

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. 14

Tribunal

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

Registry

Permanent Court of Arbitration
Mr. Julian Bordaçar

August 31, 2018

A. PROCEDURAL HISTORY

1. By letter dated August 21, 2018, the Respondent wrote to the Tribunal to address two separate issues related to the upcoming hearing.
2. By letter dated August 22, 2018, the Tribunal acknowledged receipt of the Respondent's letter and invited the Claimants to provide their comments thereof, by no later than August 24, 2018.
3. By letter dated August 24, 2018, the Claimants provided their comments thereof and submitted further additional matters for the Tribunal's consideration.
4. By e-mail dated August 26, 2018, the Respondent requested leave to respond to the Claimants' letter.
5. By letter dated August 26, 2018, the Tribunal granted the Respondent's requested leave but ordered that such response be limited to the additional matters raised by the Claimants and shall therefore not include a rebuttal in relation to the matters raised by the Respondent in its letter of 22 August 2018.
6. By letter dated August, 28, 2018, the Respondent submitted its response to the Claimants' letter dated August 24, 2018.

B. POSITION OF THE PARTIES

1. The Respondent's Applications

7. The Respondent raises two separate issues in connection with the upcoming hearing: (i) the testimony of expert witnesses at the hearing, and (ii) the introduction of new evidence into the record.
8. Regarding the first, the Respondent requests the Tribunal to provide, as it is customary nowadays, the Parties with the opportunity to have their expert witnesses make a direct presentation to the Tribunal – e.g. through Power Point–, because it would facilitate the task of understanding the key issues in the experts' testimony and of defining the areas of disagreement between the experts.
9. The Respondent notes that Procedural Order No. 1 (the “**PO 1**”) does not prohibit such practice and thus, its application is “*intended to confirm the Tribunal's understanding that it would be permissible*”.¹ The Respondents further notes that, since both Parties would benefit from such

¹ Respondent's letter dated August 21, 2018, p. 1.

application, there would appear to be no disadvantage. However, the Respondent points out that the Claimants have disagreed with this proposal albeit without explaining their reasons.

10. Regarding the second issue, the Respondent requests the Tribunal to admit the following two documents to the record: (i) Norm No. 2-98 and (ii) Law 155-17 and its Regulation (Decree No. 408-17).²
11. The Respondent explains that Norm No. 2-98 was first mentioned in a “statement/expert report submitted by Mr. José La Paz Lantigua Balbuena” on the occasion of the submission of the Claimants’ Rejoinder on Jurisdiction. Mr. Lantigua referred to the Norm of January 8, 1998, issued by the Dominican Tax Authorities but it did not include the norm’s text as annex to his report. The Respondent contends that the inclusion of the document (and its translation) would help the Tribunal to follow Mr. Lantigua Balbuena’s cross-examination in a more informed fashion.
12. The Respondent refers to the statement of Mr. Lantigua Balbuena in which Law 155-17 of June 7, 2017 of Anti-Money Laundering and Terrorism Financing Law, as well as the Decree No. 408-17, implementing the Regulation of the above-mentioned Law are mentioned but not included. For the same reasons as for Norm No. 2-98, the Respondent requests to admit them into the record, as well as translations of the relevant pages.

2. The Claimants’ Reply to the Respondent’s Applications

13. Regarding expert testimony, the Claimants explain that Respondent’s assertion that the Power Point presentations would be allowed under PO 1 is flawed for two reasons. First, because Article 7.8(b) of the PO 1 states that counsel can “conduct” a brief examination and not that the expert can give a presentation. This rule is later applied by Article 8.3 *mutatis mutandis*. As a result, only the counsel can conduct the brief examination of the experts at the hearing. And second, the Claimants believe that a 30- or 45-minute presentation goes beyond the “brief” mandate for a direct examination.³
14. The Claimants nevertheless express their non-opposition (in principle) to the expert’s presentation, as long as the Tribunal establishes a time limit or guidance with respect to the amount of time allocated to each Party for the direct examinations. According to the Claimants, the important thing is that both Parties have an expectation as to what constitutes a brief direct examination, whether with respect to witnesses or experts, now that we know that Respondent

² Respondent’s letter dated August 21, 2018, p. 2.

³ Claimants’ letter dated August 24, 2018, p. 1.

believes that 30 minutes constitutes a brief direct examination. In any event, if the Respondent's experts are granted 30 minutes to conduct their presentations, then the Claimants' experts should likewise have that opportunity.

