United States Department of State

Washington, D.C. 20520

May 22, 2020

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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 May 19 and May 8, 2020, and makes the following observations with respect to whether footnote 11 of the United States' non-disputing Party submission dated May 1, 2020 should be redacted prior to publication on the Permanent Court of Arbitration's (PCA) website.

Article 10.21 of the U.S.-Colombia Trade Promotion Agreement (TPA) sets forth the transparency provisions that apply to investor-State arbitrations taking place under the TPA. In relevant part, Article 10.21 provides (emphases added):

> 1. Subject to paragraphs 2 and 4, **the respondent shall**, after receiving the following documents, **promptly** transmit them to the non-disputing Parties and **make them available to the public**:
> …
> (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and **any written submissions submitted pursuant to Article 10.20.2** and 10.20.3 and Article 10.25

The United States submission of May 1, 2020 was made pursuant to Article 10.20.2, as noted in paragraph 1 of that submission. Thus, pursuant to Article 10.21(1)(c) the Republic of Colombia has an obligation to make the U.S. submission available to the public, subject only to paragraphs 2 and 4 of Article 10.21, which provide for the protection of "protected information."

"Protected information" is defined by Article 10.28 to mean: "confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law[.]" The content of the footnote 11 is not confidential business information, nor is it protected by the law of the United States. Thus, there is no basis to redact the information under the TPA, and the Republic of Colombia has an obligation to publish this information.

With respect to the relevancy of the UNCITRAL Transparency Rules (referred to in the PCA Secretariat's May 8 letter), TPA Article 10.16.5 provides: "The arbitration rules applicable under

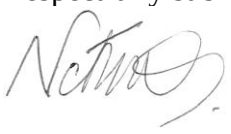
paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration **except to the extent modified by this Agreement**." (Emphasis added.) Thus, the UNCITRAL Transparency Rules apply only to the extent that the TPA does not address an issue. In this instance, as discussed above, the TPA addresses the issue and requires that the Republic of Colombia publish the content of footnote 11.

The United States understands that the disputing parties agreed that the present arbitration is to be conducted in accordance with the UNCITRAL Transparency Rules. Those Rules do not, as noted above, displace the Republic of Colombia's TPA obligation to publish the United States' submission, including footnote 11. And, in any event they do not mandate a different result. Article 3(1) of the rules provides in relevant part that: "Subject to article 7, the following documents **shall** be made available to the public: … any written submissions by the non-disputing Party (or Parties) to the treaty …." (Emphasis added.) Thus, the UNCITRAL Transparency Rules require a non-disputing Party's submission be made public, subject only to the provisions of Article 7. Article 7 provides for the protection of confidential or protected information, as defined in Article 7(2). The content of footnote 11 does not constitute confidential or protected information as defined therein.

Nor does the content of footnote 11 jeopardize the "integrity of the arbitral process"[1] within the meaning of Article 7(7) of the UNCITRAL Transparency Rules, which may provide a tribunal with latitude to restrain or delay the publication of information in "exceptional circumstances." The statements made in footnote 11 concern the interpretation of the TPA and thus fall squarely within the scope of Article 10.20.2. The footnote is necessary to inform the Tribunal and the public that Mr. Wethington's views do not represent the current or former position of the United States. In the absence of the footnote, both the Tribunal and the public might assume that the United States had approved Mr. Wethington's testimony as required by U.S. law. Moreover, Mr. Wethington's testimony was offered solely on the issue of treaty interpretation, and in this connection, as a non-disputing Party to the TPA, the United States has a right to inform investor-State tribunals when the interpretations advanced by its former officials are discordant with the U.S. interpretation, and to clarify that such testimony was offered outside the appropriate legal channels for doing so.

Finally, the United States notes that in the interest of transparency the United States' practice is to put its non-disputing Party submissions in investor-State arbitrations on the U.S. Department of State's web site,[2] and it intends to do the same for the submission in this case as well.

Respectfully submitted,



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[1] *See* Email from Mr. Domenico Di Pietro to Mr. Aragón Cardiel, dated May 16, 2020.
[2] *See* https://www.state.gov/international-claims-and-investment-disputes/