

PCA Case No. 2018-56

**IN THE MATTER OF AN ARBITRATION UNDER THE UNITED STATES –
COLOMBIA
TRADE PROMOTION AGREEMENT, SIGNED ON NOVEMBER 22, 2006 AND
ENTERED INTO FORCE ON MAY 15, 2012**

- and –

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW, AS REVISED IN 2013 (the “UNCITRAL
Rules”)**

- between –

- 1. ALBERTO CARRIZOSA GELZIS**
- 2. FELIPE CARRIZOSA GELZIS**
- 3. ENRIQUE CARRIZOSA GELZIS**

(“Claimants”)

- and –

THE REPUBLIC OF COLOMBIA

(“Respondent”)

**CLAIMANTS’ OBSERVATIONS CONCERNING
NON-DISPUTING PARTY SUBMISSION OF THE
UNITED STATES OF AMERICA**

May 15, 2020

INTRODUCTION

1. For the most part, the United States' submission is too general and incomplete to provide meaningful assistance to the Arbitral Tribunal in this case. It consists largely of a top-level recitation of general principles and positions without providing a comprehensive analysis of those propositions or of their application in the context of this dispute.
2. Accordingly, with the exception of certain statements in the "Dual Citizenship" discussion,¹ Claimants respectfully submit that the United States' submission does not add anything of value to the parties' briefing of the relevant issues.
3. While Claimants will not address every proposition in the United States' submission with which they disagree or which they consider to represent a materially incomplete presentation of the law, Claimants do wish to comment on the United States' discussion of two topics: arbitration of claims under Chapter 12 of the TPA and the testimony of Olin Wethington.

CHAPTER 12 OF THE TPA AND DISPUTE RESOLUTION

A. Basis of the U.S. Position

4. The United States has offered no evidence (whether in the form of contemporaneous fact or expert testimony, documents, or indeed any other type of evidence) in support of its interpretation of the scope of NAFTA Chapter 14 and, derivatively, Chapter 12 of the TPA. Instead, the government's interpretation is premised simply upon argument of counsel.

¹ The submission correctly (i) explains the relevant timeframes during which the investor's dominant and effective nationality should be considered while also taking into account the investor's entire life (as set forth in rules of international law), (ii) notes that, as provided in the TPA, the determination is to be made, and the TPA construed, in accordance with rules of international law as set forth in the TPA's textual language (TPA Art. 10.22), and (iii) does not purport to endorse a close-ended list of factors with a suggested hierarchy of importance presumably relevant to that determination.

TPA Article 10.22(1) leaves no discretion to the arbitral tribunal in the interpretation of "dominant and effective", because that provision states that "the tribunal *shall* decide the issues in dispute in accordance with this Agreement and applicable rules of international law." (emphasis added). (Submission at ¶¶ 40-41 & n. 43; ¶ 44 & n. 44).

B. Illogical Consequences of the U.S. Interpretation

5. The United States contends in its submission that – apparently regardless of any other treaty provisions -- TPA Articles 10.7 and 10.8 provide the only rights that financial services investors may enforce in arbitration. This position, if correct, would render the National Treatment protections provided by TPA Article 12.2 and the Most-Favored Nation (MFN) protections extended by TPA Article 12.3, along with all other purported investor protections contained in Chapter 12, rights without remedies because they would not be enforceable by financial services investors.
6. Although the United States argues that State-to-State dispute resolution may provide some sort of derivative remedy for the investor protections extended by Chapter 12 (Submission ¶ 13; *see* ¶¶ 15-17), this contention is not workable. Among many other reasons, the TPA’s State-to-State arbitration mechanism does not provide for recovery of damages for a host State’s violation of Chapter 12 protection standards. (See Claimants’ Reply to Respondent’s Answer on Jurisdiction, Part II.A.3).
7. State-to-State arbitral dispute settlement – and, in particular, the dispute settlement mechanism provided in TPA Article 12.18 – is not designed to provide investors with compensation for losses suffered because of the host State’s breaches of investment protection standards. Consequently, the United States has failed to offer an interpretation of TPA Article 12.1.2(b) that provides financial services investors with any enforceable protection standards under TPA Chapter 12.
8. Indeed, under this construction of the TPA, financial services investors would receive the benefit of only two enforceable investment protection standards, Article 10.7’s protection against expropriation and Article 10.8’s rather limited protection for transfers, despite being purportedly guaranteed a wide range of significant rights by Chapter 12 of the TPA. Such a construction would discriminate against financial services investors vis-à-vis investors generally, relegating the former to a disfavored second-class status contrary to the TPA’s

language, object and purpose (and despite the language, object and purpose of the NAFTA, which served as the model for the TPA).

9. The illogical nature of the interpretation proposed by the United States is placed into even sharper relief by the submission's utter silence on the subjects of the striking textual differences between the MFN protections extended by Articles 10.4 and 12.3 of the TPA, and of Footnote 2 to Article 10.4 TPA, which excludes dispute-resolution mechanisms from the scope of the former but not the latter protections.² As the Arbitral Tribunal is aware, this distinguishing footnote to Article 10.4 is a feature of the TPA that was not present in NAFTA. The submission avoids any discussion of these topics even while noting, pointedly, that "[p]er Article 23.1 of the U.S.-Colombia TPA, footnotes are an integral part [of] the TPA." (Submission ¶ 18 n. 21).

C. Reliance Upon the *Fireman's Fund* Decision

10. The United States' submission places great reliance upon the *Fireman's Fund v. Mexico* arbitration in seeking to limit the scope of arbitrable claims under the TPA. However, the *Fireman's Fund* jurisdictional decision and subsequent award are neither binding nor persuasive precedents.
11. The United States dedicates a substantial portion of its submission to *Fireman's Fund* and cites extensively to that tribunal's references to NAFTA Chapter 14 (which served as the template for Chapter 12 of the TPA). (Submission ¶¶ 10-13). After canvassing (without any analysis) select passages from the Award, the United States cites to language in the 2003 Decision that at first *appears* to be a holding:

In sum, if the measures challenged in this arbitration are covered by Chapter Fourteen, the claims brought under Articles 1102, 1105, and 1405 must be dismissed, and only the claim for expropriation pursuant to Article 1110 remains to be decided by this Tribunal.³

² As described in Claimants' Reply to Respondent's Answer on Jurisdiction, this structure, and the specifically limited nature of the clarifying footnote, are also reflected more broadly in the treaty practices of both the United States and Colombia, and may be found in multiple other treaties concluded by each nation. (¶¶ 23-28).

³ Submission, ¶ 11, quoting *Fireman's Fund Ins. Co. v. Mexico*, NAFTA/ICSID Case No. ARB(AF)/02/01, Decision on the Preliminary Question ¶¶ 66, 67 (July 17, 2003).

12. By analogy, the United States reasons and concludes that “[I]ikewise here, the Parties to the U.S.-Colombia TPA did not consent to investor-State arbitration of any claims other than those explicitly incorporated into Chapter Twelve via Article 12.1.2(b). Therefore, an investor-State tribunal has no jurisdiction to consider claims not explicitly set out in 12.1.2(b).”⁴ It is thus that the United States arrives at the proposition that only Expropriation and Compensation (10.7) and Transfer (10.8) claims are made available to the TPA’s Chapter 12 investors.
13. The U.S. submission, however, omits thirteen critical premises that meaningfully qualify *Fireman’s Fund’s* reach and application to this case.
14. First, the parties in *Fireman’s Fund* never arbitrated NAFTA Chapter 14 claims. Even though the claimant in that case *alleged* that Mexico had violated Article 1405 (Chapter 14’s National Treatment provision), that claim never was contested and submitted for adjudication. Rather, only the claims under NAFTA Chapter 11 (the general investments chapter) were arbitrated.
15. Second, because no claims under Chapter 14’s treatment protection standards were arbitrated, the *Fireman’s Fund* tribunal’s pronouncements concerning the extent to which the NAFTA Parties consented to submit to investor-State arbitration claims under Chapter 14’s treatment protection standards, including Article 1405 (National Treatment), were merely *obiter dicta*.
16. Third, the jurisdictional issue on which the arbitral tribunal premised its determination of whether claims are actionable under NAFTA Chapter 14 or NAFTA’s general investments chapter, Chapter 11, concerned the extent to which a “financial holding company” is a “financial institution” under NAFTA Chapter 14, or whether such a holding company falls within the more general ambit of Chapter 11. Indeed, the United States’ three-page submission in *Fireman’s Fund* merely purports to respond “to the Tribunal’s question, raised on the first day of the hearing on jurisdiction, on whether a bank holding

⁴ Submission, ¶ 12.

company under United States law should be considered a ‘financial institution’ within the meaning of Article 1416.”⁵ No such issue is present in this case.

17. Fourth, in *Fireman’s Fund* both the claimant and the respondent *stipulated* that Article 1405 (National Treatment) under the Financial Services Chapter was not subject to investor-State arbitration. For this reason, the issue of whether Article 1405 provides financial service investors with the right to arbitrate a claim of breach of that treatment protection standard was never briefed or otherwise presented for analysis by the tribunal.
18. Fifth, the *Fireman’s Fund* claimant sought to arbitrate only claims for violation of Chapter 11 treatment protection standards – not potential claims under Chapter 14. In fact, the *Fireman’s Fund* claimant *sought to avoid* Chapter 14 jurisdiction, explicitly asserting the proposition that its allegation of an Article 1405 violation was not subject to investor-State dispute settlement (ISDS). The claimant asserted this premise as part of its effort to establish jurisdiction under Chapter 11’s expropriation provision, Article 1110.
19. In contrast, the jurisdictional question posed in the case before this Tribunal is materially different. Here, Claimants seek to establish the Tribunal’s jurisdiction for violations of TPA Chapter 12 investment protection standards, as well as of TPA Article 10.7 (Expropriation and Compensation), rather than seeking to avoid jurisdiction pursuant to the TPA’s Financial Services chapter (Chapter 12).
20. Sixth, because both the claimant and the respondent in *Fireman’s Fund* stipulated to the scope of investor-State dispute settlement within the NAFTA’s Financial Services Chapter, the Preliminary Decision and the Award in that case only provide a legal conclusion as to the scope of Article 1401(2). Notably, the *Fireman’s Fund* tribunal offers no analysis or rationale for its conclusion that it lacks jurisdiction over claims alleging violation of Article 1405 (National Treatment).

