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 ENVIORONMENTAL 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

FINAL BRIEF OF PLAINTIFF-APPELLEE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

J. Martin Wagner
Abby L. Rubinson
Earthjustice
50 California Street, Suite 500
San Francisco, CA 94111
Phone: (415) 217-2000
Fax: (415) 217-2040
mwagner@earthjustice.org
arubinson@earthjustice.org

Counsel for Plaintiff-Appellee Center for International Environmental Law

DATED: November 28, 2012

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with this Court's order entered on April 30, 2012, and the requirements of D.C. Circuit Rule 28(a)(1), Appellee Center for International Environmental Law submits the following:

A. Parties and Amici

All Parties, Intervenors and Amici Appearing before the District Court and in this Court are listed in the Initial Brief for Appellants.

B. Rulings Under Review

Reference to rulings at issue appears in the Initial Brief for Appellants.

C. Related Cases

This case has not previously been before this Court. Counsel is not aware at this time of any other related cases within the meaning of Circuit Rule 28(a)(1)(C).

DATED: November 28, 2012

Respectfully submitted,

/s/ J. Martin Wagner
J. Martin Wagner

Counsel for Plaintiff-Appellee Center for International Environmental Law

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 28(a)(1) and D.C. Circuit Rule 26.1, Plaintiff-Appellee Center for International Environmental Law makes the following disclosures:

The following are parent companies, subsidiaries, or affiliates of Center for International Environmental Law that have issued shares or debt securities to the public: None.

Center for International Environmental Law is a public interest, not-for-profit organization founded in 1989 in the District of Columbia to strengthen and use international law and institutions to protect the environment, promote human health, and ensure a just and sustainable society.

DATED: November 28, 2012

Respectfully submitted,

/s/ J. Martin Wagner
J. Martin Wagner

Counsel for Plaintiff-Appellee Center for International Environmental Law

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*Authorities upon which Plaintiff-Appellee chiefly relies are marked with asterisks

GLOSSARY

CIEL	Center for International Environmental Law
FOIA	Freedom of Information Act, 5 U.S.C. § 552
FTAA	Free Trade Agreement of the Americas
USTR	United States Trade Representative (and, collectively, the Office of the United States Trade Representative and Ambassador Ron Kirk, in his official capacity as the United States Trade Representative)

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OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, et al.,
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On Appeal from the United States District Court
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INITIAL BRIEF OF PLAINTIFF-APPELLEE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

STATEMENT OF THE CASE

At issue in this case is Appellant United States Trade Representative's (USTR) withholding of a document (referred to here as "Document 1") prepared by the United States and submitted to 33 other governments during negotiations in 2000 of a possible Free Trade Agreement of the Americas (FTAA). USTR identified Document 1, which discusses the views of the US government concerning the interpretation of the phrase "in like circumstances," as responsive to Appellee Center for International Environmental Law's (CIEL) Freedom of

Information Act (FOIA) request for documents related to the negotiations. USTR withheld the document on the basis of FOIA's Exemption 1, which permits agencies to withhold documents properly classified because of a conclusion that disclosure "reasonably could be expected to result in damage to the national security."

Although the district court gave USTR three opportunities to provide the specific, plausible and logical evidence necessary to support the classification of Document 1, USTR failed each time. Each time the district court found USTR's arguments and evidence to be vague, conclusory, and unsupportive of a reasonable expectation of damage to the national security. Finally, the district court ordered USTR to disclose the document. USTR has appealed that decision.

PERTINENT STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Initial Brief for the Appellants.

STATEMENT OF FACTS

During the 1990s and early 2000s, the United States and other Western Hemisphere governments undertook to negotiate a "Free Trade Agreement of the Americas" (FTAA) that would have established rules governing international trade and investment throughout the hemisphere. The FTAA was never concluded, *see*

USTR Second Renewed Mot. Summ. J. (June 13, 2011) (Doc. 50-1) p. 15, and in 2008 the FTAA Administrative Secretariat closed. USTR App. Br. p. 7.

The rules adopted in an FTAA would affect the ability of the United States to protect the environment and human health. As CIEL noted in its first summary judgment briefing,

> Investment protection provisions in the NAFTA have been the basis for a $1 billion challenge to a California plan to phase out the use of the harmful gasoline additive MTBE and a $16 million award to the US-based Metalclad corporation after local Mexican government officials refused to authorize the company to build a hazardous waste facility that could have contaminated drinking water. See *Methanex Corporation v. The United States of America*, Notice of Intent to Submit A Claim to Arbitration, as Amended, at http://www.methanex.com/investmentcentre/mtbe/noticeofintent.pdf; *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1 (2000), at http://www.state.gov/documents/organization/3998.pdf. Such challenges weaken the ability of the United States to protect the environment and human health. Extending these rules in an FTAA agreement could further weaken that ability.

CIEL First Mot. Summ. J. (Jan. 28, 2002) (Doc. 34) pp. 3-4, n.2.

Because "[d]isclosure of all or part of the documents would permit [CIEL] and other members of the US public to provide useful and informed input to the US government concerning appropriate parameters of those rules," *id.* at 3, in July 2000, CIEL submitted a request under the Freedom of Information Act, 5 U.S.C. § 552, (FOIA) to USTR for documents circulated or tabled by the United States during portions of the negotiations focused on the investment rules. *See* Compl. (Mar. 7, 2001) (Doc. 1) ¶ 10 [JA 10], an important element of some of the

investment rules that were under discussion. USTR identified forty-six documents responsive to CIEL's request, released one document to CIEL, withheld forty-one documents under FOIA Exemption 5,[1] 5 U.S.C. § 552(b)(5), and withheld four documents under FOIA Exemption 1, *id.* § 552(b)(1). Harrison Decl. (Jan. 11, 2002) (Doc. 33-2) ¶¶ 10, 11 [JA 21-22].

Each of the four documents under Exemption 1 contains a U.S. government position on a "subject that was 'tabled' (i.e. shared) with the…FTAA negotiating group on investment." *Vaughn* Index (Nov. 5, 2007) (Doc. 42-1) pp. 1-2 [JA 45-46]. FOIA's Exemption 1 allows agencies to withhold information properly classified on the basis of a "reasonabl[e] expect[ation]" of "harm to…[US] foreign relations…from the unauthorized disclosure of information." Executive Order 12,958, Classified National Security Information, §§ 1.2(a)(3), 1.6(d), 60 Fed. Reg. 19,825 (Apr. 20, 1995). On January 11, 2002, USTR moved for summary judgment on the ground that its classification of those four documents was justified because of several harms to national security USTR claimed might arise from their disclosure. *See* USTR First Mot. Summ. J. (Jan. 11, 2002) (Doc. 33) pp. 4-7. A key factor in USTR's justification for classifying these four documents was a confidentiality arrangement purportedly established under the operating rules of the FTAA negotiations that applies to documents the governments exchange

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[1] CIEL did not challenge these withholdings.

during the course of the negotiations.[2] *See id.*; *see also* USTR Renewed Mot. Summ. J. (Nov. 5, 2007) (Doc. 42) pp.7-9.

