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THE NIGHTMARE CONTINUES

Advice and No Dissent

Public Health and the Rigged U.S. Trade Advisory System

[by Joseph Brenner and Ellen Shaffer](#)

The United States has signed and is currently negotiating a striking array of trade agreements with countries around the world.

Critics charged that these trade deals reflect undue business influence over the U.S. trade negotiating process.

It turns out that industry influence is structured into the very machinery of the U.S. governmental trade bureaucracy.

In 1974, Congress created an international trade advisory system as a mechanism for input into trade negotiations from interested parties in the United States.

An extensive group of advisory committees now provide formal recommendations to the official U. S. trade negotiating agency, the Office of the U.S. Trade Representative (USTR). Business and trade association representatives dominate those committees.

But international trade agreements do not just affect narrow commercial interests. There is growing recognition that these trade deals can significantly shape public health-related policies both in the United States and in other countries, by requiring changes in laws and regulations and especially by foreclosing policy options that countries may wish to pursue in the future.

Public health advocates have called attention to trade agreement provisions that affect access to affordable prescription drugs, the public character of services such as healthcare and drinking water provision, standards for health professional licensing, alcohol and tobacco regulations, food safety standards, and rules on how governments procure goods and services, such as affordable medicines for veterans and seniors.

But public health advocates are nowhere to be found in the USTR trade advisory system. A 2002 report from the Government Accountability Office, the nonpartisan research arm of Congress, concluded that “new stakeholders in the trade process, such as public health ... have limited or no participation in the formal committee system, even though topics such as intellectual property are of interest to them.” A restructuring of the trade advisory committees in August 2004 did not address this problem.

In contrast, pharmaceutical and tobacco companies and corporations from other industries with questionable public health records continue to maintain a number of seats on advisory committees.

Locked out

Congress established the trade advisory committee system in the Trade Act of 1974. Over the years, Congress has amended the Act to broaden the purposes for which trade advisory committees provide advice to executive branch officials. The committees are supposed to provide advice both on negotiating objectives and the likely impact of agreements. By law, the executive branch is supposed to inform the advisory committees of “significant departures from their advice.”

Trade advisory committees are subject to the requirements of the Federal Advisory Committee Act (FACA). Each advisory committee covered by the Act is required to be fairly balanced in terms of points of view represented and committee functions performed. The legislative history of the Act “shows that the fair balance requirement was intended to ensure that persons or groups directly affected by the work of a particular advisory committee would have some representation on the committee.”

It has required lawsuits, however, to include even minimal representation on advisory committees by non-industry groups, and to open up advisory

committee proceedings.

Following a public outcry about the complete lack of environmental representation, USTR added a few environmental representatives to a handful of advisory committees in the 1990s. A Presidential Executive Order created a new Trade and Environmental Policy Advisory Committee in 1994.

But environmental groups remained locked out of the industry-specific advisory committees. In November 1999, several environmental organizations sued USTR, challenging the composition of two industry advisory committees that dealt with forest products. The district court judge's ruling found that the wood and paper products advisory committees were obligated to be fairly balanced in representation, and that both advisory committees should include environmental representatives. The court relied on two key factors in arriving at its decision: first, on a routine basis, the forest products committees advised the government on trade issues which affected the environment in the United States and internationally; and, second, the advisory committees supported positions which directly contradicted positions of the environmental organizations seeking representation.

In 2003, following another environmental group suit, USTR agreed to place a permanent environmental representative on the industry sector advisory committee on chemicals.

Dominance

The tiny gains for environmental organizations have not been matched by public health groups.

The trade advisory committee structure consists of an overarching Advisory Committee for Trade Policy and Negotiations to provide overall trade policy advice; general policy advisory committees, including the environmental advisory committee, a labor advisory committee and an advisory committee for state and local officials; a large number (now 16) of industry-specific advisory committees; and six agricultural advisory committees.

Not one of these committees has even a single public health representative (though there are a very few environmental, consumer group and labor representatives).

