

**TRADE AGREEMENT BETWEEN THE EUROPEAN UNION AND ITS MEMBER STATES, AND COLOMBIA, ECUADOR AND PERU.**

**VI MEETING OF THE PUBLIC PROCUREMENT SUBCOMMITTEE  
MINUTES**

**Videoconference**

**THURSDAY, 17 OCTOBER 2019  
BOGOTA, D. C. COLOMBIA**

- 1. Welcome and introduction**
- 2. Adoption of the agenda**

Colombia chaired the meeting and presented the agenda of the meeting for consideration of the parties. The Parties adopted the agenda, which was circulated in due course.

- 3. Points of interest of the European Union**

- 3.1. Concerning Colombia**

- a. Access to procurement entities at the sub-central level of government in Colombia: Implementation of the Trade Committee Decision 01/2017**

The EU recalled that both sides (Colombia and the EU) during the 2018 sub-committee in Quito, agreed to find a solution to solve the problem of access at the sub-central level in Colombia. The delegation of Colombia through the "Agencia Colombia Compra Eficiente" gave an extensive explanation of the entities covered under Decision 01 of 2017, and explained the reasons why some entities would not be covered. Therefore, Colombia explained that Title VI of the Trade Agreement would not be applicable to them. Hence, in the case of State owned Industrial and Commercial Companies "Empresas Industriales y Comerciales del Estado", Joint Stock Companies between State Entities "Sociedades por Acciones entre Entidades Estatales", Mixed Economy Companies "Sociedades de Economía Mixta", and Domiciliary Public Services Companies "Empresas de Servicios Públicos domiciliarios", since they are deemed to have an industrial and commercial character, are therefore covered by the exception established in Decision 01 of 2017.

The European Union expressed its concern about this interpretation as, in its view, such an exception would not apply to the provision of public services.

The EU reiterated that its understanding during the negotiations was that the entire sub-central level of both Parties was committed under the Trade Agreement. However, Colombia disagreed, because the entities mentioned above were never listed as covered entities.

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On the other hand, the term "utility" in English and translated into Spanish as "public service"; or for "governmental purpose," under Colombian law, is not an applicable element to define whether an entity has the character of "industrial and commercial." In this regard, for Colombia, the interpretation of the term "industrial and commercial character" includes companies that, by nature and by virtue of the activity they undertake, engage in commercial and industrial activities, such as, among others, companies that provide public services. This notion is different from the interpretation and understanding of the European Union.

Therefore, according to Colombia, it is not possible to include in the framework of the Agreement companies that provide domestic public services or other economic activities, such as water, electricity, telecommunications, public transportation, among others. Consequently, the inclusion of such entities within the scope of the Agreement should be the subject to negotiations to extend its coverage. Nonetheless, the EU disagrees with this position and considers that any discussion should be self-contained in the Government Procurement Chapter of the Agreement.

Colombia stated that this was not its understanding and that it would consult with its hierarchical superiors on the corresponding position.

Finally, it was agreed that Colombia would undertake the relevant consultations to initiate negotiations for the inclusion of industrial and commercial entities belonging to the sub-central level of government.

In addition, Colombia will consult with the Administrative Department of Public Functions "Departamento Administrativo de la Función Pública" in order to submit to the sub-committee on public procurement of the Agreement a list of the sub-central level entities covered by Decision 1 of 2017, in order to clarify the entities that, according to the meaning of the expression "industrial and commercial character", would be covered by the Trade Agreement.

#### **b. Coverage of the procurement by the Rural Development Agency (ADR)**

On the other hand, Colombia, with the support of the Public Procurement Agency "Agencia Colombia Compra Eficiente," provided information on the legal nature of the Agencies created between 2011 and 2015. In this regard, Colombia mentioned that some of these agencies are entities that existed at the time of the negotiation of the agreement, but given their change in nature, they are not currently reflected in the lists of Colombia under the Trade Agreement.

