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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

GEOFFREY GAMBLE, VINCENT M. DeLISI, and FANWOOD CHEMICAL, INC.,)	Civil Action No. 1:01CV00018
)	
Plaintiffs,)	INTERVENOR-DEFENDANTS’
)	MEMORANDUM IN OPPOSITION TO
v.)	PLAINTIFFS’ MOTION FOR A
)	PRELIMINARY INJUNCTION AND IN
ROBERT B. ZOELICK, DONALD EVANS, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, UNITED STATES DEPARTMENT OF COMMERCE, and THE UNITED STATES OF AMERICA,)	SUPPORT OF INTERVENOR- DEFENDANTS’ MOTION TO DISMISS
)	
Defendants,)	
)	
and)	
)	
WASHINGTON TOXICS COALITION, PUBLIC CITIZEN, and ASIA PACIFIC ENVIRONMENTAL EXCHANGE,)	
)	
Intervenor-Defendants.)	

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INTRODUCTION

This case challenges the defendant agencies' authority to appoint environmental representatives to an industry advisory committee that serves as a preferred source of advice on trade policy relating to chemicals. Intervenor Washington Toxics Coalition, Public Citizen, and Asia Pacific Environmental Exchange ("Toxics Coalition") – environmental groups that seek to protect the public from adverse health and environmental effects of toxic chemicals – challenged this industry-only advisory committee as a violation of the Federal Advisory Committee Act's ("FACA's") requirement that the membership of federal advisory committees be "fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. App. 2, § 5(b)(2), (c); Washington Toxics Coalition, et al. v. Office of the U.S. Trade Representative, Civ. No. C00-0730R (W.D. WA). To settle that case, defendants Office of the U.S. Trade Representative ("USTR") and the U.S. Department of Commerce have agreed to appoint one or more environmental representatives to the advisory committee. Settlement Agreement (March 2001) (Exhibit 3). Plaintiffs – the Chair and Vice Chair of the chemical advisory committee at issue (collectively referred to as "the Chairs") – seek to thwart that settlement. However, rather than intervene in the Toxics Coalition case, the Chairs have brought the instant lawsuit challenging the USTR's authority to appoint environmental representatives to trade advisory committees.

The industry-only chemical advisory committee is rendering advice on some of the most significant environmental policies of our day, such as trade in toxic chemicals, the expansion of NAFTA throughout the Americas, and whether and the extent to which international trade regimes will adapt themselves to and respect environmental safeguards. Clearly, federal agencies have ample authority to decide to broaden the voices heard on their advisory

committees to include environmental representatives. Indeed, such representation is legally compelled.

The 1974 Trade Act expressly makes FACA's fair balance requirement applicable to trade advisory committees and that requirement is shaped, by its plain terms, by the functions performed by the committees. Under FACA's fair balance requirement, an advisory committee serving as a preferred source of advice on policy issues that have such overriding and potentially grave environmental consequences must have environmental representation. Broadening the chemical advisory committee's membership to reflect the environmental ramifications of the issues it addresses heeds FACA's mandates, common sense, and good government in action. Accordingly, the Chairs' claims entirely lack merit, the motion for a preliminary injunction should be denied, and this case should be dismissed.

BACKGROUND

This brief begins by describing: (1) the statutory structure in which the industry sector advisory committees operate; (2) the skewed make-up of this advisory committee; (3) the opportunities this advisory committee has to obtain information from and provide input to governmental decision-makers; and (4) the weighty policy issues on which this advisory committee obtains information and renders preferred advice.

I. THE STATUTORY STRUCTURE IN WHICH THE CHEMICAL TRADE ADVISORY COMMITTEE OPERATES.

A. The Trade Act Authorization

The Trade Act of 1974 authorizes the establishment of various types of advisory committees. First, it mandates the establishment of an Advisory Committee for Trade Policy and Negotiations ("ACTPN") to provide overall advice on trade objectives, negotiating positions, and agreements. 19 U.S.C. § 2155(b)(1). Second, the Trade Act authorizes, but does not

require, the establishment of other general policy, functional, or sectoral advisory committees. Id. § 2155(c). The Act lists various interests that should be represented on the various committees, “insofar as practicable.” Id. § 2155(b)(1), 2155(c)(1)-(2). When enacted in 1974, the Trade Act made no mention of environmental or consumer interests in any of these lists.

Pursuant to the authority granted in the Trade Act, the USTR and Department of Commerce have organized and utilized a series of trade advisory committees, including the Advisory Committee for Trade Policy and Negotiations, several policy and functional advisory committees, and more than one and a half dozen Industry Sector Advisory Committees (“ISACs”).¹ One of the ISACs established by the USTR and the Department of Commerce relates directly to chemicals. This committee is known as ISAC-3 on Chemical and Allied Products. The USTR and Department of Commerce established this advisory committee in 1980 for a two-year term, which has been renewed every two years since. The charter authorizes as many as 50 members on this committee, and it currently has approximately 33 members, appointed for two-year terms, which can be renewed. Exs. A-C to Declaration of Geoffrey Gamble (Feb. 28, 2001).

