

# Recommendations for the United States Trade Representative 2016 Open Government Plan

May 23, 2016\*

\*Updated May 27, 2016 to add the Electronic Frontier Foundation as a signatory

**The following recommendations are submitted for inclusion in the United States Trade Representative's (USTR) 2016 Open Government Plan.**

## **1. Publish U.S. textual proposals on rules in ongoing international trade negotiations**

### **Background:**

In its 2014 Open Government Plan, USTR made several claims related to “increased inclusiveness in trade negotiations”. In contrast to the Administration’s commitment to creating an “unprecedented level of openness in Government” and its launch of the Open Government Partnership, multiple aspects of USTR’s trade negotiations process fail to meet basic standards of transparency.

During the entirety of the Trans-Pacific Partnership (TPP) negotiations, USTR did not publish *any* of its textual proposals at any time, despite repeated urging and demands from civil society organizations,<sup>i</sup> academics, and members of Congress.<sup>ii</sup> This despite the fact that the USTR provides access to its textual proposals to cleared advisors, nearly 9 out of 10 of which are representatives of large corporations and trade associations.<sup>iii</sup>

The Transatlantic Trade and Investment Partnership (TTIP) negotiations represented an opportunity for USTR to follow the lead of its negotiating partner and to provide greater transparency. In January 2015, due to public pressure in Europe, the European Commission announced that it would make available on its website its own textual proposals for the TTIP negotiations.<sup>iv</sup> The EU has been fulfilling its promise to enhance transparency, releasing not only fact sheets and position papers, but has continually updated its website with draft textual proposals. USTR has refused, however, to make its own textual proposals available, despite repeated demands by civil society groups<sup>v</sup> and members of Congress.<sup>vi</sup> USTR has also failed to publish any of its textual proposals in the ongoing Trade in Services Agreement (TiSA) negotiations, despite the fact that the European Union and some other negotiating partners have published some of their offers and proposals.

### **Recommendation:**

**USTR should immediately make available on its website the textual proposals related to rules that it has already tabled to its negotiating partners in the context of the TTIP, TiSA, and any other bilateral, regional, or multilateral trade negotiation it undertakes.** While there may be a valid argument to keep confidential the details of tariff line negotiations on goods that may privilege some industries over others, tariff negotiations are just one part of the expansive coverage of the TPP, TTIP, and TiSA. Non-tariff related rules affect domestic policymaking in a host of policy areas, including but not limited to labor, the environment, healthcare, intellectual property, food safety, financial services regulation, public services, professional licensure, investment, and competition policy. The TTIP and

other trade agreements are being made behind closed doors and without sufficient public participation or scrutiny even though they could set standards that will place restrictions on the ways Congress, state legislatures, and local governments can create, amend, and enforce laws to respond to constituents' needs. Trust in government and its representatives is essential in a democracy, but secrecy breeds suspicion and uncertainty.

## **2. Publish consolidated texts after each round of ongoing negotiations**

### **Background:**

In its 2014 Open Government Plan, USTR touted its efforts to host open stakeholder forums at its negotiating rounds and to accept meetings with a broad range of stakeholders. While USTR and TPP negotiating partners held limited stakeholder engagement sessions during earlier rounds of the TPP negotiations, August 2013 was the last time that USTR or other TPP countries hosted a stakeholder forum during a TPP negotiating round. Negotiations then continued for more than two years, without any official opportunity for stakeholder input at the rounds. Stakeholders have not had access to the consolidated negotiating texts, and thus have been forced to provide input based on guess work or leaks rather than on the actual texts being debated and discussed.

It is common practice in international negotiations, from the UN Framework Convention on Climate Change (UNFCCC) talks to the World Intellectual Property Organization (WIPO), for consolidated texts to be made public periodically during the negotiating process. At the World Trade Organization, which has hardly been considered a paragon of transparency, negotiating texts and detailed meeting notes are published on a periodic basis. Even within past U.S. regional trade negotiations, there is precedent for publication of consolidated texts. For instance, the Bush Administration agreed to publish the composite text of the Free Trade Area of the Americas trade negotiations in 2003.<sup>vii</sup>

### **Recommendation:**

**USTR should impose as a prerequisite to any new or continuing trade negotiations that all parties agree to publish consolidated draft texts on rules after each negotiating round.** With increased transparency, negotiators would be able to benefit from the expertise of a much broader range of civil society actors to ensure that the legal texts do not have adverse unintended consequences and would result in a much more balanced agreement that the public would be more inclined to support. As Senator Elizabeth Warren explained, "I have heard the argument that transparency would undermine the Trade Representative's policy to complete the trade agreement because public opposition would be significant. In other words, if people knew what was going on, they would stop it. This argument is exactly backwards. If transparency would lead to widespread public opposition to a trade agreement, then that trade agreement should not be the policy of the United States. I believe in transparency and democracy, and I think the U.S. Trade Representative should too."<sup>viii</sup>

It is our understanding that the U.S. government has largely been the driver of the secrecy in international trade negotiations. The USTR should follow the lead of President Obama in promoting transparency and the lead of the Intelligence Community in committing to [Principles of Intelligence Transparency for the Intelligence Community](#) that are intended to facilitate making information publicly available in a manner

that enhances public understanding of intelligence activities, while continuing to protect information when disclosure would harm national security. As President Obama said in [his national security speech on January 17, 2014](#), “for our intelligence community to be effective over the long haul, we must maintain the trust of the American people, and people around the world—we will reform programs and procedures in place to provide greater transparency.” Surely if the Intelligence Community can make a commitment to make more information publicly available, the USTR should be able to do so.

