PCA Case No. 2018-56

IN THE MATTER OF AN ARBITRATION UNDER THE UNITED STATES – COLOMBIA TRADE PROMOTION AGREEMENT, SIGNED ON 22 NOVEMBER 2006 AND ENTERED INTO FORCE ON 15 MAY 2012

- and -

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, AS REVISED IN 2013 (the "UNCITRAL Rules")

- between -

1. ALBERTO CARRIZOSA GELZIS
2. FELIPE CARRIZOSA GELZIS
3. ENRIQUE CARRIZOSA GELZIS

(the "Claimants")

- and -

THE REPUBLIC OF COLOMBIA

(the "Respondent", and together with the Claimants, the "Parties")

PROCEDURAL ORDER NO. 2

Presentation of Claimants' Witnesses at the Hearing on Jurisdiction

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Tribunal
Mr. John Beechey CBE (Presiding Arbitrator)
Prof. Franco Ferrari
Mr. Christer Söderlund

Assistant to the Tribunal
Mr. Niccolò Landi

Registry
Permanent Court of Arbitration

6 April 2020

I. Background

1. On 20 March 2020, the Claimants provided their notification of witnesses and experts for examination at the Hearing on Jurisdiction scheduled for the week commencing 27 July 2020 (the "**Hearing**"), stating, *inter alia*, as follows:

> Claimants wish to respectively examine (including, if necessary, re-examination) and cross-examine each and every witness and expert introduced in the proceeding by the Parties and having filed a witness statement and/or an expert report or legal opinion in the present proceeding.

2. On the same day, the Respondent (i) called on Claimants to produce at the Hearing for cross-examination Dr. Martha Teresa Briceño de Valencia; and (ii) requested "that the Tribunal reject Claimants' attempt to call [their] own witnesses and experts for examination at the hearing."

3. By e-mail of the same date, the Claimants requested leave to (i) call for the appearance at the Hearing of the witnesses and experts referred in their earlier communication of the same day; and (ii) "expand on the reasons for granting the presence of their experts and witnesses."

4. On 24 March 2020, with the leave of the Tribunal, the Claimants filed their Supplemental Submission in Support of their Application for the Presentation of Claimants' Witnesses and Experts at the Hearing (the "**Claimants' Supplemental Submission**").

5. On 30 March 2020, with the leave of the Tribunal, the Respondent submitted its Response to Claimants' Submission Regarding the Examination of Claimants' Witnesses and Experts (the "**Respondent's Response**").

II. The Claimants' Application to Present their Witnesses at the Hearing

6. The Claimants have requested leave to examine "every witness and expert introduced in the proceeding by the Parties."[1] They include:

   (i) The Claimants themselves, Messrs. Alberto, Felipe and Enrique Carrizosa Gelzis, and their mother, Ms. Astrida Benita Carrizosa; Prof. Loukas Mistelis, Mr. Olin Wethington, Prof. Jack J. Coe, Dr. Martha Teresa Briceño de Valencia, Dr. Luis Fernando López Roca, Dr. Antonio L. Argiz and Dr. Alfonso Vargas Rincón, all presented by the Claimants; and

   (ii) Dr. Jorge Enrique Ibáñez Najar, retained as an expert by the Respondent.

7. The Claimants note that the Respondent has only submitted testimony in response to the evidence of Drs. López Roca and Briceño and has elected to cross-examine Dr. Briceño alone.[2] In doing so, the Respondent has, in the Claimants' submission, "fractured the testimony and the issues before the Tribunal, underscoring the need to address the many propositions that the Respondent has simply ignored."[3]

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1 Claimants' Supplemental Submission, paras. 6, 60-61.

