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September 23, 2020

RE: PCA CASE N° 2018-56 – 1. ALBERTO CARRIZOSA GELZIS, 2. FELIPE CARRIZOSA GELZIS, 3. ENRIQUE CARRIZOSA GELZIS V. THE REPUBLIC OF COLOMBIA

Dear Mesdames,  
Dear Sirs,

I write on behalf of the Tribunal, further to the Parties' respective communications of September 18, 2020, provided in response to the Tribunal's communication of September 11, 2020.

By its correspondence of August 28, September 1 and September 8, 2020, the Respondent informed the Tribunal that Dr. Ibáñez had been appointed as a justice (*magistrado*) of the Constitutional Court of Colombia by the Senate of Colombia on August 27, 2020. The Respondent stated that, as a result of this appointment, Dr. Ibáñez "would not be permitted to participate in the upcoming Hearing", as Colombian law "precludes judges from engaging in the practice of law outside of their judicial functions" and "bars judges from maintaining contractual relationships external to their judicial positions. It further confirmed that these were rules that "are not subject to derogation." However, the Respondent observed that Dr. Ibáñez would only become subject to this prohibition after assuming his judicial functions on October 7, 2020. It offered to make Dr. Ibáñez available for cross-examination before that date. The Respondent also requested that the above circumstances be considered by the Tribunal as a valid reason to justify Dr. Ibáñez's failure to appear at the Hearing on Jurisdiction pursuant to Section 7.7 of Procedural Order No. 1, and that, as a result, the Tribunal should consider Dr. Ibáñez's written reports, notwithstanding his inability to testify orally at the Hearing on Jurisdiction.

In a submission dated September 8, 2020, the Claimants asserted that "the proper course for the Tribunal is to summon Dr. Ibáñez to appear for cross-examination at the hearing and, in the event of his non-appearance, to strike his two expert reports from the record." The Claimants considered Dr. Ibáñez's unavailability the result of a "voluntary transaction between Dr. Ibáñez and Colombia", which, they alleged, was actively sought by Dr. Ibáñez, was foreseen by him and the Respondent when submitting his expert reports and was not disclosed to the Claimants and the Tribunal until now. The attendance at the Hearing of Dr. Ibáñez was "particularly important", in the Claimants' view, because his second expert report was filed together with the last substantive submission filed by the Parties (the Respondent's Rejoinder on Jurisdiction), meaning that he "had the proverbial 'last word'" on the issues raised in his report. The Claimants also considered that the provisions of Colombian law relied upon by the Respondent to justify Dr. Ibáñez's unavailability "simply do not apply" to the present circumstances, as Dr. Ibáñez "would not need to engage in any of the proscribed activities" in order to testify. As such, the Claimants claim, the Respondent has failed to provide a valid reason for Dr. Ibáñez's failure to appear.

On September 11, 2020, the Tribunal invited the Parties to explain whether they remained of the view that the evidence of Drs. Ibáñez and Briceño will inform the Tribunal on issues dispositive for the matter of jurisdiction, and if so, to what extent. The Claimants have expressed the view that the testimony of these experts is "relevant to the issue of jurisdiction *ratione temporis* to the extent that the arbitral tribunal has any questions concerning the maturation date of the violations of the United States-Colombia Trade Promotion Agreement that have been asserted by Claimants." They note however, that other matters addressed by these experts "are less germane to the jurisdictional issues under discussion at this stage of the arbitration." The Respondent largely agrees with this assessment. It considers that the opinions of Drs. Briceño and Ibáñez are articulated clearly enough in their written reports, such that oral testimony would not be necessary. Lastly, the Respondent offers to waive its cross-examination of Dr. Briceño, "provided that Claimants likewise waive their cross-examination of Dr. Ibáñez and withdraw their request to strike Dr. Ibáñez's written reports from the record."

Prior commitments of the members of the Tribunal unfortunately make it impossible to arrange to hear Dr. Ibáñez's evidence before he becomes unavailable on October 7, 2020, such that he might be examined upon the expert reports that he has tendered. In the circumstances, and in view of the Parties' agreement that the oral testimony of these experts would be, at best, of limited value at this juncture of the proceedings, the Tribunal is inclined to proceed on the basis that it has the written expert reports of Drs. Briceño and Ibáñez. It will accord such weight to those reports as it deems fit, having regard to all of the submissions of the Parties.

Accordingly, the Tribunal excludes the participation at the Hearing on Jurisdiction of Drs. Briceño and Ibáñez pursuant to Section 7.10 of Procedural Order No. 1 and the Tribunal denies the Claimants' application that Dr. Ibáñez's expert reports be stricken from the record.

Should either Party wish further to address the contents of the expert reports of Drs. Briceño and Ibáñez, they may do so in the course of their oral arguments at the Hearing.

In accordance with Article 3 of the UNCITRAL Transparency Rules, the PCA will publish this letter on its website on **Wednesday, September 30, 2020**, subject to any representations from the Parties pursuant to Article 7(3) of the UNCITRAL Transparency Rules.

Please do not hesitate to contact me at the contact details set forth above, or my colleague, Markel Eguiluz Parte, Assistant Legal Counsel (tel.: +31 70 302 4263; e-mail: meguiluzparte@pca-cpa.org) should you have any questions regarding this letter.

Yours sincerely,



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