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1 INTRODUCTION

2 This case challenges defendants’ establishment and utilization of two industry advisory
3 committees composed entirely of representatives from the wood and paper industries as a
4 preferred source of advice on trade policy relating to forests. Plaintiffs – environmental groups
5 that seek to promote preservation and sustainable management of forests – seek a declaration that
6 defendants Office of the U.S. Trade Representative (“USTR”) and the U.S. Department of
7 Commerce are violating the Federal Advisory Committee Act’s (“FACA’s”) requirement that the
8 membership of federal advisory committees be “fairly balanced in terms of the points of view
9 represented.” 5 U.S.C. App. 2, § 5(b)(2), (c). Plaintiffs also seek an order enjoining the USTR
10 or the Department of Commerce from calling any meetings of, providing otherwise nonpublic
11 information to, obtaining advice or information from, or otherwise utilizing these two advisory
12 committees until one or more representatives from the environmental community have been
13 appointed to each committee.

14 BACKGROUND

15 To understand the basis for this motion, it is necessary to review: (1) the advisory
16 committees at issue and the opportunities that they have, but the plaintiffs lack, to obtain
17 information and provide input to governmental decision-makers; and (2) the impacts of trade
18 liberalization in forestry and related matters addressed by these advisory committees on
19 plaintiffs’ interests.

20 I. THE WOOD AND PAPER PRODUCTS TRADE ADVISORY COMMITTEES

21 A. The Industry Sector Advisory Committees

22 The Trade Act of 1974 directs the President to establish an Advisory Committee for
23 Trade Negotiations to provide overall advice on trade objectives, negotiating positions, and
24

1 agreements. 19 U.S.C. § 2155(b)(1). The Trade Act also authorizes the President to establish
2 other general policy, functional, or sectoral advisory committees to provide advice on trade
3 policies. *Id.* § 2155(c). The Trade Act expressly gives the USTR, at times in conjunction with
4 the Department of Commerce, certain responsibilities for organizing and convening these
5 advisory committees.

6 Pursuant to the authority granted in the Trade Act, the USTR and Department of
7 Commerce have organized and utilized a series of trade advisory committees, including more
8 than one dozen Industry Sector Advisory Committees (“ISACs”). The USTR and Department of
9 Commerce seek advice and information from these advisory committees on U.S. and multilateral
10 trade policy. 19 U.S.C. § 2155(a).

11 Two of the ISACs established by the USTR and the Department of Commerce relate
12 directly to forest products. These committees are known as ISAC-10 (Lumber and Wood
13 Products) and ISAC-12 (Paper and Paper Products) (referred to hereinafter collectively as the
14 “forest products ISACs”). The USTR and Department of Commerce established these advisory
15 committees in 1980 and have renewed them every two years since. These ISACs consist of
16 approximately 19 and 12 members, respectively, appointed for two-year terms, which can be
17 renewed. The USTR and/or Department of Commerce provides approximately \$15,000 annually
18 in staff support and services to ISAC-10 and approximately \$25,000 annually in staff support
19 and services to ISAC-12. Charters (Exs. 2 & 3).

20 B. Defendants’ Statutory Duty to Consult these Advisory Committees

21 The Trade Act requires the USTR and the Department of Commerce to consult with the
22 ISACs and keep them informed on a timely and continuing basis on significant trade issues and
23 developments. The forest products ISACs meet at the call of the USTR and the Department of
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1 Commerce. In practice, these ISACs meet on a quarterly basis.

2 The forest products ISACs have numerous other opportunities to provide advice,
3 information, and recommendations to the USTR and the Department of Commerce regarding
4 trade barriers and the implementation of trade agreements. For example, the forest products
5 ISACs select one or more of their members to serve on each Industry Functional Advisory
6 Committee, and they may send representatives to meetings of the Industry Policy Advisory
7 Committee for Trade Policy Matters.

8 Significantly, the forest products ISACs must meet at the conclusion of negotiations for
9 each trade agreement entered into pursuant to the Trade Act of 1974 and must provide an
10 advisory opinion to the President, Congress, and the USTR on the impact of such agreement on
11 the forest and paper products sectors. U.S. negotiators are required to take this advice into
12 account, and the USTR must inform the ISACs of significant departures from their advice or
13 recommendations. See 19 U.S.C. §§ 2155(a), (e), (i).

14 C. The Advisory Committees' Access to Secret, Inside Information

15 Members of the ISACs have access to inside government information about the overall
16 negotiating objectives and positions of the United States, even where such information is
17 classified, contains trade secrets, or is otherwise unavailable to the general public. 19 U.S.C. §§
18 2155(a)-(c), (g), (i). A 1989 Commerce Department publication touting the benefits of serving
19 on trade advisory committees during the Tokyo Round of GATT negotiations reported that
20 members have access to a vast store of classified information concerning trade negotiations and
21 to a database that allows them to transmit their views directly to government negotiators.

