
This comment is submitted on behalf of the undersigned legal academics. We are members of the Project on International Intellectual Property and the Public Interest, coordinated by the Program on Intellectual Property and the Public Interest (PIJIP). We write to provide the following comments on the Public Interest Trade Advisory Committee (PITAC) proposal.

A. Academics should be allowed on the proposed Public Interest Trade Advisory Committee.¹

Given the laudable goals of the PITAC and the polarization around many of the issues on the table in both the Trans Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP), the USTR should allow objective expert input from scholars whose interests derive from the duty of academia to encourage the free and open exchange of ideas. Academics can and should play a critical role in helping the USTR understand and distill competing positions. Through those efforts, the USTR can offer nuanced proposals that reflect the broad constituencies that have an interest in the outcome of trade negotiations.² The USTR has recognized the important role academics can play by including them on other advisory

¹ For purposes of this comment, we assume that there is a question of eligibility given recent correspondence between Sean Flynn of American University's Program on Information Justice and Intellectual Property and Tiffany Enoch of the United States Trade Representative (USTR). In that correspondence, reproduced in its entirety as Attachment A hereto, Mr. Flynn asked Ms. Enoch to clarify the standard for academic admission.

² The undersigned have all expressed reservations about the creation of a separate PITAC. See Sean Flynn, USTR Accepts Business Proposal to Segregate Public Interest in Advisory Committees, infojustice.org (February 19, 2014), <http://infojustice.org/archives/32248>; Margot Kaminski, Fixing International IP Capture? Some Problems with the Public Interest Trade Advisory Committee (PITAC), *Concurring Opinions* (March 13, 2014), <http://www.concurringopinions.com/archives/2014/03/fixing-international-ip-capture-some-problems-with-the-public-interest-trade-advisory-committee-pitac.html>; David Levine, Putting the Public's Interest Back Into the "Public Interest", infojustice.org (March 21, 2014), <http://infojustice.org/archives/32460>. Nonetheless, we support the USTR's efforts and offer this comment in the interest of being able to contribute to the improvement of this advisory process.

committees.³ We are perplexed as to why academics do not appear to be eligible for inclusion on the PITAC.

On February 18, 2014 Ambassador Froman announced the formation of the PITAC. He explained, in relevant part:

The Obama Administration is committed to increased inclusiveness in trade negotiations. Early in the President's first term, USTR worked to diversify membership in the advisory system that Congress established to provide official recommendations on trade policy. ... **The Obama Administration has expanded representation on advisory committees to include more voices from academia, NGOs and others with varying views. ... We are calling on NGOs, academics, and other public interest groups to submit their candidates to be founding members of the PITAC.**⁴

The following day, the USTR published a PITAC "Request for Nominations." In it, and as explained in Attachment A, USTR announced the following ambiguous "eligibility requirement:"

The applicant must represent a U.S. organization that represents whose members (or funders) have a demonstrated interest in international trade.

For eligibility purposes, a "U.S. organization" is an organization, including trade association, labor union and organization, and nongovernmental organization (NGO), established under the laws of the United States, that is controlled by U.S. citizens, by another U.S. organization (or organizations), or by a U.S. entity (or entities), as determined based on its board of directors (or comparable governing body), membership, and funding sources, as applicable. To qualify as a U.S. organization, , U.S. organizations, or U.S. entities. Additionally, at least 50 percent of the organization's annual revenue must be attributable to nongovernmental U.S. sources.⁵

These requirements call into question whether USTR is backtracking from Ambassador Froman's endorsement of academic membership on the PITAC. To be

³ For example, Duke Law Professor James Salzman participates on the Trade and Environment Policy Advisory Committee. Trade and Environment Policy Advisory Committee (TEPAC), Washington, D.C.: Office of the United States Trade Representative, *available* at <http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees/trade-and-environment-policy-advisory-committ>, and Am. Charles Stith, an Adjunct Professor at Boston University, serves on the Trade Advisory Committee on Africa. <http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees/trade-advisory-committee-africa-taca>.

