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NEWS: US FORESTRY COMPANY AND CANADA DISPUTE BRITISH COLUMBIA LOGGING REGULATIONS

By Elizabeth Whitsitt

Oral hearings were held in May over a claim by an American forestry and land management company against the Government of Canada for damages of US$25 million for alleged breaches of NAFTA Chapter 11.

At the heart of Merrill & Ring's complaint is a complex regulatory regime in Canada that controls the export of logs out of the Canadian province of British Columbia (BC). All logs exported from Canada require federal export permits for any destination. Logs exported from BC, however, are subject to different export permit application procedures depending on whether the federal or provincial government owns the land from which logs are harvested.

Under both regulatory schemes, log exporters in BC must comply with a surplus testing process before they are considered eligible for an export permit. Specifically, the surplus testing process requires that logs harvested from either federal or provincial lands in BC be deemed "surplus" to BC's needs before they can be exported. BC, however, is the only Canadian province in which the federal government exercises its authority to control the export of logs harvested from federal lands through a surplus testing process. As such, log exports generated from timber grown on federal lands in another province do not have to be deemed "surplus" to that province's needs before they can be exported.

In addition to the surplus testing process, potential exporters whose logs are harvested from timber grown on provincial lands may obtain an export permit when: (i) timber cannot be processed and/or transported economically by or for a mill in BC (the "economic exemption") and/or (ii) permitting the export of logs from BC would prevent the waste of or improve the use of timber from provincially owned lands (the "utilization exemption").

> *"Noting that the regulation governing timber grown on federal lands has been in effect since 1998, Canada claims that Merrill & Ring has known about the alleged breaches of NAFTA Chapter 11 for almost a decade, and certainly more than three years, before it commenced arbitral proceedings in this case."*

Potential exporters whose logs are harvested from timber grown on federal lands in BC are not entitled to obtain an export permit on the basis of an economic or utilization exemption.

Merrill & Ring claims that the economic and utilization exemptions available exclusively to provincial landowners under the BC *Forest Act* provide them with significant advantages, including: (i) increased revenues because such landowners have a greater likelihood

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NEWS: ECUADOR DEFIES PROVISIONAL MEASURES IN DISPUTE WITH FRENCH OIL COMPANY

By Damon Vis-Dunbar

An ICSID tribunal authorized provisional measures on May 8th in an effort to stop the Government of Ecuador from seizing assets belong to the French oil company Perenco. Nonetheless, the state-owned Petroecuador attempted a week later to auction 1.4 million barrels of oil confiscated from Perenco, although no bidders stepped forward to purchase the oil.

Ecuador is seeking US$327 million owed under a windfall tax enacted in 2006 (Law 42)—a tax Perenco contests is in violation of its contract with Ecuador and the France-Ecuador bilateral investment treaty.

Perenco's application for provisional measures was in response to "coercive measures" announced by Ecuador in February, which led to the seizure of oil produced by Perenco a month later. Perenco requested provisional measures to preserve its existing contract with Ecuador, and prevent Ecuador for taking action to collect the payments due under the windfall tax.

In its May 8th decision, the Tribunal granted the provisional measures, having concluded that the seizure of Perenco's assets risked "crippling" the company's business in Ecuador.

The tribunal also recommended that Perenco deposit the contested tax payments into an escrow account, which would be released to Ecuador in the case that the tribunal declines jurisdiction, or finds that Ecuador is within its rights to enforce payment of the taxes. Ecuador and Perenco have been given 3 months to agree on terms and conditions for the escrow account.

Tribunal stresses legal consequences of provisional measures

Although ICSID tribunals are empowered to "recommend" rather than "order" provisional measures, the tribunal maintians that ICSID provisional measures carry "legal consequences". After referring to case law from ICSID, the International Court of Justice, and the European Court of Justice, the tribunal submits that state parties to the ICSID convention are inherently "under an international obligation to comply with provisional measures issued by an ICSID tribunal".

However, the repercussions of non-compliance are not provided; the tribunal simply states that it "would have to take a serious view of any failure to comply with its request."

