

February 2017

# Practical Strategies for Improving Trade Policy Consultation

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*A case can be made . . . that secrecy is for losers, for people who don't realize how important information really is. Openness is now a singular, and singularly American, advantage.*

—Daniel Patrick Moynihan<sup>1</sup>

## Executive Summary

To improve the trade consultation process requires that both the cleared adviser system and public engagement be overhauled. The cleared adviser system must account for the diffusion of expert knowledge—within both firms and civil society—and trade negotiators will need access to this expertise to negotiate better deals. Public consultations should aim to restore public confidence in trade deals.

For the cleared adviser system:

1. The industry advisory committee system represents a valuable source of expert technical advice, but is in need of management attention, especially in chartering, membership, effective public representation, and operation. Each advisory committee should implement balanced membership requirements—including public interest groups, technical experts, small businesses, and broader industry representation—and should be equipped to consult with outside experts on specific issue areas where appropriate.
2. The U.S. Trade Representative (USTR) and Commerce Department should work with the U.S. International Trade Commission (ITC) to develop data-based assessments of trade flows and industry composition, and realign the membership and work programs of the advisory committees to reflect changes in who trades, what is traded, and how trade is managed.
3. Committees should produce regular work products beyond the required reports on completed trade agreements, such as an annual report on the effect of foreign trade barriers

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<sup>1</sup> Daniel Patrick Moynihan, *Secrecy: The American Experience* (New Haven, CT: Yale University Press, 1998).

for their sector. Committee chairs and designated federal officials (DFOs) should further operate committees in a way that builds trust between members and government officials.

For consultations with the public:

4. Officials should seek greater participation with the public on the substance of negotiations, and develop methods for more frequent and meaningful public input and feedback on negotiating objectives and texts, including through notice and comment methods and crowdsourcing tools. Model texts for key areas of negotiation, developed through an open public process, can play an important role.
5. Officials should work with negotiating partners to schedule the release of consolidated texts after negotiating rounds in a manner that does not undermine the ability of negotiators to bargain on tariff measures and quotas.
6. Third parties can advance the substance and process of negotiations, highlighting areas of agreement. Officials should improve their utilization, especially as a way of bridging differing viewpoints.
7. Executive branch officials should pay particular attention to new or emerging issues and should seek input from groups or individuals outside the advisory committee system with technical expertise on these issues.
8. Officials should seek out and adopt innovative digital tools for increasing public engagement, including Internet-based methods for crowdsourcing ideas and feedback, based on the experience of other government agencies and the private sector.

## Introduction

How the U.S. government develops and carries out international trade and investment policy has recently become a topic of increasing public attention. Overall, the scope of these activities is very broad, reflecting the diffusion of power inherent in our federal system as well as the diverse interests and views of the 300-plus million citizens our elected officials represent. The Constitution assigns responsibility and authority for these matters to both the Congress (to regulate foreign commerce) and the president (to make treaties with foreign powers). These principal decisionmakers are supported by an array of formal and informal advisers, as well as subsidiary decisionmakers at the levels of state and local government.

## Scope

This report makes recommendations on a relatively narrow question: how can the executive branch improve its processes for soliciting and responding to input from the public regarding trade policy and negotiations? In our view, improved consultations would raise the quality of the resulting

agreements and their contributions to economic growth. Also, better consultation would likely increase public confidence in the outcome of negotiations.

Two other channels of trade policy consultation are vital but beyond the scope of this report. First and foremost, the interaction between Congress and the executive branch is where almost all significant policy is made. The debate over “trade promotion authority,” most recently in 2015, is a reminder of the structural tension between the two coequal branches and their own individual political dynamics.<sup>2</sup> Yet this very public process reflects the increasing interest of a diverse set of actors. Congress not only sets negotiating objectives and determines whether agreements negotiated by the president are implemented, but also conducts oversight on an ongoing basis. The second channel for consultations not considered here is the “interagency” process within the executive branch. Trade and investment policy is carried out through a wide range of departments and agencies, each of which has specific responsibilities and domestic authority for implementing trade agreements. Successful trade policies are a product of effective consultations with the Congress, executive agencies, and the public.

## Methods

This report makes recommendations based upon a series of interviews with people involved in U.S. trade policy and negotiations. We conducted a series of roundtable discussions with experts as well as one-on-one interviews. Participants included current and former executive branch officials, congressional staff members, academics, and individuals engaged in trade policy from business, labor unions, law firms, and nongovernmental organizations (NGOs). In total, over 75 people participated in the process. Since we promised confidentiality to the participants, we will not associate recommendations with any individual or group. The conclusions reached are those of the writers, and are offered on that basis.

## Public Consultation and the Advisory System

The executive branch solicits information through a variety of means. Congress, in order to ensure that trade policy and negotiations adequately reflect U.S. commercial interests and to formalize private-sector input, created an official advisory committee system. This statutory system (Section 135 of the Trade Act of 1974) was originally intended to provide private-sector input to the global trade negotiations occurring at the time (the General Agreement on Tariffs and Trade, or GATT, Tokyo Round), but has subsequently been modified to expand the scope of topics on which the executive branch is required to seek information and advice. Advisory committees are required to provide reports on the trade agreements pursued, a requirement reauthorized in the Trade Priorities Act of 2015. Trade advisory committees are subject to the Federal Advisory Committee Act (FACA), including the requirement that committees be “fairly balanced in terms of points of view represented and functions the committees perform.”

