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SEALED

January 12, 2024

FILED UNDER SEAL

The Honorable Kathleen M. Williams
United States District Court
Southern District of Florida
Wilkie D. Ferguson, Jr. United States Courthouse
400 North Miami Avenue, Room 11-3
Miami, Florida 33128

Re: United States v. Trafigura Beheer B.V. (23-CR-20476-KMW) (SEALED)

Dear Judge Williams:

We respectfully submit this letter on behalf of our client, Trafigura Beheer B.V. ("Trafigura" or the "Company"), in support of the parties' effort to enter the plea agreement this Court reviewed in advance of the December 22, 2023 plea hearing (the "Plea Agreement").

For the reasons set forth in the letter filed by the Department of Justice (the "Government" or "DOJ") on January 10, 2024 ("Gov't Ltr."), Trafigura agrees that the Plea Agreement sets forth a well-established and enforceable structure that will ensure the Company meets its ongoing obligations, including with respect to its compliance program. As the Government explains, the ongoing compliance obligations are not part of the sentence to be imposed by the Court but rather form part of the broader contractual agreement between the Government and Trafigura. Gov't Ltr. 2; *see also United States v. Howle*, 166 F.3d 1166, 1168 (11th Cir. 1999) ("A plea agreement is, in essence, a contract between the Government and a criminal defendant."); *United States v. San Pedro*, 781 F. Supp. 761, 771 (S.D. Fla. 1991) ("A plea agreement is a contract between the defendant and the United States. Therefore, although constrained at times by due process implications, commercial contract principles govern the interpretation and enforcement of plea agreements.").

The Government has multiple ways to enforce the Plea Agreement if it determines that Trafigura is falling short of its compliance obligations. "It is generally accepted that when a defendant breaches [its] plea agreement, the Government has the option to either seek specific performance of the agreement or treat it as unenforceable." 5 Wayne R. LaFave et al., *Criminal Procedure* § 21.2(e), Westlaw (database updated Dec. 2023). The Government could seek specific performance—compelling the Company to comply with its obligations—or treat the Plea Agreement as breached and bring an indictment against the Company. In either case, the dispute would come before an Article III judge. *See, e.g.*, *San Pedro*, 781 F. Supp. at 773 (dismissing indictment because it was barred by plea agreement, after scrutinizing factual record and concluding that government failed to prove defendant had breached). In addition, the Government could extend Trafigura's obligations under the Plea Agreement by an additional year. Plea Agm't ¶ 1. Given these available remedies, we submit there is no need for the Court

to retain additional jurisdiction to monitor the Company's adherence to the compliance obligations or other aspects of the Plea Agreement outside of the Court's sentence.

Trafigura writes separately to emphasize that modifying the structure established by the Plea Agreement would not reflect the parties' intent. The Plea Agreement is the product of a lengthy negotiation between the Government and the Company. Following a detailed review of the Company's current compliance program, the Government determined that it was unnecessary to require independent oversight of the Company's efforts to fulfill its compliance obligations. That determination was driven by the extensive steps the Company has already undertaken to enhance its compliance program, including developing policies and procedures, investing additional resources in training and compliance testing, and enhancing ongoing compliance monitoring and controls testing. Plea Agm't ¶ 7(e). This is not a situation in which DOJ has determined that the Company must now take specific compliance "steps to comply with the law" or to remedy misconduct identified in the Statement of Facts. Sealed Change of Plea Proceedings Tr. 13:13-14, Dec. 22, 2023. Rather, the compliance obligations contemplate an iterative and cooperative process between compliance experts to identify ways to ensure that the Company's program is and remains best-in-class.

Under DOJ policy, the imposition of an independent oversight mechanism—through an independent compliance monitor, probation, or other means—is a critical variable in resolutions of this kind. DOJ carefully calibrates such resolutions in light of the close attention that market observers devote to their constituent parts, and the form that DOJ selects sends an important message about the nature of the conduct and the status of the particular company's compliance program. The Government's decision not to impose an independent oversight mechanism here was based on a robust record reflecting the facts and circumstances of this case. Modifying this term of the Plea Agreement would deprive the Company of an important benefit of the bargain it struck with the Government.

Trafigura has every expectation and confidence that it will satisfy its compliance obligations in direct communication with DOJ's compliance specialists. The Company has every incentive to do so, in light of both its internal commitment to compliance—as recognized by the Government's review of Trafigura's compliance program and decision not to impose independent oversight—and the serious negative consequences, including immense reputational harm, that would follow an alleged breach. Accordingly, Trafigura respectfully submits that there is no need here to modify the Plea Agreement to create ongoing judicial oversight. Federal courts already have jurisdiction to resolve any dispute involving an alleged breach of the Plea Agreement.