A tribunal hearing a contract dispute over the oil windfall tax (*City Orient v. Ecuador*) also issued provisional measures against Ecuador in a 2007 decision. In this case, the tribunal called on Ecuador to refrain from prosecuting representatives of the oil company City Oriente, and to cease demanding payment of the windfall royalty tax. Yet Ecuador's General Prosecutor proceeded to seek the arrest of several of City Oriente's Quito-based in employees, despite the provisional measures.

US FORESTRY COMPANY AND CANADA DISPUTE ...

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of obtaining the international price for logs instead of the BC price, (ii) reduced compliance costs because such landowners do not have to go through the surplus testing process if they can obtain an economic or utilization exemption, and (iii) longer term contracts because such landowners are better able to provide a predictable timber supply to international buyers.

Moreover, Merrill & Ring argues that the surplus testing process—which is only applicable to log exports generated from timber grown on federal lands in BC—provides similar advantages to those investors and investments situated in other Canadian provinces.

As a result, Merrill & Ring claims that Canada, among other things, has breached its obligations under Section A of Chapter 11 of NAFTA, including Articles 1102 (National Treatment), 1105 (International Standards of Treatment), 1106 (Performance Requirements), and 1110 (Expropriation).

While Canada disputes the foregoing alleged breaches, its primary argument is an objection to jurisdiction of the Tribunal. Specifically, Canada asserts that Merrill & Ring's claim is time barred. Article 1116(2) prevents an investor from making a claim "if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."

Noting that the regulation governing timber grown on federal lands has been in effect since 1998, Canada claims that Merrill & Ring has known about the alleged breaches of NAFTA Chapter 11 for almost a decade, and certainly more than three years, before it commenced arbitral proceedings in this case. Consequently, Canada has requested that the Tribunal dismiss Merrill & Ring's claim without further consideration.

NEWS: ECUADOR CONTINUES EXIT FROM ICSID

By Fernando Carbrera Diaz

Ecuadorian president Rafael Correa announced on May 30 that his country would be denouncing the International Centre for Settlement of Investment Disputes (ICSID), calling the World Bank's arbitration facility an atrocity and claiming that his government was working on a regional alternative involving the South American Union (UNASUR).

In remarks made on the weekly radio program, 'Dialogue with the President,' Correa said withdrawing from ICSID is necessary for "the liberation of our countries because this [ICSID] signifies colonialism, slavery with respect to transnationals, with respect to Washington, with respect to the World Bank and we cannot tolerate this."

As ITN reported in August, Ecuador's Oil and Mining Minister at the time, Galo Chiriboga, questioned the impartiality of ICSID arbitration, at a point when Ecuador faced over US$10 billion in claims at the World Bank's arbitration facility. Most of the pending claims stem from a 2006 tax on oil company 'windfall profits'.

Ecuadorians approved a new constitution in September which makes it unconstitutional for the country to submit itself to arbitration outside of Latin America.

"Ecuadorians approved a new constitution in September which makes it unconstitutional for the country to submit itself to arbitration outside of Latin America. "

Hernán Pérez Loose, a partner at Quito-based Coronel & Pérez Abogados and former Attorney General of Ecuador, maintains that the constitutional change does not affect existing contracts or Bilateral Investment Treaties (BITS), on the grounds that governments cannot use domestic legislation to shield themselves from commitments made under international law.

Ecuador has been working vigorously to renegotiate existing contracts with oil companies. Last year agreements were reached with Andes Petroleum (owned by China's state oil company) and Brazilian state-owned Petrobras. A source with knowledge of the negotiations tells ITN that in both these cases the renegotiated contracts include arbitration clauses under UNCITRAL Rules administered by the Permanent Court for Arbitration in Chile.

In March, Ecuador also reached an interim deal with Argentinean-Spanish oil company Repsol, under which both sides agreed not to advance their ICSID arbitration pending final negotiations. Repsol has also agreed to begin to pay US$444.7 million owed under the windfall profits tax. A final agreement with the company is expected later this year, and will presumably include regional arbitration.

However, Ecuador has not reached agreements with the oil companies Burlington and Perenco, both of which have initiated ICSID arbitration against the Andean nation.

Ecuador has also denounced 9 BITs, mostly with other developing countries in the region. The Attorney General Diego García Carrión said that these BITs were cancelled because they did not foster foreign investment. Many of these BITs included ICSID arbitration clauses which have now been eliminated.

