CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

STATEMENT OF
DANIEL B. MAGRAW, JR.
PRESIDENT
CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

BEFORE
THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEE ON TRADE

AT A HEARING ON

THE TRADE ADVISORY COMMITTEE SYSTEM

JULY 21, 2009

1350 Connecticut Avenue N.W. Suite 1100 • Washington D.C. 20036-1739
Phone: 202-785-8700 • Fax: 202-785-8701 • Email: info@ciel.org • Internet: http://www.ciel.org

15 rue des Savoises, 1205 Geneva, Switzerland
Phone: 41-22-789-0500 • Fax: 41-22-789-0739 • Email: geneva@ciel.org • Internet: http://www.ciel.org

I. Introduction

Thank you Chairman Levin and Ranking Member Brady for the opportunity to appear before this subcommittee. I am Daniel Magraw, President and CEO of the Center for International Environmental Law (CIEL), a nonprofit organization that uses international law and institutions to protect the environment, promote human health, and ensure a just and sustainable society.

I currently serve on the Trade and Environment Policy Advisory Committee (TEPAC), a Tier 2 Policy Advisory Committee. Previously I served as a senior official in the U.S. government with direct experience in the creation and implementation of this advisory committee. In addition, a senior attorney from CIEL served as the first public interest representative on a Tier 3 Technical Advisory Committee for the chemical and allied industries.

In this testimony, I will offer some lessons learned from CIEL's experience with the trade advisory committee system. I will also recommend administrative and legislative improvements to enhance transparency and public participation and to ensure that U.S. trade policy achieves sustainable development, which necessarily involves integration of environmental, social and economic policies.

I have been asked to address the environment-and-trade aspect of that integration. I would like to stress at the outset that the term "environment" includes human health. The U.S. Environmental Protection Agency's statutes, for example, direct it to protect human health and the environment.[1] Environmental standards are set with human health as a primary consideration. Moreover, trade rules' restrictions on non-tariff barriers affect the United States' ability to protect human health just as they do our ability to protect natural resources. Thus when I use the term "environment," I am also referring to human health.

II. Transparency and Public Participation: Congressional Intent of the Trade Act and FACA

Thirty-five years ago, Congress recognized the importance of transparency and public participation in developing sound U.S. trade policy. I applaud this subcommittee for its continuing oversight of this important issue. The inclusion and consideration of diverse views leads to stronger trade policy, reflective of American interests. As the GAO concluded in their 2007 report, "to effectively perform the unique role in U.S. trade policy [that] Congress has given trade advisory committees, certain process issues need to be resolved."[2]

When read together, the Trade Act of 1974[3] and Federal Advisory Committee Act[4] (FACA) demonstrate Congress' commitment to the development of U.S. trade policy with public participation and transparency, subject to limited safeguards for legitimate trade secrets. The

---

[1] *See, e.g.* 42 U.S.C. §§ 7401-7671 (1990) [Clean Air Act]; 7 U.S.C. § 136 (1996) [Federal Insecticide, Fungicide and Rodenticide Act].
[2] United States General Accounting Office, An Analysis of Free Trade Agreements and Congressional and Private Sector Consultations under Trade Promotion Authority, 66-67 (2007) [hereinafter GAO Report].
[3] 19 U.S.C. § 2155 (2006).
[4] 5 U.S.C. app. §§ 1-16 (2001).

Trade Act requires that the U.S. Trade Representative (USTR) seek policy advice from trade advisory committees before entering into trade agreements.[5]

Additionally, by direct reference to FACA, the Trade Act creates a presumption of open meetings, public notice, public participation, and public availability. This mandate is only constrained when it "would seriously compromise the development by the United States government of trade policy, priorities, negotiating objectives or bargaining positions."[6]

FACA requires that the membership of these advisory committees be "fairly balanced" with regard to the viewpoints represented and the functions performed.[7] Some courts have refused to apply that standard, which has resulted in practice in a failure to achieve balance.[8] Additionally, FACA requires some degree of transparency by directing that the committees "ensure that the public [is] informed with respect to the number, purpose, membership, activities, and cost of advisory committees."[9]

III. CIEL's Experience with the Trade Advisory Committee System

Let me share some of our direct experience with the trade advisory committee system and offer lessons learned and suggestions for improvement. As you know, this system includes three tiers of advisory committees.