In November 2008, USTR voluntarily released Documents 8, 38 and 43. Notice of Release of Documents (Nov. 21, 2008) (Doc. 45) pp. 1-2 [JA 66-67]. In its Notice of Release of Documents, USTR explained that, "pursuant to the agreed-on procedures for seeking derestriction of documents," an FTAA government can circulate a document to the other governments to determine whether any would object to disclosure. *Id.* at 1 [JA 66]. If they do not object within 30 days, the document is considered unrestricted. *Id.* The Notice of Release of Documents explained that USTR had circulated Documents 8, 38 and 43 pursuant to this procedure in October 2008 and had received no objection. *Id.* at 1-2 [JA 66-67].

Only one document remains at issue in this case: "Document 1," a one-page position paper entitled "Commentary: 'In Like Circumstances,'" that USTR prepared solely for the purpose of those negotiations. Second Bliss Decl. (June 13,

[2] According to USTR, "[u]nder 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." USTR App. Br. p. 34 (citing Davidson Decl. (Jan. 11, 2002) (Doc. 33-1) ¶ 2 [JA 16-17]). In 2008, the participating nations agreed that all FTAA documents would become derestricted and available for public release on December 31, 2013, unless a country objected to the release of one of its own documents at that time. Third Bliss Decl. (Aug. 3, 2011) (Doc. 53-1) ¶ 5 [JA 92]. Seven years after USTR's initial determination to classify Document 1, and during the course of this litigation, USTR reclassified Document 1 on September 18, 2008. *Id.* ¶ 6 [JA 93].

2011) (Doc. 50-2) ¶¶ 3-4 [JA 85]. Document 1 "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." *Vaughn* Index p.1 [JA 45]. The phrase "in like circumstances" "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." USTR Second Renewed Mot. Summ. J. p. 2; *see* First Bliss Decl. (Nov. 5, 2007) (Doc. 42-3) ¶¶ 13-14 [JA 53].

USTR's Three Previous Failures to Justify Withholding Document 1

In March 2001, CIEL filed this suit challenging USTR's withholding of Document 1 and other documents. Over the course of the litigation, USTR unsuccessfully moved for summary judgment three times. *See* USTR First Mot. Summ. J.; USTR Renewed Mot. Summ. J.; USTR Second Renewed Mot. Summ. J.. Each time, USTR presented slightly varying versions of the same arguments it presents in this appeal. And each time the district court found USTR's support for them unconvincing, inconsistent, implausible or illogical.

The court also generally found that USTR's declarations in support of its motions "contain[ed] sweeping conclusory statements of the harm USTR expects will result but fail[ed] to provide the basis of that conclusion." 2007 Opinion (Sept. 5, 2007) (Doc. 40) p. 12 [JA 40]; *see also id.* at 12, n. 4 [JA 40]

("The…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.").

USTR's primary argument was based on speculation about two ways its negotiating partners might react to the release of Document 1. First, USTR speculated that releasing Document 1 could limit the negotiating flexibility of its FTAA partners because some of those partners' citizens might oppose the adoption of US positions even if they did not oppose the substance of the provisions themselves. *See, e.g.*, Vargo Decl. (Feb. 6, 2002) (Doc. 35-1) ¶ 9 [JA 27-28]; *see also* USTR Reply First Mot. Summ. J. (Feb. 6, 2002) (Doc. 35) p. 5; USTR Renewed Mot. Summ. J. p. 8; First Bliss Decl. ¶ 10 [JA 53]; USTR Second Renewed Mot. Summ. J. pp. 9-10.

The district court found that USTR had not provided plausible and logical support for this argument. For example, the fact that the FTAA negotiations are not ongoing undercut many of USTR's assertions. *See* 2012 Opinion (Feb. 29, 2012) (Doc. 56) pp. 11-12 [JA 104-05] (USTR's "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' is substantially mitigated because the FTAA negotiations are not ongoing.") (quoting First Bliss Decl. ¶ 10 [JA 53]); *see also* 2007 Opinion p. 11 [JA 39] ("[T]here is no showing that reduced negotiation flexibility would cause the 'requisite degree of harm' to the economic and security interests of the United States.") (quoting *King v. Dep't of Justice*, 830 F.2d 210, 224 (D.C. Cir. 1987)).

USTR's second argument is based on its speculation that releasing Document 1 could cause its FTAA partners to lose trust in the United States, and then to adopt rigid negotiating positions, out of belief that the release was intended to influence public opinion in the United States' favor or violated the confidentiality agreement. *See, e.g.*, USTR Reply Mot. Summ. J. p. 2, n.2; USTR Renewed Mot. Summ. J. p. 7; USTR Second Renewed Mot. Summ. J. pp. 8-13.

The district court rejected this argument as well, finding that "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." 2012 Opinion pp. 10, 13 [JA 103, 106]; *see also* 2011 Opinion (Apr. 12, 2011) (Doc. 47) p. 11 [JA 78] (USTR had "not shown it likely that disclosure 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."); *see also* 2007 Opinion p. 12 [JA 40] ("USTR suggests that the operating rules of FTAA negotiations have a preclusive effect, [but] it provides no specific information about…whether the United States' agreement to produce its proposals, but refusal to provide those of its negotiating partners, constitutes a breach of the rules."). The court also found implausible the concern that foreign governments would view release of the document to be a tactical ploy to influence U.S. public opinion because the release would be the result of a court order, not of USTR's unilateral decision. *See* 2012 Opinion p. 5 [JA 98]; *see also* 2011 Opinion p. 15 [JA 82].

USTR's third argument was that releasing Document 1 could limit its own flexibility in ongoing and future trade negotiations and arbitration proceedings. USTR expressed a desire not to be bound in other settings by the positions it conveyed to its FTAA partners in Document 1 during the FTAA negotiations. *See, e.g.*, USTR Second Renewed Mot. Summ. J. pp. 13-14, 16; First Bliss Decl. ¶ 11 [JA 53].

