

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. 3

Hearing on Jurisdiction

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

11 November 2020

I. Background

1. Pursuant to Section 9.1 of Procedural Order No. 1, “[a]fter consultation with the Parties, the Tribunal shall issue, for each hearing, a procedural order convening the meeting, establishing its place, time, agenda, and all other technical and ancillary aspects.”
2. Following several exchanges with the Parties, on 12 June 2020, the Tribunal advised that it had decided to vacate the dates previously reserved for the Hearing on Jurisdiction (the “**Hearing**”) and reschedule it for a later date, noting that it would in due course confer with the Parties with respect to the developing COVID-19 pandemic and the feasibility of conducting the Hearing in person.
3. After further consultations with the Parties, on 22 June 2020, the Tribunal issued an Amended Procedural Calendar, providing that the Hearing would be held on 15-19 December 2020, subject to the following caveat:

The global health situation permitting, the Hearing on Jurisdiction will be held in person in Washington, D.C. Should it become unfeasible to conduct the Hearing in person, it will take place by video conference in the week commencing December 14, 2020.

4. On 14 October 2020, the Tribunal wrote to the Parties (i) noting that, in its view, there was no prospect of holding an in-person hearing in Washington, D.C. commencing on 15 December 2020; (ii) suggesting that preparations be made to conduct the Hearing remotely; and (iii) inviting the Parties’ comments on these matters.
5. By separate communications of 15 October 2020, the Parties respectively indicated that they agreed that the Hearing should be held remotely and that necessary arrangements should be made to that effect. The Respondent further suggested that the electronic platform used for the Hearing be *Zoom*, while the Claimants stated that they did not object to using such platform unless the Tribunal and the PCA preferred to proceed otherwise.
6. On 21 October 2020, the Tribunal circulated a draft of this Procedural Order No. 3 and invited the Parties’ comments thereon.
7. On 30 October 2020, the Parties jointly submitted their comments on the Tribunal’s draft Procedural Order No. 3.
8. On 3 November 2020, the Tribunal sent a letter to the Parties, *inter alia* providing clarifications in respect of certain technical and logistical questions raised by the Parties.
9. On 4 November 2020, the Tribunal sent a communication to the Parties outlining its preliminary views on the Parties’ comments on the Tribunal’s draft Procedural Order No. 3. On the same day, the Tribunal, the Parties and the PCA held a pre-hearing videoconference.

II. Hearing Dates

10. In accordance with the Amended Procedural Calendar, the hearing will take place from Monday, 14 December 2020 to Friday, 18 December 2020.

III. Pre-Hearing Guidance

11. In advance of the Hearing, and if it considers that it would facilitate the efficient and effective use of hearing time, the Tribunal may indicate to the Parties whether any matters to be addressed in the course of the Parties' presentations are matters upon which it would particularly wish to hear the Parties' observations and submissions.
12. The Tribunal may provide further guidance during the Hearing.

IV. Pre-Hearing Preparation

13. As foreseen in the Amended Procedural Calendar, a pre-hearing conference call shall be held on 4 November 2020 in order to discuss the organization of the Hearing. This call will be held by videoconference and shall also serve to verify the proper functioning of the videoconference system. All participants shall strive to replicate the conditions under which they will participate in the Hearing:
 - (i) To the extent possible, at least one participant per device or connection to be used at the Hearing should attend the pre-hearing videoconference;
 - (ii) Should testing all connections require witnesses or experts to participate personally in the pre-hearing videoconference, the Tribunal initially will limit discussions to introductions and technical matters, with procedural matters to be discussed subsequently after all witnesses and experts have been excused;
 - (iii) Each participant should join the pre-hearing videoconference with the same device(s) and internet connection and from the same physical location that they intend to use for the Hearing;
 - (iv) Participants will join the pre-hearing videoconference through the waiting room function and will follow the same identification procedure as for the Hearing itself (see Sections 32 to 34 below);
 - (v) The pre-hearing videoconference shall include a test of each of the functions of the videoconference platform that is intended to be used during the Hearing (*e.g.*, presentation of evidence via shared screen, simultaneous interpretation, etc.); and
 - (vi) The Parties shall not address the substance of any matter scheduled for discussion at the Hearing, but may raise before the Tribunal any procedural issues pertaining to the organization of the Hearing.
14. In addition to the pre-hearing videoconference, the Parties are invited to undertake further test calls with the PCA of different groups of Participants (as defined in Section 30 below), both prior to and following the pre-hearing videoconference, in order to facilitate the readiness of all Participants for the Hearing.
15. The Tribunal may direct further videoconference testing sessions to take place with all or some Hearing Participants, as it considers necessary.