⁵ U.S. Submission, *Fireman’s Fund v. The United Mexican States*, Feb. 27, 2003, ¶2 (available at <https://www.italaw.com/sites/default/files/case-documents/italaw7823.pdf>).

21. Seventh, the *Fireman's Fund* tribunal makes only superficial reference to Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). Although it articulates the relevant standard, it offers no explanation of the manner in which these articles govern the tribunal's interpretation of NAFTA Article 1401(2).
22. In that regard, the *Fireman's Fund* tribunal nowhere considers "context" or "object and purpose", as is compelled by a holistic VCLT analysis. Thus, the tribunal never refers to – and appears to have been wholly unaware of – the negotiating history establishing the U.S. negotiators' position and objectives with respect to extending financial services investors' arbitration rights to cover violations of the National Treatment and other Chapter 14 investment protection standards. Because of the parties' stipulation concerning whether Article 1405 was susceptible to investor-State arbitration, the *Fireman's Fund* tribunal was not provided with, and did not consider, the extensive evidentiary record and legal analysis addressing this point, which have been made available to the Arbitral Tribunal in the present case.
23. Thus, the *Fireman's Fund dictum* upon which the United States' submission rests is based upon an incomplete record. Nevertheless, the United States urges this Arbitral Tribunal to turn a blind eye and a deaf ear to the factual premises and legal reasoning that were not available to the *Fireman's Fund* tribunal.
24. Eighth, the conclusion of the *Fireman's Fund* tribunal that State-to-State dispute settlement provides NAFTA Chapter 14 (Financial Services) investors with a remedy completely misses the mark. By way of example, that tribunal never considered, because the parties' stipulation mooted the pertinent discussion, that the State-to-State dispute settlement mechanism (i) is only prospective and (ii) does not provide for compensatory damages.
25. In this same vein, the *Fireman's Fund* tribunal failed to recognize that, leaving to one side arbitrations before special-purpose claims tribunals, only three State-to-State investment treaty arbitrations have reached Panel Report finality.

In fact, as of the issuance of the *Fireman's Fund* Award on July 17, 2006, only three non-claims tribunal State-to-State investment treaty arbitrations *ever* had been filed.⁶

26. Ninth, the *Fireman's Fund* tribunal had no opportunity to consider the implications and necessary consequences of its *dictum* limiting investor-State dispute settlement for financial services investors to just two protection standards under Chapter 11, which would (i) relegate financial services protection standards to the status of rights without remedies, (ii) extend to financial services investors significantly fewer investment protection standards than the treaty provided to other investors under Chapter 11, and (iii) do so notwithstanding the more highly-regulated environment to which financial services investors are exposed.
27. Tenth, the NAFTA panel did not have the opportunity to consider, and did not consider, public congressional hearings on the part of multiple United States agencies and departments, which included testimony as to the importance of having National Treatment and MFN guarantees as central pillars of NAFTA's Chapter 14 treatment protection standards available to U.S. financial services investors.⁷ A central interest of the NAFTA negotiators (and the U.S. government) at that time was the ability to provide investors in the financial services sector with robust treatment protection standards that would protect them in Canada and in Mexico by exporting to those jurisdictions fulsome National Treatment and MFN standards.
28. This testimony is memorialized in print and cannot now be disavowed, twenty-seven years later, pursuant to the current Administration's *new* position (in 2020) on the availability of investor-State arbitration to U.S. investors who invest in non-U.S. jurisdictions rather than within the United States.⁸

⁶ Claimant's Reply on Jurisdiction at 174 n. 190/.

⁷ See Claimant's Reply on Jurisdiction, Section III.C.d, *The Testimony on National Treatment before the House Committee on Banking, Finance, and Urban Affairs*, pp. 236-57.

⁸ *Id.*

29. Eleventh, the United States' submission is driven by the current Administration's disavowal of ISDS because of the unlikely and untested theory that ISDS is conducive to the export of U.S. jobs to foreign markets. It is not at all based on the policy and position of the U.S. government at the time that the NAFTA was entered into. For that reason, the United States' 2003 submission in *Fireman's Fund* did not take the position that ISDS is unavailable to financial services investors with respect to Chapter 14 treatment protection standards, including National Treatment and MFN. The twelve-paragraph submission that the United States filed in that case was silent on that issue -- even though the U.S. submission in the present case paints that question as the primary jurisdictional issue in *Fireman's Fund*.
30. Twelfth, the *Fireman's Fund* tribunal completely omits discussion of the prudential measures exception's non-contravention provision. The NAFTA negotiators were sensitive to protecting regulatory discretion while also supplying remedies to financial services investors for damages suffered because of the *excessive* exercise of regulatory sovereignty. This concern is memorialized in the textual language of Article 1410(4) of the NAFTA and, of course, replicated in its entirety in Article 12.10(4) of the Colombia-U.S. TPA.
31. Thirteenth, both the Decision on the Preliminary Question and the Award in the *Fireman's Fund* case are significantly weakened on the issue of the availability of ISDS to enforce Financial Services Chapter protection standards because the tribunal does not consider -- indeed, completely ignores -- the Mexican and Canadian Submissions concerning the interpretation of NAFTA's Article 1401(2) (the counterpart to 12.1.2 of the Colombia-U.S. TPA).⁹
32. Accordingly, the United States' submission's reliance on the *dictum* in *Fireman's Fund* concerning the availability of ISDS to financial services investors under NAFTA Chapter 14 (and, analogously, to TPA Chapter 12)

⁹ Mexico, as the respondent, would be expected to assert premises in favor of a narrow reading of Article 1401 (2). While Canada asserted a narrow reading of that provision in a conclusory fashion, it did not offer any rationale for its position beyond that of a plain meaning analysis. As noted, the United States, as the third NAFTA party, never offered a view on the scope of investor-State dispute settlement under the Financial Services Chapter.

runs afoul of the context and object of both of those chapters, and is premised upon *dictum* arising from a less than complete record available to the tribunal in that case.

33. Moreover, the United States' submission in this case stands in sharp relief to its submission in *Fireman's Fund*. The absence of any reference in its *Fireman's Fund* submission to the availability or unavailability of investor-State arbitration to financial services investors is particularly eloquent.

34. Consequently, notwithstanding the heavy reliance placed upon it by the United States' current submission, *Fireman's Fund* provides little if any helpful guidance on the issues before the Arbitral Tribunal.

TESTIMONY OF OLIN WETHINGTON

35. Recognizing that the views that it presently expresses concerning the scope of dispute resolution available under the TPA are contradicted by the testimony of Olin Wethington, the United States has included a lengthy footnote in its non-disputing Party submission concerning Mr. Wethington's testimony. (Submission at ¶ 10 n. 11). In that footnote, the United States makes a series of assertions concerning the application of a domestic U.S. administrative regulation, 31 C.F.R. § 1.11, to Mr. Wethington's testimony in this case.

36. Such a comment by a non-disputing Party upon evidence in the case is unusual, not least because the scope of non-disputing Party submissions under the TPA is fixed in Article 10.20.2 as "submissions to the tribunal regarding the interpretation of this Agreement." (See also Article 5(1) of the UNCITRAL Transparency Rules, providing for non-disputing Party submissions "on issues of treaty interpretation.") The comment is all the more unusual because the United States asserts in its Submission that it "does not take a position on how [its interpretation of the TPA] applies to the facts of this case." (Submission ¶ 1).

37. Claimants respectfully submit that the United States' assertions in its footnote 11 are not helpful to the Arbitral Tribunal because they are either irrelevant (as

in footnote 11 ¶ 1), misleading or misinformed (as in footnote 11 ¶ 3), or simply incorrect (as in footnote 11 ¶ 2).

A. The Nature of Mr. Wethington's Testimony

38. In paragraph 1 of footnote 11, the United States asserts that “[o]nly the government of the United States is authorized to offer interpretations of treaties on behalf of the United States. Mr. Wethington, as a former official, is not authorized to offer such interpretations.”

39. This proposition is uncontroverted and is surprising only because of its clear irrelevance. No one, least of all Mr. Wethington himself, has suggested in any fashion that he was purporting to offer an interpretation of treaties on behalf of the United States.

40. To the contrary, Mr. Wethington has consistently made it plain that his testimony is “based upon my genuine belief, personal knowledge, experience and judgment, unless otherwise qualified.” (Wethington witness statement, CER-2 at ¶ 4; Wethington supplemental witness statement, CER-2.1 at ¶ 2; see ¶¶ 62-64).

41. Indeed, the book published by Mr. Wethington in 1994, which described much of the information contained in his witness statements, makes plain that he is in no way purporting to speak for the United States government:

The objective of this publication is to provide insight into the financial services component of the North American Free Trade Agreement (NAFTA). My hope is that it will be a substantial and comprehensive commentary on the origins and content of the NAFTA provisions related to banking, securities, insurance, and other important financial sectors in the North American market.

This publication is not intended to be a “behind the scenes” look at the negotiating process, although it does contain some observations concerning the dynamics of the negotiating process on financial services. ... Rather, the purpose is to explain the operation of the Agreement and explain the key factors which led to the Agreement as it is written in the financial field. ...

...