⁴ February 18, 2014, A Values-Driven Trade Policy: Remarks by Ambassador Froman at the Center for American Progress, Washington, D.C.: Office of the United States Trade Representative, *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 (emphasis added).

⁵ Jewel James, Requests for Nominations: Public Interest Trade Advisory Committee, Regulations.gov (Feb. 19, 2014), <http://www.regulations.gov/#!documentDetail;D=USTR-2014-0005-0001>.

sure, an academic could credibly argue that he/she qualifies under the existing definition of “U.S. organization.” For example, most private American universities, including American University⁶, Elon University⁷ and Yale University⁸ (the institutions with which the undersigned are affiliated), can be classified as “NGOs,” “controlled by U.S. citizens,” with “more than 50 percent of the board of directors (or comparable governing body) and more than 50 percent of the membership of the organization to be represented [as] U.S. citizens” and “at least 50 percent of the organization's annual revenue ... attributable to nongovernmental U.S. sources.”

Nonetheless, the somewhat tortured hoop-jumping that must be engaged to qualify academics that are affiliated with private universities (to say nothing of those affiliated with public universities), the fact that Ambassador Froman seemed to draw a distinction between NGOs and academia in his February 18 speech, and Ms. Enoch’s response to Mr. Flynn’s emails, all suggest that the exclusion of academics might be intentional. Thus it is important to identify the benefits of having academics on the PITAC.

Objective Neutrality: Academics have the freedom to explore positions that may not have organized constituencies and/or are outside the bounds of traditional policymaking. The rigor that is expected of academic scholarship can facilitate an understanding of issues that transcends one viewpoint or concern. Policymakers need access to unbiased information and analysis in order to craft law.

Expertise: Academics hardly have the monopoly on expertise. But academics have the luxury of full immersion in policy analysis. There is plenty of academic scholarship that is worthy of use in policymaking, and allowing academics on the PITAC would facilitate an easy connection to such work. The USTR should avail itself of the academic community’s expertise. .

Methodological Rigor: Academics can help insert intellectual and methodological rigor into the lawmaking process. Particularly in areas like intellectual property infringement, academics can help create methods to assess complex questions. Academics can lend a much-needed hand to policymakers who wish to hew policy proposals to rigorous assessment of data and information.

⁶ Fast Facts, Washington D.C.: American University, <http://www.american.edu/about/fast-facts.cfm>.

⁷ About Elon University, Elon University School of Law, <http://www.elon.edu/e-web/about/default.xhtml>.

⁸ About Yale University, Leadership and Organization, <http://www.yale.edu/about/leadership.html>.

Combating Polarization: Perhaps the strongest reason to include academics on the PITAC is the academic value of impersonal and professional debate of issues. Professor Steven Walt made this point in a 2012 article in the *Yale Journal of International Affairs*. Addressing the question of the role of international relations academics in the “public discourse on international affairs,” he wrote that

the scholarly community ... offers a useful model of constructive debate. Although scholarly disputes are sometimes heated, they rarely descend to the level of *ad hominem* attack and character assassination that increasingly characterizes political discourse today. Indeed, academics who use these tactics in a scholarly article would probably discredit themselves rather than their targets. By bringing the norms of academic discourse into the public sphere, academic scholars could help restore some of the civility that has been lost in contemporary public life.⁹

That is perhaps the best argument for allowing academics on the PITAC. Academics may be best suited to offer a steady voice in the highly-charged debates that are ongoing around a variety of TTP and TTIP substantive areas. Such voices could help disparate parties come to agreement, or short of that, aid in a mutual understanding of the competing visions expressed in policy debate. In that way, the USTR can become better informed and better represent the interests of the United States as a whole.

Thus, for all of the above reasons, we urge the USTR to embrace the possibility of academics on the PITAC.

B. We call for the USTR to implement a stronger public interest advisory system that better promotes balance, inclusion, participation and transparency.

