Office of Government Ethics
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Letter to a Private Attorney dated April 17, 1990

Your letter of January 8, 1990, requested our opinion on issues involving the application of 18 U.S.C. § 207 to [a former Government employee]. As indicated by our interim response of January 19, 1990, we were seeking comments from ethics officials at [the individual's] former employing agencies prior to responding substantively to you. Having received those comments, we can now offer the following guidance.

You indicate that [the former employee] served in [one] Department in 1986; and [in another agency in 1987 and a portion of 1988]. [In late] 1988, he joined a wholly-owned affiliate of your law firm. [The former employee] would like to represent foreign governments and industries before the executive branch of the United States Government in negotiating bilateral agreements. This may involve amendments, extension or renegotiation of the terms of agreements in which [the former employee] personally and substantially participated or which were under his official responsibility during previous negotiations while he was with the Department or the [agency]. Your second letter of March 29, 1990, stated that issues in the additional matter of [the former employee's] representation in securing an import exemption for [a particular product], specified in your initial request, was being withdrawn, as it had become moot.

Restrictions in 18 U.S.C. § 207(a) and § 207(b) bar former employees during certain periods of time from representing others before the Government in a "particular matter involving specific parties" if they had "participated personally and substantially" in that same matter while a Government employee or if the same matter was pending under their official responsibility within their final year of such responsibility.

BILATERAL TRADE AGREEMENTS AS PARTICULAR MATTERS INVOLVING SPECIFIC PARTIES

The basic issue which you raise concerns whether bilateral trade agreements on [specific items] are particular matters involving specific parties. You argue that bilateral agreements should not be viewed as matters involving specific parties,

because they are government to government agreements on quotas and growth rates which have general application to [specific] industries, not to individual companies. We disagree, for the reasons indicated below.

Regulatory guidance for determining what constitutes a particular matter involving specific parties can be found at 5 C.F.R. § 737.5(c)(1), as you noted. While these regulations indicate that rulemaking and actions of general application are excluded, we do not view bilateral agreements to be analogous. Such agreements do involve isolatable transactions between specific identifiable parties, which are the United States and the exporting country concerned. These agreements are distinguishable from unilateral programmatic policies established by the United States Government, which are described in the examples provided with the regulations to illustrate particular matters not involving specific parties.

Enclosed is a copy of a 1979 opinion from the Office of Legal Counsel at the Department of Justice (3 Op. OLC 373), which bears directly on the issue. It concerned whether the Panama Canal Treaty constituted a particular matter involving specific parties. The opinion concluded at page 375 that it did:

> Unlike general legislation or rulemaking, treaties are intended to affect specific participating parties, namely their signatories. In form, treaties closely resemble contracts, which are expressly covered by the statute. They are signed after the type of quasi-adversarial proceedings or negotiations that precede or surround the other types of `particular matters' enumerated in section 207(a). The phrase `involving a specific party or parties' has been read to limit the section's concern to `discrete and isolatable transactions between identifiable parties.' . . . Such a characterization aptly describes the treaty negotiation process.

Recognizing that a bilateral trade agreement on [specific items] may be somewhat different because it does not directly include as parties the industries affected, nonetheless this Office, as well as the Department and the [agency], views trade negotiations and agreements as particular matters which normally involve the Government signatories as specific parties.

RENEGOTAIATION OF BILATERAL TRADE AGREEMENT AS THE SAME PARTICULAR MATTER

As we understand your position, you also argue that even if bilateral agreements on [specific items] are considered to be particular matters involving specific parties, [the former employee] might not be prohibited from representing clients in their renegotiation, extension or amendment, even though he participated in or had under his official responsibility their earlier negotiation, since a new or replacement agreement may not be the same particular matter as its predecessor, under the circumstances. As noted in 5 C.F.R. § 737.5(c)(4), the prohibitions in 18 U.S.C. § 207(a) and § 207(b) only apply where the former employee represents someone before the Government in the same particular matter as that with which he had been involved as a Government employee. Criteria and examples are provided in that section of the regulations.

Your letter anticipates that bilateral agreements being negotiated now may involve significant changes in the underlying facts and the negotiating strategies and priorities from what existed when the agreements were negotiated during [the former employee's] Government employment. For example, market changes such as consumer preference may alter a country's quota needs. Economic and political conditions may significantly alter a country's objectives and negotiating position. Additionally, you indicate that the outcome of the Uruguay Round of multilateral trade negotiations is expected to alter some aspects of future bilateral agreements, and may even begin a phaseout entirely of quotas and [an] exception to the General Agreement on Tariffs and Trade (GATT) under which bilateral agreements have been negotiated since 1973. You indicate that, at a minimum, the pending Uruguay Round will require entirely new considerations in bilateral agreements, such as provisions allowing the agreements to be reopened following the current Uruguay Round, different relative negotiating leverage, and the possible injection of multilateral issues.

While these factors may change the nature of bilateral agreements in varying degrees, we are unable to determine in the abstract whether a new particular matter may be involved in a given bilateral negotiation or whether the same particular matter may simply be continuing in another form. We would suggest that extensions, technical amendments, provisions allowing agreements to be reopened, or different relative negotiating leverage would

not likely be sufficient to transform renegotiation of an existing bilateral agreement into a new particular matter, since the same basic facts, issues and parties would appear to be involved. See for example, United States v. Medico Industries, Inc., 784 F.2d 840 (7th Circuit, 1986). On the other hand, changing quota needs, new negotiating objectives and priorities, the injection of multilateral issues or a process to phase out the quota system and the exception from GATT for [these types of] agreements, or other fundamental changes could cause renegotiation of a bilateral agreement to be considered a new particular matter. The Department and [agency] concur in the necessity for this case-by-case analysis.

We recommend that you consult with ethics officials at the Department and the [agency] as the issue arises with respect to specific bilateral negotiations, so that a determination can be made in terms of the regulatory criteria and judicial interpretation. As the regulations indicate at 5 C.F.R. § 737.1(c)(8), § 737.5(c)(4), and § 737.5(e), in complex factual cases the agency with which the former Government employee was associated is likely to be in the best position to make a determination as to certain issues such as the identification of particular matters and the extent to which they are the same or different.

I hope that this guidance will be useful to you.

Sincerely,

Donald E. Campbell
Acting Director