A. Modifications of the Compliance Structure in the Plea Agreement Would Vitiate an Important Component of the Resolution

Over more than four years, the Government and Trafigura engaged in an intensive course of dealing. Among other activities, the Government investigated the underlying conduct; the Company engaged outside counsel to conduct an independent, unfettered investigation the findings of which were communicated to DOJ in numerous exchanges and presentations; the Company cooperated by facilitating interviews, producing documents, explaining industry terms and practices, and engaging experts to provide financial analysis; and the parties spent a great

deal of time and made a concerted effort to negotiate a resolution appropriate for these specific circumstances. The Company and its external counsel also provided several presentations to DOJ on its compliance program and produced extensive related documents and data, in recognition of the fact that—as DOJ has emphasized repeatedly[1]—the Government takes into serious consideration the state of a company's compliance program when determining the appropriate structure for a resolution.

Consistent with Federal Rule of Criminal Procedure 11(c)(1), the Plea Agreement is the final result of this prolonged and deliberate process.[2] Apart from the agreed-upon sentence, Trafigura has agreed, for a three-year period:

- to continue to cooperate with DOJ in any ongoing investigation (Plea Agm't ¶ 12);
- to continue to enhance its compliance program and internal controls (*id.* ¶¶ 9-10 & Attachment C);
- to certify prior to the expiration of the period, through Trafigura's Chief Executive Officer and Chief Compliance Officer, that the Company met its compliance obligations (*id.* ¶ 9);
- to report annually to DOJ regarding remediation and compliance enhancements (*id.* ¶ 25 & Attachment D);
- to provide advance notice to DOJ, and to accept various conditions, in relation to certain corporate transactions (*id.* ¶ 11);
- to promptly report "any evidence or allegation of conduct that may constitute a violation of the FCPA anti-bribery provisions had the conduct occurred within the jurisdiction of the United States" (*id.* ¶ 13); and
- not to make public statements contradicting the Statement of Facts (*id.* ¶¶ 30-31).

As explained in the Government's letter, these obligations, by agreement of the Government and Trafigura, were intentionally *not* made a part of the sentence in this case, and are instead contractual in nature. *See* Gov't Ltr. 2. This plea agreement structure is not unusual. Rather, it is commonplace for a plea agreement to contain commitments by the Government and defendant that are not subject to judicial oversight. Such obligations routinely include a defendant's

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1 *See, e.g.*, U.S. Dep't of Justice, Criminal Div., *Evaluation of Corporate Compliance Programs* 1 (updated Mar. 2023), https://www.justice.gov/criminal-fraud/page/file/937501/download; U.S. Dep't of Justice, Criminal Div. and U.S. Sec. & Exch. Comm'n, Enf't Div., *A Resource Guide to the U.S. Foreign Corrupt Practices Act: Second Edition* 57 (July 2020), https://www.justice.gov/media/1106611/dl?inline.

2 Rule 11(c)(1) provides that plea discussions must be between the Government and the defense, in recognition that such negotiations are a core aspect of our adversarial system.

undertaking not to make public statements contradicting the Statement of Facts[3] as well as ongoing compliance obligations.[4]

The Plea Agreement also reflects deliberate choices that the Government and the Company made about what *not* to require as part of the Plea Agreement. In particular, the Government determined that it was appropriate not to make any of the Company's ongoing obligations subject to probation or other supervision by the Court, or to oversight by an independent compliance monitor or any other third party. *See* Plea Agm't ¶ 7(g); Sealed Change of Plea Proceedings Tr. 7:11-12, Dec. 22, 2023 ("Your Honor, the Government is not seeking probation in this matter"). As explained below, this determination was fully justified and consistent with DOJ policy and precedent.

B. The Government's Determination Not to Require Judicial Supervision Was Fully Justified Based on the Facts of This Case, DOJ Policy, and Relevant Precedent

In negotiating a corporate resolution, DOJ gives serious consideration to whether a company's ongoing obligations should be subject to independent oversight. If the Government believes that such oversight is necessary, it requires a corporate monitor or probation as part of the resolution.[5]

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3 *See, e.g.*, Plea Agreement, *United States v. J&F Investimentos SA*, No. 20-cr-365-MKB (E.D.N.Y. Oct. 14, 2020), https://www.justice.gov/media/1103326/dl?inline; Plea Agreement, *United States v. Sargeant Marine Inc.*, No. 20-cr-363-ENV (E.D.N.Y. Sept. 22, 2020), https://www.justice.gov/media/1093741/dl?inline.