Balanced Membership Requirements: One of our observations as researchers on international intellectual property law is that international intellectual property politics affect domestic politics. International norms are used as justifications for locking in or changing U.S. law. In addition, public interests, like private ones, are globalized. The functioning of our Internet, our libraries, our education systems, our system for the protection and promotion of access to knowledge and to the products of science and culture depends on access and production by others. Because these laws are important, it is imperative that a full range of interests affected by them be represented in the process that constructs international law in this area.

Congress has given the USTR discretion to form a balanced advisory committee

⁹ Stephen M. Walt, Theory and Policy in International Relations: Some Personal Reflections by Stephen M. Walt, 7 Yale J. of Int'l. Affairs 2 (2012) available at <http://yalejournal.org/2012/09/18/theory-and-policy-in-international-relations-some-personal-reflections-by-stephen-m-walt/> (emphasis in original).

process.¹⁰ The current USTR's advisory system is not balanced. According to a *Washington Post* infographic, industry voices make up 85% of the membership of trade advisory committees, greatly outweighing NGOs, academics, and other interests.¹¹ Even among those industry members, there is an acute imbalance. In the intellectual property policy ITAC currently listed on USTR's website,¹² there are at least four representatives of the brand name pharmaceutical industry – including Phrma, Bio, Gilead and Johnson and Johnson. There is also Mylan – who sometimes operates as a brand firm and sometimes as generic. A balanced IP advisory committee would have representatives of IP owners off-set with equal numbers of users interests (including, e.g. generics; intermediaries, ISPs, patients, Internet end users).

Participation at every level: Segregating public interest representatives into their own tier two advisory committee will not ensure adequate representation of public interest voices. Tier two committees meet less frequently and their members are not privy to the same meetings and subcommittees (like the chair of chairs committee). There should be balanced representation of public interest concerns on each tier, and within all of the tier three committees.

Having all public interest representatives on one large committee will dilute the PITAC's effectiveness. USTR should consider creating narrower, and consequently more effective, public interest committees dedicated to other particular issues, including digital civil liberties, public health, and trade and development.

PITAC members should be made eligible for all benefits of the ITAC system, including to be “designated as advisors to a negotiating delegation,” and “permitted to participate in international meetings to the extent the head of the United States delegation deems appropriate.”¹³

Transparency: Even if the problems of balance, participation and inclusion were corrected, effective public interest oversight of the influence of industry trade advisors cannot be corrected without increased transparency in the ITAC process.

The ITAC invitations state that one must be a representative of an organization to be a member. But we understand that members must sign non-disclosure

¹⁰ See 19 USC 2155(c).

¹¹ Christopher Ingraham & Howard Schneider, *Industry Voices Dominate the Trade Advisory System*, *The Washington Post*, Feb. 27, 2014 available at <http://www.washingtonpost.com/wp-srv/special/business/trade-advisory-committees/index.html>.

¹² Industry Trade Advisory Committee on Intellectual Property Rights ITAC 15, Washington, D.C.: U.S. Department of Commerce and Office of the United States Trade Representative available at <http://www.ita.doc.gov/itac/committees/itac15.asp>.

¹³ 19 U.S. Code § 2155 (k).

agreements preventing sharing of information with broader members of the organization represented. This is a rule that prevents effective representation. One cannot represent an organization without sharing information with that organization to obtain the necessary mandates to take positions.

For public interest organizations, their membership or those that they represent is by definition the whole public. Public interest organizations cannot serve this public interest representation role if they cannot share information and solicit views from the public they serve.

The object should be to balance *influence* on the outcomes of the policy process USTR coordinates. That goal cannot be achieved if PITAC members are forced to sign non-disclosure agreements preventing their voicing of concerns to the public.

There must also be more transparency in the advisory process itself. Most advice from industry advisory committees and their members is given through communications that the USTR has voluntarily defined as exempt from the Freedom of Information Act and the Federal Advisory Committee Act. In relation to FACA, Congress has stated that the ITAC system *may* be exempted from FACA's open government requirements, but does not mandate such secrecy.¹⁴

Application of these core open government laws will not prohibit private conversations between an industry representative and a public official. But at minimum, such communications should be subject to the same standards as would apply to any other contact between a rule making agency and a private representative. We see no reason why communications with trade advisors – including those of the new PITAC – should not be subject to the full scope of our open government regulations. At minimum, compliance with such laws should be the default, and a compelling justification offered for any detour from the standard.