22 *Government Seeks Advice From Industry on U.S. Trade Policy*, Bus. Am., Jan. 16, 1989, at 8

23 See Declaration of William J. Snape III, ¶ 5 (July 1999).

1 This access to inside information is in sharp contrast to the dearth of public information
2 about trade negotiations. While the Trade Act explicitly makes the trade advisory committees
3 subject to FACA, it establishes an exception to FACA's ordinary rules requiring open meetings,
4 records, and public participation for the ISACs. 19 U.S.C. § 2155(f). Under that exception,
5 advisory committee proceedings and records may be closed to the public "whenever and to the
6 extent it is determined by the President or his designee that such meetings will be concerned with
7 matters the disclosure of which would seriously compromise the Government's negotiating
8 objectives or bargaining positions with respect to" trade agreements or trade policies. *Id.* §
9 2155(f)(2). The USTR is the President's designee for making such determinations by virtue of
10 Exec. Order No. 11,846, 40 Fed. Reg. 14,291 (1975).

11 Beginning in at least 1980, the USTR issued blanket closure orders on a biannual basis
12 closing all meetings of all ISACs that would take place over that two-year period. In issuing
13 these orders, the USTR invoked the Trade Act exception to the ordinary FACA openness
14 mandates. In a lawsuit brought by the Sierra Club and another group, the U.S. District Court for
15 the District of Columbia invalidated the blanket closure order for 1996-1998 on the ground that
16 the USTR could not credibly determine that all portions of all ISAC meetings fall within the
17 Trade Act's closure authority, particularly in light of the advisory committees' broad mandates.
18 Mem. Opinion, in Public Citizen v. Barshefsky, No. 94cv2236 (RMU) (D.D.C. Sept. 19, 1996)
19 (Ex. 4). However, even though the USTR must now make individualized closure decisions, it
20 has still closed all recent meetings of the forest products ISACs. 1998 Meetings (Ex. 5).

21 Members of the ISACs may attend the closed meetings and are privy to the information
22 exchanged in those meetings. Given the secrecy surrounding the development of trade policy,
23 much of this information is classified and thus unavailable to the general public. In fact, many of
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1 the plaintiffs have expended their energies and resources simply trying to track down
2 information that is freely shared with the ISACs. Declaration of A. Paige Fischer ¶¶ 4-16 (July
3 1999). Many Freedom of Information Act requests have been answered by extensive
4 withholdings on national security grounds. *Id.* ¶ 10. Even an International Trade Commission
5 study in which some of the plaintiffs participated is unavailable to the public. *Id.* ¶ 13.

6 Nor are there other avenues for significant public access to information and involvement
7 in the development of trade policies. Indeed, the Trade Act overhauled the trade negotiation and
8 approval process in an attempt to resolve an interbranch power struggle between Congress and
9 the President. While the Trade Act confirmed the President’s authority to negotiate nontariff
10 trade agreements, Congress agreed to accelerated and truncated legislative approval procedures
11 provided that the President followed specific notice, consultation, and other procedural
12 requirements. 19 U.S.C. §§ 2112(c)-(e), 2151-2155. Consulting with the trade advisory
13 committees is one such consultation requirement, which supplants ordinary opportunities for
14 public input into the development of administrative and legislative trade policies. Moreover, the
15 USTR does not prepare environmental impact statements on trade agreements. See Public
16 Citizen v. Office of the USTR, 822 F. Supp. 21 (D.D.C. 1993), rev’d on jurisdictional grounds, 5
17 F.3d 549 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 685 (1994).

18 D. The Forest Products ISACs Consist Solely of Industry Representatives

19 Every member of ISAC-10 and ISAC-12 is either an executive of a timber or paper
20 products company or trade association. Exs. 8-9 to Goldman Decl. This imbalance is not by
21 accident, but by design. Indeed, in soliciting nominees for these ISACs, the USTR and the
22 Department of Commerce explicitly stated that “[i]n order to qualify for representation on an . . .
23 ISAC, nominees must . . . represent[] U.S. manufacturing and service firms that trade
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1 internationally or an industry association.” 64 Fed. Reg. 10,448 (Mar. 4, 1999).

2 The skewed make-up of the ISACs continues a longstanding practice of establishing
3 industry-dominated trade advisory committees. During the early 1990s, as many as 800 industry
4 representatives served on U.S. trade advisory committees. Until recently, none of the advisory
5 committees had any environmental representation. In 1992, in response to public and
6 congressional outcry, the USTR and Commerce Department appointed environmental
7 representatives to a few select trade advisory committees. However, several of these advisory
8 committees have since been abolished, and at present, only one - the Advisory Committee for
9 Trade Policy and Negotiations - retains an environmental representative. None of the ISACs
10 have any environmental representation. Snape Decl. ¶¶ 6-8.

11 In 1994, the President established the Trade and Environment Policy Advisory
12 Committee (“TEPAC”) to provide advice and information to the USTR on issues concerning
13 trade and the environment. Exec. Order No. 12,905, 59 Fed. Reg. 14,733 (1994). TEPAC is
14 comprised of a mix of business and environmental representatives. TEPAC meets solely at the
15 discretion of the USTR, and in practice, meets less often than the ISACs. Although TEPAC
16 received three briefings during 1997 and 1998, it held only one meeting in that two-year period –
17 far less frequently than the ISACs’ quarterly meetings. Snape Decl. ¶ 7. TEPAC addresses a
18 vast array of trade policy matters affecting the environment and has paid little attention thus far
19 to trade liberalization in the forestry sector.

