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. 13

Tribunal

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

Registry

Permanent Court of Arbitration
Mr. Julian Bordaçahar

August 30, 2018

A. PROCEDURAL HISTORY

1. Following the procedural incidences which led to the issuance of Procedural Orders Nos. 8, 9 and 10, by letter of July 31, 2018, the Claimants sought leave from the Tribunal (the "**Request**"), under Rule 6.4 of Procedural Order No. 1, to submit the new expert reports of Leonard Apedaile and Delbert Ferguson (the "**New Experts**").

2. By e-mail of the same date, the Respondent requested an opportunity to convey its views to the Tribunal before the latter made a decision on the Request by August 1, 2018, which was granted by the Tribunal.

3. By letter of August 1, 2018, the Respondent provided its comments on the Request (the "**Reply**").

4. By letter of August 2, 2018, the Tribunal informed the Parties that it would not be receiving any more submissions on this issue and that the Claimants should wait until the Tribunal issues its ruling before submitting any new evidence.

5. By letter of August 7, 2018, the Tribunal informed the Parties that it had considered their submissions on the Request and had decided, by majority, to deny it. The Tribunal explained that it had to communicate its decision summarily in light of time constraints due to the upcoming hearing. However, it also advised that a reasoned decision concerning this issue would be communicated to the Parties shortly by way of a Procedural Order.

B. POSITION OF THE PARTIES

1. The Claimants' Position

6. The Claimants contend that, after the issuance of Procedural Order No. 10 on 14 May 2018, they reached out to the Respondent to find a set of days suitable for the site visits. They say that the only days the Respondent had available was 26 June to 28 June, i.e., near the end of the period ordered by the Tribunal. The Claimants add that the site visits were to respond to the expert reports of Messrs. Deming and Booth, submitted by Respondent in its Rejoinder, and that they were concluded successfully. Moreover, the New Experts also surveyed Phase 1 and Phase 2 of Jamaca de Dios.[1]

7. The Claimants maintain that they have instructed the New Experts to conduct the same analysis of the 8 properties that Messrs. Deming and Booth conducted in their reports. They further

[1] Request, p. 1.

contend that, given the later date of the site visits, and the amount of slope and environmental data required to conduct the analysis for these 8 projects, as of July 31, 2018 the New Experts were still finalizing their report (the "**Report**"). The Claimants expect that it will be finalized on Friday, 3 August 2018.[2]

8. The Claimants note that Rule 6.4 of the Procedural Order No. 1 does not state whether the application to seek leave to admit additional evidence requires (or even allows) the party to submit the evidence to the Tribunal for consideration when making the application. They claim that the Parties debated this issue prior to the issuance of Procedural Order No. 1, with the Respondent taking the position that the evidence should not be submitted with the application so that the Tribunal would not be tainted by reviewing the evidence when considering whether the evidence should be admitted. Although the New Experts' Report was not yet finalized by the time they submitted their Request, this application sought leave to have it admitted. The Ballantines sought an extension of the 31 July 2018 deadline to Friday, 3 August 2018 in order to submit the Report, should the Tribunal determine that the Report had to be submitted with the Rule 6.4 application.[3]

9. According to the Claimants, the Request should be granted both because the New Experts Report could not have been submitted earlier and because exceptional circumstances exist.

(a) Why Were the Reports Not Submitted Earlier

10. The Claimants argue that they could not have submitted the Report earlier because Respondent waited until its Rejoinder – when the Ballantines could not submit any more evidence on the merits – to make arguments for the first time, based on expert reports that followed a site visit of Jamaca, and make its post hoc engineering and environmental impact analysis of the planned Phase 2 project.[4]

11. Despite this being an issue from the very beginning of the case, the Claimants say that the Respondent waited until its Rejoinder to hire engineering and building experts to assess the planned project of Phase 2 and then to argue that such a project was not feasible or harmful to the environment. The true vice of this new argument by Respondent, so the Claimants contend, is that it purposefully ignores the comparator projects at issue in this case. In any event, such arguments could have (and should have) been made in the Statement of Defense so that the Ballantines could have responded in their Reply. Thus, the Claimants conclude that they are fully

[2] Request, p. 1.
[3] Request, p. 1, footnote 2.
[4] Request, p. 2.

excused for not submitting this Report in their Reply because Respondent had not submitted the expert testimony on this issue yet.[5]

(b) The Presence of Exceptional Circumstances

12. The Claimants maintain that this proceeding is in large part a question of whether Respondent treated the Ballantines differently than it did the comparator projects – and/or whether the Respondent discriminated against the Ballantines with respect to the denial of the permit. The expert reports of Messrs. Deming and Booth do not speak to this central issue at all. In fact, according to the Claimants, these experts do not appear to have looked at these other projects or withheld such information if they did so.[6]

