

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. 15

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. Procedural Order No. 1, issued by the Tribunal on 21 October 2016, states that “[u]pon 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.”¹
2. By letter dated August 23, 2018, the Respondent wrote to the Tribunal requesting that Mr. Jaime David Fernández Mirabal, a witness called to testify at the upcoming hearing from 3 September 2018 to 7 September 2018 (the “**Hearing**”), be allowed to do so via videoconference.
3. By letter dated August 24, 2018, the Tribunal acknowledged receipt of the Respondent’s letter dated August 23, 2018, and invited the Claimants to provide their comments thereof, by no later than August 28, 2018.
4. By letter dated August 28, 2018, the Claimants provided their comments to Respondent’s letter dated August 23, 2018.
5. By letter dated August 29, 2018, the Claimants wrote to the Tribunal requesting that Mr. Jose La Paz Lantigua Balbuena, an expert called to testify at the Hearing, be allowed to do so via videoconference.
6. By letter dated August 29, 2018, the Tribunal acknowledged receipt of the Claimants’ letter dated August 29, 2018, and invited the Respondent to provide its comments thereof, by no later than August 30, 2018.
7. By letter dated August 30, 2018, the Respondent submitted its comments to the Claimants’ letter dated August 29, 2018.

B. POSITION OF THE PARTIES

1. The Respondent’s Request

8. The Respondent requests that Mr. Jaime David Fernández Mirabal, former Minister of the Environment of the Dominican Republic and a witness called to testify at the Hearing, be allowed to do so from the Dominican Republic by videoconference.
9. The Respondent states that the exceptional circumstance that prevents Mr. Fernández Mirabal from appearing at the Hearing in person is his medical condition, which according to the medical

¹ Procedural Order No. 1, parr. 7.6, 21 October 2016.

certificate issued by Dr. Alejandro Montero Valdez “*prevents him from remaining for hours sitting or standing*” and thus “*air travel is not advisable*” for Mr. Fernández Mirabal.²

10. The Respondent further notes that, should the Tribunal grant its application for Mr. Fernández Mirabal to testify via videoconference, the Respondent “*would make all arrangements necessary for his examination*”.³

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

11. The Claimants state that they “*do not object to having Mr. Fernández Mirabal be examined via videoconference*”.⁴
12. Nevertheless, the Claimants require that “*certain protocols are in place to ensure the integrity of the process*”.⁵ The Claimants note that they expect to reach an agreement with the Respondent on such protocols before the first day of the Hearing. Should the Parties be unable to do so, the Claimants state that any pending issues regarding the protocols would be raised with the Tribunal during the first day of the Hearing.

3. The Claimants’ Request

13. The Claimants request that Mr. Jose La Paz Lantigua Balbuena, a lawyer and notary in the San Francisco de Macorís municipality in the Dominican Republic and an expert called to testify at the Hearing, be allowed to do so from the Dominican Republic by videoconference.
14. The Claimants state that exceptional circumstances that prevent Mr. Balbuena from appearing in person at the Hearing are (i) the Friday, 31 August 2018, departure from his practice of the only two lawyers currently working with him; (ii) that Mr. Balbuena, as of 29 August 2018, has been unable to hire any replacements for these two lawyers; and (iii) Mr. Balbuena’s appointments with clients during the week the Hearing is to take place, and work for which he needs to be in San Francisco to perform.
15. The Claimants note that Mr. Balbuena has requested that he be allowed to testify on Wednesday, 5 September 2018, in the afternoon, and that he would be willing to travel to Santo Domingo for the videoconference. The Claimants finally note that they did not object to the videoconference testimony of Mr. Mirabal.

² Attachment A to Respondent’s letter dated 23 August 2018, *Medical certificate issued by Dr. Alejandro Montero Valdez*, 22 August 2018.

³ Respondent’s letter dated 23 August 2018, pp. 1-2.

⁴ Claimants’ letter dated 28 August 2018, p. 1.

⁵ Claimants’ letter dated 28 August 2018, p. 1.

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

16. The Respondent states that although it does not find compelling the arguments put forth by the Claimants for Mr. Balbuena's in-person absence from the Hearing, "*the Dominican Republic would not object to Mr. Balbuena's testimony by videoconference*".⁶
17. The Respondent's acquiescence is subject, however, to the observance of certain conditions for Mr. Balbuena's testimony by videoconference, which are,
- (a) that the Claimants be responsible for making the appropriate arrangements to book a videoconference facility in Santo Domingo (and front any cost related thereto);
 - (b) that two representatives of the Dominican Republic be allowed to be present at the videoconferencing facilities during the video examination (and of course Claimants similarly would be free to have two representatives present);
 - (c) that, other than technical personnel for the videoconferencing, nobody be allowed in the examination room aside from the witness and the Party representatives; and
 - (d) that the pre-established order of testimony per Procedural Order No. 12 be maintained.⁷
18. The Respondent notes that the above-described conditions (a), (b), and (c) are the same as those agreed upon by the Parties for Mr. Fernández Mirabal's testimony by videoconference.

C. THE TRIBUNAL'S ANALYSIS AND DECISION

19. Based on the Parties' positions, the Tribunal grants the Respondent's and the Claimants' requests. Therefore, Mr. Fernández Mirabal and Mr. Balbuena shall be allowed to testify at the Hearing by videoconference.
20. In light of the protocol agreed by the Parties, for Mr. Fernández Mirabal's and Mr. Balbuena's testimony by videoconference (a) each Party shall be responsible for the necessary arrangements (and for the costs related thereto) to allow the examination of their respective witness or expert via videoconference (with the Respondent responsible for the arrangements related to Mr. Fernández Mirabal's testimony, and the Claimants responsible for those related to Mr. Balbuena's testimony); (b) during the examination by videoconference, up to two representatives from each of the Parties shall be allowed to be present at each of the rooms in Santo Domingo, Dominican Republic, where the testimony by videoconference will be taken; and (c) other than technical


⁶ Respondent's letter dated 30 August 2018, p. 1.

⁷ Respondent's letter dated 30 August 2018, p. 1.

personnel for the videoconferencing, nobody shall be allowed in the examination room aside from the witness or expert, and the Party representatives.

21. The Parties shall inform each other and the Tribunal the addresses in Santo Domingo, Dominican Republic, where each examination by videoconference will be performed, and the names of the Party representatives that will be present at the examination room during the testimony by videoconference, at least 48 hours before such examination is scheduled to begin.
22. As requested by the Respondent, the pre-established order of testimony per Procedural Order No. 12 shall be maintained. Because it is difficult to predict, at this stage, the exact day and time of the Hearing in which each witness and expert will testify, the Claimants will have to make sure that Mr. Balbuena is ready and available to testify before the examinations of the Respondent's witnesses and experts begin, per the Parties' agreed order in Procedural Order No. 12. In other words, the maximum flexibility that the Tribunal is ready to give the Claimants for the timing of the examination of Mr. Balbuena is to alter –to the lesser extent possible and only if really necessary– the order in which the Claimants' experts will testify. The Claimants shall, however, provide notice of any alteration in the order at least 12 hs. in advance. Likewise, the Respondent also should provide notice of any alternation in order at least 12 hs. in advance to the Claimants with regard to Mr. Mirabal's testimony.
23. Any issues related to Mr. Fernández Mirabal's or Mr. Balbuena's testimony by videoconference that either Party considers to be pending resolution, should be raised with the Tribunal during the first day of the Hearing, unless the urgency of that matter mandates that the issue be dealt with before that.

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



Ricardo Ramírez Hernández
(Presiding Arbitrator)

On behalf of the Tribunal