Tier 1 – ACTPN

I do not serve on the Advisory Committee for Trade Policy and Negotiations (ACTPN), the Tier 1 committee. However, despite my service on a Tier 2 committee, my security clearance to review trade secrets, and my professional involvement in trade issues, the workings of ACTPN are essentially hidden from view. It is nearly impossible to determine when ACTPN meets, with what agenda, what issues it addresses, or what conclusions it reaches.

Tier 2 – TEPAC

As a member of the Trade and Environment Policy Advisory Committee (TEPAC), and having been involved in its creation and early operation, I have a much better understanding of how this Tier 2 committee functions. I have witnessed successful cooperation between the USTR and TEPAC, such as when they worked together on fishing subsidies. A constructive experience was possible for several reasons.

Perhaps most importantly, the elimination of fishing subsidies presents a win-win-win situation: environmentalists want to end over-fishing in the world's oceans, which is encouraged by subsidies; U.S. industry wants to have a level playing field without being disadvantaged by the subsidies provided to foreign fleets; and trade policymakers want to eliminate subsidies as a general matter because they distort trade. In addition, a strong and effective leader (Oceana) on

[5] 19 USC 2155(a)(1)(A)-(C); (b), (c). (2006).
[6] 19 U.S.C. 2155(f)(2) (2006).
[7] 5 U.S.C. app. § 5(b)(2) (2001).
[8] *See* Ctr. for Policy Analysis on Trade and Health (CPATH), et. al. v. USTR, 540 F.3d 940 (9th Cir 2008).
[9] 5 U.S.C. app. § 3(2)(A)-(C) (2001).

TEPAC put the committee into a proactive mode and headed the effort, which occurred via a subcommittee of TEPAC. In addition, non-governmental participants on the sub-committee could immediately see classified negotiating documents because they already had clearance; and the participants could rely on the familiarity and trust that had been built up through their common experiences on TEPAC.

The TEPAC subcommittee's involvement led to a balanced and more nuanced trade position. Moreover, endorsement of the U.S. negotiating position validated USTR's assertions to other countries regarding its environmental sustainability, which was reinforced by environmental NGOs' activities in Geneva during the negotiations. This experience thus helped forge, and supported, a constructive U.S. trade policy on fishing subsidies.

I have also witnessed some serious shortcomings of TEPAC as a vehicle to advise U.S. policy. I would like to draw your attention to several procedural issues that hinder effective advice by TEPAC. In my experience, TEPAC generally has very little or no access to actual U.S. negotiating positions prior to or during U.S. negotiations. Instead, TEPAC receives general, sometimes perfunctory briefings which lack confidential information and often occur often only *after* USTR has completed negotiations. Negotiating texts which are put on the internal, classified website are often out-of-date or already agreed. This situation makes it essentially impossible for TEPAC to guide or advise U.S. trade policy in a meaningful way.

The Korea-U.S. Free Trade Agreement is an example of a failure of transparency and consultation that led to deeply flawed U.S. trade policy. Without consulting TEPAC, U.S. negotiators agreed to unprecedented and damaging language in the investment chapter, in the process deviating from the corresponding language in other FTAs and the U.S. Model Bilateral Investment Treaty. The lack of involvement occurred despite the fact that USTR was aware of TEPAC's interest because of our repeated expressions of concern in reports to Congress about investment language.

