

Gabriel Gari, *Engaging Stakeholders in Trade Policymaking – What can we learn from the USTR Public Consultation on US – UK Trade Negotiations?*
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ENGAGING STAKEHOLDERS IN TRADE POLICYMAKING – WHAT CAN WE LEARN FROM THE USTR PUBLIC CONSULTATION ON US – UK TRADE NEGOTIATIONS?

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This paper conducts an empirical analysis of stakeholders' responses to the United States Trade Representative's (USTR) public consultation on the US-UK trade negotiations with the objective of shedding light on the efficacy of this type of mechanism for engaging stakeholders in trade negotiations. The findings reveal the limited capacity of this public consultation mechanism to reach out to the diverse range of stakeholders that are likely to be affected by trade negotiations and to take advantage of stakeholders' input in the formulation of the USTR's specific objectives for these negotiations. The paper suggests ways to strengthen the outreach of public consultations and the impact of stakeholders' responses on the trade policy-making process in order to reinforce trust in the governments' efforts to promote public engagement in trade negotiations.

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The empirical data that supports this paper's analysis draws from and further expands the findings of a previous study on this matter, i.e., Yulia Dragunova & Gabriel Gari, "What do Americans want from a US – UK Trade Agreement? Analysis of USTR' public consultation" (April 18, 2021). Queen Mary Law Research Paper No. 355/2021, <https://ssrn.com/abstract=3829190>. [hereinafter Dragunova & Gari]. The author is grateful for the generous statistical analysis assistance provided by Diego Casaravilla, who may be contacted at dcasar[at]fine-research.com. The paper has benefited from feedback provided by the attendants to a presentation of an earlier version at the SIEL Biennial Conference, July 7-9, 2021. Generous feedback was also received from Kathleen Clausen & Lauge Paulsen. The usual caveats apply.

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I. INTRODUCTION

Recent developments in the trade policy realm offer compelling reasons to pay increasing attention to stakeholder engagement in trade negotiations. From 2000 onwards, the number of Preferential Trade Agreements (PTAs) has been rising at a fast rate. As of December 2021, there were 352 PTAs in force, notified to the World Trade Organization (WTO).¹ The range of policy areas covered by these agreements has expanded well beyond tariffs and quotas. Recent PTAs cover ‘within the border’ policy areas, such as domestic regulations affecting trade in services and investment, all the way up to policy measures dealing with the interface between trade and societal concerns such as labour standards, environmental protection, human rights, and animal welfare.² The wider the range of policy matters covered by PTAs, the broader the range of stakeholders, i.e., the parties with an interest or stake in trade negotiations, affected by them is.

Gone are the days when trade negotiations were limited to the easing of tensions between producers’ import and export interests. Trade diplomats now face conflicting demands from a much wider range of stakeholders, which can raise the levels of politicisation and discord linked to trade negotiations to unprecedented levels. For instance, the resistance of a European Union (EU) Member State’s regional parliament to ratify the Canada-European Union Comprehensive

¹ See WTO, REGIONAL TRADE AGREEMENTS, <http://rtais.wto.org/UI/publicsummarytable.aspx>.

² See WORLD BANK GROUP, HANDBOOK OF DEEP TRADE AGREEMENTS (A. Mattoo et. al. eds., 2020).

Economic and Trade Agreement (CETA)³ shows that public support for trade agreements can no longer be taken for granted. There is an increasing need to conduct trade negotiations in a transparent and inclusive manner to foster public trust, secure political support, and provide continuity to trade deals, and this has become more important now than ever.

Against this background, the United States of America (US)⁴ and other major trade players are revamping their public consultation and other stakeholder engagement mechanisms on trade matters. For example, after BREXIT, the United Kingdom's (UK) Department of International Trade (DIT) committed to engage regularly with stakeholders "to ensure the benefits of trade can be widely felt and understood".⁵ A couple of years later, it implemented three stakeholder engagement mechanisms: open public consultations, the creation of a Strategic Trade Advisory Group (STAG), and the Expert Trade Advisory Groups (ETAGs).⁶ In 2015, the EU Commission committed to working more closely with the civil society on trade and investment negotiations.⁷ Two years later, it decided to publish its recommendations for negotiating directives (in addition to the existing practise of publishing negotiating proposals and reports of negotiating rounds) and to create an advisory group on EU Trade Agreements to provide advice on EU trade negotiations and their implementation.⁸ In its most recent trade policy review, the Commission reiterates its commitment to ensure a transparent and inclusive trade policy.⁹

³ Maïa De La Baume, *Walloon Parliament Rejects CETA Deal*, POLITICO (Oct. 14, 2016), <https://www.politico.eu/article/walloon-parliament-rejects-ceta-deal/>.

⁴ See *infra* Part II.

⁵ DEPT. OF INT'L TRADE, *TRADE WHITE PAPER: OUR FUTURE UK TRADE POLICY*, at 22 (Oct. 9, 2017), <https://www.gov.uk/government/publications/preparing-for-our-future-uk-trade-policy>.

⁶ DEPT. OF INT'L TRADE, *PROCESSES FOR MAKING FREE TRADE AGREEMENTS AFTER THE UNITED KINGDOM HAS LEFT THE EUROPEAN UNION*, at 10 (Feb. 28, 2019), <https://www.gov.uk/government/publications/processes-for-making-free-trade-agreements-once-the-uk-has-left-the-eu>.

⁷ European Commission, *Trade for all - Towards a more responsible trade and investment policy*, at 12-13, COM (2015) 497 final (Oct. 14, 2015), https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf.

⁸ European Commission, Directorate-General for Trade, *Report on the implementation of the trade policy strategy Trade for All Delivering a progressive trade policy to harness globalisation: communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* (Sept. 13, 2017), <https://data.europa.eu/doi/10.2781/148862>.

⁹ European Commission, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, at 21-22, COM (2021) 66 final (Feb. 18, 2021), https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc_159541.0270_EN_05.pdf.

Countries like Australia,¹⁰ Canada,¹¹ and New Zealand¹² have set up formal mechanisms to consult the public on trade negotiations.

Alemanno defines “stakeholder engagement” as “the practice of involving members of the public in the policy-making process. As such it may be differentiated from and contrasted with nonparticipation situations typical of more traditional models of government in which elected representatives, assisted by appointed experts, are left alone in enacting policies.”¹³ The rationale for stakeholder engagement in policy-making revolves around their intrinsic value for democracy and their instrumental value in sound policy making.¹⁴ First, in a democracy, expanding the scope in which societal actors can influence policy-making is regarded as a value *per se*; it strengthens citizenship, enhances accountability and transparency in public governance, and builds trust in the government.¹⁵ Second, stakeholder engagement has an instrumental value for policy makers, who can access valuable information and benefit from stakeholders’ knowledge and expertise for making policy decisions.¹⁶ Stakeholders can provide new inputs, innovative ideas, and evidence about the problems as well as the proposed solutions and help policymakers calibrate the policies to the real needs of the public.¹⁷

In the trade policy context, one of the benefits of engaging with stakeholders is the access to information necessary to define the “national interest” that trade diplomats should champion at the negotiation table. Exporters are the ones best placed to identify the trade barriers that domestic products face in foreign markets, and domestic producers and users of like imported products can provide valuable information to fine-tune the required degree of protection from foreign competition. Other stakeholders, such as regulators and civil society representatives

¹⁰ AUSTL. DEPT. OF FOREIGN AFFAIRS AND TRADE, HAVE YOUR SAY: PUBLIC CONSULTATIONS ON FTAS <https://www.dfat.gov.au/trade/engage/public-submissions/Pages/have-your-say-public-consultations-on-ftas>.

¹¹ GLOBAL AFFAIRS CANADA, CONSULTATIONS (Jun. 06, 2022) https://www.international.gc.ca/trade-agreements-accords-commerciaux/consultations/index.aspx?lang=eng&_ga=2.2179440.1581046309.1623427487-215176198.1611509927.

¹² N.Z. FOREIGN AFFAIRS & TRADE, PUBLIC ENGAGEMENT ON TRADE, <https://www.mfat.govt.nz/en/trade/nz-trade-policy/public-engagement-on-trade/>.

¹³ Alberto Alemanno, *Stakeholder Engagement in Regulatory Policy*, in REGULATORY POLICY IN PERSPECTIVE: A READER’S COMPANION TO THE OECD REGULATORY POLICY OUTLOOK 10 (2015) [hereinafter Alemanno].

¹⁴ CITIZENS AS PARTNERS: OECD HANDBOOK ON INFORMATION, CONSULTATION AND PUBLIC PARTICIPATION IN POLICY-MAKING 14 (2001).

¹⁵ *Id.*

¹⁶ *Id.* at 14.

¹⁷ *Id.* at 16.

can intimate trade diplomats about the implications of undertaking binding commitments in the policy space to protect a range of legitimate public policy objectives, such as financial stability, public health, cultural diversity, and minorities' rights.

This paper is concerned with the efficacy of public consultations for engaging stakeholders in trade negotiations. The public-private interaction in shaping trade policies has attracted considerable interest in academic literature for many years now, typically from a politico-economic perspective.¹⁸ The expansion of policy areas covered by recent PTAs has prompted a new wave of studies that apply legal and political science tools to examine the problems of transparency and legitimacy unleashed by this trend.¹⁹ In addition, there are a few studies that compare stakeholder engagement mechanisms used in various jurisdictions for trade policy-making purposes, but to the best of the author's knowledge, so far there have been no empirical assessments of their functioning.²⁰ This paper aims to contribute to

¹⁸ See, *inter alia*, Grossman G. M. & E. Helpman, *Protection for Sale*, 84(4) AM. ECON. REV., 833-50 (1994); Grossman, G.M. & E. Helpman, *The Politics of Free Trade Agreements*, 85(4) AM. ECON. REV., 667– 90 (1995); Gawande et al., *The Political Economy of Trade Policy: Empirical Approaches*, in HANDBOOK OF INTERNATIONAL TRADE 213-249 (E. Kwan Choi & James Harrigan eds., 2003); Gawande et al., *Lobbying Competition Over Trade Policy*, 53(1) INT'L ECON. REV., 115-132 (2012); EDWARD MANSFIELD & HELEN MILNER, VOTES, VETOES AND THE POLITICAL ECONOMY OF INTERNATIONAL TRADE AGREEMENTS (Princeton University Press, 2012); Leonardo Baccini et. al., *The Service Economy: US Trade Coalitions in an Era of Deindustrialization*, 14 REV. INT'L ORG. 261-296 (2019).

