OTHER-THAN-INDUSTRY REPRESENTATION ON INDUSTRY TRADE ADVISORY COMMITTEES

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This article covers the often-overlooked framework for developing trade policy in the United States. With two major international trade agreements currently in the midst of negotiations, the stakes are high for industry groups and other-than-industry actors looking to have their interests manifested in the final texts of these plurilateral pacts. Historically, the voices of other-than-industry actors have been restrained by their underrepresentation among the highly-influential Industry Trade Advisory Committees (ITACs), the most powerful cohort of committees in the trade policy framework. While the Obama Administration has sought to increase the potency of other-than-industry actors by creating additional opportunities for participation elsewhere in the trade policy framework, it is unclear that this solution provides the most effective remedy for groups seeking to exert greater influence in the trade policy arena.

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I. Introduction

It is a tremendously exciting time for international trade in the United States. Washington is currently in the midst of negotiating two major plurilateral regional trade agreements – one with Pacific Rim countries (the Trans-Pacific Partnership, TPP) and one with the European Union (the Transatlantic Trade and Investment Partnership, TTIP) – that promise to widen and deepen global efforts to liberalize trade further than ever before. While there has been much focus in the media and in the political sphere on the progress of these negotiations and the potential for realizing U.S. negotiating objectives, much less attention has been paid to how U.S. negotiating objectives are promulgated in the first place. This topic arises in the media from time to time, most recently with the Sierra Club and various additional other-than-industry groups calling on the Office of the United States Trade Representative (USTR), the negotiating arm of the U.S. Government in free trade agreements, to release the draft text of the TPP Agreement so as to facilitate "a real conversation about the impacts of th[e] agreement on communities and the environment."[1] The Sierra Club's call for the draft text of the TPP Agreement to be publicly released raises the question of who has access to draft negotiating texts, and by extension, the opportunity to help shape negotiating objectives as they are being formulated. In the United States, in addition to certain government officials, only a select group of private sector actors has access to draft negotiating texts. Specifically, only members of trade advisory committees[2] can access draft negotiating texts as "cleared advisors" within the trade policy framework. Accordingly, who serves on these committees, and what their interests are, can have a profound impact on the development of U.S. trade policy, and ultimately, the content of agreements to which the United States is party.[3]

The aim of this article is to explore the history, controversies, and future of the trade advisory committee system, and specifically the Industry Trade Advisory Committees (ITACs), which form an important sector-based cohort of advisory committees within the system. This article will focus on the legal and policy-based arguments surrounding the issue of the ITACs' compositions and the extent to which other-than-industry representation is required by law or justifiable on other grounds. As will

1. "Environmental and Consumer Advocates to Protest Secret Trade Talks in Salt Lake City," KUER. Available at: http://kuer.org/post/environmental-and-consumer-advocates-protest-secret-trade-talks-salt-lake-city.

2. Trade advisory committees "ensure that U.S. trade policy and trade negotiating objectives adequately reflect U.S. public and private sector interests" by providing information and advice to the Office of the United States Trade Representative. 2010 Trade Policy Agenda and 2009 Annual Report, Office of the United States Trade Representative at 196. Available at: www.ustr.gov/webfm_send/1678.

3. *See generally* Timothy B. Lee, "E-mails show cozy relationship between Obama trade negotiators and industry groups," Washington Post (November 29, 2013). Available at: http://www.washingtonpost.com/blogs/the-switch/wp/2013/11/29/e-mails-show-cozy-relationship-between-obama-trade-negotiators-and-industry-groups/.

be discussed, the issue of ITAC composition is an important part of the Sierra Club's and other groups' frustrations about the trade policy formulation process. This article will argue that the issue of the ITACs' composition can be resolved by increasing the flow of information to "cleared advisors" through channels already in place.

Following this introduction, Part II provides an overview of the trade advisory committee system so as to contextualize the ITACs within the larger trade policy framework. Part III provides an in-depth look at the ITACs, including their function, structure, and membership eligibility requirements. In Part IV, an important basis for the legal arguments relating to the ITACs' compositions – the Federal Advisory Committee Act's (FACA's) "fair balance" requirement – will be introduced. Part V provides an overview of industry's domination of the ITACs and associated problems while Part VI explores some of the legal challenges which have been brought as a result of this arguable imbalance. Part VII considers actions taken by Congress and the Executive Branch regarding the ITACs' compositions. Finally, Part VIII discusses potential future changes to the ITACs and the trade advisory committee system as a whole and provides insight into what changes make the most sense from both a legal and policy perspective.

II. Overview of the Trade Advisory Committee System

In 1974, Congress created a private sector advisory committee system to ensure that U.S. commercial and economic interests were adequately incorporated into U.S. trade policy and trade negotiations.[4] Today, each advisory committee provides information and advice related to its policy (e.g. environment, labor) or its sectoral (e.g. aerospace equipment, consumer goods) domain both before and after the United States enters into a bi-, pluri-, or multi-lateral trade pact. As a result, private sector actors have the opportunity to help shape outcomes from the negotiation to the implementation stage of an agreement.[5] The system is arranged into three tiers: the President's Advisory Committee for Trade Policy and Negotiations (ACTPN) (Tier 1), general policy advisory committees (Tier 2), and technical/sectoral advisory committees (Tier 3).[6]

Within the trade advisory committee system, the ACTPN (Tier 1) is the highest-level committee and examines U.S. trade policy and agreements from the perspective of the overall national interest.[7] The Trade

4. "Mission of the USTR," Office of the United States Trade Representative. Available at: http://www.ustr.gov/about-us/mission.

5. *Id.* 19 U.S.C. § 2155(a)(1)(A)-(C) requires the President to seek information and advice from representative elements of the private sector and the non-Federal governmental sector with respect to negotiating objectives and bargaining positions before entering into a trade agreement, the operation of any trade agreement once entered into, and other matters arising in connection with the development, implementation, and administration of the trade policy of the United States.

6. 2010 Trade Policy Agenda and 2009 Annual Report, *supra* note 2, at 196.

7. *Id*. at 197.

Act of 1974 requires that the ACTPN consist of not more than 45 members who are broadly representative of the key economic sectors affected by trade. It also requires that the ACTPN include representatives of non-Federal governments, labor, industry, agriculture, small business, service industries, retailers, non-governmental environmental and conservation organizations, and consumer interests.[8] Members of the Committee are recommended by the United States Trade Representative (USTR) and appointed by the President for a term of four years or until the Committee charter expires, whichever comes first.[9] The ACTPN meets as needed, either at the call of the USTR, or when two-thirds of the members of the Committee so agree.[10]

The Trade Act of 1974 states that the President *may* establish individual general policy advisory (Tier 2) committees for industry, labor, agriculture, services, investment, defense, and other interests, as appropriate.[11] The Trade Act requires that, should a general policy advisory committee be established, it be as representative as practicable of all industry, labor, agricultural, service, investment, defense, and other interests, including small business interests.[12] Tier 2 committees are organized by the USTR and the Secretaries of Commerce, Defense, Labor, Agriculture, the Treasury, or other Executive departments, as appropriate.[13] Committee members are appointed by the USTR in consultation with the aforementioned secretaries.[14] Currently, five Tier 2 policy advisory committees exist. They are the Intergovernmental Policy Advisory Committee (IGPAC),[15] the Trade Advisory Committee for Africa (TACA),[16] the Agricultural Policy Advisory Committee (APAC),[17] the Labor Advisory