According to Colombia, it is necessary to update the lists of entities that fall under the scope of the Agreement. This should be done in accordance with article 191 of the Agreement. Hence, the entities that need to be updated are the following:

- i. National Mining Agency, "Agencia Nacional de Minería."
- ii. National Infrastructure Agency, "Agencia Nacional de Infraestructura."
- iii. National Road Safety Agency, "Agencia Nacional de Seguridad vial."
- iv. National Spectrum Agency, "Agencia Nacional del Espectro."
- v. Presidential Agency for International Cooperation of Colombia, "Agencia Presidencial de Cooperación Internacional de Colombia."
- vi. Rural Development Agency, "Agencia de Desarrollo Rural."



On the other hand, there are other new Agencies created with new functions, which are of a unique nature, and represent a new typology within the administrative structure of the State, and therefore would not be covered by the Agreement, such as:

- i. Military Forces Logistics Agency, "Agencia Logística de las Fuerzas Militares."
- ii. Real estate Agency Virgilio Barco, "Agencia Inmobiliaria Virgilio Barco."
- iii. Agency of the Renewal of the Territory, "Agencia de Renovación del Territorio."
- iv. National Public Procurement Agency, "Agencia Nacional de Contratación Pública - Colombia Compra Eficiente."

The European Union asked about the possibility of creating new Agencies not covered by the Agreement. Then, Colombia expressed that this was an unlikely possibility since the creation of these Agencies depends exclusively on the legal powers conferred on the government by law and the Constitution. That is to say, it is an extraordinary faculty that the Legislative branch expressly confers to the Executive on a temporary basis. Colombia stated that such powers are not conferred on a regular basis.

The European Union also enquired whether it is possible to provide a pragmatic solution to this issue, i. e. without resorting to Article 191 of Title VI of the Agreement. Hence, the European Union proposed that the inclusion of these covered Agencies in the Manual for the Management of Trade Agreements published by the "Agencia Colombia Compra Eficiente" would be sufficient. Colombia stated that the European Union proposal has two problems:

1. The first problem relates to the non-mandatory nature of the Manual for the Management of Trade Agreements.
2. The second issue relates to the legal base for the inclusion of Agencies in the Manual when they are not de facto part of Colombia's list of market access commitments. In this regard, it is necessary a binding Decision by the Trade Committee of the Agreement.

The European Union stated that the coverage shall be extended to these agencies as soon as possible. Irrespective of the non-bidding nature of the Manual, the EU suggested that Colombia updates the manual before the adoption of the Decision by the Trade Committee.

Finally, it was agreed that Colombia will explore the viability of managing, in a relatively short time, a decision of the Trade Committee updating the lists of entities for the case of Colombia.

### **3.2. Concerning Peru**

Peru stated that most of the issues queried by the EU addressed during the meeting also dealt with questions that had already been formulated by the European Union in the framework of the V Peru's Trade Policy Review before the WTO. Therefore, it was informed that the EU was going to receive the corresponding answers in writing containing



sufficient detail on the scope of the queries, without prejudice to the information that could be provided on the occasion of the meeting of the subcommittee on public procurement.

**a. Provisions on exemptions to public procurement law**

With regard to provisions on exemptions to public procurement law, including "public service procurement." Peru stated that this exception could only be applicable if there were no possibilities of undertaking the procurement with more than one supplier. Moreover, it stated that, in practice, these contracts were mainly related to the purchase of electricity, water and sewage in certain localities.

**b. Provisions on direct adjudication and time limits for filing an appeal.**

Concerning the provisions of direct adjudication, particularly for the procurement of advertising services, Peru reported that, in the vast majority of cases, the amounts of these contracts are below the thresholds agreed in Trade Agreements. Besides, these contracts refer to the services provided directly by the media to disseminate a specific content to a target audience, which involves the evaluation of particular characteristics of the message to be communicated and the target audience to which the message will be addressed. It should be noted that, according to the provision, the definition of media mainly refers to television, radio, and written communication capable of informing about activities undertaken by the State and of importance for the public.