The district court found USTR's evidence of this harm to be insufficiently specific, illogical, and inconsistent. *See* 2012 Opinion p. 15 [JA 108] ("Accepting USTR's logic" that "a party is free to revise its positions at any point until a final agreement is reached,…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."); *see also* 2007 Opinion p. 11 [JA 39] ("[T]here is no showing that reduced negotiation flexibility would cause the 'requisite degree of harm' to the economic and security interests of the United States.") (quoting *King*, 830 F.2d at 224). The court also found USTR's concern about being locked into an interpretation of "in like circumstances" unconvincing in light of USTR's acknowledgment that the position expressed in Document 1 was widely recognized not to be binding. *See* 2012 Opinion p. 15 [JA 108]; *see also* USTR Second Renewed Mot. Summ. J. pp. 16-17.

After having carefully considered each of USTR's three efforts to support its withholding of Document 1, the district court found that USTR had "fail[ed] to provide a plausible or logical explanation of why disclosure of Document 1 reasonably could be expected to damage United States' foreign relations." 2012 Opinion p. 17 [JA 110]. Accordingly, the court denied USTR's final motion, granted CIEL's motion, and ordered USTR to release Document 1. *Id.*

SUMMARY OF ARGUMENT

At issue in this case is a document (Document 1) that CIEL requested under FOIA from USTR on July 14, 2000. Document 1 discusses the views of the US government concerning the interpretation of the phrase "in like circumstances." The United States submitted the document to its negotiating partners during

negotiations in 2000 of a Free Trade Agreement of the Americas (FTAA) that was never concluded. USTR withheld Document 1 under FOIA Exemption 1, *see* 5 U.S.C. § 552(b)(1), which permits agencies to withhold documents properly classified because of a conclusion that disclosure "reasonably could be expected to result in damage to the national security." Exec. Order 12,958.

FOIA creates a strong presumption of disclosure of agency information, and thus mandates narrow construction of the exemptions. To apply Exemption 1, an agency must provide specific, consistent, plausible and logical evidence demonstrating that the release of the document could be reasonably expected to damage national security. A district court reviewing the claim must give substantial weight to the agency's explanations, but must not simply acquiesce in the agency's determination. An appellate court reviews a FOIA summary judgment determination de novo, but must not overturn the district court's underlying factual determinations in the absence of clear error.

In this case, USTR moved for summary judgment three times. Each time, the district court found that USTR had not provided sufficient evidence to support the application of Exemption 1. USTR's arguments on appeal are essentially identical to those it made unsuccessfully before the district court, and its support for those arguments suffers from the same flaws.

Two of USTR's three arguments are based on speculation about how foreign

governments might react to the release of Document 1 and thus fail to establish a reasonable expectation of harm. USTR speculates that the release of the document will cause foreign governments to be constrained in their ability to negotiate with the United States. USTR also speculates that release will cause foreign governments to lose trust in the United States because of the existence of a confidentiality arrangement that protects from public disclosure some documents exchanged during the FTAA negotiations.

Speculation such as this would be dubious support for withholding Document 1 under any circumstances. Here, however, the confidentiality arrangement gave USTR the opportunity to seek the consent of its FTAA negotiating partners to releasing the document – a step USTR took before releasing three other documents exchanged in the same negotiations – but USTR failed to seek consent. In light of this, USTR's failure to confirm or disprove its speculation about the impacts of releasing the document on its FTAA partners makes such speculation particularly inappropriate support for classifying the document.

The evidence supporting the potential effect of release on foreign governments is also weak. As the district court concluded, although USTR asserts that release of the document would limit the ability of foreign governments to adopt the position contained in Document 1, it failed to show a reasonable expectation of such harm because the FTAA negotiations are not ongoing. USTR

also failed to establish that reduced negotiating flexibility would cause the requisite degree of harm to US national security. And, because Document 1 contains the United States' own positions, USTR was unable to show that release of the document would cause foreign governments to lose trust in the United States or to adopt more rigid negotiating positions.

USTR's third argument is that releasing Document 1 could limit its own flexibility in ongoing and future trade negotiations and arbitration proceedings to advocate for positions different from that set out in Document 1. Because, as USTR itself acknowledged, Document 1 is not binding on the United States and governments and negotiators understand that different administrations will advocate different positions in different settings, USTR was unable to provide evidence of harm that was sufficiently specific, logical, and consistent with its other rationales for withholding Document 1.

USTR provides no evidence or explanation it did not provide three times to the district court, the same evidence and arguments the district court correctly found unpersuasive and insufficient to merit deferring to the agency's national security determination. Given FOIA's presumption in favor of disclosure, and USTR's repeated failure to provide an explanation sufficient to justify withholding Document 1, the Court should affirm the district court's granting of CIEL's motion for summary judgment and order that USTR disclose Document 1.

ARGUMENT

I. FOIA and Standard of Review

A. The Freedom of Information Act and Exemption 1

"In FOIA, a new conception of Government conduct was enacted into law, a general philosophy of full agency disclosure." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 16 (2001) (quotations omitted). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire Co.*, 437 U.S. 214, 242 (1978). Consistent with FOIA's intent "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny," the statute creates a "strong presumption in favor of disclosure" and "places the burden on the agency to justify the withholding of any requested documents." *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (quotations omitted). Accordingly, FOIA's "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act…and [the exemptions] must be narrowly construed." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

Exemption 1 pertains to documents 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). Pursuant to the relevant Executive order, USTR must show that disclosure "reasonably could be expected to result in damage to the national security." Exec. Order 12,958, § 1.2(a)(4); *see also King*, 830 F.2d at 224 ("the agency affidavits must…explain how this material falls within one or more of the categories of classified information authorized by the governing executive order; and…explain how disclosure of the material in question would cause the requisite degree of harm to the national security"). "'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." Exec. Order 12,958, § 6.1(j).

B. Standard of Review

Although summary judgment is generally reviewed *de novo*, this Court has acknowledged that summary judgment in FOIA cases often involves factual determinations that should not be overturned unless clearly erroneous. For example, in *Summers v. Dep't of Justice*, 140 F.3d 1077 (D.C. Cir. 1998), this Court noted that "fact-related inquiries [are] necessary to determine the applicability of [Exemption 1 and other FOIA exemptions]" and that such inquiries "are better handled in the first instance by a court designed for the processing of fact than by a collegial court better equipped for review." *Id*. at 1082; *see also id.*

at 1080 ("When the district court reviews an agency's *Vaughn* index to verify the validity of each claimed exemption, its determination resembles a fact-finding process.").

Because "[t]he appellate court is particularly ill-equipped to conduct its own investigation into the propriety of claims for non-disclosure," *id.* at 1080 (quotation omitted), this Court has clarified its role on review:

> On appeal, the court is to determine, from inspection of the agency affidavits submitted, whether the agency's explanation was full and specific enough to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding. "Once we are satisfied that [the affidavits provided] the trial court...an adequate basis to decide, we are guided by the 'clearly erroneous' standard in evaluating the substance of that decision."

