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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WASHINGTON TOXICS COALITION,  
et al.,  
  
Plaintiffs,  
  
v.  
  
OFFICE OF THE UNITED STATES  
TRADE REPRESENTATIVE, et al.,  
  
Defendants.

NO. CCO-730R

ORDER GRANTING PLAINTIFFS'  
MOTION TO ENFORCE THE  
SETTLEMENT AGREEMENT  
AND DENYING REQUEST  
FOR INJUNCTION

*Chen Bode*

THIS MATTER comes before the court on plaintiffs' motion to enforce the Settlement Agreement in this case, requiring that defendants, the Office of the United States Trade Representative and the Department of Commerce (collectively "USTR"), appoint a "properly qualified environmental representative" to attend meetings of the Industry Sector Advisory Committee on Chemicals and Allied Products for Trade Policy Matters ("ISAC-3"). Plaintiffs also request that the court enjoin USTR from convening an upcoming meeting of ISAC-3 either until USTR appoints an environmental representative or arranged for an interim representative to attend that meeting. Defendants oppose the motion, arguing that an environmental representative has already been appointed to ISAC-3.

On January 15, 2003, the court held a telephone conference

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1 with the parties to discuss issues raised in this motion. Having  
2 now conferred with the parties and having reviewed the documents  
3 filed in support of and in opposition to this motion, the court  
4 finds and rules as follows:

5  
6 I. BACKGROUND

7 ISAC-3 is one of 17 sectoral advisory committees for trade  
8 policy matters that the President has established under the Trade  
9 Act of 1974. Its area of expertise is chemicals and allied  
10 products. ISAC-3, as well as the other trade advisory commit-  
11 tees, advises USTR on trade issues that affect the environment  
12 both nationally and internationally. Congress has recognized the  
13 importance of ending industry domination of such committees and  
14 has therefore enacted the Federal Advisory Committee Act ("FACA")  
15 to regulate the activities of advisory committees such as the  
16 ISAC at issue here. See 5 U.S.C. App. 2 §§ 3(2). Among other  
17 things, FACA requires that the membership of an advisory commit-  
18 tee be "fairly balanced in terms of point of view represented and  
19 the functions to be performed by the advisory committee." Id.  
20 § 5(b)(2).

21  
22 In April 2000, plaintiffs Washington Toxics Coalition,  
23 Public Citizen, and Asia Pacific Environmental Exchange, organi-  
24 zations that advocate for health and environmental protections  
25 from toxic chemicals, filed this lawsuit challenging the lack of  
26

1 any health or environmental representation to ISAC-3. On March  
2 22, 2001, the court approved a Settlement Agreement in this case  
3 in which USTR agreed to "make a good faith effort to expedite the  
4 appointment of one or more properly qualified environmental  
5 representatives to ISAC-3" and to "include at ISAC-3 meetings an  
6 interim qualified environmental representative who is serving on  
7 another advisory committee that the defendants administer."  
8 Agreement ¶¶ 1.A-B.

9  
10 For many months, USTR convened meetings of ISAC-3 with an  
11 interim environmental representative but stopped holding meetings  
12 once that individual could no longer attend. On June 29, 2001,  
13 defendants received the nomination of Richard Hind, the legisla-  
14 tive director of the toxics program at Greenpeace Inc. Plain-  
15 tiffs have expressed their support for Hind's appointment, but  
16 defendants never acted on his application. Defendants have  
17 published notices in the Federal Register soliciting nominations  
18 for the position. These announcements garnered little response.  
19 Defendants also aver that they contacted various environmental  
20 organizations to promote interest in serving on ISAC-3.

21  
22 In December 2002, USTR announced that it had appointed Brian  
23 Mannix of the Mercatus Center at George Mason University to ISAC-  
24 3. According to defendants, the appointment of Mr. Mannix  
25 fulfills their obligation under both FACA and the 2001 Settlement  
26 Agreement to name an environmental representative to ISAC-3.