A government official who wished to remain anonymous tells ITN that Ecuador is currently working on a model BIT that will be used to initiate negotiations with other states on the remaining 17 BITs it is a party to. The Ecuadorean model BIT is also expected to limit dispute settlement to regional arbitration fora.

IN BRIEF: SUSPENSION EXTENDED IN *PIERO FORESTI, LAURA DE CARLI AND OTHERS V. REPUBLIC OF SOUTH AFRICA*

By Damon Vis-Dunbar

European claimants and the government of South Africa have agreed to extend the suspension of their ICSID arbitration.

The high-profile case was suspended at the end of March for two months, as the parties seek to resolve the dispute. The suspension is now due to run until June 19th.

The claimants—several Italian citizens and a Luxembourg corporation—hold interests in South African granite quarrying companies. They claim that legislation enacted in 2004 to increase the participation of historically disadvantaged South Africans effectively "extinguished" their mineral rights without providing adequate compensation.

The claim is pursuant to the Italy-South Africa and Benelux-South Africa bilateral investment treaties, and was registered with ICSID in 2007.

Both parties have submitted memorials and hearings are currently scheduled for April 2010.

NEWS: NGOS CLAIM THE PHILIPPINE-JAPAN FREE TRADE AGREEMENT IS UNCONSTITUTIONAL

By Damon Vis-Dunbar

A petition lodged with the Philippine Supreme Court by non-governmental organizations (NGOs) argues that the investment chapter of the Japan-Philippines Economic Partnership Agreement (JPEPA) violates the Philippine constitution.

The Japan-Philippines EPA—a comprehensive trade and investment agreement—grants Japanese the right to establish investments in sectors like public utilities, education, mass media and advertising, in violation of constitutional limits on foreign ownership in these sectors, argue the Philippine NGOs.

Under the Philippine constitution, foreigners are restricted to a 40% ownership stake in public utilities and education, 30% for advertising, and no foreign ownership of mass media is allowed.

The NGOs also maintain that the JPEPA liberalizes land ownership, in violation of the strict limits currently in place. Only Filipino citizens and corporations with at least 60% Filipino-owned capital may acquire private lands.

Although the Philippines exempts national treatment for the establishment of investments in private land ownership for manufacturing and services, it does not exclude other subsectors, such as real estate development, residential purchases and agribusiness ventures. As a result, the NGOs argue that "if a Japanese corporation wishes to own private lands in the Philippines for its real estate projects and/or agribusiness, it may do so ...".

NGOs seek to bar implementation of JPEPA

It is a matter of contention whether an exchange of notes that followed the JPEPA ensures harmony between the Philippine Constitution and the JPEPA. The note agreed to by both the Philippines and Japan in August 2008, states that the JPEPA must be implemented in accordance with their respective constitutions. Yet the NGOs charge that despite the note the JPEPA is still incompatible with the Philippine constitution.

The Philippine Solicitor General has yet to respond on behalf of the Philippine Government to the claims made by the Philippine NGOs. ITN also requested comment from Senator Mar Roxas, Chairman of the Senate Committee on Trade and Commerce and a co-sponsor of JPEPA, but he declined to respond.

The NGOs are seeking an order from the Supreme Court that would bar the implementation of the agreement. However, time is quickly running out. The JPEPA has been ratified by the Senate, and the process of implementing the agreement has been underway since December 2008.

Moreover, the question of the JPEPA's compatibility with the constitution may become at least partly moot by the time a Supreme Court ruling is rendered. The Philippine Congress is currently considering amending the constitution to ease foreign ownership restrictions.

Nonetheless, a complete lifting of foreign ownership restrictions in sensitive sectors like education, mass media and public utilities is unlikely. The Philippine Chamber of Commerce and Industry, for example, has endorsed the idea of relaxing foreign ownership restrictions in principle, but cautions it "should not apply to all industries, because some may benefit and some might be harmed due to this proposal."

No consent for investor-to-State arbitration

As ITN previously reported, the JPEPA is notable for the fact that it does not provide consent to arbitrate investor disputes through international arbitration.

The agreement states: "the disputing Party may, at its option or discretion, grant or deny its consent in respect of each particular investment dispute and that, in the absence of the express written consent of the disputing Party, an international conciliation or arbitration tribunal shall have no jurisdiction over the investment dispute involved."