King, 830 F.2d at 217-18 (quoting *Church of Scientology v. United States Dep't of the Army*, 611 F.2d 738, 743 (9th Cir. 1979)); *see also id.* at 743, n.63 ("In order to show that the district court's decision was incorrect as a substantive matter, [the requester] must establish that it was either based on an error of law or a factual predicate which is clearly erroneous." (quotation omitted)). Thus in *King*, this Court concluded that "[i]t is not for us to upset th[e] [district court's] conclusion" that there was "a sound factual basis" for the exemption claim. *Id.* at 235-36. *See also Holy Spirit Ass'n for Unification of World Christianity v. FBI*, 683 F.2d 562, 563 (D.C. Cir. 1982) (district court's determination that documents were "investigatory records" was a "finding of fact [and] was not clearly erroneous").

In reviewing for clear error a district court's factual findings underlying an Exemption 1 claim, appellate courts must keep in mind that, although courts owe "substantial weight to detailed agency explanations in the national security context," *King*, 830 F.2d at 217, "deference is not equivalent to acquiescence." *Campbell v. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998). Especially given FOIA's "broad disclosure policy,…FOIA exemptions [including Exemption 1] are to be narrowly construed," *Wolf v. C.I.A.*, 473 F.3d 370, 374 (D.C. Cir. 2007) (quotation omitted), and courts must not "relinquish[] their independent responsibility" to review classification determinations. *Goldberg v. Dep't of State*, 818 F.2d 71 (D.C. Cir. 1987); *see also Miller v. Casey*, 730 F.2d 776 (D.C. Cir. 1984) (district court "not obliged to accept [the agency's] affidavit [concerning harm to national security] without question.").

In 1974, Congress confirmed its intention that the courts "act as an independent check on challenged classification decisions." *Goldberg*, 818 F.2d at 76. Prior to 1974, FOIA did not expressly require the agency to show that information withheld pursuant to Exemption 1 was properly classified. *See* 5 U.S.C. § 552(b)(1) (1970). In 1973,

> [n]otwithstanding a de novo judicial review provision elsewhere in FOIA, *see* 5 U.S.C. § 552(a)(4)(B), the Supreme Court interpreted Exemption 1 to require courts routinely to defer to government affidavits stating that documents had been properly classified, without engaging in any direct substantive review of the withheld information. *EPA v. Mink*, 410 U.S. 73, 93 (1973). Congress promptly responded by amending FOIA and clarifying

> its intent that courts act as an independent check on challenged classification decisions.

Goldberg, 818 F.2d at 76. Indeed, the 1974 FOIA amendments' *de novo* standard of review of agency exemption claims "was a rejection of the alternative suggestion…that in the national security context the court should be limited to determining whether there was a reasonable basis for the decision by the appropriate official to withhold the document." *Ray v. Turner*, 587 F.2d 1187, 1193 (D.C. Cir. 1978) (citations omitted); *see also* 5 U.S.C. § 552(a)(4)(B). In the context of Exemption 1, Congress explicitly "stressed the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security." *Ray v. Turner*, 587 F.2d at 1194 (citing 120 Cong. Rec. 36870 (1974)).

As a result, FOIA's statutory language now expressly provides for review of the classification decision. *See* 5 U.S.C. § 552(b)(1); Pub. L. No. 93-502, 88 Stat. 1561 (1974).

> Exemption 1 now applies only to matters that are (A) specifically authorized under criteria established by an [applicable] Executive order…*and (B) are in fact properly classified* pursuant to such Executive order. …. As the statute and legislative history and numerous decisions of th[e D.C. Circuit] make clear, the district court is now required to conduct a de novo review of the classification decision, with the burden on the agency claiming the exemption.

Goldberg, 818 F.2d at 76-77 (emphasis in original). Thus, an agency's

declarations explaining why information falls within FOIA Exemption 1 must "afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *Campbell*, 164 F.3d at 30.

Indeed, the "court's 'deferential' standard of review, is not…'vacuous,'" *id.* at 32 (quoting *Pratt v. Webster*, 673 F.2d 408, 421 (D.C. Cir. 1982)), and "a district court may award summary judgment to an agency invoking Exemption 1 only if…the agency affidavits describe the documents withheld and the justifications for nondisclosure in enough detail and with sufficient specificity to demonstrate that material withheld is logically within the domain of the exemption claimed." *King*, 830 F.2d at 217. Agency declarations must "supply facts 'in sufficient detail" to establish a "rational nexus" between the alleged exemption and withheld documents. *Campbell*, 164 F.3d at 31. "Specificity is the defining requirement of the...affidavit; affidavits cannot support summary judgment if they are conclusory, merely reciting statutory standards, or if they are too vague or sweeping." *King*, 830 F.2d at 219 (citations omitted); *see also Ray v. Turner*, 587 F.2d at 1195, n.22 ("Whether there is a 'sufficient description' to establish the exemption[] is, of course, a key issue." (citation omitted)). USTR cannot sustain its burden with explanations that are "called into question by contradictory evidence in the record." *Halperin v. C.I.A.*, 629 F.2d 148 (D.C. Cir. 1980); *see*

also Elec. Privacy Info. Ctr. v. Dep't of Justice, 511 F. Supp. 2d 56, 66 (D.D.C. 2007) (deference to "government's predictions about the security implications of releasing particular information to the public" only warranted "where those predictions are sufficiently detailed and do not bear any indicia of unreliability") (quoting *ACLU v. FBI*, 429 F. Supp. 2d 179, 177-78 (D.D.C. 2006)).

Therefore, although USTR need not show that the harms it describes are certain to occur, it must show that "the unauthorized disclosure of the information *reasonably* could be expected to result in damage to the national security" that USTR "is able to identify or describe." Exec. Order 12,958, § 1.2(a)(4) (emphasis added). "To accept an inadequately supported exemption claim 'would constitute an abandonment of the trial court's obligation under the FOIA to conduct a *de novo* review.'" *King*, 830 F.2d at 219.

II. USTR Has Not Sustained its Burden of Showing a Reasonable Expectation that Disclosure of Document 1 Could Result in Damage to the National Security

Consistent with its "general philosophy of full agency disclosure," *Klamath Water Users*, 532 U.S. at 16, and intent "to pierce the veil of administrative secrecy," *Ray*, 502 U.S. at 173, FOIA mandates public disclosure of agency records unless one of the exemptions applies. Even when national security is at issue, FOIA exemptions "must be construed narrowly,…[so] as to provide the maximum access consonant with the overall purpose of the Act." *Vaughn v.*

Rosen, 484 F.2d 820, 823 (D.C. Cir. 1973). A court must independently review the agency's support for the application of the exemption, to determine whether the agency has provided specific evidence that justifies the application of the exemption.