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<sup>2</sup> Bipartisan Congressional Trade and Priorities Act of 2015, 114th Congress, Public Law 114-26, June 2015.

Led by the office of the U.S. Trade Representative (USTR), four federal agencies administer a three-tiered committee system. USTR directly operates the first-tier, overall policy committee, the Advisory Committee on Trade Policy and Negotiations (ACTPN), as well as three of the second-tier committees on Africa, intergovernmental affairs, and environmental policy. The Department of Labor coadministers (with USTR) the labor advisory committee (LAC), while the Department of Agriculture (USDA) coadministers the agricultural policy committee. For the third tier, the Commerce Department coadministers 16 industry committees (known as Industry Trade Advisory Committees, or ITACs) and USDA coadministers four technical committees (known as Agricultural Technical Advisory Committees, or ATACs). These 28 committees can potentially include over 1,000 members, with appointments cleared by both USTR and the relevant coresponsible agency.<sup>3</sup>

The views of the broader public on trade policy matters are invited in a number of ways. The executive branch formally solicits public input on major issues before, during, and after negotiations. Similarly, congressional committees hold hearings, invite witnesses, and solicit written comments on major trade policy issues. Beyond the formal process, both the executive and legislative branches are constantly provided with unsolicited, formal and informal advice from interested parties. Individuals and groups make their views known to elected representatives as well as trade officials as a matter of course. Ultimately, elected representatives must defend their records before the voters.

## The Backdrop: Changes in Technology, Policy, and Society

During the course of interviews, a central theme about technological progress emerged: specifically, that the policy consultation arrangements created in the twentieth century were insufficient to manage twenty-first-century issues and problems. Moreover, several of the solutions with the most promise for improving the trade consultations process, such as crowdsourcing, have been made possible because of technological advancement.

Interviewees identified several underlying changes (mainly propelled by technological progress) that increased the difficulty and complexity of effective consultations with the public. In general, these backdrop issues can be summarized in four categories.

1. *The Information and Communications Technology (ICT) Revolution.* Prior to the 1990s, information flows of all sorts were relatively expensive. Martin Gurri and others have observed that, under conditions of scarcity, sources of information tend to be authoritative.<sup>4</sup> Today, the marginal cost of transmitting and disseminating information approaches zero, and nearly anyone can communicate with millions of people, instantly. One consequence is that the number of partial answers to any question has become very large—an assertion that can be confirmed by an Internet search of almost any question. The expansion of “partial answers” increases uncertainty, which can be corrosive to authority and common culture,

<sup>3</sup> U.S. General Accounting Office (GAO), *International Trade: Advisory Committee System Should Be Updated to Better Serve U.S. Policy Needs*, Report to the Ranking Minority Member, Committee on Finance, U.S. Senate (GAO-02-876), September 2002, <http://www.gao.gov/new.items/d02876.pdf>.

<sup>4</sup> Martin Gurri, *The Revolt of the Public and the Crisis of Authority in the New Millennium* (Seattle, WA: Amazon Digital Services, 2014).

but also creates an information environment with fewer passive recipients and, instead, more networks of groups sharing an interest, theme, or point of view. As a result, it becomes necessary to cast a wider net when one seeks to gain input from these diverse and often antagonistic sources of information.<sup>5</sup>

2. *"Globalization 2.0" and Its Policy Implications.* The ICT revolution has had a large impact on international trade flows and policy interests. Richard Baldwin describes how the radical reduction of coordination costs resulting from advances in ICT have influenced trade flows to an extent not seen since the Industrial Revolution, when steam power allowed for large-scale production and reduced the costs of moving goods (Globalization 1.0).<sup>6</sup> Today's ability to coordinate and direct specific tasks at a long distance at low cost has further changed trade flows. Exchange of finished goods evolved into "trade in tasks," also described as "value chains." What were once intra-plant or inter-plant (but domestic) transfers became international trade. Industrial economies (whose firms had unique technical "know-how") became interested in protecting knowledge, while developing economies (whose firms could offer cost advantages as value chain partners) worked to reduce border costs, usually by negotiating free-trade agreements with neighbors. Meanwhile, due to the growth of the global Internet, the costs of participating in trade were radically reduced, allowing small businesses and individuals to market and sell to increasingly global audiences. As trade flows changed, so did the interests of traders.
3. *Deep-Integration "Trade" Agreements.* The new conditions of Globalization 2.0 influenced the scope and comprehensiveness of trade agreements. Unlike earlier trade agreements, the new model of deep-integration FTAs began to reflect the fact that technology was allowing trade to occur in sectors (like the delivery of many services) that had not previously been covered, while adding interest in entirely new activities (like cross-border data flows). From the standpoint of policy consultation, this change brought along new difficulties. Trade agreements began reaching much more deeply into domestic regulation, and from the standpoint of the U.S. government, reached areas of jurisdiction not previously engaged in international policy. Further, the added complexity of agreements posed a challenge to policy experts in both the legislative and executive branch.
4. *Dispersion of Knowledge within Firms and Industries.* Globalization 2.0 has influenced the strategy and structure of firms engaged in international commerce. Conditions generally have favored greater specialization within firms internally. The increasingly complex network of trade agreements has further encouraged firms to move managerial oversight from operations executives into compliance functions, thereby changing where firm expertise resides. Further, in some of the most technologically advanced firms, managers who understand the technologies and their application may be removed from those who understand public policy and regulation. An advisory system organized by industry and which