¹⁹ See, *inter alia*, Brain Hocking, *Changing the terms of trade policy making: from the 'club' to the 'multi-stakeholder' model*, 3(1) WTR (2004); UN. Conference on Trade and Development, *The Challenges of Trade Policymaking: Analysis, Communication and Representation*, UNCTAD/ITCD/TAB/37 (2008); GOVERNMENTS, NON-STATE ACTORS AND TRADE POLICY – MAKING: NEGOTIATING PREFERENTIALLY OR MULTILATERALLY (Ann Capling & Patrick Low eds., 2010); Genevieve Tung, *International Trade Law and Information Policy: A Recent History*, 42(2) INT'L L. J. LEGAL. INFO. 241 (2014); Ernst-Ulrich Petersmann, *Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?*, 18 J. INT'L ECON. L. (2015); Simon Lester, *Transparency in trade negotiations: How much is enough, how much is too much?*, 4(7) INT'L CTR. TRADE & SUSTAINABLE DEV. (2015); Niels Gheyle & Ferdi De Ville, *How Much Is Enough? Explaining the Continuous Transparency Conflict in TTIP*, 5(3) POL. & GOVERNANCE 16-28 (2017); HYUN-JUNG JE, PUBLIC-PRIVATE RELATIONSHIPS IN TRADE POLICY-MAKING (2018); Maria Laura Marceddu, *Implementing Transparency and Public Participation in FTA Negotiations: Are the Times a-Changing?*, 21(3) J. INT'L ECON. L. 681-702 (2018).

²⁰ See INTAL-ITD-STA, *Trade Policy Making-Making Process Level One of the Two Level Game: Country Studies in the Western Hemisphere* (INTAL eds.) OCCASIONAL PAPER 13 (2002); SEBASTIAN SÁEZ, DIV. INT'L TRADE & INTEGRATION, TRADE POLICY MAKING IN LATIN AMERICA: A COMPARED ANALYSIS 55 E.05.II.G.156(2005); CUTS INTERNATIONAL, TOWARDS MORE INCLUSIVE TRADE POLICY MAKING: PROCESS AND ROLE OF

filling this vacuum with a case-study analysis of the United States Trade Representative's (USTR) public consultation on the US-UK trade negotiations. It is expected that the empirical findings outlined below will support further research on the public-private interactions shaping trade policies.

The paper reviews all the responses to the consultation with the object of shedding light on two critical dimensions of the process: a) outreach, i.e., the extent to which the consultation manages to reach out to all relevant stakeholders, in particular those less likely to have the time, technical expertise, and resources to respond to the consultation; and b) impact, i.e., the weight assigned by the consultation body to stakeholders' input in the formulation of the USTR's specific negotiating objectives for the US-UK trade negotiations. To this end, the paper examines the number and type of stakeholders that responded to the public consultation and the number and type of policy requests filed by them. It then analyses stakeholders' submissions in three policy areas characterised by starkly conflicting demands: rules of origin, intermediary liability protection for internet service providers, and investor-state dispute settlement mechanisms, and contrasts them with the USTR's negotiating objectives for a US-UK trade agreement in these areas.²¹

The paper proceeds as follows: part II outlines the US legal framework for stakeholder engagement on trade negotiations; part III assesses the capacity of the USTR public consultation on US-UK trade negotiations to reach out to all relevant stakeholders; part IV assesses the impact of the consultation on USTR's formulation of trade negotiating objectives with the UK; and part V concludes the paper.

II. US LEGAL FRAMEWORK FOR STAKEHOLDER ENGAGEMENT IN TRADE NEGOTIATIONS

A. Overview

STAKEHOLDERS IN SELECT AFRICAN COUNTRIES (2009); Rashid S Kaukab, *Inclusiveness of Trade Policy-Making: Challenges and Possible Responses for Better Stakeholder Participation*, COMMONWEALTH TRADE HOT TOPICS (2010); CUTS INTERNATIONAL, IMPROVING OWNERSHIP THROUGH INCLUSIVE TRADE POLICY MAKING PROCESSES: LESSONS FROM AFRICA (2009); Dao Ngoc Tien et. al., State Secretariat for Economic Affairs, World Trade Institute, Conference Presentation at the Foreign Trade University: Participation of non-state actors in formulation of trade policy in Vietnam (2013).

²¹ USTR, UNITED STATES-UNITED KINGDOM NEGOTIATIONS: SUMMARY OF SPECIFIC NEGOTIATING OBJECTIVES, (Feb. 2019), https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf.

Under the US Constitution, the President has the authority to negotiate international agreements,²² including PTAs, but it is the Congress that has the sole authority to “regulate commerce with foreign nations”.²³ In order to facilitate the passage of trade agreements, Congress can delegate (temporarily) Trade Promotion Authority (TPA) to the President. TPA, also known as “fast-track authority”, has been described as “the process Congress has made available to the President for limited periods to enable legislation to approve and implement certain international trade agreements to be considered under expedited legislative procedures”.²⁴ Provided that the process of negotiation and conclusion of the trade agreement meets certain requirements, the TPA ensures time-limited congressional consideration of the implementing legislation and an up-or-down vote without any possibility of amendments.²⁵ The requirements stipulated by the TPA statute normally include a series of trade negotiating objectives that the President must advance when entering into the negotiations of trade agreements, a series of notification and consultation requirements with Congress and other public and private sector stakeholders that the President must observe before, during, and upon completion of trade agreement negotiations, and the obligation to submit to Congress a draft implementing bill and a range of supporting information, which must meet specific content requirements.²⁶

The TPA was first introduced by the Trade Act of 1974 and renewed without interruption until 1994. It was reintroduced in 2002, until 2007, and then in 2015. Under the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, TPA was effective until July 1, 2018 and was subsequently extended through July 1, 2021.²⁷ The Trade Priorities and Accountability Act includes a set of consultative, notification, and reporting requirements designed to achieve greater transparency, improve Congressional oversight of trade negotiations, and encourage public participation in policy-making.²⁸ Among these requirements, the ones mentioned subsequently stand out. First, the Act directs the USTR to appoint a senior agency official to serve as Chief Transparency Officer, charged with taking concrete steps to increase transparency in trade negotiations, engaging with the public, and consulting with Congress on transparency policy,²⁹ who was duly appointed in

²² US CONST. art. II, § 2, cl. 2.

²³ US CONST. art. I, § 8, cl. 3.

²⁴ IAN F. FERGUSSON & CHRISTOPHER M. DAVIS, CONG. RES. SERV., R43491, TRADE PROMOTION AUTHORITY (TPA): FREQUENTLY ASKED QUESTIONS 1 (2019) [hereinafter Fergusson & Davis].

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ 19 U.S.C. §§ 4203-4204., 2015.

²⁹ 19 U.S.C. § 2171(b)(3), 2015.

September 2015.³⁰ Second, the Act directs the USTR to develop written guidelines for public engagement with the aim of facilitating transparency, encouraging public participation, and promoting collaboration in the negotiation process, specifying the need to include procedures that “provide for rapid disclosure of information in forms that the public can readily find and use” and “provide for frequent opportunities for public input through Federal Register requests for comment and other means”.³¹ Finally, the Act expressly requests the USTR to facilitate the participation of small businesses in the trade negotiation process to ensure that their interests are duly considered.³²

The USTR guidelines for consultation with Congress and public engagement were adopted in October 2015.³³ They include new responsibilities to disseminate information about trade negotiations and specific means to provide interested persons the chance to present their views on ongoing and future trade negotiations, namely: (a) USTR duty to issue Federal Register notices³⁴ for every trade agreement under negotiation, encouraging interested members of the public to submit comments, recommendations, or concerns that they may have to suggest to the USTR regarding positions and strategies in that negotiation; (b) USTR duty to arrange and host public hearings as a forum for receipt of public comments by senior USTR officials and for meaningful exchange of views; and (c) USTR duty to hold public stakeholder briefing events where diverse groups of stakeholders and the public can meet directly with the USTR negotiators.³⁵

³⁰ Press Release, U.S. Trade Representative, Timothy Reif to Serve as Chief Transparency Officer (Sept. 03, 2015) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/september/timothy-reif-serve-chief>.

³¹ 19 U.S.C. § 4203 (d) (2015).

³² 19 U.S.C. § 4208 (2015) [hereinafter U.S.C. § 4208].

³³ USTR, GUIDELINES FOR CONSULTATION AND ENGAGEMENT OFFICE OF THE USTR (2015) <https://ustr.gov/sites/default/files/USTR%20Guidelines%20for%20Consultation%20and%20Engagement.pdf>.

³⁴ See FEDERAL REGISTER: THE DAILY JOURNAL OF THE UNITED STATES GOVERNMENT <https://www.federalregister.gov/>. Pursuant to the Administrative Procedure Act (APA), all U.S. government agencies must to provide public notice and seek comment prior to issuing new subordinate regulations or revising existing ones. In general, the comment period ranges between 30 and 60 days and all “interested persons”, regardless of domicile, may participate. The government portal <https://www.regulations.gov/>, supports the public notice and comment process and provides access to all publicly available regulatory materials and stakeholders’ comments.

³⁵ *Id.*

On top of these requirements, in May 2021, the newly appointed USTR adopted the USTR Transparency Principles.³⁶ According to these principles, the USTR is committed to seeking public input with respect to new major trade initiatives when feasible, even when not required by law, and to using innovative and adaptable forms of communication, including virtual hearings and outreach, in addition to Federal Register Notices.³⁷

B. USTR consultation on US-UK Trade Negotiations

In July 2017, the US and the UK established a Trade and Investment Working Group aimed at providing commercial continuity for US and UK businesses, consumers, and workers following the UK's then proposed exit from the EU, exploring ways to strengthen trade and investment ties, and laying the groundwork for a potential future free trade agreement.³⁸ The group met six times between July 2017 and July 2019.³⁹ On October 16, 2018, the USTR notified the US Congress of the Administration's objective to initiate negotiations on a trade agreement with the UK at the earliest after BREXIT.⁴⁰ On November 16, 2018, the USTR issued a notice in the Federal Register seeking public comments in writing and orally at a public hearing on the proposed US-UK Trade Agreement, including comments on US interests and priorities, in order to develop the US negotiating position.⁴¹ The deadline for the submission of written comments was set for January 15, 2019, and the public hearing was held on January 29, 2019. Both the non-confidential comments received and the testimony of the twenty-four witnesses that attended the public hearing are available online.⁴² Less than a month after the public hearing, the

³⁶ Press Release, U.S. Trade Representative, USTR Release Agency Transparency Principles (May 07, 2021) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/ustr-releases-agency-transparency-principles>.

³⁷ *Id.*

³⁸ OFFICE OF THE USTR, U.S. – UK TRADE AGREEMENT NEGOTIATIONS (PREPARATIONS), <https://ustr.gov/countries-regions/europe-middle-east/europe/united-kingdom/us-uk-trade-agreement-negotiations>.

