Written Testimony of
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United States House of Representatives
Committee on Ways and Means, Trade Subcommittee
March 25, 2025

Chairman Smith, Ranking Member Sanchez, and Members of the Subcommittee, I appreciate the opportunity to appear today to discuss American Trade Negotiation Priorities. My testimony will focus on the congressional-executive relationship in concluding trade agreements. I have studied trade agreements as a scholar for the last seven years. For four years, I have taught a class on the subject. I am also editing a book that also studies the evolution in types of trade agreements in the last decade. Prior to joining academia, I was involved in trade agreement negotiations led or supported by the Office of the U.S. Trade Representative (USTR) during my service in USTR's Office of the General Counsel from 2014 until 2017.

The Congressional-Executive Relationship in U.S. Trade Agreements

Trade agreements have long served important functions in our nation's history. From the earliest days, the United States has pursued treaties and other forms of agreements with its trading partners for multiple purposes.[1] Trade agreements have been complements to other tools in the economic, regulatory, security, and foreign policy toolkits.

Congress has had and continues to have a critical role in this exercise. Primarily, Congress tasks the executive branch with negotiating agreements and often approves those agreements that the executive branch seeks to enter. The cornerstone in that relationship between the branches has always been Article I, Section 8 of the Constitution, which provides that Congress "shall have Power To lay and collect Taxes, Duties, Imposts and Excises, . . . [and] To regulate Commerce with foreign Nations."

In the late eighteenth and early nineteenth centuries, much of the development of the United States' foreign commercial relationships was a collaboration between the two branches.[2] For instance, the President and his Cabinet negotiated "friendship, commerce, and navigation" treaties, and the Senate provided advice and consent on those treaties.[3] The executive branch came to act like a fiduciary for U.S. foreign commercial policy, carrying out the charges given to it by Congress.

By the twentieth century, and especially with the enactment of the federal income tax in 1913, Congress tasked the executive branch with additional responsibilities related to foreign commerce in the areas of tariff modification and negotiations with foreign nations, among others. Of relevance to the Subcommittee's focus today, no longer was commerce with foreign nations primarily governed by treaties. Rather, in a series of statutes, Congress granted the executive

[1] Kathleen Claussen, *Trade's Mini-Deals*, 62 VA. J. INT'L L. 315 (2021).
[2] Kathleen Claussen, *Trade Administration*, 107 VA. L. REV. 845 (2021).
[3] *Id.*

branch carefully circumscribed authority to negotiate trade deals that did not require advice and consent from the Senate. According to these delegations, the President could agree with a foreign government to reciprocally lower tariffs, often on products specifically named by Congress, and then the President could implement the agreement directly in U.S. law without further congressional approval. For example, the Dingley Tariff Act of 1897 authorized the President to negotiate reciprocal tariff agreements on certain goods and to make those changes to tariff lines by proclamation.[4]

Policymakers at that time had come to view negotiating lower tariffs as critical to U.S. economic growth. Consequently, these statutes focused on facilitating the executive's ability to secure reciprocal reductions. The Reciprocal Trade Agreements Act (RTAA) in 1934 likewise gave the President the authority to make trade agreements in which the United States and a trading partner committed to lower tariffs, and to implement those agreements by presidential proclamation alone.[5] This legislation was limited, however. It contained a sunset provision, and thus Congress could choose periodically whether to renew the power. During the late 1940s and the 1950s, the RTAA's successor statutes provided the President authority to enter into tariff reduction negotiations conducted under the auspices of the General Agreement on Tariffs and Trade (GATT).