15. Regarding the second issue sought by the Respondent – the introduction of new evidence –, the Claimants do not object to it, as long as they are also allowed to introduce new evidence into the record.⁴

3. The Claimants' Applications

16. In addition to replying to the Respondent's applications, the Claimants present two applications of their own. Firstly, the Claimants that Mr. Delbert Ferguson or Mr. Leonard Apedaile be allowed to present a "brief" direct testimony of their observations on the 8 properties referenced in Procedural Order No. 10 and the Ballantines' property. The Experts could later be fully cross-examined by the Respondent and questioned by the Tribunal.⁵
17. The Claimants explain that the Experts would not be allowed to present any new documents or evidence but simply their observations from the June 2018 visits, through an oral testimony. The Claimants recall that the Respondent objected to the Expert's Reports because it would not have an opportunity to prepare evidence to rebut them. Thus, allowing direct testimony would be substantially different from submitting lengthy reports outside normal course of submissions. The Claimants add that the Respondent would be able to challenge and question the observations during cross-examination. Furthermore, since experts are allowed to be present in the hearing room, the Respondent could be advised by its experts with respect to the cross-examination.
18. The Claimants contend that having direct testimony followed by cross-examination is standard in courts all over the world. Moreover, the Claimants refer to several sources in which it was held that it is appropriate to allow direct examination in investment arbitrations when new documents were raised with the last submission of the other party and the information was not discussed in written statements or reports.⁶
19. The Claimants assert that this is precisely what has occurred in the present case, because the Respondent only presented expert reports on the construction and environmental impact of Jamaca de Dios' Phase 2 together with its Rejoinder. The Claimants consider it inequitable if the

⁴ Claimants' letter dated August 24, 2018, p. 2.

⁵ Claimants' letter dated August 24, 2018, p. 2.

⁶ The Claimants rely on the following sources: See, e.g., Sourgens, et al., *Evidence in International Investment Arbitration*, Oxford University Press, 2018, at p. 70; see also *Abaclat and Others v Argentine Republic*, ICSID Case No ARB/07/5, Procedural Order No 27 (30 May 2014) [7(iii)].

Respondent would be allowed to submit these expert reports without granting the Claimants an opportunity to respond.

20. Alternatively, if the Tribunal would not allow the Expert's testimony, the Claimants request to allow Mr. Eric Kay to present his observations on the June 2018 site visits to the eight properties during his brief examination or presentation. They contend that, since Mr. Kay's Reply Report already made some observation on these properties, he would already be testifying as to some of these issues.
21. Concerning the second issue, the Claimants explain that the subject of Mr. Balbuena's testimony, and relatedly, the subject of Respondent's proposed new exhibits, involves the so-called "different versions" of contracts issue that Respondent raised for the first time in its Rejoinder.
22. With respect to this issue, the Claimants alleges that they "have recently obtained" some of the contracts of Respondent's witness, Mr. José Roberto Hernández, the principal behind the comparator properties Quintas del Bosque 1 and 2. The Claimants maintain that these contracts are responsive to the issue raised in the Respondent's Rejoinder and which in any case should be admitted in their own right, as the Claimants did not have an opportunity to submit them before. They add that they are also responsive to the documents that Respondent seeks to submit for its cross-examination of Mr. Balbuena and should be admitted independently on that basis. In addition to these contracts, the Claimants request to admit a court document from the Dominican Republic, related to these contracts.

4. The Respondent's Reply to the Claimants' Applications

23. The Respondent moves on to discuss the two new issues raised by the Claimants, namely: (i) the request for direct testimony of the experts Messrs. Delbert Ferguson or Mr. Leonard Apedaile (the "**Experts**"), or alternatively, Mr. Kay; (ii) the Claimants' application to introduce new evidence into the record.
24. Regarding the first issue, the Respondent reminds the Tribunal that these Experts were the ones that were going to provide the evidence which was not submitted within the one-month deadline established by the Tribunal.⁷ The Respondent points out that the Claimants concede to considering this reports as brand-new evidence.⁸

⁷ Respondent's letter dated August 28, 2018, pp. 1, 2.

⁸ The Respondent directs to the following passage of the Claimants' letter dated August 24, 2018: "[W]e are not asking that Mr. Ferguson or Apedile be allowed to present any new documents or evidence **other than their observations**, which would be in the form of [f] oral testimony, from the June 2018 site visits" (emphasis added by Respondent).