I am indebted to many people for making this publication possible. I am particularly grateful for the encouragement of the finance ministries of the three governments party to the Agreement – the U.S. Department of the Treasury, the Canadian Department of Finance, and the Mexican Ministry of Finance and Public Credit. *Although this manuscript had been available in advance of publication to interested persons within these three ministries, the views and contents of this publication are solely mine and do not reflect in any way on the current position of any of the three governments with respect to any particular matter or issue.*¹⁰

42. Paragraph 1 of footnote 11 thus adds nothing to the discussion of the issues before the Arbitral Tribunal.

B. “Contemporaneous Evidence”

43. In paragraph 3 of footnote 11, the United States asserts that it “is not aware of any contemporaneous evidence that supports Mr. Wethington’s view of the scope of investor-state dispute settlement in the financial services chapter of NAFTA.”
44. This assertion is, at best, misleading or misguided, because it fails to take into account Mr. Wethington’s testimony itself and the contemporaneous evidence that he has cited.
45. As Mr. Wethington explains in considerable detail in his witness statement, much of his testimony is based upon his “personal recollection and experience arising from [his] leadership role in the negotiation of the financial services and investment chapters of the NAFTA on behalf of the United States government.” (CER-2, ¶ 6). This experience was, by its nature, obtained contemporaneously with the events in question.
46. Moreover, even a cursory perusal of Mr. Wethington’s supplementary witness statement reflects that he has cited additional contemporaneous evidence that supports his analysis. In addition to the book that he published in 1994 as the NAFTA entered into force (see CER-2.1, ¶¶ 10, 12, 15, 21, 44, quoting excerpts), he cites and discusses proceedings and U.S. government officials’

¹⁰ Olin L. Wethington, *Financial Market Liberalization: The NAFTA Framework*, pp. iii-iv (Shepard’s/McGraw-Hill, Inc. 1994) (emphasis supplied).

testimony in 1993 before the U.S. House of Representatives Committee on Banking, Finance and Urban Affairs, relating to the ratification of the NAFTA, (see CER-2.1, ¶¶ 14 n. 3, 19, 43), as well as the September 11, 1992 Report of the Services Policy Advisory Committee on the North American Free Trade Agreement (see CER-2.1, ¶ 24 n. 8).

47. In light of the foregoing, the United States' submission should, at a minimum, have included the word "other" before the phrase "contemporaneous evidence" in paragraph 3 of footnote 11, because it may hardly claim ignorance of the evidence mentioned in the very witness statements that it addresses.
48. Even had the United States' submission not pointedly ignored the other contemporaneous evidence described in Mr. Wethington's testimony, its claim to ignorance of further supporting evidence would be of little benefit, absent some indication of the efforts it had made (if any) to discover and locate such evidence. *What is clear, though, is that the United States has not offered any evidence that contradicts Mr. Wethington's testimony or supports a competing interpretation of the relevant language.¹¹ Instead, as discussed in the next section, it has chosen to attack his testimony in a different fashion.*

C. Asserted Relevance of U.S. Treasury Regulation (31 C.F.R. § 1.11)

49. In paragraph 2 of footnote 11, the United States asserts that Mr. Wethington was bound to follow procedures set forth in an internal U.S. Treasury Department regulation, 31 C.F.R. § 1.11, and that by offering his testimony without having done so Mr. Wethington's testimony somehow "was in violation of U.S. law."
50. As is discussed below, these assertions are incorrect for numerous reasons. Among other things, the regulation in question is a so-called "housekeeping

¹¹ Indeed, given the manner in which the United States has chosen to comment on Mr. Wethington's testimony, it is striking that, in its non-disputing Party submission, the United States does not affirm or deny the substantive premises contained in Mr. Wethington's two witness statements. It offers no comments on his testimony as to the NAFTA's negotiating context and its policy objectives. In this same vein, the United States is silent as to Mr. Wethington's testimony on treaty practice and the treaty's purpose as understood by the parties' negotiators, including Mr. Wethington's own views.

regulation”, which is authorized only to regulate the agency’s *internal* governance, and which does contain any sanctioning or other enforcement provision with respect to former employees. Consequently, the regulation does not rise to the level of “law” in U.S. jurisprudence.

51. Moreover, neither the language of the regulation nor its stated underlying policy objectives lead to its application with respect to Mr. Wethington’s testimony here.

52. Finally, of course, even if the United States’ assertions about the internal Treasury regulation had been correct, there is no suggestion that such domestic administrative questions could provide any basis for depriving this Arbitral Tribunal of his testimony in an investor-State arbitration under the TPA.

(i) Background Facts

53. As is noted in his first witness statement, Mr. Wethington served in a series of U.S. government posts during the time periods 1981-1985, 1990-1993, and 2003-2005. (¶¶ 8-16). He left government service for the final time nearly fifteen years ago.

54. Mr. Wethington’s government service during the period of the NAFTA negotiations in question ended some twenty-seven years ago.

55. Mr. Wethington’s testimony in this case does not reveal any government secrets. To the contrary, as discussed above, much of its subject matter is covered in public documents from 1992 and 1993, and in his 1994 book (which was made available, pre-publication, to representatives of the three NAFTA countries’ finance ministries).

56. His testimony on behalf of Claimants in this arbitration has been a matter of public-record for nearly one year.

57. On October 21, 2019, the United States contacted Claimants’ counsel about the government’s desire to file a non-disputing Party submission.

58. Yet it was not until April 20, 2020 (six months later) that a member of the United States’ working group first suggested that there was any question with

respect to Mr. Wethington's testimony, or that 31 C.F.R. § 1.11 was possibly relevant to his provision of testimony.

59. On April 28, 2020, counsel for Claimants wrote to the United States Treasury counsel who had raised the question of 31 C.F.R. § 1.11. This letter (a copy of which is attached as Appendix 1) explains in some detail why the regulation does not apply to Mr. Wethington's testimony here.
60. On April 30, 2020, a Treasury Department attorney wrote a letter to Mr. Wethington, referencing the April 28 letter. A copy of the April 30 letter is attached as Appendix 2.
61. Contrary to the United States' assertion in its submission, the April 30 letter did not quite state that Mr. Wethington's "testimony was in violation of U.S. law." Rather, the April 30 letter stated that, in the absence of written approval from Treasury counsel, "your testimony on these official matters is in violation of [31 C.F.R.] section 1.11." This difference is significant because, as is explained in section (iii) below, that administrative regulation lacks the force of law with respect to former employees such as Mr. Wethington.
62. Although it referenced the April 28 letter from Claimants' counsel, the April 30 Treasury Department letter did not engage in any substantive discussion of the points that were raised. Rather, it simply offered a two word response: "Treasury disagrees."¹²
63. In its April 30 letter, the Treasury Department made no demands with respect to the testimony that Mr. Wethington has already provided in this proceeding and a second, related investor-State arbitration. Nor did it identify any legal basis for enforcing the Treasury Department's position that he was required to seek permission to testify. To the contrary, the letter states that "Treasury remains willing to review any written materials that you might wish to submit

¹² Similarly, the United States' non-disputing Party submission in this case does not engage in any substantive discussion of the reasons identified in the April 28 letter as to why the regulation does not apply to Mr. Wethington. (Submission ¶ 10 n. 11).

and to discuss the matter with you and any counsel that you might retain to represent you.”

64. On May 15, 2020, Mr. Wethington responded to the Treasury attorney’s April 30 letter. A copy of Mr. Wethington’s response is attached as Appendix 3.

(ii) The Regulation’s Irrelevance in These Proceedings

65. Significantly, the United States did not seek to require Mr. Wethington to withdraw his witness statements in these proceedings. Nor have they sought to bar him from testifying at the upcoming hearing of this matter.

66. As is explained below, the Treasury Regulation in question is invalid and unenforceable, as a matter of U.S. law, to the extent that it is sought to be applied to former employees such as Mr. Wethington. Nor, if it did have legal force, would it even apply according to its own terms, which apply only where the testimony in question concerns “official, subjects, or activities” and which exempt expert testimony that “involves only general expertise gained while employed at the Department.” (31 C.F.R. § 1.11(f)(1). (3)).

67. Nevertheless, even if the Regulation were valid and applicable to Mr. Wethington’s testimony as a matter of U.S. domestic law (which it is not), such domestic-law considerations would provide no basis for exclusion of his testimony in this investor-State arbitration governed by international law.

(iii) The Regulation Does Not Apply to or Bind Mr. Wethington

68. As the April 28 letter from Claimant’s counsel to U.S. Treasury counsel (Appendix 1) explained, the regulation cited by Treasury counsel (31 C.F.R. § 1.11) is not applicable to Mr. Wethington’s testimony in this case. This is true for multiple reasons, not least of which is that the Treasury Department lacks the legal authority to regulate the testimony of former employees such as Mr. Wethington.

**(a) The Regulation Lacks the Force of Law
With Respect to Former Employees
Such as Mr. Wethington**

1. Agencies Have Only Limited Authority to Regulate

69. The mere fact that a U.S. administrative agency, such as the Department of the Treasury, promulgates a regulation such as 31 C.F.R. § 1.11 does *not* mean that the regulation has the force of law. Even when a regulation is “substantive”, in the sense of affecting individual rights and obligations as opposed to merely regulating internal agency procedures, it does not automatically have legal status within the U.S. legal system. Rather, because U.S. administrative agencies do not themselves hold lawmaking power, the regulation in question must be a proper exercise of regulatory authority delegated to the agency by the United States Congress.

70. *In other words, a U.S. agency regulation is not valid, and does not have legal effect, unless it falls within the scope of the rulemaking authorization granted to that agency by the U.S. Congress. An agency’s regulation that exceeds its statutory authority to regulate is thus unlawful and invalid.*

71. *In this case, the regulation cited in the United States’ non-disputing Party submission, 31 C.F.R. § 1.11, exceeds the relevant legislative delegation of authority to the extent that it purports to apply to former Treasury employees such as Mr. Wethington. Therefore, it does not have the force of law with respect to Mr. Wethington or any other former employee.*

72. These principles are firmly established in U.S. constitutional and administrative jurisprudence. For example, in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), the United States Supreme Court explained,

That an agency regulation is “substantive”, however, does not by itself give it the “force and effect of law.” The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.