TEPAC finally learned of the new language only via other parts of the U.S. government and only after we insisted on being briefed, but by that time it was too late. The result was: the creation of two new tests for expropriation that will make it easier for foreign investors to successfully challenge U.S. laws and regulations regarding the environment, health and safety;[10] the insertion of a Korean legal concept into the expropriation provision that none of the U.S. negotiators could explain;[11] and the inclusion of a factually inaccurate footnote that also could lead to easier success in challenging legitimate U.S. environmental, health and safety laws.[12]

Another example concerns implementation of the Peru-U.S. Trade Promotion Agreement. Implementation of that agreement led to dozens of deaths during violent protests against decrees (especially one regarding forests) that were promulgated with virtually no public input (under a

[10] Korea-U.S. Free Trade Agreement, Investment chapter, Annex B, paragraph 3(b) (the new, unprecedented tests are whether a regulatory action is "extremely severe" or whether a regulatory action is "disproportionate in light of its purpose of effect").
[11] *Id.*, para. 3(a), sub-paragraph (iii) (the Korean legal concept is "special sacrifice", which apparently is based on German law but in any event appears no where in other U.S. agreements or international law generally.
[12] *Id.*, n. 19 to sub-paragraph (ii) (the footnote assumes that regulatory changes are more likely to occur in heretofore heavily regulated sectors than in heretofore lightly regulated sectors, thus ignoring the situation of merging technologies such as nanotechnology, potential changes in scientific understanding of risks, and experience in regulating a sector).

kind of fast-track authority) and allegedly with the explanation that the U.S. government had required the Peruvian government to promulgate them in order to satisfy environmental and other provisions of the agreement. Among other things, this raises questions about the agreement's public participation provisions that TEPAC, in its February 1, 2006 report to Congress, recommended be improved as soon as possible and which TEPAC "urge[d] USTR and Congress to monitor closely."

In response to questions, USTR staff repeatedly stated that TEPAC had been "robustly" involved during the entire process involving the decrees in question. I respectfully disagree. I urged Congress to investigate this situation to better understand the role of the agreement in this tragedy and the subsequent destabilization of a U.S. ally. This should include whether the U.S. government insisted on the decrees in question, how it acted to counter any assertions that it had so insisted (if it had not), what positions it took vis-à-vis the transparency and public participation required by the agreement, and how it involved TEPAC throughout.

USTR is under no obligation to respond to TEPAC recommendations, either consensus opinions or dissenting views. This makes it difficult to determine whether USTR has considered or understood our advice. The 2007 GAO report and my own experience attest to the short time frame for TEPAC to formulate a position and draft a report to USTR. The short window (30 days) does not leave adequate time to craft a thorough opinion, particularly when we often do not receive trade agreement text until well after the 30-day window has begun. For example, TEPAC had eleven business days to review the U.S.-Peru Environmental Cooperation Agreement. Every TEPAC report to Congress since the passage of the Trade Act of 2002 has unanimously stressed that 30 days is insufficient.

Furthermore, TEPAC's reports on trade agreements are delivered to USTR and then relayed to the President and Congress. This effectively insulates TEPAC and other Tier 2 advisory committees from interaction with Congress. Our experience is the congressional staff are often unaware of TEPAC's views or even of its existence.

TEPAC's reports are not easily accessible to the public, a practice in direct opposition to congressional intent of the 1974 Trade Act. Stakeholders cannot expect to have meaningful engagement when they are unaware of pertinent trade policies.

Some members of TEPAC would welcome more direct relationship with congressional staff. The staff would also benefit from increased interaction and involvement with the trade advisory committees. Although USTR holds hundreds of meetings with congressional staff each year, GAO reports that many legislative staff expressed frustration with a sense that they did not have meaningful input.[13] Congressional engagement with trade advisory committees would allow both parties to share views at critical junctures during trade negotiations. This practice could enhance the transparency of the negotiating process and lead to a more robust trade policy for the United States.

Tier 3 – ITAC-3

[13] GAO Report at 29.