³⁹ For meeting statements see UK – U.S. TRADE & INVESTMENT WORKING GROUP, Gov.UK, <https://www.gov.uk/government/groups/uk-us-trade-and-investment-working-group#meeting-statements>.

⁴⁰ 19 U.S.C. § 4204(a) (2016); *see* Letter from the Office of the USTR to the Senator Hatch (Oct. 16, 2018), <https://ustr.gov/sites/default/files/20181017004930805-3.pdf>.

⁴¹ Request for Comments of Negotiating Objectives for a U.S. – United Kingdom Trade Agreement, 83 Fed. Reg. 57790 (Nov. 16, 2018), <https://www.federalregister.gov/documents/2018/11/16/2018-24987/request-for-comments-on-negotiating-objectives-for-a-us-united-kingdom-trade-agreement>.

⁴² *See* USTR, NEGOTIATING OBJECTIVES FOR A U.S. – UNITED KINGDOM TRADE AGREEMENT, USTR-2018-0036, <https://www.regulations.gov/document/USTR-2018-0036-0001>; *see* USTR, PUBLIC HEARING ON NEGOTIATING OBJECTIVES FOR A U.S. – U.K.

USTR issued a summary of specific negotiation objectives.⁴³ The negotiations were officially launched on May 5, 2020.⁴⁴

Table 1: USTR key stages prior to launching trade negotiations

	US-UK	US-EU (*)	US-Japan	US - Kenya
Preparatory Talks	24/07/2017	25/07/2018	Jan-18	Aug-18
USTR Notifies Congress Intention to Negotiate	16/10/2018	16/10/2018	16/10/2018	17/03/2020
USTR Requests Comments on Negotiating Objectives	16/11/2018	15/11/2018	26/10/2018	23/03/2020
Deadline for Submissions	15/01/2019	10/12/2018	26/11/2018	28/04/2020
USTR Hosts Public Hearing	26/01/2019	14/12/2018	10/12/2018	Cancelled
USTR Publishes Summary of Specific Negotiating Objectives	28/02/2019	11/01/2019	21/12/2018	22/05/2020
Launch of Trade Negotiations	05/05/2020	April 2019	Apr-19	08/07/2020

Source: USTR 2021 Trade Policy Agenda and 2020 Annual Report

(*) The Transatlantic Trade and Investment Partnership (TTIP) negotiations were launched in 2013 and ended without conclusion at the end of 2016. This second attempt is limited in scope to the elimination of tariffs and Non-Tariff Barriers (NTBs) on industrial goods, as

TRADE AGREEMENT (Jan. 29, 2019) <https://ustr.gov/sites/default/files/0129USTR.pdf> (for the minutes of the public hearing) [hereinafter Negotiating Objectives].

⁴³ The OFFICE OF THE USTR, UNITED STATES-UNITED KINGDOM NEGOTIATIONS: SUMMARY OF SPECIFIC NEGOTIATING OBJECTIVES (Feb. 2019), https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf [hereinafter Summary of Objectives].

⁴⁴ Press Release, U.S. Trade Representative, Statement of USTR Robert Lighthizer on the Launch of U.S.-UK Trade Negotiations (May 05, 2020), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/may/statement-ustr-robert-lighthizer-launch-us-uk-trade-negotiations>.

well as barriers to trade in services, chemicals, pharmaceuticals, medical products, and soybeans.

A review of USTR practice shows there are only thirty days or less between the date it notifies its intention to negotiate with Congress and the date it calls for input from the public. The consultation period lasts from thirty to forty days. This seems to be quite a short period of time for stakeholders to prepare and submit their views, considering the complexity of the consultation topic. The period between the end of the consultations and the USTR publication of the specific trade negotiating objectives also appears to be limited for conducting an in-depth analysis of stakeholders' responses to the consultation.⁴⁵ In the case of US-Japan, it was just eleven days.⁴⁶

Over the last twelve months, the election period and the change of administration in the US had slowed down the negotiations, but upon the appointment of the new USTR, both parties acknowledged the importance of continuing to work together to build a closer economic relationship and agreed to have further discussions.⁴⁷

III. OUTREACH

To shed light on the US-UK public consultation's outreach, the paper examines the number and type of respondents to the consultation and their sector of economic activity. It further compares the results with the responses to other public consultations on trade negotiations in the US and in other jurisdictions and contrasts them with the structure of US economic output and the content of US-UK trade.

A. Respondents

The USTR consultation received 125 responses from the public.⁴⁸ Ninety-one responses (73%) were submitted by business associations, i.e., entities that represent

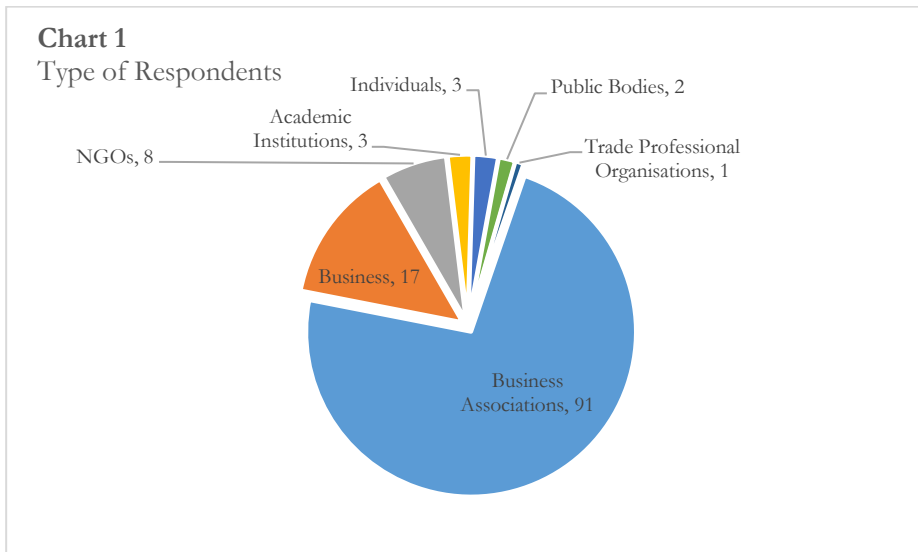
⁴⁵ See *infra* note 49.

⁴⁶ Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement, 83 Fed. Reg. 54164 (proposed Oct. 25, 2018).

⁴⁷ Press Release, Department for International Trade, Readout of International Trade Secretary Liz Truss call with USTR Katherine Tai (Mar. 22, 2021), <https://www.gov.uk/government/news/readout-of-international-trade-secretary-liz-truss-call-with-ustr-katherine-tai>.

⁴⁸ See Annex 1, Methodological Note Number 1 (In terms of their size, the average number of pages per response was 6.5. Seventy-five responses (60.8%) were between one and five pages, 34 responses (27.2%) were between six to ten pages, and 15 responses (12%) had more than ten pages. The largest response had sixty-one pages. Altogether, the public consultation received eight hundred and eighteen pages of feedback).

the interests of profit-making members.⁴⁹ Of these, eighty-five were based in the US and six in the UK. Seventeen responses (13.6%) were filed by firms. Of these, fourteen were large firms (250 employees or more), one was a medium-sized firm (between 50 and 249 employees), and two were micro enterprises (less than 10 employees). All of these firms were based in the US and traded or invested in the UK. Of the remaining seventeen responses (13.6%), eight were filed by NGOs, three by individuals, two by public authorities, three by academic institutions, and one by a trade union.



Source: Author's elaboration based on responses to USTR consultation on US-UK Trade Negotiations

There is an overwhelming majority of responses filed by respondents from the private sector (86.4%), compared with those representing the interests of the civil society (9.6%) and individuals (2.4%). While a strong presence of the private sector is expected in a trade consultation, the proportion of respondents from the civil society is surprisingly small given the wide range of policies affecting their interests covered by the trade negotiations. However, the number and type of respondents to other USTR public consultations confirm that this is not an exception.

A review of the last four consultations on trade negotiations with the UK, Japan, the EU, and Kenya indicates that the number of responses is quite modest, oscillating between 125 and 152. This is not a lot, considering the range of people that will end

⁴⁹ See Annex 1, Methodological Note Number 2 (For the criteria to classify respondents).

up being directly or indirectly affected by these agreements. Moreover, in the consultations on UK, EU, and Japan trade negotiations, the number of business associations and firms surpassed representatives of the civil society and the public sector by a large margin, while the proportion of individuals that responded to the consultations was minimal.

Table 2 Type of Respondents per Consultation – Domestic Comparison

	US-UK	US-EU	US-Japan	US - Kenya
Business Associations	91	97	98	66
Firms	17	31	34	17
NGOs	8	9	6	15
Trade Professional Organisations	1	2	3	0
Academic Institutions	3	2	0	3
Public Bodies	2	1	3	1
Individuals	3	7	1	26
Other	-	1	-	2
Unknown	-	2	1	0
Total Respondents	125	152	146	130
No. of which attended Public Hearing	24	33	44	n/a

Source: Author's elaboration based on responses to USTR consultation on US-UK Trade Negotiations

Another data point that questions the capacity of USTR public consultations to reach out to the diverse range of stakeholders likely to be affected by the trade negotiations is the similarity between respondents to different consultations. Eighty-nine of the total respondents to the US-EU consultation (58.6%), seventy-nine of the total respondents to the US-Japan consultation (54.1%), and fifty-four of the total respondents to the US-Kenya consultation (42%) also responded to the US-UK consultation. These numbers reveal that, to a significant extent, there is a core group of 'usual suspects' that respond to USTR public consultations, regardless of the partner with whom the US intends to negotiate.

A comparison of the USTR consultation on US-UK negotiations with consultations undertaken by other major trading players like Australia, the EU, and the UK reveals some interesting similarities and differences. While Australia and the US follow an open consultation approach, i.e., not limiting the content, length, or format of the

responses in any shape or form, the EU and the UK use questionnaires with pre-set questions on the different policy areas to be covered by a potential trade agreement.⁵⁰

Table 3 Type of Respondent per Consultation – International Comparison

	US-UK	EU-AUS- NZL EU Commission	AUS-EU DFAT	UK-US DIT
Consultation Body	USTR	EU Commission	DFAT	DIT
Type of Consultation	Open	Questionnaire	Open	Questionnaire
Business Associations	72.8% (91)	55.2% (48)	40.9% (36)	1.4% (90)
Firms	13.6% (17)	26.4% (23)	28.4% (25)	3.7% (234)
NGOs(#)	9.6% (12)	6.9% (6)	11.4% (16)	1.0% (61)
Public Bodies	1.6% (2)	3.4% (3)	1.1% (1)	0.3% (22)
Individuals	2.4% (3)	8.0% (7)	10.2% (9)	93.6% (5998)
Other	0.0%	0.0%	2.3% (1)	0.0%
Total	125	87(*)	88	6405

Source: Author's elaboration based on online data available from USTR, EU Commission, Department of Foreign Affairs and Trade (DFAT) and DIT websites.

