

1 PATTI A. GOLDMAN (WSB #24426)
2 AMY SINDEN (WSB #27613)
3 Earthjustice Legal Defense Fund
4 705 Second Ave., Suite 203
5 Seattle, WA 98104
6 (206) 343-7340
7 (206) 343-1526 [FAX]
8 pgoldman@earthjustice.org
9 asinden@earthjustice.org

HON. BARBARA ROTHSTEIN

6 MARTIN WAGNER (CSB #190049)
7 Earthjustice Legal Defense Fund
8 180 Montgomery St., Suite 1725
9 San Francisco, CA 94104
10 (415) 627-6700
11 (415) 627-6749 [FAX]
12 mwagner@earthjustice.org

10 Attorneys for Plaintiffs

11
12 UNITED STATES DISTRICT COURT
13 WESTERN DISTRICT OF WASHINGTON

13 NORTHWEST ECOSYSTEM ALLIANCE, et al.,) Civ. No. C99-1165 R
14 Plaintiffs,)
15 v.) REPLY IN SUPPORT OF PLAINTIFFS'
16 OFFICE OF THE UNITED STATES TRADE) MOTION FOR A PRELIMINARY
17 REPRESENTATIVE, and UNITED STATES) INJUNCTION AND OPPOSITION TO
18 DEPARTMENT OF COMMERCE,) DEFENDANTS' MOTION TO
19 Defendants.) DISMISS
20)
21)
22)
23)
24)
25)
26)

1 **TABLE OF CONTENTS**

2 PROCEDURAL POSTURE OF THE CASE 1

3 INTRODUCTION 1

4 ARGUMENT 2

5 I. NWEA HAS SUFFERED INJURY-IN-FACT FROM EXCLUSION OF

6 ENVIRONMENTAL INTERESTS FROM THE FOREST PRODUCTS

7 ISACS. 2

8 II. FACAs BALANCE REQUIREMENTS DO NOT FALL WITHIN THE

9 EXCEPTION TO JUDICIAL REVIEW. 7

10 III. THE FOREST PRODUCTS ISACS ARE UNFAIRLY BALANCED TO

11 ADDRESS TRADE ISSUES AFFECTING PROTECTION OF FOREST

12 ECOSYSTEMS..... 9

13 A. The Trade Act and Charters Charge the Forest Products ISACs with

14 Providing Advice on a Broad Array of Trade Policies.....10

15 B. The ISACs, in Fact, Obtain Inside Information and Offer Advice on

16 Broad Trade Policies that Affect Forest Protection.....12

17 IV. AN INJUNCTION SHOULD ISSUE..... 16

18 CONCLUSION..... 18

1 **TABLE OF AUTHORITIES**

2 **CASES**

3 Alabama-Tombigbee Rivers Coalition v. Department of the Interior,
4 26 F.3d 1103 (11th Cir. 1994)16

5 Bowen v. Michigan Academy of Family Physicians,
6 476 U.S. 667 (1986)7

7 Byrd v. EPA,
8 174 F.3d 239 (D.C. Cir. 1999)6

9 Cargill, Inc. v. United States,
10 173 F.3d 323 (5th Cir. 1999)8, 9, 12

11 Citizens to Preserve Overton Park v. Volpe,
12 401 U.S. 402 (1971)7

13 Cummock v. Gore,
14 1999 WL 397417 (D.C. Cir. June 18, 1999)3, 6, 17

15 Claybrook v. Slater,
16 111 F.3d 904 (D.C. Cir. 1997)3

17 Heckler v. Chaney,
18 470 U.S. 821 (1985)9

19 Lujan v. Defenders of Wildlife,
20 504 U.S. 555 (1992)5

21 Metcalf v. National Petroleum Council,
22 553 F.2d 176 (D.C. Cir. 1977)8

23 National Anti-Hunger Coalition v. Executive Committee of the
24 Presidents Private Sector Survey on Cost Control,
25 711 F.2d 1071 (D.C. Cir. 1983), on remand, 566 F. Supp. 1515 (D.D.C. 1983)3, 7, 8,
26 9, 12, 13