Following the signing of the JPEPA in 2006, a Japanese official confided to ITN that the Philippines had resisted including a provision that would allow investment disputes to be settled through international arbitration, in part because the Philippines was involved in fending itself against a high-profile investment-treaty claim by the German firm Fraport AG.

A member of an NGO who helped draft the Supreme Court petition said the failure adequately to exclude certain sectors from the national treatment provisions of the investment chapters was "blunted" by the absence of an investor-state dispute settlement mechanism.

A right to transparency?

This is the second Supreme Court case that Philippine civil society has launched in reaction to the JPEPA. The first saw a petition in 2005 for access to the full text of the draft agreement, as well as the Philippine and Japanese offers.

The petitioners submitted that the JPEPA was sufficiently in the public interest to require the disclosure of draft texts and other documents related to the negotiations pursuant to a constitutional right of access to information (currently, the Philippines does not have Freedom of Information legislation which implements this right).

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NEWS: UNITED STATES REVIEWS ITS MODEL BILATERAL INVESTMENT TREATY

By Damon Vis-Dunbar

The United States has embarked on a review of its model bilateral investment treaty (BIT). Last updated in 2004, the US closely adheres to the model in its BIT negotiations with other countries.

The BIT review follows campaign pledges by President Barack Obama, in which he committed to "ensure that foreign investor rights are strictly limited and will fully exempt any law or regulation written to protect public safety or promote the public interest."

"The 2005 model BIT has received mixed reviews for its efforts to 'balance' investor protections with state rights to regulate to protect health, safety and the Environment."

A subcommittee to the Advisory Committee on International Economic Policy (ACIEP)—a committee of non-government advisers to the US government on matters of international economic policy—has been charged with "taking a fresh look" at the US model BIT.

Co-chaired by Alan Larson, a Senior International Policy Advisor to the law firm Covington and Burling LLP, and Thea Mei Lee, Policy Director for the American Federation of Labor and Congress of Industrial Organizations, the subcommittee will directly counsel the ACIEP. The ACIEP, in turn, advises the US government.

The subcommittee will seek input from interested groups and individuals through a public hearing and invitations for written statements, said a U.S. government official. A date for the public hearing will be announced in the next couple of weeks. ITN was unable to confirm whether the public hearings would be open to groups and individuals based outside of the United States.

The BIT review will also include consultations with a range of government agencies, including the Environmental Protection Agency, Department of the Interior, Justice Department and Department of Labor.

The US model BIT underwent its last transformation in 2004, after an inter-agency review. The 2004 model BIT has received mixed reviews for its efforts to "balance" investor protections with state rights to regulate to protect health, safety, and the environment.

"The 2004 US Model BIT attempts to accommodate the emergence of the regulatory state exercising authority over health, safety and the environment in a normative space already occupied by international economic law," said Marcos Orellana, an attorney with the Center for International Environmental Law.

"Environmental law is a relatively new field of law, owing to the increasing awareness of the deterioration of the local and global environment, and it is still developing in most countries of the world. Thus, the 2004 US Model BIT is more an effort at rebalancing and accommodation, and not a weakening of investment protection, in order to ensure that the government can effectively exercise its authority for the public good in a vitally important area such as environmental protection," said Mr. Orellana.

The current review promises to invigorate the debate over the "balance" struck in US investment agreements.

Indeed, addressing a Congressional trade committee in May, the co-chair of the ACIEP investment subcommittee lamented an imbalance in US investment agreements.

Ms. Lee said her key concerns include: "the investor-state dispute resolution; failure to distinguish between regulatory action on the part of government and 'indirect expropriation'; an overly broad definition of investment; potential impact on needed future national and global financial regulation efforts; and the need to establish commensurate and enforceable responsibilities for investors with respect to workers ' rights and the environment."

Meanwhile, Mr. Larson stressed the "valuable role" that international investment treaties play in "providing a more stable and predictable environment" to international investment.

Referring to investor-state arbitrations pursuant to BITs, Mr. Larson remarked: "On balance, it is fair to say that the outcome of such cases does not suggest a bias in favor of either the State or the investor".