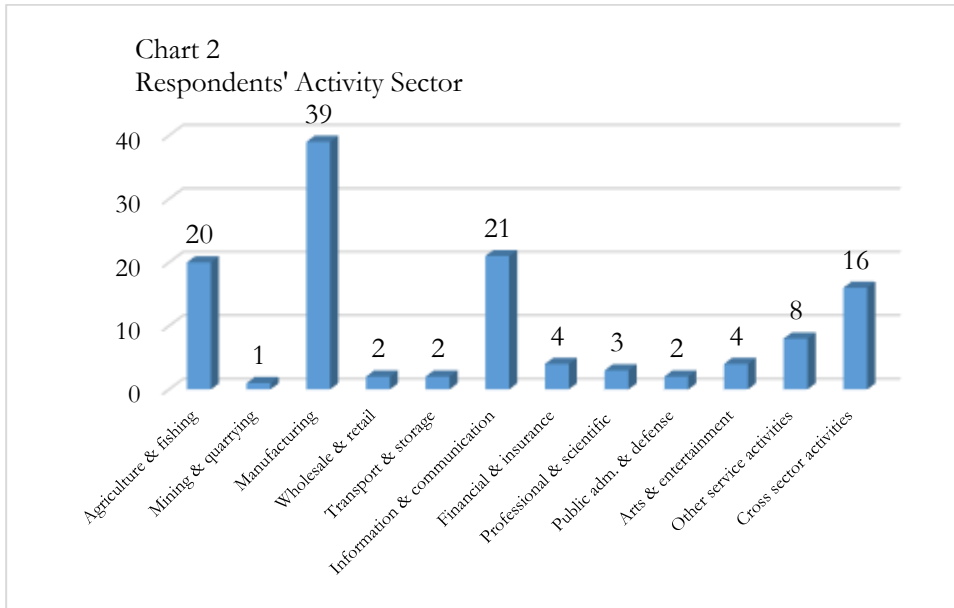
(#) Includes Trade Professional Organisations and Academic Institutions.

(*) Does not include 19 offline responses.

The number and type of respondents to the USTR, EU Commission, and DFAT consultations are relatively similar, with a clear predominance of business associations and firms among the respondents. By contrast, the number and type of respondents to the DIT consultation were quite different. In this case, over six thousand people replied to the online questionnaire, with an absolute predominance (93.6%) of individuals, which is without counting over one hundred and fifty thousand campaign-type responses.⁵¹

⁵⁰ See *infra* Annex 1 Methodological Note Number 3.

⁵¹ 38 DEGREES, <https://home.38degrees.org.uk/>; WAR ON WANT, <https://waronwant.org/>; GLOBAL JUSTICE NOW, <https://www.globaljustice.org.uk/>; OPEN RIGHTS GROUP CAMPAIGN, <https://www.openrightsgroup.org/campaigns/>; See DEPT. INTERNATIONAL



Source: Author’s elaboration based on responses to USTR consultation on US-UK Trade Negotiations

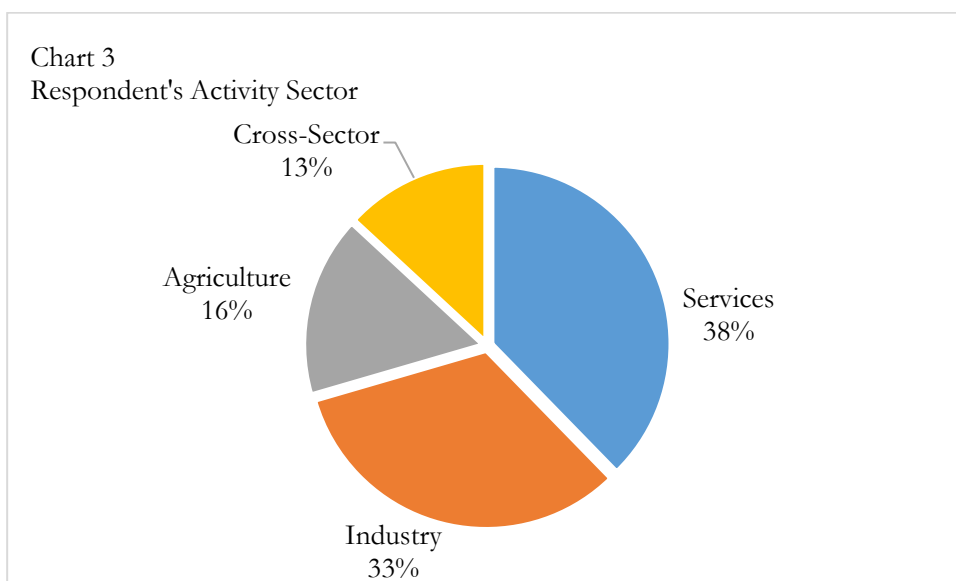
The distribution of respondents according to their principal sector of economic activity is clearly skewed toward the manufacturing sector.⁵² Chart 2 (above) shows that thirty-nine respondents (32%) represented the manufacturing sector. Within this sector, eleven represented the manufacturing of food products or beverages, ten - the manufacturing of chemical or pharmaceutical products, five - the manufacturing of basic metals and metal products, four - the manufacturing of computer, electronic, or electrical equipment, four - the manufacturing of textiles or apparel, and three - the manufacturing of vehicles or other transport equipment. Twenty-one respondents represented the information and communications sector (17.2%), covering a wide range of sub-sectors including, in particular, telecommunications, computer programming, and information service activities, while twenty respondents represented the agriculture, forestry, and fishing sector (16.4%). Finally, sixteen respondents (13.1%) were classified as cross-sector, including fourteen business associations with horizontal membership across all sectors of economic activity and two large firms engaged in business spanning

TRADE, TRADE WITH THE U.S., <https://www.gov.uk/government/consultations/trade-with-the-us> [hereinafter DIT Trade with the U.S.].

⁵² See *infra* Annex 1 Methodological Note Number 4.

various sectors of economic activity covering manufacturing and services activities.⁵³ It is interesting to note that there were no respondents from sectors like: electricity, gas, steam, and air conditioning supply; water supply, sewerage, waste management, and remediation activities; construction; accommodation and food service activities; and education, human health, and social work activities.

When looked at from an aggregate perspective, twenty respondents (16.4%) correspond to the agricultural sector, forty (32.8%) to the industry sector, and forty-six respondents (37.7%) to the services sector.⁵⁴ This differs significantly from the structure of the US economic output, which, for 2019, consisted of 1% for the agricultural sector, 19% for the industry sector, and 76.9% for the services sector.⁵⁵ The discrepancy between respondents' sectors of activity and the structure of US output is even more marked within business associations. Nineteen business associations (20.1%) advocated for the specific interests of the agricultural sector. These numbers appear to suggest an overrepresentation of the agricultural sector and an underrepresentation of the services sector among the respondents.



⁵³ CARGILL: HELPING THE WORLD THRIVE, <https://www.cargill.com/>; AMWAY, <https://www.amwayglobal.com/>.

⁵⁴ See *infra* Annex 1 Methodological Note Number 5.

⁵⁵ WORLD BANK GROUP, WORLD DEVELOPMENT INDICATORS, <https://databank.worldbank.org/source/world-development-indicators> (World Bank Data for U.S. corresponds to 2017).

Source: Author's elaboration based on responses to USTR consultation on US-UK Trade Negotiations

B. Policy Requests

The USTR public consultation has no pre-set questions, it is up to each respondent to decide how many policy requests to include in their response. The paper reviewed each response and counted the number of policy requests included in each of them.⁵⁶ The paper identified a total of 583 policy requests,⁵⁷ and classified them into thirty-four policy areas, which were further aggregated into eleven categories.

Table 4 Number of Policy Requests by Policy Area

1. Trade in Goods	255
1.1 Tariffs	76
1.2 Sanitary and Phytosanitary Measures	36
1.3 Technical Barriers to Trade	40
1.4 Quantity Control Measures	18
1.5 Price Control Measures	4
1.6 Rules of Origin	25
1.7 Trade Remedies	13
1.8 Other/Unspecified Non-Tariff Barriers	43
2. Trade in Services	66
2.1 Financial Services	17
2.2 Telecommunications	6
2.3 Transport	6
2.4 Postal and Courier Services	5
2.5 Professional Services	2
2.6 Services (unspecified sectors)	21
2.7 Movement of Natural Persons	9
3. Digital trade	43
4. Investment	22
5. Intellectual Property	46

⁵⁶ See *infra* Annex 1 Methodological Note Number 6.

⁵⁷ Fifty-five responses (44%) included between one to three policy requests, thirty-five responses (28%) included four to six policy requests, twenty-four responses (19.2%) included seven to nine policy requests and nine responses (7.2%) included ten or more policy requests.

6. Government Procurement	23
7. Levelling Playing Field	32
7.1 Competition	8
7.2 Subsidies	8
7.3 State Own Enterprises	10
7.4 Macroeconomic and Exchange Rate Matters	6
8. Regulatory Coherence	45
8.1 Good Regulatory Practices	34
8.2 Transparency	11
9. Societal Concerns	37
9.1 Small and Medium Enterprises	6
9.2 Consumer Protection	4
9.3 Labour	7
9.4 Gender	0
9.5 Human Rights	2
9.6 Public Health	5
9.7 Animal Welfare	3
9.8 Environment	10
10. Dispute Settlement	9
11. Other	5
Total	583

Source: Author's elaboration based on responses to USTR consultation on US-UK Trade Negotiations

The vast majority of policy requests (43.7%) referred to trade in goods. Within this category, the largest number of policy requests referred to tariffs (seventy-six), followed by those referring to technical barriers to trade (forty) and Sanitary and Phytosanitary measures (thirty-six).⁵⁸ In a distant second place came policy requests referring to trade in services (11.3%). Within this category, most requests did not refer to any specific service sector (twenty-one). Of those referred to a specific service sector, the largest number of requests referred to financial services (seventeen).

In third place came policy requests on three policy areas with almost the same number of requests, i.e., intellectual property (7.9%), regulatory coherence, including

⁵⁸ See Dragunova & Gari.

good regulatory practises and transparency (7.7%) and digital trade (7.4%). Only thirty-seven policy requests (6.3%) referred to societal concerns such as environment, labour, gender, human rights, public health, and animal welfare. Thirty-two policy requests (5.5%) were concerned with levelling the playing field, including competition, subsidies, state-owned enterprises, and macroeconomic and exchange rate matters. Only twenty-three requests (3.9%) referred to government procurement and twenty-two requests (3.8%) referred to investment (3.8%).