National Nutritional Foods Association v. Califano,
603 F.2d 327 (2d Cir. 1979)8

Public Citizen v. Barshefsky,
No. 94cv2236-RMU (D.D.C. Sept. 19, 1996)11, 18

1 Public Citizen v. Department of Justice,
2 491 U.S. 440 (1989)5

3 Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods,
4 886 F.2d 419 (D.C. Cir. 1989)7

4 **STATUTES**

5 Fed. R. Civ. P 65(a)(2) 1

6 Pub. L. No. 103-465, § 128, 103d Cong., 2d Sess. (1994)15

7 5 U.S.C. App. 2, § 5(b)3

8 5 U.S.C. App. 2, § 5(c)8

9 5 U.S.C. § 701(a)(2)7

10 19 U.S.C. § 2155(a)10

11 19 U.S.C. § 2155(a)(1)-(2)10

12 19 U.S.C. § 2155(b)(1)14, 15

13 19 U.S.C. § 2155(e), (i)6

14 19 U.S.C. § 2155(f)6, 15

15 **MISCELLANEOUS**

16 64 Fed. Reg. 10,448 (1999)10

17 H.R. Rep. No. 1017, 92d Cong., 2d Sess. (1972)9

18

19

20

21

22

23

24

1 First, the cases cited by USTR do not support USTR's argument. Thus, Claybrook v.
2 Slater, 111 F.3d 904, 906 n.4 (D.C. Cir. 1997), did not involve FACA's balanced membership
3 mandates. Instead, the plaintiffs there argued that an agency official had a legal obligation to
4 stop an advisory committee from acting on a matter not included on the agenda for the meeting.
5 The court held that no such duty existed under FACA, and therefore, the plaintiffs had no legally
6 protected interest. Id. at 907.¹

7 Here, by contrast, it is well established that FACA imposes a duty on federal agencies to
8 ensure that their advisory committees have balanced memberships. 5 U.S.C. App. 2, § 5(b).
9 While USTR questions whether that duty is legally enforceable, it cannot dispute that Section 5
10 of FACA requires agencies to ensure that their advisory committees are fairly balanced.

11 The premise for USTR's assertion that NWEA has no legally protected interest is the
12 statement in National Anti-Hunger Coalition v. Executive Committee of the President's Private
13 Sector Survey on Cost Control, 711 F.2d 1071 (D.C. Cir. 1983), that no individual has a personal
14 right to be appointed to an advisory committee. The D.C. Circuit made this observation,
15 however, in the course of setting out the pertinent injury-in-fact inquiry:

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

22 Id. at 1074 n.2.

23 ¹ USTR's reliance on Claybrook is undercut by numerous cases that have found FACA claims
24 justiciable. In the most recent such case, Cummock v. Gore, 1999 WL 397417 (D.C. Cir. June
25 18, 1999), the D.C. Circuit held that an advisory committee member had a justiciable action and
26 standing to sue to gain access to information shared with the rest of the advisory committee and
to obtain an opportunity to publish her revised views.

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

4 * Plaintiffs NWEA and Defenders of Wildlife are working to protect British Columbia
5 forests from overcutting due, in part, to low border taxes and U.S. demand. Trade is
6 fueling the unsustainable rate of logging. NWEA and Defenders of Wildlife want to
7 ensure that future trade liberalization does not exacerbate or duplicate this scenario by
8 removing barriers to trade without putting environmental safeguards in place.
9 Declaration of Joe Scott (July 1999). The ISACS have dealt extensively with proposals
10 to eliminate tariffs worldwide without any environmental protection component to that
11 proposal. 1998 Annual Review of ISACs (1st Goldman Decl. Exs. 8-9); Minutes of
12 ISAC-10 Meetings (2nd Goldman Decl. Ex. 1).

13 * Plaintiff Pacific Environment and Research Center (“PERC”) is working to protect
14 forests from the spread of invasive species carried on traded wood products. When
15 PERC challenged what it believed were inadequate U.S. regulations, the U.S.
16 Government argued that WTO rules prevented more stringent border measures. And
17 when PERC obtained an injunction preventing imports of certain wood products from
18 Chile and New Zealand, both countries argued that the restrictions imposed unfair trade
19 barriers. Declaration of A. Paige Fischer (Aug. 1999). The ISACs advise USTR on these
20 matters. Stanley Decl. ¶¶ 23, 27; Minutes of ISAC-10 Meeting of March 10, 1999 (2nd
21 Goldman Decl. Ex. 1).