20 II. IMPACTS ON PLAINTIFFS’ INTERESTS OF TRADE LIBERALIZATION IN
21 FORESTRY AND OTHER MATTERS SUBJECT TO THE ISACS’ REVIEW

22 The mission of the forest products ISACs is broad, covering all aspects of the
23 development and implementation of U.S. trade policy relating to forest products. Under the
24 Trade Act, the trade advisory committees, including the ISACs, are to provide information and

1 advice on the development of U.S. trade policy, the negotiation and administration of trade
2 agreements, U.S. negotiating objectives and bargaining positions, and trade dispute settlement
3 proceedings in which the United States is involved. 19 U.S.C. § 2155(a)(1). In contrast to the
4 advice offered by most other advisory committees, which federal agencies and officials may, but
5 are not legally obligated to take into account in making decisions, the Trade Act obligates the
6 President and USTR to take the trade advisory committees' recommendations into account in
7 developing U.S. negotiating positions and trade policies. Id. § 2155(a)(3).

8 The precise matters addressed by the ISACs are not generally disclosed publicly.
9 However, the report of the wood products ISAC on the Uruguay Round of GATT in January
10 1994 is public and sheds light on this advisory committee's perspective. In this report, ISAC-10
11 generally supported establishing the World Trade Organization with stronger institutional
12 structure and powers than the GATT, but it criticized the Uruguay Round for not accomplishing
13 wood product tariff elimination. Ex. 6. The report also criticized the subsidies agreement
14 provision allowing countries to offer subsidies covering up to 20% of the cost of meeting new or
15 stricter environmental regulations. Id. at 3-4. In ISAC-10's view, this provision "is threatening
16 enough to warrant dramatic efforts to sufficiently circumscribe the provision" and it urged the
17 United States to limit its applicability administratively. Id. at 3. These views are not shared by
18 the environmental community.

19 Since completion of the Uruguay Round and establishment of the World Trade
20 Organization, numerous hot-button trade negotiations and policies continue to have important
21 and significant ramifications for the protection of sustainable and healthy forest ecosystems
22 around the world. For example, the U.S. government is currently spearheading a tariff
23 liberalization initiative for the forest products sector, the goal of which is to eliminate all tariffs
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1 on forest products worldwide. Fischer Decl. ¶¶ 19-24. The environmental community and the
2 timber industry hold opposing views concerning this initiative. The timber industry, through the
3 ISACs and otherwise, has expressed its impatience at what it considers to be an unduly slow
4 pace of tariff elimination. See Ex. 6. The environmental community, on the other hand, is
5 concerned that tariff liberalization will increase consumption of forest products worldwide and
6 have adverse impacts on the preservation and health of forest ecosystems. For example, the
7 Softwood Lumber Agreement (“SWLA”) is allowing 35 million cubic meters of Canadian
8 softwood lumber to enter the U.S. annually duty free, which has created incentives to log British
9 Columbia forests for export to the U.S. This logging occurs without environmental safeguards to
10 ensure sustainability and to protect wildlife habitat and water quality. See Decl. of Joe Scott
11 (July 22, 1999); Snape Decl. ¶ 10 & Ex. 1.

12 The ISACs’ purview extends to the administration and effectiveness of recent trade
13 agreements. Some recent developments trigger sharply different responses from the
14 environmental community and the timber industry. For example, several of the plaintiff
15 organizations work to prevent the entry and spread of invasive species that could destroy native
16 U.S. forests. Increased trade in forestry products has led to an increased risk of such infestations.
17 After invasive species were detected on shipments of Siberian logs entering the United States,
18 the Animal and Plant Health Inspection Service (“APHIS”) temporarily banned Russian log
19 imports and ultimately adopted regulations prescribing a combination of border control
20 measures. Fearing these regulations were too weak, plaintiff Pacific Environmental and
21 Resource Center (“PERC”) and others challenged the regulations and the environmental impact
22 statement on which they were based. Upon declaring the impact statement invalid, the U.S.
23 District Court for the Northern District of California enjoined APHIS from issuing new permits
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1 for importation of certain wood products until it corrected the deficiencies in the impact
2 statement and issued new regulations. Oregon Natural Resources Council v. APHIS, No. 95-
3 4066 CW (N.D. Cal. Feb. 27, 1997) (Ex. 23 to Fischer Decl.); 1997 U.S. Dist. LEXIS 9521;
4 Fischer Decl. ¶¶ 25-43.

5 The injunction prompted both Chile and New Zealand to object to safeguards against pest
6 infestations that would restrict their wood exports to the United States. Fischer Decl. ¶¶ 44-45.
7 Ultimately, the district court upheld the supplemental environmental impact statement prepared
8 by APHIS and removed the injunction, Fischer Decl. Ex. 29, and the threat of a WTO challenge
9 subsided as a result.

