

TO: Office of the U.S. Trade Representative

FROM: Juliana Quattrocchi, Undergraduate Student, University of Nebraska-Lincoln

SUBJECT: Improving Public Consultation on Trade Executive Agreements through Transparency

DATE: January 24, 2023

Summary

The number of Trade Executive Agreements (TEAs) has risen sharply in recent years to more than twice the number of current free trade agreements on an annual basis, yet a third of these agreements have not been made available to Congress or the public. Because TEAs do not require congressional approval, the public has no formal opportunity for consultation on proposals or current TEAs, which reduces accountability and stakeholders' ability to make the Office of the U.S. Trade Representative (USTR) aware of their interests. Recommendation One is to create a public repository similar to Congress.gov with a form for public comment, which would increase public feedback but increase the timeframe for developing TEAs. Recommendation Two is to alter the Chief Transparency Officer role within USTR to be an individual's sole responsibility, opening the door for future reforms at the cost of allocating financial resources to pay for this position. Recommendation Three is to continue without a formal public consultation process on TEAs, which would maintain speed and flexibility of developing TEAs at the cost of any public consultation to optimize outcomes.

Background

Law professor Kathleen Claussen recently developed the term "Trade Executive Agreement" (TEA) to describe a type of agreement governing U.S. trade flows that is concluded by the executive branch. In the last thirty years, TEAs, also known as "mini-deals," have replaced regional trade agreements requiring congressional approval as the predominant form of new trade agreements. In 2020 alone, the United States entered into 32 TEAs¹ in comparison to the United States' 14 total free trade agreements over 37 years.² The contents of TEAs' range from customs arrangements to tomato storage requirements to import restrictions on archaeological material from Albania. TEAs provide executive agencies and offices, such as the Office of the U.S. Trade Representative and U.S. Department of Agriculture, the ability to make trade agreements addressing a narrow scope of trade with foreign trade partners without congressional approval. Congressional requirements for establishing free trade agreements under Trade Promotion Authority mandate the USTR to provide Congress regular updates on negotiations, receive feedback from members of Congress, and consult with individual members and committees.³ Through this congressional consultation and public outreach to stakeholders, the public has a voice in trade negotiations requiring congressional approval.

TEAs lack similar public consultation procedures. The 1972 Case-Zablocki Reporting Act requires most international agreements be transmitted to Congress within 60 days of their signing.⁴ A more stringent interpretation of the Act is that it requires TEAs to be submitted to the State Department and then reported to Congress. Competing interpretations of the Act and the State Department's

determination that some TEAs are non-binding in nature, has resulted in executive agreement texts being scattered across different databases⁵ with one-third not being available to Congress or the public.⁶ The Office of the USTR has begun to increase transparency and consultation through the creation of a Chief Transparency Officer role in 2015⁷ and the 2021 update to USTR's agency transparency principles,⁸ but more can be done to implement improvements to public consultation for TEAs.

Analysis

Problem

A lack of transparency is at the crux of the public consultation issue. The public is in the dark on what agreements have been made and their contents, and thus lack the ability to comment on TEAs. The total quantity and text of TEAs the United States has entered into remains unknown to the public with no dedicated opportunities for public consultation on TEAs. The mission of the Office of the USTR is to “create new opportunities and higher living standards for families, farmers, manufacturers, workers, consumers, and businesses.”⁹ Without public comment, negotiators are less equipped to balance opposing domestic interests among stakeholders identified in the USTR's mission, less able to identify unintended consequences, less democratic, and less accountable to specific objectives.¹⁰

There are no formal specific public consultation processes for TEAs within the USTR, although one of the duties of the Trade Advisory Committee system is to provide information on the implementation of U.S. trade policies broadly,¹¹ which could inform TEAs. TEAs are prized over agreements requiring congressional approval due to their flexibility, speed, and narrowness. TEAs allow negotiations to change course without public pressure to adopt certain provisions or sign an agreement since negotiations are generally not disclosed. The USTR also may act with relative speed to implement any TEAs since there is no need to request congressional approval after the agreement is signed or enact a period to collect public comments. Finally, TEAs enable narrow agreements to be reached on particular sectors rather than wide-reaching free trade agreements that are prone to a variety of sticking points. Any improvements to public consultation processes must be considered through the lens of their impact on the nimbleness of TEAs lest transparency efforts reduce their effectiveness. Additionally, the amount of labor required to implement changes must be examined as labor constraints are a current contributor to deficient record keeping and reporting.

Creation of a public repository of TEAs with a form for public comment

One option to increase public consultation is to create a user-friendly centralized repository of TEAs completed and in progress, similar to Congress.gov, with a form for public comment. Limited resources have prevented publication of TEAs from being a priority. A physical archival system has led to an estimated 20 percent of TEAs being lost by the USTR itself.¹² Non-classified TEAs would be scanned into an internal database upon receipt and an automated system would upload all to the public repository 30 days after being uploaded. Collecting documents in a centralized location with a forum for public comment would create the first and only formal

avenue for the public to comment on TEAs. To remove barriers to implementation, only TEAs enacted by the USTR would be collected in this repository.