4 *See, e.g.*, Plea Agreement, *United States v. Glencore Ltd.*, No. 22-cr-71-SVN (D. Conn. May 24, 2022), ECF No. 18, https://www.justice.gov/d9/press-releases/attachments/2023/01/13/dct_plea_agreement_0_0.pdf; Plea Agreement, *United States v. Telefonaktiebolaget LM Ericsson*, No. 19-cr-884-LTS (S.D.N.Y. Mar. 20, 2023), ECF No. 33-1, https://www.justice.gov/media/1283586/dl?inline.

5 *See generally* U.S. Dep't of Justice, *Revised Memorandum on Selection of Monitors in Criminal Division Matters* 3 (Mar. 1, 2023), https://www.justice.gov/opa/speech/file/1571916/download; *compare* Plea Agreement ¶ 7(f), *United States v. Sargeant Marine Inc.*, No. 20-cr-363-ENV (E.D.N.Y. Sept. 22, 2020), https://www.justice.gov/media/1093741/dl?inline (determining that an independent compliance monitor was not necessary "[b]ased on the Defendant's remediation, the state of its compliance program, including ensuring that its compliance program will satisfy the minimum elements set forth in Attachment C to this Agreement (Corporate Compliance Reporting), the Company's risk profile, including the small size of the Company's ongoing operations, and the Defendant's agreement to report to the Fraud Section and the Office as set forth in Attachment D to this Agreement (Reporting Requirements)"), *with* Plea Agreement ¶ 8(g), *United States v. Glencore Int'l A.G.*, No. 22-cr-297-LGS (S.D.N.Y. May 24, 2022), https://www.justice.gov/media/1224391/dl?inline (determining that an independent compliance monitor was "necessary to reduce the risk of recurrence of misconduct" "[b]ecause certain of the Defendant's compliance enhancements are new and

To evaluate whether independent oversight is appropriate, prosecutors must consider several factors, including, among others: (1) whether, at the time of the resolution, the organization implemented an effective compliance program and sufficient controls to detect and prevent similar misconduct in the future; (2) whether the organization adequately tested its compliance program and internal controls to demonstrate that they would likely detect and prevent similar misconduct in the future; and (3) whether the organization took adequate investigative and remedial measures to address the underlying criminal conduct.[6]

DOJ policy distinguishes between circumstances likely to justify independent oversight—i.e., where "a corporation's compliance program and controls are untested, ineffective, inadequately resourced, or not fully implemented at the time of a resolution" and especially where "a compliance program is deficient or inadequate in numerous or significant respects"—and circumstances where such oversight is likely not necessary—i.e., where "a corporation's compliance program and controls are demonstrated to be tested, effective, adequately resourced, and fully implemented at the time of a resolution."[7]

Here, after an extensive review of Trafigura's historic and current compliance program, the remedial measures it implemented, and other "individual facts and circumstances presented by this case" (Plea Agm't ¶ 7), the Government concluded that DOJ policy and the public interest did not warrant independent oversight and did not require probation as part of the sentence. *See id.* ¶ 7(g) ("Based on the Defendant's remediation and the state of its compliance program, including its discontinuation of the use of third-party agents for business origination and other compliance enhancements . . . and the Defendant's agreement to report to [DOJ] as set forth in Attachment D . . . [DOJ] determined that an independent compliance monitor was not necessary.").

The Government's decision not to require a corporate monitor, probation, or any other independent oversight of Trafigura's obligations was justified by the facts and circumstances of this case. In particular, and in contrast to cases in which the Government has reached the opposite conclusion[8]:

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have not been fully implemented or tested to demonstrate that they would prevent and detect similar misconduct in the future . . .").

6 U.S. Dep't of Justice, *Revised Memorandum on Selection of Monitors in Criminal Division Matters*, *supra* note 5, at 2-3.

7 *Id.* at 3.