Exemption 1 allows an agency to withhold certain classified information. 5 *See* U.S.C. § 552(b)(1). To withhold Document 1 under Exemption 1, USTR must show that the document was properly classified. To do so, USTR must provide affidavits that are "specific," and not "conclusory" or "too vague or sweeping," *King*, 830 F.2d at 219, showing that its disclosure "reasonably could be expected to result in damage to the national security." Exec. Order 12,958, § 1.2(a)(4). The reviewing court must not simply acquiesce in USTR's determination, but must review it independently. *See Campbell*, 164 F.3d at 30; *Goldberg*, 818 F.2d at 76.

Three times before the district court, and now on appeal, USTR has failed to articulate in sufficient detail how disclosure could reasonably be expected to result in such harm. Rather, each of USTR's assertions of harm to foreign relations is illogical, implausible, or insufficiently detailed, and thus merits no deference from the district court or this Court. This Court should thus affirm the district court's order requiring USTR to disclose Document 1.

A. USTR has not shown a reasonable expectation that disclosure of the United States' own position in past treaty negotiations would damage US foreign relations by reducing foreign governments' negotiating flexibility.

USTR posits that disclosing Document 1 will reduce foreign nations' flexibility to accept US proposals in future negotiations. *See* USTR App. Br. pp. 34-35. USTR provides no direct evidence of this hypothetical harm. Instead, it relies on the speculation of USTR staff as to how foreign governments might react to the disclosure of Document 1. Such speculation cannot "[]adequately support[]" the conclusion that release of Document 1 creates a "reasonable expectation" of harm to national security for several reasons. *See King*, 830 F.2d at 219.

USTR speculates about the impact on foreign negotiating flexibility of disclosing Document 1 based on dubious assumptions that do not meet its burden of showing a *reasonable* likelihood of harm to US foreign relations. For example, USTR speculates, without providing any evidence beyond general and conclusory statements,[3] that some people within foreign countries will not want their

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[3] USTR bases its argument on the same kinds of "sweeping conclusory statements" that the district court rejected in 2007 as not "demonstrat[ing] a strong nexus between the release of the documents and harm to United States foreign policy." 2007 Opinion p. 11 [JA 39]; *see id.* at 12, n.4 [JA 40] (Vargo Declaration "uses conclusory language such as…'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…[and thus] does not in itself provide a reasonable basis" for classification as "confidential").

government adopting positions advanced by the United States. *See* USTR App. Br. p. 35. While that could be true, it may also be true that there are people in foreign countries who *favor* particular positions proposed by the United States, just as there are groups in the United States that favor US trade proposals and others that oppose them. *See* Magraw Decl. (Dec. 17, 2007) (Doc. 44-2) ¶ 8 [JA 65] (US environmental organizations have advocated for the United States to take trade positions "diametrically opposed to [positions] advocated by industry or other organizations."). In fact, Daniel Magraw, a former US government delegate who served on "scores of U.S. delegations to international negotiations," including "represent[ing] the United States government in international trade negotiations such as the North American Free Trade Agreement and the Free Trade Area of the Americas," *see id.* ¶ 2 [JA 63], indicated that in his "experience in such negotiations, the fact that a particular government disclosed its negotiating positions to its citizens did not cause…other governments to adopt more rigid positions." *Id.* ¶ 5 [JA 64].

USTR has not asked the FTAA governments whether they would object to the release of Document 1, even though a process exists to do so, *see* Lezny Decl. (Nov. 5, 2007) (Doc. 42-2) ¶ 3 [JA 49]; First Bliss Decl. ¶ 6 [JA 52], and USTR did so in 2008 with respect to three other documents from the same negotiations and learned that the governments had no objection to releasing the documents. *See*

Notice of Release of Documents pp. 1-2 [JA 66-67]; 2012 Opinion p. 13 [JA 106] ("the record lacks any indication that the United States' FTAA partners would oppose disclosure"). USTR's refusal to avail itself of the one sure-fire means at its disposal for confirming or disproving its speculation about reduced negotiating flexibility for foreign governments or other adverse impacts of the release of Document 1 on foreign governments undermines its argument that those impacts – and in turn their damage to US national security – are reasonably likely to follow from release of the document. In light of this, USTR's speculation cannot provide the requisite "rational nexus" between Document 1 and the asserted harm to national security. *See Campbell*, 164 F.3d at 32 (agency declarations must provide sufficient detail to establish a rational nexus between the alleged exemption and withheld documents).[4]

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[4] CIEL is not arguing that USTR's willingness to seek consent to release those three documents "'means that other' disclosures should be compelled." *See* USTR App. Br. p. 50, n.9 (citing *Winter* v. *NRDC*, 555 U.S. 7, 31 (2008)). Rather, the consent to release the other documents demonstrates the *availability* to USTR of an unused means of testing its speculation about the adverse effect of disclosure on foreign governments – a means USTR indicated (in its November 2007 declarations) was available before it sought consent for those documents. *See* Lezny Decl. ¶ 3 [JA 49] ("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."); First Bliss Decl. ¶ 6 [JA 52] ("[E]ach document was produced and provided to the Secretariat based on her understanding that it would [be] 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."). Because

USTR argues that "FOIA does not require the United States to expend its negotiating capital by asking other governments to consent to the release of confidential information." USTR App. Br. p. 51. However, USTR provides no evidence that giving foreign governments an opportunity to object to the release of documents would expend negotiating capital.

Moreover, even if there were some cost to asking other governments to consent to the release of Document 1, the intent and purpose of FOIA indicate that USTR should pay it where, as is the case here, the evidence suggests the cost is not great. The Supreme Court has recognized that FOIA's philosophy of "full agency disclosure," *Klamath Water Users*, 532 U.S. at 16, will complicate the performance of agency responsibilities. In *Klamath*, for example, the Court rejected the Department of Interior's argument that requiring the release of certain information would impair its ability to fulfill its statutory obligations. *Id.* at 15. The Court noted that "FOIA's mandate of broad disclosure,…was obviously expected and intended to affect Government operations." *Id.*; *see also id.* at 16

CIEL is not proposing that the court compel USTR to seek consent and because USTR has provided no evidence that seeking consent would cause any substantial harm, *Winter* is irrelevant to this argument. *See* 555 U.S. at 10 (Navy's voluntary compliance with certain restrictions did not suffice to show that "other, more intrusive restrictions [would] pose no threat to preparedness for war").

