

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**
- (“Claimants”)**

-and-

**THE REPUBLIC OF COLOMBIA**  
**(“Respondent”)**

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**AWARD**

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*Tribunal*

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

*Secretary to the Tribunal*

Mr José Luis Aragón Cardiel  
Permanent Court of Arbitration

*Assistant to the Tribunal*

Mr Niccolò Landi

**7 May 2021**

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**DEFINED TERMS**

<b>1998 Measures</b>	The various measures adopted by certain Colombian agencies (namely the Central Bank, Fogafin and the Superintendency) with respect to Granahorrar over the course of 1998
<b>2014 Constitutional Court Order</b>	Order 188/14 of the Constitutional Court, dated 25 June 2014
<b>AA Designation Request</b>	Claimants' request that the Secretary-General of the PCA designate an appointing authority pursuant to Article 6 of the UNCITRAL Rules, submitted on 5 April 2018
<b>Answer on Jurisdiction</b>	Respondent's Answer on Jurisdiction, dated 21 October 2019
<b>Capitalization Order</b>	The Superintendency's order, issued by letter of 2 October 1998, that Granahorrar be re-capitalized
<b>Carrizosa Family</b>	Claimants and their parents, Mrs Astrida Benita Carrizosa and Mr Julio Carrizosa Mutis
<b>Central Bank</b>	The Colombian <i>Banco de la República</i>
<b>Challenge</b>	Claimants' challenge to Prof. Zachary Douglas QC, notified on 8 March 2018
<b>Claimants</b>	Alberto Carrizosa Gelzis, Felipe Carrizosa Gelzis and Enrique Carrizosa Gelzis
<b>Claimants' Observations on the US Submission</b>	Claimants' Observations concerning Non-Disputing Party Submission of the United States of America, dated 15 May 2020
<b>Colombia or Respondent</b>	The Republic of Colombia
<b>Colombia-India BIT</b>	Agreement for the Promotion and Protection of Investments between the Republic of Colombia and the Republic of India, dated 2 July 2012
<b>Colombia-Switzerland BIT</b>	Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, dated 6 October 2009

<b>Constitutional Court Judgment</b>	Judgment SU.447/11 of the Constitutional Court, dated 26 May 2011
<b>COP</b>	Colombian peso
<b>Council of State Judgment</b>	Judgment of the Fourth Section of the Council of State, dated 1 November 2007
<b>Critical Dates</b>	25 June 2014, the date of issuance of the 2014 Constitutional Court Order, and 24 January 2018, the date on which Claimants submitted their claim to arbitration
<b>Fogafin</b>	The Colombian <i>Fondo de Garantías de Instituciones Financieras</i>
<b>Fogafin Covenant</b>	Covenant concluded between Fogafin and Granahorrar, dated 6 July 1998
<b>Granahorrar</b>	<i>Corporación Grancolombiana de Ahorro y Vivienda</i> “GRANAHORRAR”
<b>Hearing</b>	The Hearing on Jurisdiction in this arbitration, held by videoconference on 14-18 December 2020
<b>IACHR</b>	The Inter-American Commission on Human Rights
<b>ICJ</b>	The International Court of Justice
<b>ICSID</b>	The International Centre for Settlement of Investment Disputes
<b>Memorial on Jurisdiction</b>	Claimants’ Memorial on Jurisdiction, dated 29 May 2019
<b>Notice of Arbitration</b>	Claimants’ Notice of and Request for Arbitration, dated 24 January 2018
<b>Parties</b>	Claimants and Respondent
<b>PCA</b>	The Permanent Court of Arbitration
<b>Procedural Order No. 1</b>	Procedural Order No. 1, issued by the Tribunal on 29 January 2019

<b>Procedural Order No. 2</b>	Procedural Order No. 2, issued by the Tribunal on 6 April 2020
<b>Procedural Order No. 3</b>	Procedural Order No. 3, issued by the Tribunal on 11 November 2020
<b>Procedural Order No. 4</b>	Procedural Order No. 4, issued by the Tribunal on 26 November 2020
<b>Rejoinder on Jurisdiction</b>	Respondent’s Rejoinder on Jurisdiction, dated 16 March 2020
<b>Reply on Jurisdiction</b>	Claimants’ Reply to Respondent’s Answer on Jurisdiction, dated 20 December 2019
<b>Respondent’s Observations on the US Submission</b>	Respondent’s Written Observations on the United States’ Non-Disputing Party Submission, dated 15 May 2020
<b>Response to the Notice of Arbitration</b>	Respondent’s <i>Respuesta a la Solicitud de Arbitraje de los Reclamantes</i> , dated 23 February 2018
<b>Submission of the United States</b>	The United States’ written submission in this arbitration, dated 1 May 2020
<b>Superintendency</b>	The Colombian <i>Superintendencia Bancaria</i> , later known as the <i>Superintendencia Financiera</i>
<b>Terms of Appointment</b>	Terms of Appointment, adopted by the Tribunal and the Parties on 15 February 2019
<b>Treaties</b>	The US-Colombia TPA, the Colombia-India BIT and the Colombia-Switzerland BIT
<b>UNCITRAL Rules</b>	The Arbitration Rules of the United Nations Commission on International Trade Law, as revised in 2013
<b>UNCITRAL Transparency Rules</b>	UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, as adopted by UNCITRAL on 11 July 2013
<b>US-Colombia TPA/TPA/Treaty</b>	United States – Colombia Trade Promotion Agreement, signed on 22 November 2006 and entered into force on 15 May 2012

**US\$**

United States dollar

**VCLT**

The 1969 Vienna Convention on the Law of  
Treaties

**I. INTRODUCTION**

**A. THE PARTIES**

1. The claimants are Alberto Carrizosa Gelzis, Felipe Carrizosa Gelzis and Enrique Carrizosa Gelzis (“**Claimants**”).
2. Claimants are represented in this arbitration by:

**Mr Pedro J. Martínez-Fraga**  
**Mr C. Ryan Reetz**  
**Mr Craig O’Dear**  
**Mr Mark Leadlove**  
**Ms Rachel Chiu**  
**Mr Domenico Di Pietro\***  
Bryan Cave Leighton Paisner LLP  
200 South Biscayne Boulevard, Suite 400  
Miami, Florida  
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**Mr Joaquín Moreno Pampín**  
RRM Legal  
Av. El Poblado, Ed.  
One Plaza, Suite 202  
Medellín, Colombia

\* As of 23 April 2021, Mr Domenico Di Pietro no longer works at Bryan Cave Leighton Paisner LLP

3. The respondent in this arbitration is the Republic of Colombia (“**Colombia**” or “**Respondent**”, and together with Claimants, the “**Parties**”).
4. Respondent is represented in this arbitration by:

**Mr Camilo Gómez Alzate**  
**Mrs Ana María Ordóñez Puentes**  
**Mr Andrés Felipe Esteban Tovar\***  
Agencia Nacional de Defensa Jurídica del Estado  
Carrera 7 No. 75-66 – 2do y 3er piso  
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**Mr Paolo Di Rosa**  
**Ms Katelyn Horne**  
**Mr Brian Vaca**  
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**Mr Patricio Grané Labat**  
Arnold & Porter Kaye Scholer LLP  
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London EC2N 1HQ, UK

\* As of January 2021, Mr Andrés Felipe Esteban Tovar no longer works for the Agencia Nacional de Defensa Jurídica del Estado.

## **B. THE DISPUTE**

5. The dispute underlying this arbitration arises from a series of measures adopted in 1998 by three Colombian institutions: the *Banco de la República* (the “**Central Bank**”), the *Fondo de Garantías de Instituciones Financieras* (“**Fogafin**”) and the *Superintendencia Bancaria*, later known as the *Superintendencia Financiera* (the “**Superintendency**”), with respect to a Colombian bank, *Corporación Grancolombiana de Ahorro y Vivienda* “GRANAHORRAR” (“**Granahorrar**”); as well as from the domestic judicial proceedings in Colombia that followed between the original majority shareholders of Granahorrar and the above-mentioned Colombian agencies.
6. Respondent has raised several objections to the Tribunal’s jurisdiction. To the extent that it is necessary for the purposes of determining its jurisdiction, the Tribunal considers these objections in this Award.

## **II. PROCEDURAL HISTORY**

### **A. COMMENCEMENT OF THE ARBITRATION**

7. By a Notice of and Request for Arbitration dated 24 January 2018 (the “**Notice of Arbitration**”), Claimants commenced arbitration proceedings against 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 United States – Colombia Trade Promotion Agreement, signed on 22 November 2006 and entered into force on 15 May 2012 (the “**US-Colombia TPA**”, the “**TPA**” or the “**Treaty**”); 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 2 July 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 6 October 2009 (the “**Colombia-Switzerland BIT**” and, together with the US-Colombia TPA and the Colombia-India BIT, the “**Treaties**”). The Notice of Arbitration was received by Respondent on 25 January 2018.

8. On 23 February 2018, Respondent submitted its *Respuesta a la Solicitud de Arbitraje de los Reclamantes* (the “**Response to the Notice of Arbitration**”).

**B. CONSTITUTION OF THE TRIBUNAL**

9. In their Notice of Arbitration, Claimants appointed Prof. Franco Ferrari, an Italian national, as first arbitrator.
10. In its Response to the Notice of Arbitration, Respondent appointed Prof. Zachary Douglas QC, an Australian national, as second arbitrator.
11. On 8 March 2018, Claimants submitted their Notice of Challenge of Arbitrator, notifying their intention to challenge the appointment of Prof. Douglas as arbitrator (the “**Challenge**”).
12. By e-mail of 9 March 2018, Respondent rejected the Challenge and advised that it maintained the appointment of Prof. Douglas as arbitrator.
13. On 23 March 2018, Respondent submitted its Response to Claimants’ Notice of Challenge of Arbitrator.
14. On 5 April 2018, Claimants (i) informed the Permanent Court of Arbitration (the “**PCA**”) that the Parties had not been able to agree on an appointing authority; (ii) requested that the Secretary-General of the PCA designate an appointing authority pursuant to Article 6 of the UNCITRAL Rules (the “**AA Designation Request**”); and (iii) confirmed their intention to pursue the Challenge before the appointing authority. At the PCA’s request, Claimants provided further information on the AA Designation Request to the Secretary-General on 9 April 2018.
15. Between 9 and 27 April 2018, the Parties exchanged correspondence with regard to the AA Designation Request. Among other things, Respondent argued that Article 10.19 of the US-Colombia TPA expressly designates the Secretary-General of the International Centre for Settlement of Investment Disputes (“**ICSID**”) as the only appointing authority; whereas Claimants stated that they had premised their case on Chapter 12 of the US-Colombia TPA.
16. On 2 May 2018, the PCA informed the Parties that (i) it had contacted ICSID to enquire whether it would be willing and available to act as appointing authority in this case, should the Secretary-General of the PCA finally decide on its designation; and (ii) by letter dated 1 May 2018, ICSID had declined the proposed designation.
17. Following an exchange of further correspondence between 4 and 10 May 2018, the Parties agreed that the PCA should serve as appointing authority.

18. On 17 May 2018, and after considering the Parties' proposals on the matter, the Secretary-General of the PCA established a schedule for written submissions on the Challenge.
19. Between 1 June and 4 July 2018, the Parties filed two rounds of written submissions on the Challenge. On 19 June 2018, following the first round of written submissions of the Parties, Prof. Douglas submitted his comments on the Challenge.
20. On 23 August 2018, Prof. Douglas submitted his resignation.
21. By letter dated 19 October 2018, Respondent appointed Mr Christer Söderlund, a national of Sweden, as second arbitrator.
22. On 16 November 2018, the co-arbitrators appointed Mr John Beechey CBE, a national of the United Kingdom, as presiding arbitrator.

**C. ADOPTION OF TERMS OF APPOINTMENT AND PROCEDURAL ORDER NO. 1**

23. On 5 December 2018, the Tribunal circulated draft Terms of Appointment and a draft Procedural Order No. 1, and invited the Parties' comments thereon, which were submitted on 11, 14 and 28 December 2018. Among other matters, the Parties agreed that the proceedings be bifurcated, such that the first phase of the arbitration would be confined to a consideration of the jurisdictional issues.
24. On 16 January 2019, the Tribunal and the Parties held a first procedural meeting via telephone conference, following which the Tribunal issued **Procedural Order No. 1** on 29 January 2019. Section 3.3 of Procedural Order No. 1 and the Procedural Calendar set out in Annex 1 of the same order were amended on 22 March 2019, further to the agreement of the Parties. The Procedural Calendar, including the dates scheduled for the Hearing on Jurisdiction (the "**Hearing**"), was amended on 28 May 2019, 11 June 2019, 4 December 2019 and 22 June 2020.
25. The **Terms of Appointment** were adopted on 15 February 2019.
26. Pursuant to Section 3.1 of the Terms of Appointment, this arbitration is conducted in accordance with the UNCITRAL Rules.
27. Pursuant to Section 2.1 of Procedural Order No. 1, the place of arbitration is London, United Kingdom.
28. Pursuant to Section 3.1 of Procedural Order No. 1 and Section 8.1 of the Terms of Appointment, and by agreement of the Parties, the languages of the arbitration are English and Spanish. In

particular, pursuant to Section 3.3. of Procedural Order No. 1, this Award has been made in English. A Spanish language version of the Award has been prepared, both language versions being equally authentic.

29. As per Section 6.1 of the Terms of Appointment, and with the Parties' consent, the Tribunal appointed Mr Niccolò Landi, an Italian national, as Assistant to the Tribunal.
30. Pursuant to Section 9.1 of the Terms of Appointment, the PCA acts as registry and administers these proceedings.
31. Pursuant to Section 10.1 of Procedural Order No. 1, and by agreement of the Parties, the arbitration is conducted in accordance with the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, as adopted by UNCITRAL on 11 July 2013 (the "**UNCITRAL Transparency Rules**"), in accordance with Article 1(2)(a) thereof, with the PCA assuming the role of the "repository" foreseen under the UNCITRAL Transparency Rules with respect to this arbitration.

#### **D. WRITTEN SUBMISSIONS**

32. On 29 May 2019, Claimants submitted their Memorial on Jurisdiction (the "**Memorial on Jurisdiction**").
33. On 24 June 2019, and with leave of the Tribunal, Claimants filed an additional expert report by Dr Alfonso Vargas Rincón, dated 11 June 2019.
34. On 21 October 2019, Respondent submitted its Answer on Jurisdiction (the "**Answer on Jurisdiction**").
35. On 21 December 2019, Claimants submitted their Reply to Respondent's Answer on Jurisdiction, dated 20 December 2019 (the "**Reply on Jurisdiction**").
36. On 16 March 2020, Respondent submitted its Rejoinder on Jurisdiction (the "**Rejoinder on Jurisdiction**").

#### **E. NON-DISPUTING PARTY SUBMISSIONS**

37. By letter of 8 November 2019, the United States of America, through its Department of State, proposed to file a written submission in the present arbitration on 1 May 2020, which it noted it was entitled to do pursuant to Article 10.20.2 of the US-Colombia TPA.

38. On 4 December 2019, the Tribunal granted leave to the United States to file a written submission by 1 May 2020.
39. On 1 May 2020, the United States (i) filed a written submission in the present proceeding (the “**Submission of the United States**”); and (ii) noted that it did not anticipate making an oral submission, although it reserved the right to do so, pursuant to Article 10.20.2 of the US-Colombia TPA “depending on the parties’ future arguments”.
40. On 15 May 2020, with the leave of the Tribunal, Claimants submitted their Observations concerning Non-Disputing Party Submission of the United States of America (the “**Claimants’ Observations on the US Submission**”) and Respondent submitted its Written Observations on the United States’ Non-Disputing Party Submission (the “**Respondent’s Observations on the US Submission**”).
41. Between 13 and 22 May 2020, and further to the Tribunal’s invitation, the Parties and the United States submitted their views with regard to the need to make redactions to the Submission of the United States, Claimants’ Observations on the US Submission and Respondent’s Observations on the US Submission prior to their publication on the PCA’s website pursuant to Article 3 of the UNCITRAL Transparency Rules. *Inter alia*, the United States noted:

... in the interest of transparency the United States’ practice is to put its non-disputing Party submissions in investor-State arbitrations on the U.S. Department of State’s web site, and it intends to do the same for the submission in this case as well.
42. By letter of 2 June 2020, the Tribunal, referring to the Parties positions, and in particular to the statements made by the United States, advised that it had concluded that no purpose would be served by ordering any redactions to the Submission of the United States or to the Parties’ written observations thereto. It directed that these materials be published in full on the PCA’s website.
43. On 9 June 2020, the United States submitted certain comments on the Tribunal’s letter of 2 June 2020, following which the Tribunal, by letter of 11 June 2020, confirmed its decision and statements as set out in its letter of 2 June 2020.
44. On 15 June 2020, Claimants submitted their comments on the United States’ letter of 9 June 2020.
45. On 21 October 2020, the Tribunal informed the United States that the Hearing would be held by videoconference during the week commencing 14 December 2020 and invited the United States to confirm whether it wished to make an oral submission at the Hearing.
46. On 28 October 2020, the United States indicated that (i) based on the Parties’ submissions to date, it did not intend to make an oral submission pursuant to Article 10.20.2 of the US-Colombia TPA

at the Hearing; and (ii) if the Parties' positions with respect to the interpretation of US-Colombia TPA changed during the Hearing, there was a possibility that it would wish to address such new positions under Article 10.20.2 through a post-hearing written submission.

47. On 4 December 2020, the United States provided notice that it might indeed wish to "exercise its right" under Article 10.20.2 of the US-Colombia TPA to make a short submission either in oral form at the Hearing or in a written form after the Hearing, as the Tribunal deemed appropriate.
48. By separate communications of 8 December 2020, the Parties expressed the view that the United States should be given the opportunity to make its submission orally at the Hearing.
49. On 9 December 2020, the Tribunal confirmed the timing of the United States' oral submission at the Hearing.

#### **F. THE HEARING ON JURISDICTION**

50. By two communications of 20 March 2020, and in accordance with the Procedural Calendar then in force, Claimants provided their notification of witnesses and experts for examination at the Hearing, requesting leave to call for the appearance at the Hearing of "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". On the same day, 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."
51. On 24 and 30 March 2020, with the leave of the Tribunal, the Parties respectively filed further submissions with regard to Claimants' application to present their own witnesses and experts at the Hearing.
52. On 6 April 2020, the Tribunal issued **Procedural Order No. 2**, whereby it granted leave to 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. The Tribunal further directed that evidence to be given by any witness or expert whom Claimants called to testify at the Hearing should be limited strictly to the issues of jurisdiction upon which the Tribunal was to be addressed.
53. Between 1 May and 11 June 2020, the Tribunal and the Parties exchanged correspondence with regard to the timing and format of the Hearing, in light of the impact of the COVID-19 pandemic.

54. On 12 June 2020, after consulting with the Parties, the Tribunal advised that it had decided to vacate the dates previously reserved for the Hearing in the week commencing 27 July 2020 and to 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.
55. On 22 June 2020, after further consultations with the Parties, 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.
56. By communications of 28 August, 1 September and 8 September 2020, Respondent (i) informed Claimants and the Tribunal that its expert, Dr Jorge Enrique Ibáñez Najar, had been elected as a justice of the Constitutional Court of Colombia; (ii) submitted that such appointment meant that, pursuant to Colombian law, Dr Ibáñez would not be permitted to participate in the Hearing; (iii) requested, pursuant to Section 7.7 of Procedural Order No. 1, that the Tribunal exercise its authority and discretion to take into account Dr Ibáñez's written reports, notwithstanding his inability to testify orally at the Hearing; and (iv) nevertheless offered to make Dr Ibáñez available for cross-examination before 7 October 2020, after which date, Dr Ibáñez's assumption of judicial office would preclude any such opportunity.
57. On 8 September 2020, Claimants submitted their observations concerning the unavailability of Dr Ibáñez to testify at the Hearing. They requested, *inter alia*, that the Tribunal summon Dr Ibáñez to appear for cross-examination at the Hearing and, in the event of his non-appearance, strike his two expert reports from the record. In the alternative, they expressed a desire to cross-examine Dr Ibáñez prior to the date of his asserted inability further to participate in the proceedings.
58. Pursuant to the Tribunal's invitation, on 18 September 2020, the Parties submitted their respective views on whether, and if so to what extent, the evidence of Drs. Ibáñez and Briceño would inform and assist the Tribunal on issues dispositive for the matter of jurisdiction.
59. By letter of 23 September 2020, the Tribunal (i) informed the Parties that prior commitments made it impossible to arrange to hear Dr Ibáñez's evidence before 7 October 2020; (ii) observed that it was inclined to proceed on the basis of the expert reports of Drs. Briceño and Ibáñez; (iii) excluded the participation at the Hearing of Drs. Briceño and Ibáñez pursuant to Section 7.10 of Procedural Order No. 1; (iv) denied Claimants' application that Dr Ibáñez's expert reports be

stricken from the record; and (v) noted that the Parties could further address the contents of the expert reports of Drs. Briceño and Ibáñez in the course of their oral arguments at the Hearing.

60. 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.
61. By separate communications of 15 October 2020, the Parties respectively indicated, *inter alia*, that they agreed that the Hearing should be held remotely and that necessary arrangements should be made to that effect.
62. On 21 October 2020, the Tribunal circulated a draft Procedural Order No. 3 convening the Hearing and addressing all other technical and ancillary aspects thereof, for discussion at the pre-hearing conference.
63. On 30 October 2020, the Parties submitted certain joint comments on the Tribunal's draft Procedural Order No. 3, as well as their respective views with regard to the aspects of the said draft on which they could not reach agreement.
64. On 3 November 2020, the Tribunal provided clarifications in respect of certain technical and logistical questions raised by the Parties with regard to the Hearing and draft Procedural Order No. 3.
65. 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. Later on the same day, the Tribunal, the Parties and the PCA held a pre-hearing videoconference, which served to discuss the Parties' comments on the draft Procedural Order No. 3 and to test the functionalities of the videoconference system.
66. On 11 November 2020, the Tribunal issued **Procedural Order No. 3**, convening the Hearing and establishing the Hearing schedule as well as its technical, organizational and other ancillary aspects.
67. On 17 November 2020, Claimants sought leave to file the hearing transcripts and video recordings of the examinations of Drs. Ibáñez and Briceño in ICSID Case No. ARB/18/05, an arbitration initiated against Colombia by Mrs Astrida Benita Carrizosa (the "**ICSID Proceedings**"). In response, on 20 November 2020, Respondent requested that the Tribunal authorize the Parties to submit the entire transcripts and recording of the hearing held the ICSID Proceedings.