B. The USTR Consults the Chemical Advisory Committee on Trade Policies Affecting Chemicals

Pursuant to the Trade Act, the USTR and the Department of Commerce consult with the ISACs and keep them informed on a timely and continuing basis on significant trade issues and developments. More specifically, the trade advisory committees, including the ISACs, provide information and advice on the development of U.S. trade policy, the negotiation and

¹ The Trade Act expressly gives the USTR, at times in conjunction with the Department of Commerce, certain responsibilities for appointing, organizing, and convening these advisory committees, and the President has delegated his authority to the USTR. Id. § 2155(b), (c), (d); Exec. Order No. 11,846, § 4(d), 40 Fed. Reg. 14,293 (1975).

administration of trade agreements, U.S. negotiating objectives and bargaining positions, and trade dispute settlement proceedings in which the United States is involved. 19 U.S.C. § 2155(a)(1), (i). The chemical ISAC meets at the call of the USTR and the Department of Commerce. Ex. A to Gamble Declaration.

The chemical ISAC has numerous other opportunities to provide advice, information, and recommendations to the USTR and the Department of Commerce regarding trade barriers and the implementation of trade agreements. Significantly, the chemical ISAC meets at the conclusion of negotiations for each trade agreement entered into pursuant to the Trade Act of 1974 and provides an advisory opinion to the President, Congress, and the USTR on the impact of such agreement on the chemical sector. 19 U.S.C. § 2155(e). The President and USTR must take the trade advisory committees' recommendations into account in developing U.S. negotiating positions and trade policies, *id.* § 2155(a)(3), and must inform the ISACs of significant departures from their advice or recommendations. *See id.* § 2155(i).

II. THE CHEMICAL ISAC HAS CONSISTED SOLELY OF INDUSTRY REPRESENTATIVES

When the Toxics Coalition brought its lawsuit, every member of ISAC-3 was either an executive of a chemical or allied products company or a related trade association. Ex. B to Gamble Declaration. This imbalance had occurred not by accident, but by design. The USTR and the Department of Commerce had solicited as nominees for the ISAC only those who represented these industries. Industry Consultations Program: The U.S. Industry's Voice in International Trade Policy, Mission & History (<http://www.ita.doc.gov/td/icp/mission.html>) (March 22, 2000).

The skewed make-up of the ISAC reflected a longstanding practice of industry-dominated trade advisory committees. Hundreds of industry representatives serve on U.S. trade

advisory committees. Id. Until recently, none of the advisory committees had any environmental representation. In 1992, in response to public and congressional outcry, the USTR and Commerce Department appointed environmental representatives to a few select trade advisory committees. However, several of these advisory committees have since been abolished, and at present, only one – the Advisory Committee for Trade Policy and Negotiations – retains an environmental representative. Prior to 2000, none of the ISACs had any environmental representation.

In 1994, the President established the Trade and Environment Policy Advisory Committee (“TEPAC”) to provide advice and information to the USTR on issues concerning trade and the environment. Exec. Order No. 12,905, 59 Fed. Reg. 14,733 (1994). TEPAC is comprised of a mix of business and environmental representatives. TEPAC meets solely at the discretion of the USTR, and in practice, has met less frequently than the chemical ISAC. Ex. C to Gamble Declaration. TEPAC has gone through lengthy periods without holding any meetings. See Declaration of Mark Vallianatos ¶ 2 (Aug. 1999) (Ex. 2 to Declaration of Jim Puckett (March 19, 2001). TEPAC addresses a vast array of trade policy matters affecting the environment and has paid little attention to particular issues addressed by the ISACs. Vallianatos Declaration ¶¶ 3-4.

At the time environmental appointments were made to the ACTPN and TEPAC, the Trade Act did not expressly require or authorize environmental representation on any of the trade advisory committees. The original Trade Act provided that the ACTPN “shall include representatives of non-Federal governments, labor, industry, agriculture, small business, service industries and retailers.” 19 U.S.C. § 2155(b)(1). It was not until after the President had appointed environmental and consumer representatives to the ACTPN that Congress amended

the Trade Act to add these two interests to the list to codify that existing practice. Pub. L. No. 103-465, § 128, 108 Stat. 4809, 4836 (1994); H.R. Rep. No. 103-826(I), at 37 (1994), reprinted in 1994 U.S.C.C.A.N. 3773, 3809. The lack of specific mention of environmental interests did not operate as a bar to the appointments.

III. THE ISACS' OPPORTUNITIES TO OBTAIN INFORMATION AND INFLUENCE GOVERNMENT DECISION-MAKERS

A. The Advisory Committees' Access to Secret, Inside Information

Members of the ISACs have access to inside government information about the overall negotiating objectives and positions of the United States, even where such information is classified, contains trade secrets, or is otherwise unavailable to the general public. 19 U.S.C. §§ 2155(a)-(c), (g), (i). See Gamble Declaration ¶¶ 16-17. Indeed, the Declarations submitted by plaintiffs Vincent DeLisi and Geoffrey Gamble highlight the benefits that accrue to them and the industry they represent from access to such inside information. Thus, Mr. DeLisi states that:

My participation in ISAC-3 meetings and access to materials made available in connection with those meetings have become a major asset for [my company].

Since ISAC-3 meetings have terminated, my ability to supply accurate information and guidance to my customers and prospective customers has been seriously impaired.

DeLisi Declaration ¶¶ 7-8.