International trade negotiations in the 1960s and 1970s shifted away from their previous focus on tariffs to the elimination of "non-tariff barriers" to trade, such as licensing requirements, health and safety regulations, and other administrative measures that could be considered discriminatory to foreign business. This demand for attention to a broader range of trade-related matters by the executive branch required coordination and management and prompted Congress to direct the President to appoint a Special Representative for Trade Negotiations in 1962.[6] The Trade Act of 1974 created the Office of the Special Representative for Trade Negotiations, which later became the USTR. Congress provided that the USTR would "be the chief representative of the United States" for trade negotiations and "be responsible to the President and the Congress for the administration of trade agreements programs."[7]

Also in the Trade Act of 1974, Congress established "trade promotion authority" (TPA), or "fast track" authority, which included elaborate organizational mandates and objectives for the executive at trade agreement negotiations. The concept behind TPA is that Congress empowers the President to negotiate significant reductions in tariffs and non-tariff barriers, under the condition that the negotiated outcome will not be implemented in U.S. law unless Congress approves the final package. Congress conducts that approval process through streamlined legislative procedures, provided the President fulfilled Congress's statutory mandates and objectives.[8] All but one of the bilateral or plurilateral free trade agreements (FTAs) negotiated since 1985 have been approved and implemented by Congress through the TPA process.[9]

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[4] Dingley Act, ch. 11, 30 Stat. 151, 203 (1897).
[5] Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-315.
[6] Trade Expansion Act of 1962, sec. 241, Pub. L. No. 87-794.
[7] Trade Act of 1974, sec. 141(c), Pub. L. No. 93-618.
[8] *See, e.g.*, 19 U.S.C. §§ 4203-05.
[9] Office of the U.S. Trade Representative, https://ustr.gov/trade-agreements/free-trade-agreements.

Trade Promotion Authority & Its Objectives

Trade Promotion Authority legislation has at least three important facets that I will highlight here: (1) authorization; (2) approval and implementation; and, (3) content.

First, TPA empowers and, indeed, invites the executive branch to negotiate large-scale agreements that cover substantially all the trade between the United States and trading partners that the President and his team would identify. It delegates this component of foreign commercial regulation to the executive for a particular purpose, on a timeline, and within certain clear substantive and procedural parameters.

Second, in TPA, Congress retains the final word to review, provide input on, and ultimately, to approve and implement into U.S. law the trade agreement that the executive negotiates. The executive may not, with one exception discussed below, conclude and implement the agreement alone.

Third, Congress directs the executive branch with respect to the content of the agreement. Over time, the negotiating objectives in TPA legislation have grown. In its most recent iteration, from 2015, Congress has given the executive a long list of objectives for its negotiations. These objectives reflect a careful bargaining process among members of Congress and guide the policy space in which the executive branch, primarily USTR, can operate. The executive provides important input in that exercise as TPA legislation is crafted.

The 2015 TPA objectives cover not just tariff-related barriers, but also, for example, labor and environment protection goals, among others. This list was the result of a compromise that was reached in 2007 among Democrats and Republicans known as the "May 10 agreement".[10] The May 10 agreement was a bipartisan deal that permitted the inclusion of stronger labor, environment, and intellectual property obligations, among other topics, in U.S. trade agreements. It also required that the labor and environment provisions would be subject to the same enforcement disciplines as the commercial provisions. The May 10 language became the starting point and standard for all U.S. agreements that entered into force in the following years, and many other agreements around the world.[11]

TPA legislation has also enabled the President to enter into certain limited agreements that lower tariffs without further congressional approval. Section 103(a) of the 2015 TPA legislation granted the President the ability to negotiate trade agreements and proclaim reductions in U.S. tariff rates of up to 50 percent of existing rates (with no limits on rates already below 5 percent).[12] This tariff-proclamation authority is similar to that in place since 1934. Presidents have entered trade

[10] OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, BIPARTISAN TRADE DEAL, May 2007, available at https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf.
[11] Kathleen Claussen, *Separation of Trade Law Powers*, 43 YALE J. INT'L L. 315, 342 (2018).
[12] 19 U.S.C. § 4202. *See* Christopher A. Casey, *Presidential Authority to Address Tariff Barriers in Trade Agreements*, Congressional Research Service, IF 11400.

agreements and lowered tariffs on several occasions based on this authority, most recently in 2020.[13]

Trade Executive Agreements

Given its political significance, TPA has occupied considerable time and attention both among members of Congress and in the eyes of the public. But TPA is not the only congressional-executive process in place for trade agreements and FTAs are not the only trade-related agreements into which the United States has entered.

