

PCA Case No. 2016-17

**IN THE MATTER OF AN ARBITRATION UNDER THE DOMINICAN REPUBLIC-
CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT,
SIGNED ON AUGUST 5, 2004 (“CAFTA-DR”)**

– and –

**THE UNCITRAL ARBITRATION RULES (AS ADOPTED IN 2013)
(the “UNCITRAL Rules”)**

– between –

MICHAEL BALLANTINE AND LISA BALLANTINE

(the “Claimants”)

– and –

THE DOMINICAN REPUBLIC

(the “Respondent”, and together with the Claimants, the “Parties”)

PROCEDURAL ORDER NO. 12

Tribunal

Prof. Ricardo Ramírez Hernández (Presiding Arbitrator)
Ms. Marney L. Cheek
Prof. Raúl Emilio Vinuesa

Registry

Permanent Court of Arbitration
Mr. Julian Bordaçahar

August 24, 2018

A. PROCEDURAL HISTORY

1. Paragraph 9.1 of Procedural Order No. 1 establishes that “[a]fter consultation with the Parties, for each hearing, the Tribunal shall issue a procedural order convening the meeting and establishing its place, time, agenda, and all other technical and ancillary aspects”.
2. In accordance with the Procedural Calendar modified by Procedural Order No. 6, the Tribunal fixed the date of the Hearing (the “**Hearing**”) on Monday, September 3, to Friday, September 7, 2018, keeping Saturday, September 8, 2018, reserved should it be necessary.
3. On August 12, 2018, the Parties received a draft of this Procedural Order and were required to inform the Tribunal by August 16, 2018, if they had reached an agreement on the issues here included.
4. On August 15, 2018, the Parties notified simultaneously, via the Secretary to the Tribunal, the witnesses and experts’ identities to be called to testify at the Hearing.
5. By virtue of the agreements reached, the Parties proposed, and the Tribunal decided, that it would not be necessary to meet for a conference call.
6. As a result, this Procedural Order reflects the agreement between the Parties and/or the Tribunals’ decisions respectively.

B. LOCATION OF THE HEARING

7. The Hearing will take place in the following place:

International Centre for Settlement of Investment Disputes (“**ICSID**”)
World Bank
701 18th Street, N.W.,
Washington, D.C.
United States of America

Hearing Room: Main Complex building (MC) - hearing room MC 4-800 (4th Floor).

8. Break-out Rooms have been reserved for each Party and for the Tribunal.
9. Kindly note that, from Tuesday 4 September to Friday 7 September, the Parties and any other participants (except the Tribunal) will need to enter through the **visitor’s entrance** located at 700 18th Street N.W., Washington, D.C. However, on Monday 3 September (which is a holiday) and Saturday 8 September, should it be necessary, **all participants** must enter through the main entrance (1818 H. Street).

C. SPECIFICS OF THE HEARING

1. Confidentiality

10. In accordance with Article 10.21(2) of the Dominican Republic-Central America Free Trade Agreement and paragraph 10.2 of Procedural Order No. 1, “[t]he tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure”.
11. Considering the public nature of the Hearing, the Parties have agreed that the Hearing be video recorded and streamed in real time (*i.e.*, via live feed) on the PCA website (or other), in both Spanish and English, and that notice of the Hearing be provided through web announcement by the PCA. If either Party intends to refer during the Hearing to any document that has been classified as “attorney eyes only,” that Party shall notify the Tribunal immediately before advertizing to such document. The Hearing shall then be suspended temporarily to turn off the live feed, and to enable withdrawal from the hearing room of any persons in attendance who are not permitted to view the documents or hear discussions about their contents. While the Claimants do not object in principle to this proposal, they reserve the right prior to or at the hearing to challenge the attorneys’ eyes only designation of certain documents.¹

2. List of Attendees

12. Each Party submitted to the Tribunal and the PCA a final list of members of its delegation for the Hearing by August 23, 2018.
13. The members of the Claimants’ delegation are:

First Name	Last Name	Membership
Edward "Teddy"	Baldwin	Baker & McKenzie LLP
Matthew	Allison	Baker & McKenzie LLP
Larissa	Diaz	Baker & McKenzie LLP
Shaila	Urmi	Baker & McKenzie LLP
Eric	Kay	Kay Associates (Expert)
James	Farrell	Berkeley Research Group (Expert)
Drew	Lehmann	Berkeley Research Group
Jose	Balbuena	Expert
Graviel	Peña	Expert
Lisa	Ballantine	Claimant
Michael	Ballantine	Claimant
Leslie	Gil	Case Assistant
Jayne	Baldwin	Case Assistant

¹ The Tribunal is considering the need to establish a specific protocol to deal with confidential information during the Hearing and will inform the Parties accordingly shortly.

