IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) AND THE DOMINICAN REPUBLIC - CENTRAL AMERICA - UNITED STATES FREE TRADE AGREEMENT (CAFTA-DR)

MICHAEL BALLANTINE and LISA BALLANTINE

Claimants

v.

THE DOMINICAN REPUBLIC,

Respondent

CLAIMANTS' AMENDED STATEMENT OF CLAIM

Matthew G. Allison
Baker & McKenzie LLP
300 East Randolph Street
Chicago, IL 60601
312 861 2630
matthew.allison@bakermckenzie.com

Teddy Baldwin
Baker & McKenzie LLP
815 Connecticut Avenue, N.W.,
Washington, DC 20006
202 452 7046
teddy.baldwin@bakermckenzie.com

January 4, 2017

I. INTRODUCTION AND SUMMARY

1. Michael and Lisa Ballantine are U.S. citizens from Chicago, Illinois.[1] The Ballantines invested in the Dominican Republic and their investments were entitled to the protections afforded by the Dominican Republic Central American Free Trade Agreement ("CAFTA-DR"). Through this action, they seek redress for the damages they have suffered as a result of the treatment by the Dominican Republic ("Respondent" or "DR"), treatment which violates the Respondent's CAFTA-DR obligations and has inequitably prevented the Ballantines from completing development of the finest luxury mountain residential resort community in the Dominican Republic.

2. As the chronology of events makes plain, the Dominican government has discriminated against the Ballantines because of their nationality, and illegally expropriated their investments, among other wrongs, causing tens of millions of dollars in damage.

3. The facts reveal that the Ballantines were victims of their own hard work and success. While their development prospered, competing Dominican-owned projects languished, generating resentment and envy among politically-powerful domestic competitors. Unable to compete commercially, these domestic interests instead used governmental action to destroy the Ballantines' development. While similarly situated Dominican projects were allowed to proceed with explicit government approval, or to develop without even obtaining approvals, the Ballantines permit requests were repeatedly denied. CAFTA-DR protects foreign investors from such improper use of governmental power. This Memorial will outline the chronology of events and actions that support that Ballantines' claim for recovery under CAFTA-DR.

4. In the early 2000s, the Ballantines acquired large tracts of largely abandoned,

[1] This submission supplements the Notice of Arbitration and Statement of Claim ("NOA") submitted by the Ballantines on September 11, 2014. That document contains contact details for the Parties and jurisdictional contentions which are fully incorporated into this Memorial.

deforested mountain property in Jarabacoa, a city two hours north of Santo Domingo, with the vision of developing the first upscale mountain residential community in the DR.[2] The Ballantines, without issue, obtained the necessary governmental permits in December of 2007 from the Dominican Ministry of the Environment ("MMA"), and began to develop Jamaca de Dios, a luxury, gated community with more than 90 home sites, common areas, guest villas, a fine dining restaurant, and the highest quality private mountain road in the Dominican Republic. The infrastructure created for Jamaca De Dios was deliberately robust, as the Ballantines always intended to develop a second phase higher up the mountain, where the climate and views are even more spectacular.

5. Jamaca de Dios proved to be a resounding commercial success. The first phase of the development sold out, largely to a Dominican clientele. Beautiful, luxury homes spread quickly up the mountain.[3] The Ballantines built a successful restaurant which became a dining destination for the complex and the entire town. The Ballantines later expanded the restaurant, in anticipation of their additional development up the mountain, creating the only dining establishment in the Caribbean with a rotating floor to enhance atmosphere and views.[4]

6. The Ballantines developed plans for a luxury hotel and spa, and for a mountain lodge and apartment complex that would allow owners to rent their units to tourists. These additional facilities would add to Jamaca's reputation as the premier inland place to live and visit in the DR. In fact, Jamaca had a list of more than a hundred names interested in lots in this

[2] This was consistent with the Respondent's own policy. The Dominican Republic was actively seeking investment in Jarabacoa, having passed Law 158-01 on October 8, 2001, declaring Jarabacoa to be a tourism pole, and offering tax incentives to investors. See e.g., http://www.drlawyer.com/publication/tourism/tourism-incentive-law-158-01/ (last viewed 1-3-17).
[3] See https://www.youtube.com/watch?v=L3qcn7_jSFk (last viewed 1-3-17). See also Master Plan of Phase 1 and photos of Phase 1 homes, Group Exhibit C-28.
[4] See www.aromadelamontana.com (last visited 1-3-17).

second phase of the community ("Phase 2"), which would create breathtaking home sites to the top of the mountain.

7. By November 2010, the Ballantines had already sold 71 of the 92 lots in the first phase of the development. They requested approval from MMA to extend their road into Phase 2, and to subdivide the land to create dozens of additional parcels of land on which they would build additional luxury homes, as well as the luxury hotel and spa. Having completed a significant environmental impact study for Phase 1, and having been promptly approved, the Ballantines expected that they would be appropriately approved for their simple expansion request.

8. However, in September of 2011, the MMA denied the Ballantines' request to expand Jamaca de Dios.[5] The MMA baldly asserted that any development into Phase 2 would violate Dominican environmental regulations preventing "intensive farming techniques" on land with a slope of more than 60 percent, or roughly 31 degrees. This denial was arbitrary and discriminatory, because, among other reasons -- *as MMA's own topographical maps establish* -- little of the land in Phase 2 exceeds this slope restriction and the Ballantines had no intention to build on any portion that did.

9. This arbitrary and discriminatory denial initiated a three-year effort by the Ballantines to seek reversal of this wrongful action. The Ballantines submitted multiple reconsideration requests which were flatly denied.

10. However, contemporaneously with these repeated denials,[6] the MMA was permitting the development of competitive mountain projects that were owned by Dominicans,

[5] See Letter from Zoila González de Gutiérrez to Michael Joseph Ballantine (Sept. 12, 2011) (C-8). Exhibits C-1 to C-27 have previously been provided to the Tribunal.
[6] See Exhibits C-8, C-11, C-13, C-14, and C-15

despite similar or greater slopes at those projects.[7] The MMA was even allowing some projects to build on similar or greater slopes in the absence of permits. The Ballantines were singled out for discriminatory treatment by the MMA because they were Americans and because they were the most successful development in Jarabacoa.

11. As the MMA began to realize that its reliance upon slope restrictions would be exposed as discriminatory and inequitable, given its approval of multiple competing mountain projects, its officials searched for a new pretext to deny the Ballantines' permit request. On January 15, 2014, in its fourth official rejection letter *two and a half years* after its initial denial, the MMA invoked a new purported justification for its refusal to allow the Ballantines' expansion.[8] For the very first time, the MMA asserted that the Ballantines' Phase 2 property -- more than 283,000 square meters -- was located within Baiguate National Park, a protected area in which development was purportedly restricted.

12. Despite the Park having been created by Presidential decree nearly five years earlier, t*he MMA had never advised the Ballantines of its existence, nor relied on the Park as a reason to deny expansion*. In fact, as will be discussed later, the Ballantines -- and other affected landowners -- received no notice of this national park and even the MMA's own officials were apparently unaware of it.

13. While the Ballantines acknowledge the Dominican Republic's right to appropriately create a national park, for a genuine public purpose, it cannot discriminate against the Ballantines in creating this Park, which it did here. The Park's boundaries were drawn to prevent any expansion of Jamaca De Dios. By contrast, competing and comparable Dominican-owned mountain projects were not included in any protected area, allowing those Dominican

[7] See Environmental Permission 1956-12, Mirador Del Pino (December 28, 2012) (C-29), Environmental Permission 2245-13, Jarabacoa Mountain Garden (December 30, 2013) (C-30).
[8] See Letter from Zoila González de Gutiérrez to Michael Joseph Ballantine (Jan. 15, 2014) (C-15).

land owners continuing freedom to develop their own mountain resort properties.

14. At a minimum, the Dominican Republic has expropriated the Ballantines' investment by the creation of the National Park and thus must compensate the Ballantines for its significant commercial value.

15. As set out in more detail below, the actions and inaction of MMA, the Municipality of Jarabacoa, and other government bodies of the Dominican Republic are inconsistent with obligations under the CAFTA-DR and, more generally, with the broad commitments the Dominican Republic made in that agreement to the rule of law and high standards of openness, transparency, and non- discrimination. The Dominican Republic has breached its obligations under Section A of the CAFTA-DR, including the following provisions:

- Article 10.3: National Treatment;
- Article 10.4: Most-Favored-Nation Treatment;
- Article 10.5: Minimum Standard of Treatment; and
- Article 10.7: Expropriation and Compensation
- Article 10.18: Transparency.

16. The Ballantines have incurred damages of more than $37 million as a direct result of the Dominican Republic's breaches of the CAFTA-DR.

II. STATEMENT OF THE FACTS

17. The claims arise primarily out of actions by MMA and the Municipality of Jarabacoa that both individually and collectively deprived the Ballantines of the valuable rights and interests that they held in their investments in the Dominican Republic, invested protected by CAFTA-DR. The relevant factual background underlying these claims is summarized below.

A. The Ballantines Visit the Dominican Republic as Christian Missionaries

18. After a successful business career in the United States, Michael Ballantine travelled with his wife Lisa and their children to the Dominican Republic in 2000 to work as Christian missionaries with a ministry that they had founded. The Ballantines, and a team of more than 20 volunteers, served communities and small villages around the country, in Constanza, Dajabon, Jarabacoa, La Romana, La Vega, Moca, Puerta Plata, Santiago, San Francisco, Santo Domingo, and Tanares.[9]

19. The Ballantines also undertook significant humanitarian work during their time in the Dominican Republic, including the creation of a non-profit entity that distributes innovative water filters developed by Lisa Ballantine throughout the DR and Haiti. That charity work continues to this day despite the fact that the Ballantines have been forced to abandon their investments in Jamaca de Dios.[10]

20. The Ballantines returned to their home in Chicago in 2001 but continued their work in the Dominican Republic, visiting the country each year to further support the communities they had begun to serve. The attached witness statement of Michael Ballantine chronicles in greater detail the Ballantines' travels to the Dominican Republic to be of service to the country and its people.

21. The Ballantines were especially struck by the natural beauty of the area in and around Jarabacoa and believed the area was poised for great growth. In the early 2000s, Michael and Lisa observed that the mountains in and around Jarabacoa had several standalone houses that had been built by individual Dominicans, but that there was no successful

[9] M. Ballantine Statement at ¶ 4.

[10] The attached Statement of Lisa Ballantine documents her innovative and expansive work developing and distributing durable household filters to bring clean drinking water to the island of Hispaniola and around the world.

development of a luxury residential and tourism community with shared infrastructure and amenities. The Ballantines believed that the mountains around Jarabacoa would be an ideal place for the creation of such a development.[11]

22. As such, the Ballantines began to purchase mountain property in the Palo Blanco area of Jarabacoa. In 2003, the Ballantines bought their first tract of 218,552 square meters from Francisco Sanchís. That was followed by additional purchases between 2004 and 2008, primarily from land rights belonging to the family of Carlos Manuel Duran. All of the land in Phase 1 of Jamaca de Dios was titled in the Ballantines' name by 2009. At this time, the Ballantines also had title to 140,835 square meters in Phase 2, and they continued to acquire Phase 2 property until the initial denial of their expansion request in 2011.[12]

B. The Ballantines Develop the Concept for Jamaca de Dios, a Luxury Mountain Residential Community

23. Having acquired the land necessary to bring their vision to fruition, the Ballantines set about to make it a reality. The Ballantines planned a community where private individuals could purchase land and build luxury mountain homes, and where domestic and international tourists could stay in a boutique spa hotel high on the mountain, while enjoying recreational and other activities, such as hiking trails, organic gardens, parks and common areas. The Ballantines intended that homeowners and local citizens could also enjoy first-class dining with striking views of the valley. The Ballantines named their proposed community Jamaca de Dios.[13]

24. From its inception, Jamaca de Dios was intended to have at least two phases of

[11] M. Ballantine Statement at ¶ 7-10.
[12] See Jamaca de Dios Land Purchases (C-31).
[13] M. Ballantine Statement at ¶ 7-10. There is a well-known Dominican expression: "God is Everywhere, but sleeps in Jarabacoa." The Ballantines chose the Jamaca de Dios name to communicate a place of rest and peace to their clients.

development.[14] During Phase 1, the Ballantines would develop the lower portion of the property, creating more than 90 individual parcels of land to be sold to private buyers for the construction of luxury homes. This initial phase would also include the creation of the robust infrastructure necessary for development of the entire mountain, as well as the establishment of a restaurant to be a focal point of the complex. The success of the first phase would lay the foundation to allow the Ballantines to build the Jamaca De Dios brand for an even more successful second phase of development.[15]

25. In the Phase 2, the Ballantines would expand the project by extending their road further up the mountain and subdividing the even more desirable and valuable upper portion of their property. The Ballantines also planned to construct a luxury hotel and spa, with a second restaurant. Additionally, the second phase would include building a "mountain lodge" of apartments, across from the restaurant, that would allow owners to generate passive income through a rental program managed by Jamaca, as well as a slightly larger apartment complex nearer to the base of the property.[16]

26. The Ballantines continued to purchase land further up the mountain as part of their two-phase development plan. By the summer of 2009, after approval of Phase 1 and the subdivision of more than 90 individual luxury parcels, the Ballantines owned more than 162,000 square meters of titled property further up the mountain, and were acquiring 220,000 additional square meters, all of which were ripe for their intended development.[17]

[14] M. Ballantine Statement at ¶ 19.
[15] Id.
[16] Id.
[17] M. Ballantine Statement at ¶ 18.

