ORAL ARGUMENT SCHEDULED FOR FEBRUARY 21, 2013

No. 12-5136

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW
Plaintiff-Appellee,

v.

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

TIMOTHY M. REIF
General Counsel

DAVID J. APOL
Attorney

Executive Office of the President
Office Of The United States
Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

STUART F. DELERY
Principal Deputy Assistant
Attorney General

RONALD C. MACHEN
United States Attorney

MATTHEW M. COLLETTE
H. THOMAS BYRON III
(202) 616-5367
Attorneys, Appellate Staff
Civil Division, Room 7260
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Table of Contents

APPEAL,CLOSED,TYPE−I

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:01−cv−00498−RWR

CTR FOR INTL ENVIRON v. OFC. U.S. TRADE REP., et al
Assigned to: Judge Richard W. Roberts
Demand: $0
Case in other court: 12−05136
Cause: 05:552 Freedom of Information Act

Date Filed: 03/07/2001
Date Terminated: 02/29/2012
Jury Demand: None
Nature of Suit: 895 Freedom of Information Act
Jurisdiction: U.S. Government Defendant

Plaintiff

CENTER FOR INTERNATIONAL ENVIRONMENT LAW

represented by **J. Martin Wagner**
EARTHJUSTICE
50 California St.
Suite 500
San Francisco, CA 94111
(415) 217−2000
Fax: (415) 217−2040
Email: mwagner@earthjustice.org
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

represented by **Anne L. Weismann**
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
1400 Eye Street, NW
Suite 450
Washington, DC 20005
(202) 408−5565 Ext. 108
Fax: (202) 588−5020
Email: aweismann@citizensforethics.org
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Daniel Schwei
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Room 6145
Washington, DC 20001
(202) 305−8693
Fax: (202) 616−8470
Email: daniel.s.schwei@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Jennifer Paisner
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
P.O. Box 883
Room 6108
Washington, DC 20044
(202) 616−8268
Fax: 202−616−8460
Email: jennifer.paisner@usdoj.gov
TERMINATED: 12/10/2001
LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Laurie J. Weinstein
U.S. ATTORNEY'S OFFICE
555 Fourth Street, NW
Washington, DC 20530
(202) 514−7133
Fax: (202) 514−8780
Email: Laurie.Weinstein2@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Luke M. Jones
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, DC 20001
(202) 514−3770
Fax: (202) 616−8470
Email: luke.jones@usdoj.gov
TERMINATED: 04/28/2011
LEAD ATTORNEY

Marcia N. Tiersky
DEPARTMENT OF JUSTICE
Drug Enforcement Administration
8701 Morrissette Dr.
Springfield, VA 22152
202 353 0907
Fax: (202) 307−8046
Email: marcia.n.tiersky@usdoj.gov
TERMINATED: 12/10/2008
LEAD ATTORNEY

Defendant

ROBERT B. ZOELLICK
in his official capacity as the United States Trade Representative

represented by **Anne L. Weismann**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Daniel Schwei
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Jennifer Paisner
(See above for address)
TERMINATED: 12/10/2001
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Laurie J. Weinstein
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Luke M. Jones
(See above for address)
TERMINATED: 04/28/2011
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Marcia N. Tiersky
(See above for address)

TERMINATED: 12/10/2008
LEAD ATTORNEY

Date Filed	#	Docket Text
03/07/2001	1	COMPLAINT filed by plaintiff CTR FOR INTL ENVIRON (jeb) (Entered: 03/09/2001)
03/07/2001		SUMMONS (4) issued to federal party(s) federal defendant OFC. U.S. TRADE REP., federal defendant ROBERT B. ZOELLICK , and non−parties: U.S. Attorney and U.S. Attorney General. (jeb) Modified on 03/15/2001 (Entered: 03/09/2001)
03/27/2001	2	ATTORNEY APPEARANCE for federal defendant OFC. U.S. TRADE REP., federal defendant ROBERT B. ZOELLICK by Laurie J. Weinstein (jf) (Entered: 03/28/2001)
04/05/2001	3	MOTION (UNOPPOSED) filed by federal defendant OFC. U.S. TRADE REP., federal defendant ROBERT B. ZOELLICK to extend time to May 14, 2001, to answer complaint [1−1] (jdm) (Entered: 04/06/2001)
04/09/2001	4	ORDER by Judge Richard W. Roberts : granting motion to extend time to May 14, 2001, to answer complaint [1−1] [3−1] by ROBERT B. ZOELLICK, OFC. U.S. TRADE REP. (N) (lin) (Entered: 04/09/2001)
04/09/2001	5	NOTICE OF FILING by federal defendant OFC. U.S. TRADE REP of an amended order to accompany the defendant's motion for extension of time to respond to plaintiff's complaint. (ag) (Entered: 04/10/2001)
04/13/2001	6	ORDER by Judge Richard W. Roberts : granting motion to extend time to May 14, 2001, to answer complaint [1−1] [3−1] by ROBERT B. ZOELLICK, OFC. U.S. TRADE REP. (N) (lin) (Entered: 04/13/2001)
05/14/2001	7	ANSWER TO COMPLAINT [1−1] by federal defendant OFC. U.S. TRADE REP.; Attachments (1) . (ag) (Entered: 05/15/2001)
05/31/2001	8	ORDER by Judge Richard W. Roberts : status hearing set for 11:45 8/8/01 ; (N) (lin) (Entered: 05/31/2001)
07/25/2001	9	MOTION filed by plaintiff CTR FOR INTL ENVIRON to compel production of additional Vaughn information ; exhibits (12) (bjsp) Modified on 07/26/2001 (Entered: 07/26/2001)
07/25/2001	10	MEMORANDUM by plaintiff CTR FOR INTL ENVIRON in support of motion to compel production of additional Vaughn information [9−1] by CTR FOR INTL ENVIRON ; exhibits (5) (bjsp) (Entered: 07/26/2001)
07/30/2001	11	MOTION (UNOPPOSED) filed by plaintiff CTR FOR INTL ENVIRON to conduct the initial scheduling conference by telephone (ag) (Entered: 07/31/2001)
08/01/2001	12	MEET AND CONFER STATEMENT/REPORT PURSUANT TO L.R. 16 filed by plaintiff CTR FOR INTL ENVIRON, federal defendant OFC. U.S. TRADE REP., federal defendant ROBERT B. ZOELLICK . (ag) (Entered: 08/02/2001)
08/01/2001	13	MOTION (UNOPPOSED) filed by federal defendant OFC. U.S. TRADE REP. to extend time to 8/15/01 to respond to plaintiff's motion to compel production of additional Vaugn information (ag) (Entered: 08/02/2001)
08/02/2001	14	ORDER by Judge Richard W. Roberts: that defendant shall respond to plaintiff's motion to compel production of additional Vaughn Information on or before 8/15/01 ; (N) (kmk) (Entered: 08/03/2001)
08/02/2001	15	ORDER by Judge Richard W. Roberts: granting motion to conduct the initial scheduling conference by telephone [11−1] by CTR FOR INTL ENVIRON; that plaintiffs' California counsel may appear by telephone at the initial scheduling conference set for 8/8/01 at 11:45 am, but plaintiff must be represented in court at the conference by local counsel appearing in person. (N) (kmk) (Entered: 08/03/2001)

08/07/2001	16	MOTION filed by plaintiff CTR FOR INTL ENVIRON for Scott Pasternack, to appear pro hac vice (Earthjustice Legal Defense Fund, 180 Montgomery Street, San Francisco, CA 94104, (415) 627−6700) ; Exhibits (4) (tth) (Entered: 08/08/2001)
08/07/2001	17	ATTORNEY APPEARANCE for federal defendant OFC. U.S. TRADE REP., federal defendant ROBERT B. ZOELLICK by Jennifer Paisner (tth) (Entered: 08/08/2001)
08/08/2001	18	ORDER by Judge Richard W. Roberts : granting motion for Scott Pasternack, to appear pro hac vice (Earthjustice Legal Defense Fund, 180 Montgomery Street, San Francisco, CA 94104, (415) 627−6700) [16−1] by CTR FOR INTL ENVIRON (N) (lin) (Entered: 08/09/2001)
08/08/2001		STATUS HEARING before Judge Richard W. Roberts : motion for summary judgment due 10/1/01 ; Reporter: V. Marshall (lin) (Entered: 08/09/2001)
08/09/2001	19	ORDER by Judge Richard W. Roberts : dispositive motions due 10/1/01 or 45 days after ruling on plaintiff's motion to compel ; oppositions due 15 days later; replies due 7 days after oppositions (N) (lin) (Entered: 08/10/2001)
08/09/2001		CASE REFERRED to Magistrate Judge John M. Facciola for any discovery disputes (cjp) (Entered: 08/13/2001)
08/15/2001	20	NOTICE OF FILING DECLARATION of Scott Pasternack by plaintiff CTR FOR INTL ENVIRON in support of plaintiff's Motion to Appear Pro Hac Vice dated 8/6/01; Exhibit (1) (tth) (Entered: 08/16/2001)
08/15/2001	21	RESPONSE by federal defendant OFC. U.S. TRADE REP., federal defendant ROBERT B. ZOELLICK in opposition to motion to compel production of additional Vaughn information [9−1] by CTR FOR INTL ENVIRON . (aet) (Entered: 08/17/2001)
08/27/2001	22	REPLY by plaintiff CTR FOR INTL ENVIRON in support of motion to compel production of additional Vaughn information [9−1] by CTR FOR INTL ENVIRON (ag) (Entered: 08/28/2001)
08/31/2001	23	MOTION (UNOPPOSED) filed by plaintiff CTR FOR INTL ENVIRON to clarify the scheduling order of 8/9/01 (cjp) (Entered: 09/04/2001)
09/10/2001	25	RESPONSE by federal defendant OFC. U.S. TRADE REP., federal defendant ROBERT B. ZOELLICK in opposition to clarify the scheduling order filed 8/9/01 . (cas) (Entered: 09/12/2001)
09/11/2001	24	ORDER by Judge Richard W. Roberts : granting motion to clarify the scheduling order of 8/9/01 [23−1] by CTR FOR INTL ENVIRON (N) (lin) (Entered: 09/11/2001)
09/25/2001	26	REPLY by plaintiff CTR FOR INTL ENVIRON in support of their motion to clarify the scheduling order filed August 9, 2001. (nmr) (Entered: 09/26/2001)
11/15/2001	27	MOTION filed by plaintiff CTR FOR INTL ENVIRON to expedite consideration of Plaintiff's Motion to Compel Production of Additional Vaughn Information ; Declaration (1) (nmr) (Entered: 11/16/2001)
11/28/2001	28	MEMORANDUM OPINION AND ORDER by Magistrate Judge John M. Facciola : granting motion to compel production of additional Vaughn information [9−1] by CTR FOR INTL ENVIRON (N) (ldc) (Entered: 11/28/2001)
12/03/2001	29	NOTICE OF WITHDRAWAL of motion to expedite consideration of Plaintiff's Motion to Compel Production of Additional Vaughn Information [27−1] by CTR FOR INTL ENVIRON (nmr) (Entered: 12/04/2001)
12/10/2001	30	SUBSTITUTION OF COUNSEL for federal defendants OFC. U.S. TRADE REP., ROBERT B. ZOELLICK, substituting Marcia N. Tiersky for attorney Jennifer Paisner for ROBERT B. ZOELLICK, OFC. U.S. TRADE REP. (nmr) (Entered: 12/11/2001)

12/20/2001	31	MOTION filed by federal defendants OFC. U.S. TRADE REP., ROBERT B. ZOELLICK to extend time to 1/11/02 to file a revised Vaughn index (nmr) (Entered: 12/21/2001)
12/26/2001	32	ORDER by Magistrate Judge John M. Facciola : granting motion to extend time to 1/11/02 to file a revised Vaughn index [31−1] by ROBERT B. ZOELLICK, OFC. U.S. TRADE REP. (N) (ldc) (Entered: 12/26/2001)
01/11/2002	33	MOTION filed by federal defendant OFC. U.S. TRADE REP., federal defendant ROBERT B. ZOELLICK for summary judgment ; Declarations (2); Attachments (5) (nmr) (Entered: 01/14/2002)
01/28/2002	34	MOTION filed by plaintiff CTR FOR INTL ENVIRON for summary judgment ; Appendix (1); Exhibits (11) (nmr) (Entered: 01/29/2002)
02/05/2002		CASE referral ended Magistrate Judge John M. Facciola (ldc) (Entered: 02/07/2002)
02/06/2002	35	RESPONSE by federal defendants OFC. U.S. TRADE REP., ROBERT B. ZOELLICK in opposition to motion for summary judgment [34−1] by CTR FOR INTL ENVIRON; Declaration (1); Exhibit (1). (nmr) (Entered: 02/07/2002)
02/14/2002	36	REPLY MEMORANDUM by plaintiff CTR FOR INTL ENVIRON in support of motion for summary judgment [34−1] by CTR FOR INTL ENVIRON ; exhibit (1) (bjsp) (Entered: 02/15/2002)
03/12/2002	37	NOTICE OF CHANGE OF ADDRESS by John Martin Wagner representing plaintiff CTR FOR INTL ENVIRON. New address: EARTHJUSTICE, 426 17th Street, Sixth Floor, Oakland, CA 94612, (510) 550−6700. (nmr) (Entered: 03/13/2002)
11/21/2002	38	NOTICE OF CHANGE OF ADDRESS by Marcia N. Tiersky representing federal defendants OFC. U.S. TRADE REP., ROBERT B. ZOELLICK. New address: U.S. Department of Justice, 20 Massachusetts Avenue, NW, Room 7206, Washington, DC 20530, (202) 514−1359. (nmr) (Entered: 11/22/2002)
12/30/2002	39	NOTICE OF SUPPLEMENTAL AUTHORITY by federal defendant OFC. U.S. TRADE REP., federal defendant ROBERT B. ZOELLICK; Attachment (1) (nmr) (Entered: 01/02/2003)
09/05/2007	40	MEMORANDUM OPINION AND ORDER granting in part and denying in part defendants' motion for summary judgment, denying plaintiff's motion for summary judgment and requiring defendants to file supplemental information. Signed by Judge Richard W. Roberts on 9/5/07. (lcrwr1) (Entered: 09/05/2007)
10/18/2007	41	Unopposed MOTION for Extension of Time to *File Supplemental Materials in Support of Motion for Summary Judgment* by OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, ROBERT B. ZOELLICK (Attachments: # 1 Text of Proposed Order)(Tiersky, Marcia) (Entered: 10/18/2007)
10/22/2007		MINUTE ORDER: It is hereby ORDERED that the unopposed motion 41 for enlargement of time be, and hereby is, GRANTED. Signed by Judge Richard W. Roberts on 10/19/07. (lcrwr1) (Entered: 10/22/2007)
11/05/2007	42	SUPPLEMENTAL MEMORANDUM to *Defendants' 33 Motion for Summary Judgment* filed by OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, ROBERT B. ZOELLICK. (Attachments: # 1 Vaughn Index# 2 Declaration of Karen Lezny# 3 Declaration of Julia Christine Bliss)(Tiersky, Marcia). (Entered: 11/05/2007)
11/14/2007		MINUTE ORDER: It is hereby ORDERED that the plaintiff shall have until November 26, 2007 to respond to the defendants' supplemental brief in support of its motion for summary judgment. Signed by Judge Richard W. Roberts on 11/14/07. (lcrwr1) (Entered: 11/14/2007)
11/15/2007	43	Consent MOTION for Extension of Time to File Response/Reply *Defendants' Supplemental Brief In Support Of Its Motion For Summary Judgment* by CENTER FOR INTERNATIONAL ENVIRONMENT LAW (Attachments: # 1 Text of Proposed Order)(Wagner, J.) (Entered: 11/15/2007)

11/20/2007		Set/Reset Deadlines: Response to Motion for Summary Judgment due by 11/26/2007. (lin,) (Entered: 11/20/2007)
11/21/2007		MINUTE ORDER: It is hereby ORDERED that the plaintiff's consent motion 43 for enlargement of time to file a response be, and hereby is, GRANTED. The response is due by December 17, 2007. Signed by Judge Richard W. Roberts on 11/21/07. (lcrwr1) (Entered: 11/21/2007)
11/23/2007		Set/Reset Deadlines: Responses due by 12/17/2007 (zlin,) (Entered: 11/23/2007)
12/17/2007	44	SURREPLY to *Defendants' Supplemental Brief In Support Of Their Motion For Summary Judgment* filed by CENTER FOR INTERNATIONAL ENVIRONMENT LAW. (Attachments: #1 Declaration of J. Martin Wagner#2 Declaration of Daniel B. Magraw, Jr.)(Wagner, J.) (Entered: 12/17/2007)
11/21/2008	45	NOTICE *of Release of Documents* by OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, ROBERT B. ZOELLICK (Tiersky, Marcia) (Entered: 11/21/2008)
12/10/2008	46	NOTICE OF SUBSTITUTION OF COUNSEL by Luke M. Jones on behalf of all defendants Substituting for attorney Marcia N. Tiersky (Jones, Luke) (Entered: 12/10/2008)
04/12/2011	47	MEMORANDUM OPINION AND ORDER denying defendants' renewed motion 42 for summary judgment. The parties shall file by May 12, 2011 a joint status report and proposed order proposing a schedule on which the case should proceed. Signed by Judge Richard W. Roberts on 4/12/11. (lcrwr1) (Entered: 04/12/2011)
04/13/2011		Set/Reset Deadlines: Joint Status Report and Proposed Order due by 5/12/2011. (hs) (Entered: 04/13/2011)
04/27/2011	48	NOTICE OF SUBSTITUTION OF COUNSEL by Daniel Schwei on behalf of All Defendants Substituting for attorney Luke M. Jones (Schwei, Daniel) (Entered: 04/27/2011)
05/12/2011	49	STATUS REPORT by OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, ROBERT B. ZOELLICK. (Attachments: #1 Text of Proposed Order)(Schwei, Daniel) (Entered: 05/12/2011)
05/18/2011		MINUTE ORDER: In light of the parties' May 12, 2011 joint status report, it is hereby ORDERED that defendants shall file their second renewed motion for summary judgment by June 13, 2011; plaintiff shall file its opposition and cross−motion by July 13, 2011; defendants shall file their reply and opposition by August 3, 2011; and plaintiff shall file its reply by August 24, 2011. Signed by Judge Richard W. Roberts on 5/18/11. (lcrwr1) (Entered: 05/18/2011)
05/18/2011		Set/Reset Deadlines: Defendant's Second renewed Summary Judgment motion due by 6/13/2011; Defendants' Response to Motion for Summary Judgment due by 7/13/2011; Defendants' Reply to Motion for Summary Judgment due by 8/3/2011; Plaintiff's Reply due by 8/24/2011. (hs) (Entered: 05/18/2011)
06/13/2011	50	Second MOTION for Summary Judgment by OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, ROBERT B. ZOELLICK (Attachments: #1 Memorandum in Support, #2 Declaration of Julia Christine Bliss, #3 Statement of Facts, #4 Text of Proposed Order)(Schwei, Daniel) (Entered: 06/13/2011)
07/13/2011	51	CROSS MOTION for Summary Judgment by CENTER FOR INTERNATIONAL ENVIRONMENT LAW (Attachments: #1 Text of Proposed Order)(Wagner, J.) Modified on 7/14/2011 to correct docket text (jf,). (Entered: 07/13/2011)
07/13/2011	52	Memorandum in opposition to re 50 Second MOTION for Summary Judgment filed by CENTER FOR INTERNATIONAL ENVIRONMENT LAW. (Attachments: #1 Text of Proposed Order)(Wagner, J.) (Entered: 07/13/2011)
08/03/2011	53	Memorandum in opposition to re 51 CROSS MOTION for Summary Judgment filed by OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, ROBERT B. ZOELLICK. (Attachments: #1 Declaration of Julia Christine Bliss)(Schwei, Daniel) (Entered: 08/03/2011)