Let me turn to CIEL's experience with a Tier 3 Industry Trade Advisory Committee (ITAC). Following a 2001 settlement agreement of a civil suit between public interest advocates and the USTR, CIEL attorney Steve Porter was appointed to the ISAC-3 (now ITAC-3), the industry trade advisory committee on chemical and allied industries. After he stepped down the committee was slow to seek a replacement, resulting in a judgment to enforce the settlement in the original civil suit that prevented ITAC-3 from meeting pending another public interest member.[14] The seat was eventually filled by another qualified representative. After this member stepped down, ITAC-3 has continued to meet.

As members of ITACs, NGO representatives have the same obligation to maintain confidentiality of trade secrets as industry representatives. However, public interest representatives are hampered in representing diverse views of their community: on ITAC-3, multiple industry views are represented, but only one NGO was ever on the committee. Today, the membership of ITAC-3 includes thirty-six members representing the chemical and allied industries and not a single public interest representative.[15]

The 2007 GAO report highlighted problems that committees have recruiting representatives that are not representing for-profit industries.[16] In my experience, this is typically due to a lack of financial resources.

It is difficult to argue that the inclusion of a single public interest representative on a committee comprising dozens of industry members fulfills FACA's requirement that advisory committees be "fairly balanced." One way to address this issue would be to provide additional resources to recruit and retain public interest representatives, to ensure diverse opinions on the ITACs. In the absence of significant additional resources, increasing the number of NGO "chairs" at these ITAC tables will solve this inequity because they will not be filled.

Another possible remedy is to increase public transparency, as the Trade Act envisioned. In this way, additional perspectives could be brought to bear without the added burdens and delays of security clearances and the committee selection process. Instead of more "chairs," the Tier 3 committees might benefits from more "windows." While others in the NGO community are aware of the opportunity for public comment, many feel it is futile to participate.[17] Opportunities for public involvement and comment should be meaningful for stakeholders at as key stages of the negotiating process.

What are the practical consequences of Tier 3 committee operating with little or no participation by public interest representatives? An important and timely example is the U.S. policy on the European Union concerning their 2006 regulation on chemicals known as REACH (for the Registration, Evaluation and Authorization of Chemicals).[18] REACH is an ambitious law that

---

[14] *Wash. Toxics Coalition v. Office of the United States Trade Representative*, 2003 U.S. Dist. LEXIS 25869 (W.D. Wash. 2003).
[15] *See* Industry Trade Advisory Committee on Chemicals, Pharmaceuticals, Health Science Products and Services (ITAC 3), http://www.trade.gov/itac/committees/chem.asp (last visited July 16, 2009).
[16] GAO Report at 67.
[17] GAO Report at 58
[18] Regulation No 1907/2006, 2006 O.J. (L396) 1 (EC). [Regulation on Registration, Evaluation, and Authorization of Chemicals (REACH)].

harmonizes health and safety requirements across the now-27 EU Member States, with important implications for U.S. companies, consumers, and citizens.

Congress has already documented how U.S. chemical manufacturers and their representatives succeeded in co-opting U.S. foreign policy on REACH under the Bush administration.[19] Key U.S. government documents and communiqués were based on unsubstantiated assertions by these private interests while public interest input and Congressional inquiries were shunned. Ironically the adoption and subsequent implementation of REACH offers valuable benefits to American consumers, exporters, policymakers and others. These include: free access to health and safety information; harmonized rules across a market of nearly 500 million consumers; safer ingredients and products available to U.S. manufacturers, workers and consumers; and competitive advantages for U.S. exporters that already offer superior products.

In 2009 TEPAC members learned that ITAC members had submitted formal recommendations to USTR and the Commerce Department urging a formal Technical Barriers to Trade challenge to the EU REACH policy. This recommendation followed years of aggressive advocacy by ITAC-3. However, USTR had failed to notify TEPAC in a timely manner. Moreover, USTR strongly resisted requests by TEPAC members to receive a copy of this recommendation. USTR asserted that TEPAC members were legally prohibited from seeing the letter. They later shared this with TEPAC members. TEPAC has requested a legal opinion on whether there is such a prohibition. With all due respect, I doubt there is.