22 * The plaintiff organizations seek to reform the WTO and NAFTA to allow greater
23 environmental protections, including eco-labeling and other restrictions on trade based on
24 the way products are produced. These issues have arisen in the NAFTA expansion
25 debates, the WTO accession discussions, the proceedings of the WTO Committee on
26 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. *Id.*; 1998 Annual Review of ISACs (1st Goldman Decl. Exs. 8-9); Minutes of
ISAC-10 Meetings (2nd Goldman Decl. Ex. 1).

* 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) (1st Goldman Decl. Ex. 6).

1 The plaintiffs, therefore, have a direct interest in the work of the forest product ISACs.
2 Their injuries are far from speculative. Not only do the ISACs serve as a preferred source of
3 advice to the USTR on matters directly and pervasively affecting NWEA's interests, but they
4 also obtain access to a steady stream of nonpublic information, which enables them to offer
5 timely and fully informed advice. As the Department of Commerce's 1998 annual review of
6 these ISACs emphasizes:

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

12 1st Goldman Decl. Exs. 8-9.

13 Third, NWEA's injuries are not eliminated by the fact that advisory committees render
14 advice and do not themselves make governmental decisions. Litigants routinely have standing to
15 challenge procedural irregularities that affect their interests. In Lujan v. Defenders of Wildlife,
16 504 U.S. 555, 572 & n.7 (1992), the Supreme Court indicated that litigants need not prove that
17 adherence to required procedures will necessarily lead to a different outcome. Thus, injured
18 parties can challenge a failure to prepare an environmental impact statement or to follow notice-
19 and-comment rulemaking procedures without showing that a different agency decision or
20 regulation would result.

21 In the FACA context, the Supreme Court has noted that the “potential gains are
22 undoubtedly sufficient to give them standing” where a successful challenge would make only
23 some additional information public with the rest kept secret under the law's exemptions to
24 openness. Public Citizen v. Department of Justice, 491 U.S. 440, 451 (1989).

25 Here, members of the ISACs are kept fully informed about the hottest trade issues and the

1 U.S. Government's proposed strategies, trade-offs, and goals. The information shared with the
2 ISACs is not generally available to the public. 19 U.S.C. § 2155(f).² Access to this information
3 enables the ISAC members to provide timely, comprehensive advice that is targeted and
4 responsive to the USTR's goals, needs, and doubts, as well as to the overall political and
5 bargaining climate. See Cummock v. Gore, 1999 WL 397417 (D.C. Cir. June 18, 1999)
6 (advisory committee members have an enforceable right of access to information shared with the
7 advisory committee and to participate in a fully informed manner in advisory committee
8 proceedings and deliberations); See Byrd v. EPA, 174 F.3d 239, 243-44 (D.C. Cir. 1999)
9 (plaintiff had standing because a declaration that advisory committee failed to provide timely
10 access to documents could be used to criticize the committee's recommendations and to
11 convince the agency to change its practices). Moreover, members of the ISACs benefit from the
12 give-and-take between government officials and other ISAC members who are privy to the same
13 inside information. Finally, under the Trade Act, the USTR must obtain the ISAC's review of
14 new trade agreements and must inform the committees of any significant departures from their
15 advice. 19 U.S.C. § 2155(e), (i). No similar duty is owed to the general public.

16 For these reasons, by being denied representation on the forest product ISACs, NWEA
17 has suffered injury-in-fact sufficient to satisfy standing requirements.

20 ² The fact that a few environmental representatives who serve on the Trade and Environment
21 Policy Advisory Committee also have access to nonpublic information is not a substitute for
22 balanced membership on the forest product ISACs. The TEPAC deals with a wide array of
23 issues, with far less focus on trade policies affecting forests than the forest product ISACs. So
24 far it appears that only otherwise public documents have been distributed to the TEPAC on forest
sector issues. Declaration of Mark Ritchie (Aug. 1999); Declaration of Mark Vallianatos (Aug.
1999).

