

PCA Case No. 2018-56

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

TERMS OF APPOINTMENT

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

February 15, 2019

1. Parties to the Arbitration

The Claimants	Counsel for the Claimants
1. Alberto Carrizosa Gelzis	Mr. Pedro J. Martínez-Fraga Mr. C. Ryan Reetz Mr. Mark Leadlove Mr. Domenico Di Pietro Mr. Joaquín Moreno Pampín Bryan Cave Leighton Paisner LLP 200 S. Biscayne Boulevard, Suite 400 Miami, Florida 33131 United States of America
2. Felipe Carrizosa Gelzis	
3. Enrique Carrizosa Gelzis	Tel.: +1 (786) 322-7500 Fax: +1 (786) 322-7501 E-mail: pedro.martinezfraga@bryancave.com ryan.reetz@bryancave.com mbleadlove@bryancave.com domenico.dipietro@bryancave.com joaquin.pampin@bryancave.com

The Respondent	Counsel for the Respondent
The Republic of Colombia	Ms. Ana María Ordóñez Puentes Mr. Andrés Felipe Esteban Tovar Agencia Nacional de Defensa Jurídica del Estado Cra. 7 No. 75-66, pisos 2-3 Bogota D.C., 110221 Colombia Tel.: (571) 2558955 ext. 199 E-mail: ana.ordonez@defensajuridica.gov.co andres.esteban@defensajuridica.gov.co arbitrajesdeinversión@defensajuridica.gov.co
	Mr. Nicolás Palau van Hissenhoven Director de Inversión Extranjera y Servicios Dirección de Inversión Extranjera y Servicios Ministerio de Comercio, Industria y Turismo Calle 28 No. 13 A-15, piso 5 Bogota D.C. Colombia Tel.: (571) 6067676 ext. 2130 E-mail: npalau@mincit.gov.co
	Mr. Paolo Di Rosa Arnold & Porter Kaye Scholer LLP 601 Massachusetts Avenue NW Washington, DC 20001 United States of America E-mail: paolo.dirosa@arnoldporter.com
	Mr. Patricio Grané Labat Arnold & Porter Kaye Scholer LLP Tower 42 25 Old Broad Street London EC2N 1HQ United Kingdom E-mail: patricio.grane@arnoldporter.com xcolombiacarrizosa@arnoldporter.com

2. The Dispute and Commencement of the Arbitration

- 2.1 According to the Claimants, a dispute has arisen between the Parties under the *U.S. – Colombia Trade Promotion Agreement*, signed on November 22, 2006 and entered into force on May 15, 2012 (the “**US-Colombia TPA**”).
- 2.2 By Notice of Arbitration dated January 24, 2018, the Claimants commenced arbitration proceedings against the Respondent pursuant to Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law, as revised in 2013 (the “**UNCITRAL Rules**”); Articles 12.1, 12.2 and 12.3 of the US-Colombia TPA; Articles 1, 3(2), 3(3), 3(4), 4 and 6 of the *Agreement for the Promotion and Protection of Investments between the Republic of Colombia and the Republic of India*, dated July 2, 2012 (the “**Colombia-India BIT**”) and Article 11 of the *Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments*, dated October 6, 2009 (the “**Colombia-Switzerland BIT**”) (jointly referred to as the “**Treaties**”). The Notice of Arbitration was received by the Respondent on January 25, 2018.
- 2.3 Article 12.3 of the US-Colombia TPA (the “**MFN Provision**”) provides as follows:
1. *Each Party shall accord to investors of another Party, investments of investors in financial institutions, and cross-border financial service suppliers of another Party treatment no less favorable than that it accords to the investors, financial institutions, investments of investors in financial institutions, and cross-border financial service suppliers of another Party or of a non-Party, in like circumstances.*
- 2.4 According to the Claimants, the MFN Provision allows them to benefit from Article 11 of the Colombia-Switzerland BIT, which provides:
- (1) *If an investor of a Party considers that a measure applied by the other Party is inconsistent with an obligation of this Agreement, thus causing loss or damage to him or his investment, he may request consultations with a view to resolving the matter amicably.*
- (2) *Any such matter which has not been settled within a period of six months from the date of written request for consultations may be referred to the courts or administrative tribunals of the Party concerned or to international arbitration. In the latter event the investor has the choice between either of the following:*
- (a) *the International Centre for Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on March 18, 1965; and*
- (b) *an ad hoc-arbitral tribunal which, unless otherwise agreed upon by the parties to the dispute, shall be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).*
- (3) *Each Party hereby gives its unconditional and irrevocable consent to the submission of an investment dispute to international arbitration in accordance with paragraph 2 above, except for disputes with regard to Article 10 paragraph 2 of this Agreement.*
- (4) *Once the investor has referred the dispute to either a national tribunal or any of the international arbitration mechanisms provided for in paragraph 2 above, the choice of the procedure shall be final.*