In recent decades, USTR and other executive branch agencies have concluded hundreds of trade-related agreements without congressional authorization or approval. I refer to these as "trade executive agreements" given the lack of congressional involvement. Other scholars and policymakers have referred to them as "skinny" or "mini" deals since many have been narrowly focused on one or a small handful of trade issues, but they are not small in their impact.[14] Trade executive agreements are also important in economic terms as I explain further below.

By way of example, consider a tomato grown abroad that an importer seeks to bring into the United States for sale. The law applicable to the foreign tomato coming into the United States includes some U.S. statutes and some regulations developed by federal agencies through a public rulemaking process. But major parts of the international produce canon also consist of trade-related agreements concluded between the United States and the crop's country of origin that cover topics as specific as what treatment methods the tomato receives while abroad, its processing and storage, its labeling and packaging, and under what conditions it may be sold in a U.S. supermarket. These sorts of agreements comprise the backbone of the rules that govern not just tomatoes,[15] but also trousers,[16] titanium,[17] telecommunications,[18] and much more. These types of agreements make up the bulk of the more than 1500 U.S. trade executive agreements that my team and I have identified.

Importantly, many such trade executive agreements have been negotiated without clear permission from Congress to do so. Under U.S. law, the executive branch is required to identify the constitutional or statutory basis for its entry into an international agreement. USTR and the State Department have reported what they consider to be the legal bases for many (though not all) trade executive agreements, but these justifications are largely weak and insufficient. For example, the executive branch has cited 19 U.S.C. § 2171 as its authorization to enter into more

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[13] *Id.*
[14] *See, e.g.*, Testimony of U.S. Trade Representative Robert Lighthizer, House Ways & Means Comm., June 17, 2020.
[15] *See, e.g.*, Memorandum of Understanding for the Exchange of Information on Exports of Fresh Tomatoes Between the Secretariat of Economy of the United Mexican States and the Department of Commerce of the United States of America, Mex.-U.S., Aug. 19-23, 2013.
[16] *See, e.g.*, Agreement Concerning Trade in Women's and Girls' Wool Trousers, Arg.-U.S., May 14-31, 1991.
[17] *See, e.g.*, Agreement on Reduction of Export Duties on Ferrous and Non-Ferrous Scrap Products, Ukr.-U.S., Feb. 22, 2006.
[18] *See, e.g.*, Understanding Concerning the Procurement Procedures for Telecommunications Equipment in Korea, S. Kor.-U.S., Mar. 29-Apr. 10, 1995.

than fifty trade executive agreements in the last thirty years. That statute makes USTR the lead agency on U.S. trade negotiations and requires the agency to administer the trade agreements program, but it does not authorize USTR to enter into trade agreements on behalf of the United States.

Despite the absence of congressional authorization or approval, trade executive agreements serve important purposes in regulating the flow of goods and services into and out of the United States. They are negotiated by agencies across the executive branch. Some operate like regulations and create rules for private parties; some impose commitments on the U.S. government to open or close a particular market; some commit the United States to a future lawmaking process; and some are cooperative or non-binding. Trade executive agreements do work that may be necessary when other instruments, like comprehensive FTAs, are less well situated. For example, problem solving is the commonly offered rationale for "singles and doubles," as former USTR Robert Lighthizer has called these agreements.[19] The swiftness with which they can be completed is typically a benefit to U.S. industry in a rapidly changing market. As Ambassador Lighthizer reiterated: "What we do in all of these cases is we go and we solve problems for American business and farmers and ranchers and labor."[20]

In recent years, however, trade executive agreements have expanded in scope and have addressed subjects typically included in comprehensive FTAs that would ordinarily be subject to congressional approval. For example, a trade agreement negotiated with Japan in 2019 created reciprocal market access for certain agricultural and industrial goods by reducing tariffs on 241 categories of products coming from Japan with 78 pages regarding the specifications of products and services that can flow between the United States and Japan.[21] In seven additional exchanges of letters negotiated apart from the principal agreement, the two countries established new arrangements on products like beef, rice, and alcoholic beverages.[22] A further agreement with Japan on digital trade prohibits certain taxes on digital products, disallows data localization measures, and guarantees consumer privacy protections, among other obligations.[23] These are just a handful of more than 100 trade executive agreements the United States maintains with Japan alone.