1 Plaintiffs disagree, believing that Mr. Mannix does not "fairly  
2 balance" ISAC-3 within the meaning of FACA. Plaintiffs therefore  
3 ask the court to enjoin USTR from convening meetings of ISAC-3  
4 until USTR has either appointed a permanent or interim environ-  
5 mental representative to attend the meeting. According to  
6 defendants, such a meeting is forthcoming. Defendants represent  
7 that the President is expected to give notice to Congress later  
8 this month that he intends to enter two free-trade agreements.  
9 Under the Trade Act of 2002, ISAC-3 must meet and report on the  
10 agreements within 30 days after the President gives notice of his  
11 intention to enter those agreements.<sup>1</sup>  
12

## 13 14 II. DISCUSSION

15 Two issues are before the court: (1) whether the USTR has  
16 discharged its duty under FACA and the 2001 Settlement Agreement  
17 to appoint an environmental representative to ISAC-3; and (2) if  
18 the appointment does not satisfy FACA's fair-balance require-  
19 ments, whether the government must appoint a qualified environ-  
20 mental representative before the next ISAC-3 meeting. The court  
21 addresses each below.  
22

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25 <sup>1</sup>Plaintiffs were apparently under the impression that the  
26 meeting was originally scheduled for January 15, 2003 but the  
USTR has since confirmed that the meeting is not currently  
scheduled but will be convened soon.

1 A. Satisfaction of FACA and Settlement Agreement

2 While "the executive branch's choice of representatives is  
3 subject to deferential review by the courts," Northwest Ecosystem  
4 Alliance v. Office of USTR, 1999 WL 33526001 at \* 4 (W.D. Wash  
5 Nov. 9, 1999), it is undisputed that the Settlement Agreement in  
6 this case, as well as FACA's fair-balance requirement, obligated  
7 USTR to appoint a representative of the environmental community  
8 to ISAC-3. The instant dispute is whether the appointment of Mr.  
9 Mannix satisfies that requirement.  
10

11 The government argues that Mr. Mannix, who has worked  
12 extensively on environmental, energy, and other regulatory  
13 issues, is more than qualified to serve as an environmental  
14 representative of ISAC-3. Plaintiffs, for their part, do not  
15 challenge Mannix's qualifications to serve on ISAC-3 but question  
16 only whether his experience and background make him an appropri-  
17 ate representative of the environmental community.

18 Plaintiffs' reservations are, in the court's view, well-  
19 founded. None of the salient aspects of Mr. Mannix's background  
20 suggest that he would represent the environmental community's  
21 viewpoint on ISAC-3. While, as the government points out,  
22 Mr. Mannix does not currently work for the chemical industry,  
23 it is clear he does not have the support of any environmental  
24 groups. Mr. Mannix's experience at the research center where he  
25 currently works, in state government, and in academia no doubt  
26

1 gives him a considerable level of expertise in the chemical and  
2 allied products area. But there is nothing to indicate that,  
3 notwithstanding Mr. Mannix's impressive credentials, he has ever  
4 been affiliated with any environmental organizations or ever  
5 advocated on behalf of protecting the environment. The court is,  
6 therefore, unpersuaded that Mr. Mannix's appointment provides a  
7 voice for the environmental community on ISAC-3.  
8

9 Both FACA and the Settlement Agreement require that the  
10 government do more than simply appoint a non-industry representa-  
11 tive to the committee. Plaintiffs state that they "reasonably  
12 expected" that, upon entering the 2001 Settlement Agreement, a  
13 "leader or employee of an environmental advocacy organization"  
14 would be appointed to ISAC-3. The government contends that the  
15 court cannot construe the Settlement Agreement in accordance with  
16 plaintiff's "unilateral expectation." Resp. at 11. The court  
17 need not engage in a detailed examination of the parties' subjec-  
18 tive intent in entering the Settlement Agreement. That the  
19 Agreement memorialized the parties' understanding that a "quali-  
20 fied" environmental representative must be appointed is under-  
21 scored by two facts. First, the Agreement itself states that  
22 defendants must "solicit, review and consider nominations for  
23 appointment as the qualified environmental representative in a  
24 manner equivalent to that followed for other committee appoint-  
25 ments." Agreement, ¶ 1.C. Other ISACs' environmental represen-