441 U.S. at 302.

73. In considering whether disclosure regulations promulgated by the U.S. Department of Labor had any legal effect, the *Chrysler Corp.* court explained that

in order for such regulations to have the “force and effect of law,” it is necessary to establish a nexus between the regulations and some delegation of the requisite legislative authority by Congress. ... The pertinent inquiry is whether under any of the arguable *statutory* grants of authority the [agency] disclosure regulations relied upon by the respondents are reasonably within the contemplation of that grant of authority. ... [I]t is simply not possible to find in these statutes a delegation of the disclosure authority asserted by the respondents here.

Id. at 304-06. Consequently, the regulations in question did not have the force of law.

74. Similarly, in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), the United States Supreme Court explained that “[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.” The Court went on to find that, because the U.S. Congress had not delegated to the Secretary of Health and Human Services the authority to promulgate the regulation in question, the regulation was unauthorized and therefore invalid. 488 U.S. at 208, 215.

2. Limited Nature of the Housekeeping Statute

75. The U.S. Treasury regulation cited by the United States, 31 C.F.R. § 1.11, was enacted based upon the authority of the so-called Housekeeping Statute, 5 U.S.C. § 301.¹³ The Housekeeping Statute provides, in pertinent part, that “[t]he head of an Executive department ... may prescribe regulations for the government of his department, *the conduct of its employees*, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.” (emphasis supplied).

76. While the Housekeeping Statute authorizes the promulgation of rules to regulate (within limits) the conduct of government employees within their

¹³ 69 Fed. Reg. 54002, 54003 (Sept. 7, 2004); 68 Fed. Reg. 12584 (March. 17, 2003).

respective departments, it nowhere authorizes agencies to purport to regulate the conduct of *former* government employees. To the extent that an agency's regulation promulgated under the Housekeeping Statute purports to impose requirements upon former employees, the agency has exceeded its delegated authority and the regulation lacks the force of law.

77. The Supreme Court addressed the scope of the Housekeeping Statute in *Chrysler Corp.* In response to the respondents' argument that the statute had delegated the necessary authority to enact the disclosure regulations at issue, the court explained that

The antecedents of § 301 go back to the beginning of the Republic, when statutes were enacted to give heads of early Government departments authority to govern internal departmental affairs. Those laws were consolidated into one statute in 1874 and the current version of the statute was enacted in 1958.

Given this long and relatively uncontroversial history, and the terms of the statute itself, it seems to be simply a grant of authority to the agency to regulate its own affairs.

441 U.S. at 309.

78. The Supreme Court in *Chrysler Corp.* also discussed the 1958 amendment to the Housekeeping Statute, in which Congress expressly clarified that the Housekeeping Statute did *not* confer authority to withhold information from the public. As the Supreme Court explained,

The 1958 amendment to § 301 was the product of congressional concern that agencies were invoking § 301 as a source of authority to withhold information from the public. Congressman Moss sponsored an amendment that added the last sentence to § 301, which specifically states that this section "does not authorize withholding information from the public." The Senate Report accompanying the amendment stated:

Nothing in the legislative history of [§ 301] shows that Congress intended this statute to be a grant of authority to the heads of the executive departments to withhold information from the public or to limit the availability of records to the public. [S.Rep. No. 1621, 85th Cong., 2d Sess., 2 (1958)].

441 U.S. at 309-310.

79. Thus, the *Chrysler Corp.* court concluded, Section 301

is indeed a “housekeeping statute”, authorizing what the [Administrative Procedure Act] terms “rules of agency organization procedure or practice” as opposed to “substantive rules.”⁴¹

In the referenced footnote 41, the court explains that

⁴¹ The House Committee on Government Operations cited approvingly an observation by legal experts that

“[§ 301] merely gives department heads authority to regulate within their departments the way in which requests for information are to be dealt with – for example, by centralizing the authority to deal with such requests in the department head.” H.R. Rep. No. 1461, 85th Cong. 2d Sess., 7 (1958).

It noted that the members of its Special Subcommittee on Government Information

“unanimously agreed that [§ 301] originally was adopted in 1789 to provide for the day-to-day office housekeeping in the Government departments, but through misuse it has become twisted into a claim of authority to withhold information.” *Id.* at 12.

There are numerous remarks to similar effect in the Senate Report and the floor debates. See, e.g., S. Rep. No. 1261, 85th Cong., 2d Sess., 2 (1958); 104 Cong. Rec. 6549 (Rep. Moss), 6560 (Rep. Fascell), 15690-15696 (colloquy between Sens. Hruska and Johnston) (1958).

441 U.S. at 310 & n. 41.

3. *Touhy* Regulations

80. The regulation cited in the United States’ footnote 11 is known as a *Touhy* regulation, named after a United States Supreme Court decision, *U.S. ex rel Touhy v. Ragen*, 340 U.S. 462 (1951). In *Touhy*, the court recognized federal agencies’ ability to issue regulations concerning the production of agency documents in connection with legal proceedings, and held that a federal employee could not be held in contempt of court where he relied upon the

agency's regulation in refusing to produce documents in a manner contrary to the regulation.

81. In the wake of *Touhy*, a number of U.S. government agencies promulgated regulations under the Housekeeping Statute that set forth procedures for litigants to secure testimony by agency employees and/or production of agency documents. A common rationale for these regulations is the one invoked by the Treasury Department in support of 31 C.F.R. § 1.11: "to conserve valuable agency resources, to protect Treasury employees from becoming enmeshed in litigation, and to protect sensitive government documents and decisionmaking processes." 69 Fed. Reg. 54002 (Sept. 7, 2004).
82. However, growing concern that a number of government agencies were invoking the Housekeeping Statute as a basis for issuing regulations permitting them to withhold evidence from the public led Congress to enact the 1958 amendment to the statute described above, which added a final sentence to the statute providing that "[t]his section does not authorize withholding information from the public or limiting the availability of records to the public."
83. U.S. courts disagree over the circumstances in which, and extent to which, *Touhy* regulations may be used to restrict or prevent the testimony of *current* government employees. However, with respect to *former* government employees, there is no room for controversy: the Housekeeping Statute simply does not grant to agencies the authority to make *Touhy* regulations concerning the conduct of former employees.

4. *Touhy* Regulations May Not Be Applied To Regulate Conduct of Former Employees

84. The U.S. courts have repeatedly 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. *Koopman v. U.S. Dep't of Transportation*, 335 F.Supp.2d 556, 565 (S.D.N.Y. 2018); *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); *see also Gulf Oil Corp. v. Schlesinger*, 465 F. Supp. 913, 917 (E.D. Pa. 1979) (government conceded at hearing that Federal Energy Administration’s *Touhy* regulation, which was promulgated pursuant to 5 U.S.C. § 301, could not be applied to former employees despite the regulation’s textual applicability); *Gulf Group Gen’l Enterprs. Co. v. United States*, 98 Fed. Cl. 639, 644-45 (2011) (noting inconsistency between 5 U.S.C. § 301 and Army’s *Touhy* regulation purporting to cover former employees).

85. As the *Koopman* court noted, the natural reading of the statutory term “employees” in the Housekeeping Statute – as shown by dictionary definitions as well as common sense and usage – is “to mean current employees alone.” This is reinforced by the context of that term in the statute (which refers to regulating “conduct of [the agency’s] employees”), as well as by the interpretative canons of *ejusdem generis* and *noscitur a sociis*, and by the purpose of the statute as a whole. In short, “[n]othing in the statute as a whole suggests that Congress intended for its grant of authority to extend to regulation of the conduct of anyone who was ever employed by the agency without any temporal limitation.” 335 F. Supp.2d at 560-61.
86. Similarly, the *Louisiana Dep’t of Transportation* court explained that “the term ‘employee,’ in its common usage, contemplates someone who works, *i.e.*, currently works, or is currently employed, not someone retired from employment.” Because that term in the enabling statute is not ambiguous, the court found that the agency “has no authority to extend that definition to the conduct of former employees” and therefore its *Touhy* regulation could not be applied to them. 2015 WL 7318376 at *7.
87. Moreover, the purpose of the Housekeeping Statute, as confirmed by the post-*Touhy* amendment described above, is inconsistent with its use to prevent testimony by former government employees:

The statute was [amended] due to “congressional concern that agencies were invoking § 301 as a source of authority to withhold information from the public.” Specifically, committee reports and remarks on the

floor reveal Congress's belief "that [§ 301] originally was adopted in 1789 to provide for the day-to-day office housekeeping in the Government departments, but through misuse it has become twisted into a claim of authority to withhold information" To "return" the statute "to what appears to have been the original purpose for which it was enacted in 1789," Congress thus added a second sentence, providing that it "does not authorize withholding information from the public or limiting the availability of records to the public." "Given this long and relatively uncontroversial history, and the terms of the statutes itself" ... the Housekeeping Statute "seems to be simply a grant of authority to the agency to regulate its own affairs."

Koopman, 335 F. Supp.2d at 562 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979)) (citations omitted).

88. This history further strengthens the conclusion that the Housekeeping Statute's authorization for an agency to regulate the "conduct of its employees" refers to current employees alone and, thus, that [agency] regulations regulating when 'employees' may testify are invalid to the extent they purport to apply to former employees." *Koopman*, 335 F. Supp.2d at 562.
89. Indeed, as the *Gulf Group* court noted, a different statute – not applicable to the Treasury regulation at issue here, nor to Mr. Wethington's testimony – expressly regulates post-employment conduct of former U.S. government employees, including their service as expert witnesses in certain limited circumstances. 98 Fed. Cl. at 645 (citing 18 U.S.C. § 207, the referenced statute, and its implementing regulations).
90. In contrast to the Housekeeping Statute's *silence* on the subject of regulating the conduct of former employees, 18 U.S.C. § 207 provides "an existing, elaborate government construct to control future employment and activities of government personnel who leave government service." *Gulf Group*, 98 Fed. Cl. at 645. The existence of this specific statutory and regulatory scheme governing testimony by former government employees only further confirms that 5 U.S.C. § 301 cannot reasonably be construed as extending to this same topic. *See also* 5 C.F.R. § 2635.805, a parallel regulation propounded by the

Office of Government Ethics, which correctly limits restrictions on expert testimony to *current* government employees.