C. The Ballantines Seek and Receive Government Approval to Develop Phase 1 of Jamaca de Dios

27. The Ballantines were at all times focused on ensuring not only that their development complied with all applicable Dominican laws, but that it also be beneficial to the environment and to the local community. In furtherance of this desire, even before seeking approval from MMA to develop the mountain, the Ballantines first sought to reverse the effects of years of agriculture-induced deforestation on their newly acquired property.

28. In October of 2004, just after their purchase of more than 400,000 square meters of land, the Ballantines entered into an agreement with a German nonprofit named PROCARYN that is dedicated to reforestation efforts.[18] Their intention was to plant more than 50,000 trees across their new property, both to stabilize the environment and to create a more enticing setting for the home sites they intended to create.

29. To implement this plan, the Ballantines applied to the Dominican Ministry of Forest Resources for permission to build a road to facilitate the reforestation plan.[19] On January 18, 2005, the Ministry granted the Ballantines permission to cut a road and proceed with the tree planting.[20]

30. The Ballantines then promptly sought the requisite environmental permits from MMA to develop their property. MMA exercises its regulatory authority pursuant to the Ley General sobre Media Ambiente y Recursos Naturales (Ley No. 64-00) ("Environmental Law") to ensure that the development of real property is consistent with the Dominican Republic's legal and policy objectives concerning environmental protection.[21]

31. MMA requires that applications for environmental permits for real estate

[18] M. Ballantine Statement at ¶13. See also Procaryn Agreement (October 14, 2004) (C-32)
[19] Road Application (December 28, 2004) (C-33)
[20] M. Ballantine Statement at ¶14. See also Road Authorization (January 18, 2005) (C-34).
[21] *Ley General sabre Media Ambiente y Recursos Naturales (Ley No. 64-00)* (CLA-1)

development proceed through six specific steps.

- First, the applicant must obtain a letter of "no objection" from the municipal government of the area where the proposed project is to be located.

- Second, the applicant must provide the "no objection" letter to MMA and request that MMA provide "terms of reference" for the submission of a "Declaracion de Impacto Ambiental" ("Environmental Impact Statement").

- Third, MMA must conduct a technical visit to the location of the proposed project in order to prepare and provide the applicant with terms of reference for the Environmental Impact Statement.

- Fourth, the applicant must prepare and submit the Environment Impact Statement.

- Fifth, MMA must review the Environmental Impact Statement and related application documents, including by having its Comite Tecnico de Evaluacion, or Technical Evaluation Committee ("TEC") prepare a technical report on the proposed project.

- Finally, on the basis of its review, as well as the CTE technical report and any stakeholder or public comments, MMA must issue a decision to grant or deny an environment project for the proposed project.

32. Before embarking on their permitting efforts, the Ballantines hired one of the leading environmental companies in the Dominican Republic, Antilia Environmental Consultants, to assist their interaction with the MMA.[22]

33. The Ballantines first requested and obtained a "no objection" letter from the City Council of the Municipality of Jarabacoa. The Ballantines provided this letter to MMA and requested terms of reference for an Environmental Impact Statement.[23] The MMA conducted their technical visit to Jamaca and on August 18, 2006, MMA issued terms of reference to the Ballantines.[24] On February 14, 2007, the Ballantines submitted their comprehensive Environmental Impact Statement, with respect to 82 home sites and a restaurant,

[22] M. Ballantine Statement at ¶ 18.
[23] Letter from M. Ballantine to Zoila Gonzalez (February 7, 2005) (C-35)
[24] Letter from Zoila Gonzalez to M. Ballantine (August 18, 2006) (C-36)

to MMA.[25]

34. Subsequently in 2007, the TEC completed its technical report of the proposed project. And in December 2007, MMA issued permit No. 0649-07 for the development of the lower portion of the property.[26] Although this process took more time than it should have, the Ballantines were living in the United States during much of this period and shepherding the process from their home country.

35. At no time during this permitting process did the MMA indicate that the slope of the Ballantines' mountain property was an issue of concern, or that any portion of the land in Phase 1 could not be developed because it exceeded the slope limitations set forth in Law 64-00.

36. The establishment and initial development of Jamaca de Dios required that the Ballantines engage extensively and frequently with MMA. The Ballantines and MMA had a constructive relationship, communicating often regarding the permitting for the lower portion of the property. After its approval of Phase 1 of Jamaca, MMA conducted annual inspections of Jamaca de Dios to ensure ongoing environmental compliance, reviewed the semi-annual reports submitted by Jamaca de Dios as required by Dominican law, and exchanged communications regarding various topics.

37. The approval of Phase 1 created a commercially reasonable expectation for the Ballantines that their efforts to expand Jamaca De Dios would be subject to the same permitting process and standards and that they would be treated equally to similarly situated Dominican-owned projects.

[25] Letter from M. Ballantine to Zoila Gonzalez (February 14, 2007) (C-37)
[26] Permisio Ambiental No. 0649-07 (Dec. 7, 2007) (C-4)

D. Competing Developments Owned By Dominicans Begin to Appear in Jarabacoa

38. The Ballantines' claims in this arbitration arise in part from the discriminatory treatment that they ultimately received from the Dominican government -- most notably after the commercial success of their efforts -- as compared to similarly-situated Dominican development projects.

39. It is important to note that while the Ballantines were obtaining approval and beginning their development of Phase 1 in the 2005 to 2009 time frame, other Dominican-owned mountain developments were also seeking permission to build. There are several similarly-situated, competing projects that will be important for this Tribunal to consider to confirm the inequitable treatment the Ballantines received, but, from a chronological standpoint, the first two projects were:

a. **Paso Alto** -- this is a mountain development located on the same mountain ridge as Jamaca De Dios.[27] It is majority-owned by Dominicans, including its president Omar Rodriguez.[28] Paso Alto sought and received permission from the MMA in 2006 to subdivide property in Paso Bajito, Jarabcoa, and began to develop its infrastructure in 2006.[29] Just like Jamaca, at no time during the permitting process did the MMA ever invoke slope regulations as a limitation on the development of Paso Alto. A site visit to the Paso Alto project reveals approved and subdivided properties that are quite steep. Paso Alto remains a permitted project today, with more than 50 lots, and holds title to many other large adjacent properties, although it is commercially moribund. Rodriguez had economic difficulties in developing Paso

[27] Attached as C-38 is a series of maps of the mountain ridge that includes Paso Alto, Jamaca de Dios, Jarabacoa Mountain Garden, Quintas Del Bosque and Aloma Mountain.
[28] See Witness Statement of Omar A. Rodriguez.
[29] Rodriquez Statement at ¶4.

Alto and, as described later, turned to the Ballantines in hopes of partnering with them to finish his development.[30] The Ballantines signed a letter of intention to purchase the project on March 18, 2011.[31] The MMA's refusal to allow Phase 2 expansion of Jamaca ultimately killed the joint venture plans between Paso Alto and Jamaca, causing significant economic damage to the Ballantines.[32]

b. **Quintas Del Bosque** -- this is a mountain development to the west of Jamaca De Dios. It is owned by Dominican Jose Roberto Hernandez. QDB began its infrastructure without permission, and operated for several years before seeking and obtaining a license from the MMA in 2009 to develop 60 lots in Pinar Quemado, Jarabacoa.[33] Just like Jamaca, at no time during the permitting process did the MMA ever invoke slope regulations as a limitation on the development of QDB. A site visit to QDB reveals approved subdivided properties that are also quite steep.[34] QDB now is a community of 36 residences. QDB requested permission three years ago to expand to a Phase 2 as well, higher up the mountain. QDB made this expansion request shortly before the Ballantines submitted their Notice of Intent to submit this claim. The Respondent has not granted or denied the QDB request in three years,[35] apparently because of this arbitration. Respondent does not want to create yet another instance of disparate treatment in favor of a Dominican project, as the Ballantines have been the only residential investors in Jarabacoa who have been denied the ability to develop their property.

[30] Rodriguez Statement at ¶3; M. Ballantine Statement at ¶ 32-36.
[31] Paso Alto Letter of Intent (March 18, 2011) (C-39)
[32] M. Ballantine Statement at ¶ 36.
[33] Reynaldo de Rosario Witness Statement at ¶ 3.
[34] *Id.*
[35] Letter from Arvi Marmol to Graviel Pena (December 22, 2016) (C-40)

40. The Tribunal will learn about the illegal expropriation of the Ballantines' land later in this Memorial. But it is important to note that when the Baiguate National Park, the Jimenoa National Monument, and additional protected areas, were created in 2009, these two Dominican-owned properties were explicitly excluded from designation as a protected area, while all of the upper portion of Jamaca de Dios, and much of the lower portion as well, was made a protected area. A map of the Park reveals the discrimination in Baiguate Park's boundaries, especially when considered in light of the putative social justifications for the creation of the Park.[36]

41. These two properties were only the first of several mountain developments that attempted to replicate the success of Jamaca De Dios. The governmental treatment of all of these competing projects -- ***not one of which has been denied its right to develo****p* -- is stark and conclusive evidence of the Dominican Republic's violation of its CAFTA-DR obligations to the Ballantines as foreign investors.

E. The Ballantines Experience Significant Commercial Success with the Phase 1 of Jamaca de Dios

42. Having been granted the right to proceed, the Ballantines worked to develop the infrastructure necessary to support not just the immediate needs of Phase 1, but the future needs of Phase 2. They created networks to supply electricity, high-speed Internet, and potable water to sites throughout the property. They hired 24-hour security and maintenance to provide for the safety and comfort of residents and guests. They created recreational and other common areas to enhance the social life of the property, such as a spring-fed lake, sports areas, a fitness center, nature trails and a playground.[37]

[36] See C-38
[37] M. Ballantine Statement at ¶ 20.

43. Most importantly, the Ballantines invested significant amounts to design and to build a high-quality, environmentally sound road throughout the complex.[38] The importance of the road that the Ballantines built cannot be overstated. Its quality was not only a critical factor in the dramatic success of Phase 1, but was also a key factor motivating the discriminatory, inequitable treatment the Ballantines received when they attempted to expand to Phase 2.

44. As the Tribunal will learn, a neighboring development, Aloma Mountain, was owned by a politically-connected Dominican who wanted the Ballantines' road for access to his property. That owner, Juan Jose Dominguez, is the former brother-in-law of then Dominican President Lionel Fernandez, and the son of the Mayor of Jarabacoa, and it was Dominguez's desire to remove competition for his complex that motivated the inequitable treatment of the Ballantines. A simple video contrasts the quality of the road at Jamaca De Dios to the road at the Aloma Mountain project, which is situated next to Jamaca De Dios.[39]

45. Mountain roads are difficult to build and to maintain. The commercial failures of many of the mountain projects in Jarabacoa have at their root the failure to create a quality road. People seeking to buy a vacation home in the mountains for use with their family want a safe, well-maintained road from which to access their property. The Ballantines understood this from the inception of their vision of Jamaca De Dios. They then invested the time and money necessary to create the finest private mountain road in the Dominican Republic.

46. The attached Statement of engineer Eric Kay describes in detail the effort undertaken by the Ballantines to ensure that their road -- the backbone of the complete development of Jamaca de Dios -- would be of the highest quality. Mr. Kay has global

[38] See Witness Statement of Eric L. Kay. See also M. Ballantine Statement at ¶ 11-12.
[39] Exhibit C-47 is a video from February 2016 which contrasts travel on the road at Jamaca de Dios versus travel on the road at Aloma Mountain. The video documents the extent of the unlicensed development at Aloma Mountain.

experience designing and constructing forest and mountain roads in rainy environments.[40] Prior to beginning the road, the Ballantines took the time necessary to clear and fully survey the mountain. They cut in trails and fully analyzed potential routes using physical and computer modeling. They sought to build a road that avoided significant steepness while still gaining altitude, and conveyed traffic in a manner that allowed exploitation of the flattest areas of the mountain for the development of premier home sites.[41]

47. Having invested the time and experience to create the road at Jamaca de Dios, the Ballantines were well-situated to make a simple extension of the road into Phase 2.[42] The complex had purchased much of the machinery necessary to build the road, and had access to the raw material necessary for the road bed in the mountain itself.[43]

48. Despite the MMA's refusal to permit the expansion on the basis of slope percentages, Phase 2 of Jamaca slopes are more gradual Phase 1, and the engineering necessary to duplicate the quality of the Phase 1 road would be less intensive.[44]

49. Having established the necessary infrastructure for Phase 1, the Ballantines subdivided that property into individual lots and began marketing them to private purchasers. Jamaca de Dios had a standard sales contract, which allowed landowners the right to construct the homes of their choice, subject to certain parameters imposed by Jamaca. Importantly, the purchasers were required to begin construction within two years of purchase and to complete construction within two years of commencement, or Jamaca had the right to repurchase the lot.[45] It was important to the Ballantines that investors actually build quality homes in the

[40] See Kay Statement.
[41] M. Ballantine Statement at ¶ 11.
[42] Kay Statement at ¶ 7, 12.
[43] Ballantine Statement at ¶ 16; Kay Statement at ¶ 12.
[44] Kay Statement at ¶ 12.
[45] M. Ballantine Statement at ¶ 22.

development in order to attract future investors and to prevent land speculation. These requirements reduced the potential of a development littered with empty lots and half-built properties, issues that have plagued competing projects.

50. The Ballantines also worked to develop their restaurant, Aroma de la Montana, into a fine dining establishment that would serve as a central point for much of the social and residential life of the community. Since its establishment in May 2007, Aroma de la Montana, which sits near the top of Phase 1, has become an increasingly popular dining destination for residents of both Jamaca de Dios and the wider community of Jarabacoa, as well as for visitors from Santo Domingo and elsewhere.[46]

51. Phase 1 of Jamaca de Dios was a dramatic success. In less than five years, Jamaca de Dios became the most popular and prosperous mountain tourism and residential project in the Dominican Republic. Between 2007 and 2011, the Ballantines sold 75 lots, including 68 to Dominican citizens.[47] As of the date of this Memorial, all of the lots have been sold, and the small remaining inventory consists of reacquisitions by Jamaca.