The absolute predominance of policy requests on trade in goods over trade in services contrasts with the content of US trade with the UK. In 2019, of a total of \$147.4 billion worth of exports, \$69.1 billion (46.9%) corresponded to goods and \$78.3 billion (53.1%) to services, while of a total of \$125.5 billion worth of imports, \$63.2 billion (50.3%) corresponded to goods and \$62.3 billion (49.7%) to services.⁵⁹ And these are gross terms. When measured in value-added terms, the proportion of services grows significantly, both in exports and imports.⁶⁰

It is interesting to note that of the 583 policy requests, 420 (72%) referred to policy areas already covered by WTO disciplines, whereas only 163 (28%) referred to the “WTO extra” disciplines,⁶¹ which are typically covered by deep trade agreements such as state-owned enterprises, exchange rate policies, and trade disciplines on policies dealing with societal concerns such as environment, labour, gender, human rights, and animal welfare.

Given the increasing use of services as input and output in the manufacturing sector, also known as the “servicification of manufacturing”,⁶² it would be reasonable to expect an interest of the manufacturing sector in the liberalisation of trade in services and an interest of service industries in products that require a significant amount of service input for their production. To test this hypothesis, the paper counts the policy requests on trade in services from manufacturing sector respondents and trade in goods from services industry respondents. Table 5 (below) shows little evidence of respondents from one sector of economic activity filing requests related to other sectors of economic activity.⁶³

⁵⁹ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, UNITED KINGDOM, <https://ustr.gov/countries-regions/europe-middle-east/europe/united-kingdom>.

⁶⁰ See Miroudot & Cadestin, *Services in global value chains: From inputs to value-creating activities*, 197 OECD TRADE POLICY PAPERS (2017).

⁶¹ See Henrik Horn et al., *Beyond the WTO? An anatomy of EU and US preferential trade agreements*, 7 Bruegel Blueprint Series 1 (2009) (Policy areas going beyond the current WTO mandate).

⁶² See THE NATIONAL BOARD OF TRADE, *SERVICIFICATION OF SWEDISH MANUFACTURING*, KOMMERSKOLLEGIUM (2010).

⁶³ See *infra* Annex 2 Table 4.1

Table 5
Policy Requests by Policy Area and Respondents' Sector of Activity

	Agriculture & fishing	Mining & quarrying	Manufacturing	Wholesale & retail	Transport & storage	Information & communication	Financial & insurance	Professional & scientific	Public adm. & defence	Arts & entertainment	Other services activities	Cross sector activities	Individuals	Grand Total
Trade in Goods	56	0	109	3	2	19	1	3	2	3	10	46	1	255
Trade in Services	0	2	4	0	3	14	4	7	3	3	1	25	0	66
Intellectual Property	4	0	13	1	0	16	1	1	0	1	1	7	1	46
Regulatory Coherence	3	0	16	0	1	1	6	1	1	0	5	11	0	45
Digital Trade	0	0	4	0	0	20	4	1	1	3	1	9	0	43
Societal Concerns	0	0	5	0	0	1	0	3	0	1	16	9	2	37
Levelling Playing Field	2	0	13	0	0	4	1	3	0	0	3	6	0	32
Procurement	0	1	5	0	0	6	2	1	0	0	1	7	0	23
Investment	1	1	2	0	0	2	4	1	0	1	3	7	0	22
Dispute Settlement	2	0	2	0	0	0	1	0	0	0	1	3	0	9
Other	0	0	1	0	0	0	1	0	0	1	1	1	0	5
Total	68	4	174	4	6	83	25	21	7	13	43	131	4	583

Source: Author's elaboration based on responses to USTR consultation on US-UK Trade Negotiations

Take, for example, the agricultural sector. Respondents from the agricultural sector filed sixty-eight policy requests, the overwhelming majority of which (82.4%) related to trade in goods. The few remaining requests referred to intellectual property, subsidies, regulatory coherence, and investment. Notwithstanding the increasing

value that services bring to the agricultural sector,⁶⁴ the paper does not identify policy requests by respondents from this sector related to services or digital trade.

Likewise, the vast majority of policy requests filed by respondents operating in the manufacturing sector (62.3%) referred to the trade in goods. The paper identifies only four requests asking for the liberalisation of specific service sectors,⁶⁵ and four requests from manufacturers of motor vehicles (Association of Global Automakers, National Association of Manufacturers), electrical equipment (National Electrical Manufacturers Association), and chemical products (American Chemistry Council) asking for the liberalisation of cross-border data flows and the prohibition of data localisation requirements. These numbers are extremely low when contrasted with the essential role of services and the free flow of data in managing a production process fragmented across various jurisdictions, which is typical of these sectors.

The interest of respondents from the service industry in policy measures affecting trade in goods appears to be slightly stronger. The paper identifies forty-three policy requests filed by respondents from the service industry related to this matter. The majority of the requests were filed by respondents from the information and communication sector. They requested, inter alia, to align the UK's *de minimis* duty-free threshold for low-value shipments with the US standards (Internet Association, the Information Technology Industry Council and Etsy Inc)⁶⁶; duty-free treatment for Information and Communication Technology (ICT) products (The Computing Technology Industry Association, Telecommunications Industry Association); harmonisation or mutual recognition of technical regulations on ICT products (Tech UK, Software Alliance, The Computing Technology Industry Association, Telecommunications Industry Association, Information Technology Industry Council); flexible rules of origin for ICT products (Tech UK and Computing Technology Industry Association); and facilitation of customs procedures for low value goods (TechUK, Internet Association, Etsy Inc, The Computing Technology Industry Association).

⁶⁴ See FAO, *Synergy between agriculture and services trade: enabling new growth opportunities*, Summary (2019) <https://www.fao.org/3/ca6986en/CA6986EN.pdf>.

⁶⁵ *Libbey Inc* (global manufacturer and marketer of glass tableware products) requested the liberalization of the following sectors – restaurant and food service; hotels; tourism; distribution; franchising; transportation; express delivery; and telecommunications; the *National Electrical Manufacturers Association* requested the full opening of the UK's market for services, including testing and technical services, distribution services, energy services, environmental services, and medical services; and *Herbalife Nutrition* (global leader in nutritional supplements and skin care products) requested commitments on direct selling to ensure that countries are not prohibited from distributing products through direct selling.

⁶⁶ Respondents noted that the UK's *de minimis* duty-free threshold was about \$200, while in the US it is about \$800.

In addition, representatives from the arts and entertainment industry requested strong technical regulations on connected consumer products (Pokémon International Inc) and duty-free treatment for cinematographic equipment (Motion Picture Association of America); a representative from the wholesale and retail sector requested the elimination of tariffs and quotas on automobiles (National Automobile Dealers Association); an insurance industry association (The American Property Casualty Insurance Association) requested the elimination of tariffs on certain goods that have a substantially negative economic impact on insurers, such as construction materials, autos, and auto parts; and a logistics and delivery industry association (Express Association of America) also requested to align the UK's *de minimis* duty-free threshold to US standards and facilitate customs procedures for low value goods.

C. *Taking Stock and Moving Forward*

All in all, the number and type of respondents and the content of the policy requests clearly suggest that there is still plenty of room to improve the outreach capacity of USTR's public consultations. Only a small number of stakeholders responded to the USTR public consultation. Of those who responded, the vast majority were business associations and large multinational companies, with only very few responses filed by small and medium enterprises or civil society representatives. When contrasted against the economic structure of the US, the distribution of respondents according to their principal sector of economic activity showed an overrepresentation of the agricultural sector and an underrepresentation of the services sector. Although over half of the trade value between the US and UK comes from trade in services, the vast majority of policy requests refer to trade in goods, in particular tariffs. Also, contrasting with the ever-expanding scope of policies covered by recent PTAs, including non-trade matters such as labour, the environment, human rights, and animal welfare, the paper identifies only a very small number of policy requests in these areas. Finally, the paper does not identify evidence of supply-chain type of policy requests where stakeholders from the manufacturing sector show an interest in policy measures affecting trade in services and vice versa.

The small proportion of respondents from the civil society contrasts with the USTR's goal to reach out to "all too frequently silenced voices" to get a better understanding of how the proposed trade policies may affect people of colour, minority-owned businesses, and aspirational entrepreneurs before making policy decisions.⁶⁷ Likewise, the fact that just one medium-sized firm and two micro

⁶⁷ Press Release, Office of the U.S. Trade Representative, Testimony of Ambassador Katherine Tai Before the House of Ways and Means Committee Hearing on the President's Trade Agenda (May 13, 2021) <https://ustr.gov/about-us/policy-offices/press-office/press->

enterprises responded to the consultations suggests that more needs to be done to fulfil the Trade Priorities and Accountability Act's express mandate to facilitate the participation of small businesses in the trade negotiation process.⁶⁸

Common obstacles that stand against effective public consultation outreach include: a) lack of awareness of engagement opportunities; b) inability or unwillingness to participate due to lack of resources, lack of time, or lack of incentives; c) complexity of the subject matter; and d) scepticism towards governments' efforts to promote public engagement.⁶⁹ It is important to address these obstacles in order to realise the intrinsic and instrumental values associated with public consultations. This is particularly important for consultations on deep trade agreements, which cover a wide range of policy areas and thus affect the interests of a number of people, even those other than importers and exporters of goods and services. It is also critical to fulfil the ever more frequent promises of inclusive trade policy-making that are entrenched in current political discourses. By contrast, when a consultation fails to reach out to all relevant stakeholders, inputs may be biased in favour of the more powerful sectoral interests. If the consultation mechanism is captured by lobbyists from specific sectors, policymakers may end up accessing only biased information that may steer the policies away from the public interest.

A number of things could be done to improve the capacity of USTR's public consultation to reach out to all relevant stakeholders, in particular those less likely to have the time, technical expertise, and resources to respond to the consultation. For instance, in addition to publishing a notice in the Federal Register, the USTR could take more pro-active steps to disseminate the calls for comments on trade negotiations, such as creating a register of stakeholders like the EU Transparency Register⁷⁰ and writing directly to them every time a call is opened. The USTR could also conduct impact assessments of trade negotiations before the consultation and disseminate the results in a plain, non-technical manner, and provide targeted and meaningful support to less resourceful stakeholders to help them better understand what is at stake and how to prepare a submission. Finally, the consultation period could be extended to give stakeholders more time to prepare and submit their inputs and public hearings with stakeholders could be held beyond Capitol Hill.

releases/2021/may/testimony-ambassador-katherine-tai-house-ways-and-means-committee-hearing-presidents-trade-agenda.

⁶⁸ U.S.C. § 4208, *supra* note 32.

⁶⁹ Alemanno, *supra* note 13, at 31-34.

⁷⁰ EUROPEAN UNION, TRANSPARENCY REGISTER, https://ec.europa.eu/info/about-european-commission/service-standards-and-principles/transparency/transparency-register_en.