08/03/2011	54	REPLY to opposition to motion re 50 Second MOTION for Summary Judgment filed by OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, ROBERT B. ZOELLICK. (Attachments: # 1 Declaration of Julia Christine Bliss)(Schwei, Daniel) (Entered: 08/03/2011)
08/23/2011	55	REPLY to opposition to motion re 51 CROSS MOTION for Summary Judgment filed by CENTER FOR INTERNATIONAL ENVIRONMENT LAW. (Wagner, J.) (Entered: 08/23/2011)
02/29/2012	56	MEMORANDUM OPINION. Signed by Judge Richard W. Roberts on 2/29/2012. (lcrwr1) (Entered: 02/29/2012)
02/29/2012	57	ORDER denying the defendants' second renewed motion 50 for summary judgment, granting the plaintiff's cross−motion 51 for summary judgment, and ENJOINING the defendants from withholding Document 1, for the reasons set forth in the Memorandum Opinion filed this day. Signed by Judge Richard W. Roberts on 2/29/2012. (lcrwr1) (Entered: 02/29/2012)
03/12/2012	58	STIPULATION *TO EXTEND TIME* by CENTER FOR INTERNATIONAL ENVIRONMENT LAW, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, ROBERT B. ZOELLICK. (Attachments: # 1 Text of Proposed Order)(Wagner, J.) (Entered: 03/12/2012)
03/14/2012	59	ORDER; Plaintiff's Motion for Recovery of Cost and Fees now due by 5/14/2012, Signed by Judge Richard W. Roberts on 3/14/2012. (hs) (Entered: 03/14/2012)
04/05/2012	60	NOTICE of Change of Address by J. Martin Wagner (Wagner, J.) (Entered: 04/05/2012)
04/26/2012	61	NOTICE OF APPEAL as to 57 Order on Motion for Summary Judgment,,, by ROBERT B. ZOELLICK, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE. Fee Status: No Fee Paid. Parties have been notified. (Schwei, Daniel) (Entered: 04/26/2012)
04/27/2012	62	Transmission of the Notice of Appeal, Order Appealed, and Docket Sheet to US Court of Appeals. The Court of Appeals docketing fee was not paid because the fee was an Appeal by the Government re 61 Notice of Appeal. (jf,) (Entered: 04/27/2012)
05/01/2012		USCA Case Number 12−5136 for 61 Notice of Appeal filed by OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, ROBERT B. ZOELLICK. (jf,) (Entered: 05/01/2012)

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW,
1367 Connecticut Avenue
Suite 300
Washington, D.C. 20036,

Plaintiff,

vs.

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, and ROBERT B. ZOELLICK, in his official capacity as the United States Trade Representative,
600 17th Street, N.W.
Washington, D.C. 20508,

Defendants

Civil Ac

CASE NUMBER 1:01CV00498
JUDGE: Richard W. Roberts
DECK TYPE: FOIA/Privacy Act
DATE STAMP: 03/[redacted]/2001

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This action is brought under the Freedom of Information Act, as amended, 5 U.S.C. § 552 ("FOIA"), seeking access to documents identified by the Office of the United States Trade Representative and the United States Trade Representative (collectively, "USTR" or "Defendants") as responsive to a FOIA request, dated July 14, 2000, (the "FOIA Request") from the Center for International Environmental Law ("CIEL"). As detailed below, these documents relate to sessions of the Negotiating Group on Investment for the Free Trade Area of the Americas ("FTAA"), a free trade area that may be created among approximately 34 participating nations in the Western Hemisphere.

2. CIEL seeks declaratory and injunctive relief for USTR's violations of FOIA. These violations result from USTR's refusal to disclose the documents and USTR's failure to give a detailed, clear and accurate explanation for its refusal, as required by 5 U.S.C. § 552(a)(6)(A)(i).

JURSDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. Venue of this action is properly laid in this Court pursuant to 28 U.S.C. § 1391(b) because Defendants reside in the District of Columbia.

PARTIES

4. Plaintiff is a public interest, not-for-profit organization founded in 1989 to strengthen international and comparative environmental law and policy around the world. CIEL provides a full range of environmental legal services in both international and comparative national law, including policy research and publication, advice and advocacy, education and training, and institution building.

5. CIEL has focused on the impact of trade policy on the environment for many years. Much of the staff at CIEL possesses expertise in this area as well as international law and policy issues in general. Such expertise will enable CIEL to understand and use the data contained in the records requested. Information sought from USTR is relevant to CIEL's mission as a not-for-profit organization. Such information is likely to contribute significantly to public understanding of the FTAA and is not primarily for CIEL's commercial use.

6. Defendant Office of the United States Trade Representative is an agency within the meaning of FOIA. Defendant Robert B. Zoellick in his official capacity as United States Trade Representative is the head of that agency.

7. In a letter to CIEL dated October 25, 2000, USTR identified 46 documents in its office files that were responsive to CIEL's request. Therefore, USTR is the agency within the meaning of FOIA that possesses and controls the documents that CIEL seeks.

BACKGROUND

8. Since the First Summit of the Americas in December 1994, the United States has participated in annual meetings of the trade ministers of nations of the Western Hemisphere

designed to create a Free Trade Area of the Americas. During and between these meetings, USTR sends representatives to nine different negotiating groups, including the Negotiating Group on Investment. These negotiating groups are each responsible for drafting different components of an international agreement that will establish the FTAA.

9. At the most recent ministerial on November 4, 1999, in Toronto, Canada, the trade ministers of participating governments jointly declared that each negotiating group should submit by April 2001 a draft of its portion of the international agreement to the Trade Negotiating Committee, the body established by the trade ministers at the previous ministerial to guide and oversee negotiation of the international agreement to establish the FTAA. Following that announcement, the Negotiating Group on Investment met in February and May 2000. At those meetings, USTR made available to the negotiators from each of the attending foreign governments documents containing US proposed text and commentary for the investment portion of the international agreement.

10. On July 14, 2000, CIEL submitted a FOIA request to USTR that asked for, *inter alia*,

> [1] US documents circulated or tabled during the fifth and sixth sessions of the FTAA Negotiating Group on Investment held in February and May 2000, respectively. This would include both proposed text and any commentary, including but not limited to a discussion of what is meant by the phrase 'in like circumstances.' [2] All documents prepared during the inter-agency process of the US coming to positions reflected in documents referred to above.

In a letter dated July 21, 2000, USTR informed CIEL that it had received the FOIA Request on July 19, 2000, and had initiated the search process. After receiving nothing further from USTR for nearly three months, CIEL repeated its request in a letter to USTR dated October 5, 2000.

11. USTR responded on October 25, 2000, informing CIEL that it had "located a total of forty-six (46) documents that are responsive to [CIEL's] request. Of those, [USTR was] withholding forty-six (46) documents in full based on 5 U.S.C. § 552(b)(5), which pertains to certain inter- and intra-agency communications protected by the deliberative process privilege."

USTR did not provide any further explanation for the withholding or any notice of any anticipated fees.

12. On November 13, 2000, CIEL timely appealed USTR's refusal to USTR's Freedom of Information Appeals Committee. Although handicapped by USTR's failure to provide any information concerning the responsive documents, CIEL argued that these 46 documents did not fall within 5 U.S.C. § 552(b)(5) ("Exemption 5") as USTR claimed and that FOIA therefore entitled CIEL to receive them. CIEL also argued that USTR had to identify the withheld documents, justify more fully its decision to withhold the documents and provide factual portions of the responsive documents, Exemption 5 notwithstanding.

13. In a letter dated December 20, 2000, the Chair of the USTR Freedom of Information Appeals Committee affirmed USTR's refusal to disclose the requested documents. In addition, the Committee denied CIEL's request to identify the documents and provide a fuller explanation of the reasons for USTR's decision to withhold them. The Committee failed to respond to CIEL's request that USTR provide factual portions of the responsive documents.

14. Because of the change in presidential administrations, CIEL notified USTR on January 25, 2001, that "[t]he previous administration denied [CIEL's FOIA Request], asserting the deliberative process exemption under 5 U.S.C. § 552(b)(5). . . . Although this request is now ripe for action in federal district court and we are fully prepared and committed to pursuing such action, we want to offer you the opportunity to revisit this decision before filing suit." On March 2, 2001, the Associate General Counsel for USTR responded, "We have reviewed both the substantive law and the administrative procedure that led to our decision to deny disclosure of these documents. Based on that review, we do not consider that there is a basis for changing our decision."

15. CIEL has exhausted all of its administrative remedies in attempting to obtain the documents responsive to its FOIA Request.

16. Three meetings scheduled for April 2001 will advance FTAA negotiations. As mentioned above, the Trade Negotiating Committee will meet in Buenos Aires, Argentina, to review and build upon the draft portions of the agreement. The eighth Trade Ministerial, a gathering of the trade ministers for each FTAA participating nation, will also meet in Buenos Aires to move the FTAA process to the next stage. Finally, the Third Summit of the Americas, a gathering of the heads of state of each FTAA participating nation, will take place in Quebec City, Canada, to promote FTAA more generally. These meetings will create momentum for renewed negotiations in the months that follow.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

17. CIEL incorporates by reference the allegations of all the foregoing paragraphs as if fully set forth herein.

18. In addition to other uses for the documents responsive to the FOIA request, CIEL intends to use the documents to provide input to USTR concerning the three April 2001 meetings discussed above and subsequent negotiations. Therefore, CIEL has good cause to request an expedited review of this action pursuant to 28 U.S.C. § 1657(a).

SECOND CLAIM FOR RELIEF

19. CIEL incorporates by reference the allegations of all the foregoing paragraphs as if fully set forth herein.

20. USTR's decision to withhold from the public documents that it otherwise makes available to foreign governments during treaty negotiations violates FOIA and is unlawful.

THIRD CLAIM FOR RELIEF

23. CIEL incorporates by reference the allegations of all the foregoing paragraphs as if fully set forth herein.

24. USTR's decision to withhold and not produce the 46 documents and other documents responsive to the FOIA Request was improper, violates FOIA and is unlawful.

FOURTH CLAIM FOR RELIEF

21. CIEL incorporates by reference the allegations of all the foregoing paragraphs as if fully set forth herein.

22. USTR's decision to withhold and not produce the factual portions of the requested records was improper, violates FOIA and is unlawful.

FIFTH CLAIM FOR RELIEF

25. CIEL incorporates by reference the allegations of all the foregoing paragraphs as if fully set forth herein.

26. The circumstances surrounding USTR's withholding of the 46 documents responsive to the FOIA Request raise questions whether USTR acted arbitrarily or capriciously with respect to the withholding. This Court should therefore issue to CIEL and submit to the Office of the Special Counsel a written finding to that effect, pursuant to 5 U.S.C. § 552(a)(4)(F).

SIXTH CLAIM FOR RELIEF

27. CIEL incorporates by reference the allegations of all the foregoing paragraphs as if fully set forth herein.

28. USTR's failure to give a detailed, clear and accurate explanation for its refusal to produce documents as required by 5 U.S.C. § 552(a)(6)(A)(i) violates FOIA and is unlawful.

RELIEF

WHEREFORE, for all the foregoing reasons, CIEL prays that this Court:

(A) Expedite this case in accordance with 28 U.S.C. § 1657(a);

(B) Declare that USTR's decision to withhold from the public documents that USTR otherwise makes available to foreign governments during treaty negotiations violates FOIA and is unlawful;

(C) Enjoin USTR pursuant to 5 U.S.C. § 552(a)(4)(B) from withholding the 46 documents and any other documents responsive to the FOIA Request;

(D) Order USTR pursuant to 5 U.S.C. § 552(a)(4)(B) to produce without charge within 10 days from the date of such order the 46 documents and any other documents responsive to the FOIA Request;

(E) Declare that USTR's decision to withhold from the public factual portions of the requested records to the FOIA Request violates FOIA and is unlawful;

(F) Enjoin USTR pursuant to 5 U.S.C. § 552(a)(4)(B) from withholding factual portions of the requested records;

(G) Order USTR pursuant to 5 U.S.C. § 552(a)(4)(B) to produce without charge within 10 days from the date of such order the factual portions of the requested records;

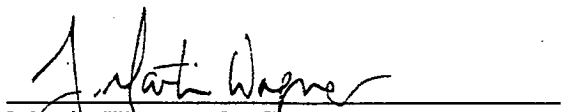
(H) Issue to CIEL and refer to the Office of the Special Counsel pursuant to 5 U.S.C. § 552(a)(4)(F) a written finding that the circumstances surrounding USTR's withholding raise questions whether USTR acted arbitrarily and capriciously with respect to the withholding;

(I) Declare that USTR's failure to give a detailed, clear and accurate explanation for its refusal to provide documents as required by 5 U.S.C. § 552(a)(6)(A)(i) violates FOIA and is unlawful;

(J) Award plaintiff its attorneys' fees and other costs in this action pursuant to 5 U.S.C. to § 552(a)(4)(E); and

(K) Grant such other and further relief as the Court may deem just and proper.

Respectfully,



Martin Wagner (D.C. Bar No. 435730)
Scott Pasternack (D.C. Bar No. 456096)
Earthjustice Legal Defense Fund
180 Montgomery Street, Suite 1725
San Francisco, CA 94104
(415) 627-6700

Counsel for Plaintiff

Stephen Porter (D.C. Bar No. 448508)
Center for International Environmental Law
1367 Connecticut Avenue, Suite 300
Washington, D.C. 20036

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, Plaintiff, v. OFFICE OF THE U.S. TRADE REPRESENTATIVE, et al., Defendants.	Civil Action No. 01-498 (RWR/JMF)

DECLARATION OF PETER B. DAVIDSON

I, do hereby state and declare:

1. I am General Counsel to the Office of the United States Trade Representative (USTR) and have served in this position since February 20, 2001. My primary duties include advising the United States Trade Representative on all agency legal matters, including matters arising under the Freedom of Information Act ("FOIA"). By virtue of my position, I also have original classification authority at the "confidential" level. I am submitting this declaration in support of a revised *Vaughn* Index in this case.

Justification for Withholding Certain Documents under 5 U.S.C. 552(b)(1)

2. On May 10, 2001, I submitted a Decision Memorandum to Ambassador Zoellick, United States Trade Representative, recommending that he direct the classification of four negotiating documents. These documents represented U.S. positions that were "tabled" (*i.e.*

shared) with our trading partners in the negotiations on the investment chapter for a Free Trade Area of the Americas ("FTAA"). Under the operating rules of the FTAA negotiations, Western Hemisphere countries participating in this broad negotiation submit their negotiating positions in confidence and are expected to maintain each other's proposals in confidence.

3. At the time that the FOIA request was received from Plaintiff, these four documents had not been classified. Consequently, we were required to follow the provisions of Section 1.8 of Executive Order 12958 which allows the head of an agency to classify records following the receipt of a FOIA request, so long as a document-by-document review is undertaken.

4. The May 10, 2001 memorandum to Ambassador Zoellick advised him with respect to the requirements of Section 1.8. The memorandum also provided Ambassador Zoellick the chief FTAA negotiator's assessment that the disclosure of these documents would create policy obstacles for our hemispheric trading partners which would seriously affect their ability to conclude a free trade agreement. In terms of the application of the classification criterion established by Section 1.5 of the Executive Order, we advised him to direct the classification of these documents on the basis that their release would "harm foreign relations or foreign activities of the U.S.," Subparagraph 1.5(d).

5. On May 10, 2001, Ambassador Zoellick affirmatively determined to classify these four documents on this basis. They are classified at a "confidential" level. The duration of the classification was made 10 years from May 10, 2001. Although the FTAA countries intend to wrap up their negotiations prior to this date, given that the negotiations require 34 countries to reach agreement and ratify the document, there is no assurance that this will be the case. Consequently, the 10 year period was reasonable under the circumstances.