10 As another example, in September 1998, APHIS imposed an emergency ban on imports
11 of certain untreated wooden packing materials from China and Hong Kong. The ban was
12 spurred by an infestation of the Asian long-horned beetle, which entered New York on a
13 shipment of sewer pipes from China in 1996. The beetle has attacked hardwoods, such as
14 maples, poplars, aspens, and willows in New York City and Chicago. It has no known natural
15 enemies in this country and pesticides are ineffective because the eggs are laid and the larvae live
16 deep inside the affected trees, emerging only after the host tree has been damaged or often killed.
17 Authorities in New York and Illinois have cut and burned hundreds of trees to stop the
18 infestation. After federal inspectors found live larvae in wooden crates and pallets that serve as
19 packaging material for imports from China, APHIS imposed the ban. China and Hong Kong
20 have accused the United States of imposing an unfair trade barrier. Fischer Decl. ¶ 48 & Exs.
21 30-31.

22 The threatened trade challenges to effective border measures needed to prevent the entry
23 and spread of invasive species have led many of the plaintiffs to believe the pertinent trade rules
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1 need to be reformed to allow strong safeguards against pest infestations. Fischer Decl. ¶ 49.
2 These views are presumably absent from the forest products ISACs' discussions of the
3 effectiveness of recent trade agreements as well as their recommendations for future negotiating
4 objectives.

5 Similarly, existing trade rules may prevent bans on the export of raw logs. However,
6 restrictions on the export of raw logs can be an important tool in regulating the rate at which and
7 conditions under which forests can be logged. Declaration of Steven Shrybman ¶¶ 3, 6 (March
8 23, 1994) (see Decl. of Patti Goldman ¶ 3 & Ex. 1). A Canadian raw log export ban has already
9 been challenged by the United States as an unfair subsidy. Id. ¶ 4. In the United States, raw log
10 export restrictions have been imposed to limit the demand for logging on public lands and lessen
11 the economic impact on local mills from cut-backs in logging to protect forest ecosystems. See,
12 e.g., Forest Resources Conservation & Shortage Relief Act of 1990, 16 U.S.C. § 620a(a).

13 Rather than expand forestry trade further, the environmental community is urging the
14 Administration and the international community to review the current trade rules and modify
15 them to ensure protections against invasive species and destruction of forest ecosystems. Ex. 32
16 to Fischer Decl. In contrast, the industry supports accelerated elimination of tariffs in the forest
17 sector and new initiatives to cut back on what are called non-tariff measures, which can include
18 environmental protections.

19 The Agreement on Government Procurement is often mentioned as a likely prospect for
20 expansion in the next round of trade negotiations. Throughout the 1990s, the use of government
21 procurement to increase demand for recycled paper products and to reduce consumption of
22 products from native forests has been embraced by the environmental community, but opposed
23 by the paper and wood products industry. See Snape Decl. ¶ 21. Immediately after the World
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1 Trade Organization Agreements became effective, New York proposed eliminating its ban on
2 state government purchases of tropical hardwoods to conform to the WTO Agreement on
3 Government Procurement, although it backed down in the face of public outcry. Snape Decl. ¶
4 20. The environmental community was largely shut out of the development of U.S. negotiating
5 positions on the WTO Agreement on Government Procurement, while the industry had extensive
6 and direct access to the negotiators and the negotiating positions through the paper and wood
7 product ISACs.

8 Another area targeted for expansion is investment. In recent years, the United States and
9 other industrialized countries have entered into an increasing number of international agreements
10 that give foreign investors rights to challenge environmental protections that restrict their
11 investments. Decl. of Daniel Seligman ¶ 4 (July 28, 1999). In the five years since the adoption
12 of North American Free Trade Agreement (“NAFTA”), the agreement’s investment protections
13 have been the basis for challenges to a number of environmental measures. For example, a
14 NAFTA challenge to a Canadian law banning the use of a gasoline additive that has been tied to
15 possible health and environmental risks ultimately forced Canada to rescind the ban and to pay
16 the challenging corporation \$13 million. Seligman Decl. ¶ 6.B. More recently, a Canadian
17 company is challenging a California law banning the use of MTBE, another gasoline additive
18 that is a suspected carcinogen. Seligman Decl. ¶ 6.D. Expanding investor rights could lead to
19 similar challenges to forest protection laws.

20 Trade rules also create obstacles for eco-labeling. Eco-labeling is a policy tool used to
21 distinguish between products based on their relative impact on the environment in an attempt to
22 influence consumer purchasing decisions in favor of “environmentally-friendly” products.
23 Twenty-eight countries have national eco-labeling programs to encourage market-driven
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1 environmental changes within industry. Comment, "The Role of Ecolabeling in Sustainable
2 Forest Management," 11 J. Env'tl. L & Litig. 165 (1996). However, eco-labeling, in particular
3 the European Union's eco-labeling program, which is based the environmental impact of the
4 product throughout the production process from manufacturing to disposal, has come under
5 intense pressure from the U.S. government and U.S. industry. The American Forest and Paper
6 Association, which sits on both forest products ISACs, has argued that such eco-labeling
7 programs operate as de facto trade barriers. In response to lobbying by the U.S. government at
8 the industry's behest, the EU delayed its paper eco-labeling regulation. Exs. 12-18 to Goldman
9 Decl.

