

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. 8

Tribunal

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

March 4, 2018

A. PROCEDURAL HISTORY

1. On February 27, 2018, the Respondent wrote to the Claimants to request access to the Claimant's property, Jamaca de Dios, on March 5 and 6, 2018. In particular, the Respondent wished that its independent experts Peter Booth, Jose Sananes and Andrew Klaetsch, accompanied by certain members of the Dominican Republic's Government, "gain first-hand familiarity with existing site conditions and areas that were proposed for the contested real-estate development, including temporary and permanent access roads, staging areas, offsite operations (e.g., quarries and storage areas), internal roads, and footprints of proposed structures and landscaped areas".¹
2. By e-mail of the same day, the Claimants denied the access on the basis that the Respondent did not explain why it would need access once more and beyond the access that was granted for the preparation of the Statement of Defense. Also, the Claimants noted that the Respondent did not explain why the previous visit was not sufficient or why it would be needed for the preparation of the Rejoinder. The Claimants invited the Respondent to provide compelling information on these issues in order to reconsider their decision.
3. On February 28, 2018, the Respondent wrote to the Tribunal filing an emergency request for order to access Jamaca de Dios (the "**Respondent's Emergency Application**"),² in which it requested "that the Tribunal order the Ballantines to allow our experts and accompanying officials access to Jamaca de Dios (including the lands that the Ballantines call Phase 1 and Phase 2), and to provide full cooperation during their planned visit of 5 and 6 March 2018."
4. On the same day, the Claimants requested permission to respond to the Respondent's Emergency Application on the following day. The Tribunal granted the Claimants' request.
5. On March 1, 2018, the Claimants filed their comments on the Emergency Application (the "**Claimants' Reply**").

¹ Respondent's e-mail to Claimants, dated February 27, 2018, para. 3.

² The Respondent also enclosed proof of several e-mails exchanged between the Parties on (i) December 19, 2017 and (ii) February 27, 2018.

B. POSITION OF THE PARTIES

1. The Respondent's Position

6. According to the Respondent, pursuant to Procedural Order No. 1,³ the Tribunal may “make necessary arrangements to permit evidence to be presented”, and require the inspection by a party-appointed expert of any site the Tribunal deems appropriate.⁴
7. The Respondent contends that the Claimants are basing their objection on an alleged lack of explanation of the reasons for the site visit by the Respondent's experts, in preparation of the Rejoinder, considering that in preparation for the Statement of Defense the Dominican Republic sought and the Ballantines granted access to Jamaca de Dios to expert Sixto Inchaustegui (environment, protected areas and biodiversity expert) and witness Eleuterio Martínez (who discussed in his witness statement the environmental and biodiversity rationale for the creation of the Bagueate National Park). In contrast, the site visit requested now is for “Messrs. Booth (environmental scientist specialized in environmental due diligence), Sananes (engineer with experience in geo-environmental engineering) and Klaetsch (geo-technical engineer)”.⁵ The Respondent alleges that these experts, who are new, have never been to the Claimants' property, Jamaca de Dios.
8. The Respondent complains that in comparison to its own experts, the Claimants' experts—including those who submitted expert reports along with the Amended Statement of Claim (*i.e.*, Messrs. Eric Kay and Graviel Peña), and those who have only recently submitted an expert opinion with the Reply (*i.e.*, Messrs. Luis Fernando Potes and Jens Richter)—have all had unlimited access to Jamaca de Dios.⁶ Therefore, it requests that its own experts be granted “reciprocal treatment”,⁷ which would mean giving access to them for two days in order to allow them to write their reports. Moreover, the request of additional explanation is “burdensome and infringes on the rights of the Dominican Republic to collect evidence and present its case”.⁸
9. The Respondent notes that it has the procedural right to call experts that would visit Jamaca de Dios, to assess the property, the engineering conditions required to build the luxury project planned by the Claimants and its environmental impact. The conclusions in the expert reports that the Respondent

³ Procedural Order No. 1, para. 6.1 (“... the Tribunal may use, as an additional guideline, the IBA Rules on the Taking of Evidence in International Arbitration 2010, when considering matters of evidence.”).

