

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. 7

Tribunal

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

December 22, 2017

A. PROCEDURAL HISTORY

1. On November 8, 2017, the Respondent submitted its ‘Objection to Admissibility’ by which it requested that the Tribunal dismiss certain claims as inadmissible or, alternatively, on the basis of lack of jurisdiction, by virtue of Article 10.18.1 DR-CAFTA (“**Respondent’s Objections**”).
2. By email dated November 9, 2017, the Claimants requested permission to respond to the Respondent’s Objections towards the end of the following week.
3. By letter dated November 9, 2017, the Tribunal acknowledged receipt of the Respondent’s Objections and the Claimants’ request, and granted the Claimants the opportunity to reply until November 17, 2017.
4. On November 17, 2017, the Claimants submitted their ‘Response to Respondent’s Article 10.18.1 Admissibility Objections’ by which they requested the Tribunal to, *inter alia*, dismiss the objections as an admissibility objection that is not timely and not applicable, and the jurisdictional objection is made too late (“**Response to the Objections**”).
5. Even though the Tribunal has analyzed all of the arguments put forward by the Parties in relation to the Respondent’s Objections, it will now only conduct a brief summary and overview of the Parties’ positions to the extent relevant to provide some context for the purposes of arriving at the decision included in this Procedural Order.

B. POSITION OF THE PARTIES

1. The Respondent’s Position

6. The Respondent contends that this objection is submitted in light of new facts that surfaced as a result of the Ballantines’ document production mandated by the Tribunal.¹ In particular, in Procedural Order No. 5, the Respondent notes that the Tribunal had ordered the Ballantines to provide “any document referencing when the Ballantines first became aware of the adoption of the Decree 571-09 and/or the creation of Bague National Park.”² In response to this, a series of emails exchanged between Michael Ballantine and environmental consultants Mario Méndez and Miriam

¹ Respondent’s Objections, ¶ 3.

² Respondent’s Objections, ¶ 3.

Arcia, between September 22 and 29, 2010 (“**the September 2010 Communications**”),³ were produced on August 2, 2017.⁴

7. According to the Respondent, the September 2010 Communications prove that the Ballantines first learned on September 29, 2010 –at the latest– about the creation of the Bagueate National Park (“**the Park**”) and the restrictions it would impose on the Ballantines’ use of the Project 3 land.⁵ These dates precede by more than three years “the Ballantines’ Notice of Arbitration, which was submitted on 11 September 2014”.⁶ Consequently, the claims that the Ballantines have raised regarding the violation of DR-CAFTA Articles 10.3, 10.4, 10.5 and 10.7 fall outside the three-year limit established in Article 10.18.1, and thus, are inadmissible.⁷
8. The Respondent asserts that these objections should be considered ones of admissibility.⁸ Accordingly, the objections cannot be considered to be governed by Article 23(2) of the UNCITRAL Arbitration Rules, which affects solely objections to jurisdiction.⁹ Therefore, the Respondent contends that its objections are timely as (i) they have been raised “as soon as practicable after the evidence and facts underlying the objection came to light”¹⁰ and (ii) it is in any event an objection of admissibility rather than jurisdiction, and therefore not subject to Article 23(2) of the UNCITRAL Rules.¹¹
9. If, however, the Tribunal considers that the objections affect the jurisdiction of the Tribunal or, alternatively, that the time limits of Article 23(2) of the UNCITRAL Arbitration Rules are equally applicable to admissibility objections, the Respondent contends that the Tribunal should still admit

³ See **Ex. R-169**, Emails between Michael Ballantine, Mario Mendez and Miriam Ancía of Empaca Redes, and Zuleika Salazar (22–29 September 2010) (original in Spanish); see **Ex. R-170**, Email from Miriam Arcia to Michael Ballantine, Zuleika Zalazar, and Mario Mendez (22 September 2010) (original in Spanish).

⁴ Respondent’s Objections, ¶ 3.

⁵ Respondent’s Objections, ¶ 4.

⁶ Respondent’s Objections, ¶ 4.

⁷ Respondent’s Objections, ¶ 4, ¶¶ 9-12.

⁸ Respondent’s Objections, ¶ 9; The Respondent understands that the “objection to jurisdiction goes to the ability of a tribunal to hear a case while an objection to admissibility aims at the claim itself” (**RLA-088**, *Ioan Micula, et al. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008) (Lévy, Alexandrov, Ehlermann), ¶ 63; see also **RLA-089**, *Abaclat, et al. v. Republic of Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) (Tercier, Abi-Saab, van den Berg), ¶ 247(i) (“While a lack of jurisdiction *stricto sensu* means that the claim cannot at all be brought in front of the body called upon, a lack of admissibility means that the claim was neither fit nor mature for judicial treatment”).