68. On 26 November 2020, the Tribunal issued **Procedural Order No. 4**, in which it (i) determined that it was unnecessary to depart from, or otherwise vary, its decision of 23 September 2020 to admit into the record for the Hearing the expert reports of Drs. Briceño and Ibáñez; and (ii) denied Claimants' application for leave to file the hearing transcripts and video recordings of the examinations of Drs. Ibáñez and Briceño in the ICSID Proceedings.
69. The Hearing was held by videoconference on 14-16 and 18 December 2020. A public webcast of the Hearing was also made available on the PCA's website. The following persons attended the Hearing:

**The Tribunal**

Mr John Beechey CBE (Presiding Arbitrator)  
Professor Franco Ferrari  
Mr Christer Söderlund

**Assistant to the Tribunal**

Niccolò Landi

**Claimants**

Alberto Carrizosa Gelzis  
Felipe Carrizosa Gelzis  
Enrique Carrizosa Gelzis

Pedro J. Martínez-Fraga  
C. Ryan Reetz  
Craig S. O'Dear  
Domenico Di Pietro  
Rachel Chiu  
Satvaldiev Dilmurod  
Chun Yu  
*Bryan Cave Leighton Paisner LLP*

Joaquín Moreno  
*RRM Legal*

Olin Wethington  
Loukas Mistelis  
*Experts*

**Respondent**

Camilo Gómez Alzate  
Ana María Ordóñez Puentes  
Andrés Felipe Esteban Tovar  
Giovanny Andrés Vega Barbosa  
Elizabeth Prado López  
María Angélica Velandia  
*Agencia Nacional de Defensa Jurídica del Estado*

Dina María Olmos Aponte  
*Fondo de Garantías de Instituciones Financieras*

Juan Pablo Buitrago León  
*Superintendencia Financiera*

Manuela Barrera Rego  
*Banco de la República*

Paolo Di Rosa  
Patricio Grané Labat  
Katelyn Horne  
Brian Vaca  
Cristina Arizmendi  
Kelby Ballena  
*Arnold & Porter LLP*

**The United States of America (Non-Disputing Party)**

Lisa J. Grosh  
John D. Daley  
Nicole C. Thornton  
John I. Blanck  
Amy Zuckerman  
Amanda Blunt  
Catherine Gibson  
*US Department of State*

**Permanent Court of Arbitration (Registry)**

José Luis Aragón Cardiel  
Markel Eguiluz Parte  
Luis Popoli

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Dante Rinaldi  
*D-R Esteno*

**Interpreters**

Silvia Colla  
Daniel Giglio

**Technical Support**

Faraz Khan  
*Law in Order*

**G. POST-HEARING PROCEEDINGS**

70. At the closing of the Hearing, the Tribunal directed that the Parties file submissions on costs by 15 January 2021.

71. On 15 January 2021, the Parties filed their respective **Costs Submissions**.

72. On 23 April 2021, the Tribunal requested that the Parties advise whether they would be content to receive its upcoming ruling only in electronic form, and signed electronically by the members of the Tribunal, for the purposes of Article 34(6) of the UNCITRAL Rules. The Parties confirmed their agreement with the Tribunal’s proposal by separate communications of 27 April 2021.

### III. FACTUAL BACKGROUND

73. The events described below are a summary of the factual background of the dispute as alleged by the Parties in their submissions. They are solely meant to provide context for the Tribunal’s Award. They do not constitute factual findings of the Tribunal.

#### A. GRANAHORRAR

74. Claimants claim to have made an investment in Granahorrar, a Colombian banking entity incorporated in 1972 and engaged primarily in promoting private saving channelled to the construction industry.<sup>1</sup> Originally a subsidiary of *Banco de Colombia*, Granahorrar was sold in 1986 to a group of leading building contractors in Colombia, alongside Claimants and their parents, Mrs Astrida Benita Carrizosa and Mr Julio Carrizosa Mutis (together, the “**Carrizosa Family**”).<sup>2</sup>
75. Claimants held divers equity interests in Granahorrar through at least six Colombian companies operating in businesses such as agriculture, forestry, real estate and construction and which also served as holding companies.<sup>3</sup> As of October 1998, Claimants’ stake in Granahorrar amounted to 40.2570%, divided as follows: (i) Mr Alberto Carrizosa Gelzis owned and controlled a 13.5797% equity interest; (ii) Mr Enrique Carrizosa Gelzis owned and controlled a 13.3420% equity interest; and (iii) Mr Felipe Carrizosa Gelzis owned and controlled a 13.3353% equity interest.<sup>4</sup> The Carrizosa Family as a whole owned 58.76% of Granahorrar’s shares at the time.<sup>5</sup>

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<sup>1</sup> Notice of Arbitration, para. 8; Granahorrar Information Memorandum (Lehman Brothers), August 1998, p. 1 (C-0001); Decree No. 678 of 1972, Republic of Colombia, 2 May 1972, Art. 1 (R-0156).

<sup>2</sup> See Granahorrar Information Memorandum (Lehman Brothers), August 1998, p. 18 (C-0001); *Composición de Capital de personas jurídicas que posean más del 5% del capital de acciones de la entidad*, 31 December 1989 (R-0110).

<sup>3</sup> See Notice of Arbitration, paras. 16-25. See also Shareholders Registries of Holding Companies 1987-2012 (R-0154).

<sup>4</sup> Notice of Arbitration, paras. 16-40; Answer on Jurisdiction, para. 38.

<sup>5</sup> Granahorrar Information Memorandum (Lehman Brothers), August 1998, p. 18 (C-0001). Respondent adds that it was Claimants’ father who “controlled the Carrizosa Family’s businesses, including Granahorrar”. See Answer on Jurisdiction, para. 40, fn. 104.

76. According to Claimants, Granahorrar had become one of the leading and most successful savings and loan institutions in Colombia by 1998, notwithstanding an increasingly competitive market environment.<sup>6</sup>

## **B. STATE MEASURES AFFECTING GRANAHORRAR**

77. Colombia experienced a severe economic crisis during the late 1990s.<sup>7</sup> As defaults increased, the Colombian government adopted a battery of measures designed to subject financial institutions to strict supervision. Those measures included capitalization followed by temporary State-ownership (a process known as “*oficialización*”) or liquidation.<sup>8</sup>

78. In this context, Granahorrar suffered an increase in its liabilities and a significant outflow of deposits leading to a liquidity deficit, as a result of which the bank sought support from Colombian authorities.<sup>9</sup> Between June and early July 1998, the Central Bank provided funds to Granahorrar in the form of “temporary liquidity support” (“*apoyos transitorios de liquidez*” in Spanish) in excess of COP 300 billion (approximately equivalent to US\$ 190 million at the time)<sup>10</sup> through three separate transactions.<sup>11</sup> Granahorrar also requested financing from Fogafin in the further amount of COP 300 billion (through a temporary purchase of a credit portfolio). That request eventually resulted in a covenant between both entities (the “**Fogafin Covenant**”) under which Fogafin undertook to guarantee Granahorrar’s interbank financing and overdraft obligations up to the requested amount in exchange for promissory notes valued at 134% of the guarantee amount (i.e. COP 400 billion, approximately US\$ 250 million).<sup>12</sup>

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<sup>6</sup> See Notice of Arbitration, paras. 9-15.

<sup>7</sup> Notice of Arbitration, para. 41; Answer on Jurisdiction, para. 45.

<sup>8</sup> Notice of Arbitration, paras. 41-43; Answer on Jurisdiction, paras. 45-46; Alejandro Torres G., *La Crisis Colombiana de Finales del Siglo XX: ¿Un choque real o financiero?*, Perfil de Coyuntura Económica No. 18, 18 December 2011, pp. 82-83; Clara Elena Parra and Natalia Salazar, *La Crisis Financiera y la Experiencia Internacional*, Boletines de Divulgación Económica, Unidad de Análisis Macroeconómico del Departamento Nacional de Planeación, p. 21 (C-0002); *Bancos: Sigue la Ola de Ventas y Fusiones*, El Tiempo, 12 September 1997, pp. 2-4 (R-0064); *El Gobierno Oficializó el Banco Uconal*, El Tiempo, 26 September 1998 (R-0162); *La Superintendencia Bancaria en la Crisis de Los Noventa*, Sara Ordóñez Noriega, July 2003, p. 8 (R-0159); *La Oficialización de Granahorrar*, El Tiempo, 5 October 1998 (R-0163).

<sup>9</sup> The Parties disagree as to the reasons that led to this situation. See generally Notice of Arbitration, paras. 42, 44-47; Answer on Jurisdiction, paras. 47-54.

<sup>10</sup> For strictly illustrative purposes, the Tribunal will use the exchange rate of COP 1,568.45=US\$ 1 throughout this Award (see Notice of Arbitration, fn 7).

<sup>11</sup> These deposits required assets to be provided as collateral and had a repayment term of 180 days. See Notice of Arbitration, paras. 47-50; Answer on Jurisdiction, paras. 55-61; Communications between GRANAHORRAR and the Central Bank concerning three (3) short-term credits, June-September 1998, pp. 1-4 (C-0006); Letter from Granahorrar (R. Navarro) to Central Bank (M. Urrutia), 17 June 1998 (R-0068); External Resolution No. 25, 31 October 1995, Arts. 2, 3, 6, 25(2), 29 (R-0142).

<sup>12</sup> Letter from Granahorrar (J. Amaya) to Fogafin (F. Azuero), 2 July 1998 (R-0089); Covenant between Fondo de Garantía de Instituciones Financieras and Corporación Grancolombiana de Ahorro y Vivienda

79. In July 1998, the board of Fogafin dismissed some of Granahorrar's requests for broader coverage and maturity periods, suggesting that a change of ownership would not only propel "restoration of trust" in the bank, but it should be made a condition for any further financial support.<sup>13</sup> The Carrizosa Family, alongside another family with a majority stake in the bank, eventually expressed their "irrevocable intention" to sell their shares in Granahorrar, preferably in a single transaction.<sup>14</sup> Following this announcement, the Central Bank modified the amortization schedule for the liquidity support arrangements, while the terms of the Fogafin Covenant were further adjusted through various addenda to respond to certain requests from Granahorrar.<sup>15</sup> Since Fogafin's management advised against granting the bank's additional requests, one of the later addenda to the Fogafin Covenant provided that, in the event that Granahorrar ceased to make payments, Fogafin would be entitled fully to dispose of the promissory notes.<sup>16</sup> Claimants label this provision as "specious and indicative of an irregular and unorthodox practice exercised to the detriment of Granahorrar", whereas Respondent argues that it was included "[i]n light of Granahorrar's dismal financial state".<sup>17</sup>
80. As of 1 October 1998, the attempts to sell the Carrizosa Family's majority shareholding in Granahorrar – including the negotiation of an option contract with certain banking creditors of

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GRANAHORRAR, 6 July 1998 (C-0005). The Parties again have diverging views on the exact background to this request and the extent to which Fogafin's response was suitable for Granahorrar's situation. *See* Notice of Arbitration, paras. 51-59; Answer on Jurisdiction, paras. 62-64.

<sup>13</sup> Minutes of the Board of Directors of Fogafin, Minutes No. 218, 22 July 1998, p. 2 (C-0013, R-0007); Documento a Consideración de la Junta Directiva, Fogafin Management, 22 July 1998, p. 4 (R-0090). *See also* Notice of Arbitration, paras. 94-103.

<sup>14</sup> Letter from Granahorrar (J. Amaya) to Fogafin (F. Azuero), 22 July 1998 (R-0091) (Tribunal's translation); Minutes of the Board of Directors of Fogafin, Minutes No. 218, 22 July 1998, pp. 3-4 (C-0013, R-0007); Letter from Julio Carrizosa Mutis to Fogafin (F. Azuero), 29 July 1998 (R-0157); Letter from Julio Carrizosa Mutis to Fogafin (F. Azuero), 30 July 1998 (R-0158). The two families then executed a trust agreement for this purpose. *See* Irrevocable Trust Agreement, 5 August 1998 (R-0061).

<sup>15</sup> Letter from Central Bank (P. Correa) to Granahorrar (R. Navarro), 31 July 1998 (R-0073); Letter from Central Bank (A. Velandia) to Granahorrar (R. Navarro), 1 September 1998 (R-0075); Addendum No. 1 to the Fogafin Agreement, 3 August 1998 (R-0092); Addendum No. 2 to the to the Fogafin Agreement, 6 August 1998 (R-0093); Addendum No. 3 to the Fogafin Agreement, 21 August 1998 (R-0094); Addendum No. 4 to the Fogafin Agreement, 31 August 1998 (R-0095); Addendum No. 5 to the Fogafin Agreement, 2 September 1998 (R-0104); Addendum No. 6 to the Fogafin Agreement, 4 September 1998 (R-0096); Addendum No. 7 to the Fogafin Agreement, 7 September 1998 (R-0105); Addendum No. 8 to the Fogafin Agreement, 8 September 1998 (R-0097); Addendum No. 9 to the Fogafin Agreement, 10 September 1998 (R-0098); Addendum No. 10 to the Fogafin Agreement, 21 September 1998 (R-0099). *See also* Notice of Arbitration, paras. 78-79; Answer on Jurisdiction, paras. 74-76.

<sup>16</sup> *See* Informe de la Administración de Fogafin para la Consideracion de la Junta Directiva, Fogafin Management, 23 September 1998, p. 2 (R-0023); Contract between FOGAFIN and GRANAHORRAR / Addendum No. 11 to the Fogafin Agreement, 24 September 1998, Art. 2 (C-0011, R-0106); Addendum No. 12 to the Fogafin Agreement, 30 September 1998 (R-0027); Addendum No. 13 to the Fogafin Agreement, 1 October 1998 (R-0028). *See also* Informe Desarrollo Apoyo Especial de Liquidez C.A.V. Granahorrar, Central Bank, 15 September 1998, pp. 8-9 (R-0020); Letter from Central Bank (A. Velandia) to Granahorrar (R. Navarro), 1 October 1998 (R-0019).

<sup>17</sup> *See* Notice of Arbitration, paras. 80-92; Answer on Jurisdiction, paras. 82-83. *See also* Memorial on Jurisdiction, para. 14.

the majority shareholders – had failed.<sup>18</sup> On 2 October 1998, Fogafin informed the Superintendency that Granahorrar had breached the Fogafin Covenant,<sup>19</sup> as the bank had (i) recorded a negative balance of COP 31 billion at the close of the day;<sup>20</sup> (ii) had some of its checks returned due to insufficient funds;<sup>21</sup> and (iii) failed to pay the interest owed to the Central Bank.<sup>22</sup> Accordingly, Fogafin enforced the clause enabling it to take ownership of Granahorrar’s promissory notes,<sup>23</sup> leading the Superintendency to notify the Central Bank that Granahorrar had thus fallen into a “status of insolvency”,<sup>24</sup> following which the Central Bank also terminated the liquidity support and took possession of the promissory notes provided as collateral.<sup>25</sup> Shortly before the end of the day on 2 October 1998, the Superintendency, referring to the risk of “a systemic crisis and eventual economic panic” issued an order addressed to Granahorrar’s Chairman whereby it required that the bank be capitalized in the amount of at least COP 157 billion by no later than 3:00 PM on 3 October 1998 (the “**Capitalization Order**”) in order to protect “the interest of savers and depositors.”<sup>26</sup>

81. As Granahorrar’s shareholders did not meet the capitalization requirement by the deadline that it had set,<sup>27</sup> the Superintendency sent a report to Fogafin outlining the bank’s overall financial situation.<sup>28</sup> The board of Fogafin then decided that it would proceed to the *oficialización* of Granahorrar, ordering it to reduce the nominal value of its shares to COP 0.01 (the “**Value**

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<sup>18</sup> See Letter from Granahorrar (J. Amaya) to Fogafin (F. Azuero), 22 September 1998, pp. 6-7 (**R-0022**); 1998 Option Contract, 30 September 1998 (**R-0030**); Letter from the Creditor Banks to Grupo I.C., 1 October 1998 (**R-0031**); Letter from Julio Carrizosa Mutis to Creditor Banks, 1 October 1998 (**R-0167**). See also Notice of Arbitration, paras. 123-128.

<sup>19</sup> Correspondence from Francisco Azuero Zuñiga of FOGAFIN to Dr Sara Ordoñez Noriega (Superintendent of Banking), 2 October 1998 (**C-0016, R-0035**). Claimants also refer to an alleged leak regarding the failure of the sale negotiations, which eventually resulted in a “perception of an institutional crisis” within Granahorrar and a “deposit run”. See Notice of Arbitration, para. 129; Memorial on Jurisdiction, para. 17.

<sup>20</sup> Letter from Granahorrar (A. Arciniegas) to Superintendency (M. Arango), 2 October 1998 (**R-0032**).

<sup>21</sup> Letter from Superintendency (S. Ordoñez) to Fogafin (F. Azuero), 2 October 1998 (**R-0033**); Letter from Superintendency (S. Ordoñez) to Central Bank (M. Urrutia), 2 October 1998 (**R-0034**).

<sup>22</sup> Letter from Granahorrar (J. Amaya) to Superintendency (S. Ordoñez), 2 October 1998 (**R-0036**).

<sup>23</sup> Correspondence from Francisco Azuero Zuñiga of FOGAFIN to Dr Sara Ordoñez Noriega (Superintendent of Banking), 2 October 1998 (**C-0016, R-0035**).

<sup>24</sup> Correspondence from the Superintendent of Banking, Dr Sara Ordoñez Noriega to Dr Miguel Urrutia Montoya of the Central Bank, 2 October 1998 (10:17 PM) (**C-0017**); Notice of Arbitration, para. 132.

<sup>25</sup> Correspondence from José Darío Uribe of the Central Bank to Dr Jorge Enrique Amaya Pacheco (Granahorrar), 2 October 1998 (**C-0018**).

<sup>26</sup> Correspondence from Sara Ordoñez Noriega to Dr Jorge Enrique Amaya Pacheco, reference No. 1998050714, 2 October 1998 (11:50 PM) / 1998 Capitalization Order, p. 3 (**C-0019, R-0038**). See Answer on Jurisdiction, paras. 91-93; Notice of Arbitration, paras. 135, 147; Memorial on Jurisdiction, paras. 21, 26.

<sup>27</sup> Letter from Granahorrar (J. Amaya) to Superintendency (S. Ordoñez), 3 October 1998 (**R-0039**); Letter from Granahorrar (J. Amaya) to Superintendency (S. Ordoñez), 3 October 1998 (**R-0041**).

<sup>28</sup> Letter from Superintendency (S. Ordoñez) to Fogafin (Board of Directors), 3 October 1998 (**R-0048**).

- Reduction Order**”).<sup>29</sup> Between 3 and 5 October 1998, Fogafin capitalized Granahorrar in the amount of COP 157 billion as required by the Superintendency, and hence became the majority shareholder in the bank.<sup>30</sup>
82. Following these events, Granahorrar underwent a series of structural and organizational changes and its financial situation improved progressively, as it received further support from the Colombian authorities.<sup>31</sup> Finally, on 31 October 2005, Fogafin sold Granahorrar to the Spanish bank *Banco Bilbao Vizcaya Argentaria* for COP 970 billion, and the two entities merged a few months later.<sup>32</sup>
83. Claimants submit that the “guarantee-restructuring program” implemented by Fogafin was discriminatory towards Granahorrar, which, they argue, was a “sound and viable” financial institution that had “no solvency issue whatsoever” throughout 1998.<sup>33</sup> They argue that it was Fogafin’s continuous discriminatory treatment, as well as its “irregular, unorthodox, and absolutely non-responsive” measures, that placed Granahorrar in a “fictitious state of insolvency” through the misappropriation of its assets.<sup>34</sup>
84. Respondent posits that the relevant Colombian institutions “promptly responded to Granahorrar’s request for assistance” and notes that, as the bank’s “liquidity crisis had devolved into an insolvency emergency”, the Colombian authorities had to intervene to “prevent its collapse”, recalling that other financial institutions underwent a similar process of *oficialización*.<sup>35</sup> It further denies that Colombia forced Claimants to sell their shares to “Granahorrar’s creditors”, explaining that the intended purchasers of those shares were “any third party buyer[s]”, but that a “threshold obstacle” was that many of the shares were encumbered.<sup>36</sup>

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<sup>29</sup> Fondo de Garantía de Instituciones Financieras, Actas de la Junta Directiva No. 225, 3 October 1998, pp. 8-9 (C-0003); Fogafin’s Resolution No. 002, 3 October 1998, Art. 1 (C-0020, R-0042); Letter from Granahorrar (J. Amaya) to Fogafin (F. Azuero), 3 October 1998 (R-0168).

<sup>30</sup> See Letter from Fogafin (I. Quintana) to Granahorrar (A. Arciniegas), 5 October 1998 (R-0153); Fondo de Garantía de Instituciones Financieras, Actas de la Junta Directiva No. 225, 3 October 1998, p. 11 (C-0003). Claimants submit that Fogafin took “two weeks” to recapitalize Granahorrar. See Notice of Arbitration, para. 137 (emphasis omitted).

<sup>31</sup> See *\$157.000 Millones Para Granahorrar*, EL TIEMPO, 6 October 1998 (R-0043); Minutes of Granahorrar Shareholders Assembly, 16 October 1998 (R-0047); Minutes of Fogafin Board of Directors Meeting, 17 December 1998, p. 3 (R-0103); Notice of Arbitration, para. 136; Answer on Jurisdiction, para. 101.

<sup>32</sup> *El Banco Granahorrar es ahora del BBVA*, PORTAFOLIO, 5 November 2005, *El BBVA se “quedó” con el Banco Granahorrar que será fusionado*, CARACOL RADIO, 31 October 2005 (C-0021); *Gobierno vende Banco Granahorrar a grupo español BBVA*, DINERO, 31 October 2005 (R-0045); *Lista fusión de BBVA y Granahorrar*, EL MUNDO, 29 April 2006 (R-0164).

<sup>33</sup> Notice of Arbitration, paras. 60-77.

<sup>34</sup> Notice of Arbitration, paras. 78, 93, 104-105, 138-146; Memorial on Jurisdiction, para. 18.

<sup>35</sup> Answer on Jurisdiction, paras. 43, 54, 87, 103-104.

<sup>36</sup> Answer on Jurisdiction, paras. 68-72.

