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Colombia Prevailed in Two Arbitrations Related to the Financial Sector under the Colombia-US TPA

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Earlier this year, Colombia prevailed in two arbitrations under the Colombia-US Trade Promotion Agreement ("TPA"). The claims were filed by Alberto Carrizosa Gelzis, Felipe Carrizosa Gelzis and Enrique Carrizosa Gelzis ("Carrizosa brothers") under the UNCITRAL Arbitration Rules, and by Astrida Benita Carrizosa ("Ms. Carrizosa") under the ICSID Convention.

In both arbitrations Ms. Carrizosa and the Carrizosa brothers alleged that Colombia breached the fair and equitable treatment and national treatment standards, among other provisions of the TPA by undertaking a series of regulatory measures in 1998, and a series of judicial decisions between 2005 and 2014, that affected its investment in Granahorrar, a financial institution in which the claimants were shareholders.

The United States filed a Non-Disputing Party submission in both arbitrations on its interpretation of the relevant provisions of the US-Colombia TPA.

On April 19, 2021, the tribunal constituted under the ICSID Convention decided that it did not have *ratione temporis* jurisdiction over Mr. Carrizosa's claims. On May 7, 2021, the tribunal constituted under the UNCITRAL Arbitration Rules rejected the claims presented by the Carrizosa brothers as it alsofound that it did not have *ratione personae* jurisdiction over their claims.

In both cases, the tribunals ordered the claimants to bear the entirety of the arbitration costs and 50% or more of Colombia's legal costs and expenses.

Facts

Granahorrar was incorporated in 1972 as a subsidiary of *Banco de Colombia*. Granahorrar was a a financial institution authorized to obtain capital via private savings and to finance the construction industry through loans and mortgages. In 1986, the Carrizosa brothers and their parents, Ms. Astrida Bentia Carrizosa and Mr. Julio Carrizosa Mutis (the "Carrizosa Family"), acquired shares in Granahorrar. Within the following two years, the Carrizosa Family became a majority shareholder in Granahorrar. They indirectly owned 58.76% of Granahorrar. As of October 1998, the Carrizosa Brothers' stake in Granahorrar amounted to 40.2570%. Ms. Carrizosa, in turn, owned 2.3307% of Granahorrar.

In the late 1990s Colombia suffered an economic crisis. In this context, the Colombian government adopted measures to subject financial institutions to strict supervision. In 1998, Granahorrar suffered a severe liquidity crisis, and thereby sought support from Colombian authorities. In response, the Central Bank provided funds as "temporary liquidity support" (TLS), equivalent to approximately US$194 million at the time. In turn, Fogafín (a Government entity created to protect savings) undertook to guarantee up to approximately US$222 million of Granahorrar's interbank financing. In exchange, Granahorrar agreed to issue promisory notes to Fogafín valued at 134% of the guaranteed amount.

In the following months, Granahorrar's financial standing continued to deteriorate. On October 2, 1998, the Superintendency of Finance ordered Granahorrar to raise approximately US$ 99.8 million in new capital to offset its insolvency. Granahorrar, however, did not raise the additional capital. On the next day, October 3, 1998, the Superintendency issued a report to Fogafín concluding that Granahorrar was insolvent and illiquid. On the same date, Fogafín's board decided that the Government would take over Granahorrar, and ordered the company to reduce the nominal value of its shares to COP 0.01.

Fogafín capitalized Granahorrar and became the majority shareholder in the bank. The financial situation of Granahorrar improved andFogafín sold Granahorrar to the Spanish bank Bilbao Vizcaya Argentaria in 2005.

Following the measures adopted by Colombian authorities, the Carrizosa Family initiated a number of administrative judicial proceedings that culminated in a judgment in 2005, rejecting the claims on the merits. The Carrizosa Family appealed this decision. Colombia's Council of State upheld the appeal and ordered the Superintendency and Fogafín to compensate the Carrizosa Family in an amount up to US$ 114 million (the "2007 Judgment").

On March 5, 2008, the Superintendency and Fogafi?n filed constitutional injunctions (*tutelas*) against the 2007 Judgment. On May 26, 2011, the Constitutional Court issued a unanimous judgment, whereby it reversed the 2007 (the "2011 Judgment"). Although the Carrizosa Family requested the annulment of the 2011 Judgment, the Constitutional Court dismissed this request in 2014 (the "2014 Order").

International Claims against Colombia

The UNCITRAL Arbitration

In the UNCITRAL arbitration proceedings, the Carrizosa brothers requested compensation in the amount of US$ 323 million for the alleged breach of the TPA.

The UNCITRAL Tribunal addressed and upheld the respondent's *ratione personae* objection, pursuant to which Colombia alleged that Article 12.20 of the Colombia-US TPA only covered claims filed by U.S nationals, or dual nationals with US dominant and effective nationality.