13. For the aforementioned reason, the Claimants describe the reports as being devoid of any discussion of the other projects even on the same mountain, which makes them not helpful in assisting the Tribunal to decide the actual issues in contention. Clarity of these issues, which would be helpful to and necessary by the Tribunal, requires an understanding of whether the 8 comparator projects that either were granted permits or built in the absence of permits (without penalty) are materially different from Jamaca Phase 2 with respect to the considerations made in the Deming and Booth reports. The Claimants argue, therefore, that given that the Deming and Booth reports are part of the record, exceptional circumstances exist that justify and require the admission of a Report examining this same issue with respect to the other comparator projects.[7]

14. Without such an analysis, the Claimants continue to argue, in light of the Deming and Booth report, Respondent would be able to obscure the truth from the Tribunal. Having created the exceptional circumstances here, the Claimants contend that the Respondent should not be allowed to keep these facts with respect to the other projects from the Tribunal.[8]

15. Lastly, the Claimants state that, for the sake of clarity, they do not intend to submit any argument or other evidence with respect to this issue. In fact, they merely request that the Tribunal grant leave for them to submit the Report and its exhibits so that the record is complete.[9]

[5] Request, p. 2.
[6] Request, p. 3.
[7] Request, p. 3.
[8] Request, p. 3.
[9] Request, p. 4.

2. The Respondent's Position

16. The Respondent contends that not only the Ballantines have managed, throughout the proceedings, to progressively usurp the role of a respondent, but now purport to arrogate to themselves the role of arbitrator, by granting themselves a *de facto* extension of an important procedural deadline. For the reasons set out below, the Respondent alleges that the Ballantines' maneuver is improper and should be rejected.[10]

17. The Respondent notes that, as the Ballantines have explained since their very first pleading, the present case is about the rejection by the Dominican Ministry of Environment and Natural Resources of a request by the Ballantines for an environmental permit relating to a proposed real estate project. At first, the Ballantines focused almost exclusively on the "slope" issue, and largely ignored the other elements of the Ministry's decision. The Respondent alludes that the Dominican Republic pointed this out in its Statement of Defense. In response, in their Reply, the Claimants proceeded to have four different "experts" address, *inter alia*, the issues of natural risk and environmental impact.[11]

18. The Respondent further notes that it wished to refute the foregoing through a combination of documentary and expert evidence, and sought permission from the Ballantines for the experts to access to their project site in Jarabacoa. They recall that it was only after the Ballantines refused access that the procedural incidences which led to Procedural Orders Nos. 8, 9 and 10 ensued.[12] Accordingly, Procedural Order No. 10 contained the order that **the visits shall be finalized by no later than June 30, 2018** and **any new evidence derived from these visits should be submitted** in accordance with Rule 6.4 of our Procedural Order No.1 **and by no later than July 31, 2018**.[13]

(a) The Claimants Cannot Justify Their Failure to Meet the Deadline

19. The Respondent notes that, in their letter of 31 July 2018, the Ballantines contend both that they could not meet the deadline, and that they in fact have not missed the deadline. However, for the Respondent, these contentions are unavailing for two reasons.[14]

20. Firstly, the Ballantines' only "excuse" for failing to meet the deadline is that the site visits took place "near the end of the period ordered by the Tribunal." This is not an excuse at all, as the

[10] Reply, p. 1.
[11] Reply, pp. 1 and 2.
[12] Reply, pp. 2 – 4.
[13] Reply, p. 4, emphasis added by the Respondent.
[14] Reply, p. 5.

Tribunal's procedural order was clear that the deadline would expire on 31 July 2018 even if the site visits were completed on 30 June 2018. Further, the Respondent argues that a full month was more than a generous allotment of time, especially given the imminence of the hearing.[15]

21. Second, per the Respondent, the deadline contemplated in Procedural Order No. 10 was not, as the Ballantines mistakenly assert, a deadline for applying to introduce new evidence under Rule 6.4 of Procedural Order No. 1. The Tribunal had set clear deadlines in Procedural Order No. 10, and according to those, the Ballantines were required to submit any new "evidence" by 31 July 2018. The Respondent adds that, if the Ballantines had truly been confused in this regard, they could and should have sought clarity long before 11:25 pm on the night of 31 July 2018.[16]

(b) The Tribunal Should Not Permit The Ballantines To Introduce New Evidence At This Stage

22. According to the Respondent, it is apparent from the Ballantines' 31 July 2018 letter that, despite missing their deadline, they are still hoping that the Tribunal will allow them to submit a new expert report. However, the Respondent maintains that the Tribunal should reject the Ballantines' application in this regard for four reasons.[17]

23. Firstly, the Respondent alleges that the timing of the Ballantines' application strongly indicates that it is not a *bona fide* request pursuant to Section 6.4 of Procedural Order No. 1. However, if the Tribunal were to treat the application as such, it would find that the Ballantines' arguments fail to justify the admission of new evidence at this late stage of the proceeding. The Respondent explains that, inevitably in a rejoinder a respondent will adduce rebuttal evidence. However, if such evidence gave right to the claimant to have an opportunity to submit a response each time, the written submissions in an arbitration would become an infinite regress. The Respondent further notes that the Ballantines are not the "respondent" in this case, and do not have any presumptive right to the last word.[18]

