***No. 00-35060***

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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NORTHWEST ECOSYSTEM ALLIANCE; PACIFIC ENVIRONMENT AND RESOURCES CENTER; SIERRA CLUB; DEFENDERS OF WILDLIFE; BUCKEYE FOREST COUNCIL; INTERNATIONAL FORUM ON GLOBALIZATION

Plaintiffs-Appellees,

v.

OFFICE OF U.S. TRADE REPRESENTATIVE; DEPARTMENT OF COMMERCE,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WASHINGTON, SEATTLE DIVISION
Civil No. 99-01165-BJR

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**PLAINTIFFS-APPELLEES' BRIEF**

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## STATEMENT OF THE ISSUE

Did the district court properly hold that two industry-only advisory committees that have access to nonpublic information and opportunities to influence broad trade policies affecting forests and environmental policies violate the Federal Advisory Committee Act's requirement that the membership of federal advisory committees must "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)?

## INTRODUCTION

This case challenges defendants' establishment and utilization of two industry advisory committees comprised entirely of representatives of the wood and paper industries as a preferred source of advice on trade policy relating to forests. Plaintiffs Northwest Ecosystem Alliance et al. ("NWEA") – environmental groups that seek to promote preservation and sustainable management of forests – challenged these industry-only advisory committees 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).

Defendants Office of the U.S. Trade Representative ("USTR") and the U.S.

Department of Commerce offer a wooden construction of a decades-old statute devoid of any grounding in the reality of how these advisory committees are operating at the millennium. 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. The industry-only advisory committees are rendering advice on some of the most significant environmental policies of our day, such as global warming, sustainable forestry standards, eco-labeling, and whether and the extent to which international trade regimes will adapt themselves to and respect environmental safeguards. 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.

## BACKGROUND

The government's brief offers a mechanical reading of the Trade Act's authorization for the advisory committees at issue. However, it stops there and never describes how these committees operate. Accordingly, this brief begins by describing: (1) the statutory structure in which these advisory committees operate; (2) the skewed make-up of the industry sector advisory committees; (3) the opportunities these advisory committees have, but the plaintiffs lack, to obtain

information from and provide input to governmental decision-makers; and (4) the weighty policy issues on which these advisory committees obtain information and render preferred advice.

## I. THE STATUTORY STRUCTURE IN WHICH THE WOOD AND PAPER PRODUCTS TRADE ADVISORY COMMITTEES OPERATE

### 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. See infra at 6.

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] Two of the ISACs established by the USTR and the Department of Commerce relate directly to forest products. These committees are known as ISAC-10 on Lumber and Wood Products and ISAC-12 on Paper and Paper Products (referred to hereinafter collectively as the "forest products ISACs"). The USTR and Department of Commerce established these advisory committees in 1980 for a two-year term, which has been renewed every two years since. While the charters authorize as many as 30 members on each committee, these ISACs currently consist of approximately 15 and 10 members, respectively, appointed for two-year terms, which can be renewed. Defs. Excerpts of Record ("ER") 93, 100 (Charters); (ER 107-110 (Rosters)). The USTR and Department of Commerce provide approximately $15,000 annually in staff support and services to ISAC-10 and approximately $25,000 annually in staff support and services to ISAC-12. (ER 95, 102).

B. The USTR's Statutory Duty to Consult These Advisory Committees

The Trade Act requires the USTR and the Department of Commerce to consult with the ISACs and keep them informed on a timely and continuing basis

[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).

on significant trade issues and developments. More specifically, the trade advisory committees, including the ISACs, are to provide information and advice on the development of U.S. trade policy, the negotiation and 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 forest products ISACs meet at the call of the USTR and the Department of Commerce. In practice, these ISACs meet on a quarterly basis.

The forest products ISACs have 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. For example, the forest products ISACs select one or more of their members to serve on each Industry Functional Advisory Committee, and they may send representatives to meetings of the Industry Policy Advisory Committee for Trade Policy Matters. (ER 94, 101 (Charters)).

Significantly, the forest products ISACs must meet at the conclusion of negotiations for each trade agreement entered into pursuant to the Trade Act of 1974 and must provide an advisory opinion to the President, Congress, and the USTR on the impact of such agreement on the forest and paper products sectors. 19 U.S.C. § 2155(e). In contrast to the advice offered by most other advisory

committees, which federal agencies and officials may, but are not legally obligated to take into account in making decisions, the Trade Act obligates the President and USTR to take the trade advisory committees' recommendations into account in developing U.S. negotiating positions and trade policies. Id. § 2155(a)(3). Indeed, the USTR must inform the ISACs of significant departures from their advice or recommendations. See id. § 2155(i).