⁴ The Respondent refers to IBA Rules on the Taking of Evidence in International Arbitration (2010), Arts. 9.4 and 7 respectively.

⁵ Respondent's e-mail to the Tribunal, dated February 28, 2018, para. 4.

⁶ Respondent's e-mail to the Tribunal, dated February 28, 2018, para. 4.

⁷ Respondent's e-mail to the Tribunal, dated February 28, 2018, para. 5.

⁸ Respondent's e-mail to the Tribunal, dated February 28, 2018, para. 5.

intends to submit with its Rejoinder, after the experts have conducted the site visit, “will be helpful for the Tribunal’s deliberations concerning this case.”⁹

10. Also, the Respondent notes that this is not the first time that the Ballantines deny access to the Dominican Republic to their property in the context of preparations for the Rejoinder. On December 19, 2017, the Respondent requested authorization for a team composed of counsel and officials of the Respondent to enter Jamaca de Dios, which was rejected by the Claimants. The Respondent explains that, at the time, in the expectation that the Ballantines would be more cooperative in the future, it decided not to bring the matter to the attention of the Tribunal. If further notes, however, that it is now compelled to submit this application as it would be prejudiced in the event its experts are not allowed access for the stated purpose.¹⁰

11. The Respondent respectfully requests that:

the Tribunal order the Ballantines to allow our experts and accompanying officials access to Jamaca de Dios (including the lands that the Ballantines call Phase 1 and Phase 2), and to provide full cooperation during their planned visit of 5 and 6 March 2018.¹¹

2. The Claimants’ Position

12. The Claimants request that the Tribunal reject the Respondent’s Emergency Application for several reasons.

13. First, the Claimants explain that on April 27, 2017, well before the submission of its Statement of Defense, the Respondent was given full and non-restricted access to the property Jamaca de Dios, which included access to the so-called Phases 1 and 2.¹² The Claimants note, moreover, that prior to these proceedings, the Respondent has inspected the site multiple times. According to the Claimants, the Respondent has had “a full and fair opportunity to examine the entirety of the Ballantines’ property and make whatever observations it deems relevant and necessary for the presentation of its defense”.¹³ Therefore, everything that the Respondent wishes to visit and assess this time, “could have and should have been made (and indeed likely [was] made)” at the previous visit.¹⁴

14. Second, the Claimants contend that the Respondent cannot be allowed to raise additional issues that it could have raised in its Statement of Defense.¹⁵ In its e-mail dated February 27, 2018, the Respondent requests access to focus on “slope and soil characteristics” as well as on other aspects

⁹ Respondent’s e-mail to the Tribunal, dated February 28, 2018, para. 6.

¹⁰ Respondent’s e-mail to the Tribunal, dated February 28, 2018, para. 7.

¹¹ Respondent’s e-mail to the Tribunal, dated February 28, 2018, para. 8.

¹² Claimants’ letter to the Tribunal, dated March 1, 2018, para. 2.

¹³ Claimants’ letter to the Tribunal, dated March 1, 2018, para. 2.

¹⁴ Claimants’ letter to the Tribunal, dated March 1, 2018, para. 2.