<sup>5</sup> See *Associated Press v. United States*, 326 U.S. 1 (1945).

<sup>6</sup> Richard Baldwin, *The Great Convergence: Information Technology and the New Globalization* (Cambridge, MA: Harvard University Press, 2016).

limits participation to one person per firm may not give negotiators access to the full array of problems and potential solutions.

On the whole, these underlying changes present a challenge to officials seeking good policy advice and transparent public processes. As one individual put it, “these aren’t your Father’s trade agreements; we shouldn’t expect your Father’s advisory arrangements to suffice.”

## Criticism from Civil Society

In the mid-1600s, Cardinal Richelieu wrote that “secrecy is the first essential in affairs of state.” State affairs in the twenty-first century, however, are quite different. The ICT revolution has altered patterns of information consumption and expectations of transparency in both liberal and illiberal societies.

Neither the United States nor the business of trade negotiations has been excepted from this change.<sup>7</sup> Civil society’s expectation of more consultation and input have led to growing discomfort with the confidentiality of trade negotiations.<sup>8</sup> An irony of this discomfort is that secrecy in negotiations is—in the view of several experts<sup>9</sup>—maintained not to get the “best deal” so much as to prevent pressure on negotiations from interest groups.

Trade negotiations typically follow a model known in systems theory terms as a “black box.” In a “black box,” inputs and outputs are observable, but the operations of the system are opaque. This model, regardless of its practical merits, has become subject to the same challenge to authority as other aspects of modern communications. While information “leaks” have been an element of diplomatic intrigue for many years, the ability to disseminate information to a large audience at low cost changes the situation. The increasing technical difficulty of maintaining secrecy greatly amplifies the potential damage of leaked texts or misinformation, as was the case when WikiLeaks posted what they claimed was the full Trans-Pacific Partnership (TPP) investment chapter in March 2015.<sup>10</sup> David Levine, commenting on the 2008–2011 negotiations of the Anti-Counterfeiting Trade Agreement, wrote that “[t]he failure of USTR to maintain the black box, you’ll find out when it’s done method of lawmaking has proven its weakness as a lawmaking modality. Real-time disclosure of information is expected and key to a deliberative democracy.”<sup>11</sup>

<sup>7</sup> Lydia DePillis, “The catch-22 of trade deals done in secret,” *Washington Post*, May 15, 2015, [https://www.washingtonpost.com/news/wonk/wp/2015/05/15/the-catch-22-of-trade-deals-done-in-secret/?utm\\_term=.0bb40408db2d](https://www.washingtonpost.com/news/wonk/wp/2015/05/15/the-catch-22-of-trade-deals-done-in-secret/?utm_term=.0bb40408db2d).

<sup>8</sup> Electronic Frontier Foundation, “Brussels Declaration on Trade and the Internet,” March 15, 2016, [https://www.eff.org/files/2016/03/15/brussels\\_declaration.pdf](https://www.eff.org/files/2016/03/15/brussels_declaration.pdf).

<sup>9</sup> Michael Colaresi and Nathan Jensen, “Do trade negotiations have to be done in secret? Here’s what experts think,” *Washington Post*, September 24, 2015, [https://www.washingtonpost.com/news/monkey-cage/wp/2015/09/24/do-trade-negotiations-have-to-be-done-in-secret-heres-what-experts-think/?utm\\_term=.2d9da5d8f539](https://www.washingtonpost.com/news/monkey-cage/wp/2015/09/24/do-trade-negotiations-have-to-be-done-in-secret-heres-what-experts-think/?utm_term=.2d9da5d8f539).

<sup>10</sup> Jonathan Weisman, “Trans-Pacific Partnership Seen as Door for Foreign Suits against U.S.,” *New York Times*, March 25, 2015, <https://www.nytimes.com/2015/03/26/business/trans-pacific-partnership-seen-as-door-for-foreign-suits-against-us.html?ref=business&r=2>.