Likewise, the Subcommittee will recall a trade executive agreement with Taiwan negotiated in 2023 which includes commitments on anti-corruption, good regulatory practices, customs administration and trade facilitation, and small and medium-sized enterprises.[24] In that instance,

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[19] *Id.*
[20] *Id.*
[21] Trade Agreement Between the United States of America and Japan, Japan-U.S., Oct. 7, 2019.
[22] Exchange of Letters Regarding Alcoholic Beverages, Japan-U.S., Oct. 7, 2019; Exchange of Letters Regarding Beef, Japan-U.S., Oct. 7, 2019; Exchange of Letters Regarding Rice, Japan-U.S., Oct. 7, 2019; Exchange of Letters Regarding Agricultural Safeguard Measures, Japan-U.S., Oct. 7, 2019; Exchange of Letters Regarding Skimmed Milk Powder, Japan-U.S., Oct. 7, 2019; Exchange of Letters Regarding Whey, Japan-U.S., Oct. 7, 2019; Exchange of Letters Regarding Interactive Computer Services, Japan-U.S., Oct. 7, 2019.
[23] Agreement Between the United States of America and Japan Concerning Digital Trade, Japan-U.S., Oct. 7, 2019.
[24] United States-Taiwan Initiative on 21st-Century Trade First Agreement, Taiwan-U.S., signed June 1, 2023, entered into force Dec. 10, 2024.

exceptionally, Congress approved the deal following its negotiation and provided conditions for any future trade agreements that the executive would seek to negotiate with Taiwan.[25]

In total, the United States maintains trade agreements that fall short of comprehensive FTAs with 130 countries. To put the scale and rhythm of these trade executive agreements in perspective, in the last decade, only one trade agreement has been made through the TPA process: the United States – Mexico – Canada Agreement. By contrast, roughly two dozen of these trade-related executive agreements regularly enter into force *each year*.[26] And recent administrations have indicated an interest in concluding more in future years.

Although trade executive agreements may serve certain meaningful ends in resolving trade problems for one industry or business, they are not without substantive and procedural costs. They may achieve victories for well-financed interest groups that have access to USTR or other agencies, but those may not be as beneficial on the whole as compared to what might be obtained through another process including public input. These sorts of agreements circumvent regular rulemaking and the important guardrails set forth in TPA, including transparency, consultation, presentment, and approval requirements, therein shielding interest groups or other advocates from public awareness or scrutiny.

Publication and reporting are a further problem surrounding these agreements. USTR reports on trade agreements annually as required by Congress; however, the agency's list of trade executive agreements is incomplete.[27] In some instances, USTR has not made Congress aware of the agreement until after the agreement entered into force.[28] Many of these agreements remain unavailable to the public.[29]

A related vulnerability of trade executive agreements is their fragility. Executives can exit trade executive agreements as easily as they can enter into them, as former President Biden did early in his time in office with a deal that the first Trump administration had made with the United Arab Emirates, creating questions of predictability for trading partners.[30]

What becomes apparent from these attractive functions and their costs and overstatements is that trade executive agreements are at least *somewhat* useful *some* of the time. Under certain conditions, the institutional, diplomatic, and practical advantages may outweigh valid concerns about robust public participation, among others. In thinking about what those conditions should be, the foundational authority remains with Congress. Congress can define the parameters for the executive's use of such agreements, i.e., to dictate when and how the executive enters into trade-related agreements and with what forms of oversight and approval.