## II. THE FOREST PRODUCTS ISACS CONSIST SOLELY OF INDUSTRY REPRESENTATIVES

Every member of ISAC-10 and ISAC-12 is either an executive of a timber or paper products company or trade association. (ER 107-110 (Rosters)). This imbalance is not by accident, but by design. In soliciting nominees for these ISACs, the USTR and the Department of Commerce explicitly stated that "[i]n order to qualify for representation on an . . . ISAC, nominees must . . . represent[] U.S. manufacturing and service firms that trade internationally or an industry association." 64 Fed. Reg. 10,448 (Mar. 4, 1999). Similarly, a Department of Commerce overview of the membership process states:

> Committee members should be U.S. citizens representing U.S. manufacturing or service firms that trade internationally (including retailing and other distribution services). Representatives of industry trade associations may also participate.

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)); see also ER 74-79.

The skewed make-up of the ISACs continues a longstanding practice of establishing industry-dominated trade advisory committees. As many as 700 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. None of the ISACs has any environmental representation. Declaration of William Snape, III ¶¶ 6-8 (July 19, 1999), in NWEA's Supplemental Excerpts of Record ("SER") 4-5; ER 107-108, 110.

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 forest products ISACs. TEPAC has gone through lengthy periods without holding any meetings. Declaration of Mark

Ritchie ¶ 4 (Aug. 1999) (SER 116); Snape Decl. ¶ 7 (SER 4). TEPAC addresses a vast array of trade policy matters affecting the environment and has paid little attention thus far to trade liberalization in the forestry sector. Ritchie Decl. ¶¶ 5-7 (SER 116-117); Declaration of Mark Vallianatos ¶¶ 3-4 (Aug. 19, 1999) (SER 112-113).

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. Indeed, the USTR conceded below that it has the discretion to appoint environmental representatives to the functional and sectoral advisory committees. Transcript of Proceedings at 49-51 (W.D. Wash. Nov. 3, 1999) (SER 121, 123, 124-125); see infra at 31-32.

## 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). A 1989 Commerce Department publication touting the benefits of serving on trade advisory committees during the Tokyo Round of GATT negotiations reported that members have access to a vast store of classified information concerning trade negotiations and to a database that allows them to transmit their views directly to government negotiators. Snape Decl. ¶ 5 (citing *Government Seeks Advice From Industry on U.S. Trade Policy,* Bus. Am., Jan. 16, 1989, at 8) (SER 3-4).

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 Sierra Club and another group, the U.S. District Court for the District of Columbia 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 has still closed all recent meetings of the forest products ISACs. 1998 Meetings (Ex. 5) (SER 30-31).

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. In fact, many of the plaintiffs have expended

their energies and resources simply trying to track down information that is freely shared with the ISACs. Declaration of A. Paige Fischer ¶¶ 4-16 (July 1999) (SER 47-51). Many Freedom of Information Act requests have been answered by extensive withholdings on national security grounds. Id. ¶ 10 (SER 49). Even an International Trade Commission study in which some of the plaintiffs participated is unavailable to the public. Id. ¶ 13 (SER 50). Until challenged, the United States invoked this authority to refuse to make public even its own submissions to dispute settlement panels. Public Citizen v. Office of the U.S. Trade Representative, 804 F. Supp. 385, 387 (D.D.C. 1992).

### B. The Forest Products ISACs Have Numerous Unique Opportunities to Influence Trade Policies Affecting Forest Practices and the Environment

The mission of the forest products ISACs is broad, covering all aspects of the development and implementation of U.S. trade policy relating to forest products. Due to the secrecy enshrouding the advisory committee process, the precise matters addressed by the ISACs are not generally disclosed publicly. However, the report of the wood products ISAC on the Uruguay Round of General Agreement on Tariffs and Trade ("GATT") in January 1994 is public and sheds light on this advisory committee's perspective. In this report, ISAC-10 generally supported establishing the World Trade Organization with stronger institutional structure and powers than the GATT, but it criticized the Uruguay Round for not

accomplishing wood product tariff elimination. (SER 32-33, 36). The report also criticized the subsidies agreement provision allowing countries to offer subsidies covering up to 20% of the cost of meeting new or stricter environmental regulations. Id. at 3-4 (SER 34-35). In ISAC-10's view, this provision "is threatening enough to warrant dramatic efforts to sufficiently circumscribe the provision" and it urged the United States to limit the provision's applicability administratively. Id. at 3 (SER 34). These views are contrary to those held by the environmental community. See, e.g., Letter to Ambassador Esserman from Center for International Environmental Law, et al. (July 1999) (SER 65-67, 69-70, 72, 75).

An annual report lists matters that came before these ISACs during 1998. It identifies expansion of the World Trade Organization and the North American Free Trade Agreement, elimination of tariffs in the forestry sector, global warming, safeguards against entry of invasive pests on wood products, and the United Nations International Forum on Forests, among other matters. (SER 37-38, 40-41 (1998 Annual Report)).