<sup>11</sup> David Levine, “Transparency Soup: The ACTA Negotiating Process and ‘Black Box’ Lawmaking,” *American University International Law Review* 26, no. 3 (2011), <http://digitalcommons.wcl.american.edu/cgi/>



Efforts by both the USTR and civil society organizations to improve consultations through changes to the composition of advisory committees have had mixed results. In large part, this reflects the origins of the advisory system, including statutory criteria that are fairly rigid—for instance, academic institutions do not qualify for ITAC membership unless they are “trading in educational services.”<sup>12</sup> In February 2014, the USTR posted to regulations.gov a notice asking for comments and nominations for membership for a “Public Interest Trade Advisory Committee.”<sup>13</sup> The notice attracted attention from a number of organizations, ranging from Harvard’s Berkman Klein Center<sup>14</sup> to the Association for Computing Machinery.<sup>15</sup> The committee has yet to be formed.<sup>16</sup>

## Balancing Public Engagement and Effective Negotiation

A central process criticism of trade agreements is the fact that negotiations take place in the “black box.” Based on our interviews, we conclude that it can be useful to distinguish between the development of trade policy and negotiation priorities—“what” an agreement is trying to accomplish—and the modalities of the negotiation itself—“how” those policies are implemented. However, this distinction is not a perfect one: when a negotiation takes place over several years and involves many negotiating partners and negotiating rounds, or involves new and fast-changing issues, the substance of what is being negotiated evolves over time, sometimes quite significantly. The remainder of this report seeks to balance respect for the current model of negotiations with recommendations for improving public engagement and expert input into the development of trade agreements.

Throughout U.S. history, agreements with foreign sovereigns have, for the most part, been negotiated in private but ratified in public. Treaties arrived at by the executive are subject to the advice and consent of the Senate; other agreements that require a change to U.S. law are not “self-executing,” but instead require Congress to pass an implementing bill that then is signed by the president.

In the United States, trade negotiations proceed under authority provided by the Congress, where elected officials develop broad negotiating objectives in public. Congress holds public hearings, and individual members listen to and respond to constituents. Bills like the Trade Priorities Act of 2015 are debated in committees and then on the floor of the House and Senate. The final result of a trade negotiation eventually becomes law in public, with Congress requiring that complete texts be publicly available prior to consideration. With regard to “how” negotiators achieve these objectives in

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viewcontent.cgi?article=1714&context=auilr.

<sup>12</sup> Sean Flynn, “USTR Industry Trade Advisory Committees Closed to Public Interest Researchers,” *InfoJustice* (blog), March 26, 2014, <http://infojustice.org/archives/32540>.

<sup>13</sup> “Public Interest Trade Advisory Committee: Comments and Nominations for Membership,” Regulations.gov, February 25, 2014, <https://www.regulations.gov/docket?D=USTR-2014-0005>.

<sup>14</sup> Global Access in Action, “Global Access in Action Submits Comments to the Office of the U.S. Trade Representative Regarding PITAC,” March 27, 2014, <https://cyber.harvard.edu/node/95684>.

<sup>15</sup> “ACM U.S. Public Policy Council,” Regulations.gov, March 25, 2014, <https://www.regulations.gov/document?D=USTR-2014-0005-0009>.

<sup>16</sup> “A Year after Unveiling, ‘PITAC’ Stalled Due to Fight over Secrecy Rules,” *Inside U.S. Trade*, February 26, 2015, <https://insidetrade.com/inside-us-trade/year-after-unveiling-pitac-stalled-due-fight-over-secrecy-rules>.

an agreement with a trading partner, the starting point is usually a past agreement covering the same subject, which is also public. Trade officials often “table” the text of a previous agreement, using brackets to indicate areas where the parties do not yet agree, as a convenient way to begin discussions. In other cases, officials rely on a “model” text that translates policy objectives into a set of neutral rules that, if implemented, would achieve the policy. Further, the executive branch may issue policy statements relevant to establishing the purpose and desired outcomes of a negotiation. A remaining challenge is how the new issues that arise in negotiations are identified, framed, and implemented.

The process of negotiation takes place in a confidential setting both because officials are required by law to do so and because it represents a proven method for successful bargaining. Contract negotiations of all sorts follow this practice, and the method succeeds in part because the confidential setting allows parties to test creative ways to resolve points of difference. Congress has established an elaborate structure for advice and consultations from “cleared advisers” along with members of Congress during negotiations. The intent is to provide negotiators with access to expert advice while maintaining the needed confidentiality of the process with foreign parties.

At the end of negotiations, all agreements are subject to public review and comment prior to their consideration by Congress. The final step of developing and passing an implementing bill is likewise a public process.

Respondents noted that this framework—policy debates in public, negotiations in private but with access to confidential advice—can sometimes function well in areas of settled policy like agriculture exports, or where policy development was explicitly a public process, for instance the model text for investment. The practice works less well in fast-changing or relatively new areas of coverage, such as digital trade or disciplines covering state-owned enterprises. Even in traditional areas of coverage, the practice of shielding consolidated texts from public view can damage public trust in how these issues are being addressed, particularly when texts evolve and accrete new meanings over dozens of negotiation rounds. Further, policy disputes left unresolved can easily carry over into negotiations. Given the complexity of trade agreements and the diversity of opinion, some of these tensions may be unavoidable, but many respondents agreed that it is incumbent on those who support trade to search for new strategies to shore up public trust and participation in this process.