52. Beautiful homes have been built throughout the complex.[48] Jamaca De Dios ultimately came to support the employment (directly or indirectly) of more than 300 people, an important social and economic contribution to the community of Jarabacoa. Jamaca de Dios also became the largest development company in Jarabacoa. It owned trucks and heavy equipment necessary for an expansion of the road, and the building of homes, including several "spec" houses that Jamaca built in Phase 1. It employed full-time engineers and support staff, and was perfectly positioned for its planned expansion.[49]

[46] M. Ballantine Statement at ¶ 23-26.
[47] M. Ballantine Statement at ¶ 24.
[48] See C-28
[49] M. Ballantine Statement at ¶ 27-28. See also Witness Statement of Wesley Proch.

53. As the Respondent was aware, Phase 2 of Jamaca De Dios was important to the Ballantines' investment as their land higher on the mountain -- where the views were even more stunning and the climate even more moderate – was much more valuable to the overall development. Tellingly, the Ballantines had a list of more than 100 investors anxious for the opportunity to purchase land in Phase 2 of Jamaca De Dios.[50] These individuals saw the realization of Phase 1, the luxury of the homes built there, the quality of the road the Ballantines had built, the success of the restaurant, the resort's amenities, and they wanted to acquire a lot higher up the mountain.

F. Additional Competing Projects Unsuccessfully Attempt to Replicate the Success of Jamaca de Dios

54. The success of Jamaca De Dios resulted in increased local competition, which the Ballantines both anticipated and believed would prove beneficial to all developments. Jarabacoa became increasingly known as a premier mountain resort community, or as Respondent's former president Leonel Fernández coined, "the Aspen of the Dominican Republic." In addition to Paso Alto and to Quintas Del Bosque, described above, other Dominican developers launched additional projects in an effort to reproduce the economic success of Jamaca De Dios.

55. It is important to examine these other developments, and to contrast the status of their permitting and development efforts, as the treatment of these projects prove that Jamaca did not receive the fair and equitable treatment promised to the Ballantines under CAFTA-DR.

56. **Jarabacoa Mountain Garden** ("JMG") is a mountain development located on the same mountain ridge as Jamaca De Dios, *directly above the Baiguate River*. JMG is owned by Dominican national Santiago Canela Duran. MMA's interaction with JMG as compared to

[50] M. Ballantine Statement at ¶ 25.

JDD plainly establishes the inequitable treatment of the Ballantines. Even before receiving authorization to develop, JMG built its roads and its infrastructure.[51] JMG sought permission to subdivide 115 lots.[52] Their application was first denied when MMA stated that development of the project would affect to water flow and the view of the Baiguate Waterfall. MMA also noted that the slopes of JMG could impact the River, but did not invoke Law 64-00.[53] JMG was then denied a second time,[54] ***before it was ultimately approved on December 30, 2013 for the 115 lots it originally sought permission to build***.[55] Two former MMA officials testify that the approval for JMG came as a result of political influence at the national level, despite the damage that JMG would do to the environment.[56] To be clear, at the very same time that Respondent was denying U.S.-owned Jamaca the right to develop, it was granting the Dominican-owned JMG the right to develop its entire property -- all 115 requested lots. This simple fact establishes the disparate treatment between these similarly-situated properties. Slopes that ostensibly prevented any development at all at Jamaca did not impact any development at JMG, although JMG has slopes in excess of 60 percent.[57] Even more absurdly, despite the fact JMG sits directly above the Baiguate River as well as the Baiguate Waterfall, which are the elements the National Park was ostensibly supposed to protect -- it was not included within the boundaries of the Baiguate National Park. One hundred percent of the rainwater that falls within this development is conveyed into the Baiguate River and the

[51] Rosario Statement at ¶ 7.
[52] See C-30. See also Technical Review Report of Jarabacoa Mountain Garden (late 2012) (C-41); Terms of Reference for Jarabacoa Mountain Garden (July 25, 2012) (C-42).
[53] See C-41, page 2.
[54] Letter from Zoila Gonzalez to S. Canela Duran (October 16, 2012) (C-43).
[55] See C-30.
[56] See Rosario Statement at ¶ 9 and Pena Statement at ¶15.
[57] Pena Statement at ¶ 14.

Baiguate Waterfall.[58] JMG remains a permitted project today, although it is commercially moribund. The Ballantines are familiar with this project as well, because Canela Duran approached Michael in an effort to joint venture with the already successful Jamaca de Dios.[59]

57. **Mirador Del Pinos** ("Mirador") is another mountain development located on a mountain ridge to the north to Jamaca de Dios. It is owned by Dominican Renan Van der Horst. Renan is the cousin of Andres Van der Horst, who was the Dominican Republic's Secretary of State from 2006-2012 during the Fernandez administration. Mirador was granted permission to subdivide its property into buildable lots on December 28, 2012.[60] It remains unclear whether or not Mirador was initially denied a right to develop, but an MMA inspection report concerning the Mirador project indicates that seven of the 84 lots originally part of the application were eliminated because they were too close to the stream that ran through the property.[61] The same report indicates that the project needs to comply with the slope regulations contained in Article 122 of Law 64-00. The inspection report indicates that Mirador submitted a revised plan which removed the seven lots that affected the stream, and that the plan indicated that the only lots with slopes greater than 60% were the same seven lots that had been removed because of the stream.[62] It is unclear if MMA ever confirmed this assertion, but what is clear is that it approved the project, despite the fact that at least 10% of the originally proposed lots had slopes greater than 60 percent. Jamaca was denied the right to develop *the entirety of their Phase 2 property*.

58. The approval letter granting Mirador the right to develop dated December 28,

[58] Pena Statement at ¶ 14.
[59] M. Ballantine Statement at ¶ 30.
[60] See C-29.
[61] See Technical Review Report for Mirador (February 2012) (C-44). See also Terms of Reference for Mirador (January 19, 2011)(C-45).
[62] See C-44.

2012, allows for the development of 77 lots and **simply states that the project must comply with Article 122**.[63] To be clear, despite the fact that MMA acknowledged that portions of Mirador contained slopes that exceeded the limits allowed in Law 64-00, it fully approved development of the Dominican-owned project and appears to have left enforcement of that law to the good graces of Mr. Van der Hort. By contrast, MMA repeatedly rejected Jamaca's application in its entirety because some small portion of Phase 2 was claimed to have slopes beyond 60 percent.[64] MMA did not grant permission to Jamaca and instruct the Ballantines to comply with Article 122, as they did for Mirador. Nor did they specifically refuse to permit development of defined areas in Phase 2 because of the alleged slopes. Instead, they prevented any expansion of Jamaca de Dios, while they expressly allowed development of both Mirador and Jarabacoa Mountain Garden.

59. This disparate treatment unambiguously violates CAFTA-DR. Despite no intention on the part of the Ballantines to construct anything on the small portion of Phase 2 where the slope may exceed 60 percent, Respondent's MMA has refused to even discuss its denial of the Jamaca de Dios permit request, let alone work with the Ballantines as it worked with Mirador and with JMG. Mirador remains a permitted project today, although it too appears to be abandoned struggling commercially, despite the regulatory advantages it received from the government.

60. **Aloma Mountain** ("Aloma") is a mountain development located on the same mountain ridge as Jamaca De Dios, and it is adjacent to Jamaca at the top of the properties. It is owned by politically-connected Dominican Juan Jose Dominguez. Although Aloma is purportedly located in the Baiguate National Park, Respondent has allowed Dominguez to

[63] See C-29.

[64] As confirmed by Michael Ballantines, Jamaca de Dios never sought to build homes on land with slopes exceeding 60 percent nor did it plan to do so.

continue to develop Aloma with impunity. In fact, even prior to the point at which people became aware of the Baiguate National Park, Respondent allowed Dominguez to develop without having the proper permits.[65] However, despite unrestrained opportunity, Aloma Mountain has not flourished. Again, without a permit, Dominguez used government-owned machinery to cut his roads. But the lack of planning and engineering skill left him with a treacherous and nearly impassable route to his development. Dominguez has built more than six kilometers of road, installed electric and water, and built homes, parks, a clubhouse, and dug wells.[66]

61. Aware of the success of Jamaca, and aware that the Ballantines intended to acquire Paso Alto, which are on opposite sides of Aloma, Dominguez understood that he could not compete commercially with the Ballantines. He decided instead to use his significant political influence to stop the expansion of Jamaca de Dios.[67] He is the brother of Leonel Fernandez' first wife, and Fernandez was the President of the Dominican Republic from 1996-2000, and then again from 2004-2012, the exact period during which the Ballantines sought permission to expand Jamaca de Dios. Dominguez was the *de facto* spokesman and representative of Fernandez in Jarabacoa during all twelve years of his presidency.[68] Dominguez was also the son of Piedad Quezada Dominguez, who was the mayor of Jarabacoa from 2010-2016, again while the Ballantines were seeking permission to expand. Additionally, Dominguez had close ties to Bautista Gomez Rojas, who was minister of the MMA from 2012-2016. Gomez Rojas had been Minister of Public Health from 2008-2012, and during that

[65] Pena Statement at ¶ 8.
[66] See Nuria Report, described at footnote 169.
[67] The Ballantines' acquisition of Paso Alto directly to the east, as well as Phase 2 properties to his west would have greatly hindered Dominguez's ability to compete. Jamaca de Dios would have many properties at higher altitudes than Aloma.
[68] Salazar Statement at ¶ 20.

period Dominguez was the Vice Minister of Oral Health directly below Gomez Rojas. These political ties allowed Dominguez to develop his property with immunity and to improperly use MMA as a barrier to the expansion of Jamaca.[69]

62. Ultimately, all of these projects have proven unable to compete commercially with Jamaca De Dios (except for Quintas del Bosque, which is significantly smaller and without the robust infrastructure of Jamaca). But a simple review of these projects' permitting status, their exclusion from the Baiguate Park, and/or their ability to develop despite the absence of a permit confirms the simple and undeniable fact that the Dominican government exercised its regulatory power in an inequitable, arbitrary and discriminatory manner to prevent the continued success of Jamaca De Dios in violation of Sections 10.3, 10.4, and 10.5 of CAFTA-DR.

63. A review of the Ballantines' efforts with respect to Phase 2 puts this evidence in even clearer focus, and also demonstrates the illegal expropriation without compensation of the Ballantines' investments.

G. The Ballantines Prepare to Expand Jamaca de Dios

64. In 2009, the Ballantines initiated the second phase of their investment -- intending to market and ultimately sell at least 70 lots on the upper portion of their property and to construct luxury private homes on those lots.

[69] The Dominican Republic claims in this Arbitration that Aloma Mountain's license request has been denied. In Paragraph 25 of its Response to the NOA, the Respondent specifically states that Aloma Mountain was denied permission to build because it is located within the Baiguate National Park. Exhibit R-6 is a letter from the Ministry to Juan Jose Dominguez dated December 5, 2013 which purports to indicate the denial on this basis. However, the Ballantines have solicited documents through the Freedom of Information Law concerning the status of the Aloma project. Exhibit C-46 is a Letter from Silmer Gonzalez Ruiz to Arvi Marmol dated February 11, 2014 (68 days later) which indicates that Aloma remains in Environmental Technical Evaluation. Attached as Exhibit C-40 is a letter dated December 22, 2016 (***more than three years later***) that also indicates that Aloma Mountain remains under environmental review Neither of these letters indicate any denial based on Park boundaries, and they are inconsistent with the purported letter presented by the Respondent as R-6.

65. Again, the upper portion of the property is significantly more valuable than the property sold as part of Phase 1. The reason for this is not surprising as lots farther up the mountain have better views of the city, cooler temperatures,[70] enhanced privacy, and enjoy the cache of the Jamaca brand name, created through the successful development of Phase 1.

66. Residents and visitors would access the Phase 2 lots by a planned extension of the road, which currently terminates at the top of Phase 1. With the Ballantines' experience, expertise, equipment, and the natural resources necessary to extend the road and subdivide the property, the Ballantines would have been able to expand Jamaca de Dios quickly and efficiently.

67. Additionally, given their now substantial development and construction expertise, and the significant investment Jamaca had made in equipment and engineering personnel, the Ballantines and their companies intended to build the luxury homes in Phase 2 themselves.[71] The attached statement of Wesley Proch details Jamaca's creation of a staffed, trained and equipped construction arm in order to undertake the construction activity associated with the expansion to Phase 2.

68. But Phase 2 was to be more than just the valuable additional lots. First, beginning in 2011, the Ballantines undertook an expansion of their restaurant, Aroma de la Montana, expanding the available seating from 90 to 225.[72] The Ballantines further had installed a rotating floor in the main dining room, the only one of its kind in the Caribbean, in order to take advantage of the views from the restaurant.[73] The Ballantines undertook the restaurant expansion solely in anticipation of the increasing number of homeowners and visitors

[70] The cooler temperatures up the mountain also have the added benefit of greatly reducing the number of mosquitoes, and the accompanying diseases and viruses they carry.
[71] M. Ballantine Statement at ¶ 27-28.
[72] M. Ballantine Statement at ¶ 26.
[73] Id.

to Jamaca De Dios with its Phase 2 expansion.[74] The restaurant expansion was intended to be an anchor for the development of the upper portion of the Ballantines' property.