1 II. FACA’S BALANCE REQUIREMENTS DO NOT FALL WITHIN THE EXCEPTION
2 TO JUDICIAL REVIEW.

3 USTR tries to invoke the exception to judicial review under the Administrative Procedure
4 Act for actions “committed to agency discretion by law.” 5 U.S.C. § 701(a)(2). This exception
5 is very narrow since it collides with the strong presumption of reviewability embodied in the
6 APA. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971). As the Supreme
7 Court stated in Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 (1986):

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

11 Remarkably, USTR represents to the Court that “[t]he prevailing view is that challenges
12 to a committee’s ‘fair balance’ under FACA are not justiciable.” Defs. Brief at 9. In making this
13 claim, USTR neglects to tell the Court about contrary authority, including an unbroken series of
14 cases in the courts of appeals.

15 USTR cites Judge Silberman’s concurring opinion in Public Citizen v. National Advisory
16 Committee on Microbiological Criteria for Foods, 886 F.2d 419 (D.C. Cir. 1989), without
17 acknowledging that the two other judges on the panel found no jurisdictional obstacle to deciding
18 the merits. Drawing from the D.C. Circuit’s decision in National Anti-Hunger Coalition, 711
19 F.2d at 1074 (ignored by USTR in its justiciability discussion), Judge Edwards observed that:

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

28 Microbiological Criteria, 886 F.2d at 433-34 (concurring in pertinent part, dissenting in part).

1 Both Judge Edwards and Judge Friedman reached the merits of the balance claim, albeit with
2 different outcomes.

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

9 What the USTR characterizes as “the prevailing view” consists of no more than one
10 Circuit Judge’s opinion and a few isolated district court decisions that are overshadowed by the
11 “weight of the caselaw” in the courts of appeals.³ Moreover, no court has ever found enforceable
12 discretion because FACA uses the term “guidelines” in applying its balance requirements to
13 advisory committees established by federal agencies and officials. Cf. Defs. Br. at 9; see 5
14 U.S.C. App. 2, § 5(c). To the contrary, the courts have uniformly rejected this assertion, holding
15 that FACA’s balance mandates are binding on federal agencies and officials. National Anti-
16 Hunger Coalition, 711 F.2d at 1073 n.1 (“we reject the Government’s contention that the ‘fairly
17 balanced’ requirement of § 5(b)(2) is not binding on the President”); National Nutritional Foods
18 Ass’n v. Califano, 603 F.2d 327, 334 (2d Cir. 1979) (“if an agency wishes to rely publicly on the
19 backing of an advisory committee, it must do what the statute commands”); Metcalf v. National
20 Petroleum Council, 553 F.2d 176, 179 n.35 (D.C. Cir. 1977) (“fairly balanced” requirement is
21 “made applicable by § 5(c) to advisory committee established” by an agency).

22
23 ³ Contrary to the suggestion made by USTR’s string citation, Metcalf v. National Petroleum
24 Council, 553 F.2d 176 (D.C. Cir. 1977), was resolved on standing, not justiciability grounds.

1 Both FACA’s language and its legislative history, indeed, provide “meaningful standards
2 against which to judge the agency’s exercise of its discretion.” Heckler v. Chaney, 470 U.S. 821,
3 830 (1985). The statute requires fair balance in terms of the views represented and the functions
4 to be performed. The legislative history explains that FACA’s balance provision prohibits an
5 industry-only advisory committee that is considering a national industrial waste inventory. H.R.
6 Rep. No. 1017, 92d Cong., 2d Sess. at 6 (1972), reprinted in 1972 U.S.C.C.A.N. 3496.

7 From the statutory language and its legislative history, the courts have found ample law
8 to apply. The D.C. Circuit has crafted a test that ensures that “persons or groups directly affected
9 by the work of a particular advisory committee would have some representation on the
10 committee.” National Anti-Hunger Coalition, 711 F.2d at 1074 n.2. Both parties have laid out
11 the relevant standards from the statute and the case law in their briefs. These standards simply
12 await application to the facts at hand.