- (5) *An investor may not submit a dispute for resolution according to this Article if more than five years have elapsed from the date the investor first acquired or should have acquired knowledge of the events giving rise to the dispute.*
 - (6) *The Party which is a party to the dispute shall at no time whatsoever during the process assert as a defence its immunity or the fact that the investor has received, by virtue of an insurance contract, a compensation covering the whole or part of the incurred damage.*
 - (7) *Neither Party shall pursue through diplomatic channels a dispute submitted to international arbitration unless the other Party does not abide by and comply with the arbitral award.*
 - (8) *The arbitral award shall be final and binding for the parties to the dispute and shall be executed without delay according to the law of the Party concerned.*
- 2.5 The Respondent argues that it has not consented to arbitrate this dispute under any of the Treaties. *Inter alia*, the Respondent rejects the proposition that the Claimants are entitled to rely on the MFN Provision to establish the Respondent's consent to UNCITRAL arbitration under Article 11 of the Colombia-Switzerland BIT. The Respondent has indicated that it will file preliminary objections to the jurisdiction of the Tribunal under the Treaties and will seek bifurcation of jurisdiction and merits, including pursuant to Article 10.20(4) of the US-Colombia TPA and/or Article 23 of the UNCITRAL Rules.
- 2.6 According to Article 3(2) of the UNCITRAL Rules, these arbitration proceedings are deemed to have commenced on January 25, 2018, the date upon which the Respondent received the Notice of Arbitration.

3. Applicable Procedural Rules

- 3.1 By agreement of the Parties, this arbitration shall be conducted in accordance with the UNCITRAL Rules.
- 3.2 By agreement of the Parties, the Secretary-General of the Permanent Court of Arbitration (the "PCA") acts as the appointing authority in this arbitration for all purposes under the UNCITRAL Rules.
- 3.3 Procedural orders shall be signed and issued by the presiding arbitrator alone after consultation with his co-arbitrators. In cases of urgency or if a co-arbitrator cannot be reached in a timely manner, the presiding arbitrator may take procedural decisions on his own, subject to reconsideration and revision, as appropriate, by the full Tribunal.
- 3.4 The Tribunal will issue all rulings, including the Final Award, within a reasonable time period. Specifically, the Tribunal will endeavor to render its Final Award within twelve (12) months of the deadline for the filing of the Parties' Statements of Costs.
- 3.5 If a ruling on a procedural matter or a specific application by a Party has not been issued within one (1) month of the final submission by the Parties on that matter, or if the Final Award is not rendered within twelve (12) months of the deadline for the filing of the Parties' Statements of Costs, the Tribunal, upon the written request of either Party, shall provide the Parties with a status update.