Segregability

6. All of the classified records were carefully reviewed by me to determine if any of the information withheld could be segregated and released. No portions of these documents could be meaningfully redacted as they constitute the actual texts submitted to our FTAA negotiating partners.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 11th day of January, 2002.

Peter B. Davidson
General Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, Plaintiff, v. OFFICE OF THE U.S. TRADE REPRESENTATIVE, et al., Defendants.	Civil Action No. 01-498 (RWR/JMF)

DECLARATION OF SYBIA HARRISON

I, Sybia Harrison do hereby state and declare:

1. I am the Freedom of Information Act Officer for the Office of the United States Trade Representative ("USTR") and have served in this position since 1995.

2. In the course of my official duties, I am responsible for processing and responding to all requests for records made to USTR pursuant to the provisions of 5 U.S.C. § 552, commonly known as the Freedom of Information Act ("FOIA"). Specifically, I am aware of the treatment which has been afforded the FOIA request of Plaintiff, Center for International Environmental Law ("CIEL"), at issue in this lawsuit.

3. The purpose of this declaration is to provide the Court with information regarding the processing of Plaintiff's FOIA request. I have reviewed and am familiar with the complaint and the November 28, 2001 magistrate's order filed in this matter, and I submit this declaration

in support of a revised *Vaughn* Index in this case.

4. All information contained herein is based upon information furnished to me in my official capacity, and upon my personal review of the records at issue in this litigation. This declaration, including the exhibits attached hereto, accompany the defendants' submission of a revised *Vaughn* Index in this case.

Administrative Processing of the Request

5. By letter dated July 14, 2000, Plaintiff submitted a FOIA request to USTR seeking documents related to the Free Trade Area of the Americans (FTAA) negotiations. CIEL sought US documents circulated or tabled during the fifth and sixth sessions of the Negotiating Group on Investment held in February and May 2000 respectively, and, in particular, text and commentary related to the phrase "in like circumstances." In addition, CIEL sought all documents prepared during the inter-agency process of coming to the positions reflected in these documents. See Exhibit **1.**

6. In accordance with USTR practice, my office forwarded the request to the Assistant USTR for the Western Hemisphere and the Assistant USTR for Services, Investment and Intellectual Property on July 19, 2000. Because each of these units within USTR is responsible for the FTAA negotiations and investment matters, respectively, they were the units reasonably likely to have the requested negotiating texts and related documents. In addition, the request was forwarded to Steve Fabry in the Office of the General Counsel who is the attorney primarily responsible for handling investment related matters.

7. By my letter dated October 25, 2000, USTR responded to Plaintiff. This initial response indicated that 46 responsive documents had been identified and that all of these were being withheld pursuant to 5 U.S.C. 552(b)(5), which pertains to certain inter- and intra-agency

communications protected by the deliberative process privilege. See Exhibit **2.**

8. Plaintiff appealed the denial of the requested documents on November 13, 2000. After consideration of this appeal by USTR's FOIA Appeals Committee, the Committee upheld the initial decision to withhold the documents and transmitted this determination to Plaintiff on December 20, 2000. See Exhibit **3.**

9. On January 25, 2001, Plaintiff submitted a letter to the newly confirmed United States Trade Representative, Robert Zoellick. In effect, CIEL submitted an informal appeal of the agency's earlier decision to the new appointees of the Bush Administration. By letter dated March 2, 2001, Associate General Counsel Bruce Overton answered on behalf of the agency, responding that the agency did not believe there was a basis for changing its earlier determinations. See Exhibit **4** and Exhibit **5.**

Justification for Withholding the Documents

10. The majority of the documents were withheld pursuant to Exemption (b)(5). FOIA Exemption (b)5 permits the withholding of "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5). Exemption b(5) has been construed to exempt those documents or information normally privileged in the civil discovery context and includes the agency's pre-decisional deliberative process, attorney work product, and attorney-client privileges.

11. Pursuant to the deliberative process privilege encompassed by Exemption b(5), we withheld all documents with the exception of numbers 1, 8, 38 and 43 (as identified in the accompanying, revised *Vaughn* Index) which were withheld under Exemption b(1) and are the subject of another declaration. The deliberative process in this case was the development of texts for the U.S. government to submit in the negotiation known as the Free Trade Area of the

Americas. As the U.S. government agency responsible for negotiating trade agreements, USTR works through an interagency process to develop the language that it proposes as text in this multilateral negotiation.

12. Most of these documents either represent drafts of proposed negotiating text which needed clearance through USTR's interagency process before it could be submitted as text by the FTAA negotiators, or they represent commentary on certain definitions or terms. Some discuss the potential consequences of choosing certain terms rather than others. Finally, some documents, or portions of documents, analyze or speculate on the possible consequences certain language would have for the FTAA or with respect to other existing trade agreements. The very nature of many of the documents is informal: e-mail exchanges done on a quick turnaround with comments. They are discursive and many include handwritten edits and comments that reflect a work in progress and an on-going dialogue that was being conducted by the counterparts in various agencies responsible for developing a draft investment text.

13. We determined that disclosure of the information would inhibit candor, and chill the open communication and free flow of information that is vital to the decision-making process among the agency participants. Disclosure of this information would not only chill the internal deliberations of the agency, but harm the interagency process.

14. Moreover, because the U.S. has the opportunity to modify or withdraw its proposed text to the FTAA negotiating partners on a given topic, the release of pre-decisional and deliberative discussions would adversely affect the government's ability to submit subsequent U.S. texts. Although the texts covered in items 1, 8, 38, and 43 (as identified in the revised *Vaughn* Index) represent texts submitted to the FTAA countries, they are not necessarily the final U.S. texts in the negotiations. Disclosure of these pre-decisional and deliberative

documents could create confusion regarding the actual U.S. negotiating position at any given time.

15. Finally, efforts by the agency to negotiate other trade agreements that would also include investment provisions, such as our bilateral negotiations with individual nations, could be prejudiced by release of these documents.

16. All of the records at issue were carefully reviewed to determine if the agency could make a discretionary release. It was determined that a paper entitled "Western Hemisphere Investment Agreement containing 'In Like Circumstances' Clauses" (Item 7) could be made available, as well as the fax cover sheet to Item 9, and the last four pages to Item 44. Item 7 has already been provided to Plaintiff, and the portions of Items 9 and 44 are being provided to Plaintiff.

17. I am also aware that on May 10, 2001, General Counsel Peter Davidson made a recommendation to Ambassador Robert Zoellick that the four documents that were submitted to U.S. negotiating texts submitted to the FTAA investment negotiating group be classified. His declaration is being submitted concurrently in support of the agency's assertion of Exemption b(1) for those documents.

Segregability

18. All of the non-classified records were carefully reviewed by me to determine if any of the information withheld could be segregated and released. Because the information contained in the documents was primarily of a deliberative and analytical nature and did not contain factual material, I determined that it was properly withheld with only minor exceptions noted in Paragraph 16. These exceptions were the fax cover sheet to Item 9 and the last four

pages of Item 44. As described in the attached *Vaughn* Index, USTR has carefully reviewed each page of every document and released all reasonably segregable information.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 11th day of January, 2002.

Sybia Harrison
Freedom of Information Officer

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, Plaintiff, v. OFFICE OF THE U.S. TRADE REPRESENTATIVE, et al., Defendants.	Civil Action No. 01-498 (RWR/JMF)

DECLARATION OF REGINA VARGO

I, do hereby state and declare:

1. I am the Assistant United States Trade Representative for the Americas at the Office of the United States Trade Representative (USTR). I have served in this position since June 2001. As part of my duties, I serve as the chief staff-level negotiator for the United States in negotiations seeking to establish the "Free Trade Agreement of the Americas" (FTAA). Before assuming my current position, I served as Deputy Assistant Secretary for the Western Hemisphere in the International Trade Administration at the Department of Commerce where, among my other duties, I had management oversight of the Commerce Department's participation in the full range of FTAA negotiations, including those relating to investment. As a result of my work at USTR and the Department of Commerce I am well acquainted with matters relating to the FTAA negotiations.

2. By virtue of my position, I have original classification authority at the "confidential" level.

3. An FTAA Secretariat, currently located in Panama City, Panama, provides administrative support for the FTAA negotiations. As part of its responsibilities, the Secretariat circulates negotiating papers and texts among the countries that are participating in the negotiation. In April 2001 the trade ministers of the FTAA nations at the Sixth FTAA Ministerial Meeting decided to authorize public dissemination of the then existing FTAA texts – which were in the form of an aggregated text ("consolidated texts") without attribution as to which country had proposed text. In response to this decision, the Secretariat translated and disseminated the consolidated texts it had received by December 2000.

4. The consolidated texts reflect an aggregate of all negotiating texts, in each subject area ("chapter"), advanced by governments participating in the negotiation. As a result, while the consolidated texts include some agreed language, they also contain strings of competing proposals, which remain in brackets.

5. The consolidated texts do not include any indication regarding which government, or governments, had offered particular proposals. Thus, for example, the consolidated texts do not indicate which bracketed provisions reflect proposals from the United States regarding investment or other matters. The English language version of the consolidated text of a proposed FTAA chapter on investment, which is posted on the official FTAA website, appears as **Exhibit 1** to this declaration (www.alca-ftaa.org).

6. USTR has not released its FTAA negotiating texts and position papers to the public. In order to provide the greatest degree of information to the public consistent with U.S.

negotiating interests, however, USTR has published general summaries of its negotiating positions in the FTAA on its website (www.ustr.gov/regions/whemisphere/ftaa.shtml).

7. The United States has made the protection of U.S. investors and investments abroad a key element of its foreign commercial policy over recent decades. The United States has concluded over 30 bilateral investment treaties and other agreements with nations around the world to ensure that foreign governments treat U.S. investors, businesses, and holdings in a fair and even-handed fashion. As part of the FTAA, the United States is seeking to extend investor protection rules to cover virtually all of the governments in the Western Hemisphere.

8. Public release of the actual U.S. FTAA negotiating text and proposals on investment could cause harm to the U.S. national security. For a variety of reasons, many of our hemispheric trading partners, and certain of their constituencies, have strongly held views regarding the role that foreign investment should play in their national economies. Foreign investment, expropriation, regulation of capital, investor-State arbitration procedures, and related subjects have traditionally been highly controversial in these countries. For that reason, it will be difficult for many participating countries to accept some or all of the rules and principles that the United States is seeking through the FTAA investment negotiations unless they have latitude to negotiate. If the U.S. investment text is released, however, our FTAA partners may have sharply reduced flexibility in the negotiations.

9. If the U.S. negotiating proposal were made public, it would become an immediate target for pressure on certain national governments from internal groups that would not want the U.S. proposals to be adopted. This could be the case even in instances where – from an objective viewpoint – the U.S. proposal was fair and balanced for all parties. This pressure could cause

FTAA governments to resist or reject U.S. proposals that might otherwise serve as the basis for negotiation or adoption, leading to possible deadlock or lengthy delay in a critical area of the FTAA negotiations. Such an eventuality would cause harm not only to U.S. near-term relations with foreign governments and foreign activities but to the longer-range national interest in obtaining an agreement that serves the economic and diplomatic interests of the United States.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 6th day of February, 2002.

Regina K. Vargo

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 01-498 (RWR)**
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The Center for International Environmental Law ("CIEL") brought this action against the Office of the United States Trade Representative, and Susan C. Schwab,[1] in her official capacity as the United States Trade Representative (collectively "USTR"), seeking documents under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The parties have filed cross-motions for summary judgment. Although there is no longer a dispute over a majority of the documents, USTR's affidavits in support of its motion for summary judgment are not sufficient to justify withholding the remaining documents at issue and USTR will be ordered to supplement those affidavits. Accordingly, USTR's motion for summary judgment will be granted in part and denied in part and CIEL's motion for summary judgment will be denied.

[1] Susan C. Schwab is substituted for Robert B. Zoellick under Fed. R. Civ. P. 25(d)(1).

BACKGROUND

CIEL is a non-profit public interest organization providing environmental legal services, some of which focus on the impact of trade policy on the environment. (Compl. ¶¶ 4-5.) It filed a FOIA request with USTR seeking documents relating to sessions of the Negotiating Group on Investment ("NGI") for the Free Trade Agreement of the Americas ("FTAA").[2] The NGI has been working on drafting an international agreement (the "Agreement") to establish a free trade area among approximately thirty-four participating nations in the western hemisphere. In the process of these negotiations, NGI meetings were held during which the USTR provided to negotiators documents containing the attending foreign governments' proposed text and commentary for the investment portion of the Agreement. (Compl. ¶ 9.)

USTR's response to CIEL's FOIA request identified forty-six documents in its office responsive to CIEL's request but withheld

---

[2] CIEL requested, inter alia:

> [1] United States' documents circulated or tabled during the fifth and sixth sessions of the FTAA Negotiating Group on Investment held in February and May 2000, respectively. This would include both proposed text and any commentary, including but not limited to a discussion of what is meant by the phrase 'in like circumstances.'
>
> [2] All documents prepared during the inter-agency process of the United States coming to positions reflected in documents referred to above.

(Compl. ¶ 10.)

all forty-six documents by relying upon 5 U.S.C. § 552(b)(5), which exempts from disclosure inter-agency and intra-agency communications protected by the deliberative process privilege. (Compl. ¶ 11.) USTR asserts that it conducted a search reasonably calculated to discover all responsive documents, and CIEL does not contest that assertion.

CIEL timely appealed to the USTR's Freedom of Information Appeals Committee, which affirmed the refusal to disclose the documents and denied CIEL's request to provide either the factual portions of the documents or a fuller explanation for withholding the documents. (Compl. ¶¶ 12, 13.) After a change in the presidential administration, the USTR, upon CIEL's request, revisited its decision but found no basis for changing its initial decision. (Compl. ¶ 14.) Following the unsuccessful administrative appeal, CIEL initiated the instant action and moved for production of a Vaughn index. Pursuant to an order by a magistrate judge, USTR provided a Vaughn Index and now moves, and CIEL cross-moves, for summary judgment.

Over the course of the proceedings, the parties have reduced the number of documents at issue from forty-six to four. USTR argued that forty-one of the requested documents are exempt from disclosure under the deliberative process privilege, 5 U.S.C. § 552(b)(5), and CIEL withdrew its claim that withholding those documents was improper. Thus, summary judgment will be granted

in USTR's favor as to those forty-one documents. Additionally, USTR has released another document to CIEL. (Defs.' Mot. Summ. J., Decl. of Sylvia Harrison (Harrison Decl.) at 16.)

Only documents 1, 8, 38, and 43, which USTR argues are protected from disclosure under 5 U.S.C. §552(b)(1), remain in dispute. Each of these documents was shared with the FTAA negotiating group on investment. Document 1 explains the United States' proposed position on the phrase "in like circumstances." (Defs.' Mot. Summ. J., Ex. 5, Vaughn Index ("Vaughn Index") ¶ 1.) Document 8 delineates the United States' position on the definitions of investment, investor, and other terms. (Vaughn Index ¶ 8.) Document 38 describes the United States' position on transparency in the investment context. (Vaughn Index ¶ 38.) Finally, Document 43 sets forth the position on the terms "national treatment" and "most favored nation treatment." (Vaughn Index ¶ 43.) These four documents were classified at the "confidential" level. (Defs.' Mot. Summ. J., Decl. of Peter B. Davidson ("Davidson Decl.") at 5.)

DISCUSSION

Summary judgment is appropriate when there exists no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The burden falls on the moving party to provide a sufficient factual record that demonstrates the absence of such a genuine issue of

material fact. See Beard v. Banks, 126 S. Ct. 2572, 2578 (2006). A court must draw all reasonable inferences from the evidentiary record in favor of the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In a FOIA suit, an agency is entitled to summary judgment upon demonstrating that no material facts are in dispute and that all information that falls within the class requested either has been produced, is unidentifiable, or is exempt from disclosure. Students Against Genocide v. Dep't of State, 257 F.3d 828, 833 (D.C. Cir. 2001); Weisburg v. Dep't of Justice, 627 F.2d 365, 368 (D.C. Cir. 1980). A district court must conduct *de novo* review of the record in a FOIA case, and the agency resisting disclosure bears the burden of persuasion in defending its action. 5 U.S.C. § 552(a)(4)(B); see also Long v. Dep't of Justice, 450 F. Supp. 2d 42, 53 (D.D.C. 2006).

The FOIA requires agencies to comply with requests to make their records available to the public, unless information is exempted by clear statutory language. 5 U.S.C. §§ 552(a), (b); Oglesby v. Dep't of Army, 79 F.3d 1172, 1176 (D.C. Cir. 1996). Although there is a "strong presumption in favor of disclosure," Dep't of State v. Ray, 502 U.S. 164, 173 (1991), there are nine exemptions to disclosure set forth in 5 U.S.C. § 552(b). These exemptions are to be construed as narrowly as possible to provide the maximum access to agency information based on the overall

purpose of the Act. Vaughn v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973).

Here, USTR must show that there is no genuine issue as to whether it properly invoked the statutory exemption authorized by § 552(b)(1) to withhold information, and that all non-exempt information that is reasonably segregable has been segregated and disclosed. Exemption 1 protects from disclosure "matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order[.]" 5 U.S.C. § 552(b)(1). USTR justifies withholding the documents based on the classification criteria of Executive Order 12,958 which permits classification of information only if "the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to national security . . . and . . . is able to identify or describe the damage." 60 Fed. Reg. 19,825, 19,826 § 1.2(a)(4).