14. The members of the Respondent's delegation are:

First Name	Last Name	Membership
Marcelo	Salazar	Dirección de Administración de Acuerdos y Tratados Comerciales Internacionales, Ministerio de Industria y Comercio
Leidylin	Contreras	Dirección de Administración de Acuerdos y Tratados Comerciales Internacionales, Ministerio de Industria y Comercio
Raquel	De La Rosa	Dirección de Administración de Acuerdos y Tratados Comerciales Internacionales, Ministerio de Industria y Comercio
Patricia	Abreu	Ministerio de Medio Ambiente y Recursos Naturales
Enmanuel	Rosario	Ministerio de Medio Ambiente y Recursos Naturales
Rosa	Otero	Ministerio de Medio Ambiente y Recursos Naturales
Johanna	Montero	Ministerio de Medio Ambiente y Recursos Naturales
Claudia	Adames	Ministerio de Medio Ambiente y Recursos Naturales
Paolo	Di Rosa	Arnold & Porter
Raul	Herrera	Arnold & Porter
Mallory	Silberman	Arnold & Porter
Claudia	Taveras	Arnold & Porter
Cristina	Arizmendi	Arnold & Porter
Kelby	Ballena	Arnold & Porter
Claudia	Boscan	Arnold & Porter
Kaila	Millett	Arnold & Porter
Jose Antonio	Rivas	Arnold & Porter* (*no longer at the firm; appearing in his personal capacity on behalf of the Respondent)
Pieter	Booth	Ramboll (expert)
Peter	Deming	Mueser Rutledge Consulting Engineers (MRCE) (expert)
Timothy H.	Hart	Credibility International (expert)
Laura Connor	Smith	Credibility International
Tyler Smith	Khoury	Credibility International
Jaime David	Fernández Mirabal	Witness

Euleterio	Martinez	Witness
Zacarías	Navarro Roa	Witness
José Roberto	Hernández	Witness

15. Access to the hearing room shall be limited to the members of the Tribunal, PCA and ICSID staff, court reporters, interpreters, technical assistance personnel, Party representatives, Counsel, Experts, non-disputing Parties (should they choose to attend the Hearing), and any witnesses that have been called for examination (who would only be permitted access during their testimony and after having testified).
16. The PCA will make arrangements to allow for the presence of non-disputing Parties' delegations in the Hearing Room, if they so require. These delegations are therefore invited to contact Mr. Julian Bordaçahar from the PCA at jbordacahar@pca-cpa.org by no later than **Wednesday 29 August, 2018** indicating the names of the persons who plan to attend the Hearing. The PCA will inform the Parties in advance of the Hearing the names of those representatives of the non-disputing parties, if any, who plan to attend the Hearing.

3. Dates and schedule of the Hearing

17. The Hearing is currently scheduled for September 3 to 7, 2018, reserving Saturday, September 8, 2018. Nonetheless, the Tribunal expects the Hearing to be concluded by Friday, September 7, 2018 and invites the Parties to make their best efforts for this to be achievable.
18. The Hearing will start at 9:15 every day and will be interrupted for lunch at 13:00, will be resumed at 14:15 and will end at 18:00. There will be at least two 15 minutes break, one in the morning and another one in the afternoon.
19. The schedule of the Hearing will be subject to any adjustments that the Tribunal finds necessary or appropriate throughout the Hearing.

4. Evidence and Power Point Presentations

20. In accordance with paragraph 9.6 of Procedural Order No. 1, “[n]o new evidence may be presented at the hearing except with leave of the Tribunal (following a request by the Party seeking to introduce new evidence, and an opportunity for the opposing Party to be heard on the request). PowerPoint slides and demonstrative exhibits in aid of argument may be used by any Party during the hearing, provided that those materials reflect evidence on the record and do not introduce new evidence, directly or indirectly. Should the Tribunal grant leave to a Party to present new evidence in the course of the hearing, it should grant the other Party the opportunity to introduce new evidence to rebut it”.
21. The Parties have agreed that any demonstrative exhibit shall be distributed to the other Party at least 15 minutes before the beginning of the presentation in which such exhibit will be presented.

5. Organization of the Hearing Bundles and Use during the Hearing

22. Each Party will provide bundles for the experts and the witnesses during the examination, in which case, the Party at issue shall provide two additional copies of the same Bundle to the other

Party, as well as a copy for each member of the Tribunal, the PCA, the court reporters, and interpreters.

23. By Wednesday August 29 the latest, the Parties will upload a full electronic copy of their submissions to an FTP site created by the PCA so that the PCA can download such documents to USB devices for distribution to each member of the Tribunal, the court reporters, the interpreters, and the PCA.