8. 19 U.S.C. § 2155(b)(1).
9. *Id.*
10. 19 U.S.C. § 2155(b)(2).
11. 19 U.S.C. § 2155(c)(1).
12. *Id.*
13. *Id*. General policy advisory committees established by the President are co-chaired by the USTR and a Secretary whose department or agency covers related issues (i.e. the Agricultural Policy Advisory Committee is co-chaired by the USTR and Secretary of Agriculture).
14. *Id.*
15. "The IGPAC consists of approximately 35 members appointed from, and representative of, the various states and other non-federal governmental entities within the jurisdiction of the United States. These entities include, but are not limited to, the executive and legislative branches of state, county, and municipal governments. Members may hold elective or appointive office. Members are appointed by and serve at the discretion of the U.S. Trade Representative." 2010 Trade Policy Agenda and 2009 Annual Report, *supra* note 2, at 198.
16. "TACA consists of not more than 30 members, including, but not limited to, representatives from industry, labor, investment, agriculture, services, non-profit development organizations, and other interests. The members of the Committee are appointed to be broadly representative of key sectors and groups with an interest in trade and development in sub-Saharan Africa, including non-profit organizations, producers, and retailers. Members of the committee are appointed by and serve at the discretion of the U.S. Trade Representative." *Id*.
17. "The Secretary of Agriculture and the U.S. Trade Representative appoint

Committee for Trade Negotiations and Trade Policy (LAC),[18] and the Trade and Environmental Policy Advisory Committee (TEPAC).[19] These committees meet at the call of the USTR and the Secretaries of Agriculture, Commerce, Labor, Defense, or other executive departments, as appropriate.[20]

The Trade Act of 1974 *requires* the President to establish technical/sectoral advisory committees (Tier 3).[21] Such committees must, insofar as is practicable, be representative of all industry, labor, agricultural, or service interests, including small business interests, in the sector concerned.[22] Today, 22 technical/sectoral advisory committees, divided between industry (Industry Trade Advisory Committees, ITACs)[23] and agriculture (Agricultural Technical Advisory Committees, ATACs),[24] are overseen by the USTR and the Secretaries of Commerce and Agriculture, respectively.[25] Each of the committees represents a sector or commodity group and provides technical advice to trade policymakers and negotiators.[26]

[APAC] members jointly. APAC members are appointed to represent a broad spectrum of agricultural interests including the interests of farmers, processors, renderers, and retailers from diverse sectors of agriculture, including fruits and vegetables, livestock, dairy, and wine. Members serve at the discretion of the Secretary of Agriculture and the U.S. Trade Representative. The Committee consists of approximately 35 members." *Id*.

18. "The LAC consists of not more than 30 members from the U.S. labor community, appointed by the U.S. Trade Representative and the Secretary of Labor, acting jointly. Members represent unions from all sectors of the economy. Members are appointed by, and serve at the discretion of, the Secretary of Labor and the U.S. Trade Representative." *Id*.

19. "TEPAC consists of not more than 35 members, including, but not limited to, representatives from environmental interest groups, industry (including the environmental technology and environmental services industries), agriculture, services, non-federal governments, and other interests. The Committee…[is] broadly representative of key sectors and groups of the economy with an interest in trade and environmental policy issues. Members of the Committee are appointed by and serve at the discretion of the U.S. Trade Representative." *Id*.

20. 19 U.S.C. § 2155(d).

21. 19 U.S.C. § 2155(c)(2).

22. *Id*.

23. There are 16 sector-based ITACs: Aerospace Equipment (ITAC 1); Automotive Equipment and Capital Goods (ITAC 2); Chemicals, Pharmaceuticals, Health Science Products and Services (ITAC 3); Consumer Goods (ITAC 4); Distribution Services (ITAC 5); Energy and Energy Services (ITAC 6); Forest Products (ITAC 7); Information and Communication Technology Services and Electronic Commerce (ITAC 8); Non-Ferrous Metals and Building Products (ITAC 9); Services and Finance Industries (ITAC 10); Small and Minority Business (ITAC 11); Steel (ITAC 12); Textiles and Clothing (ITAC 13); Customs Matters and Trade Facilitation (ITAC 14); Intellectual Property Rights (ITAC 15); and Standards and Technical Trade Barriers (ITAC 16). 2010 Trade Policy Agenda and 2009 Annual Report, *supra* note 2, at 199.

24. There are six product-based ATACs: Animals and Animal Products; Fruits and Vegetables; Grains, Feed and Oilseeds; Processed Foods; Sweeteners and Sweetener Products; and Tobacco, Cotton, Peanuts, and Planting Seeds. *Id*.

25. *Id*. at 198.

26. *Id*.

Members of the 16 ITACs are appointed by the USTR and Secretary of Commerce and serve at their discretion.[27] A Committee of Chairs, drawn from each ITAC, has been established to coordinate the work of the ITACs and to advise the USTR and Secretary of Commerce on matters of common concern to the committees.[28] Members of the six ATAC committees are appointed by and serve at the pleasure of the USTR and Secretary of Agriculture.[29] ITAC and ATAC committees meet at the call of the USTR and the Secretaries of Commerce and Agriculture, respectively, as appropriate.[30]

When a particular trade agreement impacts the interests of a committee in any of the three tiers, that committee is required to produce a report on the agreement for the President, Congress, and the USTR at the conclusion of negotiations.[31] The report of the ACTPN and each relevant Tier 2 policy advisory committee must include an advisory opinion as to whether, and to what extent, the agreement promotes the economic interests of the United States and achieves applicable overall and principal negotiating objectives.[32] The report of each relevant Tier 3 technical/sectoral committee must include an advisory opinion as to whether the agreement provides for equity and reciprocity within the committee's covered sector.[33] Typically, both majority and minority views within a committee are reflected in committee reports, which are particularly useful to Congress when deciding whether to ratify a trade agreement.[34]

III. Overview of the Industry Trade Advisory Committees

What makes the Tier 3 Industry Trade Advisory Committees (ITACs) unique vis-à-vis Tier 1 and Tier 2 committees is that the ITACs were designed to be "an integral link between industry and the United States Government."[35] While Tier 1 and Tier 2 committees tend to cover more abstract, higher level policy areas, "U.S. Government policy makers rely on [ITAC] advisors to identify [technical and other] barriers [to trade] and to provide advice on key objectives and bargaining positions for multilateral, bilateral, and regional trade negotiations."[36] In essence, the ITACs, because they are sector-based, bring a greater degree of specificity and technicality to the trade advisory committee system than any of

27. *Id*. at 199.
28. *Id*.
29. *Id*.
30. 19 U.S.C. § 2155(d).
31. 19 U.S.C. § 2155(e)(1).
32. 19 U.S.C. § 2155(e)(2).
33. 19 U.S.C. § 2155(e)(3).
34. Interview with David Apol, Chief Counsel for Administrative Law, Office of the United States Trade Representative (October 25, 2013).
35. Operations Manual for the Industry Trade Advisory Committees, Prepared Jointly by the Industry Trade Advisory Center (U.S. Department of Commerce) and the Office of the Assistant U.S. Trade Representative for Intergovernmental Affairs and Public Liaison (USTR) (March, 2004) at IV.
36. *Id*.

the Tier 1 or Tier 2 committees.[37] Consequently, U.S. trade officials rely on ITACs in the development of trade policies and negotiating objectives.

The Office of the United States Trade Representative (USTR) and the U.S. Department of Commerce have promulgated ITAC membership eligibility requirements. "Eligibility to serve on an ITAC is limited to U.S. citizens who are not full-time employees of a governmental entity, who represent a U.S. entity,[38] and who are not registered with the Department of Justice under the Foreign Agents Registration Act."[39] Each ITAC member must also "serve, directly or indirectly, as the representative of a U.S. entity[40] that *trades internationally and is engaged in the manufacture of a product or the provision of a service (including retailing and other distribution services), or an association of such entities*" (emphasis added).[41] Because of the requirement that the entity with which an ITAC member is employed be engaged in "the import or export of goods or….services abroad,"[42] many individuals employed by other-than-industry actors (e.g. environmental non-governmental organizations or labor groups) are effectively precluded from becoming ITAC members.