¹⁵ Claimants’ letter to the Tribunal, dated March 1, 2018, para. 3.

of the site. According to the Claimants, the Respondent cannot pretend that it had no idea that any argument on slope and soil characteristics should be included in its Statement of Defense because its denial of the Ballantines' permit request was based on the slopes and it has made many arguments regarding this in its Statement of Defense. Thus, the Claimant considers that the Respondent "is not entitled to a second access to the property -- on six days notice just before the due date of that Rejoinder -- in order to make observations that will purportedly bolster its arguments about slopes".¹⁶

15. Third, the Claimants' point out that approving the Respondent's Emergency Application would amount to a violation of the principle of equality of arms in view of the disparate treatment between the fate of the Ballantines' permitting efforts as opposed to the multiple other mountain development projects. The Claimants bring up the exchange of communications between the Parties on December 19, 2017, in order to state that they have not had the same opportunities. In those e-mails it is mentioned that the Claimants and its experts were not given access "to the other properties that have been allowed to build, with or without a permit"¹⁷ in order to fully examine them. According to the Claimants, they were not even allowed to access the roads of these properties even though the Respondent had stated that these roads were public "and thus freely open to all, when a project is developed."¹⁸ As a result, the Claimants explain that they had to rely mostly on images publicly available and drone footage. Hence, "[i]t would be a violation of the equality of arms here for Respondent to have free and repeated access to the Ballantines' property for the purposes of this arbitration, while the Ballantines are extremely limited in their ability to gather evidence around other properties."¹⁹

16. Fourth, the Claimants do not understand why the Respondent would need two full days to inspect the site visit. The Claimants contend that "there is no adequate description of exactly what these experts intend to observe, measure, document, or otherwise record, and precisely why they need to do so".²⁰

17. Fifth, the Claimants argue the Respondent is trying to manufacture a defense to justify the denial of the permit. According to the Claimant, the question here is "not whether Respondent's experts can now develop from whole cloth some "geo-environmental engineering" reason to deny the Ballantines a permit. The relevant question is whether the actual denial of the requested expansion based on Jamaca's slopes was appropriate, or was a violation of CAFTA, *when* [sic] the MMA

¹⁶ Claimants' letter to the Tribunal, dated March 1, 2018, para. 3

¹⁷ Claimants' letter to the Tribunal, dated March 1, 2018, para. 4.

¹⁸ Claimants' letter to the Tribunal, dated March 1, 2018, para. 4.

¹⁹ Claimants' letter to the Tribunal, dated March 1, 2018, para. 4.

²⁰ Claimants' letter to the Tribunal, dated March 1, 2018, para. 5.

repeatedly denied the permit.”²¹ However, none of the reasons that the Respondent gives to explain its request answer this question.

18. The Claimants also address the previous site visit planned on December 19, 2017. The Claimants’ counsel explain that they received the request on the morning of that day for that afternoon and so they did not have time to consult the Ballantines.²² The Claimants’ counsel considered it an odd request because the team requesting access was composed of government officials and counsels of Respondent. As they state: “[i]t is one thing for Respondent’s officials, who have procedures for accessing Dominican properties, to seek to conduct a site visit. It is another to have international counsel conduct an examination of the property of the opposing party without having counsel for the investors present.”²³ However, the Claimants clarify that they did not deny the visit but just said that they did not have time to ask the Ballantines for permission and asked for further information on the nature of the visit.²⁴ But the Respondent did not provide this additional information.²⁵
19. The Claimants notes that the previous request was made well after the Ballantines had filed their Reply. Yet, now two months later, and shortly before the Respondent’s Rejoinder is due, Respondent demands urgent access without providing grounds for an emergency application. According to the Claimant, an emergency application requires urgency but the one in this case has been created solely by the Respondent as it decided to request this site visit shortly before the submission of the Rejoinder was due.²⁶
20. For these reasons, the Claimants request that the Respondent’s Emergency Application be denied. However, if the Tribunal would accept it, the Claimants request the Tribunal to limit it to 2-3 hours, instead of 2 days. Additionally, the Claimants ask for the Tribunal to order the Respondent to pay the costs and fees of a counsel of the Claimants to be present during the visit, as they consider the Ballantines entitled to it.²⁷
21. The Claimants add lastly, that if the Tribunal allows the site visit, it should also order the Respondent to facilitate the visits of the Claimants’ experts to the various other properties and developments at issue in this case. According to the Claimants, it would be “fundamentally unfair for the

²¹ Claimants’ letter to the Tribunal, dated March 1, 2018, para. 6.