This access to inside information is in sharp contrast to the dearth of public information about trade negotiations. While the Trade Act explicitly makes the trade advisory committees subject to FACA, it establishes an exception to FACA's ordinary rules requiring open meetings, records, and public participation for the ISACs. 19 U.S.C. § 2155(f). Under that exception, advisory committee proceedings and records may be closed to the public "whenever and to the extent it is determined by the President or his designee that such meetings will be concerned with matters the disclosure of which would seriously compromise the Government's negotiating

objectives or bargaining positions with respect to” trade agreements or trade policies. Id. § 2155(f)(2). The USTR is the President’s designee for making such determinations by virtue of Exec. Order No. 11,846, 40 Fed. Reg. 14,291 (1975).

Beginning in at least 1980, the USTR issued blanket closure orders on a biannual basis closing all meetings of all ISACs that would take place over that two-year period. In issuing these orders, the USTR invoked the Trade Act exception to the ordinary FACA openness mandates. In a lawsuit brought by the intervenor Public Citizen and another group, this Court invalidated the blanket closure order for 1996-1998 on the ground that the USTR could not credibly determine that all portions of all ISAC meetings fall within the Trade Act’s closure authority, particularly in light of the advisory committees’ broad mandates. Public Citizen v. Barshefsky, 939 F. Supp. 31 (1996). However, even though the USTR must now make individualized closure decisions, it still closes vast portions of meetings of the chemical ISAC. Gamble Declaration ¶ 16 and Ex. C.

Members of the ISACs may attend the closed meetings and are privy to the information exchanged in those meetings. Given the secrecy surrounding the development of trade policy, much of this information is classified and thus unavailable to the general public.

B. The Chemical ISAC Has Numerous Unique Opportunities to Influence Trade Policies Affecting the Environment

Not only do members of the chemical ISAC obtain access to nonpublic information, but they also have numerous opportunities to influence the development of trade policies affecting the environment. After all, the committees are established to be part of the ongoing process of developing trade policy and to be “an intrinsic part of developing U.S. positions for all policy negotiations.” Ex. C to Gamble Declaration.

The mission of the chemical ISAC is broad, covering all aspects of the development and implementation of U.S. trade policy relating to chemicals. Due to the secrecy enshrouding the advisory committee process, the precise matters addressed by the ISACs are not generally disclosed publicly. However, the declarations filed by plaintiffs reveal that ISAC-3 has advised U.S. trade officials on:

- China’s Accession to the World Trade Organization;
- A draft convention dealing with Persistent Organic Pollutants (“POPs”) – an international environmental agreement banning certain chemicals and pesticides;
- The Biosafety Protocol restricting exposure to potentially harmful genetically-modified organisms;
- The Free Trade Agreement of the Americas; and
- Elimination of tariffs on chemicals, including chemicals that have been banned in the United States because of their harmful environmental effect.

Gamble Declaration ¶ 38; DeLisi Declaration ¶ 6. Intervenor-defendants and the environmental community generally have advocated for stronger environmental safeguards in each of these areas and their positions have often been diametrically opposed to those pressed by the chemical industry. See Declaration of Lori Wallach ¶¶ 13-18 (March 2001); Puckett Declaration ¶¶ 6-9. Indeed, Mr. Gamble candidly admits that “Any issue having to do with trade and the environment is critical to the chemical industry.” Gamble Declaration ¶ 38(b). With many trade issues facing ISAC-3, the converse is also true.

Membership on ISAC-3 has given the chemical industry extensive opportunities to influence USTR in ways that benefit the chemical industry. As plaintiff DeLisi attests, service on ISAC-3 “has given me an opportunity to protect the business interests of the U.S. producers”

and to “influence U.S. trade policy at a senior level.” DeLisi Declaration ¶¶ 8-9. Similarly, plaintiff Gamble testifies that:

On occasions too numerous to recount, industry assistance and counsel, expressed at ISAC-3 meetings, in follow-up sessions and during negotiations with other governments was heeded by U.S. government officials.

Gamble Declaration ¶ 21.

IV. RELATED PROCEEDINGS

In July 1999, several environmental organizations filed a lawsuit challenging the lack of environmental representation on the industry-only advisory committees dealing with wood and paper products. In November 1999, the district court held that the wood and paper advisory committees violate FACA’s balanced membership requirement. Northwest Ecosystem Alliance v. Office of the U.S. Trade Representative, No. C99-1165R, Order Granting Summary Judgment (W.D. Wash. Nov. 9, 1999) (Ex. 1).

The court decided that the forest product ISACs did not serve a solely “politically neutral and technocratic” function, in which case industry domination would be permissible, but instead they offered advice on diverse and far-reaching policy issues that affect others, especially those who promote forest conservation. Id. at 18. More specifically, “the forest product ISACs advise upon broad policy issues rather than just narrow or technical ones” and these “matters affecting the wood and paper product sectors are dramatically and inextricably intertwined with the environmental health and protection of this nation.” Id. at 14-15.² (footnotes omitted).

² The court offered the following examples of issues on which the ISACs’ views have been diametrically opposed to those of the environmental community:

[T]he forest product ISACs routinely advise the government on trade issues that affect the environment nationally and internationally. For example, the forest product ISACs support the objectives of the World Trade Organization (“WTO”), oppose government subsidies to cover the cost of meeting new or stricter environmental regulations, and oppose any tariffs on wood and paper products.