("Congress had to realize that not every secret under the old law would be secret under the new.").

The same is true of USTR's operations: FOIA's inherent sacrifice of some agency convenience for a more "informed citizenry [and] vital…democracy," *see Robbins Tire Co.*, 437 U.S. at 242, means that USTR will not always be able to conduct its business in the most convenient manner. The U.S. District Court for the District of Columbia recognized this in a case involving the application of FOIA to documents exchanged during the negotiation of a different trade agreement from the one at issue here. In *Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 237 F. Supp. 2d 17, 22 (D.D.C. 2002), USTR argued that FOIA did not require disclosure of US documents setting forth US positions in the negotiation of the US-Chile Free Trade Agreement because "once the public sees the preliminary proposals, public pressure might preclude any deviation from them." *See* Ex. A to Wagner Decl. (Dec. 17, 2007) (Doc. 44-1) (USTR Mot. Summ. J., *CIEL v. USTR*, 237 F. Supp. 2d 17 (D.D.C. 2002), attached thereto, p. 17) [JA 60]). The court held that this concern could not trump FOIA's purpose of public disclosure:

> The Court is not oblivious to defendants' concern that disclosure of these documents may complicate international negotiations on free trade and other issues, and it recognizes the importance of confidentiality in treaty negotiations, particularly where, as here, the United States has promised

> confidentiality to its partner from the outset. [However, as the Supreme Court has concluded,] such policy concerns cannot trump the plain language of the Freedom of Information Act or the underlying policy of the FOIA favoring public disclosure.[[5]]

237 F. Supp. 2d at 29-30 (citing *Klamath Water Users*, 532 U.S. at 15-16).

Especially when USTR has the means to confirm whether foreign governments believe they would lose negotiating flexibility if USTR released Document 1, speculation about that fact does not adequately support finding a reasonable expectation that releasing the document would harm national security. Looking at all the evidence, the district court found that "[t]he harm resulting from…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." 2012 Opinion pp. 11-12 [JA 104-05]. This finding is firmly supported by the evidence and is not clearly erroneous.

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[5] Although the court made this statement in response to USTR's argument concerning the application of FOIA's Exemption 5, *see* 237 F. Supp. 2d at 23-35, the purpose of FOIA and the narrow interpretation of the exemptions are the same no matter which exemption is at issue.

B. USTR has not shown a reasonable expectation that disclosure of the United States' own position in past treaty negotiations would damage US foreign relations by causing other countries' loss of trust.

USTR speculates that releasing Document 1 would harm US foreign relations by causing other countries to lose trust in the United States because of their reaction to the release of a document that may be covered by the confidentiality arrangement under the FTAA. USTR App. Br. pp. 36-40. However, USTR has not met its burden of showing a reasonable expectation that the release of Document 1 would cause this hypothetical loss of trust that would harm US foreign relations.

First, as with USTR's speculation that releasing Document 1 might reduce foreign countries' negotiating flexibility, USTR has not taken the simple step of confirming or disproving this speculation about loss of trust by inquiring whether any of the other countries objects to its release of Document 1, a step that could also remove or minimize any perception that the United States had breached the arrangement. USTR's refusal to make this inquiry, as well as the fact that it has successfully obtained the consent of the FTAA governments to the release of other documents submitted by the United States during the course of the negotiations, undermines its assertion that it cannot release Document 1 without causing a loss of trust.

Second, because Document 1 was created and submitted by the United States and represents its own negotiating position, USTR has not shown a reasonable expectation of a loss of foreign governments' trust even if USTR were to release Document 1 without obtaining their consent. Indeed, former U.S. trade negotiator Daniel Magraw explained that an expectation of harm in this situation is *not* reasonable. Mr. Magraw explained that although the operating rules established by the United States and its foreign government partners in trade negotiations often result in *all* documents submitted during the negotiations being marked as restricted to "official use" so as to "prevent the participating governments from having to make such a finding with respect to each submission," "not every document is considered sensitive."[6] Magraw Decl. ¶ 3 [JA 64]. In particular,

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[6]As justification for keeping Document 1 confidential, USTR has variously referred to a "practice," "understanding," or "arrangement" among the FTAA governments related to the management of documents exchanged during negotiations. *See, e.g.*, Lezny Decl. ¶¶ 3-4 [JA 49] ("practice" of the governments); *id.* ¶ 5) (an "understanding"); Second Bliss Decl. ¶ 5 [JA 86] ("reciprocal confidentiality arrangements that the FTAA governments have adopted"); Third Bliss Decl. ¶¶ 3, 5 [JA 92] ("confidentiality understanding"). However, USTR has never produced the actual terms of the arrangement or provided any evidence of the content of the alleged confidentiality agreement beyond the conclusory statements of USTR staff. *See* USTR App. Br. p. 34 (quoting Davidson Decl. p. 2 [JA 17]; First Bliss Decl. ¶ 9 [JA 53] ("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."); Second Bliss Decl. ¶

> [w]hile [the operating rules established by the United States and its foreign government partners in trade negotiations] 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*.[[7]]
>
> 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.
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> * * *
>
> 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, 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.[[8]]

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5 [JA 86] (same). Furthermore, USTR's assertions about the intent and effect of the arrangement are contradicted by a former US trade negotiator. *See* Magraw Decl. ¶ 4 [JA 64].

[7] That the confidentiality arrangement is primarily intended to protect a country's ability to determine the release of its own materials, not to keep others from releasing theirs, is also supported by the FTAA nations' agreement that all documents will be "derestricted – and thus available for public release – on December 31, 2013, *unless the government that produced a particular document objects to its disclosure*." USTR App. Br. pp. 6-7 (emphasis added) (citing Lezny Decl. pp. 2-3, First Bliss Decl. pp. 2-3, Third Bliss Decl. p. 2 [JA 49-50, 52-53, 92]).

[8] It is similarly implausible that foreign governments would consider the release of Document 1 to be an attempt to "entrench" the US negotiating position by "creating domestic pressure to resist giving ground." First Bliss Decl. ¶ 11 [JA 53]; *see* USTR App. Br. p. 38 (quoting *id.*). Many positions taken by the United States in international trade negotiations, particularly in the area of investment, are

Id. Magraw Decl. ¶¶ 4-5, 7 [JA 64-65] (emphasis added).