13 III. THE FOREST PRODUCTS ISACS ARE UNFAIRLY BALANCED TO ADDRESS
14 TRADE ISSUES AFFECTING PROTECTION OF FOREST ECOSYSTEMS.

15 Turning to the merits, the parties are in basic agreement as to the pertinent legal standard.
16 The parties agree that the ISACs are subject to FACA’s balanced representation requirements
17 and that the test is whether the “Committee’s members represent a fair balance of viewpoints
18 given the function to be performed.” National Anti-Hunger Coalition, 711 F.2d at 1074; Cargill,
19 Inc., 173 F.3d at 336; Def. Brief at 10. Where the committee’s functions are narrow and
20 technical, industry domination may be permissible. In contrast, where a committee’s functions
21 extend to policy matters affecting excluded interests, a broader balance is required.

22 In applying these standards, the parties offer sharply differing characterizations of the
23 charge and work of the forest products ISACs. USTR asserts that the ISACs do no more than
24 provide “product-specific, technical advice on trade negotiating strategies within a particular

1 industry.” Def. Brief at 12. This assertion is erroneous because: (1) it reflects only part of the
2 forest products ISACs’ official mandates; and (2) it is at odds with what the ISACs have done in
3 practice.

4 A. The Trade Act and Charters Charge the Forest Products ISACs with Providing
5 Advice on a Broad Array of Trade Policies.

6 USTR ascribes a narrow function to the ISACs by drawing excerpts selectively from the
7 Trade Act’s legislative history and the ISACs’ charters. *Id.* However, both the Trade Act
8 (noticeably overlooked in the USTR’s description of the ISACs’ functions) and the charters give
9 the ISACs a far broader mandate.⁴

10 The starting point for the Court’s analysis must be the Trade Act, which describes the
11 ISACs’ functions in broad terms. Subsection (a) of the Trade Act authorizes the President and
12 executive branch agencies to seek advice from trade advisory committees, including sectoral
13 advisory committees, like the ISACs, “on the overall current trade policy of the United States.”
14 19 U.S.C. § 2155(a). This subsection is the linchpin of the trade advisory committees’ authority
15 and mandates. Subsection (a) offers a litany of matters on which the ISACs and other advisory
16 committees may provide advice: (1) U.S. negotiating positions and bargaining positions; (2) the
17 implementation, operation, and effectiveness of trade agreements; (3) trade dispute settlements;
18 (4) actions taken under U.S. trade laws; (5) “important developments in other areas of trade for
19 which there must be developed a proper policy response”; and (6) “other matters arising in
20 connection with the development, implementation, and administration of the trade policy of the
21 United States.” 19 U.S.C. § 2155(a)(1)-(2).

22 ⁴ USTR also cites its most recent solicitation for nominations, but that document reiterates the
23 ISACs’ broad charge from the Trade Act. 64 Fed. Reg. 10,448 (1999). Moreover, the fact that
24 USTR has chosen to limit its appointments to industry representatives does not change the
ISACs’ functions.

1 Elsewhere, where the Trade Act speaks specifically of the charge for the ISACs, it refers
2 back to this core authorizing provision. Accordingly, the ISACs “shall . . . provide policy
3 advice, technical advice and information, and advice on other factors relevant to the matters
4 referred to in subsection (a) of this section.” Id. § 2155(d). Similarly, the ISACs must be
5 consulted on “a continuing and timely basis” and must be given information regarding:

- 6 (1) significant issues and developments; and
- 7 (2) overall negotiating objectives and positions of the United States and other parties;
8 with respect to matters referred to in subsection (a) of this section.

9 Id. § 2155(i).

10 The forest products ISACs’ charters incorporate by reference the Trade Act’s charge to
11 advisory committees. Charters ¶ 2 (Exs. 2-3 to 1st Goldman Decl.). The charters add that the
12 ISACs are to provide advice on trade matters referred to in the sections containing the basic
13 authorization to negotiate trade agreements and take actions to remove barriers to trade. Id.
14 Even the charter language quoted by USTR refers to policy and technical advice. Id. (ISACs
15 provide “detailed policy and technical advice, information and recommendations to the Secretary
16 and the USTR regarding trade barriers and implementation of trade agreements . . . which affect
17 the products of its sector”).