The court refused to read the Trade Act “in isolation” and concluded that “[s]uch balance concerns are not alleviated by the existence of committees established under different sections of the Trade Act” since “FACA requires balanced representation within each advisory committee, not among all the advisory committees” and the forest products ISACs address trade issues affecting forests more frequently and in-depth than the more generalized policy committees. Id. at 16-18. The court ordered the U.S. Trade Representative and Commerce Department to comply with FACA by expeditiously appointing at least one properly qualified environmental representative to each of the forest product ISACs as soon as possible. Id. at 22-23.

Initially, the government appealed this ruling, but it later dropped the appeal. Environmental representatives have been appointed to both the paper and wood products ISACs.

Seeking to obtain similarly more balanced representation on the chemical ISAC, Washington Toxics Coalition, Public Citizen, and Asia Pacific Environmental Exchange filed an analogous lawsuit in the Western District of Washington on April 27, 2000. That lawsuit sought the appointment of an environmental representative to ISAC-3 because environmental and citizen groups that seek to protect public health and the environment from exposure to and

Plaintiffs’ opinions on these matters are directly contrary: they seek to reform the WTO to allow for greater environmental protections, including eco-labeling and other restrictions on trade; they support government subsidies to enable companies to meet environmental regulations; and they support keeping tariffs in place until certain environmental standards are met.

The ISACs do not, for example, simply advise upon the proper price for products or explain the feasibility of processing standards. In 1998 and 1999, the ISACs offered advice on policy matters as diverse as global warming, the International Tropical Timber Agreement, the United Nations International Forum on Forests, U.S. import regulations for semi-processed wood materials, invasive species safeguards, a European Union packaging directive, and the expansion of NAFTA to include Chile. Plaintiffs hold contrary views upon these matters as well. Id. at 13-14 & n. 8 (citations omitted)

pollution from toxic chemicals, and that oppose trade policies that undermine these goals, had no representation on this committee. As the complaint alleged:

The trade policy matters upon which the ISACs are consulted have important and significant ramifications for the proliferation of toxic chemicals, pollution prevention, and public health and environmental protection around the world.

For example, the U.S. government is currently engaged in a tariff liberalization initiative for the chemicals sector, the goal of which is to eliminate all tariffs on chemical products worldwide. Such tariff liberalization would likely increase the proliferation and use of chemicals worldwide and would have the potential to cause adverse impacts on public health and the environment.

Existing trade rules create obstacles to strong and effective public health and environmental protection. In the area of toxic substances regulation, the World Trade Organization (WTO) has rejected the precautionary principle, which allows countries to protect their citizens based on scientific evidence of risk before the scientific proof of harm is conclusive. A French ban on asbestos is currently being challenged in the WTO. And the United States has invoked WTO rules to argue for the weakening of a European Union proposal to ban toxic chemicals in electronic products and to require the manufacturers to be responsible for disposing of such products. The chemical ISAC has the ability to obtain otherwise nonpublic information and to offer the USTR and the Department of Commerce their views about such issues.

Plaintiffs and their members have an interest in ensuring that U.S. and world trade policies do not erect obstacles to effective pollution prevention and public health initiatives. Their ability to advocate effectively for this goal is impaired by the exclusion from the chemical ISAC of any environmental representatives. Membership on the ISAC affords the chemical industry access to timely and complete information about trade policies and issues under negotiation as well as opportunities to influence U.S. policymaking that plaintiffs and other environmental and health advocates lack.

Complaint ¶¶ 19-21 (Ex. 2).

When the USTR decided not to appeal Northwest Ecosystem Alliance, it also offered to settle the ISAC-3 litigation by appointing an environmental representative to the chemical ISAC. The USTR solicited nominations of environmental representatives to serve on ISAC-3. The parties' settlement will be finalized and filed with the court this week.

The plaintiffs in this case – the chair and vice chair of ISAC-3 – never sought to intervene in Washington Toxics Coalition. Instead, they filed the instant case, which seeks to block implementation of the settlement in Washington Toxics Coalition.

ARGUMENT

The USTR has ample authority, indeed we believe it has the legal duty under FACA, to broaden ISAC-3 membership to include environmental representation. Accordingly, under Fed. R. Civ. P. 12(b)(6), this Court should dismiss this case in its entirety for failing to state a claim upon which relief can be granted.³ Moreover, because plaintiffs are unlikely to prevail on the merits of their claims, their motion for a preliminary injunction should be denied. In addition, the harm to the public and to intervenor-defendants outweighs any injury to plaintiffs from environmental representation on ISAC-3. For this reason as well, the requested injunction should not issue.