**C. JUDICIAL PROCEEDINGS AGAINST FOGAFÍN AND THE SUPERINTENDENCY OF BANKING**

85. In May 2000, Claimants requested information from the Superintendency with regard to the measures imposed on Granahorrar in 1998.<sup>37</sup> The Superintendency responded on 25 July 2000, indicating, *inter alia*, that Granahorrar's capitalization was conducted in accordance with the law and that the legal representative of the bank had been duly notified in this respect.<sup>38</sup>
86. On 28 July 2000, Claimants, through their Colombian holding companies, filed a nullification and reinstatement action against the Superintendency and Fogafin before the Administrative Judicial Tribunal of Cundinamarca.<sup>39</sup> Claimants alleged that the measures adopted with respect to Granahorrar were unlawful both substantively and procedurally. In essence, they requested that (i) the Capitalization Order and the Value Reduction Order be declared null; and (ii) the Superintendency and Fogafin pay damages based on the value of Granahorrar's shares prior to the imposition of these measures (plus interest).<sup>40</sup>
87. While the Administrative Judicial Tribunal initially rejected the claim on the basis that the right to invoke the action had expired, it later decided to admit it through a ruling dated 9 March 2001, following an appeal by Claimants.<sup>41</sup> In their pleadings before the Administrative Judicial Tribunal, the Superintendency and Fogafin insisted that Claimants' action was barred by the applicable statute of limitations. They further defended the measures that they had adopted in 1998 on the grounds that they were both lawful and factually justified.<sup>42</sup>

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<sup>37</sup> See Letter from Superintendency (G. Aguilar) to Compto S.A.'s Counsel (C. Cardona), 25 July 2000, p. 1 (**R-0060**). Claimants assert that the first of the requests was served on 15 March 2000. See Notice of Arbitration, para. 150; Memorial on Jurisdiction, paras. 26-27; Answer on Jurisdiction, para. 107.

<sup>38</sup> Letter from Superintendency (G. Aguilar) to Compto S.A.'s Counsel (C. Cardona), 25 July 2000, pp. 5-6 (**R-0060**). The Parties still disagree as to whether Granahorrar's shareholders were notified as required by the law. See Notice of Arbitration, para. 150; Memorial on Jurisdiction, para. 26; Answer on Jurisdiction, paras. 108-109.

<sup>39</sup> Nullification and Reinstatement Action, *Compto S.A. in Liquidación, et al. v. Superintendency and Fogafin*, Case No. 2000-00521, Administrative Judicial Tribunal of Cundinamarca, 28 July 2000 (**R-0050**). See Memorial on Jurisdiction, para. 28; Answer on Jurisdiction, para. 105.

<sup>40</sup> See Nullification and Reinstatement Action, *Compto S.A. in Liquidación, et al. v. Superintendency and Fogafin*, Case No. 2000-00521, Administrative Judicial Tribunal of Cundinamarca, 28 July 2000, pp. 1-7 (**R-0050**); Notice of Arbitration, para. 151; Answer on Jurisdiction, para. 112.

<sup>41</sup> Rejection of Registration, Case No. 20000521, Administrative Judicial Tribunal, 25 August 2000 (**R-0143**); Admission of the Nullification and Reinstatement Action, Case No. 20000521, Administrative Judicial Tribunal, 9 March 2001 (**R-0144**); Answer on Jurisdiction, para. 113.

<sup>42</sup> See generally Answer of the Superintendency to the Nullification and Reinstatement Action, Case No. 20000521, 3 August 2001 (**R-0127**); Answer of Fogafin to the Nullification and Reinstatement Action, Case No. 20000521, Administrative Judicial Tribunal, 23 November 2001 (**R-0128**); Closing Statement of Fogafin, Case No. 20000521, Administrative Judicial Tribunal, 18 November 2004 (**R-0132**); Closing Statement of the Superintendency, Case No. 20000521, Administrative Judicial Tribunal, 18 November 2004 (**R-0133**); Answer on Jurisdiction, paras. 114-117.



88. The Administrative Judicial Tribunal issued its judgment on 27 July 2005, rejecting Claimants' claims on their merits.<sup>43</sup> The Colombian court found that the actions of Fogafin, the Central Bank and the Superintendency were legally warranted, noting that Granahorrar was neither liquid, nor solvent at the time it underwent *oficialización*; and the court observed that the lack of proper notification of the challenged measures did not render them null.<sup>44</sup>

**D. JUDGMENT OF THE COUNCIL OF STATE**

89. On 5 August 2005, Claimants submitted an appeal against the judgment of the Administrative Judicial Tribunal to the Council of State, alleging, *inter alia*, that such decision (i) had not ruled on their claims; (ii) had not assessed the available evidence; and (iii) was grounded on the language of the challenged administrative acts, which were unjustified and executed through a misuse of power.<sup>45</sup> The Council of State agreed to hear the appeal on 10 October 2005.<sup>46</sup> In their substantive submissions, Claimants reiterated their complaints against the measures imposed on Granahorrar and requested compensation to the extent of COP 8.80 per share held in the bank.<sup>47</sup> Fogafin and the Superintendency requested that the first instance judgment be confirmed, notwithstanding their position that the original action had expired.<sup>48</sup>
90. On 1 November 2007, the Fourth Section of the Council of State issued its judgment (the "**Council of State Judgment**"), in which (i) it reversed the judgment of the Administrative Judicial Tribunal; (ii) it declared the Capitalization Order and the Value Reduction Order null; and (iii) it ordered the Superintendency and Fogafin to compensate Claimants (specifically, their

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<sup>43</sup> Judgment, *Compto S.A. en Liquidación, et al. v. Superintendency and Fogafin*, Case No. 2000-00521, Administrative Judicial Tribunal of Cundinamarca, 27 July 2005, p. 44 (**R-0051**). As to whether the length of this proceeding was reasonable, see Memorial on Jurisdiction, para. 29; Answer on Jurisdiction, para. 118.

<sup>44</sup> Judgment, *Compto S.A. en Liquidación, et al. v. Superintendency and Fogafin*, Case No. 2000-00521, Administrative Judicial Tribunal of Cundinamarca, 27 July 2005, pp. 25, 32-34, 38-41, 44 (**R-0051**).

<sup>45</sup> Holding Companies' Notice of Appeal, Case No. 20000521, Administrative Judicial Tribunal, 5 August 2005 (**R-0134**).

<sup>46</sup> Communications regarding the Notification of the Appeal, Case No. 20000521, Administrative Judicial Tribunal, p. 8, 10 October 2005 (**R-0136**).

<sup>47</sup> Holding Companies' Submission on the Merits of the Appeal, Case No. 20000521, Administrative Judicial Tribunal, 7 February 2006, p. 82 [PDF] (**R-0135**).

<sup>48</sup> See generally Appeal Response by Fogafin, *Compto S.A. en Liquidación et al. v. Superintendency and Fogafin*, Case No. 2000-00521-02, Council of State, 19 December 2005 (**R-0052**); Superintendency's Response to the Appeal, Case No. 20000521, Council of State, 16 February 2006 (**R-0137**).

holding companies) in the amount of COP 226,961,237,735 (plus interest).<sup>49</sup> One of the four judges comprising the relevant Section issued a dissenting opinion.<sup>50</sup>

91. The Parties' respective characterizations of the findings and reasoning of the Council of State Judgment diverge in significant respects. Claimants assert that the Council of State concluded that the "expropriation" of Granahorrar was "illegal" and further found that Fogafin and the Superintendency had created and erroneously relied upon "... an economic crisis for Granahorrar that was artificial" as a basis to justify the adoption of the Capitalization Order and the Value Reduction Order.<sup>51</sup> In Respondent's view, the Council of State did not find that there was an illegal expropriation; it had simply determined that "the evidence did not support a finding of insolvency"; in fact, the Council found that the Superintendency and Fogafin "had not behaved recklessly".<sup>52</sup>

#### **E. PROCEEDINGS BEFORE THE CONSTITUTIONAL COURT**

92. On 5 March 2008, the Superintendency and Fogafin respectively submitted two "*tutela*" petitions with respect to the Council of State Judgment, invoking violations of their fundamental rights to due process, defence and access to justice.<sup>53</sup> The two agencies requested that the Council of State Judgment be annulled. They argued that it was replete with substantive, procedural, factual and interpretative defects, including a failure to acknowledge that (i) the action initiated by Claimants had expired under the applicable statute of limitations; (ii) the Council of State was not competent to conduct an analysis of contractual liability; (iii) the actions adopted with regard to Granahorrar were properly justified; and (iv) the applicable rules on State liability for damages did not support

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<sup>49</sup> Council of State: *Compto S.A. en liquidación y otros, contra Superintendencia Bancaria y Fondo de Garantías de Instituciones Financieras (FOGAFIN)*, file No. 25000-23-24-000-2000-00521-02-15728, 1 November 2007, p. 54 (C-0022); Council of State Judgment and Dissent, *Compto S.A. en Liquidación et al. v. Superintendency and Fogafin*, Case No. 2000-00521-02(15728), 1 November 2007, pp. 89-90 (R-0054).

<sup>50</sup> Dissenting Opinion of Magistrate Ligia López Díaz on Council of State Judgment of 1 November 2007, *Compto S.A. en Liquidación et al. v. Superintendency and Fogafin*, Case No. 00521 02 (15728), 23 November 2007 (R-0086). The dissenting judge opined that there were certain procedural defects in the claimants' original action and that, in any event, the challenged administrative acts were justified.

<sup>51</sup> Notice of Arbitration, paras. 154-156, 158; Memorial on Jurisdiction, paras. 32-35, 37; Council of State: *Compto S.A. en liquidación y otros, contra Superintendencia Bancaria y Fondo de Garantías de Instituciones Financieras (FOGAFIN)*, file No. 25000-23-24-000-2000-00521-02-15728, 1 November 2007, pp. 42-43, 51-52 (C-0022). See also Memorial on Jurisdiction, para. 2.

<sup>52</sup> Answer on Jurisdiction, paras. 123-124; Council of State Judgment and Dissent, *Compto S.A. en Liquidación et al. v. Superintendency and Fogafin*, Case No. 2000-00521-02(15728), 1 November 2007, pp. 42-43, 51-52, 60 (R-0054).

<sup>53</sup> Fogafin's Tutela Petition, Council of State, 5 March 2008, p. 162, 165-166 (R-0140); Superintendency's Tutela Petition, Council of State, 5 March 2008, p. 6 [PDF] (R-0141). See Political Constitution of Colombia, 4 July 1991, Art. 86 (R-0124).

the Council's determination on compensation.<sup>54</sup> Claimants rebutted these assertions,<sup>55</sup> while the Ministry of the Treasury and Public Credit of Colombia filed a submission in support of Fogafin's *tutela* petition.<sup>56</sup>

93. The *tutela* petitions submitted by the Superintendency and Fogafin were rejected by the Fifth Section of the Council of State by separate decisions dated 10 April 2008.<sup>57</sup> The Colombian agencies appealed these decisions, but the First Section of the Council of State confirmed the judgments of the Fifth Section on 4 September 2008 (with respect to the Superintendency) and on 4 December 2008 (with respect to Fogafin).<sup>58</sup>
94. Through separate submissions filed on 27 October 2008 and 10 February 2009 respectively, the Superintendency and Fogafin then requested that the Constitutional Court of Colombia revise the judgments of the Council of State rejecting the *tutela* petitions.<sup>59</sup> The Constitutional Court selected these judgments for revision and granted the Superintendency's request to stay the Council of State Judgment until the issuance of a final decision in the revision proceedings.<sup>60</sup>
95. On 26 May 2011, the Constitutional Court issued its judgment on the Superintendency and Fogafin's revision requests (the "**Constitutional Court Judgment**"), whereby (i) it reversed the judgments of the Council of State rejecting the *tutela* petitions submitted by the Superintendency and Fogafin; (ii) it granted the *tutela* petitions; (iii) it invalidated the Council of State Judgment; and (iv) it declared that the action initiated by Claimants against the Capitalization Order and the Value Reduction Order had expired on 5 February 1999.<sup>61</sup> The judgment, which contained a

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<sup>54</sup> See Fogafin's Tutela Petition, Council of State, 5 March 2008, p. 1 (**R-0140**); Superintendency's Tutela Petition, Council of State, 5 March 2008, pp. 6-10 [PDF] (**R-0141**); Answer on Jurisdiction, para. 127.

<sup>55</sup> Holding Companies' Answer to the Tutela Petitions, 25 March 2008 (**R-0145**).

<sup>56</sup> Pleading of *Tercero Coadyuvante* by the Ministry of Finance, Council of State, 31 March 2008 (**R-0146**).

<sup>57</sup> Rejection of Superintendency Tutela Petition, Case No. 11001-03-15-000-2008-00226-00, Fifth Section of the Council of State, 10 April 2008 (**R-0056**); Rejection of Fogafin Tutela Petition, Case No. 11001-03-15-000-2008-00226-00, Fifth Section of the Council of State, 10 April 2008 (**R-0187**).

<sup>58</sup> Rejection of Superintendency Tutela Petition, Case No. 11001-03-15-000-2008-00226-00, First Section of the Council of State, 4 September 2008 (**R-0057**); Rejection of Fogafin Tutela Petition, Case No. 11001-03-15-000-2008-00225-00, First Section of the Council of State, 4 December 2008 (**R-0055**).

<sup>59</sup> Superintendency's Request for Tutela Revision, Constitutional Court, 27 October 2008, pp. 1-13 [PDF] (**R-0161**); Fogafin's Request for Tutela Revision, Constitutional Court, 10 February 2009 (**R-0160**).

<sup>60</sup> Selection of Superintendency Tutela Petition for Review, Constitutional Court, 18 November 2008, pp. 3-4 (**R-0147**); Selection of Fogafin Tutela Petition for Review, Constitutional Court, 26 February 2009, pp. 4-5 (**R-0148**); Order Stall the Council of State Judgment, Constitutional Court, 25 March 2009 (**R-0149**).

<sup>61</sup> Constitutional Court: *Superintendencia Financiera y Fondo de Garantías de Instituciones Financieras contra el Consejo de Estado, Sección Cuarta, Sentencia de 1 de noviembre de 2007, proferida en proceso de nulidad y restablecimiento de derecho iniciado por las sociedades Compto S.A. y otras contra Superintendencia Bancaria y Fondo de Garantías de Instituciones Financieras*, file No. T-2.089.121 and T-2.180.640, 26 May 2011, p. 172 (**C-0023**).

separate opinion, was officially notified to the Council of State and to Claimants' holding companies on 5 December 2011.<sup>62</sup>

96. Thereafter, between 9 and 13 December 2011, Claimants (through their holding companies) and the President of the Council of State separately filed annulment petitions against the Constitutional Court Judgment.<sup>63</sup> The Constitutional Court denied the annulment petitions by an order (“*auto*”, in Spanish) of 25 June 2014 (the “**2014 Constitutional Court Order**”), which, *inter alia*, concluded that (i) there had been no violation of due process to the extent that the Constitutional Court had correctly applied the statute of limitations and was also entitled to make a correction in this respect; (ii) constitutional precedent and *res judicata* had been respected; and (iii) the alleged procedural deficiencies associated with the submission of the *tutela* petitions had not been established.<sup>64</sup> The order, which contained two dissenting opinions, was reported in a press release on the same day.<sup>65</sup>
97. Claimants maintain that the Constitutional Court Judgment was “extraordinary”, of a “draconian nature” and represented “an emblematic denial of justice”. They assert that this ruling, *inter alia*, (i) disavowed, “without regard to evidence of record”, the Council of State’s decision that the expropriation of Granahorrar violated Claimants’ due process rights; (ii) represented “a flagrant denial of due process” in various ways, not least, that it exceeded the Court’s jurisdiction and it had misconstrued both the factual record and the governing legal standard; (iii) approved “the discriminatory treatment” directed by Fogafin at Granahorrar “in the form of the guarantee-restructuring program”, as well as the Superintendency’s “denial of due process” arising from the Capitalization Order; (iv) represented “an unprecedented usurpation of the Council of State’s authority” and “did not engage in a constitutional review” of the Council of State Judgment; (v) constituted “an aberration and extreme departure from fundamental legality” by adopting the Value Reduction Order “as legally sufficient”; (vi) constituted “an unprecedented departure from governing jurisprudence”; and (vii) was rendered by a Court which was “neither independent nor impartial”.<sup>66</sup> Claimants further note that one of the dissenting opinions to the 2014 Constitutional

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<sup>62</sup> Notice of the Constitutional Court Judgement to the Justices of the Council of State, 5 December 2011 (**R-0151**); Notice of the Constitutional Court Judgement to the Holding Companies, 5 December 2011 (**R-0152**). *See* Answer on Jurisdiction, para. 135.

<sup>63</sup> *See generally* Annulment Petition by the Holding Companies, Constitutional Court, 9 December 2011 (**R-0059**); *Solicitud de Nulidad de Sentencia SU-447*, 13 December 2011 (**C-0029**); Council of State’s motion for annulment / Annulment Petition by Mauricio Fajardo Gomez, Constitutional Court, 11 December 2011 (**C-0025**, **R-0058**). *See also* Notice of Arbitration, paras. 182-185; Memorial on Jurisdiction, paras. 79-82.

<sup>64</sup> *See generally* Auto 188/14, 25 June 2014 (**C-0026**); Constitutional Court Order No. 188/14, 25 June 2014 (**R-0049**).

<sup>65</sup> *Comunicado No. 25*, issued by Colombia’s Constitutional Court (containing Justice Rojas Rios’ dissenting opinion) 25-26 June 2014, pp. 8-11 (**C-0027**).

<sup>66</sup> *See* Notice of Arbitration, paras. 159, 161-181; Memorial on Jurisdiction, paras. 4, 42-77. *See also id.* at 83-84.

Court Order explains how the Council of State Judgment “had actually corrected a wrongful expropriation” perpetrated by Fogafin and the Superintendency, recalling that the signatory judge “was discharged” from the tribunal on the same day on which he announced his dissent.<sup>67</sup> Lastly, Claimants refer to the minutes of a session of the Council of State held soon after the issuance of the Constitutional Court Judgment as evidence that the actions of the Constitutional Court “represent an extreme example of judicial activism” which led to “a profoundly serious institutional crisis concerning the State’s entire judiciary”.<sup>68</sup>

98. Conversely, Respondent submits that “the Constitutional Court has the authority to review and resolve *tutela* petitions as a court of last instance”, which has been acknowledged by the Council of State itself, and it explains that the Constitutional Court Judgment held that the Council of State “had committed substantive, procedural and factual errors”.<sup>69</sup> Respondent adds that annulment petitions such as those filed against the Constitutional Court Judgment are “extraordinary in nature” and do not “invite the reopening of legal debate”.<sup>70</sup>

#### F. PARALLEL PROCEEDINGS

99. On 6 June 2012, the Carrizosa Family filed a petition with the Inter-American Commission on Human Rights (the “IACHR”), alleging that Colombia had violated its rights to due process and private property in the context of the measures adopted with regard to Granahorrar; and requesting, *inter alia*, that the Constitutional Court Judgment be overruled.<sup>71</sup> A further supplementary submission was filed to the same effect on 20 July 2016.<sup>72</sup>

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<sup>67</sup> Notice of Arbitration, paras. 188-192; Memorial on Jurisdiction, paras. 86-90. *See Comunicado No. 25*, issued by Colombia’s Constitutional Court (containing Justice Rojas Rios’ dissenting opinion) 25-26 June 2014, pp. 10-11 (C-0027).

<sup>68</sup> *See* Memorial on Jurisdiction, paras. 115-127; *Acta No. 15 Sala Plena de lo Contencioso Administrativo*, 31 May 2011 (C-0028).

<sup>69</sup> Answer on Jurisdiction, paras. 130, 132-134; First Expert Report of Dr Jorge Enrique Ibáñez Najar, 21 October 2019, paras. 85, 111, 114 (RER-1); Political Constitution of Colombia, 4 July 1991, Art. 241 (R-0124); Rejection of Fogafin Tutela Petition, Case No. 11001-03-15-000-2008-00225-00, First Section of the Council of State, 4 December 2008, p. 50 (R-0055); Constitutional Court: *Superintendencia Financiera y Fondo de Garantías de Instituciones Financieras contra el Consejo de Estado, Sección Cuarta, Sentencia de 1 de noviembre de 2007, proferida en proceso de nulidad y restablecimiento de derecho iniciado por las sociedades Compto S.A. y otras contra Superintendencia Bancaria y Fondo de Garantías de Instituciones Financieras*, file No. T-2.089.121 and T-2.180.640, 26 May 2011, pp. 139, 148, 154, 159 (C-0023).

<sup>70</sup> Answer on Jurisdiction, paras. 137-138, 140; First Expert Report of Dr Jorge Enrique Ibáñez Najar, 21 October 2019, paras. 131, 139, 143, 154, 161 (RER-1); Order No. 320 of the Constitutional Court, 23 May 2018 (R-0186). *See also* Answer on Jurisdiction, para. 141.

<sup>71</sup> Petition to the Inter-American Commission on Human Rights, 6 June 2012, pp. 1, 41 (R-0118).

<sup>72</sup> Supplementary Petition to the Inter-American Commission on Human Rights, 20 July 2016 (R-0119).

100. On 5 December 2016, the Registry of the IACHR notified that the abovementioned petition could not be processed as it had a legal person as the victim and, thus, fell outside the competence of the IACHR, following which the Carrizosa Family filed a further submission requesting the revision of such decision.<sup>73</sup> After the IACHR Secretariat decided again not to process the petition due to the IACHR's lack of "competence *ratione personae*", the Carrizosa Family submitted two additional revision petitions on 4 October 2017 and on 4 July 2018.<sup>74</sup> As at the date of this Award, the IACHR has not yet issued a decision on these petitions.<sup>75</sup>
101. Claimants' mother, Mrs Astrida Benita Carrizosa, initiated a separate arbitration against Respondent in 2018, also under the US-Colombia TPA, before ICSID.<sup>76</sup> The Parties agree that the underlying factual background to the latter and the present arbitration is similar in substance; in particular, Claimants have stated that "the claims brought by claimants in this case are identical, both in terms of *petitum* and *causa petendi*, to the claims brought by Mrs Carrizosa in the [ICSID Proceedings]".<sup>77</sup> The claims in the ICSID Proceedings were dismissed on jurisdictional grounds.<sup>78</sup>

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<sup>73</sup> Revision Petition to the Inter-American Commission on Human Rights, 20 March 2017, pp. 8, 12, 14, 115-117 [PDF] (**R-0120**). The Carrizosa Family thereby expanded its claims by requesting that the 2014 Constitutional Court Judgment be overruled as well.

