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")

PCA Case No. 2018-56

In the Matter of Arbitration Between:

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

Claimants,

and

THE REPUBLIC OF COLOMBIA,

Respondent.

Volume 2

VIDEOCONFERENCE: HEARING ON JURISDICTION

Tuesday, December 15, 2020

Washington, D.C.

The hearing in the above-entitled matter convened at 9:04 a.m. (EST) before:

MR. JOHN BEECHEY, CBE, Presiding Arbitrator

PROF. FRANCO FERRARI, Co-Arbitrator

MR. CHRISTER SÖDERLUND, Co-Arbitrator

ALSO PRESENT:

Registry of the Permanent Court of Arbitration:

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PCA Secretary of the Tribunal

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1 P R O C E E D I N G S

2 PRESIDENT BEECHEY: Ladies and gentlemen, good

3 morning. Day 2 of this Hearing, Jurisdictional Hearing.

4 Are there any housekeeping matters that the

5 Parties want to raise with us before we hear from the

6 United States?

7 MR. MARTÍNEZ-FRAGA: Good morning, Mr. President.

8 Not on Claimants' behalf.

9 PRESIDENT BEECHEY: Thank you, Mr. Martínez-Fraga.

10 And for Respondent? Mr. Di Rosa?

11 MR. DI ROSA: No, none for us. Thank you,

12 Mr. President.

13 PRESIDENT BEECHEY: Very well. In that event,

14 Ms. Thornton, the floor is yours.

15 STATEMENT BY NON-DISPUTING PARTY

16 MS. THORNTON: Great. Thank you, Mr. President

17 and Members of the Tribunal for this opportunity. My name

18 is Nicole Thornton. I am the Chief of Investment

19 Arbitration and the Office of International Claims and

20 Investment Disputes at the U.S. Department of State.

21 The United States makes its submission pursuant to

22 Article 1022 of the U.S.-Colombia Trade Promotion

23 Agreement, or TPA, on issues of treaty interpretation. The

24 United States does not take the position on how these

25 treaty interpretation issues apply to the facts of this

1 case.

2 Moreover, as is the case with every statement we

3 make as a non-disputing party in this and all other cases,

4 including the Fireman's Fund Case under the NAFTA, no

5 inference should be drawn from the absence of comment on

6 any issue not addressed in this submission.

7 We have listened to the Disputing Parties' Opening

8 Statements with interest and would like to briefly address

9 a few issues that were raised in addition to those

10 addressed in our non-disputing party submission of May 1 of

11 this year.

12 The first issue concerns Footnote 2 to

13 Article 10.4 and the significance of the words "for greater

14 certainty" at the beginning of that footnote. As a general

15 practice, the United States uses the words "for greater

16 certainty" in its International Trade Investment Agreements

17 to introduce confirmation regarding the meaning of

18 "agreement." In U.S. practice, the phrase "for greater

19 certainty" signals that the sentence it introduces reflects

20 the understanding of the United States and the other

21 agreement party or parties of what the provisions of the

22 Agreement would mean even if that sentence were absent.

23 As a consequence, "for greater certainty"

24 sentences also serve to spell out more explicitly the

25 proper interpretation of similar provisions mutatis

1 mutandis and other agreements or in the same agreement.
2 United States has previously made a statement to
3 this effect in Footnote 24 of our non-disputing party
4 submission in Omega v. Panamá, an ICSID Arbitration
5 pursuant to the U.S. Trade Promotion Agreement and
6 Bilateral Investment Treaty with Panamá. And that
7 submission is publicly available on our website, and we
8 would be happy to provide it to the Tribunal and the
9 disputing parties, if that would be helpful.
10 The second issue concerns the expropriation
11 provision in Article 10.7, which is incorporated into
12 Chapter 12 via Article 12.1.2 (b). The expropriation
13 provision refers to Article 10.5, the Minimum Standard of
14 Treatment, in subparagraph (d) of Article 10.7.1. This
15 reference, Article 10.5, does not mean, however, that an
16 obligation to accord fair and equitable treatment is
17 incorporated either into Article 10.7 or Chapter 12.
18 Rather, the reference to 10.5 simply provides that to be
19 lawful under Article 10.7, an expropriation must comply
20 with all the parameters listed in subparagraphs (a) through
21 (d), including the customary international law minimum
22 standard of treatment.
23 As made clear in the first and second paragraphs
24 of Article 10.5, covered investments under the TPA must be
25 accorded customary international law Minimum Standard of