Beyond the above membership eligibility criteria, the Office of the USTR and the U.S. Department of Commerce employ certain selection criteria when deciding on eligible individuals for ITAC appointments. As committee members are typically selected to represent their employer's or affiliated entity's interests on trade matters, a candidate's "knowledge and expertise of their industry and of trade related matters relevant to the work of the Committee" is considered.[43] The Office of the USTR and the U.S. Department of Commerce also consider criteria aimed at achieving balanced industry representation and realizing some form of committee diversity. As to the first objective, consideration is given to "balance among sectors, product lines, small, medium, and large firms and geographic areas."[44] As to the second objective, the USTR and the Secretary of Commerce "may from time to time appoint individuals representing

37. Interview with Office of the United States Trade Representative (USTR) "Official A" (November 18, 2013).

38. A U.S. entity is a firm incorporated in the United States (or an unincorporated U.S. firm with its principal place of business in the United States) that is controlled by U.S. citizens or by another U.S. entity. An entity is not a U.S. entity if 50 percent plus one share of its stock (if a corporation, or a similar ownership interest of an unincorporated entity) is controlled, directly or indirectly, by non-U.S. citizens or non-U.S. entities. Operations Manual for the Industry Trade Advisory Committees, *supra* note 35, at II.1.

39. *Id*.

40. For entities or corporations with 10 percent or greater non-U.S. ownership, the ITAC candidate must demonstrate at the time of nomination that this ownership interest does not constitute control and will not adversely affect his or her ability to serve as a trade advisor to the United States. *Id*.

41. *Id*.

42. *Id*.

43. *Id*. at II.2.

44. *Id*.

U.S. nongovernmental organizations to one or more Committees."[45] Such individuals must meet the membership eligibility requirements referenced above and must represent a U.S. entity[46] interested in the issues covered by the committee.[47] This second objective permits individuals employed by other-than-industry actors to get a seat at the table, because, as referenced above, the ITAC membership eligibility requirements otherwise exclude these individuals. However, as illustrated by the above quoted language, the decision to appoint other-than-industry representatives remains wholly within the discretion of the USTR and Secretary of Commerce. The selection criteria related to both the first and second objectives are usually specified within an ITAC's charter.[48]

Appointments to ITACs are made at the chartering of each committee and periodically throughout the duration of a committee's charter (which are generally valid for two years).[49] ITAC appointments are typically for the term of the committee's charter, however, members do ultimately serve at the pleasure of the USTR and the Secretary of Commerce.[50] The ITACs' charters cap membership strength at 50, the maximum permitted under the Federal Advisory Committee Act (FACA).[51]

Each ITAC designates a Chair, Vice Chair, and such additional Vice Chairs as may be determined necessary from its membership.[52] The Chair and Vice Chair(s) of an ITAC must be full-time employees of U.S. manufacturing or service companies that engage in international trade or of trade associations in which such firms participate.[53] It is also considered essential that Chairs and Vice Chairs possess expertise and interests in the Committee's technical/sectoral area.[54] The Chair of each ITAC participates in the Committee of Chairs, referenced above.[55] Additionally, the Chair of each ITAC (except the ITACs on Customs Matters and Trade Facilitation, Intellectual Property Rights, and Standards and Technical Trade Barriers) may designate one member of their committee to serve

45. *Id*.

46. *See* note 38 and note 40, *supra*. For other-than-industry candidates, 50 percent of their employer's or affiliated entity's annual revenue must be attributable to nongovernmental U.S. sources. *Id*.

47. *Id*.

48. The Charter of the Chemicals, Pharmaceuticals, Health Science Products and Services ITAC (ITAC 3), for example, states that the Committee must have at least one environmental representative and that "secondary selection criteria are ensuring that the Committee is balanced in terms of points of view, demographics, geography, and company size." *See* Charter of the Industry Trade Advisory Committee on Chemicals, Pharmaceuticals, Health/Science Products and Services (U.S. Department of Commerce and the Office of the United States Trade Representative).

49. Operations Manual for the Industry Trade Advisory Committees, *supra* note 35, at II.4.

50. *Id*.

51. *Id*. at II.5.

52. *Id*. at III.1.

53. *Id*.

54. *Id*.

55. *Id*. at III.3.

as a non-voting representative to other ITACs for the purpose of information sharing.[56]

IV. Application of the Federal Advisory Committee Act

The Industry Trade Advisory Committees (ITACs) are federally chartered advisory committees and are therefore subject to the requirements of the Federal Advisory Committee Act (FACA).[57] While the FACA has many relevant provisions in the context of the trade advisory committee system, it is important for the purposes of this article to focus on just one – the requirement that each federal advisory committee be fairly balanced in its composition.

The FACA was passed by Congress in 1972 as a response to the proliferation of federal advisory committees and concerns about unaccountability and bias.[58] A chief concern was the potential for agency capture by well-organized and overrepresented groups, especially because advisory committees tended to draw from select demographics, resulting in homogenous memberships.[59] Accordingly, the FACA requires "the membership of [an] advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee."[60] Ultimately, this "fair balance" requirement is intended to ensure that persons or groups directly affected by the work of a particular advisory committee be represented on that committee.[61]

The Trade Act of 1974, the legislation which created the trade advisory committee system, states outright[62] that the provisions of the FACA apply to trade advisory committees, with limited exceptions.[63] That being said, there is a fair amount of ambiguity as to how the FACA's "fair balance" requirement is to be construed in the context of the trade advisory committee system and specifically the Industry Trade Advisory Committees (ITACs). This is because the Trade Act only requires the

56. *Id*.

57. *Id*. at I.1.

58. Daniel E. Walters, "The Justiciability of Fair Balance Under the Federal Advisory Committee Act: Toward a Deliberative Process Approach," 110 Mich. L. Rev. 677 (February, 2012) at 680.

59. *Id*. at 679-680.

60. 5 U.S.C. app. 2, Section 5(b)(2).

61. "International Trade, Advisory Committee System Should be Updated to Better Serve U.S. Policy Needs," Report to the Ranking Minority Member, Committee on Finance, U.S. Senate, United States General Accounting Office (September, 2002) at 57.

62. 19 U.S.C. § 2155(f).

63. Common among committees across the three-tier trade advisory committee system is that committee meetings are exempt from the provisions of the FACA covering open meetings, public notice, public participation, and public availability of documents, "whenever and to the extent it is determined by the President or the President's designee that such meetings will be concerned with matters the disclosure of which would seriously compromise the development by the United States Government of trade policy, priorities, negotiating objectives, or bargaining positions." 19 U.S.C. § 2155(f)(2)(A).

Tier 1 Advisory Committee for Trade Policy and Negotiations (ACTPN) to include both industry and other-than-industry interests.[64] However, "the Trade Act and its legislative history do not specifically discuss how the fair balance requirement of [the] FACA…appl[ies] to…tier-2 and tier-3 committees."[65] The statute requires that Tier 2 general policy advisory committees "be representative of all industry, labor, agricultural, service, investment, defense, and other interests, including small business interests," insofar as is practicable.[66] As to Tier 3 technical/sectoral advisory committees, the statute requires committees, "insofar as is practicable," to "be representative of all industry, labor, agricultural, or service interests (including small business interests) in the sector or functional areas concerned."[67] This language, by excluding the "other interests" found in the provision for Tier 2 committees, seemingly suggests that the ITACs should be composed of individuals involved in a committee's particular sector and does not indicate an intention to expand membership to include other-than-industry interests.[68]

The legislative history related to the trade advisory committee system produces a mixed record of legislative intent regarding the FACA's "fair balance" requirement in the context of Tier 2 and Tier 3 committees. The Senate report accompanying the Trade Act of 1974 states that Tier 3 technical/sectoral committees were to "be representative of the producing sectors of our economy" so as to "strengthen the hand of U.S. negotiators by improving their knowledge and familiarity with the problems domestic producers face in obtaining access to foreign markets."[69] The House report similarly stated that in past trade negotiations "there has not been adequate input from U.S. producers who are in the best position to assess the effects of removing U.S. and foreign trade barriers on their particular products."[70] This language would support the view that the FACA's "fair balance" requirement must be contextualized within the spectrum of industry interests pertinent to an ITAC's technical/sectoral focus (i.e. fair balance among industry representatives). Nevertheless, the legislative history of the 1979 amendments to the Trade Act of 1974 undermine this view. The Senate report, for example, states that in estab-

64. "International Trade, Advisory Committee System Should be Updated to Better Serve U.S. Policy Needs," *supra* note 61, at 59. The ACTPN must include representatives of non-Federal governments, labor, industry, agriculture, small business, service industries, retailers, non-governmental environmental and conservation organizations, and consumer interests. *See* 19 U.S.C. § 2155(b)(1).