69. The Ballantines also intended to construct a boutique hotel in Phase 2. There were no mountain hotels in the region and the commercial opportunity was manifest.[75] The Ballantines invested significant time and effort into the development of this concept. They engaged an architect to design the property.[76] They engaged a Taino Indian expert to help ensure the cultural appropriateness of the hotel design and decoration.[77]

70. The Ballantines were pleased that new Dominican President Danilo Medina had made increased tourism a cornerstone of his campaign and administration, intending to double, within 10 years, the number of tourists who visit the DR annually.[78] The Ballantines did all of their work on the hotel with the expectation that their permitting request to develop Phase 2 would be evaluated fairly and equally with the other developments in the area and, importantly, consistently with their treatment with regard to Phase 1.

71. The Ballantines also developed plans to construct a mountain lodge ("Mountain Lodge") at the top of Phase 1, just above the restaurant. They contracted with respected Dominican architect Rafael Selman to design the Mountain Lodge.[79] The attached witness statement of David Almanzar confirms the effort undertaken to create the Lodge. As shown in the attached marketing brochure, the Mountain Lodge was a fully-realized addition to the existing complex.[80] The building was designed in full and ready to be built as soon as MMA

[74] Id. See also Restaurant Expansion Report (C-48). This exhibit documents costs associated with the expansion of Aroma.
[75] M. Ballantine Statement at ¶ 19, 37.
[76] M. Ballantine Statement at ¶ 37.
[77] M. Ballantine Statement at ¶ 37.
[78] See, e.g., http://noticiassin.com/2011/05/danilo-medina-quiere-atraer-10-millones-de-turistas/
[79] Almanzar Statement at ¶ 3; M. Ballantine Statement at ¶37.
[80] See C-49, Mountain Lodge Brochure.

granted permission for the modification to the Phase 1 permit.[81] Indeed, the Ballantines received commitments to buy several units before even breaking ground.[82]

72. The Ballantines also planned to build another apartment building near the base of the complex, with larger units, to allow access to the development for larger families.[83] The Ballantines established a management company to oversee rental programs for these properties.[84] This, also, would have increased the desirability of the complex and created additional profit for Jamaca.

III. THE RESPONDENT'S MISTREATMENT OF THE BALLANTINES

A. The Ballantines Request Approval to Develop the Upper Portion of their Mountain Property, But their Request is Inequitably Denied

73. As the Ballantines prepared to seek permission to expand Jamaca De Dios, the Ballantines first applied for tax-free status for the entire project, pursuant to CONFUTOR Law 158, a law intended to promote tourism throughout the Dominican Republic. This status would allow the Ballantines to sell all of their properties without having to pay tax to the Dominican government. The Ballantines sought this status in August of 2010 for Phase 1and Phase 2.[85] Respondent promptly approved the provisional tax-exemption request on November 10, 2010.[86]

74. Tellingly, this approval was signed by the Dominican ministries of tourism, culture, tax, ***and environment***. All four of these agencies reviewed the Ballantines' plan to expand their development and approved it as furthering the policy behind the CONFUTOR law. It is important to emphasize that in November of 2010, *MMA and Tourism expressly approved*

[81] Almanzar Statement at ¶3-6.
[82] See C-50, Mountain Lodge Purchase Commitments.
[83] Proch Statement at ¶9; See Design for Apartment Complex (C-51)
[84] M. Ballantine Statement at ¶ 38.
[85] Based on their land ownership at that time of application, the Ballantines sought tax-free status for the hotel and 50 initial Phase 2 lots. Subsequent to receiving the provisional tax-free status and prior to receiving their first rejection from MMA the Ballantines acquired an additional 88,655 square meters, from which an additional 20 lots would have been divided.
[86] CONFUTOR Provisional Approval (November 10, 2010) (C-52).

tax-free status for the anticipated Phase 2 development, without any mention from either agency of slope restrictions or the recent establishment of a national park.[87] This approval was consistent with the Ballantines experience with approvals for Phase 1.

75. Only one month later, on December 13, 2010, the Ballantines obtained a letter of no objection from the City Council of Jarabacoa with respect to their expansion plans for the hotel and the subdivision of lots.[88] None of Respondent's many officials involved in granting the CONFUTOR approval or the no objection letter mentioned issues with 60 degree slopes or a national park.

76. Simultaneously, the Ballantines requested that MMA provide it with "terms of reference" for their expansion, and they fully expected the MMA would issue this with appropriate dispatch.[89]

77. However, rather than providing the reference terms, Respondent's officials began to target both the Ballantines and their investment. In addition to the repeated denials of their expansion request, as explained below, Respondent's officials targeted the Ballantines with harassment and disparate treatment with respect to their investment. At the same time, Respondent's officials allowed similarly-situated "copycat" projects in the area to proceed, either with express approvals from the MMA, or with the MMA turning a blind eye to unapproved development.

78. Why was the Ballantines' expansion request denied? The answer is simple. Jamaca De Dios was successful, and Dominican-owned projects were floundering. The most significant of these was Aloma Mountain -- right next to Jamaca -- owned by the politically-

[87] It is noteworthy that in the approval of CONFOTUR tax-free status, the Respondent specified that Jamaca properties were at an altitude of 1,200 meters, which is well within the boundaries of the National Park. The approval makes no mention of the Baiguate National Park. See C-52.
[88] Letter from Miguel Abreu and Roberto E. Crauz to Michael J. Ballantine (Dec. 13, 2010) (C-6).
[89] Letter from Zuleika Salazar to Ernesto Reyna (Nov. 30, 2010) (C-5).

connected Juan Jose Dominguez. Aloma could not compete commercially with Jamaca, so Dominguez used his and his family's power to prevent the expansion of Jamaca. At the very same time Jamaca's permit requests were being denied, Dominguez was developing Aloma Mountain without even having a permit, and other Dominican-owned projects in Jarabacoa were granted licenses to develop their land despite the undisputed fact that these proposed development had slopes in excess of 60 percent.

79. The Ballantines were singled out, and are the only project in Jarabacoa, indeed in the entire Dominican Republic, as far as the Ballantines are aware, ever to have been fully denied any permission to develop because of slope issues.[90] Respondent has international obligations under CAFTA-DR to protect and treat foreign investment as it treats domestic investment. As such, it is important to understand the full chronology of events surrounding the denial of Phase 2.

1. Respondent Slaps The Ballantines With An Irregular and Unprecedented Fine

80. The Ballantines' early interaction with MMA and the City of Jarabacoa had been positive, as both entities appeared to understand the significant economic value that Jamaca de Dios brought to the region. However, beginning in early 2009, both MMA and other governmental agencies had begun to treat the Ballantines and Jamaca de Dios in an increasingly troubling way.

81. On May 22, 2009, MMA officials brought men brandishing automatic weapons purportedly to conduct an environmental inspection. Respondent's officials and these heavily

[90] While Chapter 10 of the CAFTA-DR "applies to measures adopted or maintained by a Party relating to" investors of another Party or their investments, not to the motive or intent behind those measures, an understanding of Respondent's motives and intent contextualizes facts and allows this Tribunal to discern the true nature of the measures it is examining. Here, there is evidence that the Government's mistreatment of the Ballantines is the product of politically-motivated action.

armed men treated the Ballantines and their employees in a harassing and hostile manner.[91]

82. MMA officials threatened criminal action against Michael Ballantine for alleged violation of environmental laws. They claimed that by creating access to and flattening a small space on three lots -- lots which had been approved for development -- and by removing a few small trees, Jamaca de Dios had violated environmental regulations.[92]

83. Francis Santana, then the local director of MMA, later told Michael Ballantine that this unannounced, militaristic "inspection" was unprecedented and unique in her experience as local director. Indeed, Ms. Santana told him that she was unaware of any complaint having been lodged against Jamaca de Dios, and that the event was directly ordered by the Minister of MMA, Jamie David Mirabal.[93]

84. Almost six months later, on November 19, 2009, on the basis of this purported inspection, MMA imposed a fine of almost one million DR pesos (more than US$27,500) on Jamaca de Dios.[94] To the Ballantines' knowledge, this was the largest fine the MMA had ever assessed on a property owner in the region. (This was the case even though several developments had no permits at all.) Local MMA officials indicated privately to the Ballantines that the fine was excessive and arbitrary.[95]

85. This fine also included an order to complete twice annual ICA Environmental reports, which the MMA asserted were required by law. Since receiving this notification, the Ballantines completed this requirement for all 15 semi-annual periods.[96] No Dominican-owned projects have complied with this law, nor have they been required to do so.

---

[91] Salazar Statement at ¶9-11; M. Ballantine Statement at ¶ 44-46.
[92] Id.
[93] M. Ballantine Statement at ¶ 45
[94] Resolución SGA No. 973-2009 (Nov. 19, 2009) (C-7).
[95] M. Ballantine Statement at ¶ 46.
[96] Pena Statement at ¶ 28.

86. The Ballantines immediately requested a meeting with MMA Minister Jaime David Mirabal to discuss the fine and explain that they had been acting entirely within the permissions of their environmental permit. MMA did not respond to the Ballantines' request and refused to discuss or reconsider the fine.[97] Having been unable to even discuss the fine, the Ballantines refused to pay it and continued to seek an audience with the Minister of Environment. Almost a year later, on October 7, 2010, Minister Mirabal informed the Ballantines that MMA would reduce the fine by 50 percent.[98]

87. Without legal justification, the MMA stated that it would not act on the requested Terms of Reference for Phase 2 unless and until the fine was paid. (The MMA did not say at that time that the requested area to be developed was in a National Park.) The Ballantines again requested an in-person meeting with Minister Mirabal, to which the Minister agreed on the condition that the Ballantines first paid the fine. On February 1, 2011, to facilitate the prompt and equitable consideration of their request for a license to expand Jamaca de Dios, the Ballantines paid the fine.[99]

88. On February 14, the Ballantines were granted a meeting with Minister Mirabal and several senior MMA officials.[100] Mr. Ballantine conveyed his views that the fine was unjustified, but that he looked forward to working with MMA with respect to Phase 2.[101] Omar Rodriguez, president of the Paso Alto development, attended the meeting and spoke in support of the Ballantines, indicating that Jamaca de Dios was an excellent project that was important to

[97] M. Ballantine Statement at ¶ 46.
[98] M. Ballantine Statement at ¶ 49.
[99] M. Ballantine Statement at ¶ 49.
[100] These officials included Bernabe Manon, who was the Vice-Minister of Protected Areas, and Ekers Raposo, Management Director of Protected Areas. At no time during this meeting was the existence of the Baiguate National Park ever mentioned by the Respondent.
[101] M. Ballantine Statement at ¶ 51.

the city of Jarabacoa.[102] In the meeting Michael also discussed his intention to purchase Paso Alto. Minister Mirabal promised to send another inspection team to Jamaca de Dios to investigate the matter, and to expedite a response to the Ballantines' request to extend their existing permit.[103] Again, Minister Mirabal did not mention anything at that meeting about the planned expansion area being in a National Park.[104]

2. A Series of Inspection Teams Are Sent to Jamaca as the Ballantines Seek An Answer to their Expansion Request

89. Two days later on February 16, 2011, an inspection team from MMA visited Jamaca De Dios. Michael Ballantine received the team with Eric Kay, the Canadian engineer who had helped to design and construct the Phase 1 road, and who had been engaged to help the Ballantines develop Phase 2 and to oversee the completion of the civil engineering necessary for Paso Alto.[105] The MMA team walked the Phase 2 site and was overwhelmingly positive about the prospects of expansion, never mentioning any issue about slopes or the fact that Phase 2 purportedly had been designated as part of a national park in late 2009.[106]

90. Cesar Sena was the lead MMA inspector and he recommended that Jamaca De Dios seek permission initially to expand the road into Phase 2. Based upon this recommendation, the Ballantines sent a letter on February 24, 2011 to Vice Minister of the Environment Ernest Reyna seeking permission to immediately begin work on the road.[107]

91. Supposedly, only a month later, on March 18, 2011, without any officials of Jamaca being aware, there was purportedly a separate inspection of Jamaca de Dios by an

[102] See attached Witness Statement of Omar Rodriguez, president of Paso Alto, ¶5-9.
[103] M. Ballantine Statement at ¶ 52.
[104] Rodriguez Statement at ¶ 9.
[105] Kay Statement at ¶ 11; M. Ballantine ¶54-55.
[106] Kay Statement at ¶ 11; M. Ballantine ¶54-55.
[107] Letter from M. Ballantine to Ernesto Reyna (February 24, 2011) (C-53).