Because the party requesting disclosure is at a disadvantage to argue misapplication of an exemption given that it cannot know the precise contents of the documents withheld, a factual dispute may arise regarding whether the documents actually fit within the cited exemptions. Vaughn, 484 F.2d at 823-24. To enable the requesting party an opportunity to effectively challenge the

applicability of the exemption and the court to properly assess its validity, the party in possession of the materials must explain the specific reason for the agency's nondisclosure. Id. at 826; see, e.g., Oglesby, 79 F.3d at 1176 ("The description and explanation the agency offers should reveal as much detail as possible as to the nature of the document, without actually disclosing information that deserves protection."). Although this explanation may include a detailed description of each document being withheld and take the form of a Vaughn index, this index is not always mandated and the government may satisfy its burden by other means. Voinche v. Fed. Bureau of Investigation, 412 F. Supp. 2d 60, 65 (D.D.C. 2006) (noting that because "courts have repeatedly held that it is the function of a Vaughn index rather than its form that is important, . . . an agency does not have to provide an index per se"). Regardless of the form of the government's declaration, it must show why exemption is appropriate and conclusory statements and generalized claims of exemption are insufficient to justify withholding. Vaughn, 484 F.2d at 826; see also Mead Data Cent., Inc. v. Dep't of Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977) ("[T]he burden which the FOIA specifically places on the Government to show that the information withheld is exempt from disclosure cannot be satisfied by the sweeping and conclusory citation of an exemption . . . ."). Where disclosures are not sufficiently detailed to

permit a meaningful *de novo* review, a court may order the agency to submit more detailed disclosures. Voinche, 412 F. Supp. 2d at 65.

The D.C. Circuit has set forth specific requirements to justify withholding documents under Exemption 1:

> the agency affidavit must, for each redacted document or portion thereof, (1) identify the document, by type and location in the body of the documents requested; (2) note that Exemption 1 is claimed; (3) describe the document withheld or any redacted portion thereof, disclosing as much information as possible without thwarting the exemption's purpose; (4) explain how this material falls within one or more of the categories of classified information authorized by the governing executive order; and (5) explain how disclosure of the material in question would cause the requisite degree of harm to the national security.

King v. Dep't of Justice, 830 F.2d 210, 224 (D.C. Cir. 1987). Even if Exemption 1 applies, because "[t]he focus of the FOIA is information, not documents, . . . an agency cannot justify withholding an entire document simply by showing that it contains some exempt material. It has long been a rule in this Circuit that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." Mead Data, 566 F.2d at 260; see also Vaughn, 484 F.2d at 825; 5 U.S.C. § 552(b) (requiring disclosure of "any reasonably segregable portion" of an otherwise exempt record).

Although "in conducting *de novo* review in the context of national security concerns, courts must accord *substantial weight* to an agency's affidavit concerning the details of the classified status of the disputed record," Wolf v. Cent. Intelligence Agency, 473 F.3d 370, 374 (D.C. Cir. 2007) (internal citations omitted), when the agency's affidavit is inadequate, summary judgment may be withheld and the agency required to provide a new declaration. Cf. Campbell v. Dep't of Justice, 164 F.3d 20, 31 (D.C. Cir. 1998) (remanded because declaration provided only a sweeping conclusory assertion of anticipated harm to national security and instructed the district court to require a new declaration); King, 830 F.2d at 225 (remanded because affidavits inadequately described the redacted material and did not explain with sufficient specificity how disclosure would harm national security).

USTR makes two basic claims regarding the applicability of Exemption 1. It argues that the four documents are properly classified as confidential because they contain information that might harm foreign relations and national security, and because these documents pertain to negotiations that were expected to be maintained in confidence. (Def.'s Mot. Summ. J. at 6-7.)

First, USTR contends that the release of this information could reduce the chances of the United States' proposals being adopted. (See Def.'s Reply to Pl.'s Mot. Summ. J. ("Def.'s

Reply"), Decl. of Regina Vargo ("Vargo Decl.") ¶ 9.) USTR explains that foreign investment activities are highly controversial issues for many of the United States' trading partners. It reasons that publishing the United States' proposal would allow the proposal to become a target for constituencies of the United States' negotiating partners who would pressure their governments not to adopt it, thereby reducing the negotiation flexibility of those partners. Ultimately, USTR asserts, disclosure could harm both the United States' near-term relations with foreign governments and its long-term ability to obtain agreements that best serve its economic and diplomatic interests. (Vargo Decl. ¶ 9.)

CIEL contests that harm will result from public disclosure because the averments contained in the Vargo Declaration do not identify or describe with sufficient specificity how disclosure of the documents will cause the alleged harm to national security. Also, CIEL argues that because these kinds of documents have been disclosed in the past during other treaty negotiations, there is no reason to suspect that harm will now result.

Alternatively, USTR argues that disclosure of the information could create confidentiality concerns for the United States' hemispheric trading partners. (Davidson Decl. ¶ 4.) USTR submitted the declaration of Peter Davidson, General Counsel

to the USTR, which states that under the operating rules of FTAA, negotiating countries "are expected to maintain each other's proposals in confidence." (Id. ¶ 2.) CIEL disputes this assertion regarding confidentiality because use of the operating rules to justify applicability of Exemption 1 would allow the USTR to make pre-emptive confidentiality rules and avoid judicial scrutiny of document exclusion. In addition, the operating rules, which USTR does not suggest are binding, negate contrary obligations arising out of federal law. (Pl.'s Mot. Summ. J. at 9.)

The USTR has not proved the appropriateness of withholding the four documents under Exemption 1. USTR principally relies on declarations from Davidson and Regina Vargo, neither of which demonstrates a strong nexus between the release of the documents and harm to United States foreign policy. Although both declarants state that disclosure would hamper the United States' and its trade partners' ability to engage in fruitful negotiations regarding a free trade agreement, there is no showing that reduced negotiation flexibility would cause the "requisite degree of harm" to the economic and security interests of the United States.[3] King, 830 F.2d at 224. Additionally, the

[3] See Davidson Decl. ¶ 4 ("[D]isclosure of these documents would create policy obstacles for our hemispheric trading partners which would seriously affect their ability to conclude a free trade agreement . . . ."); Vargo Decl. ¶ 8 ("[M]any of our hemispheric trading partners, and certain of their

Vargo declaration, which was submitted following the magistrate judge's order to provide a declaration describing with specificity how disclosure of each document would harm national security (Pl.'s Mot. Summ. J. at 10), contains sweeping conclusory statements[4] of the harm USTR expects will result but fails to provide the basis of that conclusion. Finally, although USTR suggests that the operating rules of FTAA negotiations have a preclusive effect, it provides no specific information about the nature of these rules, including whether the United States' agreement to produce its proposals, but refusal to provide those of its negotiating partners, constitutes a breach of the rules.

Failing to prove that there is sufficient justification for classifying the documents as confidential, USTR has not established the applicability of Exemption 1.[5] Cf. Wolf, 473

---

constituencies, have strongly held views regarding the role that foreign investment should play in their national economies . . . . For that reason, it will be difficult for many participating countries to accept some or all of the rules and principles that the United States is seeking through the FTAA investment negotiations unless they have latitude to negotiate.")

[4] The Vargo declaration uses conclusory language such as "for a variety of reasons" and "controversial" without providing facts to indicate what the reasons are or to show the basis for the defendants' conclusion that the subjects of the negotiations are controversial. The declaration submitted by USTR does not in itself provide a reasonable basis to conclude that the agency has sufficient justification for classifying the documents as confidential.

[5] Although in a supplemental filing, USTR points to Ctr. for Int'l Environ. Law v. Office of the U.S. Trade Rep. to further justify withholding the documents, the record submitted

F.3d at 376 (noting that agency's affidavits explaining that disclosure of records regarding foreign nationals might potentially "reveal targets of CIA surveillance and . . . CIA methods" are sufficient to justify withholding under Exemption 1); Public Citizen v. Dep't of State, 276 F.3d 634, 644 (D.C. Cir. 2002) (affirming the district court's entry of summary judgment for the government on the basis of its declaration that disclosure of the withheld information "could enable foreign governments or foreign persons or entities opposed to United States foreign policy objectives to identify U.S. intelligence activities, sources or methods").

Even if Exemption 1 is found to justify withholding the documents, USTR may not automatically withhold the full document as categorically exempt without disclosing any segregable portions. USTR asserts that none of the withheld documents contains segregable material. However, the record is

---

in that case was more detailed than the one filed here. 237 F. Supp. 2d 17, 23 (D.D.C. 2002). In the prior case, CIEL requested documents pertaining to the United States-Chile Free Trade Agreement and USTR properly withheld the documents pursuant to Exemption 1. See Ctr. for Int'l Environ. Law, 237 F. Supp. 2d at 32. USTR provided a declaration explaining not only that trade policy issues are "often sensitive and controversial," but also that disclosure of U.S. proposals would expose U.S. legal policy and strategic analysis along with the differing agency viewpoints, permitting other governments to gauge the strength of U.S. negotiating positions and exploit interagency differences. Here, the Vargo declaration fails to draw a similar connection between the disclosure and the alleged harm that would result from disclosure.

insufficient as to this point because USTR does not explain which underlying facts in the documents are confidential in nature. See Voinche, 412 F. Supp. 2d at 69 (noting that a government agency must provide more than "conclusory statements as to the impossibility of segregating any portions of the released material without even citing specifically which withheld documents it was referring to"). Without a more detailed description of the contents of the documents, it is not possible to ascertain if, as stated by USTR, the documents consist of solely legal analysis and contain no factual material. Accordingly, a genuine issue of material fact remains as to whether the documents should be classified as confidential and summary judgment cannot be entered for either party. Cf. Long, 450 F. Supp. 2d at 53-54 (holding that a court may award summary judgment solely on the affidavits and declarations provided by the agency as long as the justification for invoking the exemptions is specifically detailed).

Finally, CIEL argues that even if Exemption 1 applies, USTR has waived its right to invoke the exemption because there has been a prior public disclosure of similar information on the internet in the form of a draft of the investment portion of the FTAA.

Prior disclosure of similar information does not suffice as a general waiver of a FOIA exemption; instead, it must be proven

that the information requested has been officially released into the public domain. See Wolf, 473 F.3d at 378. "'[A] plaintiff asserting a claim of prior disclosure must bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld.'" Id. (quoting Afshar v. Dep't of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983). "The fact that some 'information resides in the public domain does not eliminate the possibility that further disclosures can cause harm[.]'" Students Against Genocide, 257 F.3d at 835 (quoting Fitzgibbon v. Cent. Intelligence Agency, 911 F.2d 755, 766 (D.C. Cir. 1990)). Thus, "while the logic of FOIA postulates that an exemption can serve no purpose once information . . . becomes public, we must be confident that the information sought is truly public and that the requestor receive no more than what is publicly available before we find a waiver." Students Against Genocide, 257 F.3d at 836 (internal quotations omitted).

Although the publicly disclosed draft contains proposals for each provision of the Agreement, the draft does not disclose the identity of the negotiating party proffering each proposal. CIEL has not met its burden of proving that the same information has already been released in the public domain. The identity of the negotiating parties has been kept confidential and whether it must be released must await a more detailed explanation of the possible harm that will result from disclosure.

CONCLUSION AND ORDER

A genuine issue of material fact exists as to applicability of Exemption 1 and the extent to which a potential harm to the United States' negotiating efforts or breach of confidentiality may result from disclosure. Therefore, neither motion for summary judgment is supported by sufficient facts in the record to warrant judgment as a matter of law. The parties' requests for summary judgment will be denied and the USTR will be ordered to produce additional declarations addressing how disclosure will threaten United States' foreign relations and national security and the nature of any confidentiality agreement among the FTAA negotiating parties. Accordingly, it is hereby

ORDERED that USTR's motion [33] for summary judgment be, and hereby is, GRANTED as to documents 2-7, 9-37, 39-42, and 44-46 and DENIED without prejudice as to documents 1, 8, 38, 43. It is further

ORDERED that CIEL's motion [34] for summary judgment be, and hereby is, DENIED without prejudice. It is further

ORDERED that within 45 days of the entry of this order, USTR file supplements to its disclosures in support of its motion for summary judgment.

SIGNED this 5th day of September, 2007.

/s/
RICHARD W. ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, Plaintiff, v. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, and SUSAN C. SCHWAB, in her official capacity as the United States Trade Representative, Defendants.	Civil Action No. 01-CV-498 (RWR/JMF)

VAUGHN INDEX

Document # **Description and Exemption**

1. **Paper identified as Attachment B and entitled "Commentary: 'In Like Circumstances.'"** One page. This document was created by the Office of the U.S. Trade Representative (USTR). It is the initial US government position on this subject that was "tabled" (i.e. shared) with the Free Trade Agreement of the Americas (FTAA) negotiating group on investment. It sets forth the language for the U.S. proposed position on the terms "In Like Circumstances" as related to the negotiations on FTAA investment provisions.

   This document is being withheld pursuant to Exemption (b)(1) of the Freedom of Information Act which allows the withholding of national security information, properly classified. This document has been classified by USTR under the provisions of Section 1.8 of Executive Order 12958 on the basis that its release will cause damage to the national security on the because of the effect its release would have on the foreign relations and foreign activities of the United States. This document has been reviewed by the General Counsel to determine whether there was segregable information that could be released. It was determined that there was none.

8. **Paper entitled "Proposed Definitions of Investment, Investor, Investor and Other Terms" and undated.** Three pages. This is an initial USTR government position on this subject that was "tabled" (i.e. shared) with the FTAA negotiating group on investment. It sets forth the language for proposed definitions of certain words with reference in the FTAA negotiation on investment.

This document is being withheld pursuant to FOIA Exemption (b)(1) which allows the withholding of national security information, properly classified. This document has been classified by USTR under the provisions of Section 1.8 of Executive Order 12958 on the basis that its release will cause damage to the national security on the because of the effect its release would have on the foreign relations and foreign activities of the United States. This document has been reviewed by the General Counsel to determine whether there was segregable information that could be released. It was determined that there was none.

38. **Paper entitled "FTAA Investment Negotiating Group New Topics: Transparency" and undated.** Four pages. This document represents the US government position on this subject which was "tabled" (i.e. shared) with the FTAA negotiating group on investment. It proposes draft language for the U.S. position on transparency in the form of a discussion paper on specific transparency requirements in relation to the goals of the FTAA, and as such, it discusses approaches the negotiating parties might take on this subject. Finally, the document provides analysis of how this may fit into a scheme particular to the FTAA in the context of other existing trade agreements.

This document is being withheld pursuant to FOIA Exemption (b)(1) which allows the withholding of national security information, properly classified. This document has been classified by USTR under the provisions of Section 1.8 of Executive Order 12958 on the basis that its release will cause damage to the national security on the because of the effect its release would have on the foreign relations and foreign activities of the United States. This document has been reviewed by the General Counsel to determine whether there was segregable information that could be released. It was determined that there was none.

43. **Paper entitled "National Treatment and Most Favored Nation Treatment" and undated.** One page. This document is the initial US government position on this subject that was "tabled" (i.e. shared) with the FTAA negotiating group on investment. It sets forth the language for the U.S. negotiating position on the terms "National Treatment and Most Favored Nation Treatment" as related to the negotiations on FTAA investment provisions.

This document is being withheld pursuant to FOIA Exemption (b)(1) which allows the withholding of national security information, properly classified. This document has been classified by USTR under the provisions of Section 1.8 of Executive Order 12958 on the basis that its release will cause damage to the national security on the because of

the effect its release would have on the foreign relations and foreign activities of the United States. This document has been reviewed by the General Counsel to determine whether there was segregable information that could be released. It was determined that there was none.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, Plaintiff, v. OFFICE OF THE U.S. TRADE REPRESENTATIVE, et al., Defendants.	Civil Action No. 01-498 (RWR/JMF)

DECLARATION OF KAREN M. LEZNY

I, Karen M. Lezny, do hereby state and declare:

1. I am the Deputy Assistant United States Trade Representative for the Free Trade Area of the Americas (FTAA) at the Office of the United States Trade Representative (USTR). I have served in this position since June 2002. Before assuming my current position, I served as the Director for the FTAA at USTR. As part of my duties in both positions, I served as the primary staff-level negotiator for the United States coordinating USTR's participation in the full range of the FTAA negotiations at the direction of the Deputy USTR and Assistant USTR for the Americas. As a result of my work at USTR, I am well acquainted with matters relating to the FTAA negotiations and am able to provide additional information the court requested in its order of September 5, 2007.

2. The statements made in this declaration are based on knowledge that I have acquired in the performance of my official duties as well as information provided to me by USTR personnel.

3. Among the principles and objectives that have guided the work of the 34 governments participating in the FTAA negotiations is the basic principle of consensus in decision-making. In the FTAA process, consensus is achieved through either general agreement or "non-objection." From the initiation of the FTAA process in December 1994 through the FTAA Ministerial meeting in Belo Horizonte, Brazil, in May 1997, the practice among the 34 participating governments was to keep documents they exchanged confidential, with the exception of Ministerial Declarations. At their May 1997 meeting, the trade ministers of the 34 participating governments created an official website through which specific documents would be released to the public if the 34 governments agreed to do so by consensus.

4. In March 1998, the trade ministers of the 34 participating governments initiated negotiations to create the FTAA and established the "FTAA Administrative Secretariat" (Secretariat), which operates based on instructions from the Trade Negotiations Committee comprising the 34 vice ministers of trade. The Secretariat is responsible, *inter alia*, for receiving, translating, marking, maintaining, and distributing to the 34 participating governments documents it receives from any participating government.

5. There is an understanding among the 34 participating governments, consistent with longstanding practice in multiparty trade negotiations, that they will not release to the public any negotiating document they produce or receive in confidence in the course of the negotiations unless there is a consensus among the 34 governments to do so. Reflecting this understanding, the Secretariat marks negotiating documents – such as the four documents that

are the subject of the FOIA request in this case – that it receives from participating governments to indicate that they are restricted to official use only.

6. The FTAA Administrative Secretariat, currently located in Puebla, Mexico, maintains the official records of the FTAA negotiations. These records include the four documents that are the subject of the FOIA request in this case. On October 5, 2007, I contacted Ms. Natalia Andrade, Executive Director Ad Interim of the FTAA Administrative Secretariat. She confirmed that the United States had submitted each of the four documents to the Secretariat in 2000, that the Secretariat had marked each document to indicate it is restricted to official use and that each of the four documents continues to be marked and treated as restricted. Ms. Andrade also told me that she is not aware of any instance in which one of the 34 participating governments has released a restricted FTAA document to the public.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5th day of November, 2007.