18 Under the Trade Act and their charters, the forest products ISACs enjoy far broader
19 authority than USTR’s brief acknowledges. See Public Citizen v. Barshefsky, No. 94cv2236-
20 RMU, at 9 (D.D.C. Sept. 19, 1996) (“The Trade Act provides that the [ISAC] advisory
21 committees consult the President concerning a broad range of issues affecting United States trade
22 policy.”) Moreover, the broad trade policies on which the ISACs offer advice directly affect
23 NWEA’s interests, as discussed more fully below.

1 B. The ISACs, in Fact, Obtain Inside Information and Offer Advice on Broad Trade
2 Policies that Affect Forest Protection.

3 USTR limits its analysis to “the stated function of the committee,” as set forth in selective
4 portions of the Trade Act’s legislative history and the charters. Def. Brief at 14. As shown
5 above, the stated functions are far broader than USTR admits. In addition, both common sense
6 and past cases require that the Court consider what the ISACs are doing in practice in
7 determining whether they are properly balanced. Two cases are directly on point.

8 First, in Cargill, Inc., the government argued that the court should limit its balance
9 inquiry to the advisory committees’ charter even if the advisory committee is later assigned a
10 new task - there conducting a peer review of a diesel exhaust study - that might call for a
11 different balance in its membership. The Fifth Circuit rejected this contention and held that
12 “assigning new functions to an advisory committee may render it functionally out of balance.”
13 173 F.3d at 336. The court explained:

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

19 Id.

20 Second, USTR relies on National Anti-Hunger Coalition, 711 F.2d at 1074, where the
21 D.C. Circuit found the advisory committee’s function limited to applying private sector cost
22 control techniques to the federal government. Because this function drew upon industry
23 expertise and did not directly affect the interests of food program recipients, the court rejected a
24 balance challenge to the committee’s composition. However, the court of appeals noted that a
25 different result might be warranted if the committee had strayed from its originally stated
26 function and recommended substantive changes in federal policies and programs. Id.

1 On remand, the district court looked beyond the stated function in the committee's
2 charter to evidence that the committee, in fact, had recommended cutbacks in federal food
3 programs. 566 F. Supp. 1515 (D.D.C. 1983). The court held that such substantive
4 recommendations "do not fall within the narrow area of cost and management control but fall
5 directly into areas of general national import." *Id.* at 1516. Because such recommendations
6 could not be approved by a committee lacking representation of the points of view affected, the
7 court declared them ultra vires and illegal. *Id.*

8 Here, the forest products ISACs have been privy to nonpublic information and have been
9 used by governmental decisionmakers to obtain preferred advice, in the Department of
10 Commerce's words, on "the broad spectrum of trade policy rather than a single facet." 1998
11 Annual Report on ISACs-10 & -12, at 2 (Exs. 8-9 to 1st Goldman Decl.). For example, in its
12 report on the Uruguay Round agreements, the Lumber and Wood Products ISAC objected to
13 subsidies for costs of complying with environmental regulations. Excerpts from the ISAC-10
14 Report to Congress on the Uruguay Round (Jan. 10, 1994) (1st Goldman Decl. Ex. 6). In 1998
15 and 1999, the forest products ISACs obtained inside information and offered advice on such
16 controversial and environmentally significant public policy matters as global warming, the
17 United Nations International Forum on Forests, acceleration of trade liberalization in the forest
18 sector, invasive species safeguards, and a European Union recycling initiative. 1998 Annual
19 Review of ISAC-10 & ISAC-12 (1st Goldman Decl. Exs. 8-9); Minutes of ISAC-10 Meetings
20 (2nd Goldman Decl. Ex. 1).

21 The ISACs and the plaintiff organizations are working at cross-purposes with respect to
22 each of these matters. As discussed above in connection with standing, the plaintiffs seek to
23 reform the WTO to make it more hospitable to forest protections, such as border measures to
24

1 prevent the spread of invasive species, and to initiatives that reduce the demand for forest
2 products, such as eco-labeling and government procurement. Declarations of A. Paige Fischer,
3 William Snape, III and Daniel Seligman (July 1999). The plaintiffs oppose further liberalization
4 in the forest sector that would create incentives to increase or perpetuate logging of native forests
5 without environmental safeguards. Declaration of Joe Scott (July 1999).