<sup>74</sup> Second Revision Petition to the Inter-American Commission on Human Rights, 4 October 2017, pp. 1, 5, 11-12, 103 [PDF] **R-0121** (Tribunal's translation); Third Revision Petition to the Inter-American Commission on Human Rights, 4 July 2018, pp. 1-2 (**R-0122**).

<sup>75</sup> Answer on Jurisdiction, para. 143. Colombia was invited to provide comments on the Carrizosa Family's petition in April 2019, but did not respond. *See* IACHR Letter, 25 April 2019 (**C-0032**); IACHR Letter, 18 October 2019 (**C-0033**).

<sup>76</sup> *See* Claimant's Memorial on Jurisdiction, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, 13 June 2019 (**R-0101**).

<sup>77</sup> Letter from Claimants to the Tribunal, 17 November 2020, p. 3; Answer on Jurisdiction, para. 35.

<sup>78</sup> *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021.

#### IV. THE PARTIES' REQUESTS FOR RELIEF

##### A. CLAIMANTS' REQUEST FOR RELIEF

102. In their Notice of Arbitration, Claimants request the following relief:

Reserving their right to amend, supplement, or otherwise restate their claims and the relief requested in connection with such demand, claimants request an award granting, without limitation, the following relief:

- (i) A declaration that Colombia has violated the Treaties, customary international law, and Colombian law with respect to claimants' investments;
- (ii) Compensation to claimants for all damages that it has (*sic*) suffered, to be developed, and quantified in the course of this proceeding, but including, without limitation, compensation for the wrongful expropriation of claimants' investments, and damages for Colombia's failure to provide claimants and their investments fair and equitable treatment, national treatment, fair judicial recourse, and for its arbitrary and discriminatory interference with claimants' use and enjoyment of its investments;
- (iii) Such compensation, exclusive of attorney's fees and costs must be no less than USD 323,393,712.81;
- (iv) All costs and fees associated with this proceeding, including all professional fees and disbursements;
- (v) An award of compound interest until the date of Colombia's final satisfaction of the award at a rate to be fixed by the Tribunal; and
- (vi) Such other relief as counsel may advise and the Tribunal may deem appropriate.<sup>79</sup>

103. In their Memorial on Jurisdiction, Claimants request the following relief:

For the foregoing reasons, authority, premises, and evidence, Claimants, Alberto Carrizosa, Felipe Carrizosa, and Enrique Carrizosa, respectfully request that this Arbitral Tribunal deny Respondent's, the Republic of Colombia[s], objections as to jurisdiction, and proceed to a merits hearing in furtherance of the equitable administration of justice.<sup>80</sup>

104. In their Reply on Jurisdiction, Claimants request the following relief:

For the foregoing reasons, authority, premises, and evidence, Claimants, Alberto Carrizosa Gelzis, Felipe Carrizosa Gelzis, and Enrique Carrizosa Gelzis, respectfully request that this Arbitral Tribunal reject Respondent's, the Republic of Colombia[s], objections to jurisdiction, and proceed to a merits hearing in furtherance of the equitable administration of justice.<sup>81</sup>

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<sup>79</sup> Notice of Arbitration, para. 247.

<sup>80</sup> Memorial on Jurisdiction, p. 263.

<sup>81</sup> Reply on Jurisdiction, p. 611.

**B. RESPONDENT'S REQUEST FOR RELIEF**

105. In its Response to the Notice of Arbitration, Respondent requests the following relief:

92. *Por las razones antes expuestas, Colombia solicita respetuosamente al Tribunal que:*

1. *Tomando en cuenta la seriedad de las objeciones a la jurisdicción de los reclamos de los Reclamantes anticipadas en la sección "OBJECIONES A LA JURISDICCIÓN", supra, y de conformidad con los artículos 10.20(4) del APC y 23 del Reglamento CNUDMI, ordene la bifurcación del procedimiento para decidir estas objeciones de forma previa.*
2. *Rechace su jurisdicción.*
3. *Si, par impossible, el Tribunal decide rechazar la solicitud de bifurcación o aceptar que tiene jurisdicción total o parcialmente, rechace en su totalidad los reclamos de los Reclamantes; y*
4. *Condene a los Reclamantes a reembolsar a Colombia el pago de todos los gastos y costos en los que haya tenido que incurrir en razón de esta controversia.*<sup>82</sup>

106. In its Answer on Jurisdiction, Respondent requests the following relief:

For the foregoing reasons, Colombia respectfully requests that the Tribunal:

- a. render an award dismissing Claimants' claims in their entirety, for lack of jurisdiction; and
- b. order Claimants to pay all of Colombia's costs, including the totality of the arbitral costs that Colombia incurred in connection with this proceeding, as well as the totality of its legal fees and expenses.<sup>83</sup>

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<sup>82</sup> Response to the Notice of Arbitration, paras. 92-93. Tribunal's courtesy translation:

"For the foregoing reasons, Colombia respectfully requests that the Tribunal:

1. Noting the seriousness of the objections to jurisdiction over the Claimants' claims, as advanced in section "OBJECTIONS TO JURISDICTION" above, and in accordance with Articles 10.20(4) TPA and Article 23 of the UNCITRAL Rules, order the bifurcation of the proceedings so as to decide such objections as a preliminary question.
2. Determine that it lacks jurisdiction.
3. If, *par impossible*, the Tribunal decided to reject the request for bifurcation or uphold its jurisdiction in whole or in part, reject the Claimants' claims in their entirety; and
4. Order Claimants to pay all of Colombia's costs incurred in connection with this proceeding."

<sup>83</sup> Answer on Jurisdiction, para. 510.



107. In its Rejoinder on Jurisdiction, Respondent requests the following relief:

For the foregoing reasons, Colombia respectfully requests that the Tribunal:

- a. render an award dismissing Claimants' claims in their entirety, for lack of jurisdiction; and
- b. order Claimants to pay all of Colombia's costs, including the totality of the arbitral costs incurred by Colombia in connection with this proceeding, as well as the totality of Colombia's legal fees and expenses, plus interest.<sup>84</sup>

## V. JURISDICTION

108. Respondent has raised four objections to the jurisdiction of the Tribunal, which are summarized as follows in its Answer on Jurisdiction:

In sum, Claimants' claims: (i) are based on events that took place years before the entry into force of the TPA, as a result of which jurisdiction *ratione temporis* is lacking in this case ...; (ii) are not subject to arbitration under the TPA, as a result of which there is also no jurisdiction *ratione voluntatis* ...; (iii) are not asserted by foreign investors as required by the TPA, as a result of which there is an absence of jurisdiction *ratione personae* ...; and (iv) do not concern a qualifying "investment," as defined in the TPA, as a result of which there is an equally fatal absence of jurisdiction *ratione materiae* ... At the very least, it is plain that the level of certainty of the State's consent required by public international law, and recognized by the ICJ, is not attained in the instant case. The totality of Claimants' claims must therefore be dismissed on one or more of the above-mentioned jurisdictional grounds.<sup>85</sup>

109. The Tribunal will now summarize the Parties' respective positions on burden of proof with respect to jurisdiction and Respondent's *ratione personae* objection. As further set out below, in view of its decision to uphold the *ratione personae* objection, the Tribunal finds it unnecessary to address Respondent's remaining jurisdictional objections.

### A. BURDEN AND STANDARD OF PROOF

110. The Parties hold diverging views on the burden and standard of proof that should apply to jurisdictional issues. Their respective positions are summarized below.

#### 1. Claimants' Position

111. In Claimants' submission, "international law and the law of the overwhelming majority of national systems conceptually provides Claimants with an expansive rather than a restrictive presumption of truth with respect to jurisdictional allegations".<sup>86</sup> Claimants argue that "[o]nly upon a showing that under no rational hypothesis of law or fact can a Claimant plead the requisite

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<sup>84</sup> Rejoinder on Jurisdiction, para. 503.

<sup>85</sup> Answer on Jurisdiction, para. 24.

<sup>86</sup> Memorial on Jurisdiction, para. 160.

jurisdictional averments, should a jurisdictional challenge be sustained”.<sup>87</sup> According to Claimants, the majority of arbitral tribunals have adopted a particular methodology in determining the burden of proof at the jurisdictional stage incorporating these criteria.<sup>88</sup>

112. In particular, Claimants posit that the majority of arbitral tribunals have followed the *pro tem* test developed by Judge Higgins in her separate opinion in the *Case Concerning Oil Platforms*.<sup>89</sup> As applied by the tribunal in *Impregilo*, the test requires the Tribunal to consider “whether the facts as alleged by the Claimant in this case, if established, are capable of coming within those provisions of the BIT which have been invoked”.<sup>90</sup> However, if the respondent presents credible evidence contradicting the claimant’s jurisdictional allegations, the tribunal will be required to decide the factual dispute that then arises or join the issue to the merits.<sup>91</sup>
113. Claimants further contend that they are only required to make a *prima facie* showing that all conditions necessary to establish jurisdiction are satisfied, following which the burden shifts to Respondent to establish the absence of jurisdiction.<sup>92</sup> In their view, they have provided ample evidence going beyond a *prima facie* case and proving “under any reasonable standard” that the Tribunal has jurisdiction *ratione temporis*, *ratione voluntatis*, *ratione personae* and *ratione materiae*.<sup>93</sup>
114. Claimants are critical of the alternative approaches that have been adopted by other arbitral tribunals faced with a similar question, as, in their view, those approaches fail to take into account the disparate consequences arising from the grant or denial of a jurisdictional challenge and “the fundamental policy of providing parties with presumptions that would favour access to a merits hearing”.<sup>94</sup>

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<sup>87</sup> Memorial on Jurisdiction, para. 161.

<sup>88</sup> Memorial on Jurisdiction, para. 161.

<sup>89</sup> Memorial on Jurisdiction, paras. 162-170, 178; *Case Concerning Oil Platforms Oil Platforms (Islamic Republic of Iran v. United States of America)*, 1996 ICJ 803, 856, 12 December 1996 (Separate Opinion of Judge Higgins), paras. 32-34 (CLA-0016).

<sup>90</sup> Memorial on Jurisdiction, paras. 171, 174; citing *Impregilo S.p.A v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 254 (CLA-0039) (emphasis in original); *Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 62 (CLA-0061).

<sup>91</sup> Memorial on Jurisdiction, para. 175; *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 61 (CLA-0061).

<sup>92</sup> Memorial on Jurisdiction, paras. 179-183; *Saipem S.p.A. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 86 (CLA-0074).

<sup>93</sup> Memorial on Jurisdiction, para. 185.

<sup>94</sup> Memorial on Jurisdiction, paras. 158-160.

115. In particular, Claimants reject the proposition that a claimant should discharge the burden of proving all essential facts required to establish jurisdiction over its claims.<sup>95</sup> In Claimants' view, such approach, "[g]lossing over foundational distinctions blurs material presumptions endemic to procedural and substantive adjudications, among other considerations".<sup>96</sup> Claimants further reject the alternative approach under which neither party would bear the burden of proof for assessing a jurisdictional challenge and the tribunal would "determine[] its jurisdiction without being bound by the argument of the parties".<sup>97</sup> Lastly, Claimants consider it inappropriate to draw a distinction between facts which are specifically relevant for the jurisdictional question and facts which are also relevant to a determination of the substance of the dispute, while also asserting the claimant's burden of proving the facts required to establish jurisdiction, insofar as they are contested by the respondent.<sup>98</sup> In Claimants' view, this approach, "places the entire burden on the Claimant excising at the jurisdictional stage only a Claimant's obligation to prove from an evidentiary perspective merits related facts".<sup>99</sup>

## 2. Respondent's Position

116. According to Respondent, Claimants have misstated the burden of proof that should apply in relation to jurisdictional issues.<sup>100</sup> Instead, it relies on the principle *actori incumbit onus probandi*, codified in Article 27(1) of the UNCITRAL Rules,<sup>101</sup> which it says leaves the burden of proof with Claimants at all times throughout the jurisdictional phase. If they are successful in establishing jurisdiction, then the burden to show that, notwithstanding the facts proved by Claimants, the Tribunal lacks jurisdiction shifts between the Parties, as described by the tribunal in *Spence v. Costa Rica*:

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<sup>95</sup> Memorial on Jurisdiction, para. 145; *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, 3 April 2014 (CLA-0055).

<sup>96</sup> Memorial on Jurisdiction, para. 148.

<sup>97</sup> Memorial on Jurisdiction, para. 149; *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007 (CLA-0074). See also, Memorial on Jurisdiction, paras. 151-155; *Muhammet Çap Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Republic of Turkmenistan*, ICSID Case No. ARB/12/6, Decision on Respondent's Objection to Jurisdiction under Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty, 13 February 2015, paras. 119-121 (CLA-0053); *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, 25 October 2016, para. 239 (CLA-0084).

<sup>98</sup> Memorial on Jurisdiction, para. 156; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award, 26 April 2017, paras. 65-66 (CLA-0014).

<sup>99</sup> Memorial on Jurisdiction, para. 157.

<sup>100</sup> Answer on Jurisdiction, para. 145.

<sup>101</sup> Answer on Jurisdiction, para. 146; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Award, 26 April 2017, para. 66 (CLA-0014) ("... the Claimant bears the burden of proving the facts required to establish jurisdiction, insofar as they are contested by the Respondent"). See also Respondent's Observations on the US Submission, para. 16.

[t]he burden is therefore on the Claimants to prove the facts necessary to establish the Tribunal's jurisdiction. If that can be done, the burden will shift to the Respondent to show why, despite the facts as proved by the Claimants, the Tribunal lacks jurisdiction.<sup>102</sup>

117. Respondent further submits that Claimants have failed to satisfy their initial *prima facie* burden of proving the necessary facts to establish jurisdiction.<sup>103</sup> In Respondent's view, it is insufficient for Claimants simply to assert (instead of proving) the existence of elements sufficient to establish jurisdiction.<sup>104</sup>
118. Respondent disputes Claimants' proposition that the Tribunal should accept their allegations *pro tem*,<sup>105</sup> as it is based "on the unsupported notion that they have an inherent right to have their case on the merits heard"<sup>106</sup> and is incorrect as a matter of law.<sup>107</sup> On the contrary, Respondent argues that "a State's consent to arbitration shall not be presumed",<sup>108</sup> and that a tribunal "must conclusively determine all issues that are necessary to establish its jurisdiction, including by making all necessary factual findings".<sup>109</sup>
119. According to Respondent, Claimants' reliance on Judge Higgins' *pro tem* test in the *Oil Platforms* case is inapposite,<sup>110</sup> as it was designed for a specific type of preliminary objection which is not at stake in this case, namely, "whether a claimant's claims are capable of falling within the substantive scope of a treaty, which is different from the question of whether certain jurisdictional requirements of the treaty have been met".<sup>111</sup> In Respondent's view, an acceptance of Claimants' approach by the Tribunal "would require [it] to forgo the very inquiry it is required to undertake, i.e., determining whether or not the Tribunal has jurisdiction".<sup>112</sup>

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<sup>102</sup> Answer on Jurisdiction, para. 147; citing *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, 25 October 2016, para. 239 (CLA-0084). See also, Respondent's Observations on the US Submission, para. 16.

<sup>103</sup> Answer on Jurisdiction, para. 148.

<sup>104</sup> Answer on Jurisdiction, para. 148.

<sup>105</sup> Answer on Jurisdiction, para. 149.

<sup>106</sup> Answer on Jurisdiction, para. 150.

<sup>107</sup> Answer on Jurisdiction, paras. 149-150.

<sup>108</sup> Answer on Jurisdiction, para. 151; citing *ICS Inspection and Control Services Ltd. v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, para. 280 (RLA-0034).

<sup>109</sup> Answer on Jurisdiction, para. 151; citing *Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, para. 58 (CLA-0080).

<sup>110</sup> Answer on Jurisdiction, para. 153.

<sup>111</sup> Answer on Jurisdiction, paras. 154-155, 157; Respondent's Observations on the US Submission, paras. 16-17.

<sup>112</sup> Answer on Jurisdiction, para. 160; *Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, para. 58 (CLA-0080).

**3. The Position of The United States of America**

120. The United States recalls that Article 10.22.1, TPA (which is incorporated into Chapter 12 by Article 12.1.2(b), TPA) provides that the Tribunal “shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law”.<sup>113</sup> According to the United States, such rules include general principles of international law regarding burden of proof in international arbitration, pursuant to which a claimant bears the burden of proving its claims and the respondent bears the burden of proving any affirmative defences which it may raise.<sup>114</sup>
121. So far as jurisdictional objections are concerned, the United States avers that the claimant bears the burden to prove the necessary and relevant facts to establish that a tribunal has jurisdiction,<sup>115</sup> in particular, where “an objection as to competence raises issues of fact that will not fall for determination at the hearing of the merits”.<sup>116</sup> Applying this rationale, the tribunal in *Bridgestone* found that “the burden of proof lies fairly and squarely on [the claimant] to demonstrate that it owns or controls a qualifying investment”.<sup>117</sup>

**B. JURISDICTION *RATIONE PERSONAE***

122. The Parties agree that Claimants are dual national citizens of the United States and of Colombia.<sup>118</sup> They disagree, however, on which is their dominant nationality and, consequently, on whether the Tribunal has jurisdiction *ratione personae* under the TPA to hear Claimants’ claims.

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<sup>113</sup> Submission of the United States, paras. 45-46.

<sup>114</sup> Submission of the United States, para. 47.

<sup>115</sup> Submission of the United States, para. 48. The United States cites the tribunal in *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction, 1 June 2012, para. 2.8 which held that “it is impermissible for the Tribunal to found its jurisdiction on any of the Claimant’s CAFTA claims on the basis of an assumed fact (i.e., alleged by the Claimant in its pleadings as regards jurisdiction but disputed by the Respondent). The application of that ‘prima facie’ or other like standard is limited to testing the merits of a claimant’s case at a jurisdictional stage; and it cannot apply to a factual issue upon which a tribunal’s jurisdiction directly depends, such as the Abuse of Process, *Ratione Temporis* and Denial of Benefits issues in this case”.

<sup>116</sup> Submission of the United States, footnote 48; citing *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, para. 118.

<sup>117</sup> Submission of the United States, para. 48; citing *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, para. 153.

<sup>118</sup> Memorial on Jurisdiction, p. 11; Answer on Jurisdiction, para. 379.

**1. The Dominant and Effective Nationality Standard**

*(a) Respondent's Position*

123. Respondent argues that, pursuant to the terms of the TPA, Colombia has consented to arbitrate claims filed by US nationals, or dual nationals with US dominant and effective nationality. However, in the present case, Respondent considers Claimants to be Colombian citizens with dominant and effective ties to Colombia.<sup>119</sup> As such, granting Claimants the benefits of the protection of the TPA would be, in Respondent's view, contrary to the TPA's purpose.<sup>120</sup>
124. Respondent considers that Claimants bear the burden of proving that their US nationality is their dominant and effective nationality.<sup>121</sup> According to Respondent, the requirement of dominant and effective nationality applies to claimants on matters of jurisdiction as a general principle of international law,<sup>122</sup> and underpins Colombia's consent to arbitrate.<sup>123</sup> In Respondent's view, the expression "dominant and effective nationality" has a broader purpose than simply to "prevent investors from acquiring the nationality of the other State in order to secure the protections of the TPA," as asserted by Claimants.<sup>124</sup> Relying on *Aven v. Costa Rica*,<sup>125</sup> Respondent posits that the purpose of this test is to "ensure that domestic investors do not arrogate to themselves rights that were intended only for investors of the other State party."<sup>126</sup>
125. Respondent distinguishes three limbs in the dominant and effective nationality test, namely: "(i) what the Tribunal should determine; (ii) how it should be determined; and (iii) by reference to when it should be determined."<sup>127</sup>
126. In respect of the first limb, Respondent argues that both the plain language of the TPA and the ordinary meaning of its terms support the existence of two distinct requirements: effectiveness and dominance. Such double-barrelled test for the determination of a person's nationality is supported by international jurisprudence.<sup>128</sup> Considering that the effectiveness of both of

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<sup>119</sup> Response to the Notice of Arbitration, para. 57; Answer on Jurisdiction, para. 380.

<sup>120</sup> Response to the Notice of Arbitration, para. 57; *Loewen Group, Inc. and Raymond Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Final Award, 26 June 2003, para. 223.

<sup>121</sup> Response to the Notice of Arbitration, para. 56.

<sup>122</sup> Respondent's Observations on the US Submission, para. 16.

<sup>123</sup> Answer on Jurisdiction, para. 386.

<sup>124</sup> Answer on Jurisdiction, para. 387.

<sup>125</sup> *David Aven et. al. v. Republic of Costa Rica*, Case No. UNCT/15/3, Final Award, 18 September 2018, para. 215 (**RLA-0085**).

<sup>126</sup> Answer on Jurisdiction, para. 390 (emphasis by Respondent).

<sup>127</sup> Answer on Jurisdiction, para. 392.

<sup>128</sup> Answer on Jurisdiction, para. 393; *Mergé Case—Decision No. 55*, UN Italian-United States Conciliation Commission, Decision, 10 June 1955, p. 247 (**CLA-0047**); *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Final Award, 3 September 2019, para. 539 (**RLA-0088**).

Claimants' nationalities is unchallenged,<sup>129</sup> the Tribunal need only determine which of the two nationalities is dominant.<sup>130</sup>

127. Respondent further rejects Claimants' attempt to rely upon the "dominance" factor alone. It contends that "dominance" and "effectiveness" are two entirely separate and discrete enquiries.<sup>131</sup> In particular, while effectiveness "does not have a comparative dimension", Respondent posits that dominance of nationality "entails a comparative analysis, insofar as a tribunal must weigh and compare the claimant's genuine ties to each of the two States, to 'determine which of the two ... nationalities is the preponderant one.'"<sup>132</sup>
128. As to how exactly the Tribunal should determine which nationality is dominant, Respondent considers that the Treaty's provision on applicable law permits the Tribunal to "find guidance in the factors previously applied by international courts and tribunals, both in the context of customary international law and of the investment jurisprudence."<sup>133</sup> Reviewing the decisions issued in such matters,<sup>134</sup> Respondent argues that the Tribunal should consider the following elements to determine Claimants' dominant nationality:

(i) the location of Claimants' permanent and habitual residence; (ii) the center of Claimants' economic lives; (iii) the center of Claimants' family, social and political lives; and (iv) how Claimants have identified themselves."<sup>135</sup> These elements, the Respondent claims, will enable the Tribunal to "compare the relative strength of Claimants' ties to Colombia and the United States."<sup>136</sup>

129. Respondent denies that it has omitted any key elements in its analysis, as suggested by Claimants: Respondent thus notes that "the 'dominance' test is objective and purely fact-based; it is not self-judging or based on the subjective perception of the relevant person."<sup>137</sup> Respondent says that

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<sup>129</sup> Answer on Jurisdiction, para. 395.