Karen M. Lezny

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, Plaintiff, v. OFFICE OF THE U.S. TRADE REPRESENTATIVE, et al., Defendants.	Civil Action No. 01-498 (RWR/JMF)

DECLARATION OF JULIA CHRISTINE BLISS

I, Julia Christine Bliss, do hereby state and declare:

1. I am the Assistant United States Trade Representative for Services and Investment in the Office of the United States Trade Representative (USTR). I have served in this position since February 2005. As part of my duties, I oversee all bilateral, regional, and multilateral negotiations on investment. Before assuming my current position, I served as Deputy Assistant USTR for Services. As a result of my work at USTR, I am well acquainted with negotiations to conclude a Free Trade Area of the Americas (FTAA) and, in particular, investment matters related to those negotiations.

2 The statements made in this declaration are based on knowledge that I have acquired in the performance of my official duties, information provided to me by USTR personnel, as well as my own experience.

3. By virtue of my position, I have original classification authority at the "Confidential" level.

4. The four documents at issue in this case were determined by the head of USTR at the time, Ambassador Robert Zoelick, to be classified, pursuant to Executive Order 12498, as amended, section 1.4(d) (foreign relations or foreign activities of the United States) and were classified pursuant to that determination. As USTR's original classifying authority with responsibility for Services and Investment, I have reviewed the four documents and for the reasons explained below have concluded the documents should remain classified. I am also able to provide the additional information that the court requested in its order of September 5, 2007, regarding these four documents. Specifically, I am in a position to explain further why release to the public of the documents referred to in the Court's order would cause harm to the national security.

5. USTR produced the four documents (numbered 1, 8, 38, and 43) for purposes of the FTAA negotiations and transmitted them to the FTAA Administrative Secretariat (Secretariat) in 2000 for distribution to the FTAA Negotiating Group on Investment. As indicated in Karen Lezny's declaration, there is an understanding among the governments of the 34 countries participating in the FTAA negotiations that they will not release to the public any negotiating documents they produce or receive in confidence during the negotiations. Reflecting this understanding, the Secretariat marks negotiating documents in a manner to indicate that they are restricted to official use.

6. I have confirmed with Frances Huegel, who was the USTR official who transmitted the four documents to the Secretariat in 2000, that each document was produced and provided to the Secretariat based on her understanding that it would marked and treated as a restricted document and that neither the United States nor the other 33 governments would publicly release it absent a consensus to do so. Ms Huegel was the Director for Services Trade and Investment Negotiations and is currently the Senior Director for Capacity Building.

7. As indicated in her declaration, Ms. Lezny has confirmed with Natalia Andrade, Executive Director Ad Interim of the Secretariat, that after receiving the four negotiating documents in 2000 the Secretariat marked each document to indicate that it is restricted to official use and that it continues to be restricted to government use today. Ms. Andrade also noted that she is not aware of any of the 34 governments having publicly released any restricted FTAA document.

8. It is my judgment that unilateral public release by the United States of any restricted FTAA negotiating documents would damage the trust that U.S. negotiating partners have in the United States to protect negotiating documents exchanged with an expectation of confidentiality. That, in turn, would undermine the ability of the United States to negotiate and conclude the FTAA and other trade and investment agreements on terms favorable to U.S. economic and security interests.

9. In my experience, foreign governments are typically willing to engage in the give-and-take of negotiations with the United States necessary to conclude trade and investment agreements only if they can rely on assurances from the United States that negotiating requests, offers, position papers, analyses, texts, and other similar documents that it provides to or receives

from its negotiating partners in the course of the negotiations will be protected from public disclosure. A unilateral disclosure by the United States of any restricted FTAA negotiating document – including any documents it produced – would be a breach of the reciprocal confidentiality arrangements provided for under the FTAA. The disclosure would undermine trust by those governments – as well as other U.S. trade and investment negotiating partners – in the willingness or ability of the United States to keep their and our negotiating positions confidential.

10. In the absence of such mutual trust, our trade and investment negotiating partners are more likely to adopt and maintain rigid negotiating positions unfavorable to U.S. economic and security interests, significantly reducing the prospects for compromise and eventual agreement on terms favorable to the United States. This is particularly true with respect to matters pertaining to investment. Foreign governments often feel under pressure to protect vested local economic interests from U.S. firms that seek investment protections under U.S.-negotiated trade and investment agreements from arbitrary or unfair government conduct. If foreign government negotiators cannot rely on U.S. assurances of confidentiality, and thus come to expect that negotiating papers will be publicly divulged, it will substantially reduce their room to negotiate and conclude investment agreements on terms favorable to the United States.

11. In particular, our negotiating partners may well view public release by the United States of its own negotiating documents as an unfair effort to entrench its positions by generating creating domestic pressure to resist giving ground. That, in turn, could cause U.S. negotiating partners to adopt similar tactics, dimming prospects for compromise and eventual agreement.

12. Finally, the understanding calling for negotiating documents to be kept confidential applies to the documents in their entirety, and a unilateral release by the United States of portions of those documents would breach that understanding. Accordingly, it is my conclusion that there are no segregable portions of these documents that can be released.

13. In addition to the forgoing rationale, which applies to all the documents, there is an additional harm with respect to Document 1. Document 1 consists of a commentary that the United States submitted to the FTAA Negotiating Group on Investment in November 2000 expressing U.S. views on a key element of the non-discrimination rules set out in U.S. investment agreements. In particular, the document addresses the phrase "in like circumstances." That phrase appears in rules requiring each party to provide investors from the other party that have made or seek to make investments in the party's territory "national treatment" and "most-favored-nation" treatment (MFN). National and MFN treatment rules are two of the most important obligations included in U.S. investment agreements. The phrase "in like circumstances" defines the conditions under which those rules apply.

14. Document 1 sets out U.S. views on what the "in like circumstances" test means and how it ought to be interpreted. The United States has routinely avoided making public U.S. interpretations of this type concerning "in like circumstances" or other specific language included in U.S. investment agreements. That is because, given the wide variety of factual circumstances that could characterize investment relationships, the United State might want to assert a broader or narrower view of the meaning and applicability of the "in like circumstances"

doctrine than the interpretation set out in Document 1 might suggest. For this reason, the disclosure of Document 1 could serve to reduce U.S. flexibility in defending the United States in litigation initiated under U.S. investment agreements. Under those agreements foreign investors, including foreign governments that are investors, are entitled to pursue arbitration against the United States to enforce the investment protections established under the agreements.

15. If the broad U.S. interpretative statement concerning "in like circumstances" set out in Document 1 were made public, foreign governments could use the statement where it suits their purposes to support interpretations of "in like circumstances" that could lead to a finding that the United States has breached its investment obligations under existing or future U.S. trade or investment agreements. A dispute settlement finding that the United States has breached its investment commitments under such an agreement could potentially subject the United States to trade or investment retaliation, causing harm to U.S. foreign relations. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 2nd day of November 2007.

Julia Christine Bliss

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, Plaintiff, vs. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, and SUSAN C. SCHWAB, in her official capacity as the United States Trade Representative, Defendants.	Civil Action No. 01 CV 00498 (RWR/JMF)

DECLARATION OF J. MARTIN WAGNER

I, J. Martin Wagner, hereby declare:

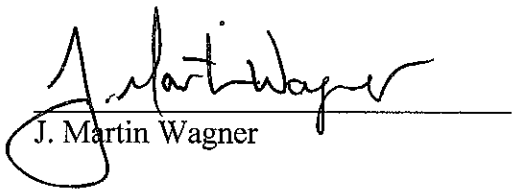
1. I am the Director of the International Program at Earthjustice and am counsel for the Plaintiff Center for International Environmental Law ("CIEL") in this action.

2. I represented CIEL in a prior litigation against the Defendant Office of the United States Trade Representative ("USTR") entitled *CIEL v. USTR*, (Civ. No. 1:01CV02350-PLF).

3. Attached hereto as Exhibit A is a true and correct copy of Defendants' Memorandum in Support of Summary Judgment in that matter.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of any knowledge and belief.

Executed on December 17, 2007, in Oakland, CA.



J. Martin Wagner

WAGNER DECLARATION
EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, et. al. Plaintiffs, v. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, et. al. Defendants.	Civ. No. 1:01CV02350-PLF

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT

the final agreement, and every memorandum instructing USTR negotiators is by its nature preliminary in character. Further, until the free trade agreement takes effect, none of the documents defines any rights or liabilities—none has any legal effect whatsoever. This is in stark contrast to the legal memoranda at issue in *Sears, Roebuck & Co.*, which determined what claims would be brought before the NLRB.

B. Releasing Any of the Withheld Documents Would Reveal the USTR's Decisionmaking Process.

Under Exemption 5 of the FOIA, documents are properly withheld as deliberative if their release would reveal the agency's decisionmaking process. All the documents withheld here as deliberative would, if released, expose to the public glare the USTR's development of its final position regarding the free trade agreement.

(1) "Drafts" and "Comments." Releasing the documents in the Drafts and Comments[3] group would expose the USTR's deliberative process because those documents *are* the USTR's deliberative process. The process by which the USTR develops its positions, creates a consensus among personnel in other agencies, and identifies and makes use of the expertise spread throughout the executive branch is by circulating draft documents—sometimes texts, sometimes negotiating instructions, sometimes less formal papers—and then discussing them. Cronin Decl. ¶ 12. Each agency has its own particular expertise, and the breadth of topics covered by the free trade agreement necessitates that the USTR turn to other agencies for their knowledge. *Id.* at ¶ 13. The exchange of Drafts and Comments are, therefore, essential elements of the USTR's deliberative process, and are paradigmatic examples of what the deliberative process privilege

[3] These terms refer to the groups of documents discussed *supra*, pp. 4-7.

protects. See, e.g., *Arthur Anderson & Co. v. Internal Revenue Service*, 679 F.2d 254 (D.C. Cir. 1982); *Dudman Communications Corp. v. Department of the Air Force*, 815 F.2d 1565 (D.C. Cir. 1987); *Russell v. Department of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982); *Hamilton Securities Group Inc. v. Department of Housing & Urban Development*, 106 F. Supp.2d 23 (D. D.C. 2000). Their exposure now would chill debate within the USTR and within the executive branch because officials would not speak freely if they knew that their comments could later be revealed. See Cronin Decl. ¶ 28, and the discussion *supra*, pp. 9-10.

(2) "Summaries." Similarly, releasing the Summaries would prematurely reveal the USTR's decisionmaking process. Summaries represent what one United States negotiator thought were the critical issues raised at a meeting with Chile and where the USTR might focus in the future. Cronin Decl. ¶ 23. These views are fed back into the ongoing inter-agency discussion mentioned above, and generate more debate. *Id.* Their function is essentially the same as Comments; they are the author's contribution to the inter-agency debate. See *Fulbright & Jaworski v. Department of the Treasury*, 545 F. Supp. 615 (D. D.C. 1982) (protecting summaries of negotiations with France). Exposing the Summaries would have the same effect as releasing the Drafts and Comments. Authors would be unlikely to give their honest impressions of the meeting if they knew that those candid thoughts could later become public and be attributed to them. See Cronin Decl. ¶ 28, and the discussion *supra*, pp. 10-11.

(3) "Negotiating Instructions." Releasing the Negotiating Instructions would also expose the USTR's decisionmaking process. Negotiating Instructions detail the preliminary positions taken by the USTR in its process of developing a final position. Cronin Decl. ¶¶ 17-19. Indeed, their sole purpose is to articulate and record the preliminary positions. Thus, while they do not

contain the views of any one person with the U.S. government, releasing the Negotiating Instructions would reveal just as much about the USTR's deliberative process as would the revelation of the groups of documents discussed above.

Releasing the Negotiating Instructions may also cause a second harm—it may solidify public opinion in a way that impairs the USTR's ability to alter its preliminary positions. See *supra*, pp. 10-11; *Quarles v. Department of the Navy*, 893 F.2d 390 (D.C. Cir. 1990). Toward the end of the negotiations, high-level negotiators from both sides meet together to work out final issues. At these meetings, the United States may agree to modify a U.S. position in exchange for a reciprocal concession from Chile. Cronin Decl. ¶¶ 10, 29. While these modifications may involve unrelated parts of the agreement, the negotiators might see the concessions as a reasonable tradeoff in the context of the overall balance of benefits to be gained from the final agreement. *Id.* at ¶ 10. But if public constituencies saw the preliminary proposals tabled in the negotiations, they would likely object if their interest was bargained away in the late stages of the negotiations. While the reciprocal concessions may be best for the broader interests of the United States, an adversely-affected constituency will see only what it "lost," not what the United States as a whole "gained." *Id.* at ¶ 29. Thus, as in *Quarles*, once the public sees the preliminary proposals, public pressure might preclude any deviation from them. This problem is exacerbated because at times the USTR takes positions in preliminary negotiations specifically to allow room for a reciprocal concession at a later date. *Id.* at ¶ 24. Revealing to the public these preliminary proposals, then, essentially fools various public constituencies into thinking they might get a benefit that the USTR never intended to appear the final agreement.

(4) "Minutes" and "Texts." Releasing the Minutes and Texts would expose the USTR's

deliberative process no less than releasing the documents from the other groups. Minutes and Texts are only different from the other documents at issue because the information they contain has been exchanged between the United States and Chile, which has no effect on whether their release would expose the USTR's decisionmaking process.

To be clear, there are other deliberative processes proceeding parallel to the USTR's during these negotiations. The Chilean government has its own internal process. And both sides working together probably qualifies as another deliberative process. These other deliberative processes are irrelevant. The only concern in this controversy is the USTR's process of coming to *its* final position on the free trade agreement. So long as revealing the documents would reveal *that* decisionmaking process, the deliberative process privilege's second requirement is satisfied. (That the documents also may reflect one of the other deliberative processes has no significance.)

The Minutes and Texts reflect the USTR's own decisionmaking process. They contain all the proposals tabled by the United States in the negotiations to date. Cronin Decl. ¶¶ 25-26. The proposals detail the preliminary positions taken by the USTR in its process of developing its final position, which is embodied in the final text of the agreement. *Id.* at ¶¶ 17-19. Even releasing Chile's proposals would reveal critical information about the USTR's decisionmaking process because Chile's proposals are always a reaction to previous information shared by the United States (and vice versa).[4] Cronin Decl. ¶ 14.

Releasing the Minutes and Texts would have the same effect as releasing the Negotiating

[4] As explained in Susan Cronin's declaration, the USTR shared some of the Texts with its trade advisory committees, which are established by statute to advise the USTR and the executive branch on trade matters. See 19 U.S.C. §2155(c). As the statute itself makes clear, these consultations part of the USTR's deliberative process.

Instructions. Just as in *Quarles*, once various public constituencies see the preliminary positions of the USTR, the United States may lose its ability to effectively negotiate. See *supra*, pp. 10-11.

C. All Documents Withheld under the Deliberative Process Privilege Are "Inter-agency" Memoranda.

Finally, only "inter-agency" documents may be withheld under Exemption 5 of the FOIA. 5 U.S.C. §552(b)(5). This term, however, is not defined rigidly according to its literal meaning. Rather, any documents—even those given to the agency from an outside source—that play a role in the agency's deliberative process are considered inter-agency. *Dow Jones & Co. v. Department of Justice*, 917 F.2d 571, 575 (D.C. Cir. 1990); *Durns v. Bureau of Prisons*, 804 F.2d 701, 704 n.5 (D.C. Cir. 1986); *Soucie v. David*, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971).[5]

So, for example, in *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980), the D.C. Circuit evaluated the propriety of withholding documents sent from individual Senators to the Department of Justice in response to the Department's request for information on how the Senators identified potential judicial nominees. Although the documents were generated outside the executive branch, the Court held that they were properly withheld under the FOIA. The Court reasoned that agencies often must rely on outside experts to inform their decisions. "Such consultations are an integral part of [an agency's] deliberative process; to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of

---

[5] The House Report for the FOIA also supports a broad reading of "inter-agency," stating that "a Government agency cannot always operate efficiently if it is required to disclose documents or information which it has *received or* generated before it completes the process of awarding a contract or issuing an order, decision or regulation." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966) (emphasis added). The reference to documents "received" by an agency reinforces the D.C. Circuit's conclusion that material submitted by parties outside the agency are protected by Exemption 5 in appropriate circumstances.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, Plaintiff, vs. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, and SUSAN C. SCHWAB, in her official capacity as the United States Trade Representative, Defendants.	Civil Action No. 01 CV 00498 (RWR/JMF)

DECLARATION OF DANIEL B. MAGRAW, JR.

I, Daniel B. Magraw, Jr., hereby declare:

1. I am President and Chief Executive Officer of the Center for International Environmental Law ("CIEL").

2. From March 1992 to December 2001, I was Director of the International Environmental Law Office at the U.S. Environmental Protection Agency. From May 2000 to January 2001, I co-chaired a White House assessment of how the United States regulates genetically engineered organisms, and from January 2001 to August 2001, I served as Acting Principal Deputy Administrator of the Office of International Activities at the U.S. Environmental Protection Agency. During my service in the federal government, I served on scores of U.S. delegations to international negotiations. I personally represented the United States government in international trade negotiations such as the North American Free Trade Agreement and the Free Trade Area of the Americas.

3. The United States and its negotiating partners sometimes develop "operating rules" prior to entering into trade negotiations, which may or may not include an operating procedure whereby documents submitted to the Secretariat are marked to indicate that they are restricted to "official use." This procedure is used to protect from public disclosure documents or information that a particular government may consider sensitive. While not every document is considered sensitive, all documents typically are marked as such in order to prevent the participating governments from having to make such a finding with respect to each submission.