MMA official named Socrates Nivar, who allegedly drafted a report dated March 21, 2011.[108] The Ballantines were never provided a copy of the report until it was included as part of the Dominican Republic's response to the Ballantines' Notice of Arbitration.[109] The attached Witness Statement of Graviel Pena, who at the time was the local director for MMA in Jarabacoa, casts significant doubt on the legitimacy of that report.[110]

92. On April 21, 2011, the Ballantines wrote to MMA, seeking an update on the terms of reference they were requesting for Phase 2.[111] They received no response. On July 15, 2011, the Ballantines again wrote to MMA seeking a status report.[112] Again, the Ballantines received no response. Multiple telephone call and visits to the MMA from both Jamaca de Dios and their environmental company Empaca-Redes failed to generate a response.[113]

93. On August 22, 2011, Ernesto Reyna replaced Jamie David Mirabal as Minister of MMA. Again, at this time, Respondent had not provided a formal response to the request for reference terms for nine months.[114] On September 1, 2011, the Ballantines sent yet another letter, directly to Ernesto Reyna, congratulating him on his new position, inviting him to Jamaca de Dios, and again seeking a response to their expansion request.[115]

3. The Ballantines' Plans for Expansion Are Denied on the Basis that the Slopes of Phase 2 Are Too Steep

94. On September 12, 2011, more than nine months after the Ballantines had requested the Phase 2 expansion, the MMA finally responded to the Ballantines. The MMA

[108] Respondent Exhibit R-9
[109] M. Ballantine Statement at ¶ 56.
[110] Pena Statement at ¶25-33
[111] Letter from M. Ballantine to Ekers Raposo (April 21, 2011) (C-54).
[112] Letter from M. Ballantine to Jamie David Mirabal (July 15, 2011) (C-55).
[113] Salazar Statement at ¶14.
[114] It is noteworthy that Jaime David Mirabal was the vice president of the Dominican Republic from the years 2000-2004 in the first Leonel Fernandez administration and that Ernesto Reyna is the biological uncle of Leonel Fernandez.
[115] Letter from M. Ballantine to Ernesto Reyna (September 1, 2011) (C-56).

rejected the expansion request on the grounds that slopes of the upper portion of the property exceeded the maximum grade of 60 percent permitted under Article 122 of the Environmental Law.[116]

95. The MMA denial was apparently based upon a Technical Evaluation Committee meeting convened on May 8, 2011. This meeting was highly irregular in that local MMA director Graviel Pena was not invited to attend, in contravention of standard MMA policy. Indeed, as Mr. Pena testifies, he was present at other meetings in which permits were considered for projects in Jarabacoa.[117]

96. It is apparent that the rejection of Jamaca de Dios' expansion request was preordained and that the MMA did not want Pena, who was not part of the conspiracy to deny the Ballantines' permission to expand, present to object to the denial.

97. The rejection letter was surprising and unsupportable for several reasons. Critically, the Ballantines had no intention to build on land where slopes exceeding 60 percent. MMA had never before mentioned slope restrictions, even though the land that MMA had already approved for development in Phase 1 had slopes in excess of 60 percent. MMA had not once raised the issue of slopes with respect to the permitting of Phase 1 and had never mentioned any issue with respect to slopes during in any communication since it had received the request to expand Jamaca De Dios.[118]

---

[116] See C-8. The denial letter added that, while the Ballantines were not permitted to undertake real estate development with respect to the Phase 2 land because of the environmental fragility of the area, they were free to grow fruit trees.

[117] Pena Statement at ¶10.

[118] These facts support an estoppel against the DR's belated effort to enforce restrictions that it had never previously enforced. The DR simply does not have unfettered discretion to determine when and whether it desires to enforce certain statutory restrictions with respect to development. The Dominican Republic has promised to treat foreign investors equitably, with minimum standards of treatment, and no differently than it treats domestic investors. But it did treat those domestic investors more favorably then it treated the Ballantines.

98. The MMA had also previously approved the environmental permits of other, similarly situated investors, namely Quintas del Bosque and Paso Alto, without any mention of slopes. ***But most tellingly, after the MMA rejected in 2011 the Ballantines' request based on slope concerns, the MMA approved two other similar projects for development -- Dominican-owned Mountain*** Garden ***Jarabacoa and Dominican-owned Mirador Del Pino -- despite the fact that these two developments have slopes exceeding 60 percent.***[119] Not only were these domestic projects approved for development, the evidence reveals that the MMA affirmatively worked with the owners to modify their plans to ensure compliance with regulatory requirements.[120]

99. Even more telling is the fact that the MMA's own maps for Phase 2 of Jamaca de Dios show that the proposed development area **does not have slopes that exceed 60%**. Although MMA refused to give the Ballantines any technical information about their denial, the Ballantines obtained the MMA map during the public meetings held in Jarabacoa in December of 2014 concerning the management plan for the Baiguate Park (albeit five years after the Park had been created).[121] MMA's own map rejects their contentions about the slope of Phase 2 and reveals the lack of any substantive scientific support for its discriminatory denial of the Ballantines' expansion request.

100. It is important to note that the MMA did not deny a permit ***only*** for the Phase 2 areas with a slope exceeding 60 percent, or condition the permit on an agreement not to build in such areas. *Rather, the MMA denied the ability of the* Ballantines *to develop any part of the land.* The treatment Respondent gave to the Ballantines by refusing any development stands in stark contrast to the approval of Jarabacoa Mountain Garden and Mirador Del Pino.

[119] See C-29 and C-30.
[120] See C-41 and C-44.
[121] MMA Map of Baiguate Park (from 12/4/14 public meeting) (C-57).

4. The Ballantines Immediately Seek Reconsideration of the Denial And Are Stonewalled

101. The Ballantines immediately requested that MMA reconsider its decision, confirming the slope of any areas that would be designated for home construction in Phase 2 would not exceed the 60 percent threshold, asking for another inspection team to visit the project.[122] MMA did not provide any reports, findings, or other technical data that would support their rejection and no further inspection of the project was undertaken.

102. Instead, it appears that on February 22, 2012, MMA convened another Technical Evaluation Committee meeting to support its denial. Graviel Pena attended that meeting, and confirms that no "evaluation" occurred.[123] On March 8, 2012, the Ballantines' request for reconsideration was summarily rejected without discussion.[124]

103. The Ballantines continued to seek MMA's reconsideration of the matter. On December 18, 2012, MMA rejected the Ballantines' second reconsideration request in a letter that repeated the letter of March 8, 2012 almost word for word.[125] It is apparent that no real consideration was ever given to their appeal.

104. On July 4, 2013, Empaca-Redes, a premier Dominican environmental firm who had worked with the Ballantines for years, submitted to MMA an extensive engineering and geological report demonstrating that the slopes of the proposed Phase 2 land complied with all applicable slope restrictions and other environmental requirements.[126]

105. The MMA ignored the Empaca-Redes report and at no time has responded to the factual contentions contained in this comprehensive report. Unlike similarly situated

[122] Letter from Michael Ballantine to Ernesto Reyna (Nov. 2, 2011) (C-10).
[123] Pena Statement at ¶ 11.
[124] Letter from Zoila González de Gutiérrez to M. Ballantine (Mar. 8, 2012) (C-11).
[125] Letter from Zoila González de Gutiérrez to M. Ballantine (Dec. 18, 2012) (C-13).
[126] Letter from Leslie Gil to MMA (Jul. 4, 2013) (C-14).

competing projects that were allowed to cooperatively work with MMA to address any concerns -- including slope concerns -- and then were granted permission to develop, Respondent ignored the Ballantines.

106. The Ballantines tried to use other contacts in the Dominican government to seek answers. A friend of the Ballantines, Victor Pacheco, is a well-known Dominican businessman. He organized and attended a meeting in May of 2013 with Michael Ballantine and Jean-Alain Rodriguez, the Executive Director of the Centro de Exportación e Inversión de la República Dominicana, the official Dominican agency responsible for the promotion of international trade and foreign direct investment.[127] Mr. Ballantine advised Mr. Rodriguez of the struggles that Jamaca was having with MMA. Mr. Ballantine advised him that as a result of Dominguez's influence with MMA and in Jarabacoa, the DR was arbitrarily denying the Ballantines a right to expand.[128] Rodriguez agreed to look into the situation, and indeed on July 1, 2013, in his formal capacity as Director of the CEI-RD, wrote a letter to MMA Director Bautista Gomez Rojas, emphasizing the importance of foreign investment and requesting reconsideration of the denial.[129]

107. Mr. Ballantine received an email from Mr. Pacheco the next month in which he communicated that Mr. Rodriguez had confirmed that Mr. Dominguez was "neck deep" in the MMA's mistreatment of Jamaca de Dios.[130] This is independent confirmation of the discriminatory, arbitrary and unfair treatment by Respondent of the Ballantines in order to wrongly advantage Dominguez's floundering Aloma Mountain project.

108. The Ballantines also sought the assistance of US officials in hopes of prodding

[127] M. Ballantine Statement at ¶ 63.
[128] M. Ballantine Statement at ¶ 63-64.
[129] Letter from Jean Alain Rodríguez to Bautista Rojas Gómez (Jul. 1, 2013) (C-26)
[130] Email from V. Pacheco to M. Ballantine (June 12, 2013) (C-58); M. Ballantine Statement at ¶ 64.

the Dominican government to act equitably with respect to their requests. On July 18, 2013, the Ballantines met with officials from the U.S. Embassy in Santo Domingo.[131] On July 30, Embassy officials met with Zoila Gonzales from MMA, and followed up by letter on August 22, 2013, expressing concern with respect to MMA's treatment of the Ballantines.[132]

109. Without further communication to the Ballantines, MMA sent another inspection team to Jamaca de Dios on August 28, 2013. Mr. Ballantine met with the team and gave them a tour of Phase 2, and showed them the slope maps that were part of the Empaca-Redes report. He showed them satellite imagery showing the unpermitted development of Aloma Mountain and expressed his concern that Jamaca was being treated unfairly.[133]

110. On September 13, 2013, Michael Ballantine, his lawyer Mario Pujols, Miriam Arcia from Empaca-Redes, and Jamaca administrator Leslie Gil met with Zacarias Navarro, MMA Director of Environmental Evaluation.[134] Mr. Navarro informed Mr. Ballantine that the planned expansion was within the protected area of the Baiguate National Park. This was the first time that the Park had ever mentioned by the MMA in any written or oral communication.[135]

111. Mr. Ballantine also sought redress from the Office of the President Danilo Medina on October 1, 2013.[136] His requests for assistance were summarily rejected, as indicated by letters to both Jamaca de Dios and MMA.[137] Tellingly, a 2013 appeal made by Jarabacoa Mountain Garden to the Presidency had a much different end result. In that case, as

[131] M. Ballantine Statement at ¶ 65.
[132] Letter from Kristina Dunne to Zoila Gonzalez (August 22, 2013) (C-59).
[133] M. Ballantine Statement at ¶ 65.
[134] Leslie Gil Statement at ¶ 38-39; M. Ballantine Statement at ¶ 66
[135] Leslie Gil Statement at ¶ 38-39; M. Ballantine Statement at ¶ 66
[136] Letter from M. Ballantine to Carlos Pared Perez (October 1, 2013) (C-60)
[137] Letter from Danilo Diaz to M. Ballantine (October 28, 2013) (C-61); Letter from Carlos Pered Perez to B. Gomez Rojas (October 10, 2013) (C-62).

confirmed by the testimony of Reynaldo de Rosario and Graviel Pena, the Office of the Presidency directly intervened in the permitting process and *Jarabacoa Mountain Garden secured approval of their entire project.*[138]

B. The Final Rejection from the Dominican Government is Premised on the Entirely Different Basis of A National Park Boundary

112. On January 15, 2014, *more than two years* after the Ballantines requested terms of reference for Phase 2 expansion, the MMA provided its fourth and final rejection.[139] The letter failed to provide any response to the detailed submission from the Ballantines through the Empaca-Redes firm, or to provide any documentary support to justify its denial based upon slopes. No other environmental regulation was cited as a basis for the denial.[140]

113. However, MMA also stated that the Ballantines could not extend their development into Phase 2 because that land was located within the boundaries of the Baiguate National Park, which had been designated as a protected area by the Dominican government.[141] ***Astonishingly, that designation was made by presidential decree in August of 2009, and this January 2014 letter was the very first time that MMA had relied upon the existence of the Park as a basis for denying the additional development of Jamaca de Dios***.[142]

114. To reiterate, the Baiguate National Park was created in 2009 and it was not until almost five years later in 2014 that MMA, the Dominican agency tasked with managing protected areas, invoked the existence of the Park as a justification for why the Ballantines would be denied their expansion permit. This delay is in itself evidence of the inequitable treatment of the Ballantines by MMA, and evidence that MMA realized that the slope

[138] Rosario Statement at ¶ 9; Pena Statement at ¶ 15.
[139] Letter from Zoila González de Gutiérrez to M. Ballantine (Jan. 15, 2014) (C-15).
[140] Id.
[141] Id.
[142] Decreto Número 571-09 (Aug. 7, 2009) (C-16)

arguments were specious and discriminatory and that it needed another justification to deny the continued commercial success of the Jamaca de Dios complex.

115. Despite extensive communication between the Ballantines and MMA between 2009 and 2014, MMA remained silent concerning the Baiguate National Park:

- In no previous writing concerning the Ballantines' request to expand into Phase 2 had MMA even mentioned the existence of the Park, or advised the Ballantines that the property was within the boundaries of the Park. At no time did MMA inform the Ballantines of any implications of the Park for their development activities, open discussions with the Ballantines regarding these issues, or offer to pay compensation.

- Indeed, between August 2009 and January 2014, MMA interacted extensively with the Ballantines regarding a number of matters, reviewing 10 semi-annual reports submitted by Jamaca de Dios on its Phase 1 environmental compliance, negotiating a reduction of the fine imposed in November 2009, exchanging eight letters regarding various matters, and making five in-person visits to Jamaca de Dios for purposes of reviewing environmental compliance, among other activities. MMA even extended the duration of the existing permit for the lower portion of the property for an additional five years, despite the fact, as discussed below, that the boundaries of Baiguate National Park include a significant portion of the approved Phase 1.

- More broadly, during this 53-month period, the Government engaged repeatedly with the Ballantines with respect to Jamaca de Dios, with the Registro de Titulos issuing titles to newly acquired lots in the Phase 1 and 2 area (the deeds to which do not mention protected parkland), multiple ministries (Tourism, Culture, Hacienda and MMA) preliminarily approving Phase 1 for tax incentives under CONFOTUR 158, and the Ministry of Tourism approving the Ballantines' request for approval of Jamaca de Dios as a "tourism complex."

- And, of course, on three separate occasions during this period - September 12, 2011, March 8, 2012, and December 18, 2012 - MMA rejected the Ballantines' Phase 2 expansion for an enumerated reason - the slope restrictions - but never mentioned the national park.