²² Claimants’ letter to the Tribunal, dated March 1, 2018, para. 7.

²³ Claimants’ letter to the Tribunal, dated March 1, 2018, para. 7.

²⁴ See Claimants’ e-mail to the Respondent, dated December 19, 2017.

²⁵ Claimants’ letter to the Tribunal, dated March 1, 2018, para. 8.

²⁶ Claimants’ letter to the Tribunal, dated March 1, 2018, para. 8.

²⁷ Claimants’ letter to the Tribunal, dated March 1, 2018, para. 9.

Respondent's experts and officials to have access to the Ballantines' property without the Ballantines' experts having access to the many comparators."²⁸

C. THE TRIBUNAL'S ANALYSIS AND DECISION

22. The Tribunal will first like to recall that, under Article 17 of the UNCITRAL Rules, the Tribunal is empowered to conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. Additionally, as noted by the Respondent, under Article 6.1. of the Procedural Order No. 1, the Tribunal established that, in addition to the relevant articles of the UNCITRAL Rules, it may use, as an additional guideline, the IBA Rules on the Taking of Evidence in International Arbitration 2010 (the "**IBA Rules**"), when considering matters of evidence.

23. Article 7 of the IBA Rules provides that:

Subject to the provisions of Article 9.2, the Arbitral Tribunal may, at the request of a Party or on its own motion, inspect or require the inspection by a Tribunal-Appointed Expert or a Party-Appointed Expert of any site, property, machinery or any other goods, samples, systems, processes or Documents, as it deems appropriate. The Arbitral Tribunal shall, in consultation with the Parties, determine the timing and arrangement for the inspection. The Parties and their representatives shall have the right to attend any such inspection.

24. Even though the timing of the Respondent's Emergency Application appears late, it does pertain to matters which seem to be relevant and material to this dispute. The Claimants' objections do not seem to dispute that much. In the interest of preserving the Parties' rights to present their cases, the principle of equal treatment, the principle of sound administration of justice and to allow the Tribunal to be as much informed as possible, the Tribunal grants the Respondent's Emergency Application under the following conditions.

25. First, the Respondent will only have one day to visit the Claimants' premises. Second, the Parties should mutually agree on a date for their convenience within the week of 5 to 9 March 2018. And third, inasmuch as the Tribunal allows the Respondent to have access to the Claimants' premises, it also orders the Respondent to facilitate the visits of the Claimants' experts to the various other properties and developments at issue in this case. In this regard, the Claimants will have an opportunity to address any findings they may have while delivering its arguments during the September Oral Hearing and their cross-examination of the Respondent's expert witnesses. Additionally, the Tribunal underscores that this Procedural Order does not alter the Procedural Calendar in any way and that the Respondent's Rejoinder remains due on March 19, 2018.

²⁸ Claimants' letter to the Tribunal, dated March 1, 2018, para. 10.

26. The Claimants of course have the right to have counsel present at the site visit and the Claimants and their counsel are of course free to decide whether their presence is needed. The Tribunal cannot, however, at this stage order the Respondent to pay the cost and fees of counsel for the Ballantines to go to the Dominican Republic to be present for this visit. The Parties will have an opportunity, at a later stage of the proceedings, to make submissions on the overall costs of this proceedings. The Tribunal will then assess any request the Claimants may have in relation to this site visit and the admissibility and/or relevance that any evidence resulting out of the visit has had on the outcome of the proceedings.
27. The Tribunal will like to make clear that this decision does not in any way prejudice the admissibility, relevance, materiality and weight of any evidence offered; all these being matters which remain at the Tribunal's discretion under Art. 27(4) of the UNCITRAL Rules.

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



Ricardo Ramírez Hernández
(Presiding Arbitrator)

On behalf of the Tribunal