65. "International Trade, Advisory Committee System Should be Updated to Better Serve U.S. Policy Needs," *supra* note 61, at 59.

66. 19 U.S.C. § 2155(c)(1).

67. 19 U.S.C. § 2155(c)(2).

68. "International Trade, Advisory Committee System Should be Updated to Better Serve U.S. Policy Needs," *supra* note 61, at 60.

69. S.Rep. 1298, 93d Cong., 2d Sess. 102 (1974). *See also* Federal Register / Vol. 75, No. 80 / Tuesday, April 27, 2010 [22121] Docket Number: 100416189-0189-01.

70. "International Trade, Advisory Committee System Should be Updated to Better Serve U.S. Policy. Needs," *supra* note 61, at 60.

lishing the membership of Tier 2 and Tier 3 committees, each committee was expected to "fully represent the interests of the Government, small business, retailers, wholesalers, distributors, consumers and the general public, as well as labor, industry, agriculture and services, as the case may be."[71] The House report similarly suggests that "[a]ll major recognized organizations, regardless of their point of view, should be invited to participate in appropriate advisory groups."[72] Certainly, "these statements are consistent with the legislative history of [the] FACA, which shows that the focus of committee membership was intended to be on the groups directly affected by the work of a committee, rather than whether those groups represent business or nonbusiness interests."[73]

In the context of the ITACs, the ultimate question which emerges as a result of this statutory language and legislative history is whether the FACA's "fair balance" requirement can be satisfied by appointing individuals with diverse industry perspectives within a particular sector or whether the appointment of individuals with related other-than-industry perspectives is required.

V. Industry Domination of the Industry Trade Advisory Committees and Associated Problems

A perusal of Industry Trade Advisory Committee (ITAC) membership rosters[74] leads to the generally uncontroversial conclusion that the ITACs have largely been filled with individuals representing industry firms and associations rather than other-than-industry actors. The United States General Accounting Office (GAO) reached this conclusion in a 2002 report focusing exclusively on the trade advisory committee system. According to the GAO, "most nonbusiness members currently participating in the system are placed on a few committees in the second tier, where committees are less active and productive than in the third tier."[75] The GAO report also noted that "new stakeholders in the trade process, such as public health, development, and gender advocates, have limited or no participation in the formal committee system, even though topics such as intellectual property are of interest to them."[76] In particular, the lack of robust public health representation[77] on the ITACs has given rise

71. *Id*.
72. *Id*.
73. *Id*.
74. *See* "Industry Trade Advisory Committees," U.S. Department of Commerce. Available at: http://trade.gov/itac/committees/index.asp.
75. "International Trade, Advisory Committee System Should be Updated to Better Serve U.S. Policy Needs," *supra* note 61, at 40.
76. *Id*.
77. A 2005 analysis by a public health non-governmental organization (the Center for Policy Analysis on Trade and Health, CPATH) found that the number of committee members from the pharmaceutical, tobacco, alcohol, processed food, and health services/products industries totaled 42, across 25 committees. In particular, the pharmaceutical industry had 20 representatives and the tobacco industry had seven.

to intense debate[78] about the role of ITACs and the justification for excluding other-than-industry perspectives. This debate has become even more salient in light of evidence of tangible consequences flowing from the lack of other-than-industry perspectives on the ITACs.

Proponents of other-than-industry representation on ITACs start with the basic premise that it is dangerous when there are no voices to "counter commercial interests supporting trade liberalization for all products."[79] This is because "the core justifications for liberalized trade – to make products more readily available to consumers, worldwide, at lower prices – do not [logically] apply to the trade in [all] products."[80] Tobacco products, for example, "cause significant harms, including premature death, even when used exactly as intended and expected."[81] Instead of producing consumer benefits, liberalized trade in and the resulting increased availability of tobacco products lead to significant health risks for consumers.[82] However, tobacco industry interests have maintained a prominent place at the table in discussions pertaining to trade policy formulation and the development of trade negotiation objectives, raising the ire of public health groups and even members of the U.S. Senate.[83] In the context of the ongoing Trans-Pacific Partnership (TPP) talks, for example, the most recent U.S. proposal on tobacco does not explicitly exempt

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Additionally, the Chair of the Consumer Goods ITAC (ITAC 4) was from the Altria Group (the parent company of Philip Morris USA) and the Chair of the Services and Finance ITAC (ITAC 10) was from the U.S. Coalition of Service Industries (the largest U.S. lobbying group for services companies). In comparison, there were no public health representatives on ITACs in 2005. An updated analysis from 2009 showed that health-related industries increased representation to 65 committee members, across 31 committees. While tobacco industry representation declined, pharmaceutical industry representation increased to 27 committee members. In comparison, two individuals associated with public health entities were appointed to two different advisory committees with coverage of pharmaceutical issues by 2009. Comments on Adding Public Health to the Scope of Viewpoints Represented on the Industry Trade Advisory Committees, Center for Policy Analysis on Trade and Health (CPATH) (May 25, 2010).

78. For example, during the 2004 Congressional deliberations on the U.S.-Australia Free Trade Agreement, members of Congress expressed concerns regarding the membership imbalance on trade advisory committees and the lack of representation of public health organizations. *Id*. Also, in 2009, Congressmen Chris Van Hollen (D-MD) and Lloyd Doggett (D-TX) introduced the Public Health Trade Advisory Committee Act, which would have amended the Trade Act of 1974 to require the creation of a Tier 2 Public Health Advisory Committee. "Van Hollen, Doggett Introduce the Public Health Trade Advisory Committee Act," Press Releases, Congressman Chris Van Hollen, May 6, 2009. Available at: http://vanhollen.house.gov/news/documentsingle.aspx?DocumentID=143193#Comments.

79. Comments on the Scope of Viewpoints Represented on Industry Trade Advisory Committees, Campaign for Tobacco-Free Kids (May 25, 2010).

80. *Id*.

81. *Id*.

82. *Id*.

83. *See* Letter to Ambassador Froman, November 12, 2013. Available at: http://insidetrade.com/iwpfile.html?file=nov2013%2Fwto2013_3432a.pdf.

tobacco control measures from other TPP obligations aimed at reducing barriers to trade,[84] a point of contention recently addressed in a letter by 12 U.S. senators to United States Trade Representative (USTR) Michael Froman.[85] Currently, only one other-than-industry representative serves on the Tier 3 committee that covers tobacco-related issues.[86]

Another example of industry's strong influence in the trade arena is in the area of intellectual property rights (IPR). While the purpose of IP law is to promote the progress of science and the arts by rewarding inventors and artists with a set of exclusive rights, users of patented and copyrighted products may have a stake in limiting the extent and/or duration of those rights.[87] However, "because rights holders generally see the expansion of exclusive rights as beneficial to them, as representatives of IP industries [in the trade advisory committee system] . . . they are likely to call for [the] adoption of provisions in international agreements that . . . not only increase their market access, but also expand the scope and strength of exclusive rights."[88] Accordingly, many IPR chapters in U.S. free trade agreements tend to reflect rights holders' objectives at the expense of the public interest.[89] The U.S.-Australia Free Trade Agreement (FTA), for example, requires the United States and Australia to grant copyright owners the exclusive right "to authorize or prohibit all reproductions, in any manner or form, permanent or temporary (including temporary storage in material form)."[90] Because the U.S. Copyright Act does not extend protection to temporary copies of a work that are of a transitory nature,[91] the U.S.-Australia FTA, by granting copyright owners the right to temporary or transitory reproductions, exposes internet service providers, internet-based service providers (e.g. online music stores), and consumers to liability for copyright infringement during the course of routine activities.[92] The U.S.-Australia FTA also contains numerous

84. The concern is that provisions of the eventual TPP Agreement could be used as a basis for threatening or following through with legal action to prevent the enforcement of nondiscriminatory tobacco control measures. Currently, tobacco control measures fall under the "general exceptions" chapter of the TPP.

