


IMPROVING PUBLIC CONSULTATION ON TRADE EXECUTIVE AGREEMENTS (TEAs) THROUGH TRANSPARENCY

Introduction

 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. Consideration of methods to improve public consultation on TEAs is long overdue: transparency is the first step. Three options are of particular interest. Option 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. Option 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. Option 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 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 TEAs, in comparison to the United States’ 14 total free trade agreements over 37 years. 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. 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. 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 databases with one-third not being available to Congress or the public. The Office of the USTR has begun to increase transparency and consultation through the creation of a Chief Transparency Officer role in 2015 and the 2021 update to USTR’s

8

agency transparency principles, 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. Explorations of three potential approaches to public consultation is considered in the following sections.

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.

A public repository would bring three key advantages. First, new public access to trade developments would increase accountability and enable a wider audience to voice

their concerns and suggestions to optimize outcomes. Second, it would improve internal record keeping of current USTR operations and lay the foundation of documents for future historical research. Third, the percentage of completed TEAs reported would likely increase given lower human follow-through burdens. These advantages come at a relatively small implementation cost because the digital infrastructure for disclosure is pre-existing from Congress.gov.

Increasing transparency does tradeoff with some degree of flexibility in developing TEAs. Public awareness of pending TEAs may reduce flexibility in negotiations as stakeholders voice their opinions. TEAs may also see an increase in timeframe for completion due to the need to wait for a public comment period to elapse and potentially adjust draft TEA terms in response to feedback.

Alteration to the USTR 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.

Benefits of altering the Chief Transparency Officer Role primarily include increased personnel resources for public consultation. Increased resources for transparency could increase implementation of existing transparency regimes. This role

change would also enable the USTR the flexibility to continuously improve upon public consultation in response to changing needs overtime rather than forced adherence to a static regime stuck in time. Transferring transparency responsibilities to another individual would also reduce distracting burdens on the General Counsel to permit them to perform their role more efficiently.

Barring a commensurate budgetary increase, increasing resources to one objective will require cuts to funding for another trade program. Creating an additional personnel position comes at the cost of that individual's salary. There's also the opportunity cost of alternative uses for the marginal productivity of one additional staff member. Further, there's potential for a reduction in information flow to the Chief Transparency Officer as an independent position because they may not be directly involved in producing TEAs in the way that a General Counsel is.

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.

As mentioned in the background section, the current process enables relative flexibility in crafting TEAs. Without the need to consult additional parties, TEAs can be enacted as soon as deliberations reach a mutually beneficial conclusion between the relevant government delegations. The absence of public pressures for specific outcomes allows for creativity in identifying shared interests to be subjected to TEAs.

Current management of transparency practices has led to little oversight or accountability on a historic basis. Without public understanding of what agreements the U.S. is party to, it is impossible for members of industry or academia to determine which areas of trade require further attention and what means of improvement may consist of. Incomplete records of TEAs the U.S. has entered in the past make it difficult for new administrations to follow through on agreements that they are completely unaware of through no fault of their own. Lapses in enforcement of past TEAs degrades the credibility of American agreements and may hinder future TEA negotiations.

Conclusion

Current public consultation practices on TEAs fail to engage with the public in a meaningful way. Many TEAs that the US has entered into are kept out of public knowledge not because they pertain to classified material, but because of a lack of a concerted effort to publish them in a central location. The public cannot offer input on TEAs that they don't know exist.

Creation of a public repository of TEAs and a form for public comment, alteration to the USTR Chief Transparency Officer role, and continuance of current practices are all options worth examining. Yet, transparency regimes are only as good as their

enforcement. Real dedication to enacting reform is needed along with a plan. An ideal scenario would be public disclosure through a repository combined with an alteration to the Chief Transparency Officer role to foster compliance. A core duty of the USTR is to engage with stakeholders and increased transparency is critical to that end. Given the scope of uncertainty on TEAs, any move towards transparency is working in a better direction.

Notes

1. Kathleen Claussen, "Trade Deals Under the Radar," interview by Jill O'Donnell, *Trade Matters*, Yeutter Institute, August 19, 2021, transcript, <https://yeutter->
2. U.S. Customs and Border Patrol, "Side-by-Side Comparison of Free Trade Agreements and Selected Preferential Trade Legislation Programs, Non-Textiles," 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
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 <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,
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, <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 (20

<https://www.columbialawreview.org/content/trade-transparency-a-call-for-surfacing-unseen-deals/>.