In addition to our suggestions about applying traditional open government laws

¹⁴ See 19 U.S. Code § 2155 (f)(2).

(A) the meetings of advisory committees established under subsections (b) and (c) of this section shall be exempt from the requirements of subsections (a) and (b) of sections 10 and 11 of the Federal Advisory Committee Act (relating to 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 with respect to matters referred to in subsection (a) of this section, and that meetings may be called of such special task forces, plenary meetings of chairmen, or other such groups made up of members of the committees established under subsections (b) and (c) of this section ...

to USTR functions, we call on the USTR to work to promote the transparency of negotiating texts to the public, such as through public releases of draft text after every negotiating round.

Respectfully submitted,

David S. Levine, Elon University School of Law

Sean Flynn, American University PIJIP

Margot Kaminski, Yale Law School, ISP

Attachment A
Email correspondence between Sean Flynn and Tiffany Enoch

From: Sean Michael Flynn [mailto:sflynn@wcl.american.edu]
Sent: Wednesday, March 12, 2014 9:37 AM
To: Enoch, Tiffany
Cc: David Levine; Margot Kaminski
Subject: Re: Academics on PITAC?

I take it it from your answer that individual academics may not apply and rather must represent an "organization" that meets the definition. Is that correct?

-Sean

From: "Enoch, Tiffany" <[Tiffany R Enoch@ustr.eop.gov](mailto:Tiffany_R_Enoch@ustr.eop.gov)>
Date: Tuesday, March 11, 2014 9:25 AM
To: Sean Michael Flynn <sflynn@wcl.american.edu>, "Wilson, Susan" <[Susan F Wilson@ustr.eop.gov](mailto:Susan_F_Wilson@ustr.eop.gov)>
Cc: "Mendoza, Brandon" <Brandon.Mendoza@mail.house.gov>, David Levine <dlevine3@elon.edu>, Margot Kaminski <margot.kaminski@gmail.com>
Subject: RE: Academics on PITAC?

Hi Sean—

Are you a member of any trade oriented groups that would be willing to sponsor your application to PITAC?

Thanks.

Tiffany

From: Sean Michael Flynn [mailto:sflynn@wcl.american.edu]
Sent: Tuesday, March 11, 2014 6:02 AM
To: Wilson, Susan; Enoch, Tiffany
Cc: Mendoza, Brandon; David Levine; Margot Kaminski
Subject: Re: Academics on PITAC?

Dear Tiffany,

I am writing to inquire a about how academics may apply for membership on the PITAC.

In Froman's description of the committee, he invited "academics" to be "founding members."

““A new Public Interest Trade Advisory Committee (PITAC) will join the Labor Advisory Committee and the Trade and Environment Policy Advisory Committees to provide a cross-cutting platform for input in the negotiations.

"We are calling on NGOs, academics, and other public interest groups to submit their candidates to be founding members of the PITAC.

[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](http://www.ustr.gov/about-us/press-office/press-releases/2014/February/A-Values-Driven-Trade-Policy%20Remarks-by-USTR-Froman-at-Center-for-American-P)

But the Fed Reg notice is a little less clear. This part is a little confusing:

6. The applicant must represent a U.S. organization that represents whose members (or funders) have a demonstrated interest in international trade.

For eligibility purposes, a "U.S. organization" is an organization, including trade association, labor union and organization, and nongovernmental organization (NGO), established under the laws of the United States . . .

I am an academic who leads a research center on intellectual property law with a substantial focus on IP in trade agreements. If you count a university as a "non-governmental organization" then we fit. But we are not separately incorporated from the university. We don't have members as such. Our funders have an interest in trade and in law more generally. But are academics as such welcome to apply as Froman indicated in his talk? Or must apply as representing another organization?

Please advise.

With kind regards,

Sean Flynn

Program on Information Justice and Intellectual Property

American University Washington College of Law