85. Letter to Ambassador Froman, *supra* note 83.

86. *See* "ATAC for Trade in Tobacco, Cotton, and Peanuts," United States Department of Agriculture. Available at: http://www.fas.usda.gov/itp/apac-atacs/atac-tobacco.asp.

87. Comments on Public Knowledge.

88. *Id*.

89. *Id*. *See also* Timothy B. Lee, "Here's why Obama trade negotiators push the interests of Hollywood and drug companies," Washington Post (November 26, 2013). Available at: http://www.washingtonpost.com/blogs/the-switch/wp/2013/11/26/heres-why-obama-trade-negotiators-push-the-interests-of-hollywood-and-drug-companies/.

90. Comments on Public Knowledge, *supra* note 87. *See also* Article 17.4 of the U.S.-Australia Free Trade Agreement. Available at: http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file469_5141.pdf.

91. *See* H.R.Rep. No. 94-1476 at 53 (noting that Congress intended to exclude transitory reproductions under the U.S. copyright regime).

92. Comments on Public Knowledge, *supra* note 87. Liability would arise from

IPR provisions favorable to pharmaceutical manufacturers, including a provision barring generic drug makers from citing safety or efficacy information originally submitted by brand-name drug makers for a period of five years after the information was submitted when seeking approval for their drugs.[93] This provision undoubtedly makes it difficult for generic drug makers to enter the market.[94] Today, ITAC 15, which focuses on intellectual property issues, is totally devoid of public interest groups, academics, and other non-industry experts.[95]

A third and final example is in the area of environment and related to a 2006 European Union (E.U.) regulation on chemicals known as "REACH" (Registration, Evaluation, and Authorization of Chemicals). In 2009, members of the Tier 2 Trade and Environmental Policy Advisory Committee (TEPAC) learned that certain ITAC members had submitted a formal recommendation to the Office of the USTR and the U.S. Department of Commerce urging the commencement of dispute settlement proceedings at the World Trade Organization (WTO) in response to REACH.[96] While certain environmental non-governmental organizations represented on the TEPAC, including the Center for International Environmental Law (CIEL), supported REACH,[97] the now former President of the CIEL alleged that the Office of the USTR initially resisted requests by TEPAC members to receive copies of the recommendation, only later sharing the letter. This delay allegedly affected the TEPAC's ability to respond in a timely manner.[98] According to the President of the CIEL, the recommendation "followed years of aggressive advocacy by ITAC-3."[99]

Despite these and other instances where industry interests have dominated in discrete areas of trade policy, industry has kept its all but exclusive place within the ITACs. This result has been achieved through advancing several arguments as to why other-than-industry voices should be excluded from the ITACs. The first argument is a legal one. It is suggested that the various ITACs, stacked overwhelmingly with employees of industry firms and associations, are already "fairly balanced" pursuant to the Federal Advisory Committee Act (FACA) based on the purpose of the committees – to provide industry advice and perspectives to U.S.

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the storage of protected works in digital form, etc.

93. Timothy B. Lee, *supra* note 89.

94. *Id*.

95. *Id*.

96. Statement of Daniel Magraw Jr., President of the Center for International Environmental Law, Before the U.S. House of Representatives Committee on Ways and Means Subcommittee on Trade, Hearing on the Trade Advisory Committee System (July 21, 2009).

97. Cited benefits to REACH included free access to health and safety information; harmonized rules across a market of nearly 500 million consumers; the availability of safer ingredients and products to U.S. manufacturers, workers, and consumers; and competitive advantages for U.S. exporters that already offer superior products. *Id*.

98. *Id*.

99. *Id*.

trade policymakers and negotiators.[100] This argument stems from the fact that the FACA requires an "advisory committee to be fairly balanced in terms of…*the functions to be performed by the . . . committee*."[101] As suggested by Daniel E. Walters, the FACA "can be read to impose a requirement that the memberships of committees meet a substantive standard of deliberative quality, where members simply put forth a fair balance of points of view."[102] Per this reading of the FACA, and because the Trade Act of 1974 imposes no representation requirements for the ITACs, there is no legal imperative to include other-than-industry viewpoints. In light of disputes within various sectors regarding the correct balance of industry representation itself,[103] one could see how the "fair balance" requirement of the FACA would still be relevant in a committee comprised entirely of industry representatives.

The second argument in favor of other-than-industry exclusion from the ITACs relates to the structure of the trade advisory committee system. Specifically, the idea has been advanced that other-than-industry voices "have a place in the system already"[104] – namely Tier 1 and Tier 2 committees[105] – and that the ITACs should remain the exclusive domain of industry points of view. Many of the ITACs "have a membership that is already so diverse and so complicated that it is enormously difficult to provide information to [the Office of the] USTR that both reflects a consensus and is also helpful from a technical standpoint."[106] "Including even more representatives on . . . ITACs, which are designed to provide . . . technical nuts and bolts advice, would complicate the mission so substantially as to make the ITACs effectively useless."[107] A major concern here is that ITACs would become "unproductive 'debating clubs'" and

100. Interview with Office of the United States Trade Representative (USTR) "Official B" (November 20, 2013).

101. 5 U.S.C. app. 2, Section 5(b)(2).

102. Daniel E. Walters, *supra* note 58, at 695.

103. For example, in response to a Federal Register notice on the scope of ITAC representation promulgated by the Office of the USTR and the U.S. Department of Commerce, the Generic Pharmaceutical Association (GPhA) stated that it, "would like to see more balance in the representation of the pharmaceutical industry on the ITACs [because]…the brand industry has six seats, while the generic industry only has one." Re: Scope of Viewpoints Represented on the Industry Trade Advisory Committees (ITA-2010-0001), Generic Pharmaceutical Association (May 25, 2010).

104. Testimony of Brian T. Petty, Senior Vice President, Government Affairs International Association of Drilling Contractors; Chairman, Industry Trade Advisory Committee 02, Automotive Equipment and Capital Goods. U.S. House of Representatives, Committee on Ways and Means, Subcommittee on Trade (July 21, 2009).

105. Tier 1 and Tier 2 committees have a much greater other-than-industry presence as a proportion of committee memberships, with some committees, such as the Tier 2 Intergovernmental Policy Advisory Committee (IGPAC) and Labor Advisory Committee (LAC), comprised almost exclusively of other-than-industry representatives.

106. Congressman Geoff Davis (R-KY). U.S. House of Representatives, Committee on Ways and Means, Subcommittee on Trade (July 21, 2009).

107. *Id*.

that important industry voices would be drowned out.[108] A related concern is that valuable industry input would be "diluted" by other-than-industry stakeholders[109] who do not have the technical expertise to advise the government.[110]

The third argument in favor of other-than-industry exclusion from the ITACs is policy-based and relates to the idea that industry "business[men] would be less forthcoming about discussing trade issues because of concern that nonbusiness representatives might release sensitive information to the public."[111] According to one ITAC industry representative, "allowing non-industry oriented individuals to participate at the technical level would seriously undermine [a] committee's ability to accomplish its mission as some industry experts would no longer be willing to actively and openly participate."[112]

VI. Legal Challenges

The strategy of using the courts to gain access to Industry Trade Advisory Committees (ITACs) has produced mixed results for the other-than-industry groups looking to gain a seat at the table. As a result of legal challenges to the industry-only composition of several of the ITACs, two committees[113] gained environmental representatives.[114] An additional committee[115] was also required to take on an environmental representative as a result of a settlement agreement with the U.S. Government.[116] However, outside of these three committees, the extent to

108. "International Trade, Advisory Committee System Should be Updated to Better Serve U.S. Policy Needs," *supra* note 61, at 43.