Advantages

- New public access to trade developments enabling increased accountability and a wider audience to voice their concerns and suggestions to optimize outcomes
- Improved internal record keeping for current USTR operations and future historical research
- Pre-existing website infrastructure from Congress.gov: small implementation cost
- Increased percentage of TEAs reported because of reduced human follow-through responsibility

Disadvantages

- Reductions in flexibility when negotiating some TEAs due to public pressure
- Potential increase in timeframe to create a TEA due to incorporation of public comment concerns

Alteration to the Chief Transparency Officer role

A second option to increase public consultation is to transfer the role of Chief Transparency Officer to an individual with that role as their sole responsibility. Presently, the Chief Transparency Officer has especially limited time and resources as they balance that title with obligations of holding the role of General Counsel. While altering the Chief Transparency Officer role will not directly increase public consultation, this option facilitates future reform by re-allocating resources to increase transparency and increase implementation of existing transparency regimes.

Advantages

- Increased resources allocated to transparency to implement existing transparency regimes
- Flexibility to continuously improve upon public consultation through transparency as needs change over time
- Reduction in distractions from the General Counsel role

Disadvantages

- Financial cost of creating additional position
- Opportunity cost of alternative usages for the labor of an additional staff member
- Potential reduction in information flow to Chief Transparency Officer as they may not be as involved as a General Counsel in producing TEAs

Continue without formal public consultation on TEAs

A third option is a continuance of the status quo where there is no formal public consultation process for TEAs. There is no readily accessible documentation of the existence of a formal public consultation process for TEAs, which suggests public consultation is not a concern of the USTR on TEAs. However, USTR has informal channels to collect feedback on potential TEA topics, so it is not entirely without external input. TEAs have increased in relative popularity for a reason in an era of questioning the fundamental rules and institutions of international trade. Regardless of transparency, the ongoing development of TEAs nurtures the existence of trade relationships necessary as a starting point for new articulations of order.

Advantages

- Speedy timeframe to develop agreements on trade without needing to consult additional parties
- High level of flexibility in negotiating TEAs in the absence of public pressures
- No additional financial costs

Disadvantages

- Little oversight and accountability through lack of public knowledge
- Incomplete records of past TEAs the United States has entered

Recommendations

Recommendation One: Creation of a public repository of TEAs with a form for public comment

___ yes, the USTR should create a public repository of TEAs with a form for public comment

___ no, the USTR should not create a public repository of TEAs with a form for public comment

Recommendation Two: Alteration to the Chief Transparency Officer role

___ yes, the USTR should alter the Chief Transparency Officer Role

___ no, the USTR should not alter the Chief Transparency Officer Role

Recommendation Three: Continue without formal public consultation processes on TEAs

___ yes, the USTR should remain with the status quo and continue without formal public consultation processes on TEAs

___ no, the USTR should not remain with the status quo and continue without formal public consultation processes on TEAs

Notes

1. Kathleen Claussen, “Trade Deals Under the Radar,” interview by Jill O’Donnell, *Trade Matters*, Yeutter Institute, August 19, 2021, transcript, <https://yeutter-institute.unl.edu/trade-deals-under-radar>.
2. U.S. Customs and Border Patrol, “Side-by-Side Comparison of Free Trade Agreements and Selected Preferential Trade Legislation Programs, Non-Textiles,” August 30, 2021, https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/Side-by-Side_Comparison_of_Free_Trade_Agreements_and_Selected_Preferential_Trade_Legislation_Programs_0_0.pdf.
3. Office of the United States Trade Representative, *Guidelines for Consultation and Engagement Office of the United States Trade Representative*, October 27, 2015, (2-5).
4. Case-Zablocki Act of 1972, U.S Code 1 § 112b (1978).
5. Oona A. Hathaway, Curtis A. Bradley, and Jack L. Goldsmith, “The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis,” *Harvard Law Review* 134, no. 2 (2020). <https://harvardlawreview.org/wp-content/uploads/2020/11/134-Harv.-L.-Rev.-629.pdf>.
6. Claussen, “Trade Deals Under the Radar”.
7. Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26 (2015).
8. Office of the United States Trade Representative, *United States Trade Representative Transparency Principles*, May 2021, <https://ustr.gov/sites/default/files/files/about/USTRTTransparencyPrinciples.pdf>.
9. Office of the United States Trade Representative, “Mission of the USTR,” <https://ustr.gov/about-us/about-ustr>.
10. Delia Rodrigo and Pedro Andrés Amo, “Background Document on Public Consultation,” Organization for Economic Cooperation and Development, accessed December 4, 2022, <https://www.oecd.org/mena/governance/36785341.pdf>.
11. Office of the United States Trade Representative, “Advisory Committees,” <https://ustr.gov/about-us/advisory-committees>.
12. Kathleen Claussen, “Trade Transparency: A Call for Surfacing Unseen Deals,” *Columbia Law Review* 122, no. 1 (2022). <https://www.columbialawreview.org/content/trade-transparency-a-call-for-surfacing-unseen-deals/>.