V. Hearing Schedule

16. The timing of the Hearing shall proceed as follows:
- (i) Commence each day at 2:00 PM GMT (9:00 AM EST Bogotá, Miami, New York, Washington D.C.; 3:00 PM CET Stockholm, Milan, The Hague);
 - (ii) Conclude each day at 8:30 PM GMT (3:30 PM EST Bogotá, Miami, New York, Washington D.C.; 9:30 PM CET Stockholm, Milan The Hague); and
 - (iii) Total time each day: 6.5 hours, two breaks of 15 minutes each (starting around 3:15 PM and 4:45 PM GMT each day) and one one-hour break (starting around 6:00 PM GMT each day), for a total of 5 hearing hours per day.
17. The schedule for the Hearing is subject to any changes that the Tribunal may deem necessary or appropriate to make during the Hearing. In particular, the Tribunal may adjust the schedule of the Hearing as necessary in the event of delays or other interruptions caused by technical problems in the functioning of the videoconference.

VI. Hearing Sequence and Allocation of Time

18. The Hearing will be ordered sequentially, hearing from each of Claimants and Respondent as to each item, as follows: Opening Statements, Witnesses, Experts, Closing Statements.
19. Time shall be allocated equally between the Parties, subject to the circumstances of the case. However, the Tribunal has concluded that an exactly equal distribution of time would not be appropriate, given the circumstances of the present case, notably that (i) Claimants have pressed to be allowed to call their own witnesses; and (ii) Respondent has chosen to cross-examine those witnesses. Accordingly, the time for opening and closing statements will be shared equally between the Parties, while the time devoted to witness examination will be allocated as set out in Section 20 below. The PCA will keep the time count and advise the Parties daily of the length of time used.
20. The following parameters will be used to facilitate planning, while maintaining certain flexibility for testimony (i.e., some testimony may be shorter and other testimony may require additional time). On the basis that the second and third days of the Hearing, Tuesday 15 December 2020 and Wednesday 17 December 2020, shall be devoted to hearing the testimony of fact witnesses and experts, the 10 sitting hours available shall be split as to 3 hours 40 minutes to Claimants and 6 hours 20 minutes to Respondent. Within those overall time allocations, the Parties shall in any event observe the limits set out below in respect of each phase of the examination of any fact witness or expert:
- (i) Opening statements: 2.5 hours each side.
 - (ii) Witnesses: Direct (20 minutes), cross-examination (1 hour 10 minutes), redirect (20 minutes).
 - (iii) Experts: Direct (30 minutes), cross examination (1 hour 25 minutes), redirect (20 minutes).
 - (iv) Closing statements: 2 hours in principle, subject to adjustment depending on the nature and number of Tribunal questions.

21. The Tribunal has adopted an indicative daily schedule for the Hearing, after considering the Parties' views on the schedule for witness examination (see Section 56 below).
22. Time devoted to procedural questions or to address questions or matters raised by the Tribunal will not be counted against the Parties' time. The Parties should prepare on the basis that one hour each day will be consumed by Tribunal questions, procedural matters, potential technical interruptions, or other contingencies.

VII. Videoconference Platform

23. With the agreement of the Parties, the Hearing shall be held via videoconference using the *Zoom* videoconference platform.
24. The PCA will retain the firm *Law in Order* to provide additional technical support through the Hearing and, upon request, to assist with document management.
25. The log-in details for the videoconference will be circulated by the PCA on the day prior to the start of the Hearing.
26. Once admitted to the videoconference, and barring technical issues or other exceptional circumstances, counsel and party representatives should remain connected throughout the hearing day.
27. Each Party will make its own separate arrangements for private communication with their respective teams during the Hearing by instant messenger or other appropriate means.
28. The Parties will make use of the breakout room functions within the *Zoom* videoconference platform to avoid delays associated with admitting Participants to the videoconference and to enable the Tribunal promptly to reconvene all Participants following breaks.