6. Witness and Expert Examination

24. The witness examination will take place in accordance with the provisions of paragraph 7.4 to 7.11 of Procedural Order No. 1:

7.4 Before any oral hearing, and within the deadline set forth in the procedural calendar, a Party may be called upon by the Tribunal or the other Party to produce at the hearing for examination and cross-examination any witness or expert whose written testimony has been submitted with the written submissions. If a Party wishes to present for examination at the hearing any of its own witnesses or experts who have not been called by the Tribunal or the other Party, it shall request leave of the Tribunal. The Tribunal shall afford both Parties an opportunity to be heard on whether the witness may be examined at the hearing (and, if so, the rules governing such examination).

7.5 Each Party shall be responsible for summoning its own witnesses to the applicable hearing, except when the other Party has waived cross-examination of a witness and the Tribunal does not direct his or her appearance. The Tribunal may, on its own initiative or at the request of a Party, summon any other witness to appear.

7.6 If a witness or expert who has been called to testify by the Tribunal or the other Party does not appear to testify at the hearing, the witness's or expert's testimony shall be stricken from the record, unless the Tribunal determines that a valid reason has been provided for failing to appear. In such case, the Tribunal may summon the witness to appear a second time if satisfied that the testimony of the witness is relevant and material. Upon written application by a Party to the Tribunal presenting exceptional circumstances that prevent the in-person appearance of a witness at hearing, and an opportunity for the other Party to be heard, the Tribunal may allow the appearance of a witness at hearing by videoconference.

7.7 Each Party shall cover the costs of appearance of its own witnesses. The Tribunal will decide, if so requested, upon the appropriate allocation of such costs in its final award.

7.8 At any hearing, the examination of each witness shall proceed as follows:

- (a) the witness shall make a declaration of truthfulness;
- (b) although direct examination will have been given in the form of a written statement, the Party presenting the witness may conduct a brief direct examination;
- (c) the adverse Party may then cross-examine the witness on relevant matters that: (i) were addressed or presented in the witness statement, (ii) were not addressed or presented in the witness statement but are or should be within the scope of the witness's knowledge, or (iii) go to the witness's credibility;
- (d) the Party summoning the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination; and

(e) the Tribunal may examine the witness at any time, either before, during or after examination by any of the Parties.

7.9 The Tribunal shall, at all times, have complete control over the procedure for hearing a witness.

7.10 It shall not be improper for counsel to meet with witnesses and potential witnesses to establish the facts, prepare the witness statements, and prepare the examinations.

7.11 Unless the Parties agree otherwise, a factual witness shall not be present in the hearing room during the hearing of oral testimony, discuss the testimony of any other witness, or read any transcript of any oral testimony, prior to his or her examination.

25. In accordance with paragraph 8.3 of Procedural Order No.1, the provisions set out in relation to witnesses shall apply, *mutatis mutandis*, to the evidence of experts, except that, (i) experts will make a declaration that corresponds to their role as experts rather than witnesses of fact, and (ii) unless the Parties agree otherwise, experts may be present in the hearing room at any time.
26. Per the Parties' agreement, Rule 7.11 of Procedural Order No. 1, referenced above, shall apply also to any expert who has proffered factual testimony (which would include Eric Kay and Graviel Peña).
27. Cross-examinations will be conducted by one lawyer for each witness or expert. However, the participation of an additional lawyer will be allowed in the cross-examination if the Party at issue does request it so beforehand, and always, after having first provided reasonable prior notice to the other Party, explaining who will conduct the cross-examination. The Parties agree on the application of this rule to the direct and re-direct examination.
28. Also, in the event of objections to the questions asked to a witness or an expert, the Parties agree that these objections can be raised by any member of the corresponding legal team, even if that member has not examined or is not expected to examine any witness or expert.

7. Language of the Proceedings, Simultaneous Interpretation and Court Reporting

29. In accordance with paragraph 3.1 of Procedural Order No. 1, the language of the arbitration is English and Spanish. Also, paragraph 3.6 of Procedural Order No. 1 establishes the following:

Oral argument before the Tribunal shall be given in English or Spanish. Simultaneous interpretation into the other procedural language shall be provided. Witnesses and experts may testify orally in a language of their choosing, with simultaneous translation (as needed) into both procedural languages. Both Parties shall equally share oral interpretation costs.
30. In consultation with the Parties, the PCA has organized the hiring of interpreters to perform simultaneous translations.
31. Furthermore, in accordance with paragraph 9.4 of Procedural Order No. 1, after consulting with the Parties, the PCA has also organized the hiring of court reporters in Spanish and court reporters in English. The Parties and the Tribunal will receive daily transcriptions of the Hearing.
32. The Parties informed the PCA and the Tribunal by August 16, 2018 how many Live Notes connections they need. While the Respondent informed that it would like to have five English

real-time transcription terminals and three Spanish ones, the Claimants requested four English real-time transcription terminals.