IV. IMPACT

At the outset, it must be recalled that the USTR's manoeuvring room to entertain requests from stakeholders is limited by the trade policy objectives set by the Congress.⁷¹ However, even within these outer limits, the USTR does retain a significant degree of discretion to further define US trade policy objectives. Therefore, it is valid to ask: what weight did the USTR assign to stakeholders' input, if any, for the definition of the specific negotiating objectives for the US-UK negotiations?

To shed light on this matter, the following paragraphs zoom into stakeholders' requests on three policy areas – rules of origin, intermediary liability protection for online service providers, and investor-state dispute settlement mechanisms – characterised by sharply conflicting demands between stakeholders, and contrast them with the specific objectives defined by the USTR on these policy areas for the negotiations with the UK.

A. Rules of Origin

Preferential Rules of Origin (ROOs) determine whether a product from one PTA country qualifies for preferential tariff treatment when imported into another PTA country. ROOs are intended to prevent preferential benefits from being extended to products originating in third countries merely because they were trans-shipped through, or had minor processing in, one of the PTA parties. Industries concerned about the risk that the PTA could open the door to more competitive products from third countries typically ask for ROOs that require high Regional Value Content (RVC) to satisfy the origin requirement. By contrast, industries integrated into international supply chains would normally call for low RVC or other flexible criteria to determine origin to ensure that they can continue sourcing inputs from third countries to manufacture their products without losing eligibility for preferential treatment. The criteria for determining the origin of products have direct implications for the fate of many industries, and thus it is one of the policy issues that attract the highest level of interest from stakeholders. It is a highly sensitive, technical, and industry-specific topic. The USTR consultation received twenty-five responses with detailed policy requests on ROOs that revealed significant differences in the desired criteria to determine the origin of products both across and within specific industries.

Respondents from industry sectors deeply integrated into international value chains, such as the chemical, pharmaceutical, information technology, and food industries, and business associations with a broad cross-sectoral membership base, typically

⁷¹ See *supra* Part III.

asked for liberal ROOs.⁷² By contrast, respondents from less internationalised sectors like agriculture or sectors more sensitive to third-country competition like basic metals, demanded rigid rules of origin to ensure that the benefits of a potential US-UK Agreement remain available only to products genuinely made in the US and the UK.⁷³ One NGO (Citizens Trade Campaign) also requested rigid ROOs for

⁷² American Chemistry Council, Comment Letter on Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement (Jan. 15, 2019), <https://www.regulations.gov/comment/USTR-2018-0036-0090>; American Association of Exporters and Importers, Comment Letter on Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement (Jan. 15, 2019), <https://www.regulations.gov/comment/USTR-2018-0036-0129>; Amway, Comment Letter on Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement (Jan. 15, 2019), <https://www.regulations.gov/comment/USTR-2018-0036-0064>; Computing Technology Industry Association, Comment Letter on Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement (Jan. 15, 2019), <https://www.regulations.gov/comment/USTR-2018-0036-0082>; Tech UK, Comment Letter on Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement (Jan. 15, 2019), <https://www.regulations.gov/comment/USTR-2018-0036-0038>; National Confectioners Association, Comment Letter on Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement (Jan. 10, 2019), <https://www.regulations.gov/comment/USTR-2018-0036-0013>; Society of Chemical Manufacturers and Affiliates, Comment Letter on Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement (Jan. 15, 2019), <https://www.regulations.gov/comment/USTR-2018-0036-0123>; U.S. Chamber of Commerce, Comment Letter on Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement (Jan. 10, 2019), <https://www.regulations.gov/comment/USTR-2018-0036-0014>; U.S. Council for International Business, Comment Letter on Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement (Jan. 15, 2019), <https://www.regulations.gov/comment/USTR-2018-0036-0130>.

⁷³ National Milk Producers Federation and the U.S. Dairy Export Council, Comment Letter on Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement (Jan. 15, 2019), <https://www.regulations.gov/comment/USTR-2018-0036-0066>; Northwest Horticultural Council, Comment Letter on Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement (Jan. 14, 2019), <https://www.regulations.gov/comment/USTR-2018-0036-0033>; Distilled Spirits Council, Comment Letter on Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement (Jan. 15, 2019), <https://www.regulations.gov/comment/USTR-2018-0036-0068>; Titanium Metals Corporation, Comment Letter on Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement (Jan. 15, 2019), <https://www.regulations.gov/comment/USTR-2018-0036-0042>; Allegheny Technologies Incorporated, Comment Letter on Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement (Jan. 15, 2019), <https://www.regulations.gov/comment/USTR-2018-0036-0097>; American Iron and Steel Institute, Comment Letter on Request for Comments on Negotiating Objectives for a U.S.-

products across the board, including not only high national content requirements but also high wage standards.

Interestingly, conflicting demands on ROOs can be identified not only between respondents from different sectors but also within the same sector. The textile and apparel industry is a sensitive sector, which the US negotiates separately from other goods. Traditionally, the US approach to ROOs for textiles supports production in and economic integration between the signatories to a PTA, but tightly limits third-country supply chains and inputs. This is achieved through the “Yarn-Forward Rule”, meaning everything from the yarn spinning forward needs to take place within the PTA countries.⁷⁴ The National Council of Textile Organizations, the Narrow Fabrics Institute, and the US Industrial Fabrics Institute each filed a long submission explaining the rationale for their staunch support for strong ROOs that fully embrace the “yarn-forward rule”. By contrast, the American Apparel and Footwear Association and the US Fashion Industry asked to replace the “Yarn-Forward Rule” with ROOs that better reflect the unique, global nature of the fashion industry’s supply chains, in which sourcing decisions are based on consumer demand.

What was the impact of these conflicting stakeholders’ requests, if any, on the definition of specific negotiating objectives on ROOs with the UK? A contextual analysis suggests that the USTR already had strong views on the preferred type of ROOs prior to the consultation. First, the consultation on US-UK negotiations was conducted in 2018, one year after the Trump administration took office with a defensive trade policy agenda that included, *inter alia*, the objective to revert the US trade deficit with its trading partners, particularly in manufactured goods, and to tackle the decreasing number of jobs in the manufacturing sector and the diminishing growth of the US industrial production sector.⁷⁵ Increasing the RVC of US PTAs’ ROOs was a logical way to contribute to these objectives. And that is exactly what the USTR asked for during the North American Free Trade Agreement (NAFTA) renegotiation, i.e., to increase the RVC of NAFTA products, in particular heavy trucks and passenger cars, to set the right incentives to reshore car plants from Mexico into the US.

Japan Trade Agreement (Jan. 15, 2019), <https://www.regulations.gov/comment/USTR-2018-0036-0057>; Libbey Inc., Comment Letter on Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement (Jan. 15, 2019), <https://www.regulations.gov/comment/USTR-2018-0036-0098>.

⁷⁴ See Congressional Research Service, ‘Rules of Origin’ In Focus (Updated February 17, 2021), page 2 <https://sgp.fas.org/crs/row/index.html>.

⁷⁵ See USTR, *The President’s Trade Policy Agenda, in* 2017 TRADE POLICY AGENDA AND 2016 ANNUAL REPORT <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf> [hereinafter U.S. Trade Policy Agenda].

In this context, it was reasonable to expect the USTR to push for a similar approach to ROOs in other trade negotiating processes. Unsurprisingly, in its summary of specific negotiating objectives with the UK, the USTR states that it will seek to “[d]evelop rules of origin that ensure that the benefits of the Agreement go to products *genuinely made* in the United States and the UK” (emphasis added) and “ensure that the rules of origin incentivize production in the territory of the Parties, specifically in the United States”, but the report offers no further considerations to justify this choice.⁷⁶

Second, the fact that the USTR phrased exactly the same negotiating objective on the ROOs for negotiations with the EU, Japan, and Kenya and the NAFTA renegotiation, notwithstanding the idiosyncratic nature of each, confirms that the USTR already had considered the type of ROOs it would ask from its trading partners prior to receiving the responses to the public consultations set up for each negotiating process.⁷⁷

B. *Intermediary Liability Protection for Internet Service Providers*

This topic refers to the liability framework applicable to internet service providers for third party content that is stored, processed, transmitted, distributed, or made available by their platforms or services, in particular, copyrighted content. Stakeholders submitted quite a few requests in this policy area, which is characterised by a stark conflict of interests.

On the one hand, big internet companies advocate for substantial protection from liability for third-party content.⁷⁸ They argue that this is necessary to enhance the

⁷⁶ Negotiating Objectives, *supra* note 42.

⁷⁷ *Cf.* Summary of Objectives, *supra* note 43, with THE OFFICE OF THE USTR, UNITED STATES-EUROPEAN UNION NEGOTIATIONS: SUMMARY OF SPECIFIC NEGOTIATING OBJECTIVES (Jan. 2019) https://ustr.gov/sites/default/files/01.11.2019_Summary_of_U.S.-EU_Negotiating_Objectives.pdf, THE OFFICE OF THE USTR, UNITED STATES-KENYA NEGOTIATIONS: SUMMARY OF SPECIFIC NEGOTIATING OBJECTIVES (May 2020) https://ustr.gov/sites/default/files/Summary_of_U.S.-Kenya_Negotiating_Objectives.pdf, and THE OFFICE OF THE USTR, UNITED STATES-JAPAN NEGOTIATIONS, SUMMARY OF SPECIFIC NEGOTIATING OBJECTIVES (Dec. 2018) https://ustr.gov/sites/default/files/2018.12.21_Summary_of_U.S.-Japan_Negotiating_Objectives.pdf.

⁷⁸ *See* Internet Ass’n, Comment Letter on Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement (Jan. 14, 2019), <https://www.regulations.gov/comment/USTR-2018-0036-0036> [hereinafter Comment US-Japan Trade Agreement]; Etsy Inc., Comment Letter on Request for Comments on

economic viability of online platforms that depend on user interaction and user content, facilitate the free flow of information, underpin online innovation, and ensure the competitiveness of American online platforms.⁷⁹ In particular, they request to use the United States-Mexico-Canada Agreement (USMCA) model for the US-UK trade negotiations.⁸⁰ The USMCA chapter on digital trade includes a provision that limits internet platforms' liability for third-party content other than copyrighted content.⁸¹ In its turn, the chapter on intellectual property includes provisions that limit the legal remedies against internet service providers for copyright infringements that they do not control, but that take place through systems or networks controlled or operated by them.⁸² For example, the Internet Association, which represents over forty of the world's leading internet companies, requests that a "US-UK FTA should prohibit governments from making online services liable for third-party content"⁸³, and should "adopt strong copyright safe harbours from liability for online service providers".⁸⁴ In a similar vein, the Information Technology Industry Council requests "the adoption of non-IP intermediary liability protections *like those in the USMCA*, so that governments cannot make innovative online services liable for activity by third parties that they do not control" (emphasis added).⁸⁵

On the other hand, content creators, including representatives from the music and creative industries, news, and publishing sectors, request to resist demands from the internet industry to include in the trade agreement excessively flexible safe harbours, limitations to enforcement actions against copyright infringements, and other mechanisms that water down online intermediaries' liability for third-party content

Negotiating Objectives for a U.S.-Japan Trade Agreement (Jan. 15, 2019), <https://www.regulations.gov/comment/USTR-2018-0036-0076>; BSA – The Software Alliance, Comment Letter on Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement (Jan. 15, 2019), <https://www.regulations.gov/comment/USTR-2018-0036-0062>; Information Technology Industry Council, Comment Letter on Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement (Jan. 15, 2019), <https://www.regulations.gov/comment/USTR-2018-0036-0124>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Agreement Between the United States of America, The United Mexican States and Canada, U.S.-Mex.-Can., art. 19.17, July 1, 2020. [hereinafter USMCA]

⁸² *Id.* arts. 20.87 & 20.88.