2 Claimants' Supplemental Submission, paras. 3, 8.

3 Claimants' Supplemental Submission, paras. 4, 11-12.

8. First, the Claimants contend that the testimony of the Claimants and their mother is central to the question of whether the Claimants' US nationality is "dominant and effective", a matter that is underpinned by a qualitative test including a non-exhaustive list of factors such as "how" and "why" dual nationality status was obtained, residence, financial ties and cultural and other considerations.[4] In the Claimants' view, the Tribunal would be unable to hear and assess the witnesses' responses to the factual claims made by the Respondent or seek clarifications regarding their testimony on each of the above factors on the sole basis of a paper record.[5]

9. Second, the Claimants characterize the evidence of Mr. Wethington and Profs. Mistelis and Coe, as relevant to "the identification of the actual scope of application and objectives of the U.S. Colombia TPA, including, *inter alia*, the jurisdictional protections and substantive protections made available to investors in the financial sector."[6] They note that Mr. Wethington's evidence concerns his service as a lead negotiator of NAFTA (from which the Claimants claim the US-Colombia TPA draws its structure, approach and language),[7] while Profs. Mistelis and Coe have presented evidence regarding, respectively, treaty practice regarding the scope of application of MFN clauses[8] and the "insufficiency of a 'plain meaning' analysis of the TPA's provisions relevant to Chapter 12's scope and coverage."[9] The Claimants say that the Respondent has elected to respond to all of this evidence through the submissions of counsel and nothing more.[10] They consider that to be insufficient, because (i) the object, context and purpose of a treaty, as components of interpretation, are factual in nature;[11] (ii) it ignores testimony on treaty practice, drafting and structure.[12]

10. Third, the Claimants seek to rely on the opinions of four experts,[13]whose evidence, they say, goes to the question whether there is a *prima facie* showing of wrongdoing by the Respondent.[14] Prof. Coe addresses "legal principles and standards governing foreign investors' interactions with national adjudicative systems" and their application in the instant case. Claimants suggest that he should be granted an opportunity to address arguments of counsel made only after the submission of his expert's report.[15] Prof. López Roca examines the judicial proceedings at the center of the case and the governmental actions giving rise to them, which are matters that will be discussed by the Respondent's expert, Dr. Ibáñez, at the Hearing.[16] Dr. Vargas Rincón, a former member of the Colombian Council of State, has presented evidence regarding the Council, the scope of its jurisdiction and its actions in connection with this case.[17]

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4 Claimants' Supplemental Submission, paras. 15-16.

5 Claimants' Supplemental Submission, paras. 18-19.

6 Claimants' Supplemental Submission, paras. 22-23.

7 Claimants' Supplemental Submission, paras. 25-26.

8 Claimants' Supplemental Submission, paras. 28-29.

9 Claimants' Supplemental Submission, para. 30.

10 Claimants' Supplemental Submission, para. 32.

11 Claimants' Supplemental Submission, para. 33.

12 Claimants' Supplemental Submission, paras. 34-35.

13 Including Dr. Briceño, who has been called to testify by the Respondent and is therefore not included in the Claimants' Application.

14 Claimants' Supplemental Submission, paras. 37-53.

15 Claimants' Supplemental Submission, paras. 40-42.

16 Claimants' Supplemental Submission, paras. 45-49.

17 Claimants' Supplemental Submission, paras. 50-53.

11. Finally, the Claimants have submitted an expert damages report from Dr. Argiz "in order to comply with basic jurisdictional requirements regarding damages," and who would be in a position to provide clarifications to the Tribunal at the Hearing if so requested.[18]

III. The Respondent's Position

12. The Respondent submits that the Claimants have failed to provide a valid justification for the presence of their own witnesses and experts (other than Dr. Briceño) to testify at the Hearing[19] and whom they have no inherent right to examine in any event.[20]

13. First, the Respondent refers to Sections 7.4 and 7.5 of Procedural Order No. 1, which provide that :

> 7.4 Before any oral hearing, and within the deadline set forth in the procedural calendar, a Party may be called upon by the Tribunal or the other Party to produce at the hearing for examination and cross-examination any witness or expert whose written testimony has been submitted with the written submissions. Should a Party wish to present any of its own witnesses or experts for examination at the hearing who have not been called by the Tribunal or the other Party, it shall request leave from the Tribunal.
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> 7.5 Each Party shall be responsible for summoning each witness to the applicable hearing, except when the other Party has waived cross-examination of a witness and the Tribunal does not direct his or her appearance, in which case the witness in question shall not appear in the hearing as a witness.

