United States Department of State

Washington, D.C. 20520

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BY EMAIL (JARAGONCARDIEL@PCA-CPA.ORG)

Mr. José Luis Aragón Cardiel
Legal Counsel
Permanent Court of Arbitration

Re: PCA Case No. 2018-56, *Alberto Carrizosa Gelzis, Felipe Carrizosa Gelzis, and Enrique Carrizosa Gelzis v. Republic of Colombia*

Dear Mr. Aragón Cardiel:

The United States refers to your correspondence dated June 2, 2020 on behalf of the Tribunal in the above-referenced matter, expressing the Tribunal's regret that the United States intended to publish, unredacted, its non-disputing Party submission of May 1, 2020, including language that "could potentially be construed as intimidatory of an expert witness …."[1] The United States does not agree that the language in footnote 11 of the U.S. submission could reasonably be construed as intimidatory of a witness. In order to help clarify any misunderstandings, the United States sets out additional information below.

The U.S. Department of Treasury (Treasury) regulation referred to in footnote 11 is a valid and longstanding regulation, having last been amended in 2004. It applies to both current and former Treasury employees seeking to testify in legal proceedings (both in courts and tribunals, foreign or domestic) related to the official business of the Treasury.[2] The regulation has no penalty provision and thus the United States does not believe that discussion of it could be considered intimidatory.

It is an example of a "*Touhy*"[3] regulation, common throughout federal government agencies in the United States, which requires prior agency approval before such testimony can be provided. Treasury has explained that the purpose of its regulation 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."[4] These concerns are particularly acute when Treasury does not believe that potential testimony about sensitive documents or decision making processes is accurate. No U.S. court has held the Treasury

[1] As the United States explained in its correspondence of May 22, 2020, we do not believe there is a legal basis to redact footnote 11 of the submission. While the United States indicated that, consistent with its policy of promoting transparency in investor-State arbitration, it would publish its submission, to date it has not done so.
[2] 31 C.F.R. § 1.11(a)(1) & (2).
[3] *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951) (holding that a law enforcement agent could lawfully withhold information pursuant to U.S. Department of Justice Order No. 3229).
[4] 69 Fed. Reg. 54002 (September 7, 2004).

regulation to be invalid, and Treasury routinely applies it to requests by litigants seeking the testimony of former Treasury employees.[5]

As a matter of course, litigants regularly apply to Treasury to request approval for testimony of former Treasury employees, and when doing so they frequently provide affidavits or written materials to explain what testimony they wish to provide and why it is necessary. Treasury then evaluates the request and provides the applicant a written response describing the scope of the allowable testimony as well as the reasons for Treasury's decision.

In this case, neither Claimants' counsel nor Mr. Olin L. Wethington applied for Treasury's approval, and Treasury learned of Mr. Wethington's initial testimony after it had already been given. Treasury has determined that certain aspects of Mr. Wethington's testimony, which he represents are based on his recollections as a NAFTA negotiator,[6] fall within the regulation's prohibition that former employees "not provide, with or without compensation, opinion or expert testimony concerning official information, subjects, or activities … without written approval or agency counsel."[7] Treasury reviewed its records and otherwise gathered information related to the negotiation of the NAFTA and U.S.-Colombia TPA financial services chapters and was unable to find any evidence supporting Mr. Wethington's opinion regarding the scope of investor-State arbitration in the Financial Services Chapter, or contradicting the ordinary meaning of the articles relating to this issue, as discussed in the United States' May 1, 2020 submission.

Treasury raised Mr. Wethington's non-compliance with the regulation with him and counsel prior to the United States making its non-disputing Party submission, offering Mr. Wethington the opportunity to apply for approval and to see whether Mr. Wethington's testimony could be modified so as to fall within the regulation's exception. In particular, the regulation allows for expert or opinion testimony "where the testimony involves only general expertise gained while employed at the Department," as contrasted to testimony based on specific experiences and official duties.[8] However, prior to the United States' submission, Claimants' counsel (who also represents Mr. Wethington personally in this matter) informed Treasury that no application would be submitted.

In this connection, the United States observes that if Claimants' counsel had applied to Treasury for approval in advance of submitting Mr. Wethington's testimony, like other litigants seeking the testimony of former employees do, Treasury, Claimants' counsel and Mr. Wethington would have had the opportunity to resolve these matters and the issue might never have had to be brought to the Tribunal's attention. However, the United States was concerned that omitting Mr.

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[5] To the extent that Claimants challenge the validity of the regulation, the United States notes that this is a question of U.S. law concerning the disclosure of information purportedly gained through service in the U.S. government by a U.S. national residing in the United States. Even setting that aside, Claimants counsel are unable to cite any binding authority for the proposition that *Touhy* regulations may not be applied to former employees.

[6] *See, e.g.*, Witness Statement of Olin L. Wethington at ¶ 6 ("My statement is based on … (2) 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."); Supplemental Witness Statement of Olin L. Wethington at ¶ 25 ("As chief negotiator of the NAFTA Financial Services Chapter, I can attest that this is the approach that the NAFTA negotiators sought to follow.").

[7] 31 C.F.R. § 1.11(f)(1).

[8] 31 C.F.R. § 1.11(f)(3) provides that: "Any expert or opinion testimony by a former employee of the Department shall be excepted from § 1.11(f)(1) where the testimony involves only general expertise gained while employed at the Department."

Wethington's failure to comply with the regulation from the United States' non-disputing Party submission may have left the Tribunal or the public with the incorrect impression that Mr. Wethington's testimony had been approved by Treasury as required by the regulation.

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

The United States hopes that the above explanations concerning the regulation and the efforts by Treasury to work with Mr. Wethington have been helpful to the Tribunal. In this connection, the United States respectfully requests that the Tribunal reconsider its statement that footnote 11 could potentially be construed as intimidatory of an expert witness. The United States refers also to the Tribunal's notice that it intends to publish its letter of June 2, 2020 on the PCA website. The United States respectfully requests that should the Tribunal do so, the Tribunal also publish the United States' correspondence of May 22 and today's date concerning these matters, in accordance with Article 3 of the UNCITRAL Transparency Rules.

Respectfully submitted,

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