I. THE TRADE ACT EXPRESSLY MAKES FACA’S FAIR BALANCE REQUIREMENT APPLICABLE AND THEREFORE FAILS TO EXCUSE THE ISAC’S IMBALANCE

The Chairs rely on the listing in the Trade Act of potential advisory committee members to argue that no environmental representation is legally permissible. The Trade Act establishes three types of trade advisory committees: (1) the Advisory Committee for Trade and Policy Negotiations (“ACTPN”); (2) general policy advisory committees; and (3) industry sector or

³ In their complaint, the Chairs also claim that USTR acted illegally by failing to call meetings of ISAC-3. Perhaps seeing its inherent weakness the Chairs neglect to press that claim in their motion for a preliminary injunction. Indeed, ISAC meets only at the call of the USTR. Ex. A to Gamble Declaration. Moreover, the USTR was well-advised to refrain from convening ISAC-3 in the absence of full participation of environmental interests. In Northwest Ecosystem Alliance v. Office of the U.S. Trade Representative, the district court held that FACA prohibited USTR from convening ISACs that lacked the necessary environmental representation. Because the USTR acted properly and in accordance with law in refraining from convening ISAC-3 meetings in the absence of environmental representation, Count I should be dismissed.

functional advisory committees. The Trade Act identifies interests that should be considered for inclusion on the industry and functional committees. Because that list contains neither environmental interests nor a generic catchall, while such interests are mentioned in connection with other advisory committees, the Chairs contend that no environmental representatives may be appointed to the ISACs. This argument is erroneous.

First, the USTR is not legally barred by statute from appointing environmental representatives to the ISACs because the statute simply identifies interests that should be included without making the list exclusive. Indeed, the USTR appointed environmental and consumer representatives to the ACTPN in 1992 under the original Trade Act, which contained no mention of environmental or consumer interests and no catchall for “other interests.” It was not until 1994 that Congress amended the Trade Act to reflect the change in composition that had already been made by USTR. See Pub. L. No. 103-465, § 128, 103d Cong., 2d Sess. (1994) (inserting nongovernmental environmental and conservation organizations in 19 U.S.C. § 2155(b)(1)). Accordingly, under settled agency practice, the Trade Act’s failure to explicitly mandate environmental representatives on the ISACs does not operate as a bar to such appointments where their participation will allow directly-affected interests to be heard or the USTR decides it is politically wise or fair to make such appointments.

Second, the Trade Act expressly makes FACA applicable to all trade advisory committees. The Trade Act creates express exceptions to FACA’s open record and meeting requirements, thereby demonstrating that Congress considered and knew how to carve out such exceptions. 19 U.S.C. § 2155(f). Since the Trade Act establishes no comparable exception to FACA’s fair balance requirement, Congress clearly intended for that requirement to be fully applicable to the trade advisory committees, including the ISACs.

Third, in the arena of trade policy, much has changed in the 25 years since Congress enacted the Trade Act. The collision between trade agreements and environmental protections emerged on the scene less than a decade ago with the negotiation of the World Trade Organization Agreements and the North American Free Trade Agreement, and trade disputes finding U.S. dolphin protections to be unfair trade barriers that must be eliminated on pain of retaliatory trade sanctions. The ISACs of today are grappling with trade policies that have significant ramifications for environmental protection. As the issues the ISAC addresses have expanded to encompass environmental policies, so too must its membership be broadened to provide fair balance. Indeed, in Cargill, Inc., the Fifth Circuit held that “assigning new functions to an advisory committee may render it functionally out of balance.” 173 F.3d at 336 (conducting a peer review of a diesel exhaust study not anticipated in charter might call for a different balance in its membership). Similarly, in National Anti-Hunger Coalition, 711 F.2d at 1074, the D.C. Circuit found that the advisory committee’s stated function of applying private sector cost control techniques to the federal government, drew upon industry expertise and did not call for a more diverse membership. The court of appeals noted that a different result might be warranted if the committee had recommended substantive changes in federal policies and programs. Id. On remand, the district court looked beyond the stated function in the committee’s charter to evidence that the committee, in fact, had recommended cutbacks in federal food programs. 566 F. Supp. 1515 (D.D.C. 1983). Because such recommendations could not be approved by a committee lacking representation of the affected interests, the court declared them ultra vires and illegal. Id. at 1516. So too, the composition of trade advisory committees must be broadened as trade issues grow to have a greater impact on the environment.

Finally, plaintiffs argue that the existence of the Trade Environment & Policy Advisory Committee (“TEPAC”) obviates the need for environmental representation on the chemical ISAC. The district court in Northwest Ecosystem Alliance properly rejected this argument because FACA calls for balance within each advisory committee not among an array of committees and because the TEPAC deals with a wide array of trade policies with far less frequent and detailed focus on toxics issues than the chemical ISAC. Order at 16-18. Moreover, the chemical and the allied product industries are represented on TEPAC and ACTPN, thereby undercutting any contention that representation on one trade advisory committee obviates any need for or benefit from representation on ISAC-3. <http://www.ustr.gov/outreach/tepacroster.pdf> (Monsanto Company); <http://www.ustr.gov/outreach/actpnroster.pdf> (Procter & Gamble, Eastman Kodak Company, Pharmacia Corporation, Estee Lauder Companies). Exhibits 4 and 5.

In sum, the Trade Act does not erect a legal barrier to the appointment of environmental representatives to the chemical ISAC. The USTR has ample authority, indeed the legal obligation under FACA, to broaden the viewpoints to include environmental interests given the politically-charged environmental issues being addressed by the committee.

II. FACA PROHIBITS INDUSTRY DOMINATION OF ADVISORY COMMITTEES THAT RENDER POLICY ADVICE ON MATTERS AFFECTING EXCLUDED INTERESTS.