⁹ Respondent’s Objections, ¶ 10.

¹⁰ The Respondent further submits that “[a]lthough the Dominican Republic could have waited to submit its objection in its Rejoinder, it is doing so before that in order to allow the Ballantines a more fulsome opportunity to address it” (Respondent’s Objections, ¶ 12, footnote 12).

¹¹ Respondent’s Objections, ¶ 12.

and decide the objection;¹² since it was submitted as soon as practicable after the Respondent became aware of the evidence and facts underlying the objection.¹³ Therefore, the exception under Article 23(2) UNCITRAL Arbitration Rules (that “[t]he arbitral tribunal may, in either case, admit a later plea if it considers the delay justified”) would apply.¹⁴ Moreover, admission of the objection is further justified because doing so will cause no prejudice at all to the Ballantines, as they will have ample opportunity to respond.¹⁵ Finally, the Respondent argues that the Tribunal has an *ex officio* obligation to ascertain that the claims are admissible and within its jurisdiction,¹⁶ and would have an affirmative duty to determine whether or not Article 10.18.1 bars those claims.¹⁷

10. In Section III of its submission, the Respondent further develops both the factual and legal basis of the Respondent’s Objections.¹⁸

2. The Claimants’ Position

11. The Claimants contend that the facts regarding the Park demonstrate both the strength of the Ballantines’¹⁹ claims and that they had no knowledge of a breach of CAFTA in September 2010, much less knowledge of loss relating from that breach.²⁰ It was not the creation of the National Park itself which gave rise to the Claimants’ claims but rather the denial of the permit based on the existence of the Park.²¹

12. The Claimants argue that the Respondent omits the key element of the September 2010 Communications, Empaca Redes, the environmental advisor, states that ecotourism is allowed in

¹² Respondent’s Objections, ¶¶ 13-18.

¹³ Respondent’s Objections, ¶ 14.

¹⁴ Respondent’s Objections, ¶ 15. **RLA-091**, David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (Second Edition), Oxford University Press (2013), p. 456 (“The last sentence of Article 23(2) thus expressly states ... that the arbitral tribunal has discretion in limited circumstances to admit justifiably late pleas, such as due to the discovery of new evidence”). **RLA-092**, *European American Investment Bank AG v. Slovak Republic*, PCA Case No. 2010-17, Second Award on Jurisdiction (4 June 2014) (Greenwood, Stern, Petsche), ¶ 115.

¹⁵ Respondent’s Objections, ¶ 16.

¹⁶ Respondent’s Objections, ¶ 17.

¹⁷ Respondent’s Objections, ¶ 18.

¹⁸ Respondent’s Objections, ¶¶ 19-54.

¹⁹ The Claimants note that “Respondent consistently asserts that ‘the Ballantines’ learned of the National Park in September 2010. Yet, the September 2010 emails referred to only involve Michael Ballantine. Although Respondent forgets, Lisa Ballantine is likewise a claimant in this Arbitration [...] Thus, even if Respondent’s arguments about Michael Ballantine were correct, which they are not, Lisa Ballantine is her own person and has her own claim”. (Response to the Objections, ¶ 1, footnote 1).

²⁰ Response to the Objections, ¶ 1.

²¹ Response to the Objections, ¶ 2.

the protected area.²² Furthermore, they claim that, in a follow up email the next week, which email Respondent also has but omitted, Empaca Redes again confirms both that ecotourism is allowed in the Park and, importantly, that the Ballantines' phase 2 project is ecotourism.²³ Therefore, as its advisors told them their planned development was allowed, and, *inter alia*, as similar and nearby projects in the Park were being developed simultaneously, the Claimants were not on notice that they had suffered a loss and that Respondent had breached CAFTA-DR.²⁴ In fact, the Claimants contend that the best evidence of the Ballantines' view as to whether they had a claim and had suffered loss is that the Ballantines continued to purchase land in Phase 2 after learning of the National Park.²⁵