Regarding the deadlines for filing an appeal, Peru informed that the deadlines established in the State procurement law and its regulations are expressed in working days, which are consistent with the calendar days established in the Agreement. Also, Peru stated that the challenge mechanisms covered by the FTAs are always reviewed by the State Contracting Court, "el Tribunal de Contrataciones del Estado." Thus, the bidding process is automatically suspended until a challenge is resolved. Peru also mentioned that once both the invitations to tender and the terms and conditions are published, suppliers can make queries and comments to the tenders.

**c. Concerning procedures related to infrastructure and other projects tendered under government-to-government (G2G) agreements for the provision of project management office (PMO) services.**

Peru informed that State-to-State contracting is exempted from the scope of application of the State procurement law. Additionally, Peru stated that such contracts were made exceptionally, only in cases of complex contractual objects, when there were needed highly specialized suppliers and latest generation technology, which was not available in Peru.

In addition, Peru mentioned that such contracts were within the scope of international trade and the norms and principles of international law. Peru also mentioned that as prerequisite for using this type of procurement, it was necessary to undertake a market study to identify the possible States that may comply with the requirements of the Peruvian State; and a technical-economic report that compares the conditions offered by the interested States and shows the advantages for the Peruvian State of contracting with other States.



Moreover, Peru stated that this modality has been used mainly by the Ministry of the Interior and Defense in relation to contracts considered strategic for national security and internal order affairs, and in the case of the Pan-American Games. It was also noted that there was information that in the case of the Ministry of the Interior there is a pre-established procedure relating to the registration of foreign States, formulation of the request, market inquiry, and expressions of interest of foreign States, among others.

It should be noted that in case PMOs were contracted outside the G2G framework, the rules that would be applicable will be those corresponding to the applicable regime; i. e. the State procurement law or the regime of Public-Private Associations (PPPs).

**d. Regarding the issue of technical specifications and equivalence of norms in bidding procedures**

Peru informed on the work undertaken during some months related to institutional strengthening, mainly referred to the provision of technical capacity by the EU to public officials about the international obligations assumed by the country in matters of public contracting, with an emphasis on technical specifications and the use of international standards. Training has already been given to the State Contracting Supervisory Body (OSCE), including members of the State Contracting Tribunal (Tribunal de Contrataciones del Estado), the Technical Regulatory Directorate and the Risk Directorate (Dirección Técnico Normativa y Dirección de Riesgos), and training will be given to PERU COMPRAS in November, including the participation of the homologation/standardization areas of all Ministries. In addition, Peru expects to replicate this training with the other executive branch agencies.

The European Union stated that they understand that there is progress and the training has permitted to raise awareness of public officials. However, the European Union recalled there is a need for Peru to declare the international standards as equivalent to Peruvian standards, mentioning Peru's industry that uses fire safety standards.

**4. Points of interest of Ecuador regarding the European Union**

Ecuador expressed its need for receiving the technical capacity to access SIMAP, reiterating Colombia's request made at the Sub-Committee in 2018.

The European Union clarified that the TED included in the SIMAP and stated that the requests should be channeled through the European Union delegation in Ecuador in order to achieve a better outcome.

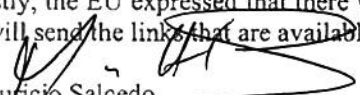
Ecuador stated that the objective of the requirement was for operators to receive technical training by the EU in order to learn how to use SIMAP. Hence, the European Union stated that it understood the request and that the target group are the economic operators and also understood the need for a visit for the training.




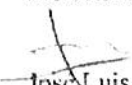
The European Union queried whether SIMAP training would be for all countries, to which Colombia and Ecuador replied in the affirmative.

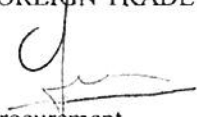
The European Union stated that it will consider and elaborate the idea and will make experts available as quickly as possible. However, a distinction must be made regarding the scope, type of cooperation, objectives, and the request must be formulated through the EU delegation in Quito. Ecuador explained that its aim was to generate capacities, particularly in commercial operators to take advantage of the Agreement and that it will formalize its request through the delegation in order to receive the visit of the experts.

Lastly, the EU expressed that there were some videos about the use of the System and that it will send the links that are available to all public.

  
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