<sup>130</sup> Answer on Jurisdiction, para. 396; Rejoinder on Jurisdiction, paras. 322-329.

<sup>131</sup> Rejoinder on Jurisdiction, para. 324.

<sup>132</sup> Rejoinder on Jurisdiction, para. 326; *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, para. 696 (**RLA-0105**).

<sup>133</sup> Answer on Jurisdiction, para. 397.

<sup>134</sup> *Nottebohm Case*, ICJ, Second Phase, Judgment, 6 April 1955, p. 22 (**CLA-0057**); *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Final Award, 3 September 2019, para. 545 (**RLA-0088**); *Mergé Case—Decision No. 55*, UN Italian-United States Conciliation Commission, Decision, 10 June 1955, p. 247 (**CLA-0047**); *Case No. A/18*, IUSCTR, Decision, 6 April 1984, p. 12 (**RLA-0089**); see also *Benny Diba and Wilfred J. Gaulin v. Islamic Republic of Iran, et al.*, IUSCT Case No. 940, Award, 31 October 1989, para. 11 (**RLA-0090**).

<sup>135</sup> Answer on Jurisdiction, para. 398.

<sup>136</sup> Answer on Jurisdiction, para. 401.

<sup>137</sup> Rejoinder on Jurisdiction, para. 336.

those elements that it has identified are those “relevant to the determination of Claimants’ dominant nationality in this case”.<sup>138</sup>

130. Lastly, as to the timing of the dominant and effective nationality, and noting Claimants’ indication that “the *only* measure that they are challenging in this arbitration is the [2014 Constitutional Court Order]”,<sup>139</sup> Respondent submits that the dominant nationality of Claimants should be assessed at two different “critical dates”:<sup>140</sup> “(i) 25 June 2014, which was the date of issuance of the [2014 Constitutional Court Order]; and (ii) 24 January 2018, which was the date on which Claimants submitted their claim to arbitration” (together the “**Critical Dates**”).<sup>141</sup>
131. Thus, in Respondent’s submission, “the Claimants’ dominant nationality must have been that of the US on the dates of the alleged breaches of the TPA” if they are to have standing before the Tribunal.<sup>142</sup> Additionally, as shown by a concurring body of jurisprudence,<sup>143</sup> “Claimants’ dominant nationality must *also* have been that of the US on the date of the submission of their claims to arbitration.”<sup>144</sup> On this point, Respondent notes that it is in agreement with the United States.<sup>145</sup>
132. In the present case, the application of the above criteria would require Claimants to prove the dominance of their US nationality on two sets of dates: the first comprising each date on which Colombia allegedly breached its obligations under the Treaty (June-October 1998, 26 May 2011, and 24 June 2014) and the second being that of the introduction of these proceedings (24 January 2018).<sup>146</sup>

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<sup>138</sup> Rejoinder on Jurisdiction, para. 337.

<sup>139</sup> Rejoinder on Jurisdiction, para. 340 (emphasis by Respondent).

<sup>140</sup> Answer on Jurisdiction, para. 402.

<sup>141</sup> Rejoinder on Jurisdiction, para. 340.

<sup>142</sup> Answer on Jurisdiction, para. 403; Rejoinder on Jurisdiction, para. 341.

<sup>143</sup> *Achmea B.V. v. Slovak Republic*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, 20 May 2014, para. 267 (“It is an accepted principle of international law that jurisdiction must exist on the day of the institution of proceedings.”) (**RLA-0094**); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005, para. 61 (“[I]t is an accepted principle of international adjudication that jurisdiction will be determined in the light of the situation as it existed on the date the proceedings were instituted.”) (**RLA-0095**); Christoph H. Schreuer et al., *THE ICSID CONVENTION: A COMMENTARY* (2d. Ed. 2009), Art. 25, para. 36 (“It is an accepted principle of international adjudication that jurisdiction will be determined by reference to the date on which judicial proceedings are instituted. This means that on that date all jurisdictional requirements must be met.”) (**RLA-0096**).

<sup>144</sup> Answer on Jurisdiction, para. 404 (emphasis by Respondent).

<sup>145</sup> Respondent’s Observations on the US Submission, para. 52.

<sup>146</sup> Answer on Jurisdiction, para. 406.



133. Respondent asserts that “Claimants make no attempt to prove that their dominant nationality was that of the US on *any* of the relevant dates”<sup>147</sup> and that, after their Reply on Jurisdiction, they have “failed to satisfy their burden of proving their dominant nationality through documentary evidence”.<sup>148</sup> Relying on jurisprudence of the Iran-US Claims Tribunal, Respondent contends that “unsupported witness statements are insufficient to satisfy a claimant’s burden of proving that it is ‘more foreign than national’.”<sup>149</sup>
134. In this respect, Respondent notes that “many of the allegations in Claimants’ witness statements are affirmatively contradicted by the considerable amount of documentary evidence that Colombia has introduced into the record.”<sup>150</sup> Respondent argues that all of the various efforts on Claimants’ part to divert the Tribunal’s attention from this fact must fail:<sup>151</sup> (i) “[t]here is no legal basis whatsoever for Claimants’ proposed evidentiary principle, which is predicated on the strange notion that natural-born citizens are somehow more truthful or credible than naturalized citizens”;<sup>152</sup> (ii) “under Claimants’ standard, the only way that Colombia could rebut the testimonial assertions of Claimants would be by means either of ... an admission by one or more of Claimants, or ... testimony from a witness with personal knowledge of Claimants’ upbringing or thoughts”;<sup>153</sup> and (iii) the evidence provided by Colombia is not simply evidence of Claimants’ place of residence, but “evidence of Claimants’ social integration in, and cultural connections with, Colombia.”<sup>154</sup>

(b) *Claimants’ Position*

135. Claimants maintain that “[t]he TPA’s plain language contemplates the [protection] of claims under the Treaty on the part of *bona fide* genuine dual citizens.”<sup>155</sup>

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<sup>147</sup> Answer on Jurisdiction, para. 408 (emphasis by Respondent).

<sup>148</sup> Rejoinder on Jurisdiction, para. 347.

<sup>149</sup> Rejoinder on Jurisdiction, para. 351; *Reza and Shahnaz Mohajer-Shojaee v. Islamic Republic of Iran*, IUSCT Case No. 273, Award, 5 October 1990, para. 9 (**RLA-0120**); *Benny Diba and Wilfred J. Gaulin v. Islamic Republic of Iran*, IUSCT Case No. 940, Award, 31 October 1989, para. 24 (**RLA-0090**), *Ninni Ladjevardi (formerly Burgel) v. Islamic Republic of Iran*, IUSCT Case No. 118, Award, 8 December 1993, para. 48 (**RLA-0119**); *Alex Arijad v. Islamic Republic of Iran*, IUSCT Case No. 413, Award, 22 April 1991, para. 10 (**RLA-0121**).

<sup>150</sup> Rejoinder on Jurisdiction, para. 352.

<sup>151</sup> Rejoinder on Jurisdiction, paras. 354-366.

<sup>152</sup> Rejoinder on Jurisdiction, para. 356.

<sup>153</sup> Rejoinder on Jurisdiction, para. 361.

<sup>154</sup> Rejoinder on Jurisdiction, para. 365.

<sup>155</sup> Memorial on Jurisdiction, para. 186. The text refers to “... perfection of claims...”

136. Claimants rely on the ICJ's *Nottebohm*'s decision as a controlling precedent on dominant and effective nationality. In Claimants' view, "[t]he *Nottebohm* 'link test' is a (i) *qualitative* inquiry into the (ii) 'genuineness' of the citizenship status at issue during (iii) a relevant timeframe."<sup>156</sup>
137. Claimants thus note that *Nottebohm* "addressed a second-in-time citizenship pursuant to *naturalization*",<sup>157</sup> which itself was sought for a non-*bona fide* purpose.<sup>158</sup> Claimants further consider that "the cornerstone issue in *Nottebohm* entails the extent to which the legitimate exercise of national law by a State *unilaterally* may engraft obligations under public international law on another State."<sup>159</sup> Because of the involvement of a third state, the situation was made more complex.<sup>160</sup>
138. In comparison, Claimants note that they were born dual nationals, having been born in Colombia to a mother who is a US citizen.<sup>161</sup> As such, Claimants have always been US citizens. It follows, in Claimants' view, that "under no reasonable hypothesis of fact, logic, or law can they be found to have at all engaged in treaty shopping or other non-genuine premise for obtaining U.S. citizenship status."<sup>162</sup> Claimants note that there is no third state involved: the situation is "eminently *bilateral*"<sup>163</sup> and "is not clouded by the interests of a third State".<sup>164</sup>
139. Claimants also note that the *Nottebohm* dispute differs from the one at hand because it was a case of diplomatic protection, while the present case is one of investment arbitration:
- [t]hese differences matter because the principles of law governing diplomatic protection are devoid of elements, such as the expectation of investors, the *bona fide* nature and character of an investor, as well as the limiting qualifications that necessarily pertain to a State's exercise of its regulatory, and judicial sovereignty.<sup>165</sup>
140. Claimants further rely on the Italian-United States Conciliation Commission *Mergé Case* to argue that *Nottebohm* was not so much "a criterion for *admissibility*", but rather, it provided "an expansive rubric (i) particular to each case, (ii) one where 'habitual residence' was only one of many factors to consider and not a dominant element and (iii) the elements to be weighed are non-

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<sup>156</sup> Memorial on Jurisdiction, para. 217 (emphasis by Claimants).

<sup>157</sup> Memorial on Jurisdiction, para. 204.

<sup>158</sup> Memorial on Jurisdiction, paras. 210-211.

<sup>159</sup> Memorial on Jurisdiction, para. 213 (emphasis by Claimants).

<sup>160</sup> Memorial on Jurisdiction, para. 216.

<sup>161</sup> Memorial on Jurisdiction, paras. 205-209.

<sup>162</sup> Memorial on Jurisdiction, para. 211.

<sup>163</sup> Memorial on Jurisdiction, para. 214 (emphasis by Claimants).

<sup>164</sup> Memorial on Jurisdiction, para. 216.

<sup>165</sup> Memorial on Jurisdiction, para. 215.

exhaustive.”<sup>166</sup> According to Claimants, “[t]he *qualitative* quantitative test applied in *Nottebohm* and *Mergé* has been imported into the public international law of investment protection.”<sup>167</sup>

141. Claimants further consider that they have also met the standard for dominant and effective nationality as adopted by treaty-based arbitral tribunals. With reference to *Micula*, Claimants argue that the tribunal’s conclusion in that case was that “the quality of Claimants’ bond of allegiance to Sweden far outweighed the habitual presence in Romania contention as a determinative factor.”<sup>168</sup> Thus, Claimants consider in the present case that their “links to the U.S. are opposable to Colombia as a matter of fact and law”,<sup>169</sup> considering that said links are “legitimate, genuine, longstanding and *bona fide*.”<sup>170</sup>
142. Relying further on *Olguín*,<sup>171</sup> where the tribunal concluded that the claimants had two effective nationalities, Claimants argue that:

Claimants’ collective and individual testimony establishes that the effectiveness of the bond with Colombia, which is real and genuine, exclusively is determined because it is the situs of Claimants’ business. Most other cultural, social, and educational effective links with Colombia have been minimized to bare essentials, mitigated, or altogether eviscerated. While Claimants certainly recognize the many great cultural contributions that the fine State of Colombia has to offer, and they indeed also share in that rich culture, their preference has been to embrace and to emphasize their U.S. heritage.<sup>172</sup>

143. Claimants further rely on the comparative standard used by the Iran-US Claims Tribunal (“*more effective than*”),<sup>173</sup> which resulted in a “qualitative approach” that “tested the nature of the context.”<sup>174</sup>
144. In Claimants’ view, all of the aforementioned methodologies lead to the conclusion that all of their activities could have been carried on by a non-Colombian: “most of (*sic*) all of Claimants’ passive assets (i.e., non-business revenue producing assets) are located (i) outside of Colombia

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<sup>166</sup> Memorial on Jurisdiction, para. 222 (emphasis by Claimants).

<sup>167</sup> Memorial on Jurisdiction, para. 223 (emphasis by Claimants).

<sup>168</sup> Memorial on Jurisdiction, para. 284; Reply on Jurisdiction, paras. 801-817.

<sup>169</sup> Memorial on Jurisdiction, para. 286.

<sup>170</sup> Reply on Jurisdiction, para. 817.

<sup>171</sup> *Eudoro Armando Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001 (CLA-0033).

<sup>172</sup> Memorial on Jurisdiction, para. 290.

<sup>173</sup> Memorial on Jurisdiction, para. 308; *Nasser Espahanian v. Bank Tejarat*, Award, IUSCT Case No. 157 (31.157.2), 29 March 1983 (CLA-0054); *Attaollah Golpira v. Islamic Republic of Iran*, IUSCT Case No. 211, Award, March 1983 (CLA-0006).

<sup>174</sup> Memorial on Jurisdiction, para. 314.

and (ii) principally in the United States”; and, “but for the location of the business in Colombia, Claimants would live in the United States”.<sup>175</sup>

145. Claimants consider that the “abbreviated standard” proposed by Respondent “is not supported by *any* tribunal that has addressed the issue” and “removes from consideration customary international law that the contracting Parties to the TPA consented to as governing any dispute under the Agreement.”<sup>176</sup>

146. According to Claimants, “the jurisprudence is of a single voice in recognizing that the factors to be considered in applying the dominant and effective test are *non-exhaustive* in scope.”<sup>177</sup> In Claimants’ view, Respondent misses a series of criteria that have been identified and relied upon by jurisprudence, namely:

- a) The need to understand that the factors are *non-exhaustive*,
- b) Consideration of Claimants’ *entire life* in the context of whatsoever specific timeframe the Tribunal wishes to analyze,
- c) a holistic approach,
- d) a *qualitative* consideration and not a “bean-counting” approach,
- e) the *effectiveness* component must be read qualitatively in terms of its genuineness and legitimacy and not removed merely because the dual nationalities formally comply with law,
- f) the factors must be considered in the context of the *particular* factual matrix of each case,
- g) the absence of a single purpose or treaty-shopping scheme must be considered,
- h) no single factor, including residency, is determinative, therefore, all are of equal hierarchy, and
- i) the “how” and “why” dual nationalities were acquired is of significance.<sup>178</sup>

147. Thus, Claimants consider that the Tribunal ought to conduct an extensive review on “every aspect of Claimant’s (*sic*) connection to the States at issue”.<sup>179</sup> The factors outlined above are not mere tools, but “constitute the principles of customary international law that apply to this proceeding

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<sup>175</sup> Memorial on Jurisdiction, para. 316.

<sup>176</sup> Reply on Jurisdiction, paras. 787-788 (emphasis by Claimants).

<sup>177</sup> Reply on Jurisdiction, paras. 796-799; *Benny Diba and Wilfred J. Gaulins v. Islamic Republic of Iran, Iranian Ministry of Housing and Urban Development*, IUSCT Case No. 940, Award, 31 October 1989 (**RLA-0090**).

<sup>178</sup> Reply on Jurisdiction, para. 826 (emphasis by Claimants).

<sup>179</sup> Reply on Jurisdiction, para. 827.

for purposes of establishing Claimants’ dominant and effective nationality” – “[t]hey are mandatory not permissive.”<sup>180</sup>

148. In this regard, precisely because these criteria must all be taken into account, Claimants argue that it is irrelevant to separate the study of the dominance and of the effectivity of a nationality as proposed by Respondent. Claimants thus consider that:

Even if one were to assume the yet-to-be articulated proposition that “effective” is limited only to the issue of whether there is nationality without more (a restrictive reading that is unsupported), the ‘how’ and ‘why’ nationality-citizenship was secured in most instances will qualify and contextualize the very much related “dominant” analysis. In a factual setting, such as the one before this Tribunal, the *genuineness*, *longstanding*, *legitimate*, and *bona fide*, standing of the dual nationals will pervade the Tribunal’s qualitative analysis of the ‘dominant’ prong. Try as Respondent may, ostensibly in the name of analytical efficiency, it is not conceptually possible to extract from the elements of the ‘dominant’ prong the legitimacy and *bona fide* nature of those deeply factual factors comprising the ‘effective’ component.<sup>181</sup>

149. Considering the decision issued by the majority in *Ballantine*, Claimants note that it was decided that:

[a] Tribunal may need to examine *any factor* that may help discern those attributes [for a given nationality], for example, the conduct of a particular State towards the investor, how the investor presented himself or herself, or the reason underlying the investor’s decision to apply for naturalization.<sup>182</sup>

150. In so deciding, the tribunal “further acknowledged that ‘a claimant’s entire life is relevant but not dispositive.’”<sup>183</sup>
151. However, Claimants consider that the *Ballantine* tribunal erred in applying an abbreviated test, as the one proposed by Respondent, by improperly analysing Article 10.28 of the applicable CAFTA-DR Treaty and concluding that it could only take “guidance from customary international law”, whereas the partial dissent issued in that case reached the opposite conclusion.<sup>184</sup> Claimants consider that, by relying on the erroneous conclusions of *Ballantine*, Respondent is asking the Tribunal to “[read] out of Articles 10.22 and 10.28 the contracting Parties’ agreement that a ‘tribunal *shall* decide the issues in dispute in accordance with [the TPA] and applicable rules of international law.’”<sup>185</sup>

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<sup>180</sup> Reply on Jurisdiction, paras. 833-834.

<sup>181</sup> Reply on Jurisdiction, paras. 841-842 (emphasis by Claimants).

<sup>182</sup> Reply on Jurisdiction, para. 985; *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Final Award, 3 September 2019, para. 554 (**RLA-0088**) (emphasis by Claimants).

<sup>183</sup> Reply on Jurisdiction, para. 985; *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Final Award, 3 September 2019, para. 555 (**RLA-0088**).

<sup>184</sup> Reply on Jurisdiction, paras. 994-995.

<sup>185</sup> Reply on Jurisdiction, para. 1001 (emphasis by Claimants).

(c) *The Position of the United States*

152. While the United States does not deny that the TPA extends its protections to dual citizens, as provided in Article 12.20, TPA, it clarifies that investors only have standing to act against the TPA Party hosting the investment if the investor's dominant and effective nationality is "that of the TPA Party which is not the respondent continuously between three critical dates: the time of the purported breach, the submission of a claim to arbitration, and the resolution of the claim."<sup>186</sup> Should that not be the case, then "the respondent Party has not consented to the submission of a claim to arbitration at the outset, and the tribunal therefore lacks jurisdiction *ab initio* under Article 10.17", which is incorporated into Chapter 12.<sup>187</sup>

**2. Claimants' Dominant and Effective Nationality**

153. It is unchallenged that Claimants permanently and habitually reside in Colombia – in particular, they were Colombian residents on the Critical Dates.<sup>188</sup> They claim, however, that they each have qualitative and quantitative contacts with the United States that entail that their dominant and effective nationality is their US citizenship.<sup>189</sup> In their witness statements, they declare, *inter alia*, that (i) English is their main language;<sup>190</sup> (ii) they use their US passports when travelling;<sup>191</sup> (iii) they live in Colombia, because it is where their business is located;<sup>192</sup> and (iv) they have most of their passive assets, property and retirement savings accounts in the United States.<sup>193</sup>

(a) *Respondent's Position*

154. Respondent argues that Claimants' dominant nationality is that of Colombia, not the United States. It cites a series of factors in support of this assertion, as further elaborated below.
155. *Residence*: Respondent rejects Claimants' contentions that (i) they only reside in Colombia for professional reasons and (ii) that significance is to be attached to their joint ownership of a condominium in the United States.<sup>194</sup> As to the first factor, Respondent says that Claimants chose to reside in Colombia, rather than in any other location – whereas their residence in the United States was not so much a choice as they were minors accompanying their parents' move.<sup>195</sup>

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<sup>186</sup> Submission of The United States, para. 40.

<sup>187</sup> Submission of The United States, para. 43.

<sup>188</sup> Rejoinder on Jurisdiction, paras. 370-372.

<sup>189</sup> Memorial on Jurisdiction, paras. 245, 262

<sup>190</sup> Memorial on Jurisdiction, paras. 231-232, 243.

<sup>191</sup> Memorial on Jurisdiction, paras. 235, 245, 264.

<sup>192</sup> Memorial on Jurisdiction, paras. 236, 250.

<sup>193</sup> Memorial on Jurisdiction, paras. 234, 237, 239, 249, 251-252, 266-268.

<sup>194</sup> Answer on Jurisdiction, para. 415; *see also* Alberto Carrizosa Gelzis Statement, para. 45 (CWS-1); Enrique Carrizosa Gelzis Statement, para. 33 (CWS-3).

<sup>195</sup> Answer on Jurisdiction, para. 417-418.

Moreover, Claimants were actively involved in the management of their Colombian investments, “even while abroad”.<sup>196</sup> In particular, it notes that Mr Alberto Carrizosa was director of the I.C. Group during the period under review. Similarly, his brothers were heavily invested in the supervision and control of the companies owned or controlled by the Carrizosa Family.<sup>197</sup> Respondent contends that the decision issued in *Ballantine* is a more relevant reference: in that case, the tribunal relied on the bi-national investors’ choice to move to the Dominican Republic, which the investors alleged to be motivated strictly by professional reasons, to establish that the dominant nationality of the investors in that case was that of the Dominican Republic.<sup>198</sup>

156. Respondent moreover considers that Claimants cannot take “advantage of their Colombian nationalities to move to Colombia, where they have engaged in business ventures (for profit), only... to now claim that they are ‘foreign’ investors for the purpose of pursuing claims under the TPA.”<sup>199</sup> In Respondent’s eyes, “[u]ltimately, the key issue here is *whether* Claimants were residing in Colombia on the Critical Dates – not their reasons for doing so.”<sup>200</sup>
157. As to the second factor, Respondent notes that the property of which Claimants allege to be the owners is in fact owned by Archinal Group Limited, a company registered in the British Virgin Islands.<sup>201</sup> In any event, this property appears to be merely a holiday home bought by Claimants in Florida.<sup>202</sup>
158. *Economic centre*: Respondent argues that the centre of Claimants’ economic lives, i.e. “the geographical location that serves as the focal point for their professional and financial life”,<sup>203</sup> is Colombia.<sup>204</sup>

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<sup>196</sup> Answer on Jurisdiction, para. 419.

<sup>197</sup> Answer on Jurisdiction, paras. 421-422.