8. Allocation of time

33. The PCA will calculate the total time employed by each Party during the witness and experts examinations using the chess-clock system, under the Tribunal's supervision.
34. Each Party will have a total of 12 hours to be allocated as it sees fit.
35. The chess-clock system will not apply to:
 - a. the Parties' opening statements on September 3, 2018, which shall not exceed 2.5 hours each one.
 - b. the Parties' closing arguments on September 7 or 8, 2018, which shall not exceed 2.0 hours each one.
36. While the Tribunal reserves its right to intervene during the Hearing as it sees fit, it has decided that there will not be any particular "Tribunal time" allocated in advance. However, time spent by the Parties, witnesses and experts responding to the Tribunal's questions shall not be counted against the Parties' time.

9. Opening Statements of the Parties

37. In line with what was agreed by the Parties, September 3, 2018, will only be devoted to the opening statements of the Parties in the following order:
 - a) Opening Statements of Claimants for 2.5 hours;
 - a) Opening Statements of Respondent for 2.5 hours.

10. Appearance order of the witnesses and experts

38. In line with what was agreed by the Parties, the witnesses and experts will be examined in the following order:
 - a) The witnesses of Claimants
 - b) The experts of Claimants
 - c) The witnesses of Respondent
 - d) The experts of Respondent
39. On August 22, 2018, the Parties submitted the order in which the witnesses and experts should be called upon:
 - i. Witnesses of Claimants
 - a) Michael Ballantine

ii. Experts of Claimants

- a) Graviel Pena
- b) Eric Kay
- c) Jose Balbuena
- d) James Farrell

iii. Witnesses of Respondent

- a) Zacarías Navarro
- b) Jaime David Fernández Mirabal²
- c) Eleuterio Martínez
- d) Jose Roberto Hernández

iv. Experts of Respondent

- a) Tim Hart
- b) Peter Deming
- c) Pieter Booth

11. Witnesses Declaration

40. Unless the Parties or the Tribunal prefer to proceed otherwise, the PCA will provide a text to any expert who has proffered factual testimony (which would include Eric Kay and Graviel Peña) to make the according declaration before commencing the examination. Such declaration reads as follows: “*I solemnly declare upon my honor and conscience, that I will say the truth, the whole truth and nothing but the truth*”. Each expert will read the following declaration before giving his or her assertion: “*I solemnly declare upon my honor and conscience that whatever I declare will be in accordance with what I sincerely believe in*”.

12. Witnesses and Experts Presence in the Hearing Room

41. In accordance with paragraphs 7.11 and 8.3 of Procedural Order No. 1, unless the Parties have agreed otherwise, a factual witness shall not be present in the Hearing room during the hearing of oral testimony, discuss the testimony of any other witness, read any transcript of any oral testimony or watch any part of the Hearing via the live streaming, prior to his or her examination. However, unless the Parties have agreed otherwise, experts may be present in the hearing room at any time. Nonetheless, Rule 7.11 of Procedural Order No. 1, referenced above, shall apply also

² The Tribunal notes that, on August 23, 2018, the Respondent informed that for medical reasons, Mr. Jaime David Fernández Mirabal will not be able to travel to Washington to attend the Hearing, and has requested that the Tribunal allow his testimony via videoconference. Pending the Claimants’ comments on this request, this issue remains a matter to be decided by the Tribunal.

to any expert who has proffered factual testimony (which would include Eric Kay and Graviel Peña).

13. Closing Statements

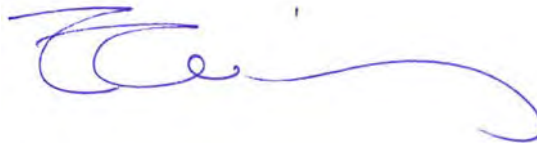
42. In accordance with the Tribunal's decision, the closing statements will proceed as follows:

- a) Claimants' Closing Statements (2 hours)
- b) Respondent's Closing Statements (2 hours)

14. Post-Hearing Briefs

43. While the Parties propose a presumption that there will be no post-hearing briefs unless the Tribunal considers it especially important to have them, the possibility of submitting post-hearing briefs will be discussed after the Hearing. The Tribunal will decide, after having consulted the Parties, the dates, format and content of any post-hearing briefs.

Place of Arbitration: Washington, D.C., United States of America



Ricardo Ramírez Hernández
(Presiding Arbitrator)

On behalf of the Tribunal