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[25] United States-Taiwan Initiative on 21st-Century Trade First Agreement Implementation Act, Pub. L. No. 118-13.
[26] Claussen, *Trade's Mini-Deals*, *supra* note 1.
[27] *See, e.g.*, Office of the U.S. Trade Representative, 2025 Trade Policy Agenda and 2024 Annual Report, citing 19 U.S.C. § 2213. *See also* Kathleen Claussen, *Trade Transparency: A Call for Surfacing Unseen Deals*, 122 COLUM. L. REV. F. 1 (2022).
[28] Claussen, *Trade Transparency*, *supra* note 27.
[29] *Id.*
[30] *See* Jennifer Doherty, *Biden Reverses Trump's Softening of UAE Aluminum Tariffs*, LAW360, Feb. 2, 2021.

World Trade Organization Rules on Trade Agreements

One question that some trading partners raise with the United States is whether the United States' trade-related agreements are consistent with the rules of the World Trade Organization (WTO). Because the WTO rules require non-discriminatory treatment among WTO members, trade agreements that provide special treatment such as FTAs at first glance may appear in conflict with that principle. However, the WTO Agreements accommodate FTAs as well as some more limited trade-related agreements.[31]

GATT Article XXIV expressly accounts for "free-trade areas", which it defines as "a group of two or more customs territories in which the duties and other restrictive regulations . . . are eliminated on substantially all the trade between the constituent territories in products originating in such territories." Article XXIV also requires that an FTA not create greater burdens for non-signatories to the FTA than existed prior to the FTA's formation. Very few WTO dispute settlement panels have interpreted the language of GATT Article XXIV.[32]

Some WTO members have questioned the legality, under the WTO rules, of U.S. trade agreements that are not FTAs. U.S. trading partners have defended these agreements as "interim" agreements which are permitted under Article XXIV.[33] Nevertheless, in general, few agreements have been challenged as inconsistent with Article XXIV because so many WTO members like the United States maintain concessionary trade agreements of one type or another.

Future and Upcoming Potential Agreements

As noted above, although, in recent years, the executive branch has likely exceeded its delegated authority with respect to certain trade executive agreements, there is still a place for these agreements in supporting the U.S. economy when authorized and overseen by Congress. Trade agreements that are not comprehensive FTAs may still serve the interests of both branches, when they are conducted consistently with Congress's power under Article I, Section 8 of the Constitution.

Among the more than 1500 existing trade-related agreements to which the United States is a party are highly specialized and technical agreements such as organics equivalency arrangements and mutual recognition agreements that enable U.S. regulators to work with their counterparts on issues of health and safety, technical interoperability, and much more. There are also those that make business easier for U.S. companies like trade facilitation and investment agreements. Space remains for more deals concentrating on specialized topics such as critical minerals, digital trade, economic security, sustainability, and beyond. Not all trading partners may be able or willing to negotiate comprehensive deals, but smaller, more focused deals may be possible. In some instances, comprehensive deals likewise may not be beneficial to the United States.

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[31] Agreement on Technical Barriers to Trade, art. 6.

[32] The WTO dispute that addressed the issue most directly is DS34: *Turkey — Restrictions on Imports of Textile and Clothing Products*.

[33] Isabelle Icso, *Japan defends U.S. trade deal amid scrutiny at the WTO*, INSIDE U.S. TRADE, Oct. 15, 2020.

Further, other governments are increasingly embracing alternative agreements to FTAs such as in the areas of digital economy, climate change, and natural resources. The United States should maintain its historic role as a thought leader and norm maker, guiding the path for other governments and setting standards to which other governments abide. Trade agreements can also be a way to achieve reciprocity on tariffs and cooperation on security measures. Through its hundreds of trade agreements, the United States has often led the way and built a network premised on U.S. norms and fundamental principles in areas from agriculture to intellectual property to labor protections to environmental protections.