The story is different for industries whose activities have an impact on public health. They have dozens of representatives on the advisory committees:

- **Pharmaceuticals:** At least 16 brand-name pharmaceutical company representatives of Big Pharma serve on at least five of the trade advisory committees.
- **Tobacco:** Tobacco company representatives serve on at least two advisory committees; at least seven individuals associated with the tobacco industry have seats at advisory committee meetings.
- **Alcohol:** At least six alcohol company reps serve on at least four separate advisory committees.
- **Food:** Food company representatives serve on at least 13 advisory committees. There are at least four representatives associated with the processed food industry on the advisory committees.
- **Health Services and Health Insurance:** There are at least five representatives on advisory committees associated with the health services and health insurance industries.

These industry representatives appear to be effective at carrying forward the policy agendas of the corporations whose activities impinge on public health. Generally, they face no restraining interests on the committees.

- Tobacco firms not surprisingly have a strong grip over the Tobacco, Cotton and Peanuts advisory committee. A 2003 Advisory Report from the committee specifically touted the U.S.-Singapore Free Trade Agreement for including tobacco products in the agreement's tariff reduction provisions. By making tobacco products cheaper, public health advocates say, this policy increases deadly tobacco consumption.
- Chaired by a DuPont lawyer and with numerous representatives associated with the pharmaceutical industry, including one from the lobbying organization for the largest drug companies (the Pharmaceutical Research and Manufacturers of America), the Chemicals, Pharmaceuticals, Health Science Products and Services advisory committee is devoid of any consumer or public health representatives. A recent report from the committee on the U.S.-Australia Free Trade Agreement (FTA) urged that each trade agreement build upon previous ones to build ever more expansive patent and intellectual property monopolies. "The resultant level of intellectual property protection that [a free trade agreement] contains

should not be viewed as setting any ceilings for the intellectual property chapters for future FTAs,” the advisory committee declared. “Rather, each individual FTA should be viewed as setting a new baseline for future FTAs.”

- The Consumer Goods advisory committee is chaired by a representative of the tobacco industry, and has other representation from the tobacco industry, as well as from the alcohol industry. There is no consumer or public health representation.
- The Distribution Services committee includes representation from the fast food industry and from the alcohol industry. There is no public health representation.
- The Services and Finance Industries advisory committee is chaired by the president of the U.S. Coalition of Service Industries (CSI). CSI represents major financial, banking and insurance corporations, including health insurance companies. CSI has explicitly identified regulations that restrict licensing of healthcare professionals and excessive privacy and confidentiality regulations as serious barriers to trade in healthcare services.
- The Intellectual Property Rights advisory committee is dominated by Big Pharma, which controls nine of the 15 seats on the committee. There is no public health representation. The committee has praised trade agreement provisions that restrict pharmaceutical reimportation, but urged still stronger rules. The committee’s report on the U.S.-Australia Free Trade Agreement cheers provisions “protecting the right of the patent owner to prevent the unauthorized importation of goods subject to the patent put on another market by the patent owner or its agent.” Provisions in the trade deal require the United States and Australia to enforce pharmaceutical industry contracts stating that buyers of their product cannot re-sell them, or permit the re-sale of the products, in countries other than the nation in which they were first sold. The report says the advisory committee “notes that the underlying right being protected is implicitly acknowledged to be the right of the patent owner to exercise its exclusive right to prohibit importation of products subject to the patent.” The committee says it “welcomes the formulation found” in the Australian agreement but “continues to urge that future agreements explicitly provide this understanding.”

The benefits of membership

Business interests are happy with how the trade advisory process is working.

The Government Accountability Office in its 2002 report found that 78 percent of the industry-specific advisory committee members were very satisfied or generally satisfied with representation of their business sector in the overall advisory committee structure, while 70 percent of advisory committee members overall were very satisfied or generally satisfied with their committee's opportunity to provide advice at meetings. Just over half were satisfied with the extent to which the executive branch sought the committees' advice on general trade policy issues.