10 The declarations submitted by plaintiffs discuss each of these issues in greater detail,
11 contrasting the concerns of the environmental community with the timber industry's quest for
12 further trade liberalization in the forestry sector. Plaintiffs and their members have an interest in
13 ensuring that U.S. and world trade policy do not erect obstacles to effective forest protection.
14 Their ability to advocate effectively for this goal is impaired by the exclusion from the forest
15 products ISACs of any environmental representatives. On June 4, 1999, plaintiffs sent a letter to
16 the USTR and the Department of Commerce requesting representation on each of the forest
17 products ISACs from environmental organizations advocating for forest protection. Ex. 7 to
18 Goldman Decl. Plaintiffs have received no response to their letter.

19 STANDARD OF REVIEW

20 In ruling on a motion for a preliminary injunction, the Court must consider plaintiffs'
21 likelihood of success on the merits and whether the balance of irreparable harm and the public
22 interest favor issuance of the injunction. Caribbean Marine Services Co. v. Baldrige, 844 F.2d
23 668, 674 (9th Cir. 1988). A party is entitled to a preliminary injunction by demonstrating either:
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1 (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2)
2 that serious questions on the merits are raised and the balance of harm tips sharply in its favor.
3 Chalk v. U.S. District Court, 840 F.2d 701, 704 (9th Cir. 1988). On the merits, this Court may
4 hold unlawful agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise
5 not in accordance with law,” such as the Federal Advisory Committee Act. Administrative
6 Procedure Act (“APA”), 5 U.S.C. § 706(2)(A).

7 ARGUMENT

8 I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

9 A. FACA Prohibits Industry Domination of Advisory Committees that Render Policy
10 Advice on Matters Affecting Excluded Interests.

11 The Federal Advisory Committee Act mandates that federal advisory committees be
12 established and utilized in an accountable, open, and fair manner. One of Congress’ core
13 concerns was with “a pernicious species of so-called ‘advisory’ bodies: those dominated by
14 industry leaders and the like with substantial parochial interest in the outcome of the matter
15 under discussion, usually some onerous regulation or policy proposal.” Natural Resources
16 Defense Council v. Herrington, 637 F. Supp. 116, 120 (D.D.C. 1986).

17 As the House Report emphasized:

18 One of the great dangers in the unregulated use of advisory committees is that special
19 interest groups may use their membership on such bodies to promote their private
20 concerns. Testimony received at hearings before the Legal and Monetary Affairs
21 Subcommittee pointed out the danger of allowing special interest groups to exercise
22 undue influence upon the Government through the dominance of advisory committees
23 which deal with matters in which they have vested interests. . . . [T]he lack of balanced
24 representation of different points of view and the heavy representation of parties whose
25 private interests could influence their [advisory committee] recommendations would be
26 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-

1 dominated advisory committees:

2 Viewed in its worst light, the federal advisory committee can be a convenient nesting
3 place for special interests seeking to change or preserve a policy for their own ends.
4 Such committees, stacked with giants in their respective fields, can overwhelm a federal
5 decisionmaker, or at least make him wary of upsetting the status quo.

6 118 Cong. Rec. 30,276 (1972); see also 118 Cong. Rec. S14,654-55 (1972) (Senator Roth)
7 (noting that FACA “addresses itself to the danger of private interests exercising unfair influence
8 on governmental decisions through membership in advisory committees”).

9 FACA prohibits such skewed and unfair domination in its balanced representation
10 mandate. Specifically, FACA requires that any law, Presidential directive, or agency action
11 establishing or authorizing an advisory committee “shall . . . require the membership of the
12 advisory committee to be fairly balanced in terms of the points of view represented and the
13 functions to be performed by the advisory committee.” 5 U.S.C. App. § 5(b)(2).¹ To further
14 strengthen this requirement, FACA also mandates safeguards that ensure that advisory
15 committee recommendations will not be “inappropriately influenced by . . . any special interest,
16 but will instead be the result of the advisory committee’s independent judgment . . .” Id. §
17 5(b)(3).

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

20 When [an advisory committee] met with government officials to consider a proposed
21 national industrial wastes inventory questionnaire, only representatives of industry were
22 present. No representatives of conservation, environmental, clean water, consumer, or
23 other public interest groups were present. This lack of balanced representation of
24 different points of view and the heavy representation of parties whose private interests

25 ¹Section 5(b) mandates balanced representation on legislatively established advisory committees;
26 § 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).

1 could influence their recommendations should be prohibited by the provisions contained
2 in [FACA].