The elimination of tariffs in the forest products sector is a hot-button trade issue with potentially significant ramifications for the protection of sustainable and healthy forest ecosystems around the world. At the behest of the timber industry, the U.S. government is currently spearheading a tariff liberalization initiative for

the forest products sector, the goal of which is to eliminate all tariffs on forest products worldwide. Fischer Decl. ¶¶ 19-24 (SER 52-55, 75). The environmental community and the timber industry hold opposing views concerning this initiative. The timber industry, through the ISACs and otherwise, has expressed its impatience at what it considers to be an unduly slow pace of tariff elimination. See Ex. 6 (SER 32-33, 35). The environmental community, on the other hand, is concerned that tariff liberalization will increase consumption of forest products worldwide and have adverse impacts on the preservation and health of forest ecosystems. (SER 75); Declaration of Joe Scott (July 22, 1999) (SER 18-23); Snape Decl. ¶ 10 and Ex. 1 (SER 2-3, 5-16).

Rather than expand forestry trade further, the environmental community, including the plaintiffs organizations, is urging the Administration and the international community to reform international trade rules to allow greater environmental protections, including eco-labeling, as well as restrictions on trade to prevent destruction of forest ecosystems. (SER 65-76). In contrast, the industry supports accelerated elimination of tariffs in the forest sector and new initiatives to cut back on what are called non-tariff measures, which can include environmental protections. Fischer Decl. ¶¶ 19-24 (SER 52-55). These issues have arisen in the NAFTA expansion debates, the WTO accession discussions, the proceedings of the WTO Committee on Trade and Environment, and in the Asia Pacific Economic

Cooperation Forum. The environmental community is also pressing for effective protections for forests, tools to reduce demand for forest products, such as eco-labeling and the European Union packaging initiative, and international action to prevent global warming. The Forest Products ISACs have deliberated over each of these matters. (SER 37-38, 40-41 (1998 Annual Report)).

## IV. PROCEEDINGS BELOW

In July 1999, plaintiffs filed this action challenging the lack of environmental representation on the industry-only advisory committees dealing with wood and paper products. Plaintiffs moved for a preliminary injunction, and the government defendants moved to dismiss. Because no material facts were in dispute, the district court consolidated these motions with the resolution of the merits by way of summary judgment.

On November 8, 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) (ER 134). At the outset, the court held that plaintiffs have standing because

> they have a direct interest in the advice given by the forest product ISACs and seek actual representation on the ISACs. Their injuries stem from the very act of being omitted: lack of access to sensitive information and the inability to provide decisionmakers with contrary viewpoints. Even if the plaintiffs are not properly members of the forest product ISACs, if the fair balance requirement is to mean

> anything, it means that parties have standing to challenge whether FACA's mandates apply to a given situation.

ER 139 (citations omitted).

Next, the court rejected the government's contention that FACA's fair balance requirement provides no legally definable standards for a court to apply, following the "clear precedents" of the only courts of appeals to decide the issue. ER 141-142 & n.5. In the court's view, FACA's fair balance requirement provides a measurable standard against which to judge executive action, although courts will accord deference to the executive branch's choice of particular representatives. ER 142. However, "[t]his deferential review is not threatened by the circumstances here. The forest product ISACs lack any environmental representation whatsoever and plaintiffs seek only to have at least one representative be appointed to each ISAC." ER 143.

Turning to the merits, the court laid out the proper standard as to whether the forest product ISACs serve solely a "politically neutral and technocratic" function, in which case industry domination may be permissible, or they offer advice on diverse and far-reaching policy issues that affect others, especially those who promote forest conservation. ER 143-144, 151. Because the Trade Act authorizes all trade advisory committees to render advice on the broad trade policy areas set forth in 19 U.S.C. § 2155(a), "the function of a given committee is best determined by examining what advice it actually gives." ER 146.

The ISAC's actual performance revealed far-reaching policy functions affecting forests. Indeed, the court noted: "The USTR does not dispute that matters affecting the wood and paper product sectors are dramatically and inextricably intertwined with the environmental health and protection of this nation. The USTR also does not seriously dispute that the forest product ISACs advise upon broad policy issues rather than just narrow or technical ones." ER 147-148 (footnotes omitted). The court then 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. 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.

ER 146-147 & n. 8 (citations omitted).

Rejecting the government's reading of the Trade Act "in isolation," the court concluded that "[t]he USTR's interpretation of the Trade Act would render such fair-balance concerns a nullity: any sectoral committee would be considered balanced regardless of the breadth of its advice so long as its charter specified that its members should be representatives only of one industry." ER 149. Moreover, "[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. ER 149-151.

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." ER 154-156.

The Clinton Administration initially resisted complying with this ruling. It continued to schedule and hold meetings of these advisory committees without environmental representation more than a month after the court's ruling. On December 7, 1999, the district court put an end to this practice, determining that

"adequate compliance with the court's prior order requires that defendants name at least one interim environmental representative to ISAC-10 prior to the December 15, 1999, meeting." Order Clarifying Order Dated November 8, 1999, at 2-3 (Dec. 7, 1999) (SER 118-120).