116. If MMA had actually believed that a portion of the development of Jamaca de Dios could be restricted on the basis that it was located within Park boundaries, this concern should have been raised years earlier, and been relied upon by MMA in its earlier denials of the

Ballantines' expansion request. The belated invocation of the Baiguate National Park was inequitable to the Ballantines, as was the opaque process that apparently led to creation of the Park more than four years earlier.

117. A simple review of the circumstances surrounding the creation of the Park exposes that the inclusion of the Ballantines' property was opaque, pretextual, unjustified, arbitrary, and discriminatory, and that the invocation of the Park as a barrier against expansion in January 2014 constituted an illegal expropriation of the Ballantines' investment in the Dominican Republic.

1. The Park Was Created Without Notice and Transparency and In Violation of Dominican Law and Policy

118. Article 51 of the Dominican Constitution establishes the protection of private property: "The State recognizes and guarantees property rights. … All persons have a right to enjoy, make us of and dispose of their property[.]" Article 51 continues: "No person shall be deprived of his or her property, except on justified grounds of public utility or social interest, for which a person shall be paid a fair value before expropriation, determined by mutual consent of the parties or by judgment of a court of competent jurisdiction[.]"[143]

119. Despite depriving the Ballantines of the reasonable commercial use of their Phase 2 property, the Dominican Republic has never offered or discussed any "fair value" compensation for the Ballantines, or any compensation at all for the significant value of the Ballantines' land in the Baiguate National Park.

120. The Ballantines, like all landowners within the Baiguate National Park, were given no advance notice of the expropriation of their land. Neither the Ballantines, nor other

[143] The complete Dominican constitution is available at: https://www.constituteproject.org/constitution/Dominican_Republic_2015.pdf?lang=en

landowners, were notified by Respondent that a National Park had been created on their land.[144] As such, the Ballantines were not provided any opportunity to be heard with respect to the inclusion of their property within the boundaries of Park. Respondent did not create any process by which the Ballantines could challenge the purported rationale for the park or the inclusion of their land in the park. Most importantly, Respondent has created no mechanism for the Ballantines to obtain compensation of any type for this taking of their land and, of course, Respondent has not paid the Ballantines for this taking.

121. Dominican law also sets forth the process by which the government can establish national parks or other protected areas. Law 202-04 is the Dominican statute concerning protected area, in which the Dominican Republic adopts the standards of the World Conservation Union (ICUN):

> ARTICLE 13.- The units of the National System of Protected Areas will correspond to the following categories of management ***consistent with universally accepted standards of the World Conservation Union***. (emphasis added).
>
> ARTICLE 14.- The management objectives and permitted uses of the categories listed above are as follows:
>
> Category II. National Parks: its management objectives are to protect the ecological integrity of one or more ecosystems of great ecological relevance and scenic beauty, with forest cover or without it or with underwater life, to the benefit of present and future generations, avoid farms and intensive occupations that alter their ecosystems, provide the basis for creating opportunities for spiritual recreation, scientific, educational, recreational and tourism.
>
> In this category, the following uses are permitted: scientific research, education, recreation, nature tourism or ecotourism, infrastructure protection and research, infrastructure for public and ecotourism use in areas with specific characteristics defined by the management plan and authorized by the Ministry of Environment and Natural Resources.[145]

122. However, the creation of Baiguate National Park failed to comply with many of

[144] M. Ballantine Statement at ¶ 66; Almanzar Statement at ¶10; Pena Statement at ¶19-20.
[145] Ley Sectorial de Areas Protegidas, No. 202-04 (C-71). Also available in full at http://www.wipo.int/edocs/lexdocs/laws/es/do/do023es.pdf

these universally accepted standards, which are the framework for the entire Protected Area law. Most specifically, Dominican law mandates the creation of a "Management Plan" for any protected area or National Park. Dominican Law 202-04 defines this document:

> Management Plan: It is a technical and policy document containing all decisions about a protected area in which, based strictly based on scientific knowledge and experience of technical applications, establishes prohibitions and specific and standard authorizations and activities that are permitted in protected areas, indicating in detail the form and the exact places where it is possible to perform these activities.[146]

123. This Management Plan is intended to be a roadmap for the administration of the protected area. It is to be generated at the creation of the Park, because it is the document that gives meaning to the implementation of the protected area by describing what activities are to be permitted or disallowed in the Park. It expressly contemplates that there will be areas within a Park in which certain activities -- such as ecotourism -- will be allowed which will promote the purpose behind the establishment of the Park. To this day, no such Plan has been created for the Baiguate National Park.[147]

124. Indeed, it was not until this arbitration was filed that the Dominican Republic even held a community meeting to discuss the existence of the five-year old Baiguate National Park and the creation of its Management Plan for the Park. That initial meeting was held on December 4, 2014.[148] And at a meeting two weeks later, on December 19, 2014, again more than five years after the establishment of the Park, MMA Coordinator for Public Areas Pedro Arias acknowledged the frustration of the local community, who was just learning that their property was now within the boundaries of a national park:

> **PEDRO ARIAS**—"I recognize all of the indignation which you might have, I respect it which is why I have said let's keep calm, let's try to. ……Because I know, it's as if you come to my house and you tell me that from today, the room, which you live in, is

[146] Id.
[147] Pena Statement at ¶ 21.
[148] Gil Statement at ¶ 45.

> mine. Do you understand? You are… I respect the truth, this indignation. It is true that they should have consulted about this, if it were me who was doing the park, the first thing I would do is to meet with the people who in one way or another were going to be affected, and I would not get into half of what they have engaged in, or more than half; if it was me who was doing it, because I say it does not qualify as a park, I can only explain, but now it is done, what are we going to do?" [149]

125. Indeed, Dominican Law calls for the participation of local communities in creating a Management Plan. Law 202-04 Article 6 states:

> Where it suits the social interest, the Ministry of Environment and Natural Resources will allow the participation of local communities and organizations in the development of management plans of protected areas, as well as their participation in the benefits of conservation.[150]

126. The Law contemplates prompt creation of such a Management Plan to guide administration of the Park:

> 202-04 Article 5: … 4) Any type of use and development of natural resources within protected areas, public or private, should be incorporated into the management plan specific to each area and their operational plans, and shall have the respective environmental assessment when appropriate;
>
> 202-04 Article 6: PARAGRAPH II - The Ministry of Environment and Natural Resources shall develop and approve the respective management plans for each of the country's protected areas, may delegate its legal formulation suitably qualified persons.
>
> 202-04 Article 16: PARAGRAPH II - Public or private investments made in a protected area must be environmentally sustainable and culturally compatible area, and may be carried out only at the locations indicated in the respective management plans by conducting a prior environmental assessment process as appropriate.[151]

127. Respondent's failure to create a simple management plan for the National Park for seven years has significantly damaged the Ballantines. According to Dominican law, the creation of a National Park does not restrict all uses of the land, and allows areas to be used for

[149] Video of Pedro Arias Comments (December 19, 2014) (C-70).
[150] C-71.
[151] C-71.

ecotourism.[152] In fact, the Ballantines understand that Respondent has allowed residential developments in protected areas under this exception.[153]

128. ***Moreover, another draft map for the Baiguate National*** Park ***that was provided by MMA at the community meeting in 2014 explicitly shows that Jamaca, and its neighbor Aloma Mountain, has been designated as an "eco-tourism" area.***[154]

129. Respondent's officials apparently believe that they do not have any obligation to compensate the Ballantines for the creation of the National Park so long as they have not finalized a management plan that restricts all use for the land. Thus, the Ballantines' investment has languished for years with no end in sight.

2. The Putative Justification for the Creation of the Park Does Not Support the Inclusion of Jamaca de Dios

130. The National Park was created by Presidential Decree No. 571-09, which describes the "social interests" that allegedly validate its creation.[155] The purported justifications for creating the National Park are pretextual and find no support in fact.

131. The text of the Decree states that a primary objective of the Park is to protect the Salto Baiguate, or Baiguate Waterfall. However, the Salto Baiguate falls some three kilometers **outside the boundaries of the national park**.[156]

132. Moreover, given that Jamaca de Dios is on a side of a mountain that faces away from Rio Baiguate, 100 percent of the rainwater that falls on Jamaca de Dios is conveyed to the North Yaque River. In other words, none of the rainwater that falls on Jamaca de Dios property

[152] C-71.
[153] Punta Alma is a development located wholly within the Luperon Bay protected area. It has been approved for development by MMA.
[154] Second MMA Map of Baiguate Park (December 4, 2014) (C-63).
[155] See C-16
[156] Exhibit C-38 contains several maps that plainly demonstrate that *the entire Baiguate River and Waterfall are outside the boundaries of the Baiguate National Park.*

has any bearing on the water levels or quality of either the Rio Baiguate or the Salto Baiguate.[157]

133. By contrast, virtually all of the rainwater that falls on two competing projects -- Jarabacoa Mountain Garden and Paso Alto -- runs directly into the Rio Baiguate. And yet both of these two projects were specifically excluded from the boundaries of the Park.[158]

134. Furthermore, the Decree indicates that the Park is intended to protect local walnut trees. However, there appear to be no walnut trees on Jamaca de Dios, in either Phase 1 or Phase 2.[159] Not surprisingly, given these pretexts, the Respondent has refused to provide the technical study, if one exists, that should have been done to support the creation of the Park. When the Ballantines requested the technical study, which the MMA is obligated to provide under Dominican law[160], the MMA replied that:

> the scientific-technical information that served as basis for the creation of the Baiguate National Park, was the result of a fast exploration-evaluation performed *in situ* (preliminary diagnosis type), which generated technical *in situ* notes[.][161]

135. It is plain that no significant study of the area was undertaken by the MMA. This, despite the fact that Dominican policy is plain that:

> The declaration, creation, modification of limits, adoption and modification of the categories and management, creation of the management plans and other instruments of management and administration in protected areas will be carried out and based on

[157] Pena Statement at ¶ 23.
[158] See C-38. Additionally, the large property owned by Felucho Jiminez, a PLD Central Committee Member and the former Minister of Tourism (1996-2000, 2004-2008) under Leonel Fernandez, is also directly above the Baiguate River, but his property has been carefully left out of the park. Jimenez also ordered the shutdown on Jamaca, demanding the purchase of a wastewater treatment plant, as described in the Zuleika Salazar and Michael Ballantine witness statements. Similarly, the property of influential businessman Dr. Victor Mendez Capellan also borders the Baiguate River but has been excluded from the Park boundaries. These exclusions exhibit manifest favoritism towards well-connected Dominicans in contrast to the discriminatory inclusion of Jamaca de Dios.
[159] Pena Statement at ¶ 22.
[160] *See Ley General de Libre Acceso a la Jnformaci6n Publica (Ley No. 200-04),* art. 2 (CLA-2).
[161] Letter from Arvi Marmol to Guily Ramirez (April 15, 2016) (C-64).

scientific and technical investigation and knowledge.[162]

The presidential declaration in support of the Park reveals the insufficient scientific and technical investigation that was undertaken here.

136. Finally, in addition to including the entirety of the land slated for development in Phase 2, the boundaries of Baiguate National Park also capture some 36 of the initial lots that the Ballantines had sold to private purchasers in the course of developing Phase 1, primarily Dominican citizens.[163] The Ballantines are not aware that any of the owners of the homes built on these lots has received a similar communication from MMA regarding the restrictions created by Baiguate National Park or has been otherwise notified by MMA or any other government authority that Baiguate National Park could serve to restrict the use and enjoyment of their property. To the contrary, the Ballantines understand that MMA has continued to transfer titles to the owners of these lots and permitted construction activities consistent with those owners having clean, unrestricted title to their property -- all without any mention of the national park.

3. Similarly Situated Dominican Properties Were Excluded from the Park's Boundaries

137. The creation of the National Park was discriminatory, arbitrary and inequitable towards the Ballantines. While the boundaries of Baiguate National Park were drawn to include all of the upper portion of the Ballantines' property (as well as a significant portion of the already approved and developed lower portion in Phase 1), they did not include the land of three comparable mountain property developments in the southern mountains of Jarabacoa, Dominican-owed Jarabacoa Mountain Garden, Dominican-owned Quintas del Bosque, and

[162] "Guide for the Implementation of Management Plans for Protected Areas" (May 2007) (C-65).
[163] M. Ballantine Statement at ¶ 71.

majority Dominican-owned Paso Alto. To the contrary, the boundaries of the Park were drawn to exclude these competing properties.[164] Only Jamaca was affected.

