INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

In the Matter of Arbitration Between:	:	
ASTRIDA BENITA CARRIZOSA	:	
Claimant,	:	Case No. ARB/18/5
v.	:	
THE REPUBLIC OF COLOMBIA,	:	
Respondent.	:	
	:	Volume 4

VIDEOCONFERENCE: HEARING ON JURISDICTION

Friday, November 13, 2020

The World Bank Group

The hearing in the above-entitled matter came on at 9:00 a.m. (EST) before:

PROF. GABRIELLE KAUFMANN-KOHLER, President

PROF. DIEGO P. FERNÁNDEZ ARROYO, Co-Arbitrator

MR. CHRISTER SÖDERLUND, Co-Arbitrator

Also Present:

MS. ALICIA MARTÍN
Secretary to the Tribunal

MR. DAVID KHACHVANI
Tribunal Assistant

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C O N T E N T S

PROCEEDINGS

PRESIDENT KAUFMANN-KOHLER: Good morning/good afternoon to all of you.

Do you hear me well? Yes, it looks like.

I hope you all had a good day yesterday. We are now starting the last day of this Hearing for Closing Submissions.

Is there anything anyone would like to raise before we start?

On the Claimant's side, Mr. Martínez-Fraga?

MR. MARTÍNEZ-FRAGA: No, Madam President. Thank you.

PRESIDENT KAUFMANN-KOHLER: Good.

On the Respondent's side?

MR. GRANÉ LABAT: Good afternoon, Madam President, Members of the Tribunal.

No, nothing from Colombia's side. Thank you.

PRESIDENT KAUFMANN-KOHLER: Good.

Then the first thing would be to give the floor to the U.S. for an oral submission of 15 minutes. I see Ms. Thornton from the State Department has her camera on. So, I understand you

are the one who will present? I also see Ms. Grosch.

To whom do I give the floor?

MS. THORNTON: Madam President, I will be presenting for this morning.

PRESIDENT KAUFMANN-KOHLER: Good.

MS. THORNTON: Thank You.

PRESIDENT KAUFMANN-KOHLER: You have the floor, please.

NON-DISPUTING TREATY PARTY'S ORAL SUBMISSION

MS. THORNTON: And thank you again, Madam President and Members of the Tribunal, for this opportunity.

My name is Nicole Thornton. I'm Chief of Investment Arbitration in the Office of International Claims and Investment Disputes at the United States Department of State. And the United States makes its submission pursuant to Article 10.22 of the U.S.-Columbia Trade Promotion Agreement, or TPA, on issues of treaty interpretation.

The United States does not take a position on how these treaty interpretation issues apply to the facts of this case. Moreover, as is the case with

every statement we make as an nondisputing party, in this case and all other cases, including the Fireman's Fund case under the NAFTA, no inference should be drawn from the absence of comment on any issue not addressed in this submission.

We have been following the proceedings with interest, and we have taken note that the Tribunal has posed a number of questions, some of which were not addressed in our written non-disputing party submission of earlier in this year. We would, therefore, like to briefly address three of the questions raised by the Tribunal.

The first question we would like to address is regarding the use of the words "for greater certainty" as part of Footnote 2 to Article 10.4. This was initially raised on Tuesday, at Pages 209 to 210 of the transcript and again on Wednesday at Page 415.

As a general practice, the United States uses the words "for greater certainty" in its international trade investment agreements to introduce confirmation regarding the meaning of the agreement. In U.S.

practice, the phrase "for greater certainty" signals that the sentence it introduces reflects the understanding of the United States and the other treaty party or parties of what the provisions of the agreement would mean even if the sentence were absent.

As a consequence, "for greater certainty" sentences also serve to spell out more explicitly the proper interpretation of similar provisions, mutatis mutandis, in other agreements or in the same agreement. The United States has previously made a statement to this effect in Footnote 24 of our non-disputing party submission in the Omega v. Panama case, which is an ICSID Arbitration, pursuant to the U.S. TPA and Bilateral Investment Treaty with Panama.

And that submission is publicly available on our website, but we would also be happy to provide the Tribunal and the disputing parties with the submission if it would be helpful.

The second question we would like to address is whether the Tribunal has jurisdiction to apply Article 12.3 and where in the TPA such jurisdiction is provided.

As we explained in Paragraph 15 of our written submission, an investor-State Tribunal has no jurisdiction to consider under this provision any procedural or substantive treatment extended by a TPA party to a third-State investor or investment through a multilateral or bilateral agreement that a TPA party has with a third State.

Any other conclusion would eviscerate the carefully crafted decision the TPA Parties made to make only certain obligations in the financial services sector subject to investor-State Arbitration. Rather, the TPA Parties agreed that any MFN claims may only be subject to State-to-State dispute resolution.

Moreover, jurisdiction to apply Article 12.3 does not and cannot arise out of Article 12.1.2(b) for the reasons stated in Paragraphs 8, 9, and 12 of our written submission.

The third question we would like to address is related to Article 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties, which was raised on Page 417 of Wednesday's transcript.