The Trade Act expressly makes FACA applicable to all of the trade advisory committees. 19 U.S.C. § 2155(f). While the Trade Act spells out some exceptions, those exceptions are limited to particular applications of FACA’s open meeting and record provisions. Id. § 2155(f)(2). FACA’s balanced membership mandate is fully applicable to trade advisory committees, including the ISACs.

A. FACA’s Balanced Membership Mandate

FACA requires that any law, Presidential directive, or agency action establishing or authorizing an advisory committee “shall . . . require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee.” 5 U.S.C. App. 2 § 5(b)(2).⁴

FACA’s fair balance requirement is Congress’s response to “a pernicious species of so-called ‘advisory’ bodies: those dominated by industry leaders and the like with substantial parochial interest in the outcome of the matter under discussion, usually some onerous regulation or policy proposal.” Natural Resources Defense Council v. Herrington, 637 F. Supp. 116, 120 (D.D.C. 1986). As the House Report emphasized:

One of the great dangers in the unregulated use of advisory committees is that special interest groups may use their membership on such bodies to promote their private concerns. Testimony received at hearings before the Legal and Monetary Affairs Subcommittee pointed out the danger of allowing special interest groups to exercise undue influence upon the Government through the dominance of advisory committees which deal with matters in which they have vested interests. . . . [T]he lack of balanced representation of different points of view and the heavy representation of parties whose private interests could influence their [advisory committee] recommendations would be prohibited by the provisions contained in [] the bill.

H.R. Rep. No. 1017, 92d Cong., 2d Sess. 6 (1972), reprinted in 1972 U.S.C.C.A.N. 3496.

Senator Charles Percy, one of FACA’s original sponsors, underscored the dangers of industry-dominated advisory committees:

Viewed in its worst light, the federal advisory committee can be a convenient nesting place for special interests seeking to change or preserve a policy for their own ends. Such committees, stacked with giants in their respective fields, can

⁴ Section 5(b) mandates balanced representation on legislatively established advisory committees; § 5(c) extends this mandate to advisory committees established by the President, agency heads, or other federal officials. See National Anti-Hunger Coalition v. Executive Committee of the President’s Private Sector Survey of Cost Controls, 711 F.2d 1071, 1073 n. 1 (D.C. Cir. 1983).

overwhelm a federal decisionmaker, or at least make him wary of upsetting the status quo.

118 Cong. Rec. 30,276 (1972); see also 118 Cong. Rec. S14,654-55 (1972) (Senator Roth) (noting that FACA “addresses itself to the danger of private interests exercising unfair influence on governmental decisions through membership in advisory committees”).

The House Report on FACA provided the following example of an advisory committee that would violate FACA’s balance mandates:

When [an advisory committee] met with government officials to consider a proposed national industrial wastes inventory questionnaire, only representatives of industry were present. No representatives of conservation, environmental, clean water, consumer, or other public interest groups were present. This lack of balanced representation of different points of view and the heavy representation of parties whose private interests could influence their recommendations should be prohibited by the provisions contained in [FACA].

H.R. Rep. No. 1017, supra, at 6 (1972), reprinted in 1972 U.S.C.C.A.N. 3496.

The hypothetical comes close to describing the industry-only chemical ISAC. As in the hypothetical, this committee suffers from a “lack of balanced representation of different points of view and the heavy representation of parties whose private interests could influence their recommendations.”

B. An Industry-Only Advisory Committee May Perform Purely Narrow, Technical Functions and May Not Render Advice on Broad Policy Issues Affecting Excluded Interests

By its plain terms, the type of balance required under FACA is determined by the functions the committee is to perform. In applying FACA’s balance requirement, the courts have upheld industry domination of advisory committees where the committees’ functions are so narrow that a broader array of interests need not be represented. However, where a committee’s functions extend to policy matters, industry domination runs afoul of FACA.

The seminal case – National Anti-Hunger Coalition v. Executive Committee of the President’s Private Sector Survey on Cost Control, 711 F.2d 1071 (D.C. Cir. 1983) – illustrates this dichotomy between narrow, technical recommendations on the one hand and broader policy advice on the other. In the initial round of litigation, the D.C. Circuit held that the Grace Commission (as this advisory committee was known) could be comprised entirely of corporate executives where its sole task was to apply private sector expertise to government programs, rather than make substantive policy recommendations. Id. at 1074. Where the committee’s goal is so narrow and explicit, a committee comprised of a discrete group of experts in a narrow field is not necessarily imbalanced. Id.; see also 557 F. Supp. 524, 528 (D.D.C. 1983) (opinion below). However, when it became clear that the Grace Commission had exceeded its articulated functions and recommended cutbacks in the food stamp and school lunch programs, Judge Gesell declared the committee imbalanced because it lacked representation of poor people who depended on such federal food programs and would be directly affected by adoption of those recommendations. 566 F. Supp. 1515, 1517 (D.D.C. 1983) (district court opinion in subsequent proceedings).