4. While this procedure may create an expectation of confidentiality with respect to the obligation of each of the governments not to disclose certain documents submitted by another government, there is no expectation that a government is required to keep its own negotiating positions confidential from its own citizens.

5. In fact, during the course of trade negotiations, many governments, including the United States, have made their negotiating positions known to their citizens, through public briefings and consultation. In such instances, I am not aware that the United States' public disclosure of *its own* negotiating positions was ever treated as a breach of a binding confidentiality agreement, a breach of trust, or a reason not to negotiate with the United States in the future.

6. Moreover, in my experience in such negotiations, the fact that a particular government disclosed its negotiating positions to its citizens did not cause the United States to adopt a more rigid position, or cause other governments to adopt more rigid positions.

7. In my opinion, it is not the case that foreign governments will only engage in trade negotiations with the United States where the United States provides assurances that all negotiating requests, offers, positions papers, analyses, texts, and other similar documents that it provides to or receives from its negotiating partners in the course of the negotiations will be protected from public disclosure.

8. CIEL has an active and well-developed program on international trade and sustainable development. In many instances, CIEL and other environmental organizations we work with advocate for changes in U.S. international trade negotiating positions that are diametrically opposed to changes or positions advocated by industry or other organizations. This is particularly true in the area of investment, where we have advocated for the United States not to include certain provisions that the business community has strongly favored.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed on December 17, 2007, in Washington, D.C.

State of Vt
Co. William County

Daniel B. Magraw, Jr.

Subscribed and Sworn to before me
this 17th day of Dec.
2007
Karen Ciesla
Notary Public

Commission Expires: July 31, 2008

Ref. # 19648

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, Plaintiff, v. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, and SUSAN C. SCHWAB, in her official capacity as the United States Trade Representative, Defendants.	Civil Action No. 01-CV-498 (RWR/JMF)

NOTICE OF RELEASE OF DOCUMENTS

Defendants hereby notify the Court that three of the four documents at issue in this Freedom of Information Act case were released to Plaintiff on November 20, 2008, and the Court therefore does not need to resolve the pending question as to whether these three documents were properly withheld pursuant to Exemption One. Still remaining is the issue of whether the document identified on the Vaughn Index as Document 1 was properly withheld pursuant to Exemption 1. That issue was briefed in cross-motions for summary judgment in late 2001/early 2002, and supplemental briefs were filed in November 2007.

On October 7, 2008, at the request of the United States, pursuant to the agreed-on procedures for seeking derestriction of documents, the documents identified on the Vaughn Index as 8, 38, and 43 were circulated to the vice ministers of all of the countries negotiating the Free Trade Area of the Americas ("FTAA") to determine if any of them would exercise their right to object to the derestriction of the documents. The states had 30 days to object. As no

state objected, the documents were marked as derestricted on November 12, 2008. As the derestricted documents do not need to be held in confidence, on November 19, 2008, the original classifying authority determined that the documents are no longer classified. The documents were then released to Plaintiff.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
U.S. Attorney for the District of Columbia

JOHN TYLER
Assistant Director, Federal Programs Branch

/s/ Marcia N. Tiersky
MARCIA N. TIERSKY, Ill. Bar 6270736
Trial Attorney
Federal Programs Branch
U.S. Department of Justice
20 Massachusetts Ave., N.W. Room 7206
Washington, D.C. 20530
(202) 514-1359
Fax (202) 318-0486
marcia.tiersky@usdoj.gov

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 01-498 (RWR)**
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The Center for International Environmental Law ("CIEL") brought this action against the United States Trade Representative[1] and his office (collectively "USTR"), seeking documents under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. USTR has renewed its motion for summary judgment regarding one document.[2] Because USTR has not sufficiently demonstrated that disclosure of the document would harm the United States' national security interests, USTR's renewed motion for summary judgment will be denied.

[1] Ron Kirk has been substituted as a defendant under Federal Rule of Civil Procedure 25(d).

[2] USTR filed a notice stating that three previously withheld documents had been released to the CIEL and that document 1 was the only remaining document at issue. (See Notice of Release of Documents, Nov. 21, 2008.)

BACKGROUND

The background of this case is fully discussed in Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative, 505 F. Supp. 2d 150, 153-54 (D.D.C. 2007). Briefly, CIEL filed a FOIA request with USTR seeking documents concerning sessions of the Negotiating Group on Investment for the Free Trade Agreement of the Americas ("FTAA"). During one of these negotiations, USTR provided to negotiators documents containing the United States' position on trade investment issues. The nations participating in the FTAA had an understanding that any negotiating document produced or received in confidence during the negotiations would not be released to the public unless all nations agreed. (Defs.' Suppl. Br. in Supp. of Defs.' Mot. for Summ. J. ("Defs.' Suppl. Br."), Lezny Decl. ¶ 5.)

The United States submitted the document in dispute here during FTAA negotiations, and the FTAA Administrative Secretariat deemed it restricted. No restricted FTAA document appears to have been released by any of the participating nations. (Id. ¶ 6.) After the countries negotiating the FTAA derestricted three of the four documents at issue, the defendant released those documents to the plaintiff. (Notice of Release of Documents, Nov. 21, 2008.) Document 1, which USTR argues is a classified national security document protected from disclosure under 5 U.S.C. § 552(b)(1), is the only document that remains in

dispute. The document explains the United States' initial proposed position on the meaning of the phrase "in like circumstances." (Defs.' Suppl. Br., Vaughn Index ¶ 1.) This phrase "appears in rules requiring each party to provide investors from the other party that have made or seek to make investments in the party's territory 'national treatment' and 'most-favored-nation' treatment (MFN)." (Defs.' Suppl. Br., Bliss Decl. ¶ 13.)

In its supplemental brief renewing its motion for summary judgment, USTR argues that disclosure of document 1 would breach a non-disclosure agreement and damage foreign relations by causing nations to adopt more rigid trade positions, resulting in less favorable trade terms for the United States. (Defs.' Suppl. Br. at 6-7.) USTR further argues that disclosure of document 1 would harm the United States' position in future trade litigation and subject the United States to trade or investment retaliation. (Id. at 8-9.) CIEL opposes, arguing that USTR did not "establish that disclosure of the documents reasonably could be expected to result in damage to U.S. foreign relations or national security." (Pl.'s Resp. to Defs.' Suppl. Br. in Supp. of Their Mot. for Summ. J. ("Pl.'s Resp.") at 2.)

DISCUSSION

Summary judgment may be granted when the materials in the record show "that there is no genuine dispute as to any material

fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Moore v. Hartman, 571 F.3d 62, 66 (D.C. Cir. 2009). A court must draw all reasonable inferences from the evidentiary record in favor of the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In a FOIA suit, an agency is entitled to summary judgment if it demonstrates that no material facts are in dispute and that all information that falls within the class requested either has been produced, is unidentifiable, or is exempt from disclosure. Students Against Genocide v. Dep't of State, 257 F.3d 828, 833 (D.C. Cir. 2001); Weisburg v. Dep't of Justice, 627 F.2d 365, 368 (D.C. Cir. 1980). A district court must conduct *de novo* review of the record in a FOIA case, and the agency resisting disclosure bears the burden of persuasion in defending its action. 5 U.S.C. § 552(a)(4)(B); see also Akin, Gump, Strauss, Hauer & Feld, LLP v. U.S. Dep't of Justice, 503 F. Supp. 2d 373, 378 (D.D.C. 2007).

The FOIA requires agencies to comply with requests to make their records available to the public, unless information is exempted by clear statutory language. 5 U.S.C. §§ 552(a), (b); Oglesby v. U.S. Dep't of Army, 79 F.3d 1172, 1176 (D.C. Cir. 1996). Although there is a "strong presumption in favor of disclosure," U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991), there are nine exemptions to disclosure set forth in 5 U.S.C. § 552(b). These exemptions are to be construed as

narrowly as possible to maximize access to agency information, which is one of the overall purposes of the FOIA. Vaughn v. Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973).

Because the party requesting disclosure cannot know the precise contents of the documents withheld, it is at a disadvantage to claim misapplication of an exemption, and a factual dispute may arise regarding whether the documents actually fit within the cited exemptions. Id. at 823-24. To provide an effective opportunity for the requesting party to challenge the applicability of an exemption and for the court to assess the exemption's validity, the agency must explain the specific reason for nondisclosure. Id. at 826; see also Oglesby, 79 F.3d at 1176 ("The description and explanation the agency offers should reveal as much detail as possible as to the nature of the document, without actually disclosing information that deserves protection."). Conclusory statements and generalized claims of exemption are insufficient to justify withholding. Vaughn, 484 F.2d at 826; see also Mead Data Cent., Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977) (noting that "the burden which the FOIA specifically places on the Government to show that the information withheld is exempt from disclosure cannot be satisfied by the sweeping and conclusory citation of an exemption" (footnote omitted)). Where disclosures are not sufficiently detailed to permit a meaningful *de novo*

review, a court may order the agency to submit more detailed disclosures. Voinche v. FBI, 412 F. Supp. 2d 60, 65 (D.D.C. 2006), remanded on other grounds, No. 06-5130, 2007 WL 1234984 (D.C. Cir. Feb. 27, 2007).

USTR asserts that document 1 is subject to Exemption 1, which protects from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order[.]" 5 U.S.C. § 552(b)(1). The D.C. Circuit has set forth specific requirements to justify withholding documents under Exemption 1:

> the agency affidavits must, for each redacted document or portion thereof, (1) identify the document, by type and location in the body of documents requested; (2) note that Exemption 1 is claimed; (3) describe the document withheld or any redacted portion thereof, disclosing as much information as possible without thwarting the exemption's purpose; (4) explain how this material falls within one or more of the categories of classified information authorized by the governing executive order; and (5) explain how disclosure of the material in question would cause the requisite degree of harm to the national security.

King v. U.S. Dep't of Justice, 830 F.2d 210, 224 (D.C. Cir. 1987).

"[I]n conducting *de novo* review in the context of national security concerns, courts must accord *substantial weight* to an agency's affidavit concerning the details of the classified status of the disputed record." Wolf v. CIA, 473 F.3d 370, 374

(D.C. Cir. 2007) (internal quotation marks omitted). "[A] reviewing court 'must take into account . . . that any affidavit or other agency statement of threatened harm to national security will always be speculative to some extent, in the sense that it describes a potential future harm.'" Id. (alteration in original) (quoting Halperin v. CIA, 629 F.2d 144, 149 (D.C. Cir. 1980)); see also Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 927 (D.C. Cir. 2003) (noting that, in the FOIA context, courts "have consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review").

However, summary judgment may be withheld and the agency required to provide a new declaration when the agency's affidavit is inadequate. See Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 31 (D.C. Cir. 1998) (remanded because declaration provided only a sweeping conclusory assertion of anticipated harm to national security and instructed the district court to require a new declaration); King, 830 F.2d at 223-25 (remanded because agency materials inadequately described the redacted material and did not explain with sufficient specificity how disclosure would harm national security). "[A]n affidavit that contains merely a 'categorical description of redacted materials coupled with categorical indication of anticipated consequences of disclosure

is clearly inadequate.'" PHE, Inc. v. Dep't of Justice, 983 F.2d 248, 250 (D.C. Cir. 1993) (quoting King, 830 F.2d at 224). An agency affidavit must provide "detailed and specific information" demonstrating a logical nexus between the material and exemption claimed to justify summary judgment. Campbell, 164 F.3d at 30. Assertions in agency affidavits that are contradicted by other evidence in the record do not meet this standard. See Halperin, 629 F.2d at 148.

USTR is withholding document 1 based on the classification criteria of Executive Order 12958 (Def.'s Suppl. Br. at 5), which permits classification of information if, among other requirements that are uncontested here, "the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security . . . and . . . is able to identify or describe the damage." 60 Fed. Reg. 19826 § 1.2(a)(4) (revoked by Executive Order 13526, 75 Fed. Reg. 707, which uses identical classification criteria in this context). "'Damage to the national security' means harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, to include the sensitivity, value, and utility of that information." Id. § 1.1(l). USTR asserts that the document is properly classified as relevant to "'foreign relations or foreign activities of the

United States, including confidential sources.'"[3] (Defs.' Suppl. Br. at 6 (quoting Executive Order 12958 § 1.4(d)).)

USTR argues that release of document 1 would constitute a breach of its agreement with the other nations participating in the FTAA negotiations. (Defs.' Suppl. Br. at 7.) Karen Lezny, the Deputy Assistant United States Trade Representative for the FTAA, states that

> [t]here is an understanding among the 34 participating governments, consistent with longstanding practice in multiparty trade negotiations, that they will not release to the public any negotiating documents they produce or receive in confidence in the course of the negotiations unless there is a consensus among the 34 governments to do so.

(Id., Lezny Decl. ¶ 5.) The United States submitted document 1 to the Secretariat during FTAA negotiations and, as agreed by the nations, the Secretariat marked the negotiation documents as restricted. (Id. ¶ 6.) In USTR's experience, foreign governments may be under pressure to safeguard local economic interests, which are affected by USTR's efforts to protect U.S. firms' investments from "arbitrary or unfair government conduct"

---

[3] CIEL argues that the document "more properly fall[s] under Section 1.5(b) as 'foreign government information[.]'" (Pl.'s Resp. at 6-7 n.6.) While the "foreign government information" classification could apply, documents created by the USTR and submitted during FTAA negotiations can also fall within the classification category relating to "foreign relations or foreign activities" of the United States. Because the parties agree that the document falls into some classification category, the relevant inquiry is whether USTR has identified adequately the harm that would result from disclosure.

by foreign nations. (Id., Bliss Decl. ¶ 10.) USTR claims that if foreign nations expect that their trade positions will be publicly disclosed, their room to negotiate will be "substantially reduce[d]" given the local economic pressures. (Id.) CIEL contends that "there is no expectation that a government is required to keep its own negotiating positions confidential from its own citizens" and that the United States has made its negotiating positions known to its citizens through public briefings and consultations in the past. (Pl.'s Resp., Magraw Decl. ¶¶ 4-7.)

The prospect of revealing foreign government information typically supports withholding disclosure under Exemption 1. See Students Against Genocide v. Dep't of State, Civil Action No. 96-667 (CKK/JMF), 1998 WL 699074, at *11 (D.D.C. Aug. 24, 1998) (finding that defendant's affidavit, which asserted that disclosure of foreign government information would make foreign governments less willing to provide information in the future, supported application of Exemption 1); Krikorian v. Dep't of State, Civil Action No. 88-3419 (RCL), 1990 WL 236108, at *2 (D.D.C. Dec. 19, 1990) (finding application of Exemption 1 supported by the defendant's affidavit, which asserted that disclosure of foreign government information would breach the "accepted diplomatic practice that when a foreign government conveys information to, or consults confidentially with, a U.S.

Government official, it does so on the understanding that the nature or substance of such exchanges will not be divulged" and "would also discourage foreign officials from providing our government with sensitive confidential information in the future" (internal quotation marks and footnote omitted)), remanded on other grounds, 984 F.2d 461 (D.C. Cir. 1993); Azmy v. U.S. Dep't of Def., 562 F. Supp. 2d 590, 600 (S.D.N.Y. 2008) (finding exemption appropriate because disclosure of information provided to the Joint Task Force-Guantanamo "would impair [the department's] ability to obtain information from foreign governments in the future, who will be less likely to cooperate with the United States if they cannot be confident that the information they provide will remain confidential"). However, while disclosure here would breach the understanding with the other participating governments, the claim that such a breach would harm national security is much less compelling than it was in Students Against Genocide, Krikorian, or Azmy, since the United States would be revealing its own position only, not that of any other country. USTR, therefore, has not shown it likely that disclosing document 1 would discourage foreign officials from providing information to the United States in the future because those officials would have no basis for concluding that the United States would dishonor its commitments to keep foreign information confidential.

However, USTR also asserts that disclosure -- even of a document that the United States itself produced -- could "undermine the ability of the United States to negotiate and conclude the FTAA and other trade and investment agreements on terms favorable to the U.S. economic and security interests" by damaging the trust that negotiating partners have in the United States. (Def.'s Suppl. Br., Bliss Decl. ¶ 8.) USTR concludes that in the absence of mutual trust, the U.S.' trade partners "are more likely to adopt and maintain rigid negotiating positions[,]" reducing the likelihood of eventual agreement. (Id. ¶ 10.) USTR's explanation here is more detailed than the explanation that it unsuccessfully made in the earlier round of summary judgment motions.[4] However, the explanation is also inconsistent with USTR's professed rationale for not disclosing the meaning of "in like circumstances."

USTR argues that disclosure of document 1 would reveal the United States' interpretation of the phrase "in like

[4] In addition to noting the pressure on foreign governments and the possible resistance to the U.S.' proposals, USTR also explains more specifically that the negotiations would stall because negotiating partners would "adopt similar tactics," that release of information would be perceived by a foreign country as "an unfair effort [by the U.S.] to entrench its positions[,]" and that foreign governments are under pressure "to protect vested local economic interests from U.S. firms that seek investment protections under U.S.-negotiated trade and investment agreements from arbitrary or unfair [foreign] government conduct." (Defs.' Suppl. Br., Bliss Decl. ¶¶ 10-11.) Cf. Ctr. for Int'l Envtl. Law, 505 F. Supp. 2d at 157.

circumstances," which would harm the economic and security interests of the United States. (Defs.' Suppl. Br. at 8-9.) The meaning of "in like circumstances" defines the conditions under which the national treatment and most-favored-nation treatment rules apply. (Id., Bliss Decl. ¶ 13.) Document 1 contains the USTR's position on the phrase's interpretation, and USTR argues that foreign nations could use USTR's position as evidence that the United States has breached investment agreements, which could "potentially subject the United States to trade or investment retaliation, causing harm to U.S. foreign relations." (Id. ¶ 15.) "Under those agreements foreign investors, including foreign governments that are investors, are entitled to pursue arbitration against the United States to enforce the investment protections established under the agreements." (Id. at ¶ 14.) There is a "wide variety of factual circumstances that could characterize investment relationships," and "the United States might want to assert a broader or narrower view of the meaning and applicability of the 'in like circumstances' doctrine[.]" (Id.) USTR claims that the government would not be as effective in asserting a broad or narrow interpretation in future litigation with foreign investors if the United States' interpretation of "in like circumstances" were disclosed. (Id.)