14. The Respondent reads the above provisions as stating that: (i) the rule in the present proceeding is that a witness or expert will only appear in the hearing as a witness if he or she is called by the Tribunal or the other Party; and (ii) a Party may apply for an exception to this default rule.[21] Thus, the enforcement of Section 7.5 would not violate any of the Claimants' due process rights.[22] The Respondent also believes that the Claimants had not taken account of the above provisions when they submitted their initial 20 March 2020 communication, and only later "recast" their notification as an application for leave in their Supplemental Submission.[23]

15. In the Respondent's view, the Claimants are attempting to create a third opportunity to present testimony following the presentation of their Memorial and Reply on Jurisdiction,[24] and to address the merits of their claims during a jurisdictional hearing.[25] In this regard, the Respondent notes that it has not raised any objection to the effect that the Claimants have failed to assert a *prima facie* claim under the Treaty. That concession renders the testimony on the merits of Prof. Coe, Dr. López Roca, Dr. Vargas Rincón and Dr. Argiz unnecessary at this stage of the proceedings.[26]

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18 Claimants' Supplemental Submission, paras. 54-55.

19 Respondent's Response, para. 1.

20 Respondent's Response, para. 3.

21 Respondent's Response, para. 7.

22 Respondent's Response, para. 8.

23 Respondent's Response, para. 3.

24 Respondent's Response, paras. 10-11, 15.

25 Respondent's Response, para. 12.

26 Respondent's Response, para. 13.

16. Finally, the Respondent rejects the Claimants' assertion that it seeks to confine the Tribunal's consideration of treaty issues to a "no-evidence, no-witness, and possible single-reading" approach. It points to the "ample evidence and legal authorities" filed in support of its interpretation of the US-Colombia TPA.[27]

IV. Analysis

17. The Tribunal turns first to the Respondent's contention that the Claimants' initial communication of 20 March 2020 did not amount to an application for leave to call their own witnesses and experts pursuant to Section 7.4 of Procedural Order No. 1. That provision requires a Party, which wishes to present any of its own witnesses or experts at the hearing whom neither the Tribunal, nor the other Party has called to request leave from the Tribunal. The Tribunal observes that the Claimants' second communication of 20 March 2020 constituted a clear application for leave, even if the first did not, and it could hardly be said that the Respondent would suffer any prejudice if the Tribunal were to entertain such application.

18. Thus, the question before the Tribunal is whether, leave having been validly requested and an objection having been raised, leave should be granted.

19. The Tribunal notes at the outset that the Parties are in agreement that Drs. Briceño and Ibañez should be examined at the Hearing. The Claimants' application for leave to present its fact and expert witnesses at the Hearing is therefore limited to those of its witnesses and experts whom the Respondent has not called to testify, that is, Messrs. Alberto, Felipe and Enrique Carrizosa Gelzis, Ms. Astrida Benita Carrizosa (witnesses of fact); and experts, Prof. Mistelis, Mr. Wethington, Prof. Coe, Dr. López Roca, Dr. Argiz and Dr. Vargas Rincón.

20. Section 7.4 of Procedural Order No. 1 is clear in that a Party may decide, in its discretion, whether to request that the other Party produce one of its witnesses at the Hearing. In turn, Articles 4.7 and 5.6 of the IBA Rules on the Taking of Evidence in International Arbitration 2010 (the "**IBA Rules**") confirm that a decision not to call a witness of fact or an expert is not to be taken as presumptive of an agreement that the contents of the statement or report are correct. It is therefore clear that the Respondent is entitled to decline to call the above individuals for questioning and it need not provide a justification for doing so.

21. However, the Tribunal does not accept the Respondent's proposition that "the rule of the present proceeding is that a witness or expert will only appear in the hearing as a witness if he or she is called by the Tribunal or the other Party."[28] That contention overlooks the express provision in Section 7.4 of Procedural Order No. 1 permitting a Party to seek leave to present its own witnesses. That provision is in line with Article 8.1 of the IBA Rules, which reads, in relevant part:

> Within the time ordered by the Arbitral Tribunal, each Party shall inform the Arbitral Tribunal and the other Parties of the witnesses whose appearance it requests. Each witness (which term includes, for the purposes of this Article, witnesses of fact and any experts) shall, subject to Article 8.2 [governing the power of the Tribunal to limit or exclude the appearance of a witness], appear for testimony at the Evidentiary Hearing if such person's appearance has been requested by any Party or by the Arbitral Tribunal.

[27] Respondent's Response, paras. 14-15.

[28] Respondent's Response, para. 7.