91. In short, as multiple courts have found, the Housekeeping Statute does not grant U.S. administrative agencies the authority to promulgate *Touhy* regulations that control the conduct of former employees such as Mr. Wethington. Rather, as the Supreme Court explained in *Chrysler Corp.*, the Housekeeping Statute is “simply a grant of authority to the agency to regulate its own affairs”, and authorizes agencies to promulgate rules of agency organization, procedure, or practice rather than “substantive rules.” 441 U.S. at 309-310.
92. Consequently, the regulation referenced by the United States’ submission (31 C.F.R. § 1.11) was enacted without the requisite legislative authority and does not have the force of law with respect to Mr. Wethington.

(b) The Regulatory Context Confirms That 31 C.F.R. § 1.11 Does Not Bind Former Employees

93. Separate and apart from the Treasury Department’s lack of legislatively-delegated legal authority to regulate Mr. Wethington’s testimony, the regulatory context in which 31 C.F.R. § 1.11 appears serves to confirm that the regulation does not operate to preclude former employees from voluntarily providing their testimony.
94. The stated purpose of the regulation in question reflects that it is focused upon internal departmental concerns and does not extend to prohibiting the voluntary testimony of former employees. Section 1.11(a)(4) explains that the provision “is intended only *to provide guidance for the internal operations* of the Department *and to inform the public about Department procedures* concerning the service of process and responses to demands or requests...”¹⁴ (emphasis

¹⁴ This is consistent with the Supreme Court’s characterization in *Chrysler Corp.* of the Housekeeping Statute as authorizing rules of agency organization, procedure or practice, as opposed to substantive rules. 441 U.S. at 310; *see Koopman*, 335 F. Supp.2d at 562. Statements of internal departmental policy are not “substantive rules that create individual rights” and thus do not have the force and effect of law. *United States v. Manafort*, 312 F. Supp.3d 60, 75 (D.D.C. 2018) (further holding that U.S. Department of Justice Special

added). Neither purpose is served by the extension of the *Touhy* procedures to long-ago former employees such as Mr. Wethington.

95. Even more significantly, the purpose of the regulation as stated upon its official publication in the Federal Register, “to conserve valuable agency resources, to protect Treasury employees from becoming enmeshed in litigation, and to protect sensitive government documents and decision making processes”, 69 FR 54002, does not address the subject of *former* employees at all. These stated purposes would be affirmatively disserved by the agency’s expending valuable resources to become involved in contentious and contested decisionmaking concerning expert testimony voluntarily provided by such a former employee, concerning fact that took place twenty-seven years ago, in a matter where the government is not even a party.
96. Moreover, the Treasury Department’s *Touhy* regulation does not identify how it would be enforced with respect to former employees who choose to testify of their own volition. Current employees could be subjected to departmental discipline in the course of their employment, but this is inapplicable to former employees. The absence of an identified enforcement mechanism further supports the conclusion that the regulation may not legitimately be applied to former employees such as Mr. Wethington.
97. Finally, the United States has taken no action to enforce its stated view of the regulation as barring Mr. Wethington’s testimony. Instead, it has simply sent Mr. Wethington the April 30 letter reproduced at Appendix 2 and offered the comments concerning his testimony that are set forth in footnote 11 of the United States’ submission. This stands in strong contrast to situations involving *current* government employees who are subpoenaed to provide testimony of documents, situations which mirror the original *Touhy* case and in which U.S. agencies commonly seek to defend their regulations in court. (See Wethington May 15, 2020 letter, Appendix 3).

Counsel Regulations enacted under Housekeeping Statute, which stated that they were not intended to create any rights, were non-substantive and therefore lacked the force and effect of law).

**(c) Even if Valid, the Regulation Would Not Apply Here
According to its Own Terms**

98. Detailed analysis of the application of 31 C.F.R. § 1.111 to Mr. Wethington’s testimony in this case is unnecessary for the reasons set forth above. Nevertheless, even if the regulation could correctly be applied to Mr. Wethington as a matter of U.S. domestic constitutional and administrative law, and even if that domestic law were somehow relevant to this investment treaty arbitration, the regulation would still not serve to preclude Mr. Wethington’s testimony, because the subject matter of his testimony does not fall within the categories that the regulation purports to address.
99. The portion of the regulation that the United States contends requires Mr. Wethington to obtain Treasury department approval, section 1.111(f)(1), addresses “opinion or expert testimony concerning official information, subjects, or activities.”¹⁵
100. As Mr. Wethington explains in his letter to Treasury counsel (Appendix 3 at 5), his testimony does not concern “official information, subjects, or activities”, because it is based upon matters in the public record, and not upon classified or internally privileged facts. Mr. Wethington notes that “The documentation I rely on is in the public record. Nothing in my statement to my knowledge involves any classified information or other information not based on the public record.” *Id.* at 4-5. The contents of his witness statements amply support that conclusion.
101. Nor has the United States identified anything in either of Mr. Wethington’s witness statements that would constitute testimony on “official information, subjects, or activities”, as distinct from matters of public record. In his April

¹⁵ “Subject to 5 CFR 2635.805, an employee or former employee shall not provide, with or without compensation, opinion or expert testimony concerning official information, subjects, or activities, except on behalf of the United States or a party represented by the Department of Justice, without written approval of agency counsel.”

In footnote 11 of its non-disputing Party submission, the United States contends that the prohibition applies broadly to testimony “regarding official subjects or based upon his official activities or official information to which he had access” – but, as shown above, the regulation’s *actual* language is narrower and more specific.

30 letter, Treasury counsel points to paragraph 6(ii) of Mr. Wethington's witness statement as supposedly falling within this scope. But the language of that paragraph actually makes plain that Mr. Wethington's testimony is *not* based upon official information within the regulation. To the contrary, it states that "[m]y testimony is based on ... (ii) my *personal recollection and experience* arising from my leadership role in the negotiation of the financial services and investment chapters of the NAFTA on behalf of the United States government." (emphasis added).

102. In fact, Mr. Wethington succinctly describes in paragraph 6 of his witness statement what he actually does in the balance of his testimony concerning NAFTA, which is to explain how the treaty works based upon his own knowledge and experience.
103. Furthermore, section 1.111(f)(3) of the Treasury regulation provides that "[a]ny expert or opinion testimony by a former employee of the Department shall be excepted from § 1.111(f)(1) where the testimony involves only general expertise gained while employed at the Department."
104. Because it is not based upon classified or internally privileged facts, but rather on matters of public record, Mr. Wethington's testimony is also exempt from the regulation as testimony that is based upon his general expertise gained while employed at the Department (and through a distinguished career in public service and private practice).

**(d) The Regulation Cannot Be Applied Retroactively
To Bar Existing Testimony**

105. Finally, even in the unlikely event that 31 C.F.R. § 1.11 could somehow be found to apply to Mr. Wethington's testimony here, he has already given his testimony to the arbitral tribunals in both proceedings. Now that the testimony has been provided, there is no basis for excluding it, even if it could somehow be deemed to have been provided in violation of the regulation. *See, e.g., Moore v. Chertoff*, Case No. 00-953, 2006 WL 2338203 (D.D.C. Aug. 10, 2006) ("Any determination of whether the *Touhy* regulations applied to [the

external lawyer asserted to be a Treasury “employee”] for the purpose of determining the proper procedures to follow for taking her deposition became moot when plaintiffs took [her] deposition”; further noting that the government “provided to the magistrate judge, and provides now, no authority to support excluding use of an agency employee's testimony taken in violation of an agency's *Touhy* regulations”).

106. Just as in the *Moore* case, a belated attempt to invoke the Treasury *Touhy* regulation with respect to Mr. Wethington, even if that regulation somehow could validly have been applied to him, would now be mooted by the fact that he has already provided his testimony.

CONCLUSION

107. For all of the foregoing reasons, Claimants respectfully submit that (1) the majority of the United States’ submission addresses treaty interpretation at a level that is too general or vague to be of assistance in resolving the issues in this case; (2) the United States’ submission is erroneous in its analysis of the scope of the availability of ISDS for claims under Chapter 12 of the TPA (including its analysis of the *Fireman’s Fund* case); and (3) footnote 11 concerning purported U.S. domestic law observations with respect to the testimony of Olin Wethington is not only beyond the proper scope of a non-disputing-Party submission but also is deeply flawed.

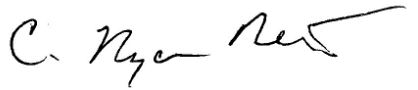
Dated: May 15, 2020

Respectfully submitted,

BRYAN CAVE LEIGHTON PAISNER LLP

Pedro J. Martínez-Fraga
C. Ryan Reetz
Craig S. O'Dear
Mark Leadlove
Domenico Di Pietro
Joaquín Moreno Pampín
Rachel Chiu

200 S. Biscayne Blvd., Suite 400
Miami, FL 33131 USA
Tel.: +1 (786) 322-7500
Fax: +1 (786) 322-7501

By: 

Counsel for Claimants

Appendix 1



BRYAN CAVE LEIGHTON PAISNER LLP
200 South Biscayne Boulevard
Suite 400
Miami FL 33131 5354
T: +1 786 322 7500
F: +1 786 322 7501
www.bclplaw.com

April 28, 2020

Pedro J. Martínez-Fraga
Direct: 786/322-7373
Fax: 786/322-7473
pedro.martinezfraga@bclplaw.com

BY EMAIL & FEDEX

Daniel Asher
United States Department of the Treasury
1500 Pennsylvania Ave NW
Washington, DC 20220-0001

Re: PCA Case N° 2018-56 - 1. Alberto Carrizosa Gelzis, 2. Felipe Carrizosa Gelzis, 3. Enrique Carrizosa Gelzis v. The Republic of Colombia: 31 C.F.R. § 1.11 and Mr. Olin Wethington's testimony

Dear Daniel,

I hope this communication finds you and yours healthy and safe.