4. Representation

- 4.1 The Parties have designated their respective representatives listed above as being authorized to act on their behalf in these arbitration proceedings.
- 4.2 To the extent they have not already done so, the Parties shall confirm these designations by each providing to the others copies of the powers of attorney or letter(s) of representation granted to its representative(s).
- 4.3 In the event of any change by a Party of its representatives or of the contact details of any of its representatives, that change shall be notified promptly in writing to opposing counsel, to each member of the Tribunal, to the Assistant to the Tribunal and to the PCA. The Tribunal reserves the right to exclude any representative from participating in any hearing or other meeting if his or her participation has not been duly notified sufficiently in advance of that hearing or meeting, and/or if the appointment of such representative would generate a conflict of interest with one or more of the arbitrators.

5. Appointment of the Tribunal

- 5.1 In their Notice of Arbitration, the Claimants appointed Prof. Franco Ferrari, an Italian national, as the first arbitrator. Prof. Ferrari's contact details are as follows:

Prof. Franco Ferrari
NYU School of Law
Executive Director
Center for Transnational Litigation, Arbitration, and Commercial Law
Tel.: +1 (212) 992-8123
Fax: +1 (917) 724-1081
New York, United States of America
E-mail: franco.ferrari@nyu.edu

- 5.2 In its Response to the Notice of Arbitration, dated February 23, 2018, the Respondent appointed Prof. Zachary Douglas QC, an Australian national, as the second arbitrator. On August 23, 2018, Prof. Douglas submitted his resignation. By letter dated October 19, 2018, the Respondent appointed Mr. Christer Söderlund, a national of Sweden, as the second arbitrator. His contact details are as follows:

Mr. Christer Söderlund
P.O. BOX 3277 SE-103 65
Stockholm
Sweden
Tel.: +46 70 388 41 22
E-mail: christer.soderlund@mornyc.com

- 5.3 On November 16, 2018, the co-arbitrators appointed Mr. John Beechey CBE, a national of the United Kingdom, as presiding arbitrator. His contact details are as follows:

Mr. John Beechey CBE
BeecheyArbitration
Arbitration Chambers Hong Kong
Chinachem Hollywood Centre
Suite 801, 1 Hollywood Road, Central
Hong Kong SAR
China
Tel: (+852) 2140 6555
E-mail: jb@beecheyarbitration.com

All physical correspondence addressed to Mr. Beechey should be sent to the following address:

Arbitration Chambers
Lamb Building, 3rd Floor South
Temple, London, EC4Y 7AS
United Kingdom

- 5.4 Subject, and without prejudice, to the Tribunal's determination of the Respondent's objections to the jurisdiction of the Tribunal, the Parties confirm that the members of the Tribunal have been validly appointed in accordance with the UNCITRAL Rules.
- 5.5 The members of the Tribunal confirm that they are and shall remain impartial and independent of the Parties. Each of the members of the Tribunal confirms that he has disclosed, to the best of his knowledge, all circumstances likely to give rise to justifiable doubts as to his impartiality or independence and that he will without delay disclose any such circumstances that may arise in the future.
- 5.6 The Parties confirm that they have no objection to the appointment of any member of the Tribunal on the grounds of conflict of interest or lack of independence or impartiality in respect of matters known to them as at the date of signature of these Terms of Appointment.

6. Assistant to the Tribunal

- 6.1 With the agreement of the Parties, the Tribunal hereby appoints Mr. Niccolò Landi, an Italian national, as Assistant to the Tribunal. His *curriculum vitae* has been circulated to the Parties. His contact details are as follows:

Mr. Niccolò Landi
Via Copernico, 38
20125, Milan - Italy
Tel: +39 02 87259354
Fax: +39 02 92853915
Mobile: +39 3288985500
E-mail: nl@landilegal.com

- 6.2 Mr. Landi confirms that he is and shall remain impartial and independent of the Parties, and has circulated a declaration to this effect.
- 6.3 When assigning tasks to Mr. Landi, the Tribunal (or its President) shall take guidance from the Best Practices for the Appointment and Use of Arbitral Secretaries as set forth in the *Young ICCA Guide on Arbitral Secretaries* and its Commentary.