Advisory committee members told the General Accountability Office that they benefit from increased access to USTR and other government agencies, and in their ability to influence trade negotiations and policy. Seventy-eight percent of advisory committee members said that they benefited from a moderate to a very great extent in access to USTR officials. Sixty-two percent said they benefited from a moderate to a very great extent in their ability to influence trade negotiations. Sixty-two percent felt they benefited from a moderate to a very great extent in their ability to influence U.S. trade policy.

Participants on trade advisory committees are able to provide advice and consult with the executive branch through formal and informal channels. In 2001, for example, there were approximately 110 formal meetings across the advisory committee system. Generally, the private sector committee chair and the managing federal government agency's designated official schedule meetings and select topics for the agenda. When quick responses are needed, USTR and other key agencies such as the Departments of Commerce and Agriculture frequently request informal advice from committee members through faxes, emails, ad hoc meetings and teleconferences. Informal consultation is a routinized part of the process; government officials look to advisory committee members to provide guidance on what industry wants. By law, advice that is provided outside of formal advisory meetings, such as through ad hoc meetings, is considered to be personal opinion. No central record is kept of informal advice, which is typically provided directly to the relevant government official.

The USTR can authorize advisory committees to operate in a transparent, public manner. For a number of years, however, the USTR has chosen to impose a blanket closure rule, requiring that advisory committee members maintain complete confidentiality regarding proposed trade agreement provisions until after each agreement is signed.

Public health advice

One of the primary purposes of the Federal Advisory Committee Act was to end industry domination of advisory bodies. Trade advisory committees, however, are dominated by industries whose activities have an impact on public health. The close-out of public health interests matters, because trade agreements are increasingly being used to shape social and health policy in the U.S. and internationally.

The Center for Policy Analysis on Trade and Health (CPATH) and other public health organizations are urging that public health representatives be given seats on relevant industry advisory committees, and that a new committee be created specifically to address public health concerns. The groups are also united in demanding more openness in the trade negotiation process, including enabling public access to trade advisory committee meetings, proceedings and submissions related to multilateral and bilateral trade negotiations. CPATH has also called for the creation of an independent, Congressionally created committee of public health experts to advise Congress on how USTR-negotiated trade agreements will impact public health — determinations that could be made outside of the realm of corporations and their allies at USTR.

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Trading Away Public Health

Although the Office of the U.S. Trade Representative likes to say that it does not negotiate trade deals that impose new obligations on the United States, trade agreements in fact impose duties on all parties. While the bilateral and regional trade pacts rarely directly require the United States to change its laws, they do routinely foreclose opportunities to change domestic law and regulations (or at least subject the United States to sanctions if it acts to contravene trade agreement rules). And investment protections incorporated into trade deals — derided as an investor bill of rights by critics — give corporations an opportunity to challenge public health rules directly.

By way of example:

- The U.S.-Singapore, U.S.-Moroccan and U.S.-Australia trade deals let patent owners use contractual provisions to block the reimportation of pharmaceuticals or other patented goods into the United States.
- The U.S.-Australian agreement may permit drug companies to challenge drug listing, purchasing and reimbursement decisions by the Department of Veterans Affairs, Medicare, Medicaid and other government authorities, all of which could lead to higher drug prices for the vulnerable populations affected.
- The U.S.-Central American Free Trade Agreement (CAFTA), expected to come up for a Congressional vote next year, may impede the ability of local, state and federal governments' procurement contracts to specify standards for medical and financial privacy, quality and performance, locally sustainable economic development, environmental protection, public health and safety, gender and racial equity, labor practices, and human rights. Under CAFTA, government purchasing decisions, including in the healthcare sector, to favor local companies or service suppliers, or to impose technical specifications, could potentially be challenged as barriers to trade.
- CAFTA and other agreements' investment provisions would give tobacco companies standing to sue the federal and state governments for warning label rules, restrictions on tobacco advertising, limitations on tobacco displays in stores and other tobacco control measures.

— *J.B. & E.S.*

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