138. The creation of the National Park was also part of a corrupt scheme, according to Reynaldo de Rosario and Daniel Jimenez, both former local MMA officials, who confirm that the decision to include Jamaca in the National Park and exclude other properties, such as Quintas del Bosque, was made in order in order to destroy the Ballantines' investment to the advantage of local interests.[165]

4. Similarly Situated Dominican Properties Continue to Enjoy the Economic Benefits of Ownership

139. While the national park boundaries do include the property of Dominican-owned Aloma (which lies adjacent to Jamaca de Dios), those boundaries were apparently never intended to actually prevent Aloma from developing its property. This simple fact is confirmed by the course of events since the creation of the Park – as there have been absolutely no restrictions of any kind on Aloma's development, despite its lack of an environmental permit.[166]

140. On May 27, 2011, Mr. Pena wrote to his regional supervisor to advise of non-permitted development being undertaken at the Aloma Mountain project. His letter was ignored and Aloma development was not affected in any way.[167]

141. On March 3, 2012, Pena wrote again, this time to the director of the MMA, Ernesto Reyna, advising of unauthorized development occurring at Aloma Mountain. This letter was also ignored and development was not affected in any way.[168]

142. Moreover, in 2013, after the gates of Jamaca were torn down as described

[164] Baiguate Park MAP
[165] Rosaria Statement at ¶ 6; Ballantine Statement at ¶ 72-73.
[166] Pena Statement at ¶ 8-9.
[167] Letter from G. Pena to Rene Salcedo (May 27, 2011) (C-66).
[168] Letter from G. Pena to Ernesto Reyna (March 3, 2012) (C-67).

below, Nuria Piera began to investigate what was happening with Jamaca de Dios. Nuria is one of the most respected journalists in the Dominican Republic and is known for her unbiased investigations. Her resulting report -- broadcast across the DR -- highlighted the disparate treatment between Jamaca de Dios and Aloma Mountain and highlighted the political connections between Dominguez and MMA.[169] Indeed, Pena's honest statements to Nuria resulted in his termination by MMA.[170]

143. Additionally, since the initiation of this arbitration, the Ballantines have personally reported the unpermitted development activity taking place at Aloma Mountain. In November of 2014, the Ballantines met with Katrina Naut, director of DICOEX, and Patricia Abreu, MMA Vice Minister for International Cooperation, to discuss a possible tolling of the current proceeding. Michael Ballantine was aware that Ms. Abreu owns a home in Jarabacoa and asked why Mr. Dominguez was allowed to develop his property for years within the Park, without any environmental permit from MMA. Abreu responded that she believed that Mr. Dominguez was permitted to develop.[171]

144. In addition to Aloma Mountain, Respondent has specifically allowed other Dominican-owned projects to build in protected areas similar to the Baiguate National Park. Respondent has approved a large marina and residential development called Punta Alma, who is entirely within the Bajia de Luperon Protected Area. Moreover, it appears that Respondent has approved this development for Punta Alma in the absence of a management plan.

5. The Denial Based Upon the Existence of the Park is an Expropriation.

145. Upon receiving the January 15, 2014 letter from MMA, the Ballantines

[169] *See* "Nuria," https://www.youtube.com/watch?v=wYLsUM8Zax4 (Jun. 29, 2013)(last viewed 1-3-17); *see also* Transcript of "Nuria" (Jun. 29, 2013) (C-25).
[170] Pena Statement at ¶ 3.
[171] M. Ballantine Statement at ¶ 86.

responded, asking MMA to identify the bases on which it had drawn the boundaries of Baiguate National Park, as there did not appear to be any coherent environmental, geological, geographic, or altitude-related reason for it to have located the park lines through the middle of their development. The Ballantines also asked MMA to explain why, after being in force for more than four years, Decree No. 571-09 was only now being relied upon as a basis for rejecting the Ballantines' expansion permit.[172] No response was received.

146. The Ballantines' letter also indicated that MMA's actions constituted an expropriation of their investment, requiring compensation under both domestic law and the CAFTA-DR.[173]

C. The City of Jarabacoa Has Also Discriminated and Acted Inequitably Toward the Ballantines

147. As stated above, Juan Jose Dominguez, the owner of the adjacent Aloma Mountain project, was the son of the Mayor of Jarabacoa. As the Dominguez project floundered and Jamaca became more successful, Jarabacoa officials also turned on Jamaca and the Ballantines. Jarabacoa city council officials also acted against the Ballantines because they expected local businesses to pay taxes to the councilors directly instead of to the Municipality of Jarabacoa. The Ballantines refused to engage in this questionable practice.[174]

148. These officials have retaliated against the Ballantines. Although the City is reimbursed by the central government for the costs of streetlights, it has refused to pay for the streetlights within Jamaca. However, the City pays for the streetlights in Dominican-owned projects. Also, the City has refused to provide any maintenance on the public road leading to

[172] Letter from M. Ballantine to Bautista Rojas Gómez (Mar. 3, 2014) (C-1).
[173] Id.
[174] M. Ballantine Statement at ¶ 75

the Jamaca complex since it was built in 2005.[175]

149. Most significantly, the City has refused to act. The plans for the Mountain Lodge required an amendment to the existing environmental permit covering Phase 1. On October 1, 2013, the Ballantines requested a "no objection" letter for the proposed lodge from the Municipality of Jarabacoa.[176] Despite the passage of more than three years, and repeated attempts by the Ballantines to elicit any response from local authorities, the Municipality of Jarabacoa has still failed to act on their request.[177]

150. Most significantly, on April 22, 2013, the Municipality of Jarabacoa passed a resolution granting public access to Jamaca's private road and authorizing the gates protecting Jamaca de Dios to be torn down.[178] This resolution was only directed at Jamaca and was passed without any notice to or input from the Ballantines. This resolution was passed despite the municipality having been advised by their own legal counsel that such action would be unlawful because it is the federal Tribunal de Tierras de La Vega ("Land Tribunal") – and not the local municipality – that has authority over real property disputes.[179]

151. Certain local officials from Jarabacoa, after obtaining the illegal resolution ordering the opening of the private road, incited local townspeople to cause them to attack the project. On June 17, 2013, in actions partially recorded on video, a group of local townspeople stormed Jamaca and proceeded to forcibly tear down three gates, with their leader carrying a copy of the City's resolution.[180] Jamaca de Dios had no knowledge that the resolution even existed until the gates were stormed.

---

[175] M. Ballantine Statement at ¶ 76
[176] Letter from Rafelina Díaz to Lucía Sánchez (Oct. 1, 2013) (C-20). As discussed above, this is the first step in obtaining approval from the MMA.
[177] Gil Statement at ¶ 27-36; M. Ballantine Statement at ¶ 39.
[178] Resolución No. 005-2013 (Apr. 22, 2013) (C-23).
[179] Resolución de Interes Judicial (Sept. 13, 2011) (C-22).
[180] Video of Events at Jamaca Gates (June 17, 2013) (C-68).

152. On July 31, 2013, the Ballantines succeeded in obtaining a preliminary injunction from the Land Tribunal to prohibit the Municipality of Jarabacoa from entering the Ballantines' property and ordering it to rebuild the gates.[181] As described in detail in the witness statements of Leslie Gil and Michael Ballantine, the ordeal was emotionally turbulent and threats were made on the life of Michael Ballantine.[182]

153. Despite the Land Tribunal's injunction, Respondent's court officials have now declared that the Ballantines' road is a pubic road.[183] Dominican-owned mountain projects such as Aloma Mountain are allowed to have private roads, whereas Jamaca has been denied that right. Respondent has never compensated the Ballantines for the expropriation of their road for public use.

IV. JURISDICTION

A. The Ballantines Are Investors Who Have Made A Covered Investment In The Dominican Republic

154. The Ballantines are naturally born U.S. citizens.[184] Except for a few years, the Ballantines have spent all of their lives in the United States. The Ballantines maintain their permanent residence in Chicago.[185] They have their strongest personal and professional relationships in the United States and always have.[186]

155. The entirety of the capital that the Ballantines initially invested in Jamaca de Dios originated in the United States.[187] The Ballantines were U.S. citizens only when they made

[181] Ordenanza de 2da Sala Tribunal de Tierras Jurisdicción Original – La Vega Provincia La Vega (Jul. 31, 2013) (C-24)
[182] Detailed accounts of this mob action are provided in the statements. See Gil Statement at ¶ 11-19; M. Ballantine Statement at ¶ 80-84.
[183] Sala Tribunal de Tierras Jurisdicción Original – La Vega Final Judgment (October 5, 2015) (C-69).
[184] M. Ballantine Statement at ¶ 87.
[185] M. Ballantine Statement at ¶ 87.
[186] M. Ballantine Statement at ¶ 87.
[187] M. Ballantine Statement at ¶ 87-88.

their investment. They later became citizens of the Dominican Republic in 2010 for purposed of asset protection and to assist their marketing efforts at Jamaca.[188] While they resided in the DR, the Ballantines' accounts maintained in the United States contained significantly more funds than their Dominican accounts did. The Ballantines continued to paid taxes in the United States every year.[189]

156. In September 2016, The Ballantines began taking steps to renounce their Dominican citizenship.[190] Because the Respondent has destroyed the Ballantines' investment, the Ballantines have returned to the United States and have no intention of living in the DR.

157. CAFTA Article 10.28 sets out a non-exhaustive list of qualified investments. The Ballantines have made a series of investments in the DR, starting in 2007, including many of the items listed in Article 10.28. These investments include ownership of land, ownership and control of domestic businesses, licenses and permits, debt, management, concession and revenue sharing, among other things.

158. The Claimants submit their claims to arbitration (i) on their own behalf under CAFTA-DR Article 10.16(1)(a) and (ii) on behalf of enterprises incorporated in the Dominican Republic that the Claimants directly or indirectly own or control (the "Enterprises") under CAFTA-DR Article 10.16(1)(b).

159. For example, the Ballantines own or control several Dominican Enterprises– including Jamaca de Dios SRL, Aroma de la Montana, E.I.R.L., Pino Cipres Investments SRL, Pina Aroma Investments SRL, and Upper Dreams Investments SRL. The Ballantines have other ownership rights and concessions.[191] These investments are qualified investments in

[188] M. Ballantine Statement at ¶ 88.
[189] M. Ballantine Statement at ¶ 91.
[190] M. Ballantine Statement at ¶ 91.
[191] See Notice of Arbitration at ¶ 20-24.

accordance with CAFTA Article 10.28.

B. The Respondent's Commitment to Protect Foreign Investment Under CAFTA-DR

160. CAFTA-DR is a multilateral agreement designed to encourage and protect foreign investment and to promote the rule of law. In the CAFTA-DR preamble, the Respondent and the United States agreed – among other things – to:

> "ENSURE a predictable commercial framework for business planning and investment;
>
> * * *
>
> "PROMOTE transparency and eliminate bribery and corruption in international trade and investment."

161. Moreover, in the first Chapter of CAFTA-DR, Article 1.2, the Respondent agreed the objectives of CAFTA-DR were to apply international rules and standards in order increase investment opportunities:

> "The objectives of the Agreement, as elaborated more specifically through its principles and rules, including national treatment, most favored-nation treatment, and transparency, are to substantially increase investment opportunities in the territories of the Parties".

162. In order to foster investment and promote transparency, the Respondent made a commitment to eliminate bribery and corruption in international investment. Specifically, CAFTA-DR Article 18.7, entitled "Statement of Principle," states that the "Parties affirm their resolve to eliminate bribery and corruption in international trade and investment."

163. The Respondent's violations of CAFTA-DR must be viewed in light of these obligations to which Respondent has agreed.

164. The continuing wrongful actions of the Respondent described herein were intentional, willful, wanton, and capricious. These actions demonstrated a callous indifference

to the rights of the Ballantines and violated the principles and the specific provisions of CAFTA-DR. Importantly, the failure of Respondent to deal with its corruption and favoring of local investors has damaged its ability to attract investment and lies at the heart of its actions towards the Ballantines.

C. The Timing of the Respondent's Conduct Under CAFTA-DR

165. CAFTA-DR entered into force for the Dominican Republic on March 1, 2007. Article 10.1 of CAFTA-DR states that the Chapter "does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into for of this Agreement."

166. The Ballantines' claims are directed toward acts and facts that are legally actionable under CAFTA-DR. Among other things, CAFTA-DR protects investors from Parties' treaty violations that exist at the time that the Agreement entered into force, and violations that occur after the date of entry into force.

167. Here, the acts and facts set forth above are actionable under CAFTA-DR because they constitute violations by Respondent that occurred after CAFTA-DR's date of entry into force on March 1, 2007.

V. RESPONDENT'S CAFTA VIOLATIONS

A. The Respondent's Actions Constitute Violations of Articles 10.3 and 10.4 of CAFTA-DR

168. Respondent has breached its National Treatment and MFN obligations under CAFTA-DR. Respondent has subjected the Ballantines to wrongful treatment[192] that is not

[192] Respondent's wrongful treatment of the Ballantines violates several of its obligations under CAFTA-DR. Even were, however, this treatment not an expropriation or a fair and equitable treatment violation, the fact that the Respondent has treated its domestic investors and non-U.S. investors more favorably than the Ballantines is sufficient to find a violation here. *See, e.g., Marvin Feldman v. Mexico,* Case No.

applied to domestic and non-U.S. investors.

169. Article 10.3 of CAFTA-DR provides that:

> "1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> "2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> "3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part."

170. Article 10.4 of CAFTA-DR, which is entitled "Most-Favored-Nation Treatment," provides that:

> "1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> "2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

171. These broad provisions expressly apply to both "investors" and "investments",

---

ARB(AF)/99/1 (NAFTA), ¶ 137 ("*Feldman*") (CLA-5) (stating that national treatment is distinct from expropriation).

meaning that Respondent has an obligation to investors to treat them as favorably as it does its nationals and all foreigners. Separately, and in addition to the obligation to investors, Respondent has an obligation to treat the investments in the same no less favorable manner.

172. The purpose of National Treatment is "to ensure that a national measure does not upset the competitive relationship between domestic and foreign investors."[193]

173. The MFN provision obligates the Respondent to treat U.S. investors and investments no less favorably than investors and investments from other foreign countries. The fundamental purpose of the MFN protection is to guarantee equality of competitive opportunities for foreign investors in a foreign state.

174. The Tribunal in *Cargill v. Mexico* laid out the basic requirements of these obligations:

> "[I]t must be demonstrated first that the Claimant, as an investor, is in "like circumstances" with the investor of another Party or of a non-Party, or that the Claimant's investment is in "like circumstances" with the investment of an investor of another Party or of a non-Party. And second, it must be shown that the treatment received by Claimant was less favorable than the treatment received by the comparable investor or investment."[194]

175. The concept of "like circumstances" is not rigid, but instead should be tailored by the tribunal to the context of each case. As the *Pope & Talbot II* tribunal explained, by "their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations."[195]

---

[193] *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (NAFTA), ICSID Case No. ARB(AF)/04/05 (Award, November 21, 2007) ("*ADM*" (NAFTA)), ¶ 199 (CLA-6).