**3. Appoint a “transparency officer” who does not have structural conflicts of interest in promoting transparency at the agency**

**Background:**

In the trade authority legislation that became law July 2015, Congress established the role of “transparency officer” in USTR to alter and improve what many in Congress consider an unacceptable lack of transparency by this administration with respect to trade policy in general and the TPP specifically. In September 2015, USTR appointed its own general counsel to fulfill the transparency officer role. It is unclear how the same USTR staff person who is responsible for defending the agency’s existing choices regarding the secrecy of draft texts and denials of Freedom of Information Act requests can also serve as an effective advocate for new transparency improvements, which was Congress’ intent in the legislation establishing this position. Appointing USTR’s own general counsel to the Fast Track-mandated transparency officer position raises concerns about the USTR’s commitment to the principle of transparency that the legislation intended to address. In September 2015, two dozen organizations committed to government openness and accountability sent a letter to USTR Michael Froman, urging USTR to reconsider the decision to appoint the USTR general counsel as its congressionally-mandated “transparency officer.”<sup>x</sup> To date, the groups have not received a response from USTR.

**Recommendation:**

**USTR should immediately appoint a transparency officer who does not have any structural conflicts of interest in promoting transparency at the agency.**

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Association of Research Libraries  
Center for Science and Democracy at the Union of Concerned Scientists  
Demand Progress  
Electronic Frontier Foundation (EFF)  
Electronic Privacy Information Center (EPIC)  
Government Accountability Project  
[OpenTheGovernment.org](http://OpenTheGovernment.org)  
Project On Government Oversight (POGO)  
Sunlight Foundation

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<sup>i</sup> Selected letters from civil society regarding USTR lack of transparency in TPP negotiations: [Transparency Groups Write to Members of Congress, Urging Public Access to Draft Trade Pacts Texts](#) (March 23, 2015); [U.S. Civil](#)

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[Society Organizations Write USTR Calling for Transparency and Stakeholder Engagement in TPP Negotiations](#) (February 4, 2013); [Transparency and Open Government Groups to Obama: Reject "Unprecedented Level of Secrecy" in Trade Negotiation](#) (February 27, 2012); [International Civil Society Requests Transparency in TPP Talks](#)(updated October 2011).

<sup>ii</sup> Selected letters/statements from Members of Congress regarding USTR lack of transparency in TPP negotiations: [132 Members of Congress Call for Transparency and Congressional Consultation in TPP Negotiations](#) (June 27, 2012); [Senators Speak Out Against Lack of Transparency In TPP Negotiations](#) (June 25, 2012); [36 Freshmen in the House of Representatives Call for Increased Transparency in TPP Negotiations](#) (June 11, 2013); [Senate Finance Subcommittee on Trade Chair Ron Wyden Floor Statement on TPP Secrecy, Undue Corporate Influence while Introducing Transparency Bill](#)(May 23, 2012); [Senator Warren Opposes Nomination of Froman for USTR; Cites Need for Transparency in TPP Negotiations](#) (June 19, 2013); [Letter from Senator Elizabeth Warren to USTR Nominee Michael Froman calling for transparency in Trans-Pacific Partnership negotiations and a release of the negotiating texts](#) (June 13, 2013)

<sup>iii</sup> The Washington Post article and infographic highlighting the industry bias on trade advisory committees, Feb 28, 2014. <https://www.washingtonpost.com/news/wonk/wp/2014/02/28/how-companies-wield-off-the-record-influence-on-obamas-trade-policy/>

<sup>iv</sup> [EU Negotiating texts in TTIP](#) (February 10, 2015)

<sup>v</sup> [More than 75 organizations demand: USTR Must End Secrecy Surrounding TTIP Negotiations](#) (October 23, 2015)

<sup>vi</sup> [Senator Sanders Contrasts U.S. Trade Secrecy to EU Transparency](#) (January 7, 2015)

<sup>vii</sup> [FTAA – Free Trade of the Americas, Draft Agreement](#) (November 21, 2003)

<sup>viii</sup> [Sen. Warren’s Floor Speech in Opposition to Michael Froman’s Nomination for U.S. Trade Representative](#) (June 19, 2003)

<sup>ix</sup> [Open government groups call for new USTR “transparency officer”](#) (September 29, 2015).