In response to this evidence, USTR has simply reiterated its speculative and conclusory statements about the possibility of a loss of trust on the part of foreign governments.[9] In light of the evidence from both parties, the district court found that "breach of a confidentiality agreement does not suffice to establish harm where the breach is caused by release of the United States' own information." 2012 Opinion p. 13 [JA 106]. This conclusion is supported by the fact that "the record lacks any indication that the United States' FTAA partners would oppose disclosure" of Document 1. *Id.* To the contrary, the FTAA governments consented to the release of three other documents created and submitted by the

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considered too weak by some groups at the same time that others argue they are too strong. *See* Magraw Decl. ¶ 8 [JA 65]. It is thus doubtful that the release of Document 1 would force an entrenchment of its position.

[9] As the district court noted, USTR's explanation is "at a high level of generality" and fails to "articulat[e] 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.'" 2012 Opinion p. 11 [JA 104]. USTR argues that it need not explain its foreign partners' interest because "[t]he confidentiality agreement does not require a government to give a reason for objecting to release of a document." USTR App. Br. pp. 47-48. However, the primary question before this Court is whether USTR has described a "reasonabl[e] expect[ation]" of harm to US foreign relations that will satisfy the requirements of FOIA. Because the harm USTR alleges is asserted to arise out of the reaction of the United States' foreign partners to the release of a US position document, the plausibility of the foreign governments' interest in maintaining the secrecy of the document is directly relevant to whether the expectation of harm is reasonable.

United States during the negotiations. *See* Notice of Release of Documents pp. 1-2 [JA 66-67].[10]

Even if USTR could show that a reduction in foreign governments' trust of the United States in trade negotiations would inevitably result from releasing Document 1, FOIA's purpose and intent would require USTR to show that the reduction in trust would cause enough damage to the national security to outweigh FOIA's policy of "full agency disclosure." *Klamath Water Users*, 532 U.S. at 16; *see also King*, 830 F.2d at 224 (Exemption 1 requires agency to "explain how disclosure of the material in question would cause the requisite degree of harm to the national security"); *CIEL v. USTR*, 237 F. Supp. 2d at 30 ("policy concerns cannot trump the plain language of [FOIA] or [its] underlying policy…favoring public disclosure") (citing *Klamath Water Users*, at 15-16). As explained

[10] USTR suggests that foreign governments cannot distinguish between US disclosure of its own documents and its ability to protect theirs. *See* USTR App. Br. p. 48 ("[I]f the United States cannot be trusted to protect its own documents from disclosure when we have promised to do so, other governments could reasonably doubt our willingness and ability to meet other obligations of confidentiality."). This is neither logical nor reasonable. As the district court noted, "because Document 1 is the United States' own material,…its disclosure would not necessarily provide a basis for foreign officials to think that [the] United States might dishonor its commitments to keep foreign information confidential." 2012 Opinion p. 4 [JA 97] (citing *CIEL v. USTR*, 777 F. Supp. 2d 77, 80-81 (D.D.C. 2011)). This conclusion is supported by Mr. Magraw. *See* Magraw Decl. ¶¶ 4-6 [JA 64] (no knowledge of US disclosure of its own negotiating positions ever being "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").

previously, Congress anticipated that FOIA's mandate of broad public disclosure would inevitably interfere with some agency responsibilities. *See Klamath Water Users*, 532 U.S. at 15-16 (Congress "obviously expected and intended [FOIA] to affect Government operations."). Minor or purely speculative interference with agency activities thus cannot support the application of one of FOIA's limited exemptions. *See King*, 830 F.2d at 224.

USTR has provided no evidence of how much the loss of foreign government trust would affect US interests. To the contrary, as Daniel Magraw indicated, and as the district court found, the release of Document 1 would have little to no effect on such trust. *See* Magraw Decl. ¶¶ 4-6 [JA 64]; 2012 Opinion p. 10 [JA 103] ("While a breach of the confidentiality agreement will occur [whether the United States releases a foreign government's information or its own], the resulting [e]ffect on the United States' foreign relations – the key factor for assessing whether the document is properly classified – is not identical.").

Furthermore, accepting USTR's argument, that the confidentiality arrangement *per se* justifies classifying and withholding Document 1, would undermine Congress's intent that the courts provide an independent check on the classification and withholding of documents. *See Goldberg*, 818 F.2d at 76. Under USTR's interpretation, USTR could withhold *any* document – even a document whose release would otherwise cause absolutely no harm – simply by

entering into a confidentiality arrangement and arguing that the breach of that arrangement would undermine trust and cause damage to US foreign relations; the withholding would be insulated from judicial review. Fortunately, FOIA limits what an agency can make confidential; "not every secret under the [pre-FOIA] law [remains] secret under [FOIA]." *Klamath Water Users*, 532 U.S. at 16.

Finally, in addition to not having carried its burden of showing that releasing Document 1 is reasonably likely to cause a loss of trust on the part of foreign governments, USTR also has not shown that the harms to US interests it claims will result from such loss of trust are reasonably likely to occur. USTR argues that a loss of trust will harm US foreign relations by making foreign governments "'more likely to adopt rigid negotiating positions unfavorable to U.S. economic and security interests.'" USTR App. Br. p. 37 (quoting First Bliss Decl. p. 3 [JA 53]). As Mr. Magraw explained, the disclosure of a government's own negotiating positions has not caused "the United States to adopt a more rigid position, or cause[d] other governments to adopt more rigid positions," and foreign governments do not condition their engagement in trade negotiations with the United States on their confidence that the United States will protect from public

disclosure *all* negotiating documents provided to or received from its negotiating partners.[11] *See* Magraw Decl. ¶¶ 4-7 [JA 64-65].

The district court found that "USTR's arguments regarding loss of trust are at a high level of generality," do not articulate "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,'"

[11] The district court noted that USTR's desire to maintain its ability in different settings to take positions contrary to the position it advocated in Document 1, *see* USTR App. Br. p. 41, appears inconsistent with its purported desire to maintain the trust of its FTAA negotiating partners. *See* USTR App. Br. pp. 36-40. As the district court recognized,

> [i]t 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.

2011 Opinion p. 14 [JA 81]. The court held that this kind of "inconsistency is an indication of unreliability," *id.* at 14-15 [JA 81-82], and that USTR's declarations would be shown no deference with respect to any justification for withholding that involved maintaining the trust of negotiating partners. *Id.*

USTR attempted to address this concern through declarations explaining that foreign governments and others would understand that Document 1 is not binding on the United States. *See* USTR App. Br. pp. 43-44. Although it may thus be true that there is no literal conflict in USTR's desired conduct, such formalism seems like meager comfort for governments deciding whether to trust the United States, and the tension between USTR's two rationales continues to be an indication of unreliability.

and do not "pass the test of reasonableness, good faith, specificity and plausibility." 2012 Opinion pp. 11-12 [JA 104-05] (quotation omitted). The court also found that "breach of a confidentiality agreement does not suffice to establish harm where the breach is caused by release of the United States' own information." *Id.* at 13 [JA 106]. These findings are strongly supported by the evidence and are not clear error.

