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**BY EMAIL**

José Luis Aragón Cardiel  
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The Netherlands

**Re: PCA Case N° 2018-56 - 1. Alberto Carrizosa Gelzis, 2. Felipe Carrizosa Gelzis, 3. Enrique Carrizosa Gelzis v. The Republic of Colombia**

Dear Mr. Aragon Cardiel,

Claimants have no objection to publication of the various letters that have been submitted to the Tribunal concerning footnote 11 of the U.S. non-disputing Party Submission in this proceeding.

Claimants want to be very clear on this point. The UNCITRAL transparency provision is central to the integrity of the process.

However, there are three very rudimentary points arising from the U.S. Department of State's June 9, 2020 correspondence that are inappropriate and, therefore, compel reference.

First, Counsel for the U.S. Department of State asserts that "no U.S. court has held the Treasury regulation to be invalid, and Treasury routinely applies it to requests by litigants seeking the testimony of former of treasury employees."

This statement is imprecise and, therefore, possibly very misleading. The actual status of the law is that no U.S. court has been presented with an opportunity to adjudicate the legality of extending the Treasury regulation to former employees. This fact matters.

The complete and accurate statement is that *all* U.S. courts that have been asked to determine whether the analogous regulation for other departments and agencies of the U.S. Government can be extended to former employees have held that it would be in violation of law to do so. Those analogous regulations are in every material respect identical to the Treasury regulation here at issue.

U.S. courts repeatedly have held in the context of *Touhy* regulations such as the one at issue that the Housekeeping Statute authorizes only regulations that govern current – not former – employees.

- *Sherwood v. BNSF Ry. Co.*, No. 2:16-CV-00008-BLW, 2019 WL 943548, at \*3 (D. Idaho Feb. 25, 2019) (holding former Federal Railroad Administration employee could testify as an expert regarding his personal opinions but could not purport to testify on behalf of the agency because "the statutory term 'employee' unambiguously covers only current employees — not current and former employees" and "construing the housekeeping statute to cover former employees would likely raise First Amendment issues").
- *Koopman v. U.S. Dep't of Transportation*, 335 F. Supp. 3d 556, 565 (S.D.N.Y. 2018) (USDOT regulations regulating when employees could testify were invalid to extent they purported to apply to former employees).
- *Louisiana Dep't of Transportation & Development v. U.S. Dep't of Transportation*, Case No. 15-2638, 2015 WL 7313876 at \*7 (E.D. La. Nov. 20, 2015) (finding that "[t]he term 'employees' [in the Housekeeping Statute] is not ambiguous, and, thus, USDOT has no authority to extend that definition to the conduct of former employees").
- *Forgione v. HCA Inc.*, 954 F. Supp. 2d 1349, 1358 (N.D. Fla. 2013) (finding that current employee of state agency—not federal— acting "under the direction" of a federal agency was not subject to *Touhy* regulations because "nothing in the [Housekeeping] [S]tatute suggests that an agency may redefine a word of common understanding, such as 'employee.'").
- *Gulf Grp. Gen. Enters. Co. W.L.L. v. United States*, 98 Fed. Cl. 639, 644 (2011) (stating in dictum that the Army's *Touhy* regulations neither barred nor required former Army contracting officer to seek authorization prior to testifying as expert witness adverse to the interests of the U.S. because "the language of the statute at 5 U.S.C. § 301 authorizes prescribing regulations for 'the conduct of its employees,' that is, present employees").

- *United States ex rel. Pogue v. Diabetes Treatment Centers of America*, 474 F. Supp. 2d 75, 79-80 (D.D.C. 2007) (holding that qui tam defendant must comply with Touhy regulations before permitting testimony of former Department of Health and Human Services employee as expert; noting in dictum, however, that "there is no authority indicating that HHS can block all testimony by a former employee as to that individual's personal opinions and observations, absent the assertion of a specific privilege").
- *Moore v. Chertoff*, No. CIV.A.00-953 RWR DAR, 2006 WL 2338203, at \*1 (D.D.C. Aug. 10, 2006) (denying motion in limine to exclude deposition testimony of former employee where "defendant provided no authority for precluding use of [the] testimony even if the Touhy regulations should have been, but were not, complied with" and finding "no authority to support excluding use of an agency employee's testimony taken in violation of an agency's Touhy regulations").
- *Gulf Oil Corp. v. Schlesinger*, 465 F. Supp. 913, 917 (E.D. Pa. 1979) (finding that Housekeeping Statute "on its face applies only to employees and not former employees of government agencies and departments" and thus "that the [Federal Energy Administration's Touhy] regulations are inapplicable to" former employees sought to be deposed).