25. The Respondent does not see any justification for allowing the introduction of the evidence. According to the Respondent, the Claimants had been on notice for at least the past “seven years” of issues related to the construction and environmental impact of their project and the application of the permit was even denied for that reason.⁹
26. The Respondent requests the Tribunal to reject the request for the following reasons. First, because according to the Claimants’ own words, the Experts would be presenting in their brief direct testimony their observations to the Claimants’ property, which was not part of their June 2018 site visits.¹⁰ Second, because the Claimants have not provided any reasons why the Experts should be allowed to present their observations on Jamaca de Dios if it was not within the scope of their testimony as originally proposed. Third, because the Experts’ testimony would not be responsive towards Messrs. Booth and Deming’s expert reports as both did not refer to the other sites at all. Accordingly, the Experts’ testimonies would be raising new issues, amounting to new evidence which would not be permissible. Fourth, because the Claimants were already given the opportunity to submit these reports before. At that time, the Respondent would have had only 33 days to prepare rebuttal evidence. Allowing this evidence now would put the Respondent under the impossible burden of rebutting highly-technical issues on the spot.¹¹
27. The Respondent rejects the Claimants’ proposal to challenge the testimony through cross-examination and their assertion that it is the standard in courts over the world. In this sense, the Respondent notes that this is not a “court” proceeding but an investment arbitration. The norm here is for direct testimony to take the form of a written statement or report. Even in U.S. court proceedings the legal system avoids any surprises at trial and ensures that the opposing party has an adequate opportunity to prepare its rebuttal. In any case, Messrs. Deming and Booth have not visited the other properties and have not testified about them, thus it would be difficult for them to respond on the spot at the hearing to Messrs. Ferguson, Apedaile and/or Kay’s observations. Furthermore, the Respondent refers to several investment arbitration awards annulled because the respondent was not given any time in advance of the hearing to prepare the rebuttal.¹² As a result, the Respondent requests the Tribunal to reject the Claimants’ proposal to create such a situation here.

⁹ See, Ex. C-008, Letter from Ministry to M. Ballantine (12 September 2011); Ex. R-003, Environmental Law, Art. 122.

¹⁰ Respondent’s letter dated August 28, 2018, p. 3, *see*, Claimants’ letter dated August 24, 2018, p. 1.

¹¹ Respondent’s letter dated August 28, 2018, pp. 3, 4.

¹² Respondent’s letter dated August 28, 2018, p. 5, referring to *Victor Pey Casado and Foundation “Presidente Allende” v. Republic of Chile*, ICSID Case No. ARB/98/2 Decision on Annulment (18 December 2012), ¶¶ 246–271.

28. Regarding the new evidence the Claimants wish to introduce into the record, the Respondent explains that what the Ballantines in effect are requesting is an opportunity to submit new evidence that is “responsive” to their own expert’s report, given that Mr. Balbuena failed to introduce the text of the norms himself.
29. Further, regarding the documents the Claimants refer to as pertaining to the issue of “parallel contracts”, the Respondent reminds the Tribunal that the Claimants could have introduced them in their Rejoinder of Jurisdiction, together with “*hundreds of pages of new exhibits, as well as a new expert report that specifically focuses on the parallel contracts issue*”.¹³ As a result, the present application is not justified and there is no justification for allowing such documents at this late stage.
30. For all the reasons set out above, the Respondent requests the Tribunal to reject the Claimants’ request for the introduction of the Experts’ testimony and the new documents “*as untimely, improper, and highly prejudicial to the Dominican Republic from a due process standpoint*”.¹⁴

C. THE TRIBUNAL’S ANALYSIS AND DECISION

31. The Tribunal has considered the applications and arguments presented by both Parties and decides the following:

1. The Respondent’s Applications

32. With regard to the first issue raised by Respondent on testimony of expert witnesses, the Tribunal *grants* the request. Therefore, experts from both Parties will be able to make a direct presentation to the Tribunal. The experts of each Party are granted 25 minutes for their presentation.
33. The Tribunal would like to note that the allowance of a 25-minute direct presentation by the Parties’ experts should not lead the Parties to the assumption that the Tribunal expects a similar time allocation for direct examination during witness testimony. Notwithstanding the Tribunal’s decision in paragraph 32, the Parties are reminded that paragraph 7.8(b) of PO 1 requires that the direct examination of any witnesses should be kept brief.