⁸³ Comment US-Japan Trade Agreement, *supra* note 78, at 6.

⁸⁴ *Id.*

⁸⁵ Information Technology Industry Council, Comment Letter on Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement (Jan. 15, 2019), <https://www.regulations.gov/comment/USTR-2018-0036-0124>, at 3.

and, in particular, copyrighted content.⁸⁶ They argue that such demands are outdated and overbroad and no longer reflect a policy debate that is revisiting the responsibilities of online intermediaries and discussing new ways to ensure that they conduct their business with reasonable care and are held accountable for their actions. For example, the Recording Industry Association of America requests not to include in the US-UK Trade Agreement overbroad provisions on copyright safe harbours that facilitate the misapplication of such safe harbours.⁸⁷ The International Intellectual Property Alliance, the News Media Alliance, and the Creative's Future expressly request not to use the USMCA safe harbours for online service providers as a model.⁸⁸

The question that persists is: what was the impact of these conflicting demands, if any, in defining the negotiating objectives for the US – UK negotiations? Again, a contextual analysis reveals that the US administration already had a strong preference for a particular trade policy approach to intermediary liability prior to the US – UK consultation that remained unchanged after the consultation.

First, the USTR's specific negotiating objectives on this matter replicate what the US had already agreed to in the USMCA. The language used to define the specific negotiating objectives on liability for non-copyrighted content follows the parameters set by Article 19.17 USMCA, which accommodates Internet Service Provider's (ISP's) demands, i.e., to "[e]stablish rules that limit non-IPR civil liability of online platforms for third-party content, subject to the Parties' rights to adopt non-discriminatory measures for legitimate public policy objectives or that are necessary to protect public morals".⁸⁹ Second, the inclusion of identical objectives for the negotiations with the EU, Japan, and Kenya and the fact that the US-Japan Digital Trade Agreement replicates almost entirely the text of the USMCA provision on this matter⁹⁰ also suggest the USTR had a pre-defined trade policy agenda on intermediary liability protection.

⁸⁶ See USTR, NEGOTIATING OBJECTIVES FOR A U.S. – UNITED KINGDOM TRADE AGREEMENT (NOV. 16, 2018) <https://www.regulations.gov/document/USTR-2018-0036-0001> (policy requests from Recording Industry Association of America, International Intellectual Property Alliance, News Media Alliance, Motion Picture Association, Creative Future, Association of American Publishers, Digital Creators Working Group).

⁸⁷ Recording Industry Ass'n of America, Comment Letter on Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement (Jan. 15, 2019), [regulations.gov/comment/USTR-2018-0036-0100](https://www.regulations.gov/comment/USTR-2018-0036-0100), at 8.

⁸⁸ *Id.*

⁸⁹ Summary of Objectives, *supra* note 43, at 6-7.

⁹⁰ Digital Trade Agreement, U.S.-Japan, art. 18, Oct. 7, 2019, TIAS 20 101.1.

C. Investor State Dispute Settlement

Another policy area where the paper identifies downright conflicting stakeholders' demands relates to the inclusion (or not) of an Investor-State Dispute Settlement mechanism (ISDS) in the investment chapter, i.e., provisions establishing a mechanism through which neutral arbitrators resolve disputes between foreign investors and host states relating to government measures that allegedly violate treaty standards of investment protection.

The US has been the precursor of the ISDS mechanism as a means of protecting US investors in foreign jurisdictions, which often do not receive the same level of basic protections as those available in the US. Since the early 1990s, the US has included ISDS mechanisms in all its bilateral investment agreements and in the PTAs' investment chapters, taking NAFTA Chapter 11 as the archetypical model for ISDS. But growing concerns over the lack of transparency of arbitration procedures, the impartiality of arbitrators, and the wider implications of arbitration awards for the right to regulate in the public interest and for the public purse have gradually started to wane the wide support that the ISDS mechanism had originally enjoyed. Eventually, the debate reached the US Congress, and it was decided to introduce specific trade negotiating objectives in the Trade Priorities and Accountability Act, 2015, to address some of these concerns.⁹¹

The Act includes an overall objective to further strengthen the system of international trade and investment disciplines and procedures, including dispute settlement; and a specific objective to provide meaningful procedures for resolving investment disputes.⁹² However, it also adds specific objectives to improve ISDS mechanisms by requesting the Executive to introduce procedures to eliminate and deter frivolous claims, ensure the efficient selection of arbitrators and expeditious disposition of claims, enhance public input, provide coherence to the interpretation of investment provisions through an appellate body or similar mechanism, and ensure the fullest measure of transparency in ISDS to the extent consistent with the need to protect information that is classified or business confidential.⁹³

When Trump took office, the USTR, Robert Lighthizer, considerably heightened the US administration's opposition to ISDS mechanisms on sovereignty grounds (there is no reason to give foreign nationals more rights than Americans have in the American court system and to open the door for a foreign arbitration tribunal to overrule the entire US system) and on economic grounds (the government must not provide US investors with a political risk insurance that encourages the outsourcing

⁹¹ See S. REP. NO. 114-42, (2015).

⁹² 19 U.S.C. § 4201 (a)(3) & (b)(4)F (2015).

⁹³ 19 U.S.C. § 4201 (b)(4) G & H (2015).

of American industry plants, particularly to Mexico).⁹⁴ Lighthizer expressly acknowledged that the matter was controversial and that his views were in the minority, but nevertheless he pushed forward for a reform of NAFTA Chapter 11.⁹⁵ The USTR's negotiating objective on this matter specified the need to "[s]ecure for US investors in the NAFTA countries important rights consistent with US legal principles and practice, while ensuring that NAFTA country investors in the United States are not accorded greater substantive rights than domestic investors."⁹⁶ In accordance with this objective, the USMCA eliminated ISDS between the US and Canada and severely restricted it between the US and Mexico to claims for breaches of post-establishment National Treatment, Most-Favoured Nation (MFN), and Direct Expropriation in all sectors, and to claims for breaches of any of the investment protection standards only in specific sectors (oil and gas, power generation services, telecommunications services, transportation services, and the management of ownership of infrastructure).⁹⁷

Against this background, the USTR public consultation on the US-UK trade negotiations received a number of responses that included requests both in favour of and against ISDS. On the one hand, representatives from the private sector expressed their unequivocal support for ISDS mechanisms and strongly advocated for reversing the reforms introduced by the USMCA and restoring a fully-fledged ISDS mechanism in an eventual US-UK trade agreement. For example, the American Property Casualty Insurance Association questioned the USMCA limitations of ISDS to specific sectors and expressly requested to stay away from them. The Groceries Manufacturers Association added that limiting ISDS protection to particular industries "would undermine decades of international and US trade policy, create uncertainty, and introduce avenues for potential discrimination against US food and agricultural exports."⁹⁸ The National Foreign Trade Council, the Securities Industry and Financial Markets Association, and the Corn Refiners Association also asked for an effective ISDS mechanism without any industry-specific or product-specific carve-outs or exceptions from coverage.

⁹⁴ U.S. Trade Policy Agenda, *supra* note 75.

⁹⁵ *Id.* at 21.

⁹⁶ OFF. OF U.S. TRADE REP., SUMMARY OF OBJECTIVES FOR THE NAFTA RENEGOTIATION (Nov. 2017). Press Release, Summary of Objectives for the NAFTA Renegotiation (Nov. 2017), <https://ustr.gov/sites/default/files/files/Press/Releases/Nov%20Objectives%20Update.pdf>.

⁹⁷ See USMCA, *supra* note 81, Chapter 14.

⁹⁸ Groceries Manufacturers Ass'n, Comment Letter on Request for Comments on Negotiating Objectives for a U.S.-Japan Trade Agreement (Jan. 15, 2019), <https://www.regulations.gov/comment/USTR-2018-0036-0086>. at 5

By contrast, representatives from civil society, including the Institute for Agriculture and Trade Policy, the Sierra Club, Citizens Trade Campaign, and American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), requested the USTR to remain firm in its position to move away from ISDS, initiated by the USMCA reform of NAFTA Chapter 11. In its turn, close to thirty health and civil society organisations endorsed the USMCA's limitations on ISDS, highlighting the benefits for public health of limiting the tobacco industry's ability to challenge tobacco control measures expressly requested to insulate the rights of the US and the UK to implement tobacco control policies from tobacco industry ISDS challenges.

The question that arises is: to what extent have these conflicting stakeholders' requests informed the specific negotiating objectives on investment with the UK? The summary of specific negotiating objectives does not include any reference to mechanisms for resolving investment disputes.⁹⁹ The language used for defining the objectives on investment provides no evidence of compromise between conflicting demands. It simply refers to the need to establish rules that reduce or eliminate barriers to US investment in the UK and the need to "[s]ecure for US investors in the UK important rights consistent with US legal principles and practice, while ensuring that UK investors in the United States *are not accorded greater substantive rights than domestic investors* (emphasis added)."¹⁰⁰ Although the objective refers to substantive rights, the emphasis on the need to avoid according preferential treatment to foreign investors *vis-à-vis* domestic investors, combined with the absence of any reference to mechanisms for resolving investment disputes, sets the tone clearly against ISDS. This is the same language used for the investment objectives for the NAFTA renegotiations, and it has already been established that the agreement following such negotiations significantly trimmed down the scope of the ISDS mechanism. In other words, when looking at the sequence of events prior to and after the formulation of the specific objectives for the US-UK negotiations, it becomes clear that the responses to the US-UK public consultation did not have a significant impact on the USTR's position on ISDS.

D. Taking Stock and Moving Forward

Stakeholders' conflicting demands on ROOs, intermediary liability for ISPs, and ISDS are not reflected in the USTR summary of trade policy objectives for US-UK negotiations. The limited amount of time allowed for considering the stakeholders' input, the succinctness of the USTR summary of negotiating objectives following the consultation, and the close similarity between specific objectives for trade negotiations with very different partners suggest that stakeholders' responses to the

⁹⁹ Summary of Objectives, *supra* note 43, at 10.