## A New Model for Consultations

Our interviews had no intention of producing a consensus view, but most respondents expressed interest in finding ways to broaden public participation in trade policy and open debate on proposals in ways that can both improve the policies as well as build public trust. Respondents generally viewed the system of “cleared advisers” as in need of management attention but, by its nature, limited in scope, making it a supplement to other inputs to policy. While this report will recommend some specific ways to improve the system of “cleared advisers,” most respondents agreed it was more important to improve participation and involvement of the public in ways that utilize new technologies and ultimately reflect broader interests. The same technological changes that have



complicated trade policy can be applied constructively to achieve a greater degree of openness and participation.

## Improving Consultations with Cleared Advisers

Respondents identified some important strengths of the advisory committee system as a source of expert advice to policymakers and negotiators. Yet, consistent with reviews by the U.S. Government Accountability Office (GAO) and testimony to Congress, the system's effectiveness has been reduced over time due to inattentive management, unaddressed changes in the economy, committee composition, and the natural limitations of the statutory design.

GAO reviews of 2002,<sup>17</sup> 2007,<sup>18</sup> and 2009<sup>19</sup> documented a number of ongoing problems in the administration of the cleared adviser system, including frequent lapses in committee charters, delays in new appointments, and other logistics issues. Respondents noted that committees with a strong chair and a strong designated federal officer (DFO) functioned reasonably well, but that good administration was too idiosyncratic. Along with more disciplined management, respondents observed that expanding the work program of committees would likely improve their relevance and incentivize better management. Specifically, the only requirement of an advisory committee is to report on the operation and effects of a concluded trade agreement. Since the lapse of Trade Promotion Authority in 2007, only one agreement requiring a report has been concluded—the TPP in 2015. Even with the best of intentions, it is difficult to administer a system in which committees have essentially no required work products for more than seven years. One creative idea would be to require that each committee prepare an annual report on the operation of trade agreements in their sector, including a priority list of foreign trade barriers. This report could be produced as an input to the USTR's annual National Trade Estimate or other required government report. Overall, focused, consistent engagement would help build trust between committee members and officials, which would increase the likelihood that negotiators have access to experts at critical points in a negotiation.

The U.S. economy and its economic engagement with the world are changing rapidly. Yet the advisory system has no built-in mechanism to respond to these changes. Over time, the committees become gradually misaligned with the interests and concerns of firms and individuals. The GAO<sup>20</sup> noted that representation in the services sector had not kept pace with its growing importance to the U.S. economy, and that committee structures have not fully aligned with the shifts in policy focus from tariffs and other border measures to complex "behind the border" issues like product safety or intellectual property. As an illustration, the U.S. International Trade Commission (ITC)

<sup>17</sup> GAO, *International Trade: Advisory Committee System Should Be Updated to Better Serve U.S. Policy Needs*.

<sup>18</sup> GAO, *International Trade: An Analysis of Free Trade Agreements and Congressional and Private Sector Consultations under Trade Promotion Authority*, Report to the Chairman, Committee on Finance, U.S. Senate (GAO-08-59), November 2007, <http://www.gao.gov/new.items/d0859.pdf>.

<sup>19</sup> Loren Yager, *International Trade: Prior Updates of the Trade Advisory System Offer Insights for Current Review*, Statement before the Subcommittee on Trade, Committee on Ways and Means, House of Representatives (GAO 09-842T), July 2009, <http://www.gao.gov/assets/130/123085.pdf>.

<sup>20</sup> Ibid.

reported that in 2011, U.S. exports of digital services (by value) exceeded total U.S. agricultural exports.<sup>21</sup> Yet just one ITAC (ITAC 8) had three advisers (out of 19 members) whose firms were engaged in digital services exports while agriculture exporters were represented on five committees—a policy committee (APAC) and four technical committees (ATACs).

Respondents observed that in some instances agency leadership has found ways to respond. In 2004, the need for access to experts on investment policy led to the creation of an Investment Working Group that drew members from a cross-section of ITACs. In 2016, Commerce Secretary Penny Pritzker formed a Digital Economy Board of Advisors to ensure private-sector input and support for the department's agenda. We recommend that the USTR and the Commerce Department work with the ITC to develop a data-based evaluation of trade flows and affected industries at regular intervals, and then work with the ITAC Committee of Chairs to realign membership and work programs of the committees. Improved alignment could be achieved by changing committee charters, or adding new members from specific industries, or by requesting specific committees work together on cross-cutting issues. Today, ITACs average 19 members each, less than half of the Federal Advisory Committee Act (FACA) limit of 50, indicating that adding new members may be the simplest route to improved alignment.

Committee composition has been a longstanding issue of concern for the ITACs. Many “industry groups” incorporate diverse and divergent interests, including both globally engaged firms and sectors along with import-competing industries. Maintaining member expertise in fast-changing industries can be a particular problem. Further, over the past 15 years, committees have attempted to balance the representation of business and nonbusiness interests, leaving almost no one satisfied with the results. While there have been improvements made to committee structure and staffing, it will require sustained effort by officials and advisers to make the system function effectively.