109. Comments in Response to Request for Public Comment on the Scope of Viewpoints Represented on the Industry Trade Advisory Committees, Technical Materials, Inc. (May 24, 2010).

110. Request for Comments: Scope of Viewpoints Represented on the Industry Trade Advisory Committees, American Association of Exporters and Importers (May 24, 2010).

111. "International Trade, Advisory Committee System Should be Updated to Better Serve U.S. Policy Needs," *supra* note 61, at 43.

112. Docket Number ITA-2010-0001, Fanwood Chemical, Inc. (May 7, 2010).

113. The Industry Sector Advisory Committee on Lumber and Wood Products (ISAC 10) and the Industry Sector Advisory Committee on Paper and Paper Products (ISAC 12) are now the Industry Trade Advisory Committee on Forest Products (ITAC 7).

114. "International Trade, Advisory Committee System Should be Updated to Better Serve U.S. Policy Needs," *supra* note 61, at 42.

115. The Industry Sector Advisory Committee on Chemicals and Allied Products (ISAC 3).

116. After filing in the District Court for the Western District of Washington, the Washington Toxics Coalition entered into a settlement agreement with the Office of the United States Trade Representative and the U.S. Department of Commerce. The parties agreed that the two government agencies would make a good faith effort to expedite the appointment of one or more qualified environmental representatives to the Industry Sector Advisory Committee on Chemicals and Allied Products (ISAC 3). "International Trade, Advisory Committee System Should be Updated to Better Serve U.S. Policy Needs," *supra* note 61, at 62.

which nonbusiness interests must be represented on ITACs has not been completely resolved.[117] Most recently, in *Center for Policy Analysis on Trade Health (CPATH) v. Office of the United States Trade Representative*, the Ninth Circuit held that because the Federal Advisory Committee Act (FACA) and the Trade Act of 1974 lack standards suggesting what Congress intended when it required all advisory committees to be "fairly balanced," the determination is best left to the executive and legislative branches of government.[118] A review of this history suggests that while other-than-industry groups have mounted successful legal challenges to various ITACs' compositions in a limited number of cases, the prospect of future legal challenges remains unlikely.

Northwest Ecosystem Alliance v. Office of the United States Trade Representative,[119] brought before the District Court for the Western District of Washington, represents the highpoint in other-than-industry litigation efforts against the industry-only nature of ITAC membership. In that case, environmental organizations with an interest in forest preservation, sued the Office of the United States Trade Representative (USTR) and the U.S. Department of Commerce seeking, inter alia, a declaration that two Industry Sector Advisory Committees (ISACs) (the ITACs' predecessors) were not "fairly balanced" within the meaning of the FACA and an injunction preventing the operation of these ISACs until at least one environmental representative was appointed to each of them.[120] The two committees under scrutiny, the ISAC on Lumber and Wood Products (ISAC 10) and the ISAC on Paper and Paper Products (ISAC 12) (the "forest product ISACs") had entirely industry-based memberships, with representatives hailing from the wood and paper industries, respectively.[121]

In adopting the plaintiffs' argument that their interests were impermissibly undermined by the exclusion of environmental representation on the forest product ISACs,[122] the Court noted that these ISACs "routinely advise the government on trade issues that affect the environment nationally and internationally."[123] The Court then found that the plaintiffs' opinions on these matters were "directly contrary" to those of the forest product ISACs' current members.[124] Because the Office of the USTR did "not dispute that matters affecting the wood and paper products sector [were] dramatically and inextricably intertwined with… environmental health [issues]" of concern to the plaintiffs, the Court re-

117. *Id*. at 42.

118. Center for Policy Analysis on Trade Health (CPATH) v. Office of the United States Trade Representative, 540 F.3d 940, Ninth Circuit (October 8, 2008) at 945.

119. Northwest Ecosystem Alliance v. Office of the United States Trade Representative, 1999 WL 33526001, W.D. Washington, November 9, 1999 (unpublished).

120. *Id*. at 1.

121. *Id*.

122. *Id*. at 8.

123. *Id*. at 5.

124. *Id*.

jected the Office of the USTR's argument that the "fair balance" requirement of the FACA had been fulfilled.[125] In doing so the Court embraced three rationales.

The first rationale adopted by the Court was that the FACA required balanced representation *within each* advisory committee, not *among all* advisory committees.[126] Accordingly, "fair balance" concerns could "not [be] alleviated by the existence of committees established under different sections of the Trade Act [of 1974]."[127] The Court then looked to the fact that "the information provided to sectoral committees . . . is of a different kind and character from that received by the general public."[128] This is because information discussed and produced within the trade advisory committee system is exempted from the FACA's disclosure requirements.[129] ISAC members are thus privy to information and advice that non-members cannot access.[130] The third rationale adopted by the Court was that the nature and function of the forest product ISACs differed from those of other Trade Act committees, including the Trade and Environmental Policy Advisory Committee (TEPAC).[131] Specifically, while the TEPAC addressed more generalized trade concerns, it only incidentally touched on trade issues that affect forest products.[132] In recognizing the Office of the USTR's failure to meet the FACA's "fair balance" requirement as to the forest product ISACs, the Court ordered it to "make a good faith effort to expedite the appointment of at least one properly qualified environmental representative to each of [these] ISACs as soon as possible."[133]

In stark contrast to the successful outcome for other-than-industry groups realized in *Northwest Ecosystem Alliance*, the Ninth Circuit's justiciability analysis in the *CPATH* case all but slammed the door on future legal challenges to the composition of ITACs. The case arose following a spurned request by the plaintiff, a public health non-governmental organization, that the Office of the USTR appoint a representative from the public health community to each of the ITACs and make available confidential trade information disseminated in the ITACs.[134] The case focused on the plaintiff's contention that the ITACs did not have a single member representing the public health community and that accordingly they were

125. The Office of the USTR argued that the FACA's "fair balance" requirement was fulfilled so long as membership of a committee was broadly representative of the sector for which it was established. *Id*.

126. *Id*. at 6.

127. *Id*.

128. *Id*.

129. *Id*.

130. *Id*. at 8.

131. *Id*. at 6.

132. *Id*.

133. *Id*. at 8.

134. Center for Policy Analysis on Trade Health (CPATH) v. Office of the United States Trade Representative, *supra* note 118, at 943.

not fairly balanced as required by the FACA.[135] The Court held that "the Trade Act and [the] FACA … provide … no meaningful standards to apply when considering whether [the Office of the] USTR complied with the 'fairly balanced' requirement imposed by [the] FACA,"[136] meaning that the plaintiff's claim was non-justiciable and had to be resolved by the political branches.

In reaching its conclusion, the Ninth Circuit focused on three arguments. First, the Court noted that the FACA "does not … articulate what perspectives must be considered when determining if [an] advisory committee is fairly balanced."[137] Second, the Court found that "while the Trade Act states that the ITACs 'shall, insofar as is practicable, be representative of all industry, labor, agricultural, or service interests (including small business interests) in the sector or functional areas concerned,' … that section provides no standards … to determine when it is, or when it is not, practicable to appoint a certain interest onto one of the ITACs."[138] Third and finally, the Court concluded that the Trade Act's legislative history suggesting that the ITACs should be "representative of the producing sectors of our economy" "provides no guidance."[139] The Court determined that it was "in no position" to gauge representativeness and compliance with the Trade Act.[140] It therefore left this determination to the Legislative and Executive branches.

VII. Actions by Congress and the Executive

Both the legislative and executive branches have toyed with various ideas as to how to bring about "fair balance" representation on Industry Trade Advisory Committees (ITACs). While executive branch actions have made more headlines than those taken by the legislature, neither branch has acted with particular vigor in this area. As will be addressed in Part VIII, now that the Court has adopted a deferential view on the "fair balance" question, congressional and executive branch actions have become all the more important.