In several other key FACA cases upholding the composition of advisory committees with narrow, technical mandates, the courts have distinguished such technical advice from far-reaching policy recommendations that call for broader representation. The importance of the advisory committee’s function when determining balance is evident from Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods, 886 F.2d 419 (D.C. Cir. 1989). The two judges who reached the merits agreed that the critical distinction is between advisory committees performing a specific, narrow function and those making broad policy decisions, but disagreed as to how to characterize the advisory committee at issue. Judge

Friedman found that because the Committee’s function of developing microbiological criteria for foods involved “highly technical and scientific studies and recommendations,” the Committee’s membership was fairly balanced without extensive consumer representation. Id. at 423. However, he distinguished the committee at issue there from the one dealing with waste inventories discussed in the legislative history “where the only individuals who met with government officials were representatives of industry.” Id. at 425. Judge Edwards agreed that if the Committee was charged with a “primarily technical or scientific” function, consumer interests could be excluded. Id. at 436. However, because the Committee was charged with recommending regulations, Judge Edwards characterized the Committee’s task as involving “complex policy choices, not merely – or even primarily – technical determinations.” Id. In his view, such a committee charged with making recommendations about a broad range of products affecting consumers and the public health presents “precisely the type of situation” in which Congress saw a need for independent public interest representation.

The Fifth Circuit recently adopted the technical-policy distinction laid out in National Anti-Hunger Coalition and Public Citizen. In Cargill, Inc. v. United States, 173 F.3d 323 (5th Cir. 1999), a committee whose task was to provide scientific peer review on mine regulations did not run afoul of FACA’s fair balance requirement because it was “politically neutral and technocratic” and was “not called upon to make policy decisions.” Id. at 337. The court concluded that a committee with a “narrow, technical mandate” devoid of policy decision-making responsibilities, “does not have to include representatives of those who might be affected by the committee’s work.” Id. at 338.

Plaintiffs rely almost exclusively on Public Citizen v. Dep't of Health and Human Services, 795 F. Supp. 1212 (D.D.C. 1992), a FACA balanced representation case that this Court dismissed as not justiciable. Public Citizen is distinguishable from the case at hand.

First, Public Citizen asked the court to declare an advisory committee imbalanced because it lacked representation of particular viewpoints on issues addressed. The court concluded that engaging in a subjective inquiry as to the viewpoints held by each committee member was beyond the purview of the courts. In contrast, assessing the imbalance on ISAC-3 does not call for an esoteric query to identify any viewpoint bias among the committee members. The industry members of ISAC-3 have been appointed to represent industry interests, not their independent subjective viewpoints. Ex. A to Gamble Declaration. The Gamble and DeLisi declarations confirm that these individuals serve to obtain information for use by the chemical industry and to promote the industry's interests in chemicals trade. Gamble Declaration ¶¶ 19, 21, 38, 40; DeLisi Declaration ¶¶ 8-9. Judged on a purely objective basis, ISAC-3 is the quintessential imbalanced industry advisory committee.

Second, the ISACs are part of the institutional policy-setting framework, rather than a one-time blue ribbon advisory committee. Due to the closely-held nature of negotiating positions, the trade advisory committees serve as a substitute for more open, participatory policy-setting mechanisms in the domestic arena. It is well within the province of the courts to determine the legality of having such a policy-setting apparatus that is open to industry but not to opposing interests who are deprived of the information and avenues for input that advisory committee membership affords.

The task before the Court is to discern whether the purview of this committee is narrow and technical or broad and policy-oriented. The functions of the chemical ISAC are broad,

extending to a vast array of trade agreements, negotiations, and policies that affect chemicals. A review of the actual issues on which ISAC-3 renders advice also leads to the inescapable conclusion that these committees address far too controversial policy issues to be composed solely of industry.

III. THE CHEMICAL ISAC OFFERS ADVICE ON TRADE POLICY MATTERS AFFECTING TOXIC CHEMICAL TRADE AND USE AND THUS MUST HAVE REPRESENTATION OF HEALTH AND ENVIRONMENTAL PROTECTION ADVOCATES.

A. The Trade Act Authorizes the ISACs to Provide Broad Policy Advice.

Subsection (a) of the Trade Act authorizes the President and executive branch agencies to seek advice from trade advisory committees, including sectoral advisory committees, like the ISACs, “on the overall current trade policy of the United States.” 19 U.S.C. § 2155(a). This subsection is the linchpin of the trade advisory committees’ authority and mandates. Subsection (a) offers a litany of matters on which the ISACs and other advisory committees may provide advice: (1) U.S. negotiating positions and bargaining positions; (2) the implementation, operation, and effectiveness of trade agreements; (3) trade dispute settlements; (4) actions taken under U.S. trade laws; (5) “important developments in other areas of trade for which there must be developed a proper policy response”; and (6) “other matters arising in connection with the development, implementation, and administration of the trade policy of the United States.” 19 U.S.C. § 2155(a)(1)-(2).

The Trade Act provision specifically laying out the mandate of the ISACs refers back to this core authorizing provision. Accordingly, the ISACs “shall . . . provide policy advice, technical advice and information, and advice on other factors relevant to the matters referred to in subsection (a) of this section.” *Id.* § 2155(d). Similarly, the ISACs must be consulted on “a continuing and timely basis” and must be given information regarding:

- (1) significant issues and developments; and
- (2) overall negotiating objectives and positions of the United States and other parties;

with respect to matters referred to in subsection (a) of this section.