- 6.4 In fulfilling his duties as Assistant to the Tribunal, Mr. Landi shall take guidance from the Best Practices for the Appointment and Use of Arbitral Secretaries as set forth in the *Young ICCA Guide on Arbitral Secretaries* and its Commentary.
- 6.5 The Assistant to the Tribunal shall be remunerated at the rate of USD 150 per hour for all work carried out in connection with this case. His fees and expenses shall be paid in the same manner as the Tribunal's fees and expenses.
- 6.6 The Tribunal shall ensure that the administrative tasks carried out by the Assistant to the Tribunal are not duplicative of those carried out by the PCA.

7. Place of arbitration

- 7.1 Pursuant to Article 18(1) of the UNCITRAL Rules, and in the absence of agreement between the Parties, the Tribunal will determine the legal place (or "seat") of the arbitration, having regard to the circumstances of the case, after consultation with the Parties.
- 7.2 Pursuant to Article 18(2) of the UNCITRAL Rules, meetings and hearings may take place at one or more locations other than the seat of the arbitration, if so decided by the Tribunal after consultation with the Parties. The Tribunal may meet at any location it considers appropriate for deliberations.
- 7.3 Pursuant to the Article 18(1) of the UNCITRAL Rules, irrespective of the place where an award is signed, it will be deemed to have been made at the place of arbitration.

8. Language of the arbitration

- 8.1 By agreement of the Parties, the languages of the arbitration shall be English and Spanish.
- 8.2 Further determinations regarding the languages of the arbitration are deferred to a future procedural order to be issued by the Tribunal after consultation with the Parties.

9. Case Administration

- 9.1 The PCA shall act as registry (the "**Registry**") and shall administer the arbitral proceedings on the following terms:
 - 9.1.1 In consultation with the Tribunal, the Secretary-General of the PCA shall designate a legal officer of the International Bureau to act as Registrar and Secretary to the Tribunal.
 - 9.1.2 The PCA shall maintain an archive of filings of correspondence and submissions.
 - 9.1.3 The PCA shall manage Party deposits to cover the costs of the arbitration, subject to the Tribunal's supervision.
 - 9.1.4 If needed, the PCA shall make its hearing and meeting rooms at the Peace Palace in The Hague or elsewhere available to the Parties and the Tribunal at no charge. Costs of catering, court reporting, or other technical support associated with hearings or meetings at the Peace Palace or elsewhere shall be borne by the Parties.

9.1.5 Upon request, the PCA shall carry out administrative tasks on behalf of the Tribunal, the primary purpose of which would be to reduce the costs that would otherwise be incurred by the Tribunal carrying out administrative tasks. Work carried out by the PCA shall be billed in accordance with the PCA's schedule of fees. PCA fees and expenses shall be paid in the same manner as the Tribunal's fees and expenses.

9.2 The contact details of the PCA are as follows:

Permanent Court of Arbitration

Attn: Mr. José Luis Aragón Cardiel, Legal Counsel
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands
Tel: +31 70 302 4155
Fax: +31 70 302 4167
E-mail: jaragoncardiel@pca-cpa.org
bureau@pca-cpa.org

9.3 The appointment of the PCA as Registry shall not affect the legal place of arbitration, the geographical location of meetings, hearings or Tribunal deliberations; the applicable procedural rules or other aspects of the arbitral proceedings, which shall all remain subject to these Terms of Appointment, any agreement between the Parties and any orders or determinations by the Tribunal.

10. Procedural meeting

10.1 Further procedural details, and in particular a procedural calendar, shall be discussed and, as far as possible, agreed at a procedural meeting to be held with the Parties in person or by telephone conference call.

10.2 The results of the procedural meeting shall be included in a further procedural order.

11. Communications

11.1 Subject to any modification arising from the procedural meeting, the following provisions shall apply to communications.

11.2 The Parties and their representatives shall not engage in any oral or written communications with any member of the Tribunal *ex parte* in connection with any substantive or procedural aspect of the arbitration.