Like many institutional arrangements, the advisory committee system retains characteristics of its creation in 1974, and the structure can be resistant to adaptation. A number of respondents recognized that the committees have some clear limitations in today's economy. Members must be affiliated with a “U.S. interest” despite the increasing irrelevance of firm “nationality” in U.S. employment or trade flows. Companies are limited to a single representative on any one committee, no matter how dispersed knowledge within firms has become. Committees still rely heavily on in-person meetings in Washington. These and other challenges led our respondents to conclude it may be best to “let ITACs be ITACs,” recognizing that they can be a valuable asset to trade officials (especially by being an avenue for confidential advice during a trade negotiation) but at the same time acknowledging their limitations and working to ensure more broad-based representation.

## Improving Consultations with the Public

Advances in communication technology offer new avenues for public engagement across government functions. Traditional forms of political participation may be in decline, yet the

<sup>21</sup> U.S. International Trade Commission, “Digital Trade in the U.S. and Global Economies, Part 1,” USITC Publication 4415 (Investigation No. 332-531), July 2013.

expectations for public input are increasing. As part of the Trade Priorities Act of 2015, Congress directed the administration to develop and maintain written guidelines on public access to information, and to appoint a “chief transparency officer” to consult with Congress on transparency policy, coordinate transparency in trade negotiations, engage and assist the public, and advise the USTR on transparency policy. The increasing depth and complexity of trade agreements, along with the limitations of the cleared adviser system, makes it essential for trade officials to improve their access to opinion and advice on trade matters.

Pursuant to the instructions of Congress, the USTR published “guidelines for consultation and engagement” in October 2015. The guidelines describe in some detail the ways in which the administration planned to improve consultations with Congress, cleared advisers, and the public.<sup>22</sup> Respondents considered the guidelines a useful starting point, but the section on “facilitating public transparency” focuses mainly on communication from the agency to the public. For instance, the section on “encouraging public participation” outlines use of Federal Register notices and public hearings, which are proven techniques but are likely to be viewed as inadequate by a public accustomed to new, Internet-based methods of interaction and familiar with social media as a driver of public communication.

Our respondents believe the administration can improve actual and perceived transparency by engaging in modern techniques known generally as “crowdsourcing.” Crowdsourcing is a model for acquiring and using contributions from (primarily) Internet users. This concept existed well before the Internet: for example, the British government sponsored the Longitude Prize in 1714, which offered a monetary prize to the person who devised the best method for measuring a ship’s longitudinal position. Today, there are many instances of crowdsourcing applied to public policy matters, including efforts like the White House Open Government initiative, begun in 2009.

Crowdsourcing is effective in part because it draws upon the diverse experience and knowledge of a large, heterogeneous audience.<sup>23</sup> There are numerous applications of this tool outside of government. For instance, news outlets routinely use crowdsourcing, and some platforms like ProPublica make it a core business practice. Branded-goods marketers make extensive use of social media for crowdsourcing, including well-known examples like PepsiCo’s use of crowdsourced Super Bowl commercials for its Doritos and PepsiMAX brands.<sup>24</sup>

An effective program of crowdsourcing, like any successful communications endeavor, flows from a strategy. Best practices include a clear purpose and scope for the initiative, as well as a plan for active engagement with respondents. Many tools for managing crowdsourcing have been developed, including software solutions like Screendoor (created to help government agencies manage RFPs, but adapted for crowdsourcing applications) and web-based collaboration software

<sup>22</sup> Office of the U.S. Trade Representative, “Guidelines for Consultation and Engagement,” October 2015.

<sup>23</sup> Tanja Aitamurto, *Crowdsourcing for Democracy: A New Era in Policy-Making* (Helsinki: Committee for the Future, Parliament of Finland, January 2012), [http://thefinnishexperiment.com/wp-content/uploads/2015/02/Crowdsourcing\\_for\\_DemocracyF\\_www.pdf](http://thefinnishexperiment.com/wp-content/uploads/2015/02/Crowdsourcing_for_DemocracyF_www.pdf).

<sup>24</sup> E.J. Schultz, “How ‘Crash the Super Bowl’ Changed Advertising,” *Advertising Age*, January 4, 2016, <http://adage.com/article/special-report-super-bowl/crash-super-bowl-changed-advertising/301966/>.

such as the products of Salesforce.com. In the context of a trade agreement, crowdsourcing could involve putting a proposed text onto a website—like medium.com or genius.com—that allows user comments and annotations, and encouraging members of the public to highlight helpful or problematic provisions and suggest alternative language where appropriate. Crowdsourcing could also allow for broader input from the public on how the USTR can structure its public consultation methods (including whether or not crowdsourcing is a viable option).

Respondents also agreed that a key step in implementing a strategy of greater public engagement is to separate policy development from negotiations—focus on the “what” first, then the “how.” The process to develop the 2012 Model Bilateral Investment Treaty (BIT) is a recent proven model of using a public process to manage input to a contentious, complex aspect of international economic policy separate from the negotiating process. Also, the USTR Office of African Affairs used a broad-based process of public engagement for its “Beyond AGOA [Africa Growth and Opportunity Act]” policy initiative in 2015 and 2016. For key areas of upcoming negotiation, officials can draw lessons from these processes and undertake a transparent, open process to develop a model text that can be the default position across negotiations.