8 *See, e.g.*, *United States v. Glencore Int'l A.G.* ¶ 7(g), No. 22-cr-297-LGS (S.D.N.Y. May 24, 2022), https://www.justice.gov/media/1224391/dl?inline ("Because certain of the Defendant's compliance enhancements are new and have not been fully implemented or tested to demonstrate that they would prevent and detect similar misconduct in the future, the imposition of a Monitor is necessary to reduce the risk of recurrence of misconduct . . . "); *United States v. Ericsson Egypt Ltd.* ¶ 6(g), No 19-cr-884-AJN (S.D.N.Y. Dec. 6, 2019), ECF No. 6, https://www.justice.gov/media/1043071/dl?inline ("Because the Parent

- Much of the offense conduct took place approximately 10 or more years ago (*see* Plea Agm't, Attachment A ¶ 14);
- Trafigura has "demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct" (*id.* ¶ 7(c));
- The Company cooperated in the Government's investigation "by, among other things: (i) providing timely updates on facts learned during its internal investigation related to conduct described in the Statement of Facts; (ii) making factual presentations to the government; (iii) facilitating the interviews of employees and agents, including an employee located outside the United States, and arranging for counsel for employees where appropriate; and (iv) producing relevant non-privileged documents and data to the government, including documents located outside the United States in ways that navigated foreign data privacy laws, accompanied by translations of certain documents" (*id.*);
- The Company "provided to the government all relevant facts known to it, including information about individuals involved in the conduct" (*id.* ¶ 7(d));
- Prior to and during the negotiations over the Plea Agreement, the Company "engaged in remedial measures, including: (i) developing and implementing enhanced, risk-based policies and procedures relating to, among other things, anti-corruption, use of intermediaries and consultants, third party payments, and joint venture and equity investment risk assessment; (ii) enhancing processes and controls around high-risk transactions; (iii) investment of additional resources in employee training and compliance testing; (iv) enhancing ongoing compliance monitoring and controls testing processes" (*id.* ¶ 7(e));
- Notably, the Company, on its own initiative, "proactively discontinu[ed] the use of third-party agents for business origination" (*id.* ¶ 7(e));
- The Company "has enhanced and has committed to continuing to enhance its compliance program and internal controls, including ensuring that its compliance program satisfies [specific] minimum elements" (*id.* ¶ 7(f));
- The Company agreed to provide "Enhanced Corporate Compliance Reporting" to DOJ (*id.* ¶ 7(g)); and
- The Company agreed "to continue to cooperate with [DOJ] in any ongoing investigation" (*id.* ¶ 7(j)).

Company has not yet fully implemented or tested its compliance program, the Parent Company has agreed to the imposition of an independent compliance monitor to reduce the risk of misconduct, including at its subsidiaries including the defendant, as set forth in Attachment D to the DPA[.]")

The Government had a robust record upon which to reach these conclusions. The Company has provided the Government with several detailed presentations on its compliance program, and made Trafigura's Chief Compliance Officer and external advisors available for multiple discussions with DOJ's compliance specialists. The Company demonstrated to DOJ that this case involved historical misconduct that the Company had fully and appropriately remediated and that was unlikely to recur given the Company's robust compliance framework and the enhanced compliance reporting to which the Company is committing. The Plea Agreement thus requires the Company to "*continue* to implement" a compliance program containing the various sophisticated elements described in Attachment C. Plea Agm't ¶ 8(i) (emphasis added).

The Plea Agreement establishes a system in which the Company must report directly to the Government. This carefully considered structure will allow for robust dialogue between the Company's compliance personnel and DOJ's compliance experts regarding the technical aspects of implementing a global compliance program, evaluating internal accounting controls at a multinational corporation, and monitoring and testing that program on an ongoing basis.

Specifically, over the course of the three-year period, the Company will (i) participate in at least quarterly meetings with the Government to discuss the status of its implementation of the compliance requirements; (ii) submit three annual reports on its compliance efforts; and (iii) meet with the Government following each submission to discuss each annual report. Plea Agm't, Attachment D ¶¶ 6-12. This extensive reporting schedule will give the Government ample opportunity to raise any questions or concerns, and allow the Company adequate time to address them.[9] The Company has also agreed to disclose to DOJ, on a proactive basis, "any evidence or allegation of conduct that may constitute a violation of the FCPA anti-bribery provisions had the conduct occurred within the jurisdiction of the United States." Plea Agm't ¶ 13.