11.3 Except for pleadings or submissions that the Tribunal directs both Parties to submit simultaneously, the Parties shall send all communications for the attention of the Tribunal by e-mail to opposing counsel, to each member of the Tribunal, to the Assistant to the Tribunal, and to the Tribunal Secretary. If the Tribunal directs the Parties to file a submission or pleading simultaneously, each Party shall send its pleading or submission via e-mail only to the Tribunal Secretary. The Tribunal Secretary shall acknowledge receipt, and inform the Tribunal, the Assistant to the Tribunal, and opposing Party (without yet forwarding the submission to them). Upon receipt of both Parties' submissions, the Tribunal Secretary shall forward all submissions to the Tribunal, the Assistant to the Tribunal, and to both Parties. The Parties shall

send copies of correspondence between them to the Tribunal, to the Assistant to the Tribunal and to the PCA only upon request of the Tribunal, or if such correspondence relates to a matter in respect of which the Tribunal is required to act, or to abstain from acting, or if the correspondence gives notice of a relevant event of which the Tribunal, the Assistant to the Tribunal and the PCA should be apprised.

12. Deposit

- 12.1 In accordance with Article 43(1) of the UNCITRAL Rules, the Parties shall make an initial deposit of USD 300,000 (USD 150,000 by each of Claimants and Respondent respectively)¹ within 30 days of the signature of these Terms of Appointment, to be deposited with the PCA by wire transfer to the following PCA account:

Bank:	ABN Amro Bank N.V. Gustav Mahlerlaan 10 1082 PP Amsterdam The Netherlands
BIC:	ABNANL2A
Account number:	0533 5127 51
IBAN:	NL61 ABNA 0533 5127 51
Beneficiary:	Permanent Court of Arbitration
Reference:	PCA Case № 2018-56

- 12.2 The PCA will review the adequacy of the deposit from time to time and, at the request of the Tribunal, may invite the Parties to make supplementary deposits.
- 12.3 Each request for a supplementary deposit shall be accompanied by a detailed interim statement of account providing details of the direct costs of the proceeding, including the total fees and expenses of all arbitrators. In addition, the Tribunal shall submit its claims for fees and expenses to the PCA and to the Parties periodically.
- 12.4 If the required deposits are not paid in full within 30 days after the receipt of the request, the Tribunal shall so inform the Parties in order that one or more of them may make the required payment. If such payment is not made, the Tribunal may order the suspension or termination of the arbitral proceedings.
- 12.5 The PCA does not charge a separate fee for the holding of the deposit but any transfer fees or other bank charges will be charged by the Registry to the deposit. No interest will be paid on the deposit.
- 12.6 The unused balance held on deposit at the end of the arbitration shall be returned to the Parties as directed by the Tribunal.

¹ The PCA will issue an invoice to each Party, for this and all future deposits in connection with this proceeding.

13. Tribunal Fees and Expenses

- 13.1 Each member of the Tribunal shall be remunerated at the rate of USD 650 per hour plus VAT, if applicable, for all time spent in connection with the arbitration. Time spent on travel will be charged at 50% of this rate.
- 13.2 The members of the Tribunal shall be remunerated in the amount of 30% of their fees for each day reserved for a hearing or meeting, based on an eight hour day, in respect of any hearing or other meeting for which they are asked to reserve more than one day and that is cancelled, or postponed by more than one week, by any or all of the Parties within four weeks of the first day of such hearing or meeting. The remuneration provided for in this paragraph is without prejudice to the Tribunal's final decision on the allocation of costs, which shall take into account whether the cancellation or postponement of the hearing or meeting is attributable to either Party.
- 13.3 The members of the Tribunal shall be remunerated in the amount of 100% of their fees for each day reserved for a hearing or meeting, based on an eight hour day, in respect of any hearing or other meeting that is cancelled, or that is postponed by more than one week, by any or all of the Parties within seven working days of the first day of such hearing or meeting. The remuneration provided for in this paragraph is without prejudice to the Tribunal's final decision on the allocation of costs, which shall take into account whether the cancellation or postponement of the hearing or meeting is attributable to either Party.
- 13.4 Members of the Tribunal shall be reimbursed for all disbursements and charges reasonably incurred in connection with the arbitration, including, but not limited to, travel expenses, telephone, fax, delivery, printing and other expenses.
- 13.5 Members of the Tribunal may bill for reimbursement of disbursements and charges as and when they are incurred, and may submit to the PCA periodic bills in respect of fees.
- 13.6 All payments to the Tribunal shall be made from the deposit administered by the PCA.