These circumstances counsel in favor of creating space that is consistent with law for many types of trade agreements. This is the time for the Subcommittee to put in place a solid foundation for the executive branch to undertake negotiations with oversight and input from Congress to ensure that future trade-related agreements are subject to appropriate scrutiny and transparency.

From the U.S. government perspective, it may not make sense for all trade-related agreements to receive *ex post* congressional approval. For certain of these technical agreements, Congress has delegated sufficient guidance to expert regulators to do the necessary work. Overburdening the executive branch with too strict review mechanisms from legislators could diminish the U.S. position in negotiations. On the other hand, Congress may wish to control not just the entry but also the potential exit from trade-related agreements. That level of oversight requires new legislation. Getting the balance right for different types of trade agreements will be important to avoid hamstringing the executive branch's ability to engage in international regulatory cooperation.

As both branches look toward future relationships with U.S. trading partners, Congress may wish to re-evaluate the scope of trade agreement delegations it has granted, and to re-visit its own role in authorizing, overseeing, and approving any resulting deals. Restoring an appropriate separation of power between Congress and the executive branch on trade agreements is important not just as a constitutional matter, but also because such agreements will be more durable, ambitious, balanced, and legitimate than agreements entered into by the executive branch alone.

An agreement negotiated by the executive branch and approved by Congress enjoys higher levels of bipartisan political and public support than a trade executive agreement. A subsequent administration, therefore, will encounter more resistance if it attempts to withdraw from the agreement. As a result, a congressional-executive agreement is more likely to remain in force, providing greater certainty for employers, workers, and others who benefit from it. Further, congressional-executive agreements are likely to have stronger commercial commitments, which Congress will subject to rigorous oversight and enforcement. Congress collectively represents a broader range of interests affected by trade policy than the executive branch at any one point in time, and Congress has a unique capacity to monitor the domestic impacts of trade policy through direct constituent engagement. This includes agriculture, industry, labor, employers, urban, rural, and groups from both political parties.

Trade agreements approved by Congress also enjoy more democratic legitimacy. The American public has more access to members of Congress to express views, and members of Congress have a responsibility and political incentive to advocate those views with the executive branch.

Only Congress can implement certain commitments into U.S. law. Sending certain agreements to Congress for approval and integration into U.S. law may, surprisingly, give negotiators more negotiating space for flexibility with trading partners. A congressional-executive agreement is also likely to be more durable and more ambitious because trading partners may be more willing to put their best offers on the table. The executive branch has more negotiating leverage if the trading partner knows that the agreement will not enter into force unless it meets the ambitious objectives set by Congress.

Finally, with a greater congressional role in trade agreement negotiations, the United States can negotiate trade agreements from a position of strength by offering strategically significant trading partners commitments that reduce their dependence on others and stem the tide of non-market economy practices. Thus, there is also a national security rationale for restoring a balance between Congress and the executive branch in trade agreement development. Doing so will empower the United States to develop innovative trade commitments designed to reinforce certain relationships and enhance coordination against measures designed to undermine U.S. economic competitiveness.

Conclusion

Trade agreements are a fixture in the U.S. foreign economic toolkit, and should remain that way. They serve multiple functions in maintaining international regulatory cooperation and those functions are critical to the U.S. economy. They take many forms and their content is variable. Some are binding and enforceable, some are not. Some create market opportunities, some do not.

Importantly, however, agreements that regulate cross-border economic activity are required by the Constitution to be authorized by Congress, or to proceed through the treaty advice and consent practice in the Senate. For more than a century, Congress has identified spaces and places for the executive branch to enter into trade-related deals. It has often spelled out the conditions under which the executive is empowered to do so. Those conditions sometimes include a detailed list of objectives and priorities, and a role for Congress to review drafts of the agreement. But recent executive practice has tended to stray from those enumerations. Congress has an opportunity now to review and, where necessary, craft new legislation to ensure that future U.S. trade agreements are on solid footing – an opportunity that will only make our nation stronger.

Thank you again for the opportunity to provide input into the important work of the Subcommittee.