13. According to the Claimants, in addition to the fact that the Respondent's objection is without any merit factually and legally, it also comes too late and is itself time-barred.²⁶ The Respondent attempts to stretch the admissibility doctrine well beyond its breaking point²⁷ since Article 10.18.1 is an objection to jurisdiction.²⁸ But even if this were an admissibility issue, admissibility is a tenuous doctrine that has been almost exclusively used in cases of egregious corruption or significant wrongdoing nothing similar to what the Respondent now alleges.²⁹ The Claimants underscore that the fact that Respondent did not timely make this objection as a jurisdictional objection is fatal³⁰ given that Respondent could have made this same objection in its Statement of Defense.³¹ In that submission, the Respondent makes it very clear that the Ballantines should have known that the Park was created in 2009, as it was a public procedure and "widely publicized".³² Therefore, according to the Claimants, if the September 2010 Communications prove that Michael Ballantine knew of the creation of the Park in 2010, it cannot consequently be considered new evidence.³³

²² Response to the Objections, ¶ 3 (C-102, Email from M. Arcia to M. Ballantine, dated September 22, 2010).

²³ Response to the Objections, ¶ 3 (C-103, Email from M. Mendez to M. Ballantine, dated September 29, 2010).

²⁴ Response to the Objections, ¶¶ 3-6.

²⁵ Response to the Objections, ¶ 9.

²⁶ Response to the Objections, ¶ 15.

²⁷ Response to the Objections, ¶ 15.

²⁸ Response to the Objections, ¶ 15.

²⁹ Response to the Objections, ¶ 16.

³⁰ Response to the Objections, ¶ 17.

³¹ Response to the Objections, ¶ 18.

³² Statement of Defense, ¶ 238.

³³ Response to the Objections, ¶¶ 19 and 100.

14. Additionally, an untimely jurisdictional objection under Article 23(2) of the UNCITRAL Rules' exception can only be admitted in very rare circumstances.³⁴ Thus, simply having any new evidence is not sufficient to excuse a late jurisdictional objection.³⁵ Furthermore, to the Claimants' view, there are other reasons that demonstrate that not admitting the late objection would not be a grave injustice.³⁶
15. Throughout Sections II and III of their submission, the Claimants further develop both the factual and legal basis of their Response to the Respondent's Objections.³⁷

C. THE TRIBUNAL'S ANALYSIS

16. The Tribunal has assessed the Parties' arguments in relation to the Respondent's Objections and has conferred and deliberated upon them. At the outset, the Tribunal wishes to clarify that, at this early stage, it has only confined itself to determine whether it is ready to rule on the admissibility of the Respondent's Objections or if this issue should be further discussed, together with the merits of the Respondent's Objections, in later stages of the proceedings. Thus, the Tribunal at this time does not make a decision on the timeliness of Respondent's objection or the merits of it.
17. Having due consideration of all relevant circumstances and bearing in mind the fact that both Parties would not object to elaborate on their arguments regarding the issue at hand,³⁸ the Tribunal wishes to explore this issue further by allowing the Parties to file another round of submissions.

D. THE TRIBUNAL'S DECISION

18. In light of the foregoing, the Tribunal decides to postpone the decision on both admissibility and merits of the Respondent's Objections to a later stage of the proceedings. The Respondent will have the opportunity to answer to the Claimants' Response to the Objections in its Rejoinder, to be filed

³⁴ Response to the Objections, ¶¶ 94-96.

³⁵ Response to the Objections, ¶¶ 101-103.

³⁶ Response to the Objections, ¶¶ 104-107.

³⁷ Response to the Objections, ¶¶ 21-107.

³⁸ The Respondent stated that it "would not object if the Tribunal were to grant the Ballantines a prudential additional amount of time to make a separate submission in response to this objection. Such submission would then be followed by a second round of briefing by the Ballantines in their Rejoinder on Jurisdiction, and by further discussion at the Oral Hearing, thereby giving the Ballantines a full opportunity to be heard." (Respondent's Objections, ¶ 16). The Claimants, on the other hand, have stated that the Tribunal "has more than enough cause to dismiss this objection right now" and that they "would object to this issue being further litigated and considered in the continuing proceedings." However, the Claimants have also pointed out that "if the Tribunal decides to allow this admissibility or jurisdictional objection to continue, that the issues could be further elaborated (over the Ballantine's objections) in the Ballantines' Rejoinder on Jurisdiction" (Response to the Objections, ¶ 108-109).

on March 19, 2018. Subsequently, the Claimants will have an opportunity to reply in the Claimants' Rejoinder on Jurisdiction to be filed on May 21, 2018. The Tribunal will then analyze whether it is ready to rule on the Respondent's Objections at that time and in advance of the Oral Hearing, or whether they should be further addressed at the Oral Hearing in September 2018.

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



Ricardo Ramírez Hernández
(Presiding Arbitrator)

On behalf of the Tribunal