14. Immunity of the Tribunal

- 14.1 The Parties shall not seek to make any member of the Tribunal, the Assistant to the Tribunal, or any PCA official liable in respect of any act or omission in connection with any matter related to this arbitration.
- 14.2 The Parties shall not require any member of the Tribunal, the Assistant to the Tribunal or any PCA official to be a party to, or witness in, any judicial, administrative, or other proceedings arising out of, or in connection with, the arbitration.

15. Duty to Assist

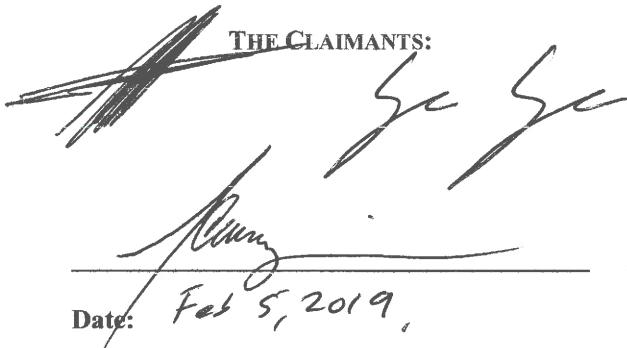
- 15.1 The Parties accept that they have a duty to assist the Tribunal and they agree that the Tribunal may direct any Party to do all such things during the arbitral proceedings as may reasonably be needed to enable an Award to be made properly, fairly and efficiently.

16. Language and Signature of the Terms of Appointment

- 16.1 These Terms of Appointment are issued in the English language (with no Spanish translation, but without prejudice to the Tribunal's decisions concerning the languages of the proceeding). The Terms of Appointment may be signed in counterparts, collectively forming one composite signed document.

[signature page follows]

THE CLAIMANTS:



Two handwritten signatures are present above a horizontal line. The signature on the left appears to be "John" and the signature on the right appears to be "Söderlund".

Date: Feb 5, 2019.

THE RESPONDENT:

Date:

THE TRIBUNAL:

Prof. Franco Ferrari

Date:

Mr. Christer Söderlund

Date:

**Mr. John Beechey CBE
(Presiding Arbitrator)**

Date:

THE CLAIMANTS:

Date:

THE RESPONDENT:


Date: February 5, 2019

THE TRIBUNAL:

Prof. Franco Ferrari

Date:

Mr. Christer Söderlund

Date:

Mr. John Beechey CBE
(Presiding Arbitrator)

Date:

THE CLAIMANTS:

THE RESPONDENT:

Date:

Date:

THE TRIBUNAL:



Prof. Franco Ferrari

Date: 12/2/2018

Mr. Christer Söderlund

Date:

Mr. John Beechey CBE
(Presiding Arbitrator)

Date:

THE CLAIMANTS:

THE RESPONDENT:

Date:

Date:

THE TRIBUNAL:

Prof. Franco Ferrari



Mr. Christer Söderlund

Date:

Date: February 15, 2019

Mr. John Beechey CBE
(Presiding Arbitrator)

Date:

THE CLAIMANTS:

Date:

THE RESPONDENT:

Date:

THE TRIBUNAL:

Prof. Franco Ferrari

Mr. Christer Söderlund

Date:

Date:



Mr. John Beechey CBE
(Presiding Arbitrator)

Date: February 15, 2019