## SUMMARY OF ARGUMENT

The balance mandated by FACA depends on the functions that the advisory committee actually performs. While an industry-only committee can provide advice on narrow, technical issues, such an industry-dominated committee does not have the proper balance to render advice on broad policy issues that significantly affect the environment.

There can be no question that the forest products ISACs are a preferred source of advice on far-reaching, politically charged trade issues. Indeed, in a single year, these committees dealt with global warming, sustainable forestry standards, a controversial initiative to eliminate all tariffs in the forest sector, expansion of the WTO and NAFTA, an initiative to reduce packaging materials, and the adequacy of proposed safeguards against the entry of invasive pests on wood imports. Each of these issues is highly charged with the affected industries sharply at odds with the positions advocated by the environmental community. The ISACs represent only one side of the most controversial trade issues affecting forests, in clear contravention of FACA.

The Trade Act's listing of interests that should be included on various advisory committees does not trump FACA's balanced membership requirement. First, the Trade Act expressly makes FACA's balanced membership requirement applicable to the ISACs and other trade advisory committees. Second, the USTR has never, in practice, treated the list as exclusive. Indeed, it appointed an environmental representative to the ACTPN before the Trade Act was amended to include environmentalists on the list of prospective ACTPN members. Third, FACA's requirements are not satisfied solely based on what the agency says the advisory committee is doing. If that were so, agencies could evade FACA by claiming that an entity is not an advisory committee or that it is rendering advice on only a narrow set of issues, when, in practice, the committee is offering far-reaching policy advice. Because the forest products ISACs serve as a preferred source of advice on controversial environmental policies, FACA mandates that they have environmental representation.

## ARGUMENT

### I. 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).[2]

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

[2] 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). To further strengthen this requirement, FACA also mandates safeguards that ensure that advisory committee recommendations will not be "inappropriately influenced by . . . any special interest, but will instead be the result of the advisory committee's independent judgment. . . ." Id. § 5(b)(3).

> 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 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 forest products ISACs. As in the hypothetical, these committees suffer 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.

Because the forest products ISACs are indisputably comprised solely of industry representatives, the task before the Court is to discern whether the purview of these committees is narrow and technical or broad and policy-oriented. In its brief, the government tacitly admits that the appropriate inquiry depends on the committees' functions. Gov't Brief at 26. However, it makes the conclusory assertion that the "task of the sector committees, unlike the mission of the overall policy committee, does not require inclusion of representatives of various public interest groups such as plaintiffs." Id. at 27. Of course, the government makes this assertion without grappling with the weighty policy issues on which the forest products ISACs routinely pass judgment. A review of the actual issues on which the ISACs render advice leads to the inescapable conclusion that these committees address far too controversial policy issues to be composed solely of industry.

## II. THE FOREST PRODUCTS ISACS OFFER ADVICE ON TRADE POLICY MATTERS AFFECTING THE SUSTAINABILITY AND ECOLOGICAL INTEGRITY OF FORESTS AND THUS MUST HAVE REPRESENTATION OF FOREST PROTECTION ADVOCATES.

The functions of the forest products ISACs are broad, extending to a vast array of trade agreements, negotiations, and policies that affect forests. The ISACs' broad, policy-oriented mandate is both by design and manifested in practice.

### 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 31, [9] (D.D.C. 1996).

The forest products ISACs' charters incorporate by reference the Trade Act's charge to provide advice on the full range of trade policies. ER 93, 100. In keeping with this broad policy mandate, the USTR and Department of Commerce describe the function of the forest products ISACs as dealing with a "broad spectrum of trade policy rather than a single facet." SER 42, 44-45 (1998 Committee Justification Forms for ISACs 10 & 12).

### B. The Forest Product ISACs Render Policy Advice on Issues Having Far-Reaching Environmental Effects.

Given the broad statutory mandates, the district court appropriately recognized that each advisory committee established under the Trade Act may provide advice on broad policy issues. The inquiry, therefore, cannot end with the Trade Act. It must extend further to encompass the functions the ISACs actually perform.

In practice, the forest products ISACs play a pivotal and preeminent role in the development of U.S. trade policies that directly affect our nation's and world forests. The forest products ISACs have offered advice on cutting-edge and exceedingly controversial issues, such as whether to enter into the WTO Agreements, expansion of NAFTA to Chile, global climate change, and the WTO's Committee on Trade and the Environment. SER 37-38, 40-41 (1998 Annual Report). The direction to be taken in each of these areas will shape both the trade regime and the environment for our generation and beyond. The ISACs have also taken on issues in which the plaintiffs are directly engaged, such as the initiative to eliminate tariffs in the forest sector and U.S. restrictions to prevent entry of invasive species on packaging materials. Id. Indeed, plaintiffs have advocated against the tariff elimination initiative and for stronger border protections against the spread of invasive pests that could devastate U.S. forests. See, e.g., Fischer Decl. ¶¶ 25-49 and Exhibit 32 (SER 55-64, 65-67, 70-72, 75).