Although the United States is not a party to

the Vienna Convention, we consider that Article 31 reflects customary international law on treaty interpretation. States are well-placed to provide authentic interpretation of their treaties, including in proceedings before ISDS tribunals like this one.

TPA Article 10.22 ensures the non-disputing TPA party has an opportunity to provide its views on the correct interpretation of the TPA. And the United States consistently includes provision for such submissions in its investment agreements.

Article 31 of the Vienna Convention on the Law of Treaties recognizes the important role that the State's Parties play in the interpretation of their agreements.

In particular, Paragraph 3 states that: "In interpreting a treaty, there shall be taken into account, together with the context, any subsequent agreement between the Parties regarding the interpretation of the Treaty or the application of its provisions and any subsequent practice in the application of the Treaty which establishes the agreement of the parties regarding its

interpretation."

Article 31 of the Vienna Convention is framed in mandatory terms. "Subsequent agreements between the Parties and subsequent practice of the parties shall be taken into account."

Thus, if the Tribunal concludes that there is either a subsequent agreement between the TPA Parties or a subsequent practice that establishes such an agreement regarding the interpretation of a TPA provision, the Tribunal must take that into account in its interpretation of the provision.

In addition, there is no hierarchy of importance amongst the elements of interpretation listed in Article 31. Accordingly, the Tribunal must consider any subsequent agreement of the Parties and any subsequent practice of the Parties alongside the Treaty's text, context, and optic and purpose.

Where the submissions by the two TPA Parties demonstrate that they agree on the proper interpretation of a given provision, the Tribunal must, in accordance with Article 31(3)(a), take this agreement into account.

In addition to reflecting an agreement under Article 31(3)(a)a, the TPA Parties' concordant interpretations may also constitute subsequent practice under 31(3)(b)a.

The International Law Commission has commented that subsequent practice may include statements in the course of a legal dispute. Accordingly, where the TPA Parties' submissions in an arbitration evidence the common understanding of a given provision, this constitutes subsequent practice that must be taken into account by the Tribunal under Article 31(3)(b)a.

Several investment tribunals constituted under the NAFTA have agreed that submissions by the NAFTA Parties in Chapter 11 proceedings, including in non-disputing party submissions, may serve to form subsequent practice.

For example, the Mobil v. Canada Tribunal found that arbitral submissions by the NAFTA Parties constituted subsequent practice and observed that the subsequent practice of the parties to a treaty, if it establishes the agreement of the parties regarding the

interpretation of the treaty, is entitled to be accorded considerable weight.

And I point you to Paragraphs 103, 104, and 158 through 160 of the Mobil v. Canada Decision on Jurisdiction and Admissibility dated July 13, 2018.

The Tribunal in Bilcon v. Canada reached a similar conclusion at Paragraphs 376 through 379 of its January 10, 2019, Award on Damages, as did the Tribunal in Canadian Cattlemen for Fair Trade at Paragraphs 188 to 189 of its January 28th, 2008, Award on Jurisdiction.

Whether the Tribunal considers that the concordant interpretations presented by the two TPA Parties in this proceeding as a subsequent agreement under 31(3)(a), as a subsequent practice under 31(3)(b), or both, on any particular provision, the outcome is the same. The Tribunal must take the TPA Parties' common understanding of the provisions of their Treaty as evidenced by their submissions in this Arbitration into account.

Finally, we take issue with the characterization of U.S. law and of the negotiation

process for the NAFTA during the Opening Statement of Claimant's counsel on Tuesday. We do not wish to belabor these issues today. We do, however, wish to reaffirm our strong disagreement, again, with counsel'æs statements on these issues.

And we reaffirm our position that under the Treasury Regulations cited in our written submission, Mr. Wethington could not provide testimony concerning official information, subjects, or activities without written approval of U.S. Department of Treasury counsel, which he has not received.

Even apart from U.æS. law on this subject, it will come as no surprise to the Tribunal that complex international trade negotiations reflect the input of multiple different participants in each of the countries that is party to the Agreement. No one participant's recollections substitute for formal travaux préparatoires or other record of the negotiations.

In closing, we stand by the interpretations as set forth in our written submission of May 1 of this year.

Thank you, Madam President and Members of the Tribunal, for your time and consideration today.

PRESIDENT KAUFMANN-KOHLER: Thank you.

Now, we had said that if the Claimant wishes to have a break that we could do this. This was actually before we said that there could be a written--a short written submission if requested after the Hearing.

So, my proposal--but since I have opened the door to this break possibility, I would not close it if you disagree, but my proposal would be that we carry on.

But let me look at Mr. Martínez-Fraga.

MR. MARTÍNEZ-FRAGA: Let'æ carry on, Madam President.

PRESIDENT KAUFMANN-KOHLER: Is that--

MR.aMARTÍNEZ-FRAGA: I would like to submit a short written response.

PRESIDENT KAUFMANN-KOHLER: That is fine. Absolutely. We can discuss this in more detail at the end of the Hearing. Absolutely.

MR. MARTÍNEZ-FRAGA: Of course.