<sup>198</sup> Answer on Jurisdiction, para. 427; Rejoinder on Jurisdiction, para. 374.

<sup>199</sup> Rejoinder on Jurisdiction, para. 375.

<sup>200</sup> Rejoinder on Jurisdiction, para. 376 (emphasis by Respondent).

<sup>201</sup> Answer on Jurisdiction, para. 428; Special Warranty Deed for 17475 Collins Avenue, Unit 1102, 25 August 2015 (**R-0208**), Miami-Dade Property Appraiser Records for 17475 Collins Avenue, Unit 1102, 2 September 2019 (**R-0209**).

<sup>202</sup> Answer on Jurisdiction, para. 428.

<sup>203</sup> Answer on Jurisdiction, para. 430; *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Final Award, 3 September 2019, paras. 576–577 (finding that “that during the relevant time [the] center [of the claimants’ economic life] was in the Dominican Republic,” *inter alia* because they had “relocated their economic center . . . to the country where they resided permanently,” and established “their ‘main’ business in the Dominican Republic”) (**RLA-0088**); *Mergé Case—Decision No. 55*, UN Italian-United States Conciliation Commission, Decision, 10 June 1955, p. 13 (identifying as a guiding principle whether “the interests and the permanent professional life of the head or the family were established in the United States”) (**CLA-0047**).

<sup>204</sup> Rejoinder on Jurisdiction, paras. 378-389.

159. Respondent rejects Claimants’ assertion that all of their passive assets – which they allege to be the majority of their assets – are in the United States.<sup>205</sup> Rather, it says that the evidence suggests that Claimants hold sizeable assets in Colombia – “a veritable business empire”, through which the Carrizosa Family was the majority shareholder of at least 29 companies in Colombia.<sup>206</sup> Considering that the burden of proof on the dominant nationality lies with Claimants, Respondent argues that “they should fully disclose the extent to which they and their companies own assets in Colombia.”<sup>207</sup>
160. Respondent further contends that the fact that Claimants have invested their gains obtained in Colombia back in the United States is irrelevant: “it is common for Latin Americans with financial means to use the United States as a safe haven for their investments.”<sup>208</sup>
161. In any event, Respondent notes that, “it is significant that Claimants have chosen to establish in Colombia *the totality* of their active assets (i.e. their business ventures).”<sup>209</sup> Referring again to *Ballantine*, Respondent notes that the majority in that case reached the conclusion that “the claimants’ economic lives were centered in the Dominican Republic despite the fact that the claimants maintained checking accounts and a retirement account in the United States.”<sup>210</sup> This decision was reached, notwithstanding the existence of two active business ventures of the claimants in the United States – “something which Claimants here do not even claim.”<sup>211</sup>
162. Second, Respondent notes that Claimants’ filing of income tax returns with the United States tax authorities is no more than “[m]ere compliance with a particular nation’s law”, something that “does not in itself constitute evidence of the dominance of that country’s nationality.”<sup>212</sup> In comparison, Respondent notes that Claimants have not provided a copy of their tax returns in

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<sup>205</sup> Answer on Jurisdiction, para. 436; Prospectus for Issuance of Preferred Shares, Banco Davivienda, August 2010, pp. 50–51, 84 (**R-0218**) (as of 31 March 2010, Davivienda had 47,757,122 shares in circulation).

<sup>206</sup> Answer on Jurisdiction, para. 437; Registry of Corporations Controlled by the Carrizosa Family, 27 September 1999 (**R-0250**).

<sup>207</sup> Answer on Jurisdiction, para. 437.

<sup>208</sup> Answer on Jurisdiction, para. 438.

<sup>209</sup> Answer on Jurisdiction, para. 439 (emphasis by Respondent).

<sup>210</sup> Answer on Jurisdiction, para. 439; *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Final Award, 3 September 2019, paras. 575-576 (**RLA-0088**).

<sup>211</sup> Answer on Jurisdiction, para. 439; *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Final Award, 3 September 2019, para. 575 (**RLA-0088**).

<sup>212</sup> Answer on Jurisdiction, para. 440; Publication No. 54, United States Department of the Treasury–Internal Revenue Service, 25 January 2019, p. 3 (“If you are a U.S. citizen or resident alien, the rules for filing income, estate, and gift tax returns and for paying estimated tax are generally the same whether you are in the United States or abroad”) (**R-0223**).



Colombia; Respondent thus argues that “as Claimants bear the burden on the issue of nationality and have invoked the issue of tax returns, they should produce their Colombian tax returns.”<sup>213</sup>

163. Third, Respondent dismisses Claimants’ argument that they had “always expected to receive protection as US investors in Colombia from the investment protection treaty entered into by the US and Colombia”.<sup>214</sup> Respondent suggests that the chronology of events does not support this claim, given that the judgment which Claimants allege to be their investment<sup>215</sup> “was issued 5 years before the TPA came into force, and the TPA explicitly precludes judicial decisions from being considered investments.”<sup>216</sup> Even if Claimants were to claim that their investment in Colombia was their shares in Granahorrar, such investment was made “over *twenty years before the TPA entered into force*.”<sup>217</sup> Thus, Respondent concludes, “it is patently untrue that Claimants always expected the TPA’s protections.”<sup>218</sup>
164. *Familial, social and political centre*: According to Respondent, Claimants’ centre of their family, social, and political lives also is Colombia.<sup>219</sup> The required analysis in this respect is “an objective one”: “[t]he Tribunal here is tasked with determining where – in physical/geographical sense – the majority of Claimants’ social and family life occurs.”<sup>220</sup>
165. In the present case, considering where Claimants’ families are located, the nationality of their children and where they are being raised, where Claimants celebrated important holidays, which non-profit corporations they have supported, and even their political activism, Respondent argues that Claimants’ centre of family, social and political life is in Colombia.<sup>221</sup>

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<sup>213</sup> Answer on Jurisdiction, para. 441.

<sup>214</sup> Answer on Jurisdiction, para. 442, *citing* Alberto Carrizosa Gelzis Statement, para. 92 (**CWS-1**); Enrique Carrizosa Gelzis Statement, para. 70 (**CWS-3**); Felipe Carrizosa Gelzis Statement, para. 61 (**CWS-2**).

<sup>215</sup> See Claimants’ Memorial, para. 420: “... More importantly, however, for purposes of pleading and/or proof of *ratione materiae*, the Council of State’s November 1, 2007 Judgment represents and constitutes Claimants’ investment as alleged and demonstrated in this proceeding.”

<sup>216</sup> Answer on Jurisdiction, para. 442; Art. 10.28, note 15, TPA (**RLA-0001**).

<sup>217</sup> Answer on Jurisdiction, para. 442 (emphasis by Respondent).

<sup>218</sup> Answer on Jurisdiction, para. 442.

<sup>219</sup> Rejoinder on Jurisdiction, paras. 390-403.

<sup>220</sup> Answer on Jurisdiction, para. 444; *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Final Award, 3 September 2019, paras. 576–577 (stating that “that during the relevant time [the] center [of the claimants’ family, and social life] was in the Dominican Republic,” because they had relocated “their family center to the country where they resided permanently, Independently of the fact that they often visited the United States, that their children continued their education in the U.S or that they kept social relations in the U.S.”) (**RLA-0088**); *Mergé Case—Decision No. 55*, UN Italian-United States Conciliation Commission, Decision, 10 June 1955, p. 13 (identifying as a guiding principle *inter alia* whether “the interests and the permanent professional life of the head or the family *were established in the United States*” (emphasis added) (**CLA-0047**).

<sup>221</sup> Answer on Jurisdiction, paras. 446 ss.

166. Respondent considers it irrelevant that Mr Alberto Carrizosa may have enrolled for selective service under the US military service, as, at the time he did so, this was done in compliance with US legislation.<sup>222</sup> Similarly, the fact that Mr Enrique Carrizosa's spouse is American is, in Respondent's view, irrelevant, as she "has fully integrated into Colombian society".<sup>223</sup>
167. Thus, says Respondent, Claimants' efforts "to deny or minimize the undeniable fact that Colombia is the center of the social, family, and political lives by asserting that they subjectively, culturally identify only with the United States" fails.<sup>224</sup> This is further proven in Respondent's view by the fact that Claimants used their dual surname, as is traditionally done in Colombia, to submit their claims.<sup>225</sup>
168. *Self-Identification as Colombian*: Respondent further asserts that Claimants' allegation that they identify only with the United States is untrue. In this regard, Respondent refers to the proceedings initiated by Claimants before the IACHR,<sup>226</sup> in which Claimants' petition only referred to their Colombian identity numbers and identity cards and their Colombian nationalities.<sup>227</sup> Respondent finds Claimants' reliance on their Colombian nationality "all the more significant if one considers that nothing compelled Claimants to file their IACHR claims as Colombians."<sup>228</sup> Indeed, Claimants could have submitted the same claim identifying as US nationals. Given that they did not do so, Respondent argues that "[i]t must be concluded, therefore, that if they self-identified as Colombians in that context it is because they genuinely consider themselves Colombians."<sup>229</sup>
169. In addition, Respondent notes that one of Claimants' key arguments in their second revision petition before the IACHR was that "Colombia's conduct amounted to a retaliation for their family's deep involvement in the Colombian opposition political party."<sup>230</sup> Respondent identifies certain inconsistencies in this respect: while Claimants argued multiple times before the IACHR that their claims arose because of mistreatment on Colombia's part against its own citizens, they

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<sup>222</sup> Answer on Jurisdiction, para. 447; Alberto Carrizosa Gelzis Statement, para. 48 (**CWS-1**); Code of the United States of America, Title 50, Section 3802(a) (**R-0226**).

<sup>223</sup> Answer on Jurisdiction, para. 449.

<sup>224</sup> Answer on Jurisdiction, para. 453.

<sup>225</sup> Answer on Jurisdiction, para. 454.

<sup>226</sup> Answer on Jurisdiction, para. 457.

<sup>227</sup> Answer on Jurisdiction, para. 458; Petition to the Inter-American Commission on Human Rights, 6 June 2012 (**R-0118**); Supplementary Petition to the Inter-American Commission on Human Rights, 20 July 2016, pp. 1–2 (**R-0119**); Colombian Identification Card of Alberto Carrizosa Gelzis, 30 May 1984 (**R-0010**); Colombian Identification Card of Enrique Carrizosa Gelzis, 27 October 1992 (**R-0189**); Colombian Identification Card of Felipe Carrizosa Gelzis, 26 September 1986 (**R-0012**); Third Revision Petition to the Inter-American Commission on Human Rights, 4 July 2018 (**R-0122**).

<sup>228</sup> Answer on Jurisdiction, para. 460.

<sup>229</sup> Answer on Jurisdiction, para. 460.

<sup>230</sup> Answer on Jurisdiction, para. 461; Second Revision Petition to the Inter-American Commission on Human Rights, 4 October 2017, pp. 3, 6 (**R-0121**).

claim in the present proceedings that they were discriminated against because they were US nationals.<sup>231</sup> Equally inconsistent is Claimants' argument that they only relied on their Colombian nationality when required by law: "[t]hat argument is disproven ... by their submissions to the IACHR ... and their willingness to identify as Colombian even prior to the promulgation of Law 43 of 1993 [Law 43 concerning Colombian nationality, dated 1 February 1993, which "requires that dual nationals enter and exit Colombia and perform domestic civil and political acts in their capacity as Colombian nationals"]".<sup>232</sup>

170. Respondent thus concludes that the Tribunal lacks jurisdiction *ratione personae* over Claimants' claims in this arbitration.<sup>233</sup>

(b) *Claimants' Position*

171. Claimants refer to a series of factors leading to the conclusion that their dominant and effective nationality is that of the United States, including their own subjective considerations,<sup>234</sup> their family matrix, culture and projects,<sup>235</sup> education,<sup>236</sup> language<sup>237</sup> and healthcare.<sup>238</sup>
172. *Residence*: Claimants clarify that their decision to live in Colombia was governed exclusively by professional factors, and was thus unrelated as to whether they consider themselves to be Colombian, which supports their dominant and effective nationality being that of the United States.<sup>239</sup> In their submission, if Respondent wished to argue that, in effect, Claimants' residency in Colombia disqualified their dominant and effective US nationality, it should produce "[c]redible testimony challenging Claimants' reasons and stated purpose for residing in Colombia", such as "actual evidence that Claimants' companies do not actually require physical presence, or that the companies need not be in Colombia".<sup>240</sup> Considering that Claimants have produced *prima facie* evidence supporting their position, they deem the burden of proof to have shifted to Respondent.<sup>241</sup>

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<sup>231</sup> Answer on Jurisdiction, para. 462; Felipe Carrizosa Gelzis Statement, para. 43 (CWS-2); Enrique Carrizosa Gelzis Statement, para. 50 (CWS-3).

<sup>232</sup> Answer on Jurisdiction, para. 463.

<sup>233</sup> Answer on Jurisdiction, paras. 465, 509.

<sup>234</sup> Reply on Jurisdiction, paras. 851-858.

<sup>235</sup> Reply on Jurisdiction, paras. 859-865.

<sup>236</sup> Reply on Jurisdiction, paras. 866-875.

<sup>237</sup> Reply on Jurisdiction, paras. 901-903.

<sup>238</sup> Reply on Jurisdiction, paras. 935-936.

<sup>239</sup> Reply on Jurisdiction, paras. 876-900.

<sup>240</sup> Reply on Jurisdiction, para. 890.

<sup>241</sup> Reply on Jurisdiction, para. 900.

173. *Economic centre*: Claimants also rely on the fact that the “*overwhelming majority*” of their assets are located in the United States to argue that their dominant and effective nationality is that of the United States.<sup>242</sup> Respondent’s arguments that the available evidence actually shows the contrary<sup>243</sup> is factually erroneous, as is shown for example by Respondent’s reliance on assets allegedly held by the Carrizosa Family as of 31 March 2020 in Colombia. Claimants emphasise that (i) the information is nearly ten years old, (ii) it refers to the Carrizosa Family, not Claimants, and (iii) it identifies a nominal amount of US\$ 1.1 million.<sup>244</sup>
174. *Familial, social and political centre*: Claimants say that detailed analysis of their cultural affinities further supports that their dominant and effective nationality is that of the United States, as shown by their witness statements. In Claimants’ view, “[t]he *only* kind of testimony, beyond a party-admission, that at all could credibly challenge these premises would be from a declarant having personal knowledge that, in effect, Claimants when being raised in their household were not in fact exposed to U.S. culture as the predominant cultural influence.”<sup>245</sup> Considering that the burden of proof after their *prima facie* showing that the US culture predominates has shifted to Respondent, Claimants consider that the effectiveness and dominance of their US nationality has not been disproven.<sup>246</sup>
175. *Genuineness of US Citizenship*: Last, Claimants underscore that their US nationality is not the result of a treaty-shopping scheme of any sort, given that they are US nationals from birth.<sup>247</sup> Thus, they cannot be precluded “from receiving the protections to be accorded to their investments in the national territory of Colombia.”<sup>248</sup> In Claimants’ view, the treaty policies of the TPA itself – Colombia’s intention to attract more investors, including by setting incentives to descendants of nationals – support their argument that the *bona fide* of their nationality participates in granting them the TPA’s protection.<sup>249</sup> Claimants thus represent that it is the incentives given to them as descendants of a Colombian national that led them to move to Colombia and invest there.<sup>250</sup>

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<sup>242</sup> Reply on Jurisdiction, para. 920 (emphasis by Claimants).

<sup>243</sup> See Answer on Jurisdiction, para. 436.

<sup>244</sup> Reply on Jurisdiction, paras. 928-933.

<sup>245</sup> Reply on Jurisdiction, para. 941 (emphasis by Claimants).

<sup>246</sup> Reply on Jurisdiction, para. 944.

<sup>247</sup> Reply on Jurisdiction, para. 947.

<sup>248</sup> Reply on Jurisdiction, para. 949.

<sup>249</sup> Reply on Jurisdiction, paras. 958-960.

<sup>250</sup> Reply on Jurisdiction, para. 963; Alberto Carrizosa Gelzis Statement, paras. 22-23 (CWS-1); Felipe Carrizosa Gelzis Statement, paras. 16-17, 35 (CWS-2).

### 3. The Tribunal's Analysis

#### (a) Introduction

176. The extent of the common ground between the Parties has narrowed the ambit of their dispute, so far as the Tribunal's jurisdiction *ratione personae* is concerned. The Parties agree that:

- (i) the TPA provides no specific guidance as to how the Tribunal should interpret the concept of 'dominant and effective nationality', and that pursuant to Article 10.22, Chapter 10, Section B of the TPA, the Tribunal is required to:

“... decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”<sup>251</sup>;

- (ii) the applicable rules of international law, which include relevant rules of customary international law, are of mandatory application;<sup>252</sup>
- (iii) only a claimant, that is to say, “an investor of a Party that is a party to an investment dispute with another Party”,<sup>253</sup> may submit a claim to arbitration;
- (iv) Article 12.20, TPA, further defines an ‘investor of a Party’ as:

a Party or state enterprise thereof, or a person of a Party, that attempts to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective nationality.

Respondent suggests ‘exclusively’ means that:

what the Tribunal must decide based on all the relevant factors, is whether, if you have to pick only one of the competing nationalities, it makes more sense to deem ... Claimants to have been exclusively Colombian or exclusively American on the critical dates.<sup>254</sup> (And *see* (vii) below);

- (v) Claimants' US and Colombian nationalities, which in the case of all three of the Carrizosa brothers, were acquired at birth, are both ‘effective’;<sup>255</sup>
- (vi) there is no suggestion that either nationality was obtained by fraud or for the purpose of treaty-shopping;<sup>256</sup>

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<sup>251</sup> Article 10.22.1, Chapter 10, Section B, TPA (RLA-0001).

<sup>252</sup> Reply on Jurisdiction, para. 788; Answer on Jurisdiction, para. 397; Transcript (English), Day 1, pp. 168-169.

<sup>253</sup> Article 12.20, Chapter 12 (and Article 10.28, Chapter 10), TPA (RLA-0001).

<sup>254</sup> Transcript (English), Day 1, p. 169.

<sup>255</sup> Memorial on Jurisdiction, para. 271; Answer on Jurisdiction, para. 396.

<sup>256</sup> Transcript (English), Day 1, p. 93, 177.

(vii) the TPA requires a dual national claimant holding the nationalities of both Parties to the TPA to demonstrate:

(a) that his or her dominant and effective nationality is that of the Party other than that in which the investment has been made; and

(b) such dominant and effective nationality was held by Claimants at the time of the alleged breach(es) by Colombia of its obligations under the Treaty and the date of the introduction of these proceedings (the Critical Dates);<sup>257</sup> and

(viii) the Critical Dates in this case are:

(a) 25 June 2014, the date of the Order of the Constitutional Court (“... the State measure that Claimants have alleged as constituting a breach of the Colombia-USA TPA...”)<sup>258</sup>; and

(b) 24 January 2018, being the date of the submission of the claim to arbitration.<sup>259</sup>

The Tribunal agrees with the Parties’ common position that these are relevant criteria for the purposes of its assessment of dominant and effective nationality.

177. With specific reference to Article 12.20, Chapter 12 of the TPA, and while it is astute to avoid an analysis of the factors relevant to the determination of dominant and effective nationality under customary international law, the United States observes in its Submission that:

... if the investor is a natural person, and that person had the dominant and effective nationality of the respondent Party [in this instance, Colombia] at the time of the submission of the claim, then the investor would not be, *at that time*, a party to a dispute with *another Party* (i.e. with a Party other than the investor’s own).<sup>260</sup>

178. And it points out, too, that unless the putative dual national claimant can demonstrate that he or she held the dominant and effective nationality of the non-disputing Party at the time of the purported breach:

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<sup>257</sup> Transcript (English), Day 1, p. 108-109, 179.

<sup>258</sup> Transcript (English), Day 1, p. 27; *see Mergé*: “The question of dual nationality obviously arises only in cases where the claimant was in possession of both nationalities at the time the damage occurred ...” *Mergé Case—Decision No. 55*, UN Italian-United States Conciliation Commission, Decision, 10 June 1955, p. 247 (CLA-0047).

<sup>259</sup> *Achmea B.V. v. Slovak Republic*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, 20 May 2014, para. 267 (“It is an accepted principle of international law that jurisdiction must exist on the day of the institution of proceedings.”) (RLA-0094).

<sup>260</sup> Submission of the United States, para. 41 (emphasis in the original).

... there can be no breach, as there was no obligation under the relevant Chapter Ten, Section A provisions as incorporated into Chapter Twelve at the time of the purported breach.<sup>261</sup>

179. The United States maintains that:

Where the requisite nationality does not exist at the operative times set out above, the respondent Party has not consented to the submission of the claim to arbitration at the outset and the tribunal therefore lacks jurisdiction *ab initio* under Article 10.17 [which is incorporated into Chapter Twelve by Article 12.1.2.(b).]<sup>262</sup>

180. The United States says that its conclusions are consistent with the “well-established” principle of international law (which this Tribunal is bound to follow) that an individual cannot maintain an international claim against his or her own State.<sup>263</sup>

181. The determination by this Tribunal, so far as Claimants’ dominant and effective nationality is concerned, is of fundamental importance to the question of the Tribunal’s jurisdiction, since if Claimants were unable to persuade the Tribunal that their dominant and effective nationality at the Critical Dates was that of the United States, then the Tribunal would not be able to entertain their claims; it would have no jurisdiction to do so.

182. For that reason, the Tribunal will address Respondent’s *ratione personae* objection first, mindful of the observations of the International Court of Justice in its seminal decision in the *Nottebohm Case*<sup>264</sup> that:

It appears to the Court that this plea in bar is of fundamental importance and that it is therefore desirable to consider it at the outset.<sup>265</sup>

183. In the case of dual nationals, the ICJ observed that in numerous instances in which international arbitrators had to consider whether full international effect was to be attributed to the nationality invoked in the context of the exercise of protection:

They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests,

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<sup>261</sup> Submission of the United States, para. 42.

<sup>262</sup> Submission of the United States, para. 43.

<sup>263</sup> See *Loewen Group, Inc. and Raymond Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Final Award, 26 June 2003, para. 225.

<sup>264</sup> *Nottebohm Case*, ICJ, Second Phase, Judgment, 6 April 1955 (CLA-0057).