NEWS: *WAGUIH ELIE GEORGE SIAG AND CLORINDA VECCHI V. ARAB REPUBLIC OF EGYPT*: A QUESTION OF NATIONALITY?

By Elizabeth Whitsitt

On 1 June 2009 an ICSID tribunal found the Arab Republic of Egypt liable to Mr. Waguih Elie George Siag and Mrs. Clorinda Vecchi for damages totaling more than US$74 million plus interest after finding that Egypt violated numerous provisions of the Italy-Egypt bilateral investment treaty.

The claimants in this case, both natural citizens of Italy, were the principal investors in two Egyptian corporations, Touristic Investments and Hotels Management Company (SIAG) S.A.E. and Siag Taba Company. In 1989, the Egyptian Ministry of Tourism sold a large parcel of oceanfront land on the Red Sea's Gulf of Aqaba to SIAG for the purpose of developing a tourist resort. SIAG subsequently transferred a portion of the property to Siag Taba Company.

The claimants alleged that, commencing in 1995, Egypt unlawfully expropriated their investment, consisting of the property and the resort which was under development.

In addition, the claimants asserted that Egypt contravened a number of its obligations under the Italy-Egypt BIT by: (i) failing to protect their investment; (ii) failing to provide the claimants and their investment fair and equitable treatment; (iii) subjecting the claimants and their investment to unreasonable and discriminatory measures; and (iv) failing to apply the most favoured nation principle.

In response, Egypt advanced a number of defenses, particularly but not exclusively in relation to Mr. Siag. Specifically, Egypt contended that Mr. Siag was at all relevant times a national of Egypt and was thereby precluded from succeeding in a claim against Egypt under the Italy-Egypt BIT. Even though the majority of the tribunal rejected those arguments in its April 2007 Decision on Jurisdiction, Egypt reformulated this contention and forcefully pursued it before the tribunal. In so doing, Egypt made two arguments in support of its continued objection to the jurisdiction of the tribunal.

First, Egypt claimed that it had recently discovered that Mr. Siag had been declared bankrupt on 16 January 1999, with retroactive effect from 20 August 1994. As a result, Egypt contended that Mr. Siag (from the date he become bankrupt in 1999) lacked the capacity to arbitrate the dispute.

Second, Egypt reasserted its earlier claim that Mr. Siag was an Egyptian national and accordingly failed the negative nationality requirement of Article 25(2)(a) of the ICSID Convention. In support of that latter argument, Egypt contended that Mr. Siag had fraudulently obtained Lebanese nationality, and, therefore, never properly shed his Egyptian nationality under Egyptian law.

In both instances, the majority of the tribunal held that Egypt's objections to the tribunal's jurisdiction were out of time under ICSID Rule 41 and should be disregarded pursuant to ICSID Rule 26. Rule 41 requires that jurisdictional objections be made as early as possible. The majority of the tribunal also found that in waiting too long to raise arguments regarding Mr. Siag's bankruptcy and alleged lack of Lebanese nationality, Egypt had waived its right to object on both grounds pursuant to Rule 27.

Having confirmed its jurisdiction, the majority of the tribunal went on to consider the merits of the case. In so doing, it found that:

> …the evidence clearly establishes that Egypt [had] unlawfully expropriated Claimants' investment, in breach of Article 5(1)(ii) of the BIT; that Egypt failed to provide full protection to Claimants' investment, in breach of Article 4(1) of the BIT; that Egypt failed to ensure the fair and equitable treatment of Claimants' investment, in breach of Article 2(2) of the BIT; and that Egypt allowed Claimants' investment to be subjected to unreasonable measures, in breach of Article 2(2) of the BIT.

Further, the majority of the tribunal dismissed Egypt's defenses to liability. In particular, Egypt argued that the claimants were estopped from denying their Egyptian nationalities, which both had relied on numerous occasions in the past in order to acquire and use Egyptian passports and to conclude business deals. The claimants did not contest those submissions, but denied that their behavior provided grounds for estoppel. The majority of the tribunal held that:

> …the Claimants acted in good faith in obtaining their Egyptian passports and in their subsequent business and other dealings with Egypt. As to the latter, Claimants did not know at that point, nor as lay persons could they reasonably be expected to have known, that in law they had lost their Egyptian nationality. Thus the Claimants are not estopped from now denying their Egyptian nationality.