Id. § 2155(i). It is, therefore, plain that “[t]he Trade Act provides that the [ISAC] advisory committees consult the President concerning a broad range of issues affecting United States trade policy.” Public Citizen v. Barshefsky, 939 F. Supp. at 36 (D.D.C. 1996).

B. The Chemical ISAC Renders Policy Advice on Issues Having Far-Reaching Environmental Effects.

In practice, the chemical ISAC plays a pivotal and preeminent role in the development of U.S. trade policies that directly affect exposure to toxic chemicals throughout the world. The chemical ISAC has offered advice on cutting-edge and exceedingly controversial issues, such as China’s accession to the WTO, removing tariffs on toxic chemicals, the Free Trade Agreement of the Americas, and international environmental agreements to ban certain toxic chemicals and to restrict trade in potentially harmful genetically-modified organisms. Gamble Declaration ¶ 38; DeLisi Declaration ¶ 6. The direction to be taken in each of these areas will shape both the trade regime and the environment for our generation and beyond. Intervenor-defendants are directly engaged in these issues, advocating against the tariff elimination initiative, for stronger restrictions on trade in toxic chemicals, and for environmental conditions to be imposed in new trade agreements. See Puckett, Wallach, and Dansereau Declarations.

It is because of the significant interests health and environmental advocates have in these trade policies that intervenor-defendants sought environmental representation on ISAC-3. Only with environmental representation is this committee positioned both legally and as a matter of fairness to address such controversial and politically-charged trade issues. The USTR wisely

chose to broaden the representation on this committee to include affected environmental interests.

IV. THE BALANCE OF HARM WEIGHS SHARPLY AGAINST ISSUANCE OF AN INJUNCTION

The Chairs assert that they will be irreparably injured if any environmental representatives become members of ISAC-3. However, they will not lose “their principal vehicle for influencing trade policy and agreements.” Chairs’ Brief at 13. They will still maintain their status as governmental advisors, and through that status they will still have access to information that is not available to the general public. They will also still be privy to government briefings on emerging trade developments and they will have inside access to trade officials at advisory committee meetings. While an environmental representative will share that preferred status, the Chairs will not lose their avenues of access. While the Chairs claim they may be less candid in the presence of an environmental representative, such self-censorship hardly amounts to irreparable harm.

On the other side of the balance, intervenor-defendants would suffer irreparable harm if the requested injunction issued. Through membership on ISAC-3, the industry has obtained inside information and opportunities to influence trade policies affecting toxic chemicals that are unavailable to intervenor-defendants. Such one-sided input essentially puts a thumb on the scales in favor of trade policies that will be deleterious to the environment. As the Eleventh Circuit concluded, environmental “matters are so serious and of such great concern to so many with differing interests, it is absolutely necessary that the procedures established by Congress [in FACA] be followed to the letter.” Alabama-Tombigbee Rivers Coalition v. Department of Interior, 26 F.3d 1103, 1107 n.9 (11th Cir. 1994).

Such blatant industry influence in the guise of an impartial advisory committee is precisely the type of pernicious harm FACA was designed to prevent. As Senator Lee Metcalf – FACA’s key Senate sponsor - emphasized:

What we are dealing with, in these hearings, goes to the bedrock of Government decision-making. Information is an important commodity in this capitol. Those who get information to policymakers, or get information from them, can benefit their cause, whatever it may be. Outsiders can be adversely and unknowingly affected. And decision-makers who get information from special interest groups who are not subject to rebuttal because opposing interests do not know about meetings – and could not get in the door if they did – may not make tempered judgments. We are looking at two fundamentals, disclosure and counsel, the rights of people to find out what is going on and, if they want, to do something about it.

S. Rep. No. 92-1098, 92d Cong., 2d Sess. 4 (1972).

This is not a situation where the FACA violation can be considered benign because some other public process will provide the excluded interests a subsequent opportunity for input on the matter addressed by the advisory committee. No later process will afford such a countervailing opportunity for public input. The USTR does not publish its proposed trade policies for public comment in accordance with notice and comment rulemaking. Cf. National Nutritional Foods Ass’n v. Califano, 603 F.2d 327, 336 (2d Cir. 1979) (rulemaking proceedings afford opportunity to correct infirmities in improper advisory committee action on the proposal). Moreover, for some trade policies, such as the reduction of tariffs on chemical products, there will be no legislative approval or authorization; for trade agreements that need congressional approval, the legislative process is generally truncated with little opportunity for public hearings, floor debate, or even legislative amendment. See 19 U.S.C. § 2112.

The injunction sought by plaintiffs should be denied both because of the harm it would cause to Toxics Coalition and to the good government principles embodied in FACA. In enacting FACA, Congress carefully weighed the pros and cons of requiring balance in advisory

committee proceedings and came out on the side of balance. The Court should respect this balance in exercising its equitable powers. See Alabama-Tombigbee Rivers Coalition, 26 F.3d at 1107 n.9; Cargill, 173 F.3d at 342.

CONCLUSION

For these reasons, intervenor-defendants Toxics Coalition respectfully asks this Court to deny the motion for a preliminary injunction and dismiss the complaint.

Respectfully submitted this _____ day of March, 2001.

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