C. USTR has not shown a reasonable expectation that disclosure of the United States' own position in past treaty negotiations would damage US foreign relations by reducing US negotiating flexibility.

USTR claims that disclosure "could reasonably be expected to cause 'additional harm' due to the specific content of [Document 1] – the meaning of the phrase 'in like circumstances.'" *See* USTR App. Br. pp. 40-43. USTR argues that public disclosure of Document 1, which "was intended only to describe how the concept of 'in like circumstances' could be applied in the context of the [FTAA]," *see id.* at 40, could harm US foreign relations "as a result of confusion and mistrust about how similar phrases in other agreements (existing or future) might be understood." *Id.* at 41. However, USTR fails to present a sufficiently detailed explanation that logically links disclosure of the content of that document to the harms USTR describes.

For example, USTR claims that releasing the content of Document 1 might

undermine its flexibility to "'assert a broader or narrower view of the meaning and applicability' of the phrase ['in like circumstances'] in different circumstances." *Id.* at 41 (quoting First Bliss Decl. p. 3 [JA 53]). However, as the district court found, this concern is an illogical and implausible basis for withholding Document 1 because it is inconsistent with USTR's asserted need to maintain its negotiating partners' trust. *See* 2012 Opinion p. 14 [JA 107].

Attempting to reconcile the inconsistency between its competing rationales, USTR notes that a "foreign government would not view the adoption by the United States of a different interpretation in a different context (such as negotiation of a future trade agreement) as 'a breach of trust' or 'an unfair tactic'" because it knows that Document 1 is not binding. USTR App. Br. p. 43. This point not only fails to reconcile the inconsistency, but also undermines USTR's prediction of reduced flexibility in current and future negotiations involving the term "in like circumstances": As the district court found, "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." 2012 Opinion p. 15 [JA 108].

USTR further argues that release of Document 1 could limit its ability, in negotiations concerning the meaning of the phrase "in like circumstances" in other

trade agreements, to start its negotiation from a different position than that expressed in Document 1 and "negotiate up" to that position, or to accept a similar position proposed by another government without a loss of negotiating capital resulting from another governments' knowledge that the United States had previously advocated that position. USTR App. Br. p. 42. Here, USTR's emphasis on "well-accepted negotiating conventions" whereby governments and trade negotiators are aware that "a party is free to revise its positions at any point until a final agreement is reached," and "that changes in positions are an essential pathway for reaching agreement, rather than grounds for mistrust," *id.* at 44; *see* Second Bliss Decl. pp. 5, 7 [JA 88, 90], undercuts its prediction of harm arising from disclosing the United States' position in Document 1.[12] As the district court found, USTR

> presented no logical or plausible reason 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.… [Thus,] 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 [imperiled] by disclosure.

2012 Opinion pp. 15-16 [JA 108-09].

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[12] The fact that the position in Document 1 was developed and advocated by a previous US administration further reduces the likelihood that other governments would expect current or future administrations to espouse the same position.

Finally, USTR claims that the substance of Document 1 could be "used against the [United States] in international arbitration brought by foreign investors accusing the United States of violating non-discrimination rules." USTR App. Br. p. 42; *see also id.* pp. 51-52. However, just as "sophisticated international negotiators understand that the U.S. position during the aborted FTAA negotiations would not bind the United States in other circumstances," *id.* at 52; *see also id.* at 43-44, equally sophisticated international arbitrators will have the same understanding and would not consider Document 1 to bind the United States in an arbitration proceeding. *See* 2012 Opinion p. 16 [JA 109] (finding that "arbitrators, like trade negotiators, are generally aware of the non-binding, preliminary nature of the interpretive position articulated in Document 1"); *id.* at 17 [JA 110] ("Document 1…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.").

After reviewing the evidence, the district court found that USTR had "presented no logical or plausible reason" why releasing Document 1 would interfere with the United States' ability to present a different interpretation of "in like circumstances" in different settings, *see id.* at 15 [JA 108], or "to open

[negotiations] with Document 1's interpretation in the future, or to accept it from a negotiating partner." *See id.* at 16 [JA 109]. The court likewise found "insufficiently substantiated" the argument that disclosure of Document 1 could increase the United States' exposure to adverse arbitration decisions." *Id.* These conclusions are amply supported by the record and are not clearly erroneous.

Finally, USTR's refusal to publicly disclose its trade negotiation positions where such information so closely touches upon policy issues of significant public interest is contrary to FOIA's basic purpose. FOIA is intended to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed," *Robbins Tire Co*., 437 U.S. at 242, by "pierc[ing] the veil of administrative secrecy and…opening agency action to the light of public scrutiny." *Ray*, 502 U.S. at 173. USTR has presented *no* evidence that the harm from the disclosure of the content of Document 1 would interfere with USTR's responsibilities enough to outweigh FOIA's policy of "full agency disclosure." *Klamath Water Users*, 532 U.S. at 16; *see also CIEL v. USTR*, 237 F. Supp. 2d at 29-30 (citing *Klamath Water Users*, 532 U.S. at 15-16) ("The Court is not oblivious to [USTR's] concern that disclosure of these documents may complicate international negotiations on free trade and other issues…. [However, as the Supreme Court has concluded,] such

policy concerns cannot trump the plain language of [FOIA] or [its] underlying policy…favoring public disclosure.”).

CONCLUSION

For the preceding reasons, this Court should affirm the judgment of the district court.

DATED: November 28, 2012

Respectfully submitted,

/s/ J. Martin Wagner

J. Martin Wagner (D.C. Bar #435730)
Abby L. Rubinson
Earthjustice
50 California Street, Suite 500
San Francisco, CA 94111
Phone: (415) 217-2000
Fax: (415) 217-2040
mwagner@earthjustice.org
arubinson@earthjustice.org

Counsel for Plaintiff-Appellee Center for International Environmental Law

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify that the foregoing brief is within the applicable word limit provided under Fed. R. App. Procedure Rule 28.1(e)(2) and this Court's orders, in that it contains 10,096 words according to counsel's word processing system.

DATED: November 28, 2012

Respectfully submitted,

/s/ J. Martin Wagner
J. Martin Wagner

Counsel for Plaintiff-Appellee Center for International Environmental Law

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on November 28, 2012, I electronically filed the foregoing **Final Brief of Plaintiff-Appellee Center for International Environmental Law** 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 certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: November 28, 2012

Respectfully submitted,

/s/ J. Martin Wagner
J. Martin Wagner

Counsel for Plaintiff-Appellee Center for International Environmental Law