1 Treatment. Footnote 3, found at the end of Article 10.5's
2 title, further explains that Article 10.5 is to be
3 interpreted in accordance with Annex 10A, the customary
4 international law annex.
5 That annex confirms that Article 10.5 refers to
6 the Minimum Standard of Treatment and explains that the
7 Minimum Standard of Treatment refers to all customary
8 international principles that protect the economic
9 interests of aliens.
10 The Minimum Standard of Treatment is an umbrella
11 concept reflecting a set of rules that, over time, has
12 crystallized into customary international law, in specific
13 contexts.
14 And currently customary international law has
15 crystallized to establish a Minimum Standard of Treatment
16 in only a few areas. One such area expressly addressed in
17 Article 10.5.1 and 2(a) concerns the obligation to provide
18 fair and equitable treatment. The fair and equitable
19 treatment obligation includes, as stated in
20 Article 10.5.2(a), the obligation not to deny justice in
21 criminal, civil, or administrative adjudicatory
22 proceedings.
23 Another such area concerns the obligation to
24 provide full protection and security, which is addressed in
25 Article 10.5.1 and 2(b). The Minimum Standard of Treatment

1 also includes the obligation not to expropriate covered
2 investments except under the conditions specified in the
3 separate article devoted to expropriation, namely,
4 Article 10.7.
5 It is this latter component of the Minimum
6 Standard of Treatment that is being referred to in
7 Article 10.7.1(d). There is no ability to bring a fair and
8 equitable treatment claim under 10.7 in a Chapter 10
9 arbitration. Such a claim must be brought under
10 Article 10.5. Similarly, there is no ability to bring a
11 fair and equitable treatment claim in Chapter 12 by virtue
12 of Article 10.7.
13 An FET claim can only be brought under
14 Article 10.5, which is not incorporated into Chapter 12.
15 There is no FET obligation falling within the scope of
16 Chapter 12.
17 The third issue we would like to address concerns
18 the shared interpretations of the State Parties to the TPA
19 as to its provisions and Article 31(3)(a) and (b) of the
20 Vienna Convention on the Law of Treaties. Although the
21 United States is not a party to the Vienna Convention, we
22 consider that Article 31 reflects customary international
23 law on treaty interpretation.
24 Dates are well placed to provide authentic
25 interpretation of their treaties, including in proceedings

1 before investor-State tribunals like this one. TPA
2 Article 1022 ensures the non-disputing TPA Party has an
3 opportunity to provide its views on the correct
4 interpretation of the TPA. And the United States
5 consistently includes provision for such submissions in its
6 Investment Agreements.
7 Article 31 of the Vienna Convention on the Law of
8 Treaties recognizes the important role that the State's
9 Parties play in the interpretation of their agreements. In
10 particular, Paragraph 3 states that, "in interpreting a
11 treaty, there shall be taken into account, together with
12 the context, any subsequent agreement between the Parties
13 regarding the interpretation of the Treaty or application
14 of its provisions and any subsequent practice in the
15 application of the Treaty which establishes the agreement
16 of the Parties regarding its interpretation."
17 Article 31 of the Vienna Convention is framed in
18 mandatory terms. Subsequent agreements between the Parties
19 and subsequent practice of the Parties shall be taken into
20 account. Notably, several Investment Tribunals constituted
21 under the NAFTA have agreed that submissions by the NAFTA
22 Parties in arbitrations under Chapter 11, including
23 non-disputing party submissions may serve to form
24 subsequent practice.
25 For example, the Mobil v. Canada Tribunal found