22. None of the above provisions suggests that the appearance of a fact or expert witness is a matter lying solely in the hands of the party adverse to that which has tendered the evidence. Nor does Section 7.5 of Procedural Order No. 1 have the effect of absolving a party of its obligation to summon a witness to the hearing simply because the adverse party has waived its right to cross-examination; the witness must attend if the Tribunal so directs.

23. As to the relevant test for ordering the appearance of a witness or expert, the Tribunal cannot accept the Respondent's assertion that the Claimants must demonstrate "exceptional circumstances or compelling need for the Tribunal to allow Claimants to call its witnesses and experts."[29] The Tribunal recalls that it has ample discretion under Article 28(2) of the UNCITRAL Rules to set the manner in which witnesses and experts may be examined and the conditions under which they may be heard, in light of all relevant circumstances. Further, under Article 17(1) of the UNCITRAL Rules, the Tribunal, in exercising its discretion, must "conduct the proceedings so as to avoid unnecessary delay and expense" and "provide a fair and efficient process for resolving the parties' dispute."

24. In determining which of the Claimants' witnesses should be allowed to appear before the Tribunal, the Tribunal recalls the Parties' agreement that the upcoming hearing be devoted solely to matters of jurisdiction.[30] In line with the agreement of the Parties, the Tribunal is inclined to limit the appearance of witnesses and experts at the Hearing to those who have offered written testimony, which deals with key issues of jurisdiction. Where a fact or expert witness has offered testimony dealing with matters tangentially related to the Tribunal's jurisdiction or going beyond it, the Tribunal considers that the testing of their evidence at the Hearing would not be in the interest of fairness and efficiency, and therefore their appearance should be excluded.

25. Applying these considerations to the instant case, the Tribunal notes first that the testimony of Messrs. Alberto, Felipe and Enrique Carrizosa Gelzis concerns, *inter alia*, their citizenship, education, careers and other biographical information, all of which are matters *prima facie* relevant to the determination of the Tribunal's jurisdiction *ratione personae*. As such, the Tribunal considers that their appearance at the Hearing would be justified, but on the clear understanding that that is so, insofar as their oral testimony is limited to matters relevant to Tribunal's jurisdiction *ratione personae*. Other matters on which the Claimants have offered written testimony, such as the actions of the Respondent's instrumentalities giving rise to this dispute, are intertwined with the merits. They are thus better canvassed on the basis of the paper record at this juncture.

26. Further, the Tribunal considers that the testimony of Mr. Wethington and Prof. Mistelis, which deals with matters of treaty interpretation, falls within the jurisdictional matters that will be under consideration at the Hearing. As such, the testing of their evidence at the Hearing is warranted.

27. The Tribunal notes that the Respondent has confirmed that it does not maintain an objection concerning the Claimants' failure to submit a *prima facie* case on the merits.[31] That being so, the Tribunal concludes that the testimony of Profs. Coe and Cohen, which goes to matters intertwined with the merits need not be addressed at the Hearing.

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29 Respondent's communication of 20 March 2020, para. 4.

30 *See* Parties' communications of 8 December 2018.

31 Respondent's Response, para. 13; Answer on Jurisdiction, paras. 155-157.

28. On the basis that it is not evidence relevant and material to the jurisdictional objections raised by Respondent with which the Tribunal must deal at the Hearing, the Tribunal rejects the Claimants' request for leave to call Ms. Astrida Benita Carrizosa, Dr. López Roca, Dr. Argiz and Dr. Vargas Rincón to give evidence at the Hearing. The written testimony offered by these individuals is insufficiently linked to the Respondent's jurisdictional objections to warrant their examination at the Hearing.

V. Decision

29. For the reasons set out above, the Tribunal grants leave to the Claimants to call evidence from:

(i) Messrs. Alberto, Felipe and Enrique Carrizosa Gelzis, but strictly on matters going to the Tribunal's jurisdiction *ratione personae* only;

(ii) Mr. Olin Wethington; and

(iii) Prof. Loukas Mistelis.

30. The Tribunal directs and reiterates that evidence to be given by any witness or expert whom the Claimants call to testify at the Hearing shall be limited strictly to the issues of jurisdiction upon which the Tribunal is to be addressed.

Place of Arbitration: London, United Kingdom

Mr. John Beechey CBE
(Presiding Arbitrator)

On behalf of the Tribunal