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

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

9 The seminal case – National Anti-Hunger Coalition v. Executive Committee of the
10 President's Private Sector Survey on Cost Control, 711 F.2d 1071 (D.C. Cir. 1983) – illustrates
11 this dichotomy between narrow, technical recommendations on the one hand and broader policy
12 advice on the other. In the initial round of litigation, the D.C. Circuit held that the Grace
13 Commission (as this advisory committee was known) could be comprised entirely of corporate
14 executives where its sole task was to apply private sector expertise to government programs,
15 rather than make substantive policy recommendations. Id. at 1074. Where the committee's goal
16 is so narrow and explicit, a committee comprised of a discrete group of experts in a narrow field
17 is not necessarily imbalanced. 557 F. Supp. 524, 528 (D.D.C. 1983). However, when it became
18 clear that the Grace Commission had exceeded its articulated functions and recommended
19 cutbacks in the food stamp and school lunch programs, Judge Gesell declared the committee
20 imbalanced because it lacked representation of poor people who depended on such federal food
21 programs and would be directly affected by adoption of those recommendations. 566 F. Supp.
22 1515, 1517 (D.D.C. 1983).

23 In several other key FACA cases upholding the composition of advisory committees with
24 narrow, technical mandates, the courts have distinguished such technical advice from broader

1 policy recommendations that call for representation from beyond the private sector. The
2 importance of the advisory committee’s function when determining balance is evident from
3 Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods, 886 F.2d
4 419 (D.C. Cir. 1989). Although the panel issued three separate opinions, the two judges who
5 reached the merits distinguished between advisory committees created to perform a specific,
6 narrow function and those making broad policy decisions, but disagreed as to how to
7 characterize the advisory committee at issue. Judge Friedman found that because the
8 Committee’s function of developing microbiological criteria for foods involved “highly technical
9 and scientific studies and recommendations,” the Committee’s membership was fairly balanced
10 without extensive consumer representation. Id. at 423. However, he distinguished the
11 committee at issue there from the one dealing with waste inventories discussed in the legislative
12 history “where the only individuals who met with government officials were representatives of
13 industry.” Id. at 425. Judge Edwards agreed that if the Committee was charged with a
14 “primarily technical or scientific” function, consumer interests could be excluded. Id. at 436.
15 However, because the Committee was charged with recommending regulations, Judge Edwards
16 characterized the Committee’s task as involving “complex policy choices, not merely -- or even
17 primarily -- technical determinations.” Id. In his view, such a committee charged with making
18 recommendations about a broad range of products affecting consumers and the public health
19 presents “precisely the type of situation” in which Congress saw a need for independent public
20 interest representation.

21 The Fifth Circuit, in a recent FACA decision, quoted both National Anti-Hunger
22 Coalition and Public Citizen with approval. In Cargill, Inc. v. United States, 173 F.3d 323 (5th
23 Cir. 1999), a committee whose task was to provide scientific peer review on mine regulations did
24

1 not run afoul of FACA’s fair balance requirement because it was “politically neutral and
2 technocratic” and was “not called upon to make policy decisions.” *Id.* at 337. The court
3 concluded that a committee with a “narrow, technical mandate” devoid of policy decision-
4 making responsibilities, “does not have to include representatives of those who might be affected
5 by the committee’s work.” *Id.* at 338.

6 Because the forest products ISACs are indisputably comprised solely of industry
7 representatives, the task before the Court is to discern whether the purview of the forest products
8 ISACs is narrow and technical or broad and policy-oriented. It is to that issue this brief now
9 turns.

10 B. The Forest Products ISACs Offer Advice on Trade Policy Matters Affecting the
11 Sustainability and Ecological Integrity of Forests and Thus Must Have
12 Representation of Forest Protection Advocates.

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

16 The Trade Act establishes the ISACs’ mandate to provide advice on the development,
17 implementation, and administration of trade policy. 19 U.S.C. § 2155(a). Not only must the
18 ISACs provide information and advice on all facets of developing and implementing trade
19 agreements, but they also must be consulted on progress made toward achieving negotiating
20 objectives, the effectiveness of recently negotiated trade agreements, actions taken under U.S.
21 trade laws and their effectiveness in achieving U.S. trade policy objectives, and important
22 developments for which a trade policy response must be developed. *Id.* § 2155(a)(2). The trade
23 advisory committees’ authority extends to other matters as well, such as enforcement of
24 countervailing duties against unfair trade practices, expansion of U.S. exports, and investment

1 both in the United States and by U.S. companies abroad. See Charters at 2 (Exs. 2 & 3);
2 Reorganization Plan No. 3 of 1979, § 1, 44 Fed. Reg. 69,173 (Sept. 25, 1979) & Exec. Order No.
3 12,188, § 1-101, 45 Fed. Reg. 989 (Jan. 2, 1980), in 19 U.S.C.A. § 2171 note. Indeed, the USTR
4 and Department of Commerce describe the function of the forest products ISACs as dealing with
5 a “broad spectrum of trade policy rather than a single facet.” 1998 Committee Justification
6 Forms for ISACs 10 & 12 (Ex. 10 to Goldman Decl.).

7 In practice, the forest products ISACs have offered advice on cutting-edge and
8 exceedingly controversial issues, such as whether to enter into the WTO Agreements, expansion
9 of NAFTA to Chile, global climate change, and the WTO’s Committee on Trade and the
10 Environment. Exs. 8-9 to Goldman Decl. The direction to be taken in each of these areas will
11 shape both the trade regime and the environment for our generation and beyond. The ISACs
12 have also taken on issues in which the plaintiffs are directly engaged, such as the APEC early
13 voluntary sectoral liberalization initiative and U.S. restrictions to prevent entry of invasive
14 species on packaging materials. Id. Indeed, plaintiffs have advocated against the APEC trade
15 liberalization initiative and for stronger border protections. See, e.g., Fischer Decl. They have
16 also weighed in on initiatives being developed to protect forests, such as the United Nations’
17 International Forum on Forests, or to reduce consumption of forest products, as with the EU
18 packaging directive.