In a dissenting opinion primarily on the issue of estoppel, Professor Francisco Orrego Vicuña disagreed and found that Mr. Siag's evidence of Lebanese nationality—a certificate of registration issued by the Lebanese authorities—was apparently originally obtained for money to avoid Egyptian military service and was inconsistent with the Lebanese Ministry of the Interior's records, which did not have any registration of Mr. Saig's Lebanese nationality. Accordingly, Professor Vicuña would have applied the doctrine of "clean hands" and found that the claimants' were estopped from disavowing their Egyptian nationality.

NEWS: NORWAY SHELVES ITS PROPOSED MODEL BILATERAL INVESTMENT TREATY

By Damon Vis-Dunbar

Norway has abandoned a proposed model bilateral investment treaty (BIT), following public input that was largely critical.

The draft text of the model BIT, released to the public in December 2007, features a number of innovations over previous Norwegian BITs, including transparent investor-state dispute settlement procedures, the requirement to exhaust local remedies before recourse to international arbitration, and efforts to limit the ability of so-called mailbox companies from using the treaty's protections.

In addition, a lengthy preamble to the proposed model BIT affirms the desire for "stable equitable, favourable and transparent conditions for investors", but also emphasises the importance of corporate social responsibility, human rights and sustainable development.

Yet despite efforts to achieve a model BIT that balanced investor protections with other public goods, a number of nongovernmental organizations and businesses charged that the proposed model agreement was imbalanced.

Indeed, public feedback fell broadly in two categories, said a Norwegian government official: groups that felt the model did not provide investors with enough protection, and those that felt the model would restrain governments' ability to regulate in the public interest.

The feedback was so polarized that Norway "decided that achieving a proper balance was too difficult," said this government official.

The Norwegian government is currently a coalition between the Labour Party, the Socialist Left party and the Centre Party. The Socialist Left Party and the Center Party both opposed the model BIT.

The Minister of Finance, Kristin Halvorsen, who belongs to the Socialist Left Party, praised the decision to "put away the model agreement."

It is uncertain whether Norway will negotiate BITs in the future. For now, Norway will only consider agreeing to provisions on investor protection in the context of free trade agreements with India, China, the Ukraine and Russia. Norway has already embarked on negotiations for FTAs with India, China and the Ukraine, and preliminary discussions are underway with Russia.

"What happens after that is unclear," said a government source.

For analysis of the proposed draft Norwegian BIT, see: "Norway proposes significant reforms to its investment treaty practices", By Luke Eric Peterson, Investment Treaty News, March 27, 2008, available here: http://www.iisd.org/pdf/2008/itn_mar27_2008.pdf

RECENTLY PUBLISHED: A THIRST FOR DISTANT LANDS: FOREIGN INVESTMENT IN AGRICULTURAL LAND AND WATER

http://www.iisd.org/pdf/2009/thirst_for_distant_lands.pdf

A new paper published by the International Institute for Sustainable Development (IISD), and authored by Howard Mann and Carin Smaller, analyzes current trends in the expansion of foreign investment in agriculture. The paper highlights the causes, mechanisms and growth of long-distance farming for home country consumption, before identifying a range of issues in relation to domestic law, the international investment contracts and international investment agreements. The authors posit that these three sources of law can have positive and negative implications for community and individual rights to land, water and food.

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As it was, the court ruled by majority against disclosure, but only after the negotiations had been concluded, at which point the text of the agreement had been made public. As for access to the Japanese and Philippine offers, the court refused to order disclosure due to the privileged character of diplomatic negotiations.

The Initiative for Dialogue and Empowerment through Alternative Legal Services (IDEALS), a Philippine NGO, is currently preparing to bring a similar case to the United Nations Committee on Human Rights by the middle of August. IDEALS will be joined by the Center for International Environmental Law (CIEL) and the Open Society Initiative, both based in the United States.

CIEL, together with two other American NGOs, launched a similar case in 2001 in the United States, seeking access to records related to the negotiation of the United States-Chile Free Trade Agreement. In that case, a U.S. District Judge ordered the USTR to release documents which revealed the negotiating positions of the United States and Chile.