DOJ is well-resourced to engage with Trafigura on compliance matters. Since 2015, nearly a decade ago, DOJ has developed a team of sophisticated compliance specialists who assist prosecutors in evaluating corporate compliance programs and monitoring companies' adherence to their ongoing compliance obligations.[10] This initiative recently led to the creation of DOJ's

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9 In addition, as is now standard in FCPA corporate resolutions, at the end of the three-year period, the Government will obtain certifications from Trafigura Group's Chief Executive Officer and Chief Compliance Officer attesting under the penalty of perjury that the Company had implemented an anti-corruption compliance program that meets the requirements set forth in the Plea Agreement, that such compliance program is reasonably designed to detect and prevent violations of the FCPA and other anti-corruption laws throughout the Company's operations, and that the annual compliance reports submitted by the Company to the Government were true, accurate and complete. *See* Plea Agm't, Attachment F; Plea Agm't ¶ 9 ("Each certification will be deemed a material statement and representation to the executive branch of the United States for purposes of Title 18, United States Code, Sections 1001 and 1519, and it will be deemed to have been made in the judicial district in which this Agreement is filed.")

10 *See e.g.*, Dylan Tokar, *Revamped DOJ Compliance Unit Takes On Greater Role in Corporate Settlements*, WALL ST. J. (June 22, 2022),

Corporate Enforcement, Compliance, and Policy Unit, whose responsibilities include "evaluating corporate compliance programs . . . and overseeing post-resolution matters, including . . . compliance and reporting obligations."[11]

Finally, we note that DOJ uses corporate resolutions as a means of communicating to the public about the factors that drive various terms of an agreement. Market observers dissect and analyze the parameters of such resolutions. The Plea Agreement in this case sends a clear message about the conduct at issue and why it did not lead to the imposition of an independent oversight mechanism, including probation or its equivalent. Out of respect for the considered judgment of the parties, and for DOJ's exercise of prosecutorial discretion and messaging to the public, we respectfully request that the Court accept the Plea Agreement in its current form.

C. The Obligations Imposed by the Plea Agreement Are Fully Enforceable and Subject to Judicial Review

In reaching its agreement with the Government, the Company was mindful that the Government has multiple ways to enforce the terms of the Plea Agreement, and that those enforcement efforts would be subject to judicial oversight. Nothing in the Plea Agreement purports to divest this Court, or federal courts generally, of their well-established jurisdiction to resolve disputes that may arise under the Agreement, including allegations that the Agreement has been breached by either party.

If Trafigura breaches any of its obligations under the Plea Agreement, the Company faces the risk that the Plea Agreement would be extended for up to one year (Plea Agm't ¶ 1) or the much more serious risk of indictment and prosecution, including based on the Statement of Facts to which the Company admits under the Plea Agreement. *See* Gov't Ltr. 2; Plea Agm't ¶ 26. That is a serious and meaningful threat. If the Government were to avail itself of this remedy, the Company could move to dismiss the indictment on the grounds that the Plea Agreement bars such a prosecution. A court would then need to determine whether the Plea Agreement was breached and, if so, whether the new prosecution is authorized. *See United States v. Carlson*, 87 F.3d 440, 447 (11th Cir. 1996) (explaining that whether a plea agreement was breached is a "question of law" for the court).

Similarly, if, in the course of its dealings with the Government, the Company believes that the Government is acting in bad faith or has otherwise breached its obligations under the Plea Agreement, the Company likewise can seek judicial relief. *See, e.g.*, *San Pedro v. United States*, 79 F.3d 1065, 1067 (11th Cir. 1996) (defendant filed a Petition for Writ of Mandamus or Prohibition seeking to compel government to comply with plea agreement); *United States v. Johnson*, 132 F.3d 628, 631 (11th Cir. 1998) ("Two remedies are available for the government's

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https://www.wsj.com/articles/revamped-doj-compliance-unit-takes-on-greater-role-in-corporate-settlements-11655940214.

[11] U.S. Dep't of Justice, *Corporate Enforcement, Compliance, and Policy Unit* (last updated Aug. 11, 2023), https://www.justice.gov/criminal/criminal-fraud/corporate-enforcement-compliance-and-policy-unit.

breach of a plea agreement: specific performance of the agreement or withdrawal of the guilty plea.").

Thus, Trafigura respectfully submits that the Plea Agreement provides both the Government and the Company with adequate remedies, including ultimate recourse to an Article III court, in the event of a dispute arising under the Plea Agreement.

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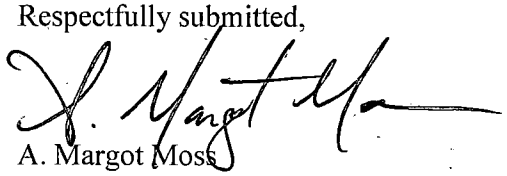
For the reasons stated above, the Company respectfully joins the Government in requesting that the Court accept the Plea Agreement negotiated and agreed by the parties without modification. We also request an opportunity to further discuss these issues if the Court has additional questions.

Respectfully submitted,



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