19 The forest products ISACs play a pivotal and preeminent role in the development of U.S.
20 trade policies that directly affect our nation’s and world forests. The environmental community
21 and plaintiffs in particular have strong interests in ensuring that forests are sustained and
22 protected to provide clean water, clean air, and wildlife habitat.

23 Despite the significant interests forest protection advocates, like plaintiffs, have in these
24

1 trade policies, the ISACs give voice only to those seeking to increase trade in forest products.
2 and “advance the industry’s negotiating objectives” are heard by the USTR. ISAC 10 is
3 comprised of nineteen members, all of whom represent major exporters and producers of lumber
4 and wood products or represent trade associations that promote the interests of the timber
5 industry. Ex. 8 to Goldman Decl. ISAC 12 has similar membership, consisting of paper
6 companies and other companies that depend economically on the paper industry. *Id.* A profile
7 of several members of the forest products ISACs reveals their deep-seated economic interests in
8 globalization, as well as their antipathy toward environmental regulation, which is underscored
9 by their political contributions and their violations of environmental laws and commitments. *See*
10 Ex. 1 to Declaration of George Draffan (July 27, 1999).²

11 Dominated by industry, and without any environmental representation, these ISACs are
12 ill-suited to provide advice on trade policies that affect global warming, invasive species
13 safeguards, and incentives to log forests unsustainably. Defendants do not even purport to have
14 created balanced advisory committees to address trade policies that affect forests. Indeed, in
15 describing the forest products ISACs, the Department of Commerce asserted that they are
16 “balanced for the most part in the areas of regional and product coverage”. 1998 Committee
17 Justification Form for ISACs 10 & 12 (Ex. 10 to Goldman Decl.).

18 Defendants may argue that they have no obligation to include environmental
19 representatives on ISACs because the Trade Act lists certain interests that should be represented

20
21 ² The current composition of the forest products ISACs also raises antitrust concerns. Under the
22 guise of trade policy discussions, similarly situated members of industry share business
23 information and strategies in ways that may serve to restrain competition, which might constitute
24 an unreasonable restraint of trade hampering competition in violation of federal antitrust laws.
See, Standard Oil of N.J. v. United States, 221 U.S. 1 (1911); *Board of Trade of the City of*
Chicago v. United States, 246 U.S. 231, 238 (1918); *see also Sullivan, Antitrust* §§ 63-66, 68,
101 (1977).

1 and environmental interests are not on the list. 19 U.S.C. § 2155(c)(2). However, the Trade Act
2 expressly makes FACA applicable to the trade advisory committees, including the ISACs, and
3 FACA requires balanced representation without any additional commands in the statute
4 authorizing establishment of the advisory committee. Id. § 2155(f). In the early 1990s, the
5 USTR and Commerce Department appointed environmental representatives to several policy
6 advisory committees under 19 U.S.C. § 2155(f)(1), which like the section authorizing the ISACs,
7 makes no mention of environmental representatives. See Snape Decl. ¶ 6.

8 Defendants may also contend they need not adhere to FACA’s fair balance mandates for
9 the ISACs because they have established another trade advisory committee – the TEPAC -- that
10 has environmental representation. However, FACA requires balanced representation within each
11 advisory committee, not among all the advisory committees established by an agency. In
12 addition, the forest products ISACs have different and far greater opportunities than the TEPAC
13 to influence trade policies that affect forests. See Snape Decl. ¶ 7; Fischer Decl. ¶ 11.

14 Where an advisory committee has broad policy mandates, like the forest products ISACs
15 have, and the committees’ mandate directly and pervasively affects the environment, the
16 committee cannot be comprised entirely of industry representatives. FACA’s balanced
17 membership mandate requires environmental representation on such a committee.

18 II. THE BALANCE OF HARMS FAVORS ISSUANCE OF A PRELIMINARY
19 INJUNCTION.

20 Plaintiffs will be irreparably harmed if the USTR and Commerce Department continue to
21 utilize the industry-dominated forest products ISACs. Through membership on these
22 committees, the industry obtains inside information and opportunities to influence trade policies
23

1 affecting forests that are unavailable to plaintiffs. Such one-sided input essentially puts a thumb
2 on the scales in favor of trade policies that will be deleterious to the environment. As the
3 Eleventh Circuit concluded, environmental “matters are so serious and of such great concern to
4 so many with differing interests, it is absolutely necessary that the procedures established by
5 Congress [in FACA] be followed to the letter.” Alabama-Tombigbee Rivers Coalition v.
6 Department of Interior, 26 F.3d 1103, 1107 n.9 (11th Cir. 1994). In such cases, “injunctive relief
7 [is] the only vehicle that carries the sufficient remedial effect to ensure future compliance with
8 FACA’s clear requirements. Anything less would be tantamount to nothing.” Id. at 1107.