This example raises troubling questions about USTR's regard for advice from TEPAC. It also demonstrates that Tier 3 committees, which are charged with providing *technical* advice, also engage in broad *policy* advice. Yet the source of this advice is committees that are the antithesis of FACA's fairly balanced standard. I believe that Congress should not only call on USTR to initiate a thorough review of its ill-advised policy on REACH, but it should also give serious consideration to changes that will prevent future cases of Tier 3 committees bypassing Tier 2 committees that have responsibility to advise U.S. trade policy, such as TEPAC.

I do not suggest that the previous administration's misguided policy was solely the result of the advice provided through the trade advisory committee system. However, the failure to ensure effective, meaningful public participation led to the formulation of a U.S. policy to the detriment of clear and compelling U.S. interests.

Transparency, Participation and Role of Classifying Documents

It is axiomatic that in order to get public input on these documents, stakeholders need to be able to know U.S. policy and proposed policy. USTR routinely classifies trade negotiating texts and other trade policy-related documents, however. Accordingly, one of the perceived advantages of the advisory committees is that their members have security clearances and thus can view and hear the contents of classified documents. This situation has at least two important effects detrimental to public participation: advisory committee members cannot get input from experts and others who do not have clearances; and, more problematically, the public at large cannot

[19] U.S. House of Representatives, Committee on Government Reform, Minority Staff, Special Investigations Division. A Special Interest Case Study: The Chemical Industry, the Bush Administration, and European Efforts to Regulate Chemicals, April 1, 2004. (*available at* http://oversight.house.gov/Documents/20040817125807-75305.pdf*)*

effectively participate at all. I thus suggest that USTR's classification practices be scrutinized to determine whether they meet legal requirements and are necessary for U.S. interests considered as a whole.

Leadership

Aside from statutory or administrative changes, the situation described above could be greatly improved through strong leadership by Congress, the U.S. Trade Representative, EPA Administrator, and other senior officials. These attitudes are extremely influential with respect to how staffs deal with the advisory committees and how seriously non-trade considerations are taken into account. At times in the past, those attitudes have unfortunately led to the view that Tier 2 committees, at least, are primarily symbolic and that environmental and social issues are peripheral: that it might be all right to leverage them through trade policy but are not integral to it.

With the Obama administration's commitment to transparency and public participation, which they have already demonstrated, I am hopeful that congressional and agency staff can put a renewed emphasis on cooperation and open dialogue within the trade advisory committees, throughout the office of the U.S. Trade Representatives and other appropriate agencies. This systemic change can be a powerful catalyst for improving the trade advisory committee system.

IV. Reflections on H.R. 2293

Finally, I would like to address pending legislation before the Ways and Means Committee that is relevant to the Trade Advisory Committee System. The bill, H.R. 2293, would amend the Trade Act of 1974 to create a new Tier 2 policy advisory committee known as the Public Health Advisory Committee on Trade (PHACT).[20]

The proposed PHACT bears important similarities to TEPAC, with a primary focus on public health rather than environmental protection. Of course, there are important overlaps between protection of public health and environmental protection. In my opinion, PHACT could be a positive addition to the trade advisory committee system. But it is important that Congress avoid the problems that hamper the effectiveness of other Tier 2 committees, including procedural obstacles and a lack of timely and meaningful engagement by USTR staff and other agencies.

Importantly, provisions of H.R. 2293 would also affect the functioning of the Tier 1, other Tier 2, and Tier 3 trade advisory committees. For example, reports regarding trade agreements would address health and environmental concerns both in the United States and in affected regions. Reports would be made publicly available on the USTR website and appropriate agencies would be required to seek input from trade advisory committees throughout the trade negotiating process, including prior to negotiations. Furthermore, appropriate agencies would be required to respond in writing to the information submitted by trade advisory committees. This expands the role of the advisory committees from existing legislation.

