes\\_the\\_greatest\\_transfer\\_of\\_wealth\\_in\\_history](http://thecable.foreignpolicy.com/posts/2012/07/09/nsa_chief_cybercrime_constitutes_the_greatest_transfer_of_wealth_in_history).

- Expressly recognizes trade secrets as intellectual property in line with TRIPS Articles 1.2 and 39.
- Effective civil and, where appropriate, criminal enforcement and remedies for misappropriation of trade secrets (fines, penalties, compensatory damages, and/or imprisonment, as well as injunctive relief where necessary to prevent actual or threatened misappropriation).
- Jurisdiction over offenders who misappropriate trade secrets outside a particular jurisdiction (e.g., U.S. or EU) if it results in economic injury within the jurisdiction.
- Reasonable measures to preserve the confidentiality of trade secrets and other confidential information during civil or criminal proceedings (e.g., protective orders, in-camera hearings, or sealed filings or records).
- Rules and procedures regarding the production and protection of relevant evidence, and measures to prevent unnecessarily complicated, costly or time consuming procedures.

An agreement on the “gold standard” elements of legislation to protect trade secrets will ensure that relevant U.S. and EU laws reflect best practices for protecting trade secrets. Moreover, such an agreement will provide a model for other countries looking to strengthen their own trade secret laws. Indeed, we suggest that the U.S. and E.U. also commit to (i) promote enhanced trade secret protection to other governments; (ii) jointly issue a public report that evaluates existing trade secret laws in key jurisdictions; and (iii) continue ongoing collaborative efforts with each other and also other like minded governments to minimize cross-border misappropriation of trade secrets.

The inclusion of strong trade secrets protections, combined with a commitment to effective enforcement in the TTIP, would provide much needed protection for a critical intangible asset of vital importance to the innovation capabilities and competitiveness of U.S. and EU businesses in every sector of the transatlantic economy. Thus, our recommendations are also consistent with the mandate of the Final High Level Working Group (HLWG) Report to identify “policies and measures to increase U.S.-EU trade and investment to support mutually beneficial job creation, economic growth, and international competitiveness.”

We look forward to working with you to make progress through the TTIP on this important issue.

Sincerely,



Jay Timmons  
President and CEO  
National Association of  
Manufacturers



Tim Bennett  
Director General  
Transatlantic Business  
Council



Markus Beyrer  
Director General  
Business Europe