<sup>265</sup> *Nottebohm Case*, ICJ, Second Phase, Judgment, 6 April 1955, p. 12 (CLA-0057).

his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.<sup>266</sup>

184. The particular circumstances of the *Nottebohm* case were very different from those which obtain here, but the approach set out by the ICJ in that case has been applied consistently: it is for a tribunal to consider all relevant factors particular to the case with which it is seised and to determine, on the basis of a comparative exercise, which of the two nationalities asserted by the claimant is the predominant:

... What is relevant in this case is the principle of dominant nationality ... [I]t is necessary to determine which of the two (or more) nationalities is the preponderant one.<sup>267</sup>

185. In the Decision of the Italian – United States Conciliation Commission in *Mergé*, the Commission appeared to equate the concepts of effective and dominant nationality, whilst contemplating the prevalence of one nationality over the other:

effective nationality does not mean only the existence of a real bond but means also the prevalence of that nationality over the other, by virtue of facts which exist in the case.<sup>268</sup>

186. In *Ballantine*, the tribunal noted that the respondent State had contended that "... 'dominant nationality' is a question of 'which connection is stronger' or with which country Claimants are more closely aligned."<sup>269</sup>

187. The *Ballantine* tribunal accepted that the word 'dominant':

... conveys the notion of strength and precedence of one thing over another and that closeness with a State and the strength of a nationality bond, could be the result of several factors in play such as the time spent by the individual in that country, family and personal attachments, language, education, work, economic or financial attachments, i.e. a cluster of elements that make up the life of an individual and that define several connections to a particular State. We understand 'dominance' as referring to the degree or magnitude in which such connections

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<sup>266</sup> *Nottebohm Case*, ICJ, Second Phase, Judgment, 6 April 1955, p. 22 (CLA-0057). The test in *Nottebohm* was adopted by the Iran – US Claims Tribunal in *Case No. A/18*, IUSCTR, Decision, 6 April 1984, pp. 10-12 (RLA-0089).

<sup>267</sup> *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, para. 696 (RLA-0105) (Tribunal's translation of the original Spanish text: "Lo relevante en este caso es el principio de la nacionalidad dominante, que concierne aquellas situaciones en que una persona posee más de una nacionalidad y hay que determinar cuál de las dos (o más) nacionalidades es la preponderante.")

<sup>268</sup> *Mergé Case—Decision No. 55*, UN Italian-United States Conciliation Commission, Decision, 10 June 1955, pp. 246-247 (CLA-0047).

<sup>269</sup> *Michael Ballantine and Lisa Ballantine v. the Dominican Republic*, PCA Case No. 2016-17, Final Award, 3 September 2019, paras. 536, 538 (RLA-0088). See also *id.*, Procedural Order No. 2, 21 April 2017, para. 25 (CLA-0050): "[Relevant factors are] among others, the State of habitual residence, the circumstances in which the second nationality was acquired, the individual's personal attachment to a particular country, and the center of the person's economic, social and family life".



are stronger than the connections that could also have been built by the individual in relation to another State that has also bestowed its nationality.<sup>270</sup>

188. As the Tribunal has already noted, for the purposes of Article 12.20, TPA, a dual national shall be deemed to be exclusively a citizen of the State of his or her dominant and effective nationality. In other words, it falls to the Tribunal in this case to determine whether, on the basis of the evidence available to it, Claimants, whom their counsel introduced to the Tribunal as “brothers, US citizens living in Colombia”<sup>271</sup>, were predominantly American or Colombian on the Critical Dates.

189. And upon the basis of what the tribunal in *AAPL v. Sri Lanka* qualified as an “established international rule”, it is for the party, which has the burden of proof, in this case, Claimants:

... not only [to] bring evidence in support of [their] allegations, but [. . .] also [to] convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.<sup>272</sup>

190. This rule applies with equal force where the facts supporting jurisdiction are to be established. In *Pac Rim*, the tribunal opined that:

...it is impermissible for the Tribunal to found its jurisdiction on any of the Claimant’s CAFTA claims on the basis of an assumed fact (i.e. alleged by the Claimant in its pleadings as regards jurisdiction but disputed by the Respondent). The application of that “prima facie” or other like standard is limited to testing the merits of a claimant’s case at a jurisdictional stage; and it cannot apply to a factual issue upon which a tribunal’s jurisdiction directly depends... In the context of factual issues which are common to both jurisdictional issues and the merits, there could be, of course, no difficulty in joining the same factual issues to the merits. That, however, is not the situation here, where a factual issue relevant only to jurisdiction and not to the merits requires more than a decision *pro tempore* by a tribunal.

...

Accordingly, this Tribunal is here required to determine finally whether it has jurisdiction over the Claimant’s CAFTA claims on the proven existence of certain facts because all relevant facts supporting such jurisdiction must be established by the Claimant at this jurisdictional stage and not merely assumed in the Claimant’s favour.<sup>273</sup>

191. It is with that admonition in mind that the Tribunal notes Claimants’ unsupported proposition that when, as here, Claimants enjoyed effective dual nationality from birth:

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<sup>270</sup> *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Final Award, 3 September 2019, para. 538 (**RLA-0088**).

<sup>271</sup> Transcript (English), Day 1, p. 14.

<sup>272</sup> *Asian Agricultural Products LTD (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/12, Final Award, 27 June 1990, para. 56; *see also Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, paras. 2.11, 2.15 (**RLA-0066**).

<sup>273</sup> *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, paras. 2.8-2.9 (**RLA-0066**).

a presumption of legitimacy must be accorded to Claimants' allegation that the non-host State represents [their] dominant and effective nationality.<sup>274</sup>

192. Inevitably, any assessment as to which of Claimants' nationalities is predominant must be based upon the particular facts and circumstances of this case. Claimants themselves urged on the Tribunal the need to apply a qualitative, not quantitative, test, but by the same token, they suggest that the Tribunal should accord equal weight to all factors to which they (and Respondent) have drawn attention on the basis that:

there is no authority setting forth a test or a methodology for the application of a test that sets forth a hierarchy between and among the various elements to be considered.<sup>275</sup>

193. The Tribunal has some difficulty with that proposition. First, since every case has to be considered on its own facts, it is hardly surprising that while there is guidance at a conceptual level as to the principles and indicative criteria to which a tribunal might have regard, the authorities provide no prescriptive granular test or formula of universal application. As the ICJ observed in *Nottebohm*, different factors fall to be taken into consideration, and their importance will vary from one case to the next.<sup>276</sup>

194. The focus of the Tribunal's attention is the period of the Critical Dates, but the Tribunal notes and adopts the well-recognised approach that it should take into account the entire life of each of the Carrizosa brothers in determining his dominant and effective nationality. In *Malek*, the Iran–US Claims Tribunal stated:

... Obviously, to establish what is the dominant and effective nationality at the date that the claim arose, it is necessary to scrutinize the events in the Claimant's life preceding this date. Indeed, the entire life of the Claimant, from birth, and all the factors which during this span of time, evidence the reality and the sincerity of the choice of national allegiance he claims to have made, are relevant.<sup>277</sup>

195. Claimants suggest that the Tribunal's task is to test the extent to which, together with other factors, the dual national has social, civic, family and other economic ties to the competing States.<sup>278</sup> The Tribunal does not disagree, but it hesitates to accept the further proposition that its assessment should be coloured as much by Claimants' subjective views as to which of their nationalities is predominant as by objective evidence of their ties to one State as opposed to another.

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<sup>274</sup> Transcript (English), Day 1, p. 92.

<sup>275</sup> Transcript (English), Day 3, p. 501.

<sup>276</sup> *Nottebohm Case*, ICJ, Second Phase, Judgment, 6 April 1955, p. 22 (CLA-0057).

<sup>277</sup> *Reza Said Malek v. Islamic Republic of Iran*, IUSCT Case No. 193, Interlocutory Award No. ITL68-193-3, 23 June 1988, p. 51 (CLA-0245).

<sup>278</sup> Transcript (English), Day 3, p. 501.

196. It is one thing to evaluate how an individual might hold himself out to the world on the basis of extrinsic evidence; it is another to base that determination upon the mere subjective feelings, however genuine and deeply held, of the subjects of the enquiry themselves and which it is impossible to test, rather than to weigh any such subjective expressions of association against objectively verifiable indicia. What is required of the Tribunal is that it undertakes an objective factual enquiry.

197. In fact, Claimants themselves did not seek to press the point too far:

What a person genuinely thinks of himself/herself in terms of dominant and effective nationality, or predominant nationality ... is important and part of the exercise ... of the testimony. When asked that question, the Tribunal can accord weight to it or accord no weight to it or actually infer that these are duplicitous people who really lie, who really ... don't see themselves that way. It is a factor to be considered, and it cuts in every direction.<sup>279</sup>

198. Doubtless mindful, first, of the observation of the ICJ in *Nottebohm* that the habitual residence of the individual concerned is an important factor (but, the Tribunal notes and emphasises, not the only, or overriding, factor) in any such evaluation and, second, that Claimants accept, as on the facts they must do, that their place of habitual residence is Colombia,<sup>280</sup> Claimants emphasise that if a dual national lives and has a primary residence in the host State, then it is hardly surprising he will have club memberships, drive a car, shop for groceries or keep a pet there. They say that it is incumbent upon the Tribunal not to engage in a “bean counting” exercise: rather:

55 years of development and refinement of the customary international law with respect to this doctrine requires the Tribunal to probe behind everyday logistical factors in cases in which the primary place of residence is the host State.<sup>281</sup>

199. Claimants suggested that the dominant and effective test would fail completely if it were axiomatic that a dual national whose asserted primary citizenship was not that of the host State, but whose primary residence was in the host State would be deemed primarily a national of that host State:

Every dual national having a primary residence in the host State would be unable to meet the dominant and effective nationality test.<sup>282</sup>

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<sup>279</sup> Transcript (English), Day 3, p. 507.

<sup>280</sup> Felipe Carrizosa Gelzis told the Tribunal that he had lived in Bogotá since 1994 (Transcript (English), Day 2, p. 268). His brother, Enrique, had been in Bogotá since 2004 (Transcript (English), Day 2, p. 226) and Alberto had lived there since 2007 (Transcript (English), Day 3, p. 318).

<sup>281</sup> Transcript (English), Day 1, p. 94.

<sup>282</sup> Transcript (English), Day 1, p. 101.

200. The Tribunal has had the benefit of both the Parties' submissions and the personal written and oral testimony of the three Claimants, all three of whom gave their evidence by video-link from Bogotá. From that evidence, the following matters pertinent to the Tribunal's analysis emerged.
201. Claimants' parents were a prominent Colombian businessman, the late Julio Carrizosa Mutis, and his wife, a naturalised US citizen born in Latvia, Astrida Benita Carrizosa (*née* Gelzis). They had lived together in Bogotá from 1962 until Mr Carrizosa's death in 2018 and his widow continues to live in Bogotá.<sup>283</sup>
202. All three Claimants were born in Colombia, acquiring both Colombian nationality and, through their mother, US nationality at birth. All three are long-term residents of Bogotá.
203. Enrique Carrizosa told the Tribunal that he has lived in Bogotá, since "[coming] back" to Colombia in 2004.<sup>284</sup> He lives there with his US-born wife and his two daughters (born in Colombia in 2007 and 2009) in an apartment that he has owned since 2007.<sup>285</sup> While he did not dispute the official Colombian migratory record showing that between his return to Colombia 2004 and 2018, he had spent 4,220 days in Colombia and 1,206 days outside the country and that in 2014, he had spent 286 days in Colombia and 78 abroad, he did question their accuracy to the extent that they purported to show the length of time he had spent in the United States. He conceded, however, that he had not produced as evidence in the arbitration the tax records and Outlook documentation upon the basis of which he maintained he would be able to demonstrate the time he had spent in the United States.<sup>286</sup>
204. Alberto Carrizosa confirmed that aside from a brief six-month period in his childhood spent in Cleveland, a period of seven years between 1983 and 1990 and a further period when he was in Miami between 1999 and 2007, he had lived in Colombia.<sup>287</sup> Since his "return" to Colombia in 2007,<sup>288</sup> he has lived in Bogotá, where he rents an apartment.<sup>289</sup> While he had never married and had no children of his own, Mr Carrizosa told the Tribunal that he had had two life partners, an American national with whom he had lived for some 16 years, and subsequently a Colombian national with whom he had lived for some 10 years and whose daughter he had raised as his own and who remained in Colombia.<sup>290</sup> He accepted the Colombian migratory statistics, recording that

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<sup>283</sup> Transcript (English), Day 2, pp. 238-239.

<sup>284</sup> Transcript (English), Day 1, p. 243.

<sup>285</sup> Transcript (English), Day 1, pp. 237-238.

<sup>286</sup> Transcript (English), Day 1, pp. 239-240.

<sup>287</sup> Transcript (English), Day 1, p. 278.

<sup>288</sup> Transcript (English), Day 1, p. 267.

<sup>289</sup> Transcript (English), Day 1, p. 282.

<sup>290</sup> Transcript (English), Day 2, pp. 279-280.

that in 2014, he had spent 325 days in Colombia and 39 abroad; in 2018, he had spent 300 days in Colombia and 65 days abroad; and in aggregate between 2007-2018, he had spent 3,406 days in Colombia and 946 days outside the country.<sup>291</sup> Of his close family members, he has an aunt in Colombia and one in the US and seven out of his nine first cousins are Colombian, five of whom have lived in Colombia for many years.<sup>292</sup>

205. Felipe Carrizosa told the Tribunal that he “came back” to Colombia in 1994.<sup>293</sup> He and his Colombian wife from whom he had divorced in 2014/2015 had married and lived together in Colombia in a family business-owned apartment. Their two daughters, now 8 and 18 years of age, had been born in Bogotá and hold dual nationality. They live with their mother in Bogotá and, from the age of four, they have attended the same exclusive private school attended by their father and his brothers, Colegio Nueva Granada.<sup>294</sup> He accepted as “about right” and “roughly accurate” the Colombian migratory statistics, recording that in 2014, he had spent 311 days in Colombia and 53 days abroad; in 2018, he had spent 302 days in Colombia and 62 days abroad; and in aggregate, between 2001 and 2018, he had spent 5,270 days in Colombia and 643 outside the country.<sup>295</sup>
206. The three Claimants share a country property outside Bogotá bought through the corporate vehicle, Burgos Montserrat, which they own.<sup>296</sup> All three have club memberships of Club el Nogal in Bogotá, used primarily in connection with their business interests, Club Lagartos (a golf club and ‘safe haven’ outside Bogotá) and the club associated with their country property (Mesa Yuegas).
207. All three Claimants confirmed that they had voted in the 2014 and 2018 Colombian presidential and congressional elections and, either personally, or through the family-owned businesses, had made campaign contributions. Enrique Carrizosa emphasised that the exercise of that civic right was “very important in regards to how fragile the democracy here is.”<sup>297</sup> Alberto Carrizosa observed that campaign contributions (he had contributed personally in 2018) were “part of doing

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<sup>291</sup> Transcript (English), Day 2, pp. 278-279.

<sup>292</sup> Transcript (English), Day 2, pp. 280-281.

<sup>293</sup> Transcript (English), Day 2, p. 324.

<sup>294</sup> Transcript (English), Day 2, pp.325-328. All three Claimants had described the Colegio Nueva Granada as an “American school”, but Felipe Carrizosa acknowledged that it was a very selective, exclusive school, accredited by the Colombian Ministry of Education as offering a curriculum that allows for entry to university in Colombia as well as to colleges and universities in the United States. He did not dispute the statement on the school’s website that 79% of the students were Colombian and only some 10% US nationals. (Transcript (English), Day 2, pp. 328-329).

<sup>295</sup> Transcript (English), Day 2, 324-325.

<sup>296</sup> Transcript (English), Day 2, p. 250.

<sup>297</sup> Transcript (English), Day 2, p. 242.

business in Colombia, you have to be close to the political parties... it is a customary tradition to provide support to the political parties.”<sup>298</sup>

208. For his part, Felipe Carrizosa acknowledged that while he had voted in the Colombian elections, he had never exercised a vote in the United States: “... democracy in United States is not at risk...”<sup>299</sup>

209. None of Claimants had ever stood for public office (in Colombia or in the US) and none had worked for government or government institutions.

210. Enrique Carrizosa sought to resist the suggestion that he lived in Colombia, because it was the centre of his economic and professional life,<sup>300</sup> but he had previously acknowledged that:

[T]he reason why we need to live in Colombia is multiple ownings are in Colombian companies and we need to be here [in Colombia] to oversee them.<sup>301</sup>

211. Enrique Carrizosa had been employed by I.C. Inversiones ever since he had “come back”<sup>302</sup> to Colombia in 2004, rising to the rank of President of the company in 2010 and assuming the Chairmanship in 2016.<sup>303</sup> He told the Tribunal that in 2014 and 2018, he served as a legal representative for the family construction company, Industrias y Construcciones I.C., S.A.S and for Manufacturas de Oriente S.A.S; in 2014, he had been the legal representative of Vanguardia Asesoría S.A.S. and between 2011 and 2018, legal representative of Vanguardia Inversiones S.A.S. Enrique Carrizosa had also served as a Board member of the Colombian companies Carbones de Samca S.A (2014) in which the family had a minority stake and VTU de Colombia S.A. (2018) in which the family held a majority stake.<sup>304</sup> In contrast, he held one directorship in the US, and while he told the Tribunal that through the line of ownership, all of the family companies were ultimately held by a US corporation<sup>305</sup>, he confirmed that neither Claimants, nor the family businesses maintained an office or offices in the United States<sup>306</sup> and that he himself had not been employed in the United States since 2004.<sup>307</sup>

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<sup>298</sup> Transcript (English), Day 2, p. 286.

<sup>299</sup> Transcript (English), Day 2, p. 330.

<sup>300</sup> Transcript (English), Day 2, p. 249.

<sup>301</sup> Transcript (English), Day 2, p. 246.

<sup>302</sup> Transcript (English), Day 2, p. 243.

<sup>303</sup> Transcript (English), Day 2, p. 244.

<sup>304</sup> Transcript (English), Day 2, pp. 243-248.

<sup>305</sup> Transcript (English), Day 2, p. 250; *see* Alberto Carrizosa’s answer at *id*, pp. 275-276: “The top corporate structure is a U.S. business incorporated in Delaware which is the owner of all the subsidiaries ....”

<sup>306</sup> Transcript (English), Day 2, p. 250.

<sup>307</sup> Transcript (English), Day 2, p. 254.

212. For his part, Alberto Carrizosa confirmed that he had returned to Colombia pursuant to a family decision that he should come back following the sale (or post-dot com bubble liquidation) of the family's US infrastructure businesses in 2007.<sup>308</sup> Upon his return, he assumed the chairmanship of the family's infrastructure development companies, the IC group of companies, although the majority of the group's investments are now in Panama.<sup>309</sup> In or about 2015, Mr Carrizosa's employment changed from his role at I.C. Investments Management to that of CEO and legal representative of Vanguardia Inversiones, in which capacity he is charged with the management of the family's business portfolio in the US.

213. Alberto Carrizosa acknowledged that the family businesses established by his father:

... have a significant value and the reason we work and live in Colombia is because those businesses that survived need to be taken care of.<sup>310</sup>

214. Alberto Carrizosa also served as the legal representative of Industrial de Construcciones S.A.S, the original family business (now in wind down) between 2010 and 2018 and as the legal representative of some 20 other family companies of five of which he is a board member.<sup>311</sup>

215. Mr Carrizosa confirmed that he maintained no office in the US and since 2007, he has held no managerial or advisory role in any US company. His last formal contract of employment in the US had been with Shearson Lehman Hutton in or about 1988-1990.<sup>312</sup> Thereafter, he had gone to the US (between 1999 and 2007) to manage the companies that the family then had there.<sup>313</sup>

216. Felipe Carrizosa had never been employed in the US (and between 2014 and 2018, he never served as a board member of any US company).<sup>314</sup> Having obtained his B.Sc from LeHigh University in Pennsylvania, he had studied at the Goethe Institut in Germany before taking up employment in that country. After three years working in Germany, he had returned to Colombia in 1994. He explained that:

I moved to Colombia because of the family business. I felt that I needed to go back to Colombia and be part of the business, especially the operating businesses. We have businesses

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<sup>308</sup> Transcript (English), Day 2, pp. 267-268.

<sup>309</sup> Transcript (English), Day 2, p. 269. Subsequently, at p. 289, Mr Carrizosa stated that he had been served as CEO of I.C. Investments between 1997 and 1999 and latterly he has served as a board member under the chairmanship of Mr Enrique Carrizosa since 2007 or 2009.

<sup>310</sup> Transcript (English), Day 2, p. 275.

<sup>311</sup> Transcript (English), Day 2, p. 292.

<sup>312</sup> Transcript (English), Day 2, p. 299.

<sup>313</sup> Transcript (English), Day 2, p. 275.

<sup>314</sup> Transcript (English), Day 2, p. 335.

outside of Colombia, but those are passive investments that I feel don't require my physical presence. But the Colombian operating companies, those do.<sup>315</sup>

217. 12 years after his return to Colombia, Felipe Carrizosa took his MBA at INALDE in Colombia.<sup>316</sup>
218. He had been employed in Bogotá as the General Manager (1997 – 2005) and subsequently the President (2005-2018) of I.C. Constructora. After working uninterruptedly for that family-owned Colombian construction company, he had become a manager at Vanguardia Inversiones in 2018.<sup>317</sup> Felipe Carrizosa had also served, first, as the legal representative of a number of other family-owned real estate development companies, namely Covitotal S.A.S (in both 2014 and 2018), I.C. Inmobiliara S.A. (2010-2015) and Industrias y Construcciones I.C., S.A.S. (2014-2017)<sup>318</sup> and, second, as a member of the Board of Directors of the Colombian company, Inversiones Codego S.A. (2014 and 2018). Felipe Carrizosa's office in Bogotá is in same building as his brothers' offices.<sup>319</sup>
219. The Tribunal was told that all three Claimants had access to cars owned by the family businesses, and all had access, too, to a driver.<sup>320</sup>
220. Claimants confirmed that their salaries in Colombia were paid into local bank accounts and that they paid income tax, social security charges and, save for Alberto Carrizosa, who owns no property, property taxes in Colombia.<sup>321</sup>
221. Enrique Carrizosa confirmed that he contributed to a mandatory pension programme, to the mandated social health plan and to a life insurance plan as well as maintaining professional liability insurance in Colombia<sup>322</sup> as did Alberto Carrizosa.<sup>323</sup> Felipe Carrizosa confirmed that he contributed to the Colombian pension programme and that he had life insurance in Colombia.<sup>324</sup>

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<sup>315</sup> Transcript (English), Day 2, p. 318.

<sup>316</sup> Transcript (English), Day 2, p. 316.