They have also weighed in on initiatives being developed to protect forests, such as the United Nations' International Forum on Forests, or to reduce consumption of forest products, as with the EU packaging directive. Snape Decl. ¶¶ 9-21 (SER 5-9); Scott Decl. (SER 18-23); and Fischer Decl. Exhibit 32 (SER 72).

Despite the significant interests forest protection advocates, like plaintiffs, have in these trade policies, the ISACs give voice only to those seeking to increase trade in forest products and "advance the industry's negotiating objectives." Indeed, the Commerce Department heralds the ISACs as providing "the U.S. industry a voice in international trade policy matters." 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)). According to the department, "Industry has a voice in U.S. trade policy formulation through the Industry Consultation Program. The Department of Commerce, Office of the U.S. Trade Representative, and other agencies work side by side with business leaders who serve as advisors to the Government." Id.

ISAC 10 is currently comprised of 15 members, all of whom represent major exporters and producers of lumber and wood products or represent trade associations that promote the interests of the timber industry. ER 107-108. ISAC 12 currently has ten members, consisting of paper companies and other companies that depend economically on the paper industry. ER 110. A profile of several

members of the forest products ISACs reveals their deep-seated economic interests in globalization, as well as their antipathy toward environmental regulation, which is underscored by their political contributions and their violations of environmental laws and commitments. See Ex. 1 to Declaration of George Draffan (July 27, 1999) *The Global Timber Titans: Profiles of Four US. Wood Products Corporations Driving the Globalization of the Industry* (SER 77-111).

The agencies do not even purport to have created balanced advisory committees to address trade policies that affect forests. Indeed, in describing the forest products ISACs, the Department of Commerce asserted that they are "balanced for the most part in the areas of regional and product coverage". SER 42 (1998 Committee Justification Form for ISAC 10); see also SER 44 (1998 Committee Justification Form for ISAC 12). Dominated by industry, and without any environmental representation, these ISACs are ill suited to provide advice on trade policies that affect global warming, invasive species safeguards, and incentives to log forests unsustainably. Indeed, they cannot be distinguished from the paradigmatic imbalanced advisory committee described in FACA's legislative history.

## III. THE TRADE ACT EXPRESSLY MAKES FACA'S FAIR BALANCE REQUIREMENT APPLICABLE AND THEREFORE FAILS TO EXCUSE THE ISACS' IMBALANCE

Rather than deal with the ISACs' track record, the USTR urges the Court to

look no further than the listing in the Trade Act of potential advisory committee members. The USTR compartmentalizes its advisory committees into three tiers: (1) the Advisory Committee for Trade and Policy Negotiations ("ACTPN"); (2) general policy advisory committees; and (3) industry sector or functional advisory committees.

The Act contains a list of interests that should be included on each type of committee. Because the list for the industry and functional committees contains neither environmental interests nor a generic catchall, while such interests are mentioned in connection with other advisory committees, the USTR contends that it need not appoint environmental representatives to the ISACs. This argument is erroneous.

First, the USTR is <u>not</u> contending that it is barred by statute from appointing environmental representatives to the ISACs, nor could it since the statute simply identifies interests that should be included without making the list exclusive. To the contrary, the USTR conceded at oral argument before the district court that it has such authority in the following exchange. NWEA's counsel exposed the pitfalls in contending that environmental representation is somehow limited by the Trade Act:

> [T]he way the government describes this three-tier system seems to suggest that they feel no environmental representation can occur on the third tier, but, as they revealed to the Court, functional committees

> are in that tier and they identified one on intellectual property, one on standards.
>
> When you start to get to those issues, those are in my view policy issues, and if their argument is taken, then, to its logical conclusion that there can be no environmental representation, it seems to be a way to circumvent the balance requirement altogether.

Transcript of Proceedings at 49 (W.D. Wash. Nov. 3, 1999) (SER 121, 123).

In response, the government's counsel made it clear that the Trade Act in no way precludes environmental representation on the sectoral and functional committees that comprise the third tier:

> As to the issue of can there be environmental representation at the third tier, something that plaintiffs' counsel just raised, it's a little bit unclear exactly what plaintiff's counsel is talking about, but it is certainly not hard – it's not infeasible that at some future stage, subject to the agency's discretion, it might choose to establish, for example, a third-tier committee representative of environmental interests. And it's also not infeasible that the functional advisory committees might contain environmental representatives, although I can't say to the Court today that I know that that's true.

Transcript of Proceedings at 50-51 (W.D. Wash. Nov. 3, 1999) (SER 124-125).