1 tatives have come from such environmental advocacy organizations  
2 as Defenders of Wildlife, Environmental Defense Fund, and the  
3 Natural Resources Defense Council. See Wallach Decl. ¶ 7.  
4 Indeed, USTR made such appointments to the paper and lumber ISAC  
5 to comply with this court's order in Northwest Ecosystem Alliance  
6 and to other advisory committees. Id. Second, the government,  
7 as required by the Settlement Agreement, appointed as an interim  
8 representative Stephen Porter of the Center for International  
9 Environmental Law, a nonprofit environmental advocacy law firm,  
10 who serves on another advisory committee that the defendants  
11 administer. Goldman Decl. Ex. 7. Plaintiffs anticipated that,  
12 pursuant to the Settlement Agreement, a comparable environmental  
13 representative would be appointed to ISAC-3.  
14

15 It bears repeating that neither plaintiffs nor the court  
16 question the qualifications of Mr. Mannix to serve on ISAC-3.  
17 The issue is whether Mr. Mannix "fairly balances" the viewpoints  
18 of ISAC-3 within the meaning of FACA and whether he is the  
19 "qualified environmental representative" required by the Settle-  
20 ment Agreement. For the foregoing reasons, the court concludes  
21 that the appointment of Mr. Mannix does not fulfill the govern-  
22 ment's obligations under FACA and the Settlement Agreement.  
23

24 B. Request for Injunction

25 On January 15, 2003, the court held a telephone conference  
26 with counsel for the parties to consider plaintiffs' request that

1 USTR be enjoined from convening meetings of ISAC-3 until it has  
2 appointed an environmental representative or ensured that an  
3 environmental representative will attend the meeting.

4         Recognizing that having the required diversity of view-  
5 points on this advisory committee is critical to prevent a  
6 committee "dominated by industry leaders and the like with  
7 substantial parochial interest in the outcome of the matter under  
8 discussion," NRDC v. Herrington, 637 F. Supp. 116, 120 (D.D.C.  
9 1986), the court directed the parties to work cooperatively in  
10 order to expedite the appointment of an appropriate environmental  
11 representative to ISAC-3, the next meeting of which will likely  
12 be sometime in February 2003. Counsel for defendants represented  
13 that Richard Hind, whose application plaintiffs have supported,  
14 was not a viable candidate to serve on the committee. Plain-  
15 tiffs, therefore, must submit a list of other candidates (which  
16 might include previously identified candidates who withdrew their  
17 application pending a decision on Mr. Hind's application) to give  
18 the government a pool of applications from which a representative  
19 could be selected. If it becomes unlikely that a suitable  
20 representative can be appointed before the next ISAC-3 meeting,  
21 the government shall ensure that an interim representative is  
22 available.  
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25         Assuming that the parties will be able to resolve this  
26 matter prior to ISAC-3's next meeting, the court declines to




1 enjoin the meeting at this time. The parties should contact the  
2 court to facilitate the resolution of any disputes arising in the  
3 course of selecting the representative.  
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6 III. CONCLUSION

7 For the foregoing reasons, plaintiffs' motion to enforce the  
8 settlement agreement [docket no. 49-1] is GRANTED. The court  
9 declines to enjoin the upcoming ISAC-3 meeting at this time.  
10 However, in accordance with FACA and the 2001 Settlement Agree-  
11 ment, the court directs the parties to work together to expedite  
12 the appointment of a qualified environmental representative to  
13 ISAC-3 or ensure that a qualified interim representative be  
14 available to attend the committee's next meeting.

15 DATED at Seattle, Washington this 15<sup>th</sup> day of January, 2003.

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19 BARBARA JACOBS ROTHSTEIN  
20 UNITED STATES DISTRICT JUDGE  
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