The 1974 and 2002 Trade Acts require committees provide a report to appropriate agencies at the conclusion of trade negotiations and allows them only 30-days to submit reports. The 2007 GAO

[20] H.R. 2293, 111th Cong. (2009).

report concluded that these reporting deadlines are difficult to meet, especially as trade agreement text is often not available on a timely basis and committee members have other obligations.[21] Involving committee members earlier in the negotiating process, as H.R. 2293 would do, is a step in the right direction to ensure that advisory committees have an opportunity to engage early in the process.

H.R. 2293 addresses many shortcomings of the current system. However, the bill does not clarify the ambiguous standard of "fairly balanced" in FACA.

V. Recommendations

The existing trade advisory committee system, while well-intentioned, is hampered from achieving its full potential due to legislative gaps, i.e. a failure to clarify "fairly balanced," and procedural impediments. For example, TEPAC is typically unable to offer meaningful input prior and during negotiations, there is an inadequate turnaround time for comments, and TEPAC receives no response from Congress or the USTR after submitting comments. Additionally, there is a sense among some participants that consultations are more symbolic than substantive.

Tier 3 committees, such as some ITACs, appear to engage in policy as well as technical advice, but without any semblance of fair and balanced representation. This deserves serious scrutiny by Congress and by the senior leadership of the Obama Administration. It may be impractical to recruit willing representatives to fill new chairs for environmental, consumer, public health and other public interest perspectives. Potential solutions may involve greater transparency, more proactive public engagement, and other means to bring broader perspectives to bear on the development of U.S. trade policy.

Although USTR is required to provide an opportunity for comment to groups or individuals outside the trade advisory committee system, the GAO Report deemed these consultations ineffective. The advisory committees should be a mechanism by which public interest perspectives can heard and subsequently considered in the development of U.S. trade policy. Making trade advisory committee recommendations available on the website of USTR and other agencies, as proposed in H.R. 2293, would be a step in the right direction.

Leadership from the U.S. Trade Representative, the EPA Administrator, and other senior officials can play a crucial role in inspiring these agencies to give the advisory committees their proper role in the formulation of U.S. policy. That leadership must be strengthened.

Here are several specific recommendations to improve public participation and transparency.

- The Subcommittee on Trade should exercise its oversight authority by investigating the role of the Peru-U.S. Trade Promotion Agreement and the U.S. government in the recent troubles in Peru, including the degree to which TEPAC was consulted.
- The U.S. government should review its policy on REACH, with full and meaningful involvement of all relevant advisory committees and the public.

[21] GAO Report at 59.

- Any legal impediments to sharing information and documents, including reports, between Tier 1, Tier 2, and Tier 3 advisory committees should be identified and removed, by legislation if necessary.
- Trade advisory committees at all levels should have greater involvement from environmental and other public interest stakeholders, with adequate resources to enable participation.
- USTR should review its practices in classifying documents to ensure it meets legal requirements and in the best interest of the United States.

VI. Conclusions

In summary, the trade advisory committee system has an important role to play in informing and improving U.S. trade policy. Greater transparency and more meaningful public participation can substantially improve this process in at least three ways. First, leadership by Congress, the U.S. Trade Representative and other senior administration officials can demonstrate the importance and value of active public engagement. Second, changes in administrative procedures, such as genuine engagement of the advisory committee prior to and during negotiations, are necessary to ensure that input from advisory committees is not too late to inform U.S. policymakers. Similarly, continued efforts are needed to broaden representation and to include more "doors and windows" to permit greater public accountability. Finally, I urge Congress and the Obama administration to revisit the congressional intent of outlined by the Trade Act of 1974 and FACA, in particular by clarifying the "fairly balanced standard and to consider other legislative improvement. This re-commitment to core American values will ensure that the trade advisory committees contribute to the formation of a U.S. trade policy that serves broad U.S. interests.