On April 21 you asked that I provide you with particular information regarding the referenced matter. Specifically, you stated that “[i]t would also be very helpful if you [the undersigned] could let us [Treasury] know by the end of the week if Mr. Wethington is planning to file a request as provided in 3 C.F.R. § 1.11 *and* if you have any comments you wish to make regarding the applicability of the regulation.” (emphasis supplied).

The answer to the first question is that Mr. Wethington is not planning to file a request. As to the second consideration, such a request appears to be unnecessary because the regulation does not apply to the factual matrix here at issue.

This conclusion has been reached upon reviewing *all* primary and secondary authority, including legislative history, concerning this regulation. These normative sources were considered within the context of the following twelve factual premises that are particular to this case.

First, Mr. Wethington is not a Treasury employee.

Second, Mr. Wethington has not been in public service since 2006.

Third, the NAFTA is no longer in force. Therefore, Mr. Wethington would be testifying on Chapter 14 of a treaty that only has historical relevance.

Fourth, the United States is not a party to the investor-State arbitrations with respect to which Mr. Wethington would be testifying.

Fifth, Mr. Wethington would be testifying on matters that already are in the public domain. In this connection, he is not testifying on formerly or currently classified information or data contained in formerly or currently classified documents.

Sixth, Wethington's testimony merely reflects his personal views as an individual and as the former lead U.S. negotiator for Chapter 14 of the NAFTA.

Seventh, those views were published in a book that he authored in 1994. That book has been in the public domain since that time (roughly twenty-six years).

Eighth, Mr. Wethington's book was provided for review in advance of publication to the Treasury as well as the counterpart ministries in Mexico and Canada. The U.S. Treasury made no objections to its publication and, in fact, the Preface of the book states that the three finance ministries of the Party governments provided encouragement for its publication, though the Preface also states the views and contents are Mr. Wethington's alone.

Ninth, Mr. Wethington's testimony is premised on factual propositions contained in his book, and also on (i) treaty language, (ii) U.S. treaty practice, (iii) public Congressional testimony, and (iv) other information contained in the public records.

Tenth, Mr. Wethington already has testified. On May 29, 2019 Mr. Wethington's Witness Statement was filed with the Permanent Court of Arbitration. On December 20, 2019 Mr. Wethington's Supplemental Witness Statement was filed with the Permanent Court of Arbitration. The regulation does not retroactively apply to testimony that already has been tendered.

Eleventh, the contemplated oral testimony that Mr. Wethington is expected to tender at the prospective jurisdictional hearings here at issue by operation of law is limited to the scope of the testimony already presented in his witness statements.

Twelfth, and finally, both witness statements pursuant to the UNCITRAL transparency stricture were made part of the public records shortly after each was filed. On October 21, 2019 the U.S. government contacted our firm concerning this arbitration and the related ICSID proceeding. It was not until the Monday April 20, 2020 telephone conference that any U.S. government employee referenced the regulation's possible application to this particular case.

At that time (the April 20 telephone conference), no sustained discussion was had concerning the extent to which this regulation would apply in the context of the particulars that here have been raised.

Notably, 31 C.F.R. § 1.11 legally may not be applied to former employees such as Mr. Wethington, because Congress only authorized Treasury to formulate such a regulation with respect to current employees. The regulation was enacted under color of 5 U.S.C. § 301, the so-called Housekeeping Statute, which provides that "[t]he head of an Executive department ... may prescribe regulations for the government of his department, *the conduct of its employees*, the distribution

and performance of its business, and the custody, use, and preservation of its records, papers, and property.” (emphasis supplied).

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. *Koopman v. U.S. Dep’t of Transportation*, 335 F.Supp.2d 556, 565 (S.D.N.Y. 2018); *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); see also *Gulf Oil Corp. v. Schlesinger*, 465 F. Supp. 913, 917 (E.D. Pa. 1979) (government conceded at hearing that Federal Energy Administration’s *Touhy* regulation, which was promulgated pursuant to 5 U.S.C. § 301, could not be applied to former employees despite the regulation’s textual applicability); *Gulf Group Gen’l Enterprs. Co. v. United States*, 98 Fed. Cl. 639, 644-45 (2011) (noting inconsistency between 5 U.S.C. § 301 and Army’s *Touhy* regulation purporting to cover former employees).

As the *Koopman* court noted, the natural reading of the statutory term “employees” in 5 U.S.C. § 301 – as shown by dictionary definitions as well as common sense and usage – is “to mean current employees alone.” This is reinforced by the context of that term in the statute (which refers to regulating “conduct of [the agency’s] employees”), as well as by the interpretative canons of *eiusdem generis* and *noscitur a sociis*, and by the purpose of the statute as a whole.

In short, “[n]othing in the statute as a whole suggests that Congress intended for its grant of authority to extend to regulation of the conduct of anyone who was ever employed by the agency without any temporal limitation.” 335 F. Supp.2d at 560-61; see *Louisiana Dep’t of Transportation*, 2015 WL 7318376 at *7 (“[T]he term ‘employee,’ in its common usage, contemplates someone who works, i.e., currently works, or is currently employed, not someone retired from employment.” Because that term in the enabling statute is not ambiguous, the agency “has no authority to extend that definition to the conduct of former employees.”).

Moreover, the purpose of the Housekeeping Statute, as confirmed by a post-*Touhy* amendment, is inconsistent with its use to prevent former government employees from testifying.

The statute was amended most recently in 1958 due to “congressional concern that agencies were invoking § 301 as a source of authority to withhold information from the public.” Specifically, committee reports and remarks on the floor reveal Congress’s belief “that [§ 301] originally was adopted in 1789 to provide for the day-to-day office housekeeping in the Government departments, but through misuse it has become twisted into a claim of authority to withhold information” To “return” the statute “to what appears to have been the original purpose for which it was enacted in 1789,” Congress thus added a second sentence, providing that it “does not authorize withholding information from the public or limiting the availability of records to the public.” “Given this long and relatively uncontroversial history, and the terms of the statutes itself” ... the Housekeeping Statute “seems to be simply a grant of authority to the agency to regulate its own affairs.”

Koopman, 335 F. Supp.2d at 562 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979)) (citations omitted). This history further strengthens the conclusion that the statutory phrase “conduct of its employees” refers to current employees alone and, thus, that [agency] regulations regulating when ‘employees’ may testify are invalid to the extent they purport to apply to former employees.” *Koopman*, 335 F. Supp.2d at 562.

Indeed, as the *Gulf Group* court noted, in contrast to the Housekeeping Statute's silence on the subject of regulating the conduct of former employees, "there is an existing, elaborate government construct to control future employment and activities of government personnel who leave government service", including service as an expert witness: 18 U.S.C. § 207 (which is implemented by 5 C.F.R. Part 2641 and also by the Treasury Department at 31 C.F.R. Part 15). 98 Fed. Cl. at 645. There can be no suggestion that Section 207 or its implementing regulations would bar Mr. Wethington's testimony in the arbitrations at issue.

The existence of the specific statutory and regulatory scheme governing the testimony of former government employees only further confirms that 5 U.S.C. § 301 cannot reasonably be construed as extending to this same issue. *See also* 5 C.F.R. 2635.805, propounded by the Office of Government Ethics, which correctly limits restrictions on expert testimony to *current* government employees.

The stated purpose of the Treasury regulation also confirms that it does not extend to barring Mr. Wethington's testimony. Section 1.11(a)(4) explains that the provision "is intended only to provide guidance for the internal operations of the Department and to inform the public about Department procedures concerning the service of process and responses to demands or requests...."

Neither purpose is served by the extension of the *Touby* procedures to long-ago former employees such as Mr. Wethington. Even more significantly, the purpose of the regulation as stated in the Federal Register, "to conserve valuable agency resources, to protect Treasury employees from becoming enmeshed in litigation, and to protect sensitive government documents and decision making processes", 69 FR 54002, would be affirmatively *diserved* by the agency's expending valuable resources to become involved in contentious and contested decisionmaking concerning expert testimony voluntarily provided by such a former employee in a matter where the government is not even a party.

These policy considerations are brought into even starker relief when viewed against the factual backdrop of Mr. Wethington's testimony in these matters. To the extent that they intersect with his tenure at Treasury, as discussed his testimony concerns negotiations that took place nearly thirty years ago, of a treaty that the United States has since replaced, and reflects his views as published in a (Treasury-reviewed) book in 1994, supported by the treaty's language, public Congressional testimony, and other public information. There simply is no intersection between this factual matrix and the discrete policy objectives that the Rule has been identified as serving.

Separate and apart from the foregoing considerations, the Department's *Touby* regulation did not even purport to cover former Treasury employees until 2003 (for fact testimony) and 2004 (for expert testimony), a full decade after Mr. Wethington left his post as Assistant Secretary for International Affairs and after the NAFTA negotiations in which he participated. Attempting to apply the revised regulation to Mr. Wethington's testimony in these circumstances would raise grave First Amendment and ex post facto concerns.

Even in the unlikely event that 31 C.F.R. § 1.11 somehow could be found to apply to Mr. Wethington's testimony, as previously stated, Mr. Wethington already has provided his testimony to the arbitral tribunals in both proceedings. In fact, on March 2 and 3, 2020 the Tribunal was

scheduled to hold the hearing on jurisdiction in the ICSID proceeding. It follows that the Arbitral Tribunal has reviewed both of Mr. Wethington's witness statements in anticipation of that event.