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

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

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

22 Injunctive relief is “necessary and appropriate to preserve the purposes of FACA, to
23 avoid making it a ‘nullity’ and preserve plaintiffs’ right to ensure that advisory committees
24 comply with the statutes’ dictates.” Natural Resources Defense Council v. Pena, 147 F.3d 1012,
25 1016 (D.C. Cir. 1998). An injunction is the only way to enhance the public accountability of the
26 advisory committee process that FACA demands. See California Forestry Ass’n v. United
States Forest Service, 102 F.3d 609, 614 (D.C. Cir. 1996); see also Center for Auto Safety v.

1 Cox, 580 F.2d 689, 694 (D.C. Cir. 1978) (injunction issued to prevent irreparable harm from
2 holding advisory committee meeting in secret); Gates v. Schlesinger, 366 F. Supp. 797, 800-01
3 (D.D.C. 1973) (same).

4 When determining the propriety of an injunction, the extent to which the FACA violation
5 has impeded the committee's output and accountability and the public's participation is a factor.
6 NRDC v. Pena, 147 F.3d at 1026-27. The forest products ISACs' imbalance renders its advice
7 tainted. This advice is not limited to written reports issued upon the committee's review of a
8 final trade agreement. Rather, the ISACs have ongoing, pervasive influence through their
9 meetings and regular contacts with the USTR and the Commerce Department. Plaintiffs and
10 other environmental groups lack comparable opportunities to provide advice to these agencies.
11 Moreover, they lack the inside information provided through membership on the ISACs that
12 makes their views fully informed and timely.

13 This is not a situation where the FACA violation can be considered benign because some
14 other public process will provide the excluded interests a subsequent opportunity for input on the
15 matter addressed by the advisory committee. See Id. No later process will afford such a
16 countervailing opportunity for public input. The USTR will not publish its proposed trade
17 policies for public comment in accordance with notice and comment rulemaking. Cf. National
18 Nutritional Foods Ass'n v. Califano, 603 F.2d 327, 336 (2d Cir. 1979) (rulemaking proceedings
19 afford opportunity to correct infirmities in improper advisory committee action on the proposal).
20 Nor will the USTR prepare an environmental impact statement under the National
21 Environmental Policy Act, 42 U.S.C. § 4332, laying out and assessing the environmental
22 consequences of various concrete trade proposals and their alternatives. For some trade policies,
23 there will be no legislative approval or authorization; for trade agreements that need

1 congressional approval, the legislative process is generally truncated with little opportunity for
2 public hearings, floor debate, or even legislative amendment. See 19 U.S.C. § 2112. Since the
3 public has no “subsequent opportunity” to “render harmless” or even comment on USTR
4 decisions, the loss of environmental participation in the process has added significance. With
5 such a flagrant FACA violation and no opportunity to correct the infirmities resulting from the
6 improper constitution of the ISACs, an injunction is the only means to prevent FACA from being
7 rendered “toothless, merely aspirational legislation.” Cargill, 173 F.3d at 341.

8 Where “procedural shortcomings are significant and the [advice of the committee]
9 potentially influential,” the 11th Circuit issued an injunction preventing the government agency
10 from utilizing the report issued by the imbalanced committee. Alabama-Tombigbee Rivers
11 Coalition v. Department of Interior, 26 F.3d at 1106. In that case, the court concluded that
12 contemporaneous access to advisory committee information and advice is a critical feature of the
13 FACA scheme. Id. (“If public commentary is limited to retrospective scrutiny, the Act is
14 rendered meaningless”). That court elaborated, “Congress outlined in detail exactly what
15 procedures were to be used and it is the responsibility of the courts to see that such laws are
16 carried out.” Id. at 1107.

17 In enacting FACA, Congress carefully weighed the pros and cons of requiring balance in
18 advisory committee proceedings and came out on the side of balance. Congress determined that
19 balance will benefit the interests of government accountability and sound decisionmaking.
20 Where, as here, the integrity of the advisory committee process is so undermined, and the matters
21 at stake so deeply affect the public interest, the balance of hardships favors issuance of an
22 injunction. See Alabama-Tombigbee Rivers Coalition, 26 F.3d at 1107 n.9. Accordingly,
23 plaintiffs ask the Court: (1) to enjoin defendants from convening or utilizing the forest products
24

1 ISACs until environmental representation is added to the committees; and (2) to order defendants
2 to disclose unclassified information shared with or provided by the forest products ISACs so as
3 to remedy the ISACs' preferred access to inside information about trade policies and U.S.
4 positions. Such an injunction "will encourage compliance with FACA's strictures while
5 remaining sensitive to its principal purposes." Cargill, 173 F.3d at 342.

6 CONCLUSION

7 For these reasons, the Court should: (1) enjoin defendants from convening or in any way
8 utilizing the forest products ISACs until they are balanced within the meaning of FACA; and (2)
9 order defendants to disclose unclassified information shared with or provided by the forest
10 products ISACs about trade policy development and U.S. positions.

11 Respectfully submitted, this _____ day of July, 1999,

12
13 _____
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