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, USTR's past

actions make it impossible for it to argue that the Trade Act's failure to explicitly mandate environmental representatives in connection with the ISACs bars it from adding environmentalists to the forest products ISACs.

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, it is well settled that the required balance is dictated by the functions that an advisory committee actually performs. Thus, the question is not whether the USTR invoked a certain provision of the Trade Act in establishing the ISACs. Rather, the determinative issue is what functions the ISACs actually perform.

Even if the Trade Act could be read to limit ISACs to technical functions, which we dispute, the USTR would not be permitted to evade FACA's fair balance requirement by establishing the forest products committees as ISACs when they are, in fact, policy committees masquerading in ISAC clothing. Indeed, USTR appears to concede that general policy advisory committees must have broad representation because their mandate is to provide broad policy advice. Under the

same logic, the forest products ISACs should have environmental representation because they are offering advice on broad policies that affect forest ecosystems. FACA's balanced membership requirement is not frozen in the past, nor is it fixed by the stated purpose of a committee without regard for the functions it actually performs.

Two cases are directly on point. In Cargill, Inc., the government argued that the court should limit its balance inquiry to the advisory committees' charter even if the advisory committee is later assigned a new task – there conducting a peer review of a diesel exhaust study – that might call for a different balance in its membership. The Fifth Circuit rejected this contention and held that "assigning new functions to an advisory committee may render it functionally out of balance." 173 F.3d at 336. The court explained:

> Under FACA, agencies should not be permitted to assign advisory committees functions that the committee members do not have the expertise to perform. Otherwise, an agency could easily evade FACA by listing, in its advisory committee's charter, functions that are so broad as to be meaningless or are simply different from the functions actually assigned.

Id.

Similarly, in National Anti-Hunger Coalition, 711 F.2d at 1074, the D.C. Circuit found the advisory committee's function limited to applying private sector cost control techniques to the federal government. Because this function drew upon industry expertise and did not directly affect the interests of food program

recipients, the court rejected a balance challenge to the committee's composition. However, 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). The court held that such substantive recommendations "do not fall within the narrow area of cost and management control but fall directly into areas of general national import." Id. at 1516. Because such recommendations could not be approved by a committee lacking representation of the points of view affected, the court declared them ultra vires and illegal. Id.

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.

It is, therefore, no surprise that the ISACs of today are grappling with trade policies that have significant ramifications for environmental protections and the

future of the world's forests. The USTR is misguided in urging the Court to put on blinders and ignore the trade developments that have propelled the ISACs into the realm of controversial environmental policies.

Finally, the USTR argued below that the existence of the Trade Environment & Policy Advisory Committee ("TEPAC") obviated the need for environmental representation on the ISACs. The district court 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 forestry issues than the forest products ISACs. ER 149-150; Ritchie Decl. ¶¶ 3-7 (SER 116);Vallianatos Decl. ¶¶ 3, 5, 7 (SER 113-114).

When assessed in light of their full authority and their actions, the ISACs must be seen as the quintessential imbalanced industry advisory committee. They are not merely dominated by industry; they consist solely of industry representatives. The Court need not engage in any esoteric query to identify any viewpoint bias among the ISAC members since they serve in a representative capacity to present the interests of their businesses. ER 78, 94, 100-101. An industry-only advisory committee is not properly balanced to address such environmentally charged subjects as global warming, recycling, and tariff liberalization without environmental safeguards.

IV. THE CASE IS JUSTICIABLE

A. Plaintiffs Have Standing to Bring this Action.

USTR argues that NWEA lacks standing because it has no legally protected interest in a seat on the ISACs. This argument is erroneous.

The premise for USTR's standing argument is the statement in 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), that no individual has a personal right to be appointed to an advisory committee. The D.C. Circuit made this observation, however, in the course of setting out the pertinent injury-in-fact inquiry:

> Section 5, to be sure, confers no cognizable personal right to an advisory committee appointment. But, the legislative history makes clear, the "fairly balanced" requirement was designed to ensure that persons or groups directly affected by the work of a particular advisory committee would have some representation on the committee. When the requirement is ignored, therefore, persons having a direct interest in the committee's purpose suffer injury-in-fact sufficient to confer standing to sue.

Id. at 1074 n. 2.

Under this test, NWEA has suffered injury-in-fact. Each of the plaintiff organizations works to protect forest ecosystems, yet their work may be thwarted by implementation of trade agreements, disputes arising under them, and new trade negotiations.

> Plaintiffs NWEA and Defenders of Wildlife are working to protect British Columbia forests from overcutting due, in part, to low border

taxes and U.S. demand. Trade is fueling the unsustainable rate of logging. NWEA and Defenders of Wildlife want to ensure that future trade liberalization does not exacerbate or duplicate this scenario by removing barriers to trade without putting environmental safeguards in place. Scott Decl. (July 1999) (SER 18-23). The ISACs have dealt extensively with proposals to eliminate tariffs worldwide without any environmental protection component to that proposal. Fischer Decl. ¶¶ 19-24 (SER 52-55).