This asserted need for flexibility in defining "in like circumstances" however, is inconsistent with USTR's stated goal

of maintaining the trust of its negotiating partners. It hardly seems consonant to argue on the one hand that disclosure would harm national security because it would undermine trade partners' trust in the United States, and on the other hand that disclosure would harm national security because it would prevent the United States from articulating one interpretation of "in like circumstances" in trade negotiations and then adjusting that definition to suit its needs in other situations -- a tactic that would presumably undermine the trust of foreign governments in the United States. Although a court must defer to agency affidavits predicting harm to the national security, "[d]eference . . . does not mean acquiescence." Larson v. Dep't of State, Civil Action No. 02-1937 (PLF), 2005 WL 3276303, at *9 (D.D.C. Aug. 10, 2005). To the extent that judicial review must at least ensure that statements in agency affidavits are not "called into question by contradictory evidence in the record[,]" Halperin, 629 F.2d at 148, inconsistent predictions of harm from disclosure should not provide the basis for withholding a document. Such inconsistency is an indication of unreliability, and the agency affidavits will be shown no deference with respect to any justification for withholding that involves maintaining the trust of negotiating partners. Cf. Elec. Privacy Info. Ctr. v. Dep't of Justice, 511 F. Supp. 2d 56, 66 (D.D.C. 2007) (noting that a court's "decision must take seriously the government's

predictions about the security implications of releasing particular information to the public, at least where those predictions are sufficiently detailed and do not bear any indicia of unreliability").

Finally, USTR contends that disclosure of its own trade positions would create the perception among foreign nations that the United States is attempting to strengthen its bargaining position through public pressure, which, in turn, might cause foreign nations to attempt to increase public support for their own positions and might reduce the likelihood of compromise among nations. (Id., Bliss Decl. ¶ 11.) This explanation does not provide a logical nexus between the document and the claimed national security exemption. USTR would not be releasing document 1 by way of a unilateral decision that a negotiating partner could perceive as a negotiating tactic. Rather, USTR would be releasing document 1 to comply with the FOIA -- after protracted litigation no less -- and it is implausible that negotiating partners would view disclosure under such circumstances as an "unfair effort to entrench [USTR's] positions by generating . . . domestic pressure to resist giving ground." (Id.)

CONCLUSION AND ORDER

USTR has not sufficiently shown that releasing document 1 would result in a harm to national security, and that Exemption 1 applies. Accordingly, it is hereby

ORDERED that USTR's renewed motion [42] for summary judgment be, and hereby is, DENIED. It is further

ORDERED that the parties file by May 12, 2011 a joint status report and proposed order proposing a schedule on which the case should proceed.

SIGNED this 12th day of April, 2011.

/s/
RICHARD W. ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, Plaintiff, v. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, and RON KIRK, in his official capacity as the United States Trade Representative, Defendants.	Civil Action No. 01-CV-498 (RWR/JMF)

SECOND DECLARATION OF JULIA CHRISTINE BLISS

I, Julia Christine Bliss, do hereby state and declare:

1. I am the Assistant United States Trade Representative for Services and Investment in the Office of the United States Trade Representative ("USTR"). I have served in this position since February 2005. As part of my duties, I oversee all U.S. bilateral, regional, and multilateral negotiations on investment. Before assuming my current position, I served as Deputy Assistant United States Trade Representative for Services. As a result of my work at USTR, I am well acquainted with negotiations to conclude a Free Trade Area of the Americas ("FTAA") and, in particular, investment matters related to those negotiations.

2 The statements made in this declaration are based on knowledge that I have acquired in the performance of my official duties, information provided to me by USTR personnel, as well as my own experience.

3. By virtue of my position, I had original classification authority at the "Confidential" level at the time I determined the document that is at issue in this case should remain classified: a one-page document entitled "Commentary: 'In Like Circumstances.'" I understand that in this proceeding, that document has been referred to as "Document 1." That document is classified as "Confidential" under Section 1.4(d) of Executive Order 12958, as amended, which permits classification of information concerning the "foreign relations or foreign activities of the United States."

4. As explained in earlier USTR declarations in this case, Document 1 was generated by USTR exclusively for use in the FTAA negotiations and was intended to be kept confidential. USTR transmitted Document 1 to the FTAA Administrative Secretariat in 2000 for distribution to the government officials comprising the FTAA Negotiating Group on Investment. All of the documents submitted to that Negotiating Group, including Document 1, were governed by a confidentiality understanding among the 34 FTAA governments. Specifically, the 34 governments agreed that they would not release to the public any negotiating documents that they exchanged in the course of the negotiations, other than on the specific request of a participating government and in the absence of any objection from another such government. Consistent with this confidentiality understanding, the FTAA Secretariat marked Document 1 to

reflect that it should be restricted to official use. The FTAA confidentiality understanding currently remains in effect, and Document 1 retains its confidential status.

5. As explained in more detail in my first declaration in this case, foreign governments are typically willing to engage in the give-and-take of negotiations with the United States necessary to conclude trade and investment agreements only if they can rely on assurances from the United States that negotiating requests, offers, position papers, analyses, texts, and other similar documents that the United States provides to or receives from its negotiating partners in the course of the negotiations will be protected from public disclosure. A unilateral disclosure by the United States of any confidential FTAA negotiating document, including any document that the United States itself produced, would breach the reciprocal confidentiality arrangements that the FTAA governments have adopted. Such a disclosure would undermine the trust that the FTAA governments – as well as other U.S. trade and investment negotiating partners – have in the willingness and ability of the United States to keep U.S. and foreign government negotiating positions confidential. The United States is currently negotiating a number of potential trade and investment agreements, some of which involve the FTAA countries. For the reasons explained in my first declaration, this loss of trust would substantially impede those on-going and future U.S. trade and investment negotiations.

6. This same loss of trust would occur regardless of whether USTR voluntarily released the document or was ordered to do so as a result of FOIA litigation. A unilateral release of Document 1 by the United States – whether court-ordered or otherwise – would still be a breach of our commitment to hold Document 1 in confidence. Thus, the release of Document 1 could

reasonably be expected to cause our FTAA and other trading partners to conclude that the United States is no longer able to honor its document confidentiality commitments, at least as they apply to U.S.-generated negotiating documents. This loss of trust would substantially impede on-going and future U.S. trade and investment negotiations.

7. The release of Document 1 could reasonably be expected to result in other specific harms as well. For instance, the release of Document 1 would expose the United States to an increased risk of adverse findings in arbitration proceedings. USTR created Document 1 solely for purposes of illustrating how the "in like circumstances" concept, if included in an eventual FTAA national treatment or most-favored-nation investment provision, might operate. USTR did not offer the document as a definitive or exhaustive statement of U.S. views on how the concept should be applied outside of the FTAA or to every situation. If Document 1 were released to the public, however, there is a substantial risk that foreign investors could introduce the document in arbitration proceedings they bring against the United States under existing or future investment agreements. Specifically, foreign investors could question any interpretation of "in like circumstances" that the United States offers that does not fall within the strict confines of Document 1, even though Document 1 was never intended to be a comprehensive statement of the United States's views. Although Document 1 is not formally binding on the United States, as discussed below, international arbitrators may nonetheless be willing to look at Document 1 for assistance in interpreting the phrase "in like circumstances" since the term is not specifically defined in trade agreements.. That result could undermine U.S. efforts to defend successfully its interests in arbitration proceedings.

8. The confidentiality understanding the United States entered into with its FTAA partners was designed to guard against such an eventuality by ensuring that confidential negotiating materials that any party submitted would be used solely in the course of those negotiations. For that reason, USTR's interest in avoiding a situation in which persons outside the negotiations could use Document 1 against the United States is fully consonant with USTR's view that the unilateral public release of Document 1 would breach the relationship of trust between the United States and its FTAA partners.

9. Moreover, the 34 FTAA governments have not concluded the FTAA, and thus they have not entered into any binding or final agreement as to how to interpret the phrase "in like circumstances." The position set forth in Document 1 is not binding on any of the 34 FTAA governments, including the United States. Document 1, therefore, is not part of an unfair tactic, whereby the United States binds itself to a particular interpretation of "in like circumstances" during negotiations, but then later asserts a different interpretation during arbitration. Instead, none of the 34 FTAA governments, including the United States, have agreed to bind themselves to the interpretation articulated in Document 1. Were the United States to assert a different interpretation in a future arbitration proceeding under another agreement, therefore, other governments would not view that move as a breach of trust. By contrast, a breach of a confidentiality understanding, which the trading partners have reached agreement on, is likely to erode mutual confidence.

10. Release of Document 1 could reasonably be expected to cause yet another harm to U.S. foreign relations: it would reduce U.S. flexibility in future investment negotiations, potentially

locking the United States into the position it took in the FTAA negotiations. Even if the United States was prepared to embrace in a future agreement an interpretation of "in like circumstances" identical to that reflected in Document 1, U.S. negotiators might not want that interpretation to be included in the opening U.S. position. They might want to start with a different offer, and then "negotiate up" to the positions taken in Document 1. Alternatively, it is possible that one of our trading partners might first propose an interpretation of "in like circumstances" that is substantially similar to the one reflected in Document 1. In that case, U.S. negotiators might wish to accept "their" proposal rather than having to expend our own negotiating capital to convince the other government(s) to accept "ours." Publicly disclosing Document 1, however, would prevent the U.S. negotiators from exercising either of these techniques—both of which are very common, and very useful, in conducting trade negotiations. By restricting the U.S. negotiators in this manner, publicly disclosing Document 1 would damage ability of the United States to conclude future trade agreements on favorable terms.

11. Based on my experience as a trade negotiator, the United States does not risk eroding the trust of its negotiating partners simply by altering the positions it advances during trade negotiations. By their nature, trade negotiations involve give-and-take by all sides with the view of reaching an eventual agreement. Indeed, one of the primary reasons for maintaining confidences during negotiations is so that the parties are free to change their positions, as well as to propose, modify, and withdraw ideas, offers, and requests as the negotiations proceed. Trade negotiating partners will commonly remind each other that "nothing is agreed until everything is agreed," which means that a party is free to revise its positions at any point until a final agreement is reached. And again, the 34 FTAA governments have not concluded the FTAA, so

the other FTAA governments do not consider the United States to be bound by the interpretation offered in Document 1. In my experience, negotiators recognize that changes in positions are an essential pathway for reaching agreement, rather than grounds for mistrust. Thus, by maintaining its flexibility in future negotiations over how the concept of "in like circumstances" should be interpreted, the United States is acting in accordance with well-accepted negotiating conventions.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 13th day of June, 2011

Julia Christine Bliss

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, Plaintiff, v. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, and RON KIRK, in his official capacity as the United States Trade Representative, Defendants.	Civil Action No. 01-CV-498 (RWR/JMF)

THIRD DECLARATION OF JULIA CHRISTINE BLISS

I, Julia Christine Bliss, do hereby state and declare:

1. I am the Assistant United States Trade Representative for Services and Investment in the Office of the United States Trade Representative ("USTR"). I have served in this position since February 2005. As part of my duties, I oversee all U.S. bilateral, regional, and multilateral negotiations on investment. Before assuming my current position, I served as Deputy Assistant United States Trade Representative for Services. As a result of my work at USTR, I am well acquainted with negotiations to conclude a Free Trade Area of the Americas ("FTAA") and, in particular, investment matters related to those negotiations. I am also well acquainted with the classification status of documents related to those negotiations.

2. The statements made in this declaration are based on knowledge that I have acquired in the performance of my official duties, information provided to me by USTR personnel, as well as my own experience.

3. Initially, the FTAA countries did not establish a definite end-date for the FTAA confidentiality understanding. Thus, the United States initially classified Document 1 for a period of 10 years (until May 10, 2011), which was thought to be enough time to conclude the FTAA negotiations and then seek agreement among the FTAA countries about whether, and if so how, to de-restrict the FTAA documents.

4. In 2008, the government of Mexico and the Inter American Development Bank decided that, for budgetary reasons, they would close down the FTAA Administrative Secretariat in Puebla, Mexico. Because the FTAA Secretariat was responsible for storing the official FTAA documents, its closure required the FTAA countries to decide how to handle the official FTAA documents.

5. These conversations between the FTAA countries also provided an opportunity to clarify whether the official FTAA documents were to remain restricted indefinitely, or whether a date could be agreed on for their derestriction. This was required because, as stated above, there was no established end-date for the FTAA confidentiality understanding. Ultimately, the 34 member states agreed that all FTAA documents would become derestricted and available for public release on December 31, 2013, unless a country were to object to the release of one of its own documents at that time.

6. On September 18, 2008, after all of the FTAA negotiating partners agreed on this proposal, Ambassador John Veroneau, then-Deputy United States Trade Representative, extended the U.S. classification of documents under its control, including Document 1, to December 31, 2013, in order to be consistent with our international obligation. Thus, Document 1 is currently classified until December 31, 2013.

7. Ambassador John Veroneau, in his capacity as Deputy United States Trade Representative on September 18, 2008, had authority to re-classify information even after a request was received under the Freedom of Information Act.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30 day of August, 2011.

Julia Christine Bliss

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 01-498 (RWR)**
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION

The Center for International Environmental Law ("CIEL") brought this action against the United States Trade Representative and his office (collectively "USTR"), seeking documents under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The only document remaining at issue is "Document 1," a one-page position paper produced by the United States during negotiations to conclude a free-trade agreement with foreign nations. USTR has filed a second renewed motion for summary judgment, and CIEL has filed a cross-motion for summary judgment. Having been afforded three opportunities to justify withholding the document, USTR has not provided a plausible or logical explanation for why disclosure of the document would harm the United States' foreign relations. Accordingly, USTR's motion for summary judgment will be denied, CIEL's cross-motion will be granted, and USTR will be ordered to disclose Document 1.

BACKGROUND

The background of this case is fully discussed in Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative ("CIEL I"), 505 F. Supp. 2d 150, 153-54 (D.D.C. 2007), and Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative ("CIEL II"), 777 F. Supp. 2d 77, 80-81 (D.D.C. 2011). As to facts relevant here, CIEL seeks "Document 1," a position paper prepared by USTR during sessions of the Negotiating Group on Investment for the Free Trade Agreement of the Americas ("FTAA"). The purpose of the agreement was to create a free-trade area among thirty-four nations in the western hemisphere. The United States took part in FTAA negotiations during the 1990s and 2000s, but no agreement was reached. (Defs.' Stmt. of Material Facts Not in Dispute ("Defs.' Stmt.") ¶¶ 2-4.) Document 1 sets forth the United States' initial proposed position on the meaning of the phrase "in like circumstances." (Mem. of P. & A. in Supp. of Defs.' Second Renewed Mot. Summ. J. ("Defs.' Mem.") at 2.) This phrase "helps clarify when a country must treat foreign investors as favorably as local or other foreign investors -- *i.e.*, when 'national' treatment or 'most-favored-nation' treatment applies." (Id.; Defs.' Suppl. Br. in Supp. of Defs.' Mot. for Summ. J. ("Defs.' Suppl. Br."), Bliss Decl. ("First Bliss Decl.") ¶¶ 13-14.)

The nations participating in the FTAA negotiations agreed initially that any negotiating document produced or received in confidence during the negotiations would not be released to the public unless all nations agreed. (Defs.' Mem. at 2; Defs.' Suppl. Br., Lezny Decl. ¶ 5.) Later they "agreed that all FTAA documents would become derestricted and available for public release on December 31, 2013, unless a country were to object to the release of one of its own documents at that time." (Defs.' Mem. of P. & A. in Opp'n to Pl.'s Cross-Mot. Summ. J. and Reply Mem. in Supp. of Defs.' Second Renewed Mot. Summ. J. ("Defs.' Opp'n"), Bliss Decl. ("Third Bliss Decl.") ¶ 5.) Subsequently, the then-Deputy United States Trade Representative extended the "Confidential" classification of all FTAA documents under USTR's control until December 31, 2013, "in order to be consistent with [the United States'] international obligation." (Defs.' Mem. at 1; Third Bliss Decl. ¶ 6.) USTR classified Document 1 based on the criteria of Executive Order 12958 (Defs.' Mem. at 1), which permits classification of information if, among other requirements that are uncontested here, "the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security . . . and . . . is able to identify or describe the damage." 60 Fed. Reg. 19826

§ 1.2(a)(4) (revoked by Executive Order 13526, 75 Fed. Reg. 707, which uses identical classification criteria in this context).[1]

USTR has twice previously moved for summary judgment, arguing that disclosure of Document 1 would damage foreign relations by violating the confidentiality agreement among the FTAA nations and causing nations to adopt more rigid trade positions, resulting in less favorable trade terms for the United States. Both motions were denied on grounds that USTR had not sufficiently substantiated the asserted harms. Specifically, the most recent memorandum opinion noted that USTR had not shown it likely that disclosure of Document 1 would damage trust with other FTAA nations, because Document 1 is the United States' own material and its disclosure would not necessarily provide a basis for foreign officials to think that United States might dishonor its commitments to keep foreign information confidential. CIEL II, 777 F. Supp. 2d at 84. In addition, the opinion noted the apparent inconsistency of USTR's argument on the one hand that breaching the confidentiality agreement would damage foreign

[1] In its cross-motion for summary judgment, CIEL argued that Document 1 ceased to be classified under the Executive Order in 2011, but it withdrew this argument (Pl.'s Reply in Support of Pl.'s Cross-Mot. Summ. J. at 2 n.1) in light of the defendants' representation and supporting declaration that a USTR official with original classification authority extended the classification of Document 1 until December 31, 2013 (Defs.' Opp'n at 2; Third Bliss Decl. ¶¶ 5-7). The dispute, therefore, concerns whether the classification was proper under the criteria set forth in the Executive Order.

officials' trust that the United States would honor its commitments, and its argument on the other hand that disclosing the document would harm national security by hindering the United States' flexibility to assert different meanings of "in like circumstances" in different contexts, a tactic that could undermine foreign governments' trust in the United States. Id. at 85. The opinion also found unconvincing USTR's argument that disclosure of the document would create the perception among foreign nations that the United States was attempting to entrench its own interpretation of the phrase at issue, noting that USTR would not be releasing the document by way of unilateral volition, but by way of court-ordered compliance with FOIA. Id.