<sup>317</sup> Transcript (English), Day 2, p. 331.

<sup>318</sup> Transcript (English), Day 2, pp. 333-335.

<sup>319</sup> Transcript (English), Day 2, p. 332.

<sup>320</sup> Transcript (English), Day 2, pp. 253, 297, 338.

<sup>321</sup> Transcript (English), Day 2, pp. 255, 257, 272, 299, 301, 399, 340.

<sup>322</sup> Transcript (English), Day 2, pp. 253-256.

<sup>323</sup> Transcript (English), Day 2, pp. 298-300.

<sup>324</sup> Transcript (English), Day 2, pp. 338-339.



(b) *Interests in the United States*

222. Claimants own a vacation home through a company structure (formerly BVI, now US) at Sunny Isles, Miami Beach, Florida. They own no other real estate in the United States.<sup>325</sup>
223. None of Claimants has, or is entitled to, a current US driving licence as none is resident in the United States.<sup>326</sup> None maintains any club memberships in the US.<sup>327</sup>
224. Of the three brothers, only Enrique confirmed that he had voted in a US presidential election. He had voted in 2020 (by mail vote in Illinois),<sup>328</sup> but not in 2012 or 2016, although he stated that he had made campaign contributions in both of those campaigns.<sup>329</sup> The last time that Alberto Carrizosa had made a political campaign contribution in the United States had been in 2000 in connection with a congressional seat campaign in the US.<sup>330</sup> No evidence to substantiate those campaign contributions has been produced.

225. Much was made of the fact that Claimants paid tax in the United States:

If someone considers themselves primarily a Colombian citizen, why on God's good green earth would they be filing tax returns in the [US]?<sup>331</sup>

...

Only someone with very deep ties to the United States who does not reside there on a permanent basis would voluntarily elect the obligation and burden ... of paying taxes in exchange for not losing their citizenship. Think about it, There's a big difference. How many people would say, "Heck, I really live in Colombia. I'm really Colombian. Why should I keep the U.S. citizenship if it forces me to pay taxes? That doesn't make any sense. We have the wherewithal to go there anyway and so what? I mean we don't need that."<sup>332</sup>

226. The short answer to their Counsel's rhetorical question is that, first, Claimants manifest not the slightest intention of any desire to give up their dual nationality and they accept that, as Enrique Carrizosa acknowledged:

... all U.S. citizens are required to pay U.S. income tax regardless of where they reside.<sup>333</sup>

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<sup>325</sup> Transcript (English), Day 2, p. 251.

<sup>326</sup> Transcript (English), Day 2, pp. 242, 283, 330.

<sup>327</sup> Transcript (English), Day 2, pp. 258, 303, 341-342.

<sup>328</sup> Transcript (English), Day 2, p. 242.

<sup>329</sup> Transcript (English), Day 2, p. 243.

<sup>330</sup> Transcript (English), Day 2, p. 286.

<sup>331</sup> Transcript (English), Day 1, pp. 95-96.

<sup>332</sup> Transcript (English), Day 4, pp. 505-506.

<sup>333</sup> Transcript (English), Day 2, p. 254.

227. Second, and although they each accepted that no evidence to substantiate their assertions had been produced,<sup>334</sup> all three Claimants maintained that they kept significant personal assets in the United States, not least, because, as Felipe Carrizosa pointed out, savings held in the US provided a more secure investment and an investment which earned better returns.<sup>335</sup>
228. Claimants all laid emphasis upon the fact that their savings and investments in the United States were in part intended to prepare the ground for eventual retirement, specifically in the case of Enrique and Felipe Carrizosa with a view to retirement in the United States. While Alberto Carrizosa confirmed that he, too, intended to avail himself of those funds for retirement because of the paucity and uncertainty of the provision in Colombia, he did not say it in terms that he intended physically to retire to the United States.<sup>336</sup>
229. Whatever the extent of those assets and investments might be and however they might be deployed in the future, the fact remains that, as Felipe Carrizosa pointed out, the family businesses in Colombia constitute a large part of their net worth.<sup>337</sup> For his part, Enrique Carrizosa acknowledged that multiple parts of the business founded by his father in Colombia were still in Colombia:
- [T]he active part of our business is in Colombia and all the oversight that we do really necessitates being local.<sup>338</sup>
230. Claimants all stated that they travel primarily on their US passports. Enrique Carrizosa told the Tribunal that he would “rather identify myself as an American travelling abroad”<sup>339</sup>, but whilst he balked at the suggestion that he chose to use his US passport simply because it was easier to travel on a US passport rather than a Colombian passport, he did not deny it – “it’s not necessarily because it’s easy.”<sup>340</sup> He was asked why, when Global Entry had been made available to US nationals in 2008 he had waited until 2016 to apply, the year in which it was made available to Colombian citizens. He insisted that he had applied as a US citizen and he had done so in 2016, because that was when he started to travel regularly to Miami.<sup>341</sup> He did not volunteer why he would then have been in transit between Miami (where the brothers maintained their vacation

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<sup>334</sup> Transcript (English), Day 2, pp. 240, 252 (Enrique); p. 297 (Alberto); and pp. 337-339 (Felipe).

<sup>335</sup> Transcript (English), Day 2, p. 322.

<sup>336</sup> Transcript (English), Day 2, pp. 233-234 (Enrique), p. 271 (Alberto) and p. 322 (Felipe).

<sup>337</sup> Transcript (English), Day 2, p. 338.

<sup>338</sup> Transcript (English), Day 2, p. 227.

<sup>339</sup> Transcript (English), Day 2, p. 259.

<sup>340</sup> Transcript (English), Day 2, p. 259.

<sup>341</sup> Transcript (English), Day 2, pp. 259-260.

home and where the family had long since ceased to maintain a physical presence for business purposes) and Bogotá on a more regular basis than hitherto.

231. Alberto Carrizosa told the Tribunal that he had applied to US colleges in the US as an American citizen, and now identified himself “almost exclusively” as a US citizen when he travelled, except when legally obliged to do so as a Colombian citizen.<sup>342</sup>
232. So far as Felipe Carrizosa was concerned, he, too, told the Tribunal that he mostly travelled on a US passport, save when returning to Colombia when he is obliged to present his Colombian documentation. He had applied for his job in Germany as an American citizen.<sup>343</sup>
233. The Tribunal declines to draw too much of an inference from this evidence. It seems to the Tribunal that the choice to travel on a US travel document and/or to hold oneself out as an American citizen when applying to academic institutions in the United States from outside the United States or when seeking employment in a country, which has long-established relations and procedures with the United States relating to foreign workers has as much to do with a pragmatic assessment of the relative ease of movement and access attaching to a US passport as opposed to a Colombian passport as it does to any particular inclination towards one of the two nationalities held by a dual national.
234. Claimants say that their respective education histories should constitute a “critical factor” in the Tribunal’s assessment.<sup>344</sup> The primary and secondary education of all three of the Carrizosa brothers was split between Colombia (principally, the Colegio Nueva Granada, about which the Tribunal has said more elsewhere) and high school in Miami. Their tertiary (and post-graduate) education was spent in the United States, save that Felipe Carrizosa took his MBA in Colombia. These, in themselves, are not indicia weighing exclusively in favour of one nationality over the other and, in any event, they now have to be seen in the context of events over the intervening 25-30 years. In the opinion of the Tribunal, they are, at best, neutral.
235. Finally, the Tribunal notes that much was sought to be made of Alberto Carrizosa’s decision to register for the United States Armed Services Selective Service. He told the Tribunal that he had sent in his card in 1988 on turning 18 at Boston University, because:

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<sup>342</sup> Transcript (English), Day 2, pp. 271-272.

<sup>343</sup> Transcript (English), Day 2, p. 316.

<sup>344</sup> Transcript (English), Day 1, p. 98.

I was always very interested in the Navy and the U.S. Air Force, but I felt it was my patriotic duty to do something that was important for the country and at that time ... it had recently become voluntary.<sup>345</sup>

236. In the event, nothing came of it, first, because, as Mr Carrizosa candidly acknowledged, he did not enlist in the United States armed forces as:

... at that point in time, my interest was more in business, and that's why I went to business school.<sup>346</sup>; and second, in Colombia, where military service is obligatory, he was exempted.<sup>347</sup>

(c) *The Tribunal's Conclusions*

237. The Tribunal has given careful consideration to the evidence and to the submissions of the Parties on the subject of its jurisdiction *ratione personae*. It has come to the conclusion that Respondent's objection to the Tribunal's jurisdiction is well founded and that it should be upheld.
238. All three Claimants were born and raised in Colombia. Each of them has made his permanent home in Bogotá since 1994 (Felipe), 2004 (Enrique) and 2007 (Alberto). None has maintained a permanent home or habitual residence elsewhere, including in the United States, where they keep what they describe as a vacation home and which is used for occasional visits.
239. Tellingly, and as the Tribunal has noted above, all three Claimants spoke in terms of coming back to, or returning to, Colombia. They all did so at the behest of their father, a prominent Colombian businessman, in order to allow him to entrust the management of a long-established and successful business to his three sons.
240. In the opinion of the Tribunal, it is unarguable on the evidence before it that Colombia is the focal point of the Carrizosa Family's, and Claimants', business activities and Claimants' professional lives. All three of Claimants are employed in Bogotá in senior positions by family-owned entities. They have offices in the same building in Bogotá. All three Claimants attributed the principal reason for their return to Colombia to their assumption of senior management roles in the significant numerous family business interests built up by their father.
241. But Bogotá is much more than merely the centre of Claimants' business and professional lives; it is the centre of family and social life for the three Claimants. Enrique Carrizosa and his wife have made the city their home. Their two daughters were born in Bogotá (in 2007 and 2009) and are being raised and educated there. Felipe Carrizosa's two daughters (now aged 8 and 18) were born in Bogotá. They have been raised and educated there and they live there with their mother from whom Mr Carrizosa divorced some six or seven years ago. The daughter of Alberto

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<sup>345</sup> Transcript (English), Day 2, p. 267.

<sup>346</sup> Transcript (English), Day 2, p. 284.

<sup>347</sup> Transcript (English), Day 2, p. 285.

Carrizosa's Colombian former partner, whom he raised as his own, still lives in Bogotá, as does her mother. Claimants' mother, now widowed, is also resident in Bogotá. Claimants' social lives is centred around their homes, their shared country residence and their city and country club memberships.

242. Claimants say that:

[T]he family matrix constitutes an important consideration that is deeply intertwined with cultural affinity, language and education.<sup>348</sup>

243. They suggest that:

sustained analysis of this factor ... compellingly demonstrates the Claimants' dominant and effective nationality is that of the United States.<sup>349</sup>

244. It may be that Claimants place considerable weight upon their own subjective feelings of being American, but they are not matters that the Tribunal can begin to evaluate on any objective basis and for which, in any event, there is no extrinsic evidentiary support. The Tribunal has considered the import of Claimants' education elsewhere. Faced with the objective evidence that:

- (i) all of Claimants' present or past spouses/life partners reside or have resided in Colombia;
- (ii) all four of Enrique's and Felipe's children were born in Colombia, they have received all of their schooling in Colombia and they have resided in Colombia all their lives (as has the daughter of Alberto Carrizosa's former Colombian partner);
- (iii) Claimants' parents/surviving parent resided in Colombia at the Critical Dates; and
- (iv) one of Claimants' aunts lives in Colombia and of the seven of nine first cousins who are Colombian, five have lived in Colombia for many years

the Tribunal cannot agree that a compelling case has been made for a finding that the dominant and effective nationality of Claimants is that of the United States.

245. In terms of commitment to public life, all three Claimants voted in Colombian presidential and congressional elections in 2014 and 2018 and all three had contributed either individually or through the family businesses to political campaigns in Colombia. Only Enrique Carrizosa had voted (by mail) in the 2020 US election, Felipe Carrizosa stated unequivocally that he had never exercised a vote in the United States and there is no evidence as to whether Alberto Carrizosa had

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<sup>348</sup> Transcript (English), Day 1, p. 99.

<sup>349</sup> Transcript (English), Day 1, p. 99.

participated in a US election, beyond a suggestion in oral evidence that he had contributed to a congressional seat campaign in 2000.<sup>350</sup>

246. Taking Claimants' submission that voting and participation in elections are "critical components of an individual's social matrix"<sup>351</sup> entirely at face value, the evidence is indicative of Claimants' active participation in the Colombian elections, but not those in the US.
247. The Tribunal notes, further, that at the Critical Dates, Claimants were holding themselves out as Colombian nationals, citing their Colombian ID numbers, for the purposes of the proceedings against Colombia before the IACHR. No mention is made of their dual US nationality.<sup>352</sup>
248. Claimants suggest that in circumstances in which a dual national is primarily resident in the host State, Respondent is attempting to have the Tribunal adopt a "one-divided-by-four test", whereby the permanent and habitual place of residence is divided into: (i) the location of permanent or habitual residence; (ii) the centre of Claimants' family social, personal and political lives; (iii) the centre of their economic lives; and (iv) how Claimants identify themselves in terms of nationality. That, say Claimants, becomes a self-fulfilling prophecy, because (iv) aside, (i) (ii) and (iii) must follow, if a person lives in the host State.<sup>353</sup> That, say Claimants, is tantamount to an "abbreviated iteration of the dominant effect of nationality test", which amounts to an invitation to the Tribunal to "embrace a purely discretionary and 'ad hoc' approach, in effect consisting of a single factor."<sup>354</sup> Claimants invite the Tribunal to have regard to the dissenting opinion in *Ballantine*, in which it was suggested that:

... [l]ooking holistically at Ms. Ballantine's habitual residence during her lifetime, the centre of her personal and professional interests, her family life and her maintenance of significant ties to the United States, the facts support a finding that under customary international law, Ms Ballantine's dominant and effective nationality is that of the United States. .... That Ms. Ballantine chose Dominican nationality not necessarily for love of country and allegiance, but out of economic self-interest does not lead to a conclusion that her dominant and effective nationality was Dominican on the critical dates. Ms Ballantine's economic ties to the Dominican Republic and her narrow reasons for seeking Dominican citizenship are but two of many relevant factors to be considered in this analysis.<sup>355</sup>

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<sup>350</sup> Transcript (English), Day 2, p. 286.

<sup>351</sup> Transcript (English), Day 4, pp. 513, 514.

<sup>352</sup> See Petition to the Inter-American Commission on Human Rights, 6 June 2012 (**R-0118**); Supplementary Petition to the Inter-American Commission on Human Rights, 20 July 2016, pp. 1–2 (**R-0119**); Third Revision Petition to the Inter-American Commission on Human Rights, 4 July 2018 (**R-0122**).

<sup>353</sup> Transcript (English), Day 4, pp. 515-516.

<sup>354</sup> Transcript (English), Day 4, p. 517.

<sup>355</sup> *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Partial Dissent of Ms. Cheek on Jurisdiction, 3 September 2019, para. 18 (**RLA-0091**).

249. Claimants say that what they describe as the “similar narrow imperatives commanding Claimants to live in Colombia, support a finding that Claimants’ dominant and effective nationality is that of the United States.”<sup>356</sup>
250. The Tribunal does not accept that submission. First, and self-evidently, there were no “narrow imperatives” in play in Claimants’ acquisition of dual nationality. Second, the suggestion that there were “narrow imperatives” akin to those weighing on Ms Ballantine, which commanded Claimants to live in Colombia is misconceived. Claimants did not go to Colombia, they returned to Colombia. They did so in order to assume responsibilities in a long established and successful business created by their father.
251. Once back, they stayed – for decades. They raised their families in Bogotá and established no habitual or permanent residence anywhere else in the world. For all the Tribunal knows, their lives behind their front doors may be the embodiment of modern American family life, but as to that, the Tribunal has only Claimants’ word and expression of subjective feeling.
252. The Tribunal has adopted a holistic approach to its analysis, albeit with the requisite emphasis upon the period of the Critical Dates. Faced with irrefutable evidence of Claimants’ long and deep-rooted connections with Colombia over many years, it would be a leap to conclude that, all of the evidence susceptible to objective review to the contrary, Claimants’ dominant nationality was that of the United States. There is, in the Tribunal’s opinion (and to adopt the language of Respondent’s submission):
- ... no way anyone could reasonably conclude from all this that [Claimants] were predominantly U.S. [nationals]. ...<sup>357</sup>
253. The Tribunal accepts, too, Respondent’s submission that:
- [T]his is a Colombian family suing Colombia in an international forum ... contrary to one of the most long-standing and time-honoured principles of international law, which is you cannot sue the State of your nationality in an international forum.<sup>358</sup>
254. Accordingly, the Tribunal upholds Respondent’s objection to the Tribunal’s jurisdiction *ratione personae*. In light of that conclusion, it is unnecessary to consider any of the other grounds of objection raised against the Tribunal’s jurisdiction over Claimants’ claims.

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<sup>356</sup> Transcript (English), Day 4, p. 518.

<sup>357</sup> Transcript (English), Day 4, p. 641.

<sup>358</sup> Transcript (English), Day 4, p. 641.

**VI. COSTS**

255. In the course of his closing remarks, Counsel for Respondent made a number of submissions in which he suggested that it was a legitimate basis for criticism of the investor-state dispute resolution system that tribunals were slow to sanction unmeritorious claims in costs, beyond requiring an unsuccessful party to pay the arbitration costs, thereby leaving the parties to bear their own legal fees and expenses. He invited the Tribunal to reflect whether it might not be appropriate in a case of a “speculative and abusive claim” to make an order for the payment of the successful party’s legal fees and expenses, as well as for the payment of the arbitration costs.<sup>359</sup>

256. Pursuant to Article 40(1) of the UNCITRAL Rules, it is incumbent upon the Tribunal to fix the costs of the arbitration in this Award.

257. In this case, Claimants have submitted an outline submission of costs dated 15 January 2021 in the following amounts:

<b>Costs of the arbitration (PCA)</b>	US\$	352,513.00
<b>Legal costs</b>		
Bryan Cave Leighton Paisner LLP	US\$	8,186,887.00
Rachadell, Rangel & Moreno	US\$	167,477.00
<b>Experts, witnesses and consultants</b>		
(Various)	US\$	1,196,332.00
Translation costs	US\$	44,426.00
<b>Total</b>	US\$	9,947,635.00

258. Respondent has submitted a statement of costs, again in outline and also dated 15 January 2021, as follows:

<b>Costs of the arbitration (PCA)</b>	US\$	350,000.00
<b>Legal costs</b>		
Arnold & Porter	US\$	1,370,125.00
<b>Expert</b>		
Constitutional Law (Dr Ibáñez)	US\$	28,830.91
<b>Colombia</b>		
(Agencia)	US\$	107,905.88
<b>Total</b>	US\$	1,856,861.79

<sup>359</sup> Transcript (English), Day 4, p. 644.



259. In its capacity as Registry and Administrator of this Arbitration, the PCA has confirmed that the fees and expenses of the PCA, and those of the Arbitrators and of the Assistant to the Tribunal pursuant to the fee notes rendered by them to the PCA, are as follows;

Fees of the PCA	US\$	103,685.29
Fees and expenses of the Tribunal, namely:		
Professor Franco Ferrari	US\$	159,250.00
Mr Christer Söderlund	US\$	154,050.00
Mr John Beechey	US\$	191,100.00
Fees and expenses of the Assistant to the Tribunal (Mr Niccolò Landi)	US\$	12,525.00
Administrative expenses	US\$	79,389.71
<b>Total</b>	<b>US\$</b>	<b>700,000.00</b>

260. As will be apparent from paragraphs 257 and 258 above, the Parties have each contributed an amount of some US\$350,000 towards the costs of the arbitration. There remains an unused balance in the deposit of US\$ 0.

261. The Tribunal decides that the entirety of these fees and expenses in the sum of US\$700,000 shall be borne by Claimants. Accordingly, Claimants shall pay US\$350,000 to Respondent towards the costs met from Respondent's share of the deposit.

262. While Respondent raised a number of objections to the Tribunal's jurisdiction, each of which was resisted by Claimants, it needed to prevail only in its objection '*ratione personae*' to cause Claimants' claims to fail in their entirety. In that, it was successful. In the exercise of its discretion, the Tribunal concludes that, in the circumstances of this case, an order that Claimants meet the entirety of the costs of the arbitration, including a very substantial contribution to Respondent's legal fees and expenses, is appropriate.

263. The Tribunal has had regard to the level of costs claimed by the Parties in their respective Costs Submissions. It is satisfied that the overall costs incurred by Respondent must be adjudged reasonable. The Tribunal determines that Claimants shall pay all of the legal costs and expenses of Respondent (some US\$1,506,861.79) save that it makes a modest adjustment of US\$30,000 to reflect the costs incurred in respect of the challenge to the appointment of Professor Douglas (*see* paras. 11-20 above).

264. The Tribunal notes that Claimants' challenge was contested by Respondent and that the Parties engaged in three substantive rounds of submissions. Professor Douglas tendered his resignation before the challenge had become the subject of a formal determination, but the Tribunal considers

that Claimants should not be left to bear all of the costs incurred by Respondent attendant upon its prosecution of the challenge.

265. The Tribunal determines that Claimants shall pay Respondent US\$1,476,861.79 in respect of its legal fees and expenses.
266. Respondent has further claimed interest on any sums awarded by way of costs. The Tribunal notes that Respondent has made no attempt to particularise any claim for interest, such that it lacks sufficient precision to provide a basis for determination by the Tribunal. The claim is therefore dismissed.

## **VII. DISPOSITIF**

267. Based on the foregoing, the Tribunal hereby renders the following AWARD:

1. Respondent's objection to the jurisdiction of the Tribunal *ratione personae* is upheld. The Tribunal thus lacks jurisdiction over the dispute before it.
2. Claimants shall bear the fees and expenses of the PCA, the Arbitral Tribunal and the Assistant to the Tribunal in the amount of US\$700,000. As a result, they shall reimburse US\$350,000 to Respondent towards the costs met from Respondent's share of the deposit.
3. Claimants shall pay US\$1,476,861.79 to Respondent in respect of its legal costs and expenses.

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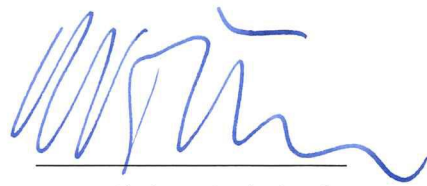
Seat of the arbitration: London, United Kingdom

Date: 7 May 2021

The Arbitral Tribunal



Prof. Franco Ferrari



Mr. Christer Söderlund

  
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Mr. John Beechey CBE

(Presiding Arbitrator)