Plaintiff Pacific Environment and Research Center ("PERC") is working to protect forests from the spread of invasive species carried on traded wood products. When PERC challenged what it believed were inadequate U.S. regulations, the U.S. Government argued that World Trade Organization rules prevented more stringent border measures. And when PERC obtained an injunction preventing imports of certain wood products from Chile and New Zealand, both countries argued that the restrictions imposed unfair trade barriers. Id. ¶¶ 25-49 (SER 55-64).

The plaintiff organizations seek to reform the WTO and NAFTA to allow greater environmental protections, including eco-labeling and other restrictions on trade based on the way products are produced. See e.g., Declaration of Daniel A. Seligman (July 1999) (SER 24-29). These issues have arisen in the NAFTA expansion debates, the WTO accession discussions, the proceedings of the WTO Committee on Trade and Environment, in connection with the European Union packaging initiative, and in the Asia Pacific Economic Cooperation Forum. The plaintiff organizations also are deeply committed to obtaining effective protections for forests, tools to reduce demand for forest products, such as the European Union packaging initiative, and international action to prevent global warming. The ISACs have deliberated over each of these matters. Snape Decl. ¶¶ 9-21 (SER 5-9); 1998 Annual Reports (SER 37-38, 40-41).

The plaintiffs support subsidies to enable companies to meet environmental regulations. However, the Lumber and Wood Products ISACs objected to a provision in the WTO Agreement on Subsidies and Countervailing Measures allowing partial environmental compliance subsidies: "This provision is threatening enough to warrant dramatic efforts to sufficiently circumscribe the provision . . .

> ." Excerpts from the ISAC-10 Report to Congress on the Uruguay Round (Jan. 10, 1994) (SER 34).
>
> Plaintiffs oppose elimination of all tariffs in the forest sector, while the ISACs have been strong proponents of this initiative. SER 75.

The plaintiffs, therefore, have a direct interest in the work of the forest product ISACs. Their injuries are far from speculative. Not only do the ISACs serve as a preferred source of advice to the USTR on matters directly and pervasively affecting NWEA's interests, but they also obtain access to a steady stream of nonpublic information. Members of the ISACs must be kept fully informed about the hottest trade issues and the U.S. Government's proposed strategies, trade-offs, and goals. The information shared with the ISACs is not generally available to the public. 19 U.S.C. § 2155(f). Access to this information enables the ISAC members to provide timely, comprehensive advice that is targeted and responsive to the USTR's goals, needs, and doubts, as well as to the overall political and bargaining climate. See Cummock v. Gore, 1999 WL 397417 (D.C. Cir. June 18, 1999) (advisory committee members have an enforceable right of access to information shared with the advisory committee and to participate in a fully informed manner in advisory committee proceedings and deliberations); see Byrd v. EPA, 174 F.3d 239, 243-44 (D.C. Cir. 1999) (standing to seek declaration that advisory committee failed to provide timely access to documents to use in criticizing the committee's recommendations and seeking to convince the agency

to change its practices). Moreover, under the Trade Act, the USTR must obtain the ISAC's review of new trade agreements and must inform the committees of any significant departures from their advice. 19 U.S.C. § 2155(e), (i).

As the Department of Commerce's official justification for the forest product ISACs emphasizes:

> [T]hrough a continuing dialogue with Government officials [members] are made aware of Government trade policy at a level not otherwise available to the private sector. Because these committees remain current in the broad spectrum of trade policy rather than a single facet – as would be the case in the absence of a committee structure – the private sector input from the committees is more pertinent.

SER 42, 44-45 (1998 Committee Justification Forms for ISACs 10 and 12).

NWEA's injuries would be redressed by compliance with FACA's balance mandates. Litigants routinely have standing to challenge procedural irregularities that affect their interests. In Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 & n. 7 (1992), the Supreme Court indicated that litigants need not prove that adherence to required procedures will necessarily lead to a different outcome. Thus, injured parties can challenge a failure to prepare an environmental impact statement or to follow notice-and-comment rulemaking procedures without showing that a different agency decision or regulation would result.

In the FACA context, the Supreme Court has noted that the "potential gains are undoubtedly sufficient to give them standing" where a successful challenge

would make some additional information available to plaintiffs but many documents and meetings still could be kept secret under the law's exemptions to openness. Public Citizen v. Department of Justice, 491 U.S. 440 (1989).

For these reasons, NWEA has standing to challenge the forest products ISACs' violation of FACA's balance mandates.

B. FACA Establishes Meaningful Standards for Judicial Review of This Case.

In a one-paragraph argument, USTR contends that FACA's balanced membership requirement creates no judicially manageable standards, and thus the case is not justiciable. Brief at 23. Without stating it precisely, USTR is trying to invoke the exception to judicial review under the Administrative Procedure Act for actions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This exception is very narrow since it collides with the strong presumption of reviewability embodied in the APA. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971). As the Supreme Court stated in Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 (1986):

> We ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive violates such a command.