¹⁰⁰ *Id.*

US-UK public consultation did not play a significant role in shaping US trade policy objectives for these negotiations.

This, of course, does not mean that the USTR does not take stakeholders' views into account. There are other ways through which the USTR draws input from stakeholders, including its extensive network of advisory committees, engagement with Congress (Senate Finance Committee, House Ways and Means, Senate Agriculture Committee, and House Agriculture Committee) where Senators and Representatives channel to the USTR the concerns of stakeholders from their constituencies, and informal channels of communication with industry representatives. Rather, it shows a weak framework for holding the consulting body accountable to stakeholders taking part in the consultation. This is problematic. If the public perceives that public consultations are used just to legitimise pre-defined governmental policy preferences, the whole stakeholder engagement process may end up undermining, rather than building, trust in government.

Looking forward, a few simple steps could be taken to improve the impact of public consultations on the definition of the trade policy objectives championed by USTR. The consultation period and the period for processing the responses to the consultation could be extended in line with international standards.¹⁰¹ In addition, the USTR could complement the publication of a summary of negotiating objectives with a report analysing stakeholders' submissions and explaining the reasons for considering (or discarding) stakeholders' demands in the formulation of such objectives.¹⁰² This could help stakeholders visualise the impact of their contribution in the trade policymaking process and combat scepticism towards governments' efforts at promoting public engagement.

¹⁰¹ See Annex 2 Stakeholder Consultations, in Commission Staff Working Document: Impact Assessment, Accompanying the document, Recommendation for a Council Decision authorising the opening of negotiations for a Free Trade Agreement with New Zealand, at 55, COM (2017) 469 final (Sept. 13, 2017) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0289&from=EN> (The OECD recommends between 30 to 60 days or longer when the consultation topic is particularly complex). See OECD HOME, PUBLIC CONSULTATION ON THE DRAFT THE OECD DRAFT BEST PRACTICE PRINCIPLES ON STAKEHOLDER ENGAGEMENT IN REGULATORY POLICY, <https://www.oecd.org/gov/regulatory-policy/public-consultation-best-practice-principles-on-stakeholder-engagement.htm>, ¶ 48. (Other jurisdictions apply longer periods for trade consultations. For example, the EU has applied 84 days & the UK 84 days) See DIT, PUBLIC CONSULTATION ON TRADE NEGOTIATIONS WITH THE UNITED STATES, SUMMARY OF RESPONSES (July 18, 2019).

¹⁰² See DIT Trade with the U.S., *supra* note 51 (Both the EU Commission & the UK Department for International Trade release public reports analysing stakeholders' responses to public consultations).

V. CONCLUDING OBSERVATIONS

This paper reviewed the responses to the USTR public consultation on the US-UK trade negotiations with a view to shed light on the efficacy of this type of mechanism for engaging stakeholders in trade negotiations. To this end, the paper examined the number and type of stakeholders that responded to the public consultation and the content of the policy requests included in the responses. It also analysed stakeholders' submissions in three policy areas characterised by starkly conflicting demands—rules of origin, intermediary liability, protection for internet service providers, and investor-state dispute settlement mechanisms—and contrasted them with the USTR's negotiating objectives for a US-UK trade agreement in these areas.

The findings revealed the limited capacity of this public consultation mechanism to reach all relevant stakeholders likely to be affected by the trade agreement and could not identify evidence that the responses to the consultation contributed to shaping the USTR objectives for US-UK trade negotiations. The paper suggested specific measures to improve the outreach and impact of USTR public consultations in order to maximise the instrumental and intrinsic benefits associated with stakeholder engagement practices.

VI. ANNEX 1: METHODOLOGICAL NOTES

1. This is the total number of non-confidential written responses available online, minus the policy requests to testify at the public hearing. The paper only found two responses signed by more than one respondent, and each of them was counted as a single response. In both cases, all respondents fell into the same respondent category.
2. The paper used the following criteria to classify the types of respondents: a) Business Association: non-profit making organisation that represents the interests of firms or other profit-making entities; b) Business: individual profit-making entity, regardless of its legal form, covering all the way from large corporation to sole-traders; c) NGOs: not-for-profit organisations (with or without legal status), which are independent from public authorities or commercial organisations; d) Public bodies: Federal and State Agencies, Regulators and any other public entity that exercises governmental functions; e) Academic Institutions: universities, think tanks, and other research-oriented institutions; f) Individuals: those responding to express personal views as a citizen or private individual of a country not susceptible of being included in any of the categories below; g) Other: respondent does not fall in any of the previous categories.
3. Australian Government Department of Foreign Affairs and Trade, Australia – EU FTA submissions;¹⁰³ European Commission Online public consultation on the future of EU-Australia and EU-New Zealand trade and economic relations;¹⁰⁴ UK Department for International Trade public consultation on a UK-US trade agreement.¹⁰⁵
4. The paper classified the respondents' principal sector of economic activity in accordance with the International Standard Industrial Classification of All Economic Activities (ISIC), Rev.4,¹⁰⁶ subject to the following

¹⁰³ AUSTRALIAN GOVERNMENT, DEPT. OF FOREIGN AFFAIRS & TRADE, AUSTRALIA-EU FTA SUBMISSIONS, <https://www.dfat.gov.au/trade/agreements/negotiations/aeufta/submissions/aeufta-submissions>.

¹⁰⁴ EUROPEAN COMMISSION, CONSULTATIONS, published on Sept. 13, 2017.

¹⁰⁵ GOVERNMENT OF UK, DEPT. OF INT'L TRADE, TRADE WITH THE US (July 20, 2018) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869592/UK_US_FTA_negotiations.pdf.

¹⁰⁶ U.N. DEPT. OF INT'L ECON. & SOC. AFFAIRS, INTERNATIONAL STANDARD INDUSTRIAL CLASSIFICATION OF ALL ECONOMIC ACTIVITIES, U.N. Doc.

modifications: 1) Business Associations were classified according to the principal sector of economic activity of their members, save for thirteen of them with horizontal membership that were classified as “cross-sectoral”; 2) NGOs and trade professional associations were assigned to Section 5 Other service activities, Division 94 Activities of membership organisations; except for AFL-CIO, which was classified as “cross-sectoral”; 3) Academic institutions and think tanks were assigned to Section M Professional, scientific, and technical activities, Division 72 Scientific Research and Development, 3) Public authorities were assigned to Section O, Division 84 Public administration and defence; compulsory social security; 4) The three individuals that submitted a response to the consultation were excluded from the classification.

5. The author used the World Bank’s criteria for the structure of output, i.e., “agriculture” corresponds to ISIC V.4 divisions 1 to 4, “industry” divisions 5 to 43 (including mining and manufacturing), and “services” divisions 44 to 99.
6. The author counted a policy request every time they identified a reference in the response to one of the thirty-four policy areas identified in Table 4, regardless of the request’s content or the number of times the specific policy area is mentioned by the response. For example, when a response refers to tariffs, the authors count it as one policy request, regardless of whether the respondent is demanding to reduce or maintain tariffs and regardless of the number of times the word “tariff” is mentioned in the response.

VII. ANNEX 2

Table 4.1 Policy Requests by Policy Area and Respondents' Sector of Activity

	Agriculture & fishing	Mining & quarrying	Manufacturing	Wholesale & retail	Transport & storage	Information & communication	Financial & insurance	Professional & scientific	Public adm. & defense	Arts & entertainment	Other service activities	Cross sector activities	Individuals	Grand Total
Tariffs	19	0	31	1	1	6	1	1	1	1	2	12	0	76
Sanitary and Phytosanitary Measures	15	0	10	0	0	0	0	1	1	0	2	7	0	36
Technical Barriers to Trade	3	0	23	0	0	5	0	1	0	0	1	6	1	40
Quantity Control Measures	9	0	4	1	0	0	0	0	0	0	2	2	0	18
Price Control Measures	2	0	1	0	0	0	0	0	0	0	0	1	0	4
Rules of Origin	2	0	15	0	0	2	0	0	0	0	1	5	0	25
Trade Remedies	2	0	9	1	0	0	0	0	0	0	0	1	0	13
Other/Unspecified Non-Tariff Barriers	4	0	16	0	1	6	0	0	0	2	2	12	0	43
Financial Services	0	0	0	0	0	3	3	3	1	0	1	6	0	17
Telecommunications	0	0	0	0	0	4	0	0	0	0	0	2	0	6
Transport	0	1	0	0	2	0	0	1	0	0	0	2	0	6
Postal and Courier Services	0	0	0	0	1	0	0	0	0	0	0	4	0	5
Professional Services	0	0	0	0	0	1	0	1	0	0	0	0	0	2
Services (unspecified sectors)	0	1	3	0	0	5	0	1	1	2	0	8	0	21
Movement of Natural Persons	0	0	1	0	0	1	1	1	1	1	0	3	0	9
Digital trade	0	0	4	0	0	20	4	1	1	3	1	9	0	43
Investment	1	1	2	0	0	2	4	1	0	1	3	7	0	22
Intellectual Property	4	0	13	1	0	16	1	1	0	1	1	7	1	46
Government Procurement	0	1	5	0	0	6	2	1	0	0	1	7	0	23
Competition	0	0	3	0	0	1	0	1	0	0	1	2	0	8
Subsidies	2	0	2	0	0	1	1	1	0	0	1	0	0	8
State Own Enterprises	0	0	4	0	0	2	0	1	0	0	0	3	0	10
Macroeconomic & Exchange Rate	0	0	4	0	0	0	0	0	0	0	1	1	0	6

Good Regulatory Practices	2	0	13	0	1	1	4	1	1	0	3	8	0	34
Transparency	1	0	3	0	0	0	2	0	0	0	2	3	0	11
Small and Medium Enterprises	0	0	0	0	0	1	0	0	0	0	0	5	0	6
Consumer Protection	0	0	0	0	0	0	0	1	0	1	1	0	1	4
Labour	0	0	2	0	0	0	0	0	0	0	2	2	1	7
Gender	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Human Rights	0	0	0	0	0	0	0	0	0	0	2	0	0	2
Public Health	0	0	1	0	0	0	0	0	0	0	4	0	0	5
Animal Welfare	0	0	1	0	0	0	0	0	0	0	2	0	0	3
Environment	0	0	1	0	0	0	0	2	0	0	5	2	0	10
Dispute Settlement	2	0	2	0	0	0	1	0	0	0	1	3	0	9
Other	0	0	1	0	0	0	1	0	0	1	1	1	0	5
Total	68	4	174	4	6	83	25	21	7	13	43	131	4	583