Action by the legislature has been somewhat pronounced in the area of public health representation within the trade advisory committee system. In June, 2006, six senators and nine congressional representatives urged the Office of the United States Trade Representative (USTR) to appoint a public health representative to the Tier 1 Advisory Committee for Trade Policy and Negotiations (ACTPN) and to create a new Tier 2 public health advisory committee to address issues such as health care, global health, environmental health, and other public health-related

135. *Id*.
136. *Id*. at 945.
137. *Id*.
138. *Id*.
139. *Id*.
140. *Id*.

issues.[141] This idea was expanded in 2009 by Congressmen Chris Van Hollen (D-MD) and Lloyd Doggett (D-TX), who introduced the Public Health Trade Advisory Committee Act, which never passed.[142] The legislation sought to "elevat[e] the issue of public health within [the trade advisory committee] system"[143] and would have amended the Trade Act of 1974 to require that public health organizations be represented on the ACTPN and other relevant technical/sectoral advisory committees and to mandate the creation of a Tier 2 Public Health Advisory Committee on Trade (PHACT).[144] The PHACT would have been the first legislatively required Tier 2 advisory committee and would have also constituted the first Tier 2 committee to be exclusively composed, by law, of non-governmental organizations.[145] Under the proposed legislation, members were required to represent organizations in the United States with an interest in improving and protecting public health and were required to possess expertise in one of a variety of different public-health related areas.[146] Individuals who represented commercial or for-profit entities, even ones interested in health services or regulations, could not serve on the PHACT.[147] Additionally, the proposed legislation required the President to "ensure that membership of the [PHACT] [was] of sufficient size to be reasonably representative of the range of organizations and persons in the United States interested in public health."[148] Not later than the date on which the President notified Congress of his intention to enter into a trade agreement, the PHACT was required to submit a committee report to the President, Congress, and the USTR. This report was required to include an advisory opinion assessing, inter alia, the extent to which the trade agreement promoted public health and the goal of protecting the environment in the United States and any other country affected by the agreement.[149] Despite its attention to detail on the Tier 2 PHACT, however, the proposed legislation did not require that public health representatives be placed on ITACs.

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141. Comments on Adding Public Health to the Scope of Viewpoints Represented on the Industry Trade Advisory Committees, *supra* note 77.

142. "Van Hollen, Doggett Introduce the Public Health Trade Advisory Committee Act," *supra* note 78.

143. *Id*.

144. 111th Congress, 1st Session, HR 2293 (May 6, 2009), Introduced by Van Hollen and Doggett.

145. "Van Hollen, Doggett Introduce the Public Health Trade Advisory Committee Act," *supra* note 78.

146. Approved areas of expertise under the statute were 1) the relationship between trade and sustainable economic development; 2) public health regulations; 3) vital human services and systems; 4) occupational safety and health; and 5) affordable pharmaceuticals. 111th Congress, 1st Session, HR 2293 (May 6, 2009), *supra* note 144, at Section 1, Paragraph 5(A).

147. *Id*. at Section 1, Paragraph 5(C).

148. *Id*. at Section 1, Paragraph 5(B).

149. *Id*. at Section 4, Paragraph (e)(1).

The executive branch has also contemplated the diversification of the trade advisory committee system. Speaking in 2009 before the U.S. House of Representatives, Committee on Ways and Means, Subcommittee on Trade, then Assistant USTR for Intergovernmental Affairs and Public Engagement Lisa Garcia noted that the Office of the USTR was working with the White House to identify candidates for the ACTPN, including representatives of consumer and public health interests.[150] Garcia also noted that the Office of the USTR would "seek additional opportunities for representatives of civil society, consumer groups, and public health interests . . . on the Tier Two committees" and that "NGO representatives have . . . been added to some of the Tier 3 committees where appropriate."[151] Following Garcia's testimony, the Office of the USTR and the U.S. Department of Commerce published a Federal Register notice seeking comments on the scope of appropriate viewpoints to be represented on the ITACs.[152] The Federal Register notice recognized that "[the Office of the] USTR and [U.S. Department of] Commerce, with minor exceptions, have limited the viewpoints represented on the ITACs to those of industry stakeholders based on the need to obtain technical and detailed sectoral advice from the representatives of the producing sectors and [that] the existence of other fora [i.e. Tier 1 and Tier 2 committees] within the [Office of the] USTR-administered trade advisory committee system…provide for advice from representatives of other viewpoints."[153] While the Federal Register notice was the result of "multiple inquiries [received by the Office of the USTR and U.S. Department of Commerce] regarding the appropriate viewpoints to be represented on the ITACs,"[154] it is unclear if any tangible agency actions followed from the numerous comments received. However, the executive branch's consideration of a new Tier 2 Public Interest Advisory Committee, which would serve as a catchall committee for other-than-industry representatives that would be ill-placed elsewhere within the trade advisory committee system, likely stemmed from these comments.[155] Another suggestion which is strongly promoted by labor unions[156] is to place additional labor representatives

150. Statement of Lisa Garcia, Assistant U.S. Trade Representative for Intergovernmental Affairs & Public Engagement, Before the House Ways and Means Committee, Hearing on Trade Advisory Committee System (July 21, 2009).

151. *Id*.

152. Federal Register / Vol. 75, No. 80 / Tuesday, April 27, 2010, *supra* note 69.

153. *Id*.

154. *Id*.

155. Interview with David Apol, Chief Counsel for Administrative Law, Office of the United States Trade Representative (USTR) (November 20, 2013).

156. In response to the 2010 Federal Register notice produced by the Office of the United States Trade Representative and U.S. Department of Commerce, an AFL-CIO Global Economic Policy Specialist suggested that, "unions can contribute substantially to the deliberations of many of the ITACs," including ITAC 1 (Aerospace Equipment), ITAC 2 (Automotive Equipment), ITAC 6 (Energy and Energy Services), ITAC 7 (Forestry Products), ITAC 8 (Information and Communications Technologies, Services and Electronic Commerce), ITAC 9 (Nonferrous Metals),

on Tier 3 advisory committees. In advancing this idea, labor groups have cited to language in the Trade Act of 1974,[157] which states that Tier 3 committees are to be balanced with individuals from certain groups that have developed expertise on specific ITAC issue areas, including labor.[158] Additional labor representation on Tier 3 committees would be in addition to the already existing Tier 2 Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC).

In addition to reconsidering ITAC composition, the executive branch has also been keen to highlight steps it has taken to advance overall transparency, engagement, and inclusiveness in the trade policy formulation process. The advanced premise is that, while the question of "fair balance" representation on the ITACs remains important, the "formal structure [of the trade advisory committee system] isn't the only game in town,"[159] and there are numerous ways to effectuate change within the trade policy arena. As stated in its 2010 Trade Policy Agenda and 2009 Annual Report, "broadening opportunities for public input and increasing the transparency of trade policy is a key priority of [the Office of the] USTR"[160] and the agency has sought to expand opportunities for engagement with trade issues through a variety of tools including a new interactive website,[161] weekly e-newsletters, Federal Register notices,[162]

ITAC 12 (Steel), ITAC 14 (Customs Matters and Trade Facilitation), ITAC 15 (Intellectual Property Rights), and ITAC 16 (Standards and Technical Trade Barriers). Docket Number ITA-2010-0001, USTR and Department of Commerce Request for Comment on the appropriate scope of representation on the ITACs (May 25, 2010).

157. 19 U.S.C. § 2155(c)(2) states that, "The President shall establish such sectoral or functional advisory committees as may be appropriate. Such committees shall, insofar as is practicable, be representative of all industry, *labor*, agricultural, or service interests (including small business interests) in the sector or functional areas concerned."

158. Comments of the International Association of Machinists and Aerospace Workers Request for Public Comment on the Scope of Viewpoints Represented on the Industry Trade Advisory Committees, International Association of Machinists and Aerospace Workers (IAM) AFL-CIO (May 25, 2010).

159. Congressman Kevin Brady (R-TX). U.S. House of Representatives, Committee on Ways and Means, Subcommittee on Trade (July 21, 2009).