6 The ISACs are addressing controversial matters that affect the sustainability and
7 protection of forest ecosystems. 1998 Annual Reviews of ISACs & ISACs Committee
8 Justifications (1st Goldman Decl. Exs.8-11); Stanley Decl. ¶¶ 23, 27. Yet they have no
9 representation of environmental organizations that seek to protect forests, rather than increase
10 trade in goods produced from forests.⁵

11 USTR seeks to defend this imbalance by pointing to the fact that the Trade Act does not
12 explicitly list environmental organizations among the list of potential ISAC members. However,
13 that is not a defense.

14 USTR compartmentalizes its advisory committees into three tiers: (1) the Advisory
15 Committee for Trade and Policy Negotiations (“ACTPN”); (2) general policy advisory
16 committees; and (3) industry sector or functional advisory committees. USTR concedes that
17 environmental representatives must sit on the ACTPN because the Trade Act explicitly requires
18 such environmental representation. 19 U.S.C. § 2155(b)(1). However, USTR added
19 environmental representatives to the ACTPN before the Trade Act was amended to include that
20

21 ⁵ USTR faults NWEA for not mounting this challenge earlier in the ISACs’ history. However,
22 this lawsuit is the product of the growing effect of recent trade agreements on the environment,
23 which has propelled the environmental community into trade policymaking in this decade. The
24 intersection between trade negotiations and forests is coming to a head with the current push to
reach a forest products agreement by the upcoming Ministerial meeting and to include the
forestry sector in a new round of WTO negotiations. See Fischer, Snape, Seligman Declarations.
This lawsuit should be considered timely rather than tardy.

1 mandate. See Pub. L. No. 103-465, § 128, 103d Cong., 2d Sess. (1994) (inserting
2 nongovernmental environmental and conservation organizations in the list of interests to be
3 represented on the ACTPN in 19 U.S.C. § 2155(b)(1)). Before the 1994 amendment, the
4 ACTPN provisions mirrored those pertaining to the ISACs in that neither explicitly listed
5 environmental organizations among the interests to be represented on the advisory committees
6 and neither had a catchall “other interests” category. Accordingly, USTR’s past actions make it
7 impossible for it to argue that it is somehow barred from adding environmental representatives to
8 industry sector advisory committees in the absence of an explicit Trade Act mandate to do so.

9 Indeed, USTR appears to concede that general policy advisory committees must have
10 broad representation because their mandate is to provide broad policy advice. Defs. Br. at 4, 12,
11 16. Under the same logic, the forest products ISACs should have environmental representation
12 because they are offering advice on general policies that affect forest ecosystems. The fact that
13 the Trade Act does not expressly mandate inclusion of environmental representatives on the
14 ISACs does not negate FACA. FACA contains that mandate in its balanced membership
15 requirement, and FACA is expressly made applicable to all trade advisory committees. 19
16 U.S.C. § 2155(f). The USTR cannot hide behind the Trade Act’s listing of potential ISAC
17 members when the ISACs are being used to provide broad policy advice affecting the
18 environment.

19 The fact that a few environmental representatives serve on the Trade and Environment
20 Policy Advisory Committee is no substitute for a balanced membership on the forest products
21 ISACS. First, the TEPAC deals with so many issues that it cannot and does not pay much
22 attention to trade policies affecting forests. In fact, no substantive discussion of forest sector
23 issues occurred in the TEPAC until recently and even then it constituted only one of half a dozen
24

1 issues on the agenda. Ex. 5 to Decl. of John Pate Felts (Aug. 13, 1999). Second, the TEPAC
2 rarely provides detailed recommendations because of its diverse composition and its inability to
3 agree on recommendations on the controversial issues it addresses. Declaration of Mark Ritchie
4 (Aug. 1999); Declaration of Mark Vallianatos (Aug. 1999).