Now that the testimony has been provided, there is no basis for excluding it, even if it could somehow be deemed to have been provided in violation of the regulation. *See, e.g., Moore v. Chertoff*, Case No. 00-953, 2006 WL 2338203 (D.D.C. Aug. 10, 2006).

For the sake of completeness, the five cases other than *Moore v. Chertoff* comprising the totality of jurisprudence addressing 31 C.F.R. § 1.11 cannot at all be construed as relevant to, let alone in support of, the proposition that 31 C.F.R. § 1.11 would suggest that a request under that regulation would be necessary in this case.¹

Indeed, those cases concern the fact pattern that the regulation actually contemplates. All of them establish that the regulation was meant to safeguard the production of documents that have not been made public and to restrict the testimony of Treasury employees. The cases further demonstrate that 31 C.F.R. § 1.11 is triggered when *demand* seeking documents not made public and/or testimony of Treasury employees is made pursuant to subpoena or other formal service of papers compelling testimony or disclosure.

Obviously, that authority is far afield from the factual configuration that here concerns us. Mr. Wethington already has testified in the form of two witness statements. Subsequent testimony would be limited to the scope of both witness statements by operation of law. Mr. Wethington has not been in government service for the last fourteen years. Moreover, any prospective testimony would be based on premises already contained in a book that he published (and Treasury reviewed for publication) twenty-seven years ago.

The policy underlying *Touby* regulations cannot be thwarted pursuant to the facts here at issue. Mr. Wethington's testimony has not created any prejudice to Treasury, or more broadly, to any division or branch of the U.S. government. Mr. Wethington's First Amendment rights would far outweigh any policy concerns.

I hope that you find these observations helpful. As you can well imagine, we prefer to leave no stone unturned in furtherance of protecting U.S. investors who have invested in non-U.S. jurisdictions and who rightfully should be protected pursuant to agreed upon treaty protection standards.

American citizens who invest in non-U.S. jurisdictions harbor the expectation that the U.S. would help, where possible, to ensure that investment treaty protection standards are construed as fulsome and robust in furtherance of protecting U.S. capital abroad. Put simply, that the U.S. would support the enforcement of treaty rights in furtherance of protecting U.S. citizens and U.S. capital.

Please let me know whether I can be of any additional assistance.

¹ *See Clark County Bancorporation v. FDIC*, *Clark Cnty. Bancorporation v. Fed. Deposit Ins. Corp.*, Case No. C14-5816 BHS (W.D. Wash. Jan. 31, 2018); *Altamirano v. Chemical Safety and Hazard Investigation Board*, 41 F. Supp. 3d 982 (D. Colo. 2014); *Lamp Pest Control Inc. v. Hemingway*, Case No. 6:05-cv-00522 (S.D.W. Va. Oct. 4, 2005); and *Codd v. Saks Fifth Ave.*, *Codd v. Saks Fifth Ave.*, No. 98-CV-6426, 1998 WL 744025, (S.D.N.Y. 1998).

As ever,

/s/ Pedro J. Martinez-Fraga

Pedro J. Martinez-Fraga

cc: Lisa J. Grosh (by email & FedEx)
John I. Blanck (by email & FedEx)
C. Ryan Reetz
Craig O'Dear
Mark Leadlove
Joaquin Moreno Pampin
Domenico Di Pietro
Rachel Chiu

Appendix 2



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

April 30, 2020

Olin Wethington
645 Potomac River Road
McLean, Virginia 22102

Dear Mr. Wethington:

I write in reference to your role as an expert witness in certain international arbitration proceedings involving the Carrizosa family and the government of Colombia.¹ On April 20, 2020, Daniel Asher, an attorney in my office, discussed with you and Claimants' counsel the applicability of 31 C.F.R. § 1.11 to your testimony. Section 1.11 prohibits a current or former employee of the United States Department of the Treasury (Treasury) from testifying in legal proceedings on official matters without the prior written approval of the office of the General Counsel of the Treasury. As a former Treasury employee, you are bound by the requirements and procedures set forth in this section.

Subsection (f) of the regulation provides, in pertinent part, that: a "former employee shall not provide, with or without compensation, opinion or expert testimony concerning official information, subjects, or activities, except on behalf of the United States or a party represented by the Department of Justice, without written approval of agency counsel." The witness statements you have provided in these arbitrations expressly concern official subjects and are represented as being based upon your official activities in negotiating NAFTA and official information to which you had access at the time of your employment with Treasury. For example, in paragraph six of your Witness Statement in ICSID Case No. ARB/18/5, you aver that: "My statement is based on . . . (ii) my personal recollection and experience arising from my leadership role in the negotiation of the financial services and investment chapters of the NAFTA on behalf of the United States government." This passage also makes clear that you are not offering testimony that "involves only general expertise gained while employed at the [Treasury]" as described in 31 C.F.R. § 1.11(f)(3). Therefore, in the absence of written approval of Treasury counsel, your testimony on these official matters is in violation of section 1.11.

To comply with the regulations, you may not provide any testimony regarding official matters until you receive the written approval of Treasury counsel. Pursuant to 31 C.F.R. § 1.11(f)(2), approval for expert testimony concerning official matters may only be provided at the discretion of the General Counsel or his designee and upon a showing of "exceptional need or unique circumstances and that the anticipated testimony will not be adverse to the interests of [Treasury] or the United States."

¹ I am aware of two such arbitrations – PCA Case No. 2018-56 and ICSID Case No. ARB/18/5 – but the contents of this letter would also apply to any other judicial or administrative actions, hearings, investigations or similar proceedings before courts, commissions, grand juries, or other tribunals, foreign or domestic, in which you might wish to give testimony.

In an April 28th letter Claimants' counsel set out its view that you did not have an obligation under the regulation because the regulation does not apply to you. Treasury disagrees.

Treasury remains willing to review any written materials that you might wish to submit and to discuss the matter with you and any counsel that you might retain to represent you.

Sincerely,


DA

David Sullivan
Assistant General Counsel for International Affairs
United States Department of the Treasury
1500 Pennsylvania Avenue N.W.
Washington, D.C. 20220

Copy to:

Pedro J. Martínez-Fraga
Bryan Cave Leighton Paisner LLP
200 South Biscayne Boulevard
Suite 400
Miami, FL 33131-5354

Appendix 3

May 15, 2020

The Honorable David Sullivan
Assistant General Counsel for International Affairs
United States Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Dear Mr. Sullivan,

I am in receipt of your April 30, 2020 letter regarding 31 C.F.R. § 1.11, as well as the May 1, 2020 US submissions in PCA Case No. 2018-56 and ICSID Case No. ARB/18/5.

Having had the privilege of twice serving at the Department of the Treasury, I have deep respect for the authorities and responsibilities of the Department. It is thus with deep regret that I find myself in disagreement with the Department's position on the application of 31 C.F.R. § 1.11 ("*Touhy* regulations"¹) to my submissions as an expert witness in the two referenced arbitrations and with statements in the May 1 US submissions. In reaching this conclusion, I have sought the advice of counsel, Bryan Cave Leighton Paisner LLP, which I believe has carefully researched the applicable law and judicial decisions with respect to the application of 31 C.F.R. § 1.11 to my testimony. Based on case precedent and advice of counsel, I in good faith do not find Treasury regulation 31 C.F.R. § 1.11 applicable to my circumstance.

Your April 30 letter invites my reply and I wish to do so here. Counsel on April 28, 2020, submitted a letter to Daniel Asher in your office setting forth reasons as to the non-applicability of 31 C.F.R. § 1.11, but I wish here to elaborate, particularly as your April 30 letter did not address the main elements of counsel's April 28 letter. I also wish here to respond to the portion of the May 1 US submission specifically addressing my witness statements (see US Submission, footnote 11). I assume the May 1 US submission incorporates the Treasury's views as well.

¹ In *U.S. ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), the U.S. Supreme Court recognized federal agencies' ability to issue regulations regarding employees' testimony and production of documents in connection with legal proceedings. Thus, an agency's regulations regarding the production of documents and information or testimony by its employees are commonly referred to as "*Touhy* regulations." *Touhy* regulations invoke the agency's authority under the federal Housekeeping Statute, which provides as follows:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

5 U.S.C. § 301.

1. My witness statements in the two arbitration proceedings are provided in my personal and independent capacity; I do not speak on behalf of the United States.

The May 1 US submission, footnote 11, item 1 states: “Only the government of the United States is authorized to offer interpretations of treaties on behalf of the United States. Mr. Wethington, as a former official, is not authorized to offer such interpretations.”

To the extent that the above statement may be implying that I am in fact offering interpretations of treaties on behalf of the US government, I wish to definitively state that I am not offering any interpretation “on behalf of the United States”. I am providing expert opinion only in an independent and personal capacity as to treaty interpretation as my witness statements make clear. I serve today in no capacity with the US government; I am a private US citizen and separated in time from the negotiating matter at issue by approximately 27 years.

In my witness statements I clearly state that the views expressed are my personal and independent interpretations of the NAFTA treaty. As I described in Paragraph 6 of my May 16, 2019 witness statement, I was asked by Claimants to provide a witness statement “as to certain aspects of United States investment treaty practice and public international law, with a particular emphasis on the investment and financial services chapters of two treaties.” As I stated, my statement is based on “independent review and analysis” and “personal recollection and experience.” Nowhere do I claim to speak or offer interpretations on behalf of the US government.

Moreover, In my 1994 book on financial market liberalization under the NAFTA, which I rely on extensively in my witness statements, I state explicitly in the preface that the views and contents of the book are “solely mine and do not reflect in any way on the current position of any of the three governments with respect to any particular matter or issue.” As also noted in the preface, I received encouragement at the time from the three finance ministries for publication of the book and made the manuscript available to them in advance of publication; none imposed any objection.

2. The Housekeeping Statute only authorizes Treasury’s Touhy regulations governing current, not former, employees.

Both your April 30 letter and the May 1 US submission assert that my testimony/witness statements in the two arbitrations require the prior approval of the US Treasury’s General Counsel. I respectfully disagree.