160. 2010 Trade Policy Agenda and 2009 Annual Report, *supra* note 2, at 194.

161. "Interactive tools on the site allow the public to participate more fully in [the Office of the] USTR's day-to-day operation. People can share their questions through the Ask the Ambassador feature, and see answers on the blog. [Also,] a new Share Your Stories feature serves as a venue for sharing how trade impacts and benefits daily life." *Id*. at 195.

162. "Throughout 2009, the [Office of the] USTR…issued Federal Register Notices online to solicit public comment, and also held public hearings in Washington, DC regarding a wide array of trade policy initiatives. [Also,] for the first time, public comments received in response to Federal Register Notices [were made]…available for inspection online at http://www.regulations.gov." *Id*.

increased transparency regarding specific policy initiatives, and an "open door policy"[163] (e.g. meetings with a broad array of stakeholders).[164]

VIII. Looking Forward

Looking forward, it is clear that any compositional changes to the Industry Trade Advisory Committees (ITACs) will be through the political branches of government. Currently, the main movement on this issue has taken place within the executive branch, which has advanced the idea of a new Tier 2 Public Interest Advisory Committee[165] and increased representation for labor on Tier 3 advisory committees. While adding labor representatives to Tier 3 committees is consistent with the purpose of the Federal Advisory Committee Act (FACA), and is responsive to concerns that have been raised about lack of other-than-industry representation on the ITACs, creating an additional Tier 2 general policy committee for public interest groups is not. Here, the ostensible aim of the Office of the USTR is to make everyone happy by adding an additional forum for other-than-industry voices, while maintaining the ITACs as the exclusive domain of industry (with the possible exception of labor). However, while a dedicated catchall public interest advisory committee within the Tier 2 branch solves the problem of where to put other-than-industry representatives that would be misplaced in other Tier 2 committees, there are some serious drawbacks to this approach which should be considered.

The first drawback, as intimated above, is that adding a Tier 2 Public Interest Advisory Committee doesn't address the concerns raised about the lack of other-than-industry representation on the ITACs. As previously discussed, this concern is mostly related to the ability of other-than-industry groups to counter assertions and policy proposals advanced by industry representatives. While members of committees across the three tiers all have equal access to information provided by the Office of the USTR (e.g. proposed and bracketed negotiation texts) as "cleared advisors,"[166] members of one committee do not necessarily have ready access to information which emerges (e.g. committee recommendations,

163. "USTR officials meet frequently with a broad array of stakeholder groups representing business, labor, environment, consumers, state and local governments, NGOs, think tanks, universities and high schools to discuss specific trade policy issues, subject to availability and scheduling." *Id*. at 196.

164. *Id*. at 194-196.

165. Shortly after the time of initial writing, the Office of the United States Trade Representative formally announced the creation of the Public Interest Trade Advisory Committee (PITAC) and called on NGOs, academics, and other public interest groups to submit candidates for the committee. "A Values-Driven Trade Policy: Remarks by Ambassador Froman at the Center for American Progress," Office of the United States Trade Representative, February 18, 2014. Available at: http://www.ustr.gov/about-us/press-office/press-releases/2014/February/A-Values-Driven-Trade-Policy_Remarks-by-USTR-Froman-at-Center-for-American-P.

166. Interview Office of the United States Trade Representative (USTR) "Official A", *supra* note 37.

etc.) in other committees, both within and across tiers.[167] A prime example of this phenomenon was discussed in Part V, where the Tier 2 Trade and Environmental Policy Advisory Committee (TEPAC) did not have immediate, automatic access to information circulated within the ITACs regarding a European Union chemicals regulation directly pertinent to its policy domain.

The second drawback is that this solution does not reflect the goal of the FACA's "fair balance" requirement, which is to avoid agency capture by well-organized and overrepresented groups by ensuring diverse representation and deliberations within committees.[168] As intimated by Congressman Sander Levin (D-MI) of the U.S. House of Representatives, Committee on Ways and Means, Subcommittee on Trade, "if there isn't a lot of back and forth of diverse points of view within an advisory committee[,] . . . that prevent[s] . . . enrichment of . . . dialogue with [the Office of the] USTR."[169] Even if Congress intended the ITACs to be "be representative of the *producing sectors* [i.e. industries] of our economy,"[170] seemingly, the FACA would require them to have at least some other-than-industry representation in order to realize the statute's purpose.

The third drawback is that many "NGOs . . . do not have the requisite resources or desire to participate" in the trade advisory committee system.[171] Many other-than-industry groups are reluctant to participate because of the confidential nature of information discussed with the advisory committees, preventing dissemination to a group's membership.[172] Creating a new advisory committee stacked completely with other-than-industry representatives seems to ignore this reality, as none of the Tier 2 general policy committees are presently at capacity.[173] Instead, the Office of the USTR should focus on opening up a few other-than-industry slots within the already existing ITACs, in addition to those potentially being created for labor representatives, which would no doubt be easy to fill.

Recognizing that industry will likely push back against any attempt by the Office of the USTR to add other-than-industry representatives to the ITACs, a solution may be available that would address the concerns of all sides. A major concern of other-than-industry groups represented on the Tier 2 general policy committees is that they lack information

167. Interview with David Apol, *supra* note 155.

168. Daniel E. Walters, *supra* note 58, at 701.

169. Congressman Sander Levin (D-MI). U.S. House of Representatives, Committee on Ways and Means, Subcommittee on Trade (July 21, 2009).

170. S.Rep. 1298, 93d Cong., 2d Sess. 102 (1974). *See also* Federal Register / Vol. 75, No. 80 / Tuesday, April 27, 2010, *supra* note 69.

171. "International Trade, Advisory Committee System Should be Updated to Better Serve U.S. Policy Needs," *supra* note 61, at 57.

172. Interview with David Apol, *supra* note 34.

173. For Tier 2 committees' current membership rosters *see* "Advisory Committees," Office of the United States Trade Representative. Available at: http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees.

being discussed within the ITACs and that accordingly, they cannot counter industry's assertions. Therefore, whether or not the Office of the USTR creates an additional public interest-oriented advisory committee, a positive first step would be to make the non-public products produced by the ITACs accessible to "cleared advisors" within the Tier 1 and Tier 2 committees. Considering that the only public document produced by the ITACs are their final reports,[174] this would give other-than-industry groups represented on the Tier 1 and Tier 2 committees a significantly expanded perspective of what is going on within the ITACs and facilitate timely responses where merited. There is already a "cleared advisor" website, and ITAC information (e.g. meeting minutes, etc.) could be made available in that location.[175]

IX. Conclusion

What is clear about the future of the Industry Trade Advisory Committees (ITACs) is that any changes to their composition will be contentious. Industry approaches the question of "fair balance" representation from the perspective that the ITACs were established as fora for the expression of *industry* perspectives and that a fairly balanced committee can be realized through the appointment of a variety of different industry representatives within a sector. Other-than-industry groups approach this question with the goals of the Federal Advisory Committee Act (FACA) in mind and argue that the exclusion of public interest and related perspectives from the ITACs allows industry interests to dominate these committees, counter to the underlying purpose of the statute.

The ultimate question is how to address the concerns of both industry and other-than-industry groups in this situation. Industry is loath to augment other-than-industry representation on the ITACs while other-than-industry groups likely won't be satisfied unless they can access the information produced by the ITACs.

The practical solution to this problem is to allow all "cleared advisors" within the trade advisory committee system to access the meeting minutes, formal recommendations, and other non-public documents of the ITACs. This will allow other-than-industry representatives on Tier 1 and Tier 2 committees to respond to industry positions which are raised in ITAC meetings and with which they take issue. This will also make industry more comfortable than a scenario in which other-than-industry groups are sitting across the table. In the end, the current debate on the ITACS' composition will be resolved through the availability of information, not the creation of additional trade advisory committees.

174. Interview with David Apol, *supra* note 155.
175. *Id*.