VIII. Participants

29. The Parties shall provide a provisional indication by **Friday, 27 November 2020** of the location from which each of their Participants (including counsel, party representatives, witnesses and experts) will join the videoconference and confirm that adequate connectivity or technology is available at that location or is in the process of being procured. The Parties will confirm the final locations from which each of their Participants will join the videoconference by **Friday, 4 December 2020**.
30. Access to the videoconference shall be restricted to the Members of the Tribunal, the Parties' representatives, counsel (and support staff), witnesses, experts, the Assistant to the Tribunal, PCA staff, court reporters, interpreters and any further technical support personnel retained by the PCA in connection with the Hearing (the "**Participants**"). All Participants in the Hearing bear an ongoing duty to warn of the presence of any other person on the videoconference. Non-participants may follow the videoconference through a separate public webcast, as established in Section 66 below.
31. The Parties are each requested to provide a final list of the Participants who will attend the Hearing on their behalf by no later than **Friday, 4 December 2020**. The Parties' lists must also include the *Zoom* usernames with which participants will join the videoconference. Any person not included in the lists provided by the Parties will not be admitted to the videoconference, unless otherwise decided by the Tribunal upon request by any of the Parties.

32. All Participants in the Hearing shall join the videoconference at least 30 minutes in advance of the start of each day. Parties are encouraged to join the videoconference earlier to facilitate the identification of Participants and avoid any technical contingencies.
33. Participants will join the videoconference through a “waiting room” to be managed by the PCA. Each Party shall identify all of its representatives at the opening of each day of the Hearing. In order to facilitate identification of all attendees, Participants must join the videoconference showing a username that enables them to be readily identified (*i.e.*, “(C)” for Claimants or “(R)” for Respondent [First Name] [Last Name]¹). Any prospective Participant who cannot be identified shall not be granted access to the videoconference, unless otherwise decided by the Tribunal upon request by any of the Parties.
34. After having been identified by the PCA, Participants will be assigned to their corresponding breakout room until the hearing commences.

IX. Internet Connection and Devices

35. The Parties are responsible for ensuring that each of their Participants connects to the video conference through a stable internet connection offering sufficient bandwidth and uses a camera, microphone and speaker of adequate quality.
36. Participants should consider using a wired Ethernet connection instead of WiFi. Participants are also encouraged to keep a smartphone or tablet, having at the minimum a 4G data connection and mobile hotspot functionality, available as a backup internet connection at all times during the Hearing.
37. A dial-in telephone audio option shall be offered as a backup option for Participants experiencing difficulties with computer audio. Certain key Participants may wish to dial-in by phone in addition to connecting through their computer, so as to be able to switch seamlessly to telephone audio in case they should happen to be disconnected at any point. The telephone number for this purpose will be circulated alongside with the access details for the conference.
38. Each Participant is encouraged to have at least two devices or screens available for use during the Hearing, one to connect to the videoconference and another for the transcription. Where possible, using a third device or screen to display evidence and demonstrative exhibits is recommended.

X. Videoconference Etiquette

39. All Participants without an active role at any given moment should mute their own audio and turn off their video in order to preserve internet bandwidth for the active Participants.
40. The Parties shall provide a list of the Participants from each side who will speak to a specific issue or conduct examination of a witness by e-mail to all other Participants (including the other side, the Members of the Tribunal, the PCA, the court reporters, the interpreters and further technical support personnel retained by the PCA) at least one hour prior to the start of each day. Similarly, the Parties should, insofar as possible, circulate any speaking notes to the court reporters and interpreters prior to the start of any relevant session.

¹ Participants joining collectively from a conference room should be identified by “Conference Room” and the name of relevant Party.

41. In order to facilitate the simultaneous interpretation and accurate transcription of the Hearing, speakers and witnesses shall speak slowly and with pauses between phrases.
42. Participants should join the Hearing from a location without background noise and with adequate lighting. Participants should not use a virtual background. Participants (especially those making oral presentations) may also consider using a complete headset (headphones with integrated microphone) of good quality.
43. The above provisions on etiquette may be adjusted or supplemented by the Tribunal, in consultation with the Parties, in the course of the Hearing.