24. Second, the Respondent highlights that, it would appear that, rather than responding to the expert reports of Messrs. Deming and Booth, the Ballantines are now attempting to shore up their case on other issues.[19]

25. Third, the Respondent argues that if the Ballantines had wished to adduce evidence about the environmental impact of alleged comparator projects, they had all the tools to do so from the

[15] Reply, p. 5
[16] Reply, p. 5.
[17] Reply, pp. 5 and 6.
[18] Reply, p. 6.
[19] Reply, p. 6.

beginning of the case. As the Dominican Republic has explained, the Ballantines and their experts were able to procure access on their own to seven of the eight other projects that are the subject of their claims, and could have sought help from the Tribunal at an earlier stage if further access had been needed.[20]

26. Fourth, the Respondent alleges that allowing the Ballantines to submit a new expert report at this late juncture — especially a report so complex that it could not be completed within the relevant deadline —would be extremely prejudicial to the Dominican Republic. As the respondent, the Dominican Republic should have the right to respond to any new evidence presented by the Ballantines. However, at this point, there is simply not enough time either to respond via expert report or to gather and submit whatever additional evidence may be needed in order for rebuttal at the hearing. Per the Respondent, pushing the deadline out would only exacerbate the problem further, as the Dominican Republic would find itself in the highly anomalous situation of facing new evidence and arguments (only four weeks before the hearing) in an arbitral proceeding that has been pending for years. Accordingly, the Respondent maintains that the simplest way that the Tribunal could avoid this irregular situation would be to deny the Ballantines' motion, and — as is normally done in investment arbitrations — to let the Ballantines respond orally at the hearing to the testimony of Messrs. Deming and Booth (including by putting questions to their existing experts, but without entirely new evidence or experts).[21]

C. THE TRIBUNAL'S ANALYSIS AND DECISION

27. The matter before the Tribunal requires an examination of its previous decision in Procedural Order No. 10.

28. Procedural Order No. 10 clarified previous orders issued by the Tribunal. In this order, the Tribunal specifically provided that the Respondent had to facilitate (seek the authorization, coordinate with private owners or take any appropriate action based on the circumstances), as well as grant immediate access to any public areas located in the sites listed by Claimants in their May 2 letter. In case a visit could not take place, the Tribunal ordered Respondent to provide a detailed explanation of such situation. The order also mandated the visits to be finalized no later than June 30.

29. Procedural Order No. 10 envisaged the possibility for new evidence, derived from the visits, to be submitted until a specific date:

[20] Reply, pp. 6 and 7.
[21] Reply, p. 7.

> d. *Any new evidence derived* from these visits should **be submitted** in accordance *with Rule 6.4* of our Procedural Order No.1 **and by no later than July 31, 2018**. (Emphasis added)

30. Rule 6.4 of Procedural Order No. 1 provides that "*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*". According to this rule, there is a procedure whereby evidence not submitted with the written submissions can be introduced and eventually considered by the Tribunal. The general rule is that the Tribunal will not consider such new evidence unless it grants leave, provided other requirements are fulfilled.

31. While paragraph 41. d. of the decision contains a reference to this rule, the language used by the Tribunal is unequivocal. Any new evidence had to "**be submitted**" by "**no later** than July 31, 2018". The reference to Rule 6.4 of Procedural Order No. 1 does not change the language used by the Tribunal, it indicated the basis on which evidence not introduced as part of written submissions, such as evidence derived from the visits, had to be submitted to the Tribunal. At the core of its decision and reflected in the language used by the Tribunal, parties *had to submit* evidence *by July 31*.

32. The Tribunal is puzzled as to the reasons for the Claimants to wait until the deadline in order to request for an extension. Due to the fact that a deadline *had been provided*, Claimant had the opportunity to request for such extension ahead of time and even had an opportunity to seek any clarification on the matter.

33. Moreover, the Claimant's Request did not provide for reasons as to the need for an extension. The issue was briefly addressed in a footnote which stated: "Should the Tribunal determine that the Report should be submitted with the Rule 6.4 application, *the Ballantines seek an extension* of the 31 July 2018 deadline to this Friday, 3 August 2018 in order to submit the Report."[22] The Tribunal considers that such an explanation was required in order to justify the extension of a deadline already provided, more so, in light of the fact that the hearing was close and any extension of time in submitting evidence could potentially affect the procedure.

34. In view of the above, the Tribunal does not consider it is in a position to justify the late submission of the evidence by the Claimants.

35. Therefore, the Tribunal hereby rejects, by majority, the Claimants' request to seek leave for the submission of the New Experts' Report. However, the Tribunal clarifies that this decision does

[22] Request, p. 1.

not prejudice the right of the Claimants to respond orally, at the hearing, to the testimony of Messrs. Deming and Booth.

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

Ricardo Ramírez Hernández
(Presiding Arbitrator)

On behalf of the Tribunal