The UNCITRAL Tribunal analyzed the "dominant and effective nationality" of the Carrizosa Brothers, concluding that the claimants had the burden of proving their dominant and effective nationality. The tribunal decided not only to analyze the critical dates of the arbitration (the date of the alleged breach, and the date of the submission of the Notice of Arbitration), but also the entire

life of the Carrizosa brothers. For this purpose, the tribunal undertook an objective factual enquiry rather than considering the subjective appreciations of the Carrizosa Brothers on what they considered their "dominant and effective" nationality to be.

The tribunal analyzed, among other criteria: the habitual residence, place of birth, property, assets, passives, economic center of their business, social life, where have they voted, tax payments, and social security, health and pension payments.

After examining the evidence in the record, the UNCITRAL Tribunal concluded that it was clear that the Carrizosa brothers were not predominantly U.S nationals but Colombian nationals.Thus, the Tribunal held that the Carrizosa brothers were not covered by the TPA.

Accordingly, the UNCITRAL Tribunal decided that it had no jurisdiction *ratione personae* under Article 12.20 of the TPA and dismissed claimants' claims. The tribunal further decided that claimants should bear the entirety of the fees and expenses of the PCA, and pay all of the legal costs and expenses of Colombia (save for a US$ 30,000 adjustment).

The ICSID Arbitration

On January 25, 2018, Ms. Carrizosa filed a Request for Arbitration with ICSID against Colombia under the US-Colombia TPA, the Colombia-India BIT, and the Colombia-Switzerland BIT, seeking compensation of US$ 40 million for the alleged breach of the TPA.

The tribunal upheld Colombia's *ratione temporis* objection. This was based on the fact that the measures that allegedly breached the TPA took place before the TPA entered into force on May 15, 2012. The tribunal concluded that the TPA did not cover the administrative measures adopted by Colombian authorities in 1998, and the 2011 Judgment issued by the Constitutional Court.

The ICSID Tribunal clarified that although the 2014 Order was issued after the TPA entered into force, the claims related to the 2014 Order were not independently actionable The 2014 Order merely rejected the Carrizosa's Family request to annul the 2011 Decision and therefore left unaltered the outcome of the 2011 Decision. Accordingly, the tribunal concluded that the measures giving rise to the arbitration predated the entry into force of the TPA and were outside of the temporal scope of the tribunal's jurisdiction.

The tribunal further analyzed Colombia's objection regarding the three-year limitation period provided in Article 10.18.1 of the TPA. Under Article 10.18.1 of the TPA, no claim may be submitted to arbitration if more than three years have elapsed as from the date on which the claimant first acquired, or should have acquired knowledge of the breach. Ms. Carrizosa acquired knowledge of the 2014 Order shortly after the Constitutional Court issued said decision on June 25, 2014. Yet, she commenced the arbitration on January 24, 2018, which is more than three years after she acquired knowledge of the alleged breach of the TPA. Consequently, the tribunal concluded that her action was outside the temporary scope of jurisdiction of the tribunal.

To overcome this hurdle, Ms. Carrizosa tried to invoke the TPA's most-favoured nation (MFN) clause to substitute the three-year period contained in the TPA with the allegedly more favorable five-year period set out in Article 1.5 of the Colombia-Switzerland BIT. The tribunal, however, concluded that it was not within its jurisdiction to apply the MFN clause given that Article

12.1.2(b) of the TPA provides that the subject-matter scope of the tribunal's jurisdiction on disputes under Chapter 12 (Financial Services) is limited to four substantive provisions of the TPA that do not include the MFN clause.

The tribunal further noted that even if it were to apply the five-year period of the Colombia-Switzerland BIT, the claim would still be time barred given that the events that gave rise to the dispute took place in 1998 and 2011, which is more than five years prior to the Request for Arbitration.

In sum, the ICSID Tribunal dismissed Ms. Carrizosa's claims and ordered her to bear the entirety of the arbitration costs and expenses, and bear 50% of Colombia's legal fees and other costs.

Final remarks

After prevailing in both arbitrations, Colombia will pursue the recovery of 100% of the arbitrations' costs and expenses, 100% of the legal fees spent in the UNCITRAL Arbitration, and 50% of the legal fees spent in the ICSID Arbitration. The total sum of the money that Colombia would recover amounts to approximately US$ 2,9 million.

However, the dispute between the Carrizosa Family and Colombia has not concluded. On June 6, 2012, the Carrizosa Family et. al filed a petition with the Inter-American Commission of Human Rights ("IACHR"), alleging that Colombia had breached their due process and property rights in the context of the measures adopted over Granahorrar. They requested, *inter alia*, that the Constitutional Court Judgment be overruled. In 2016, the Registry of the ICHR rejected the petition given that one of the victims was a legal corporation and thereby the claim fell outside the jurisdiction of the IACHR. The Carrizosa Family submitted two additional revision petitions on October 4, 2017 and on July 4, 2018, which are pending resolution.

This entry was posted on Thursday, September 30th, 2021 at 8:53 am and is filed under Colombia, Free Trade Agreements, Investment Arbitration, Latin America, United States
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