XI. Interpretation

44. Simultaneous interpretation to and from English and Spanish will be organized by the PCA and made available through the videoconference platform.
45. In order to facilitate simultaneous interpretation, at the time of providing the list described at Section 40 above, the Parties shall indicate the language(s) that will be used by each intervening Participant.

XII. Transcription

46. In accordance with Section 9.2 of Procedural Order No. 1, live transcripts of the Hearing in English and Spanish will be organized by the PCA and made available on a separate platform. The PCA will circulate the connection details for the transcript on the day prior to the start of the Hearing. Participants are encouraged to use a second device or a second screen for viewing the transcript. Final transcripts will be circulated by e-mail at the end of each day.

XIII. Recording

47. The PCA will arrange to record the Hearing in both audio and video. The floor hearing will be recorded by the *Zoom* platform; the Spanish and English channels will be recorded separately by *Law in Order*.
48. No other Participants, other than the court reporters, shall record any part of the Hearing, unless the Tribunal grants express leave to this effect.

XIV. Evidence and demonstrative exhibits

49. In accordance with Sections 9.3 and 9.4 of Procedural Order No. 1, no new evidence may be presented at the Hearing except with leave of the Tribunal, in accordance with Section 6.4 of Procedural Order No. 1. Should the Tribunal grant leave to a Party to present new evidence in the course of the Hearing, it will grant the other Party the opportunity to introduce new evidence to rebut it.
50. As further established in Section 9.3 of Procedural Order No. 1, PowerPoint slides and demonstrative exhibits in aid of argument may be used by any Party during the Hearing, provided that those materials reflect evidence on the record and do not introduce new evidence, directly or indirectly, and that the exhibit from which the referred information originates is clearly identified in each presentation. Each Party shall number its demonstrative exhibits consecutively.

51. The Party displaying demonstrative exhibits during the Hearing shall provide electronic copies by e-mail and through the online document exchange platform used in this proceeding to all Participants (including the other side, the Members of the Tribunal, the Assistant to the Tribunal, the PCA, the court reporters, the interpreters and further technical support personnel retained by the PCA), at least one hour prior to their use during the Hearing. In modification of Section 9.3 of Procedural Order No. 1, hard copies of demonstrative exhibits shall not be required.
52. The presentation of any evidence, authority, or demonstrative exhibit shall be made through the screen-sharing function of the videoconference platform in order that the speaker and the relevant document can be seen simultaneously at all times. The Parties are encouraged to designate one person on each side who shall be responsible for presentation of evidence, authority or demonstrative exhibit through the screen-sharing function of the videoconference platform during the Hearing (the “**Document Manager**”). Both Parties have stated their intention to use their own Document Manager during the Hearing.
53. Each Party will utilize its own document management system to organize and display documents during the Hearing.

XV. Witness Examination

54. The examination of fact and expert witnesses shall take place in accordance with Sections 7.9 and 7.10 of Procedural Order No. 1.
55. By agreement of the Parties, and in accordance with Section 7.9(a) of Procedural Order No. 1, each witness shall make the following declaration before giving his evidence: “I solemnly declare upon my honour and conscience that I shall speak the truth, the whole truth and nothing but the truth.” In turn, each expert shall make the following declaration before making his statement: “I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief.”
56. The daily schedule shall be as set forth in **Annex 1** to this Procedural Order. Section 7.12 of Procedural Order No. 1 anticipated that, prior to their examination, factual witnesses would not be present in the hearing room during the hearing of oral testimony, discuss the testimony of any other witness, or read any transcript of any oral testimony. Since the witnesses of fact in this case are Parties in their own right, the Tribunal determines that pursuant to Article 28(3) of the UNCITRAL Rules, no such restriction shall apply. This limitation does not apply to expert witnesses.
57. It is not permitted for counsel to communicate with fact or expert witnesses during their examination by any means other than communication on the record.
58. Cross-examining counsel will display the relevant documents through the screen-sharing function. The Parties will also provide electronic cross-examination bundles in PDF format that will be distributed electronically no later than one hour prior to each testimony; but no opposing party, witness or expert shall review such bundle prior to testimony.
59. The Parties may seek further directions from the Tribunal as necessary in relation to the procedures for the examination of witnesses.
60. The Tribunal shall have the authority at any time during the examination of a witness to request the witness to reorient their camera, whether to provide a better angle, lighting, or to verify the surroundings or any materials available to the witness.