1 that arbitral submissions by the NAFTA Parties constituted
2 subsequent practice and observed that: "The subsequent
3 practice of the Parties to a treaty, if it establishes the
4 agreement of the Parties regarding the interpretation of
5 the Treaty, is entitled to be accorded considerable
6 weight." And I would point you to Paragraphs 103, 104, and
7 158-160 of the Mobil v. Canada Decision on Jurisdiction and
8 Admissibility of 2018.
9 The Tribunal in Bilcon v. Canada reached a similar
10 conclusion at Paragraphs 376-379 of its January 2019 Award
11 on Damages, as did the Tribunal in the Canadian Cattlemen
12 for Fair Trade v. The United States at Paragraphs 188-189
13 of its January 2008 Award on Jurisdiction.
14 The International Law Commission has likewise
15 commented that subsequent practice may include statements
16 in the course of a legal dispute. Accordingly, where the
17 TPA Parties' submissions in an arbitration evidence a
18 common understanding of the given provision, this
19 constitutes subsequent practice that must be taken into
20 account by the Tribunal under Article 31(3)(b).
21 To sum up on this third issue, if the Tribunal
22 considers the concordant interpretations presented by the
23 two TPA Parties in this proceeding, as a subsequent
24 agreement under 31(3)(a), as a subsequent practice under
25 31(3)(b), or both, on any particular provision, the outcome

1 is the same. The Tribunal must take the TPA Parties'
2 common understanding of the provisions of their Treaty as
3 evidenced by their submission into account.
4 A fourth point the United States would like to
5 raise, just as a brief observation, is with respect to the
6 negotiation of the financial services chapter of the NAFTA.
7 When negotiating the chapters of trade agreements such as
8 the financial services chapter of the NAFTA, the United
9 States uses interagency committees called trade policy
10 review group and the trade policy staff committee to make
11 decisions on what to propose to include in the text of the
12 Agreement. These committees are made up of 20 different
13 executive branch agencies. The U.S. position with respect
14 to the scope of NAFTA Chapter 14 was not decided by one or
15 even a few individuals.
16 In the same vein, complex international trade
17 negotiations reflect input from multiple different
18 participants in each of the countries that is party to the
19 Agreement. No one participant's recollections substitute
20 for formal travaux préparatoires or other record of the
21 negotiations.
22 Finally, for the avoidance of doubt, we stand by
23 the interpretations on all other matters set forth in our
24 written non-disputing party submission from May 1st of this
25 year.

1 Thank you, Mr. President and Members of the
2 Tribunal, for your time and attention.
3 PRESIDENT BEECHEY: Ms. Thornton, thank you very
4 much indeed.
5 As I understand it, the Parties have proceeded on
6 the basis that, to the extent they wish to comment upon the
7 matters that we've just heard, they will be doing so in
8 their Closing Submissions.
9 So, with that being the case, we can proceed, I
10 think, to the examination of the Fact Witnesses for the
11 Claimants; correct?
12 MR. MARTÍNEZ-FRAGA: Correct.
13 PRESIDENT BEECHEY: Very well. Now, the order, as
14 I understand it, is Mr. Enrique Carrizosa and then
15 Mr. Alberto Carrizosa and then, finally, Mr. Felipe
16 Carrizosa. We will proceed on that basis.
17 Mr. Reetz, I think you are introducing the
18 evidence of Mr. Enrique Carrizosa.
19 MR. MARTÍNEZ-FRAGA: Mr. President and Members of
20 the Tribunal, I'll have to respectfully absent myself so
21 that Mr. Reetz can take my place.
22 PRESIDENT BEECHEY: All right. No, that's fine.
23 The other point is that as soon as you are ready
24 to go, I shall ask the PCA to put up on the screen the
25 Declaration that will require the witnesses of fact to make