5 When assessed in light of their full authority and their actions, the ISACs must be seen as
6 the quintessential imbalanced industry advisory committee. They are not merely dominated by
7 industry; they consist solely of industry representatives. The Court need not engage in any
8 political query to identify any viewpoint bias among the ISAC members since they serve in a
9 representative capacity to present the interests of their businesses. Charters ¶ 2 (1st Goldman
10 Decl. Exs. 2-3). An industry-only advisory committee is not properly balanced to address such
11 environmentally charged subjects as global warming, recycling, and tariff liberalization without
12 environmental safeguards.

13 IV. AN INJUNCTION SHOULD ISSUE.

14 If the Court consolidates resolution of this motion with its ultimate merits decision, as the
15 parties believe is appropriate, summary judgment standards will apply. There are no disputes of
16 material fact and the case can be decided on the pending motions.

17 NWEA asks the Court to declare that USTR has violated FACA's balance requirements
18 and to enjoin USTR from providing information to, convening meetings of, or obtaining advice
19 from the forest products ISACs until it has brought them into compliance with the law. Such an
20 injunction would further FACA's purposes by ensuring fairness, balance, and public
21 accountability. See Alabama-Tombigbee Rivers Coalition v. Department of the Interior, 26 F.3d
22 1103, 1107 & n.9 (11th Cir. 1994).

23 While USTR points to various public meetings, comment opportunities, and hearings
24

1 open to forest protection advocates, none of those avenues for public input is an adequate remedy
2 for an imbalanced advisory committee. As USTR emphasizes, the ISACs offer “a unique source
3 of information to the Government” because the ISAC members have access to extensive and
4 current inside information, which makes their advice “more pertinent” than that offered by the
5 public. 1998 Annual ISACs Reviews (1st Goldman Decl. Exs. 8-9). The Fischer Declaration (¶¶
6 4-16) recites the difficulties the plaintiff organizations have encountered in trying to obtain even
7 the most basic information about the matters on the table in trade negotiations. None of the
8 ongoing public processes reveals the type of detailed information that makes the ISACs' advice
9 “unique” and “pertinent.” Nor do they provide a public opportunity to comment fully on detailed
10 proposals before final decisions have been made. See Pls. Opening Br. at 22-23.

11 USTR complains that an injunction will deprive it of important input into ongoing and
12 imminent trade negotiations. However, an injunction need not detain USTR long. Once the
13 USTR adds environmental representatives to the ISACs, it again can call on the ISACs. The
14 appointment process need not be burdensome or lengthy.

15 Finally, because the ISACs have had extensive influence on U.S. trade policy without
16 complying with FACA, some remedial relief is also in order. NWEA asks the Court to direct
17 USTR to make available unclassified information shared with or provided by the forest products
18 ISACs. Such information should certainly be provided to newly appointed ISAC members with
19 an opportunity to respond to any advice offered by the ISACs in their absence. See Cummock v.
20 Gore, 1999 WL 397417 (D.C. Cir. 1999) (advisory committee member has a right to information
21 shared with the committee and to offer her views based on that information). If some of the
22 information cannot be made public without harming sensitive trade negotiations, USTR can
23 safeguard that information. However, such exemptions must be claimed on a document-by-
24

1 document basis. See Public Citizen v. Barshefsky, No. 94cv2236-RMU (D.D.C. 1996).
2 Accordingly, the Court should direct USTR to conduct an expedited review of such documents
3 for public release within 30 days.

4 CONCLUSION

5 For these reasons and those set forth in NWEA's opening brief, the Court should: (1)
6 enjoin USTR from utilizing the forest products ISACs until they are balanced as required by
7 FACA; and (2) order USTR to disclose unclassified information and advice shared with or
8 provided by the forest products ISACs.

9 Respectfully submitted on this 19th day of August, 1999.

10
11
12

PATTI A. GOLDMAN (WSB #24426)
AMY SINDEN (WSB #27613)
Earthjustice Legal Defense Fund
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340
(206) 343-1526 [FAX]
pgoldman@earthjustice.org
asinden@earthjustice.org

13
14
15
16
17 MARTIN WAGNER (CSB #190049)
Earthjustice Legal Defense Fund
180 Montgomery St., Suite 1725
18 San Francisco, CA 94104
(415) 627-6700
19 (415) 627-6749 [FAX]
mwagner@earthjustice.org

20
21 Attorneys for Plaintiffs