Notice and comment-style processes represent another form of crowdsourcing, if implemented properly. For example, rather than simply providing a general notice in the Federal Register of intent to enter into negotiations, trade officials can issue a notice describing potential negotiating objectives in detail (including proposed text, where appropriate) and solicit public comments and replies on negotiating objectives as well as the text itself. In resolving this input, officials should explain why changes proposed by the public should or should not be adopted.

Respondents generally believed that empowering third parties can also improve the substance and process of negotiations. When evaluating policy alternatives for new or fast-moving aspects of commerce (such as digital trade), engaged firms and sectors may have differing priorities or competing interests. In these circumstances, third parties such as business associations or other NGOs can work independently to resolve differences and agree upon common principles. For example, the 2011 working paper from the National Foreign Trade Council on cross-border data flows was useful to negotiators because it resolved differences between content producers and Internet service providers, as well as representing the views of a broad cross-section of firms engaged in digital trade.<sup>25</sup> Ad hoc coalitions can also effectively support trade policy and negotiations. The 2016 agreement to expand coverage and scope of the 1996 World Trade Organization (WTO) Information Technology Agreement (ITA) by 82 economies representing 97 percent of world trade in the covered goods was assisted throughout the four-plus years of negotiations by an independent, ad hoc coalition of interested firms and associations.

Finally, to resolve some of the public uncertainty inherent to protracted negotiations, and to ensure that expert views continue to be represented as a text evolves, it may often be useful to release consolidated texts and negotiating summaries that highlight areas where parties have not yet reached consensus and where additional public input may be helpful. Of course, any release of

<sup>25</sup> National Foreign Trade Council, “Promoting Cross-Border Data Flows: Priorities for the Business Community,” 2011.

consolidated texts prior to the conclusion of negotiations would need to be done without undermining confidentiality in the negotiating process and the ability for parties to have sensitive back-and-forth discussions, but such a determination can be worked out in advance among the parties.

## Conclusions

Cooperation between the executive, experts and practitioners, Congress, and the public is an essential component of an effective trade policy. Technological progress has changed trade flows and interests as certainly as it has changed the way we communicate and interact with officials on policy matters. It is essential that officials embrace the potential for new methods of public engagement to achieve better policy outcomes along with improvements in public support.

## Conference Proceedings

On January 26, 2017, CSIS held an afternoon conference to present findings from the project to the public. A draft of this document was released publicly as a working paper, and several experts on trade negotiation presented their views on both the paper and the issues discussed within. The experts who spoke were Ambassador Peter Allgeier, former deputy U.S. trade representative; Steve Lamar, executive vice president, American Apparel and Footwear Association; Andrea Durkin, principal, Sparkplug LLC and adjunct assistant professor, Georgetown University; Nicholas Bramble, public policy manager for trade and international relations, Google; and David Levine, associate professor of law, Elon University, and affiliate scholar, Stanford University Center for Internet and Society.

Ambassador Allgeier delivered opening remarks on the topic of what kind of advice trade negotiators need and when they need it. Good negotiations need to consider four things:

1. *The negotiators need to have clarity from the beginning on what they are trying to achieve.* To accomplish this, look back at the most recent negotiation resembling the one now underway, as it will be the closest in terms of issues now affecting the economy. Another way to accomplish this is to look at a model agreement, such as the Model Bilateral Investment Treaty (BIT). What are the specific problems that we will face with a given trading partner? The issues in consideration with a Latin American trading partner will not be the same as those with an Asian trading partner. What new issues have come along? For example, TPP negotiators had to look at digital issues in a way not needed in previous agreements.
2. *A clear understanding of tensions and competing/conflicting interests within the United States itself.* Pharmaceuticals are an example of this. The pharmaceutical industry wants strong protections for patents and test data, which conflicts with concerns over access to medicine. Solving these debates requires access to reliable information from both sides, as they quickly become politicized—evidenced in the case of investor state dispute settlement (ISDS).
3. *Timely access to technical advice down to the level of text during negotiations.* Today's trade issues are much more complicated than tariff schedules. Evaluating the impact of specific language on complicated issues requires expertise. Many issues are so complex that even cleared advisers need access to experts within their companies or fields. Better yet would be to give negotiators direct access to experts, respecting confidentiality. As negotiations go forward, and modifications occur to accommodate other countries, negotiators need technical advice at the text level. Partner countries present their preferred solutions, which may or may not solve the initial problem.
4. *Periodic checks for political viability.* It is vital that negotiators understand what the real priorities are. Honesty and reliability in consultations are important here.



Ambassador Allgeier also addressed the issue of whether texts should be made public. Total confidentiality used to be the model. Confidentiality matters because negotiators need the ability to explore alternatives and creatively test new solutions, and especially during end-stage negotiations when a party makes concessions in one area in return for partner concessions in another. One possible way to balance confidentiality with transparency is to make the initial proposals of all negotiating partners public.