Bryan Cave Leighton Paisner has undertaken an exhaustive search of judicial precedents dealing with the Housekeeping Statute, 5 U.S.C. § 301. There are many judicial decisions specifically ruling that the Housekeeping Statute does not cover former employees. Indeed, the language of the statute on its face applies only to “employees”. To my knowledge, every judicial decision that has specifically addressed whether the Housekeeping Statute covers former employees has not applied implementing *Touhy* regulations to former employees. Listed below are case precedents limiting the reach of the Housekeeping Statute to 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).

Moreover, in a District of Columbia case concerning the same *Touhy* regulation at issue here, a magistrate judge denied Treasury’s motion to quash a subpoena, finding that “it had not been shown that the *Touhy* regulations applied to” a former Treasury lawyer (retained as outside counsel, not a direct Treasury employee) whose testimony the Department sought to prevent. *Moore v. Chertoff*, No. CIV.A.00-953 RWR DAR, 2006 WL 2338203, at *1 (D.D.C. Aug. 10, 2006). The plaintiffs subsequently took the lawyer’s deposition, during which the defendant inquired into the lawyer’s employment status with the Department during the relevant time period. “Based on [the lawyer’s] deposition testimony, the defendant moved for the magistrate judge to reconsider her finding that the *Touhy* regulations did not apply . . . , and filed a motion in limine to prevent plaintiffs from using [the former employee’s]

testimony for any purpose. The magistrate judge . . . denied the motion in limine **because the defendant provided no authority for precluding use of [the] testimony even if the Touhy regulations should have been, but were not, complied with.**” *Id.* (finding “no authority to support excluding use of an agency employee’s testimony taken in violation of an agency’s *Touhy* regulations”).

Again, there is no judicial decision that I am aware of specifically upholding extension of Treasury’s *Touhy* regulatory authority to prohibit former employees from providing expert testimony in private adjudication.

3. Treasury’s *Touhy* regulations are “intended only to provide guidance for the internal operations of the Department.” 31 C.F.R. § 1.11(a)(4)

The limitation to current employees should not be surprising given the stated purpose of Treasury’s *Touhy* regulations. The opening provision of the regulation states that the regulation “sets forth the policies and procedures of the Department regarding the testimony of employees and former employees as witnesses in legal proceedings and the production or disclosure of information contained in Department documents for use in legal proceedings **pursuant to a request, order, or subpoena (collectively referred to . . . as a demand).**” 31 C.F.R. § 1.11(a) (emphasis added). The “demand” element is not present in my situation and this limitation supports the observation that *Touhy* regulations in essence are discovery rules.

Also, importantly, Treasury’s own words clarify that the regulations are “ **intended only to provide guidance for the internal operations of the Department** and to inform the public about Department procedures **concerning the service of process and responses to demands or requests[.]**” *Id.* § 1.11(a)(4) (emphasis added).

Treasury’s own language defines the purpose of its *Touhy* regulations as internal operations and concerning service of process and response to demands—all inherently related to current employees and related to efforts to obtain discovery of Treasury documents and information—none of which is present in my situation.

Additional insight into the essential purpose of the Department’s *Touhy* regulations is set forth in the Federal Register notice publishing the current regulations. In Treasury’s words, “The purpose of these regulations is to conserve valuable agency resources, to protect Treasury employees from becoming enmeshed in litigation, and to protect sensitive government documents and decision-making processes.” 69 FR 54002 (September 7, 2004). My voluntary expert testimony in the current arbitration places no burden on Treasury resources as no Treasury documents or information are being sought, nor does it pose any threat to “sensitive” government documents, information, or decision-making processes.

It is not surprising that most all litigation regarding Treasury’s *Touhy* regulation is in the context of US court proceedings where parties seek access to testimony of employees or documents/information in the hands of the Department.² Here I seek no documents or information from the Department. The

² See *Altamirano v. Chemical Safety and Hazard Investigation Board*, 2013 WL 3124466 (D. CO 2013); *Moore v. Chertoff*, 2006 WL 2338203 (D.D.C. 2006); *Lamp Pest Control, Inc v. Hemingway*, 2005 WL 2453752 (S.D. W. VA

documentation I rely on is in the public record. Nothing in my statement to my knowledge involves any classified information or other information not based on the public record.

4. “Official matters” does not extend to the public record.

Your April 30 letter states that the scope of subsection 31 C.F.R. § 1.11(f) extends to opinion or expert testimony concerning “official information, subjects, or activities” (what it also refers to as “official matters”). However, any Treasury restriction cannot extend to subject matter already in the public record merely because the subject matter relates to government activities or subjects, absent classified information or assertion of privilege (issues that *Touhy* did not reach).

I would note that the public record is fulsome as to interpretation of the NAFTA. I respectfully take issue with the statement in the May 1 US submission (footnote 11) that “[T]he United States is not aware of any contemporaneous evidence that supports Mr. Wethington’s view of the scope of investor-state dispute settlement in the financial services chapter of the NAFTA.”

The United States may not be aware, but I would refer it to the contemporaneous evidence set forth in my witness statement. The legislative history of the NAFTA and the historical context and treaty negotiating practices of the time provide ample public documentation of the basis for my views. More specifically, the House Banking Committee, on September 28, 1993, held a hearing devoted to the financial services chapter of the NAFTA and took related testimony from the Administration. The prepared testimony of the US Treasury representative stated:

“Any violation of an investment protection [in Chapter 14] will permit an investor to bring a direct action against the offending NAFTA country for the financial harm caused by the violation.”

The NAFTA treaty has been replaced by USMCA; I offer no interpretation of the successor USMCA. Interpretation of the NAFTA is relevant because the US-Colombia TPA borrows the language of the NAFTA virtually verbatim. I recognize the current Administration does not in general view favorably investor-state dispute settlement processes. This is reflected in the current USMCA. However, I am not offering expert testimony on USMCA nor do my witness statements challenge the current Administration’s policy position on investor-state dispute settlement generally. The issue of relevance before the tribunals in the current arbitration is the meaning of provisions negotiated back in 1992 and whether that interpretation carries over to the US-Colombia TPA. Present policy should not be imported into the interpretation of the 1992 text.

5. *Touhy* Regulation cannot be used to block public opinion by former employees.

Moreover, the Housekeeping Statute itself places an additional burden on the US Treasury. As quoted earlier in this letter, the statute provides that “[t]his section does not authorize withholding information from the public or limiting the availability of records to the public.”

2005); *Codd v. Saks Fifth Avenue*, 1998 WL 744025 (S.D. NY 1998); and *United States v. Meredith*, 1998 U.S. Dist. LEXIS 21925 (D. KS 1998).

I would submit that the purpose of the Housekeeping Statute, as confirmed by a post-*Touhy* amendment, is inconsistent with its use to prevent testimony by former government employees:

The statute was amended most recently in 1958 due to “congressional concern that agencies were invoking § 301 as a source of authority to withhold information from the public.” Specifically, committee reports and remarks on the floor reveal Congress’s belief “that [§ 301] originally was adopted in 1789 to provide for the day-to-day office housekeeping in the Government departments, but through misuse it has become twisted into a claim of authority to withhold information.” To “return” the statute “to what appears to have been the original purpose for which it was enacted in 1789,” Congress thus added a second sentence, providing that it “does not authorize withholding information from the public or limiting the availability of records to the public.” “Given this long and relatively uncontroversial history, and the terms of the statutes itself” ... the Housekeeping Statute “seems to be simply a grant of authority to the agency to regulate its own affairs.”

Koopman, 335 F. Supp.2d at 562 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979)) (citations omitted). This history further strengthens the conclusion that the statutory phrase “conduct of its employees’ refers to current employees alone and, thus, that [agency] regulations regulating when ‘employees’ may testify are invalid to the extent they purport to apply to former employees.” *Koopman*, 335 F. Supp.2d at 562.

I would also suggest that extension of the Treasury’s *Touhy* regulations to former employees would likely raise First Amendment issues. Indeed, in *Sherwood v. BNSF Ry. Co.*, No. 2:16-CV-00008-BLW, 2019 WL 943548, at *3 (D. Idaho Feb. 25, 2019) the court stated that “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”).

6. Imminent harm to US interests from my witness statements is not apparent.

My first witness statement has been in the public record for close to one year and my second witness statement has been in the public record for close to five months—both without any objection or notice from the Treasury or any other US government agency. During that time, at least by October 21, 2019, the US State Department’s Office of the Legal Advisor has been in communication with claimant’s counsel. Notwithstanding this passage of time, the first mention of the *Touhy* issue to claimant’s counsel or to me by a US government official occurred on April 20 at the end of a telephonic conference call chaired by the Assistant Legal Adviser, US Department of State.

I must assume that, if my testimony is harmful to the United States or involved classified or sensitive information, or certainly if it posed imminent harm to the United States, surely the Department would have interposed objection many months ago. Nonetheless, I am assuming this is consistent with the inward-looking nature of the Housekeeping Statute and *Touhy* regulations, which, as the Department states, are “only to provide guidance for the internal operations of the Department.” 31 C.F.R. 1§ 1.11(a)(4).

Indeed, as noted earlier in the letter, *Touhy* regulations are most often at issue in cases where an agency employee has been subpoenaed and then declines to provide—or is directed by the agency not to

provide—the requested documents, information, or testimony. In those cases, the ordinary rules governing discovery provide the necessary procedural and remedial measures for enforcing subpoenas.

I am open to conversation to understand any concerns the Treasury may have and perhaps Treasury would welcome further clarification on my thinking.

Sincerely,

A handwritten signature in cursive script, appearing to read "Olin Wethington".

Olin Wethington

Copies to:

Daniel Asher, US Department of the Treasury

Pedro J. Martinez-Fraga, Bryan Cave Leighton Paisner LLP