XVI. Technical Problems

61. Each Party shall designate, no later than **Friday, 4 December 2020**, one of its representatives to act as videoconferencing contact person (“**VC Emergency Contact Person**”) for purposes of addressing any technical incidents which arise during the videoconference. The VC Emergency Contact Person shall be responsible for advising the Tribunal and the PCA on the videoconference if an essential Participant from their side is disconnected or otherwise cannot participate, such that the Tribunal is requested to pause the Hearing. Otherwise, the VC Emergency Contact Person shall notify and address technical issues with Luis Popoli of the PCA (tel.: +31 621 631 760; e-mail: lpopoli@pca-cpa.org), without interrupting the Hearing.
62. The Tribunal may temporarily or permanently suspend the Hearing if it deems the functioning of the videoconference system to be inadequate or likely to prejudice the due process rights of either of the Parties or the integrity of the proceeding. The Parties are asked to bear in mind that full recordings and transcripts will be available, mitigating any prejudice arising from the failure of any given Participant to be able to follow the entire Hearing on the videoconference platform.

XVII. Post-Hearing Matters

63. After consultation with the Parties, the Tribunal shall decide at the conclusion of the Hearing whether the submission of post-hearing briefs is necessary and, if so, shall establish their scope, maximum length and submission dates.
64. The need and process for the review and correction of transcripts will be determined by the Tribunal, following consultations with the Parties, at the conclusion of the Hearing.
65. The Tribunal shall also consider whether and when the Parties shall file submissions on costs.

XVIII. Transparency

66. Pursuant to Article 6 of the UNCITRAL Transparency Rules, the Hearing shall be public. Accordingly, the PCA shall arrange for a public webcast of the Hearing.
67. Any Participant who intends to refer to confidential or protected information, or to information that could otherwise affect the integrity of the arbitral process during the Hearing shall so inform the Tribunal prior to making any such reference. The Tribunal shall then direct the PCA to pause the webcast for the period of time that such confidential or protected information is being addressed.
68. The transcripts of the Hearing and, if appropriate, its recordings, shall be made available to the public following the conclusion of the Hearing as directed by the Tribunal, after consulting with the Parties.

XIX. Costs

69. The costs of the Hearing, including the services of *Law in Order*, court reporting, interpretation and the public webcast, shall be paid from the advance payments made by the Parties with the PCA, without prejudice to the decision of the Tribunal as to which Party shall ultimately bear those costs.

70. Each Party shall be responsible for the costs associated with preparation of its Participants (any additional equipment, necessary internet connectivity, etc.), subject to the decision of the Tribunal as to which Party shall ultimately bear those costs.

Place of Arbitration: London, United Kingdom



Mr. John Beechey CBE
(Presiding Arbitrator)

On behalf of the Tribunal

Annex 1: Indicative Hearing Schedule

Date	Presentation/Examination
Monday, 14 December 2020	Tribunal Introduction and Housekeeping
	Claimants' Opening Statement
	Respondent's Opening Statement
Tuesday, 15 December 2020	Direct, Cross, and Redirect Examination of Mr. Enrique Carrizosa Gelzis
	Direct, Cross, and Redirect Examination of Mr. Alberto Carrizosa Gelzis
	Direct, Cross, and Redirect Examination of Mr. Felipe Carrizosa Gelzis
Wednesday, 16 December 2020	Direct, Cross, and Redirect Examination of Mr. Olin Wethington
	Direct, Cross, and Redirect Examination of Prof. Loukas Mistelis
Thursday, 17 December 2020	Held in reserve for remaining expert testimony and preparation of closing statements
Friday, 18 December 2020	Claimants' Closing Statement
	Respondent's Closing Statement
	Tribunal Questions and Housekeeping