Therefore, the U.S. courts interpreting the Housekeeping Statute giving rise to the Treasury regulation that here concerns us indisputably hold that such regulations *do not* extend to former employees. This omission on the part of U.S. Department of State's June 9, 2020 letter is very significant.

The U.S. Department of State's June 9, 2020 correspondence also omits disclosing to this Tribunal that even under the plain language of 31 CFR 1.11(f)(3) leave to testify is not required. And in fact the public records contain numerous such examples.

Second, the US Department of State's letter under the pretext of helping to "clarify any misunderstandings", admittedly has set "out additional information".

Indeed, it has done so, in part, to comment on Mr. Olin L. Wethington's testimony, which is the single reasonable interpretation that can be at all ascribed to the fifth full paragraph of that communication.<sup>1</sup>

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<sup>1</sup> The paragraph reads as follows:

*In this case, neither Claimants' counsel nor Mr. Olin L. Wethington applied for Treasury's approval, and Treasury learned of Mr. Wethington's initial testimony after it had already been given. Treasury has determined that certain aspects of*



The use of a communication, purportedly seeking reconsideration from the Tribunal so that the Tribunal would publish something different from what it wrote, in order to supplement its non-disputing Party Submission and to comment further on Mr. Wethington's testimony is simply inappropriate.

Third and finally, it is universally understood to be inappropriate to comment on discussions concerning the settlement of disputes arising from differences of opinion or otherwise. The U.S. Department of State, nonetheless, has sought it fit to render such discussions public, as it made clear from the penultimate paragraph of its June 9, 2020 correspondence.<sup>2</sup>

Claimants wish to communicate to the Tribunal that the discussions being conducted with Treasury do not at all contemplate a retraction of or modification to any material proposition (factual or legal) contained in the two witness statements that Mr. Wethington has submitted.

Indeed, Claimants' only interest in entertaining such discussions is to invite correction of the representation set forth in footnote 11 of the U.S. Submission wrongfully characterizing Mr. Wethington's testimony as being in "violation of U.S. law."

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*Mr. Wethington's testimony, which he represents are based on his recollections as a NAFTA negotiator, fall within the regulation's prohibition that former employees "not provide, with or without compensation, opinion or expert testimony concerning official information, subjects, or activities ... without written approval or agency counsel." Treasury reviewed its records and otherwise gathered information related to the negotiation of the NAFTA and U.S.-Colombia TPA financial services chapters and was unable to find any evidence supporting Mr. Wethington's opinion regarding the scope of investor-State arbitration in the Financial Services Chapter, or contradicting the ordinary meaning of the articles relating to this issue, as discussed in the United States' May 1, 2020 submission. (footnotes omitted)*

<sup>2</sup> The paragraph reads as follows:

*Subsequent to the United States submission, Treasury reiterated its offer to work with Claimants' counsel and Mr. Wethington to see if he could testify in compliance with the regulation, such as by modifying his testimony to fit within the exception. We understand that discussions between Mr. Wethington, counsel, and Treasury on this matter are continuing. The United States remains hopeful there will be a mutually satisfactory resolution to the issue of Mr. Wethington's testimony in the near future.*

The only contemplated changes would concern qualifications pertaining to the scope of Mr. Wethington's testimony.

Claimants regret that the U.S. Department of State has elected to disavow the context and purpose of the NAFTA (entered into force in 1994) and the US-Colombia TPA (entered into force in 2012) because of the current administration's policy against ISDS, which policy, in the absence of empirical evidence and theoretical consistency, asserts that ISDS is conducive to the exportation from the US of jobs and to investments abroad that should have been made within the U.S.

Both treaties must be construed within the framework of the context and purpose prevailing at the time when each entered into force.

Respectfully,



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