¹³ Respondent’s letter dated August 28, 2018, p. 6, referring to Rejoinder on Jurisdiction, footnote 49, which introduced 800 pages of evidence.

¹⁴ Respondent’s letter dated August 28, 2018, p. 6.

34. Regarding the second issue raised by the Respondent on the introduction of new evidence, the Tribunal notes that pursuant to PO 1, “[e]xpert reports shall be accompanied by any documents or information upon which they rely [...]”.¹⁵
35. Since Norm No. 2-98 and Law 155-17 and its Regulation (Decree No. 408-17) are publicly available documents referenced by Mr. José Lapaz Lantigua Balbuena, an expert whose statement was offered by the Claimants in their Rejoinder on Jurisdiction, the Tribunal *grants* the Respondent’s request.

2. The Claimants’ Applications

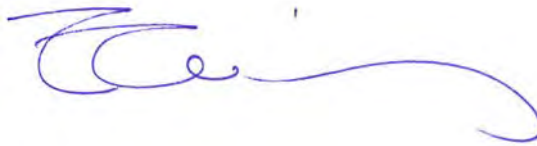
36. The Tribunal starts by recalling that, under Rule 6.4 of PO1, the Tribunal shall not consider any evidence that has not been introduced as part of the written submissions of the Parties, unless the Tribunal grants leave, after consultation between the Parties, on the basis of a reasoned request justifying why such documents were not submitted earlier together with the Parties’ written submissions or showing other exceptional circumstances.
37. The Claimants have requested that Mr. Delbert Ferguson or Mr. Leonard Apedaile be allowed to present a “brief” direct testimony of their observations on the 8 properties referenced in Procedural Order No. 10 and the Ballantines’ property. The Tribunal has already rejected, by majority, the introduction of new evidence derived from the visits in Procedural Order No. 13, therefore, the Tribunal *rejects* the Claimants’ request. However, the Tribunal notes that Mr. Kay has already been called to testify at the Hearing by the Respondent. Additionally, Mr. Kay has already made some observations in its report regarding some of the other properties, therefore, the Tribunal considers he *should be able to testify about those issues*.
38. The Tribunal emphasizes that the testimony on such issues is permitted to the extent that Mr. Kay *does not present any new evidence* based on the June 2018 site visits, since as provided by Procedural Order No. 13, any findings arising out of those visits has been rejected.
39. Regarding the recently obtained contracts of the Respondent’s witness, Mr. José Roberto Hernández, the Tribunal fails to identify the basis of such request in the Claimants’ application.
40. First, the Claimants argue that “the Ballantines did not have the opportunity to submit [these documents] in the normal course of submissions”. However, the issue of “parallel contracts” has been addressed by the Claimants in their Rejoinder to Jurisdiction and in the statement by Mr. Balbuena. Thus, the Claimants had the opportunity to submit any additional document on that

¹⁵ Procedural Order No. 1 parr. 8.2, October 21, 2016.

occasion. Additionally, the Claimants fail to justify both (a) why such documents were not submitted earlier together with the Parties' submissions;¹⁶ and (b) the presence of exceptional circumstances to grant this request. In contrast to this, the Claimants simply argue that "the Ballantines have recently obtained some of the contracts"¹⁷, without providing any additional explanation or justification or explaining any exceptional circumstances.

41. Moreover, the Claimants mention that these documents are "responsive to the documents that Respondent seeks to submit for its cross-examination of Mr. Balbuena and should be admitted independently on that basis",¹⁸ however, the Respondent only requested leave for the introduction of documents cited by Claimants' expert (which, in any event, are simple publicly available texts of certain Dominican laws and regulations) and the Claimants fail to identify what is the *link* between those documents and the documents that the Respondent seeks to submit. Consequently, the Tribunal considers the Claimants request lacks basis and thus, is *rejected*.

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



Ricardo Ramírez Hernández
(Presiding Arbitrator)

On behalf of the Tribunal

¹⁶ Not only they fail to justify why they did not present these documents with their submissions, they also fail to justify why they are doing it only 1 week prior to the Hearing.

¹⁷ Claimants' letter dated August 24, 2018, p. 3.

¹⁸ Claimants' letter dated August 24, 2018, p. 3.