USTR relies almost exclusively on Judge Silberman's opinion in Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods, 886 F.2d 419 (D.C. Cir. 1989), without telling the Court that the two other judges

on the panel found no jurisdictional obstacle to deciding the merits of that case. Indeed, both Judge Edwards and Judge Friedman reached the merits of the balance claim, albeit with different outcomes. Drawing from the D.C. Circuit's decision in National Anti-Hunger Coalition, Judge Edwards observed that:

> The question of justiciability of claims under section 5 of FACA is thus not an open issue in this circuit . . . . It does not matter that the 'fairly balanced' requirement falls short of mathematical precision in application, or that it may involve some balancing of interests by the agency. The presumption in favor of judicial review is not altered in the face of a diffuse statutory directive . . . . While the difficulty of determining what precisely constitutes a "fair balance" may incline courts to be deferential in reviewing the composition of advisory committees and may defeat a plaintiff's claim in a given case, this cannot be grounds for refusing to enforce the provisions altogether.

Id. at 433-34.

More recently, the Fifth Circuit rejected the government's justiciability defense, noting that "[t]he weight of the caselaw is the contrary." Cargill, Inc. v. United States, 173 F.3d 323, 334 (5th Cir. 1999). After reviewing the D.C. Circuit's rejection of the government's justiciability arguments, and recent district court decisions that "have strayed from" the D.C. Circuit precedent, the Fifth Circuit decided to "follow our sister circuit's lead and conclude that FACA's § 5 requirements are justiciable." Id. at 335 n. 23.

Only one Circuit Judge and a few isolated district court decisions that are overshadowed by the "weight of the caselaw" in the courts of appeals have given credence to the justiciability defense. Moreover, while some judges have struggled

to find judicially manageable standards for addressing political, philosophical, and viewpoint imbalance on federal advisory committees, most courts have acknowledged that an advisory committee assisting in setting policies affecting both the regulated industry and the environment cannot consist solely of industry representatives. Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods, 886 F.2d at 423 (J. Friedman, concurring). No prior case, however, has presented as stark an example of an industry-only committee as is presented here.

Both FACA's language and its legislative history, indeed, provide "meaningful standards against which to judge the agency's exercise of its discretion." Heckler v. Chaney, 470 U.S. 821, 830 (1985). The statute requires fair balance in terms of the views represented and the functions to be performed. The legislative history explains that FACA's balance provision prohibits an industry-only advisory committee that is considering a national industrial waste inventory. H.R. Rep. No. 1017, 92d Cong., 2d Sess. at 6 (1972), reprinted in 1972 U.S.C.C.A.N. 3496. And courts have applied these standards to hold that "persons or groups directly affected by the work of a particular advisory committee would have some representation on the committee." National Anti-Hunger Coalition, 711 F.2d at 1074 n. 2. These standards simply await application to the facts at hand.

## CONCLUSION

For these reasons, plaintiff NWEA respectfully asks this Court to affirm the judgment below.

Respectfully submitted this _____ day of April, 2000.

______________________________

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Attorneys for Plaintiffs-Appellees

## CORPORATE DISCLOSURE STATEMENT
## REQUIRED BY FRAP 26.1

Plaintiffs-appellees, Northwest Ecosystem Alliance, Pacific Environment and Resources Center, Sierra Club, Defenders of Wildlife, Buckeye Forest Council, and International Forum on Globalization, have no parent companies, subsidiaries or affiliates that have issued shares to the public in the United States or abroad.

DATED this ____ day of April, 2000.

Respectfully submitted,

______________________________

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## STATEMENT OF RELATED CASES

The undersigned, counsel of record for Northwest Ecosystem Alliance, Pacific Environment and Resources Center, Sierra Club, Defenders of Wildlife, Buckeye Forest Council, and International Forum on Globalization, are not aware of any related cases.

DATED this _____ day of April, 2000.

Respectfully submitted,

_______________________________

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## CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for plaintiffs-appellees, Northwest Ecosystem Alliance, Pacific Environment and Resources Center, Sierra Club, Defenders of Wildlife, Buckeye Forest Council, and International Forum on Globalization, certifies that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 10,152 words.

DATED this _____ day of April, 2000.

Respectfully submitted,

______________________________

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## CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104. On April ___, 2000, I served two true and correct copies of PLAINTIFFS-APPELLEES' BRIEF and one copy of PLAINTIFFS-APPELLEES' EXCERPTS OF RECORD on the parties listed below *via Airborne Express*:

Mark B. Stern
Michael S. Raab
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Phone: 202-514-5089

I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and correct.

Executed this ______ day of April, 2000, at Seattle, Washington.

________________________________
Catherine Hamborg