USTR has again moved for summary judgment, clarifying and augmenting its previous arguments for withholding Document 1. USTR maintains that the United States at present is negotiating trade and investment agreements, some but not all of which involve the FTAA countries. (Defs.' Mem. at 11 (citing Second Bliss Decl. ¶ 5).) It argues that the loss of trust caused by releasing Document 1 would impede these on-going and future negotiations. Id. In addition, USTR elaborates why disclosure would decrease the United States' flexibility in on-going and future negotiations, positing that even if the United States might want Document 1's interpretation of "in like circumstances" to be accepted by foreign governments in other agreements, the

United States might want to "negotiate up" to that position or to preserve its negotiating capital by accepting another country's proposal of that interpretation rather than expending effort to convince other governments to accept the United States' disclosed FTAA position. (Defs.' Mem. at 16 (citing Second Bliss Decl. ¶ 10).) USTR also reasserts its position that disclosing Document 1 would increase the risk of adverse arbitration decisions, should arbitrators be willing to look to the document for assistance in interpreting the term. (Defs.' Mem. at 13-14.) USTR contends that its desire to maintain the United States' flexibility to assert different interpretations of "in like circumstances" in different contexts is not inconsistent with its commitment to maintain foreign governments' trust by adhering to the confidentiality agreement. "Because the FTAA was never concluded, FTAA governments do not view Document 1 as binding the United States[,]" USTR argues, and "[t]hus, asserting an interpretation different from the one set forth in Document 1 would not be seen as a breach of trust." (Defs.' Mem. at 15.)

CIEL opposes USTR's motion and itself moves for summary judgment on the grounds that the defendants fail to substantiate their claims that foreign governments would lose trust in the United States in the event USTR is compelled to disclose its own negotiating document. (Pl.'s Mem. of P. & A. in Opp'n to Defs.' Second Renewed Mot. Summ. J. and in Support of Pl.'s Cross-Mot.

Summ. J. ("Pl.'s Mem.") at 13-19.) In addition, CIEL argues that USTR has not demonstrated that reduced negotiation flexibility would cause the requisite harm to national security. (Id. at 20-23.) CIEL maintains that USTR's previous disclosure of three related documents undermines the defendants' arguments for withholding Document 1. (Id. at 19-21.) Finally, CIEL contends that USTR's arguments regarding the harm from reduced flexibility continue to be inconsistent with the argument that adhering to the confidentiality agreement is necessary to maintain the trust of foreign negotiating partners. (Id. at 23-25.)

DISCUSSION

In a FOIA suit, the agency resisting disclosure bears the burden of persuasion in defending its action. 5 U.S.C. § 552(a)(4)(B); see also Akin, Gump, Strauss, Hauer & Feld, LLP v. U.S. Dep't of Justice, 503 F. Supp. 2d 373, 378 (D.D.C. 2007). An agency is entitled to summary judgment if it demonstrates that no material facts are in dispute and that the requested material is exempt from disclosure. Students Against Genocide v. Dep't of State, 257 F.3d 828, 833 (D.C. Cir. 2001). In order to provide an effective opportunity for the requesting party to challenge the applicability of an exemption and for the court to assess the exemption's validity, "[t]he description and explanation the agency offers should reveal as much detail as possible as to the nature of the document, without actually disclosing information

that deserves protection." Oglesby v. U.S. Dep't of Army, 79 F.3d 1172, 1176 (D.C. Cir. 1996). Where an agency fails to meet its burden to justify application of a FOIA exemption, a court may order disclosure. Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 870 (D.C. Cir. 1980).

USTR relies on FOIA Exemption 1 to oppose CIEL's request. Exemption 1 protects from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order[.]" 5 U.S.C. § 552(b)(1). For an agency to justify withholding material under Exemption 1, it must by affidavit:

> (1) identify the document, by type and location in the body of documents requested; (2) note that Exemption 1 is claimed; (3) describe the document withheld or any redacted portion thereof, disclosing as much information as possible without thwarting the exemption's purpose; (4) explain how this material falls within one or more of the categories of classified information authorized by the governing executive order; and (5) explain how disclosure of the material in question would cause the requisite degree of harm to the national security.

King v. U.S. Dep't of Justice, 830 F.2d 210, 224 (D.C. Cir. 1987). Courts should accord agency affidavits expressing national security concerns substantial weight and take account of the fact that harm to national security cannot be predicted with precision but rather will always be somewhat speculative in nature. Wolf v. CIA, 473 F.3d 370, 374 (D.C. Cir. 2007).

Nonetheless, affidavits that contain categorical or conclusory statements, or which are contradicted by other evidence in the record, will not pass muster. PHE, Inc. v. Dep't of Justice, 983 F.2d 248, 250 (D.C. Cir. 1993); Halperin v. CIA, 629 F.2d 144, 148 (D.C. Cir. 1980). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" ACLU v. U.S. Dep't of Def., 628 F.3d 612, 619 (D.C. Cir. 2011) (quoting Larson v. Dep't of State, 565 F.3d 857, 862 (D.C. Cir. 2009) (internal quotations omitted)).

The Executive Order under which USTR classified Document 1 articulates the "degree of harm" required by providing that the "Confidential" designation shall be applied where unauthorized disclosure of the classified information "reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe." E.O. 12958 1.2(a)(3) (as amended by E.O. 13292, 68 Fed. Reg. 15315 (Mar. 25, 2003)). "'Damage to the national security' means harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, taking into consideration such aspects of the information as the sensitivity, value, utility, and provenance of that information." Id. § 6.1(j). USTR asserts that the document is properly classified because "USTR determined that the unilateral release of Document 1 'reasonably could be expected to

cause damage' to the United States' foreign relations." (Defs.' Mem. at 1 (quoting Executive Order 12958 § 1.2(a)(3)). However, USTR's various arguments do not present a logical or plausible explanation for its determination, and the record does not support a reasonable anticipation of harm from disclosure.

The April 12, 2011 opinion noted that while the prospect of revealing foreign government information typically supports withholding disclosure under Exemption 1, the claim that a breach of the FTAA confidentiality agreement would harm national security is less compelling here since the United States would be revealing its own position only. USTR maintains that because the confidentiality agreement covered *all* of the material exchanged during negotiations, the loss of trust is the same. There is, however, a meaningful difference between the United States' disclosure of information that it receives in confidence from a foreign government, with the foreign government's understanding that the information will be kept secret, and the United States' disclosure of a document that it itself created and provided to others. While a breach of the confidentiality agreement will occur in either case, the resulting affect on the United States' foreign relations -- the key factor for assessing whether the document is properly classified -- is not identical. In Brayton v. Office of U.S. Trade Representative, 657 F. Supp. 2d 138 (D.D.C. 2009), the court's determination that USTR was legally

entitled to withhold a document covered by a confidentiality agreement did not hinge on the mere existence of the agreement, but depended on the circumstances of the specific disclosure in that case. In particular, the court took account of the fact that the negotiations to which the requested document related were ongoing and disclosure would have revealed the current and sensitive negotiating positions of both the United States and the European Union. Id. at 145; see also Ctr. for Int'l Envtl. Law v. U.S. Trade Representative, 237 F. Supp. 2d 17, 32 (D.D.C. 2002) (finding that defendants had properly invoked Exemption 1 where the defendants' declarant articulated the particularly sensitive and controversial topic of the requested documents, the disclosure of which would reveal high-level internal government deliberations and interagency disagreements).

By contrast, USTR's arguments regarding loss of trust are at a high level of generality, asserting that the confidentiality agreement facilitates the "give-and-take of negotiations" (Second Bliss Decl. ¶ 5) without articulating particular reasons why its foreign negotiating partners would have any continued interest in maintaining the secrecy of the United States' own initial position on the phrase "in like circumstances." The harm resulting from breach of the confidentiality agreement here, and the asserted need to insulate negotiations from potential opposition from participating nations' "vested local economic

interests" in order to provide "room to negotiate" and make it less likely that foreign partners will "adopt and maintain rigid negotiating positions unfavorable to U.S. economic and security interests" (First Bliss Decl. ¶ 10), is substantially mitigated because the FTAA negotiations are not ongoing. The defendants' failure to assert any particular present sensitivities implicated by Document 1 leaves the breach of the confidentiality agreement as the sole basis for inferring a loss of trust. A per se rule that existence of a confidentiality agreement provides an adequate basis for proper classification of a covered document is flatly incompatible with FOIA's commitment to subject government activity to the "the critical lens of public scrutiny." Alliance for the Wild Rockies v. Dep't of the Interior, 53 F. Supp. 2d 32, 35 (D.D.C. 1999). Although a court need not "agree in full with the defendants' evaluation of the danger," USTR's judgment must pass the "test of reasonableness, good faith, specificity and plausibility." Am.-Arab Anti-Discrimination Comm. v. DHS, 516 F. Supp. 2d 83, 89 (D.D.C. 2007) (internal quotations omitted). USTR's arguments that a loss of trust amounting to damage to foreign relations would occur upon disclosure here do not pass this test.

The standing agreement is that the nations will "not release to the public any negotiating documents that they exchanged in the course of the negotiations, other than on the specific

request of a participating government and in the absence of any objection from another such government." (Second Bliss Decl. ¶ 4.) The agreement therefore permits the United States to request disclosure of a document and to disclose it if it receives no objection. With regard to Document 1, the record lacks any indication that the United States' FTAA partners would oppose disclosure. To be sure, the prior proceedings in this litigation have not imposed on the USTR any obligation to request disclosure, and, as is discussed above, USTR's argument is that *unilateral* disclosure compelled by this action would itself constitute harm to foreign relations. However, because breach of a confidentiality agreement does not suffice to establish harm where the breach is caused by release of the United States' own information, reasons for predicting a loss of foreign governments' trust must be tied, but are not tied here, to the specific content of the document at issue. Moreover, the FTAA nations' agreement that all documents will be "derestricted and available for public release on December 31, 2013, *unless a country were to object to the release of one of its own documents at that time*" (Third Bliss Decl. ¶ 5) supports CIEL's argument that the primary interest protected by confidentiality is a country's ability to determine the release of its own materials, not to keep others from releasing theirs. (Pl.'s Reply at 7.)

Aside from the arguments premised on breach of the confidentiality agreement, USTR's additional arguments for withholding Document 1 do not present logical or plausible reasons why disclosure would cause harm to United States' foreign relations. First, although USTR's renewed motion attempts to resolve the apparent inconsistency, identified in the April 12, 2011 opinion, between USTR's expressed desire both to maintain the trust of foreign governments by adhering to the confidentiality agreement and to maintain its own flexibility to assert a different interpretation of "in like circumstances" in different contexts, its resolution of that issue undercuts its argument that reduced flexibility will harm foreign relations. Specifically, USTR's declarant clarifies that, since the FTAA has not been concluded and the position expressed in Document 1 is not considered binding by the FTAA nations, those governments would not view it as a breach of trust if the United States advanced a different interpretation of "in like circumstances" in arbitral proceedings or in future negotiations. (Defs.' Mem. at 15-16 (citing Second Bliss Decl. ¶¶ 9-10).) The declarant emphasized, based on her "experience as a trade negotiator," that "[t]rade negotiating partners will commonly remind each other that 'nothing is agreed until everything is agreed,' which means that a party is free to revise its positions at any point until a final agreement is reached." (Second Bliss Decl. ¶ 11.)

Accepting USTR's logic on this point, and assuming that the FTAA nations will not find the United States' shifting positions on the term untrustworthy, the grounds for predicting that disclosure of Document 1 would reduce significantly the United States' flexibility in the future are tenuous. If, as defendants maintain, trade negotiators understand that an initial position like Document 1 is a non-binding starting point, and that, accordingly, the United States may revise or withdraw it at any time, it is unclear why disclosure of the document "reasonably could be expected to cause damage" to the United States' foreign relations by reducing future flexibility. (Defs.' Mem. at 1.) FTAA negotiations extended over the 1990s and 2000s, across multiple United States administrations. (Defs.' Stmt. ¶ 2.) Defendants have presented no "logical or plausible" reason, ACLU, 628 F.3d at 619 (internal quotations omitted), why future negotiating partners would have so firm an expectation that the current or future United States administration would or should adhere to the same interpretation of "in like circumstances" presented in the FTAA context such that the United States will be impeded in presenting a different interpretation.

For the same reason, USTR's argument that withholding Document 1 is necessary to preserve its negotiating capital is unpersuasive. According to the declarant, "[e]ven if the Untied States was prepared to embrace in a future agreement an

interpretation of 'in like circumstances' identical to that reflected in Document 1, U.S. negotiators might not want that interpretation to be included in the opening U.S. position," but rather they "might want to start with a different offer, and then 'negotiate up' to the positions taken in Document 1" or they might want to accept a substantially similar proposal from a trading partner. (Second Bliss Decl. ¶ 10.) Neither of these options, however, would be foreclosed by the disclosure of Document 1. Because the interpretive position explained in that document is not binding and, according to USTR's declarant, "the United States does not risk eroding the trust of its negotiating partners simply by altering the positions it advances during trade negotiations" (Second Bliss Decl. ¶ 11), the United States' ability not to open with Document 1's interpretation in the future, or to accept it from a negotiating partner, is not realistically imperilled by disclosure. Similarly, USTR's argument that disclosure of Document 1 could increase the United States' exposure to adverse arbitration decisions is insufficiently substantiated. The FTAA was never concluded and arbitrators, like trade negotiators, are generally aware of the non-binding, preliminary nature of the interpretive position articulated in Document 1. The case law on which USTR relies for this proposition concerned instances where material relating to *concluded*, albeit possibly unenforceable, treaties were consulted

for interpretative assistance. (Defs.' Opp'n at 9.) Document 1, as the declarant herself emphasizes (Second Bliss Decl. ¶ 7), was expressly a *preliminary* position, and the risk that international arbitrators will adopt the position, much less rely on it to the United States' detriment in arbitration, is too speculative to justify a reasonable expectation of harm to foreign relations.[2]

CONCLUSION

The present round of briefing afforded USTR a third opportunity to meet its burden to justify application of Exemption 1. USTR, however, fails to provide a plausible or logical explanation of why disclosure of Document 1 reasonably could be expected to damage United States' foreign relations. USTR's motion for summary judgment therefore will be denied, CIEL's cross-motion will be granted, and USTR will be enjoined from withholding Document 1. An appropriate order accompanies this memorandum opinion.

[2] CIEL argues that USTR's release of other, related documents in the course of this litigation undermines USTR's argument for withholding Document 1. (Pl.'s Reply at 2.) The D.C. Circuit has "repeatedly rejected the argument that the government's decision to disclose some information prevents the government from withholding other information about the same subject." ACLU, 628 F.3d at 625. The present opinion bases the decision to grant summary judgment to the plaintiff on the defendants' failure to articulate logical or plausible reasons to withhold Document 1, and does not rely on the defendants' previous disclosure of Documents 8, 38, and 43.

SIGNED this 29th day of February, 2012.

/s/
RICHARD W. ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 01-498 (RWR)**
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, et al.,	)	
Defendants.	)	

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that defendants' second renewed motion [50] for summary judgment be, and hereby is, DENIED. It is further

ORDERED that the plaintiff's cross-motion [51] for summary judgment be, and hereby is, GRANTED. It is further

ORDERED that the defendants be, and hereby are, ENJOINED from withholding Document 1. Defendants shall produce to plaintiff a copy of Document 1.

SIGNED this 29th day of February, 2012.

/s/
RICHARD W. ROBERTS
United States District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, Plaintiff, v. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, and RON KIRK, in his official capacity as the United States Trade Representative, Defendants.	Civil Action No. 01-CV-498 (RWR/JMF)

DEFENDANTS' NOTICE OF APPEAL

Notice is hereby given this 26th day of April, 2012, that Defendants, Office of the United States Trade Representative and Ron Kirk, in his official capacity as the United States Trade Representative, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the final order [ECF No. 57] denying Defendants' second renewed motion for summary judgment, granting Plaintiff's cross-motion for summary judgment, and ordering the release of Document 1, entered in this action on the 29th day of February, 2012.

Dated: April 26, 2012

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

JOHN R. TYLER
Assistant Director, Federal Programs Branch

/s/ Daniel Schwei
DANIEL SCHWEI
Trial Attorney (N.Y. Bar)
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
Tel.: (202) 305-8693
Fax: (202) 616-8470
Email: daniel.s.schwei@usdoj.gov

Mailing Address:
Post Office Box 883
Washington, D.C. 20044

Courier Address:
20 Massachusetts Avenue N.W.
Washington, D.C. 20001

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that, on April 26, 2012, a copy of the foregoing document was served upon counsel of record by electronic means through electronic filing:

J. Martin Wagner
EARTHJUSTICE
426 17th Street
Sixth Floor
Oakland, CA 94612-2820
Attorney for Plaintiff

/s/ Daniel Schwei
DANIEL SCHWEI
Trial Attorney (N.Y. Bar)
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
Tel.: (202) 305-8693
Fax: (202) 616-8470
Email: daniel.s.schwei@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2012, I electronically filed the foregoing Joint Appendix with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that I will cause seven paper copies of this appendix to be filed with the Court within two business days.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ *H. Thomas Byron III*
H. THOMAS BYRON III