Four panelists made comments on the draft report.

Steve Lamar

- Advisory committees like ITACs are *not* a replacement for public consultation. Rather, they are a good validator for public consultation.
- If structured properly, these bodies are full of experts. The collective understands issues collectively. This allows a space for government negotiators to tap in to expertise on a trusted, confidential basis. This process resembles that of academic peer review.
- Consultations with advisers fill an important role, forcing negotiators to periodically come back to experts with in-process updates. Making committees do more, write more, and engage more publicly would help.
- Secrecy breeds suspicion: even if negotiators are doing amazing things behind closed doors, the lack of public engagement feeds skepticism and concern. Regular public engagement and publication from committees can show the public that lots of people from diverse interests are working on these issues. This can increase public confidence.
- Advisory committees are not just about trade agreements. Committees can provide advice and lend expertise to a whole host of issues, and can provide a service by engaging the public.
- Advisory committees should reflect the real economy. It is good that small businesses can be represented, but problematic that a foreign company employing more U.S. workers than those businesses cannot. Committees should reflect the open economy.

Andrea Durkin

- In general terms, the public is uninterested and disengaged from trade and trade agreements. This is important, because without public engagement, the public loses confidence. As a negotiator, this constrains policy choices. The best way to reduce fighting on the back end of the process is to engage at the front end.
- Negotiators cannot know what their best policy choices are if they are not engaged with the public. How do you know whether it makes more sense to do a deal with Japan versus renegotiate the North American Free Trade Agreement (NAFTA)?

- Business moves faster than trade negotiations. Trade negotiations follow business, not the other way around. It is important for negotiators to talk to businesses not just to know where they are now, but to know where they are headed. Good trade policy should seek to get ahead of problems rather than wait for them to arise.
- Crowdsourcing, along with big data and predictive tools, could help identify trends to inform the future of trade policy.
- Negotiators should approach ITACs with questions, not briefings. Good negotiators build trust with advisers, which pays off when they need real-time advice.

Nick Bramble

- Groups across the political spectrum are looking for new ways to improve trade consultation.
- The public criticism directed at trade agreements reveals that people do not feel they have a voice or stake in trade.
- However, everyday people have more of a stake in trade than ever. For example, the Internet has opened up trade for small businesses and individuals across the country and the world. Bringing people into the trade policy process is important.
- Trade also goes beyond just tariff lines and quotas. It also includes complex issues like data localization and disclosure of encryption keys. The expertise in these areas is distributed outside of Washington, D.C., and even outside of companies themselves.
- Digital tools can bring in communities of expertise. For example, GitHub, Wikipedia, and the Internet Engineering Task Force (IETF) all tap into experts dealing with important issues.
- Interchange can help individuals start thinking of trade and trade negotiations as solutions to problems rather than causes of them.
- More frequent and meaningful public input upfront. A Federal Register process soliciting requests for comment should extend beyond vague questions. Specific questions generate better feedback: a USTR notice of intent on the Transatlantic Trade and Investment Partnership (TTIP) received 370 comments, whereas a recent proceeding from the U.S. Copyright Office received 97,000 comments. The Copyright Office proceeding asked very specific questions about the language of a draft provision.
- Routine public engagement is also important during a multiyear negotiation, as it is easy to lose sight of changes.
- There is nothing preventing somebody from putting up a model BIT or previous agreement right now and soliciting feedback on what a modern agreement should look like.

- Scheduled releases of text, after it has been negotiated, could also be helpful. This approach could build on the one taken by the European Union of releasing proposals and summaries of each round of negotiation.
- It's important to create new opportunities for input from people traditionally outside Washington, D.C.

David Levine

- Diffuse public interests without private-sector or civil-society representation are not being represented in trade negotiations and need a seat at the table.
- Policy issues under negotiation reach far beyond the individual industries at the table.
- Discretion is an important part of negotiation. The challenging question is what information should be made public, and when.
- Issues of public confidence in trade agreements are issues of democratic legitimacy. With TPP, public concerns were not about the content of the agreement so much as the feeling among voters that the process was closed to them. In effect, people felt that trade agreements had no bearing on them except in the negative.
- Would TPP have been on more solid ground if public engagement had started much earlier?
- A challenge associated with bringing the public in is separating meaningful information from noise. Sorting mechanisms are essential, and technology could play a role.
- There is no obvious path for an academic expert (or other individual expert) to sit on an advisory committee. This was an issue even for the unrealized PITAC.
- The needs of consultation vary by issue. An industry-specific issue relying on knowledge of that industry and relevant legislation or agreements might not benefit from public input the way issues like balancing fair use and content protection in copyright will.
- How do we deal with the inability to keep information secret in a way that allows for the efficiency of private negotiation to occur? If trade is negotiated in an environment where earlier assumptions about secrecy still hold, the question of when the public finds out, along with legitimacy, is ceded to WikiLeaks. The government needs to get ahead of this.
- Balanced and open law requires the participation of diffuse public interest.

## Acknowledgments

This report and conference were made possible by generous support from Google.

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