[194] *Cargill, Inc. v. United Mexican States* (NAFTA), ICSID Case No. ARB(AF)/05/2 (Award, 18 September 2009) ("*Cargill* (NAFTA)"), ¶ 228 (CLA-8).

[195] *Pope & Talbot Inc. v. Government of Canada* (NAFTA), UNCITRAL (Phase 2 Merits Award, April 10, 2001) ("*Pope & Talbot II* (NAFTA)"), ¶ 75 (CLA-9).

176. To determine the "like" examples, the Tribunal should find the most apt comparators where possible. As the *Methanex* tribunal explained, "it would be as perverse to ignore identical comparators if they were available and to use comparators that were less 'like,' as it would be perverse to refuse to find and to apply less 'like' comparators when no identical comparators existed."[196]

177. The first step in the analysis is to identify comparators in "like circumstances." Tribunals engaged in a "like circumstances" inquiry have considered three principal factors in identifying comparators in like circumstances. Tribunals have considered whether the comparators (1) operate in the same business or economic sector, (2) produce competing goods or services, and (3) are subject to a comparable legal regime or requirements.[197] Tribunals assess these factors in the context of the claim, focusing on analysis of the circumstances relevant to the measure taken.[198]

178. One factor considered in establishing appropriate comparators is whether the investor's enterprise operates and competes in the same business sector as the proposed comparators.[199] The analysis focuses on the commercial operations of the investor, rather than the scale of those operations.[200] Tribunals examine the business's various activities, including

---

[196] *Methanex Corp. v. United States of America* (NAFTA), UNCITRAL (Final Award, August 3, 2005)("*Methanex* (NAFTA)"), Part IV, Ch. B, ¶ 17 (CLA-11).
[197] *Pope & Talbot II* (NAFTA), ¶ 78 (CLA-9) ("the treatment accorded a foreign owned investment protected by Article 1102(2) should be compared with that accorded domestic investments in the same business or economic sector"); *ADM* (NAFTA), ¶ 199 (CLA-6) (In analyzing like circumstances "tribunals convened under Chapter Eleven have focused mainly on the competitive relationship between investors in the marketplace."); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (NAFTA), UNCITRAL (Award, January 12, 2011) ("*Grand River* (NAFTA)"), ¶ 167 (CLA-12) ("the identity of the legal regime(s) applicable to a claimant and its purported comparators to be a compelling factor in assessing whether like is indeed being compared to like….").
[198] *Cargill* (NAFTA), ¶ 207 (CLA-8).
[199] *Corn Products International v. Mexico* (NAFTA), ICSID Case No. ARB(AF)/04/01 (Decision on Responsibility, January 15, 2008)¶ 120 ("*CPI* (NAFTA)) (CLA-13).
[200] *Pakerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8 (Award, September 11, 2007) ("*Pakerings*"), ¶ 391 (CLA-14).

the economics of the services offered, the logistics and internal controls on those operations, and the customer base.[201]

179. A second factor tribunals have examined when considering like circumstances is whether the investor provides the same or competing goods or services as its proposed comparators. Tribunals have found producers of both identical goods as well as directly competing goods to be in like circumstances. For example, in *Corn Products International v. Mexico* ("CPI"), a NAFTA tribunal considered a single comparator and found like circumstances where the claimant's sweetener (high fructose corn syrup) was in direct competition with a different sweetener produced by national companies (cane sugar).[202] Accordingly, where an investor's product is in direct competition with that of a comparator, this factor supports a conclusion that the two entities are in "like circumstances."[203]

180. The third factor tribunals have considered in determining comparators in like circumstances is whether the claimant and the comparator are subject to the same legal regime with regard to the subject matter of the claim.

181. "NAFTA tribunals have given significant weight to the legal regimes applicable to particular entities in assessing whether they are in 'like circumstances'. . ."[204] The tribunal in *Grand River*, conducting its own comparison *sua sponte*, determined that the appropriate comparators for the claimant were those "potentially subject to [the same legal penalties]."[205] Likewise, in *Merrill & Ring v. Canada*, the NAFTA tribunal found that the

[201] *UPS v. Canada*, (NAFTA), UNCITRAL (Merits Award, May 24, 2007), ¶¶ 101–04 (CLA-15).
[202] *CPI* (NAFTA), ¶ 120 (CLA-13); see also *S.D. Myers v. Canada*, (NAFTA) UNCITRAL (Partial Award November 13, 2000) ("*S.D. Myers I* (NAFTA)"), ¶ 251 (CLA-17) (holding that companies that compete for business were in like circumstances). The *S.D. Myers* tribunal noted that the claimant was in a position to attract customers from its competitors because it had extensive experience and credibility.
[203] *CPI* (NAFTA), ¶ 120 (CLA-13).
[204] *Grand River* (NAFTA), ¶ 166 (CLA-12).
[205] *Grand River* (NAFTA), ¶ 165 (CLA-12).

"proper comparison is between investors which are subject to the same regulatory measures under the same jurisdictional authority."[206]

182. Here, the Ballantines' comparators fall into all three categories. The Ballantines compete with other business in the resort/restaurant/hotel sectors. Although the Ballantines; resort property is known as the gold standard, it nonetheless competes with other companies providing high end residential communities in the DR. Lastly, the Ballantines' investment is comparable to dozens of businesses which are subject to the permitting requirements and national park restrictions – meaning essentially any development in the DR.

183. The projects described above, Jarabacoa Mountain Garden, Mirador Del Pino, Aloma Mountain, Paso Alto, and Quintas Del Bosque, are the most direct list of comparators to the Ballantines. These businesses are in the residential and hospitality sectors, compete directly with the Ballantines' project, and are supposedly subject to the same legal regime.

184. Having established the mode of deciding comparators, the Tribunal has to determine whether the Ballantines have been treated less favorably than these or other comparators.[207]

185. Tribunals have held that the term "'no less favorable' means equivalent to, not better or worse than, the best treatment accorded to the comparator."[208] A State's measures may create nationality-based discrimination *de jure* or *de facto*.[209] A *de jure* discriminatory

[206] *Merrill & Ring v. Canada* (NAFTA), UNCITRAL (Award, March 31, 2010), ("*Merrill* (NAFTA)"), ¶ 89 (CLA-16).

[207] Despite the purported open record laws in the DR, the Ballantines and their counsel have not been able to obtain records from Respondent about other projects that would likewise be comparators. The Ballantines reserve the right to supplement the list of comparators are receiving information about other projects through the document disclosure.

[208] *Pope & Talbot II* (NAFTA) (CLA-9), ¶ 42; *ADM* (NAFTA), ¶ 205 (CLA-6) ("Accordingly, Claimants and their investment are entitled to the best level of treatment available to any other domestic investor or investment operating in like circumstances…").

[209] *ADM* (NAFTA), ¶ 193 (CLA-6); *CPI* (NAFTA), ¶ 115 (CLA-13) (explaining "that Article 1102

measure is one that "on [its] face treat[s] certain entities differently,"[210] A *de facto* discriminatory measure "includes measures which are neutral on their face but which result in differential treatment" or which are applied differently to other investors.[211]

186. Here, although the rules regarding slopes, the national park and other measures ostensibly would apply to the Ballantines' comparators, Respondent's application of what it asserts to be these rules has been applied in a much less favorable manner to the Ballantines. For example:

- The Ballantines were repeatedly denied the right to develop their property based on the assertion that some of the area had slopes exceeding 60 percent. Other projects (non U.S.), which includes every mountain project in Jarabacoa, were allowed to develop property that had slopes in excess of 60 percent.

- The Ballantines have been denied the right to build a road and subsequently sell its subdivided property due to it being declared a national park. Other projects (non U.S.) have been granted permits in protected areas such as national parks. Politically-connected Dominican projects, such as the neighboring Aloma project, have been allowed to build in the national park in the absence of a permit.

- Respondent requires the Ballantines to obtain permits from the Ministry of Environment in order to construct a road and buildings. Other projects (Dominican) have been allowed to build without such a permit. These include, among others, the Aloma project and Los Aquellos, owned by Gerinaldo de lo Santos, a prominent local businessman.[212]

- The Ballantines' property was purposefully included in a protected area while other projects (non-U.S.) were purposefully excluded, as can be seen from the national park's borders.

- The President of the Dominican Republic rejected an appeal from the Ballantines regarding the permit denial while he directly intervened for a political crony to reverse a permit denial for Jarabacoa Mountain Garden.

- The Ballantines were denied the right to receive a no objection letter from the City of Jarabacoa – or even a denial of such a letter – that was required to proceed with the

---

embraces de facto as well as de jure discrimination.").
[210] *ADM* (NAFTA), ¶ 193 (CLA-6).
[211] *ADM* (NAFTA), ¶ 193 (CLA-6).
[212] See attached Photographs of Los Aquellos development (C-73).

permitting for the Mountain Lodge while other projects (non U.S.) were given no-objection letters. The Ballantines are not aware of any developer who was denied a response to its request for a no objection letter, much less had such a request denied from the City of Jarabacoa.

- The Ballantines lost control over their road while other projects (non U.S.) were allowed to maintain dominion over their roads.

- Respondent maintained aggressive inspections and fines against the Ballantines and their investments while Dominican and non-U.S. owned projects did not receive such inspections and fines.

- The Respondent specifically required the Ballantines to complete an intensive Environmental ICA report every 6 months, which the Ballantines did for 15 consecutive 6 month periods. Respondent has not required any Dominican project in the area to file these reports, with the exception of Quintas del Bosque which filed one report, one time prior to their application to expand.

187. Once the claimant has established that it is treated less favorably than comparators in like circumstances, as the Ballantines have done, the burden shifts to Respondent to demonstrate that the less favorable treatment describe above and elsewhere was justified.[213]

188. In doing so, the Respondent must show that its differential treatment of the Ballantine "bears a reasonable relationship to rational policies not motivated by [nationality-based preferences]."[214] In other words, the Respondent must show the reasonable relationship to rational policies that would allow, among other things, it to prevent the Ballantines from developing when similarly situated businesses with land that has slopes over 60 percent are allowed to develop. The same is true of the entities that have been allowed to develop in the so-called protected areas. Likewise, the Respondent must offer the same credible information to explain why the Ballantines' road has been nationalized when other private roads have been allowed to remain private.

[213] *Feldman* (NAFTA), ¶ 176 (CLA-5).
[214] *Pope & Talbot II* (NAFTA), ¶¶ 79, 88 (CLA-9).

189. Moreover, a State does not meet this burden where it could have achieved its policy objective through non-discriminatory means.[215] For example, in *S.D. Myers*, Canada attempted to justify its restrictions on the exportation of certain hazardous chemical waste products (PCBs) to the United States by claiming the ban was necessary "to ensure the economic strength of the Canadian industry, in part, because it wanted to maintain the ability to process PCBs within Canada in the future."[216] The tribunal considered this indirect objective "understandable" but held that the means Canada used to achieve it "contravened Canada's international commitments under the NAFTA . . . ."[217] In other words, no matter how laudable the goal (even though here the goal was to discriminate against the Ballantines), the means the state uses to achieve that goal has to be non-discriminatory in its application.

190. When tribunals are called upon to assess whether a State's treatment of an investor bears a "reasonable relationship to a rational policy" tribunals have identified two elements necessary to justify such measures. For a state's conduct to be reasonable, "it is not sufficient that it be related to a rational policy; it is also necessary that, in the implementation of that policy, the state's acts have been appropriately tailored to the pursuit of that rational policy with due regard for the consequences imposed on investors."[218] Thus, a justification defense demands that the State prove (1) "the existence of a rational policy", and (2) an "appropriate correlation between the state's public policy objective and the measure adopted to achieve

[215] The creation of the national park is a stark example of this. Had the Respondent wanted to set aside some land as a national park, it could do so consistent with its expropriation obligations under Article 10.7. Where, though, as here, the Respondent drew the lines with the precise intent to include a U.S. investor while painstakingly avoiding two Dominican projects shows that non-discriminatory means were not used. This is especially true when the projects excluded by Respondent, such as Jarabacoa Mountain Garden, are right next to the water ways that the national park is ostensibly designed to protect.
[216] *S.D. Myers I* (NAFTA), ¶ 255 (CLA-17).
[217] *S.D. Myers I* (NAFTA), ¶¶ 195, 255 (CLA-17).
[218] *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20 (Award, December 11, 2013) ("*Micula*"), ¶ 525 (CLA-18).

it."[219]

191. To satisfy the existence of a rational policy element, Respondent must show that implementation of the policy occurred "following a logical (good sense) explanation and with the aim of addressing a public interest matter."[220] Under the second prong, the tribunal must assess the "reasonableness" of the measure by examining "the nature of the measure and the way it is implemented."[221] This requires the tribunal to assess the "correlation between the state's policy objective and the measures adopted to achieve it."[222] Where the correlation is "reasonable, proportionate, and consistent" a tribunal will find the measure to be reasonably related to a rational policy.[223]

192. Here, even if the measures were appropriately reasonable, the measure has not been applied consistently. The Ballantines have been prevented from developing their property, have had their land rendered completely useless by being placed in a national park, and have lost dominion over their road, among other things. Respondent has not consistently applied these measures – as it interprets them – to competing businesses, Dominican businesses.

193. Likewise, here, the circumstances show that Respondent's intent was to discriminate against the Ballantines. Even if were not Respondent's intent, and the disparate treatment was purely accidental or an administrative defect, this would not cure or ameliorate the violation.

194. Under the like circumstances and less favorable treatment legal standard, the

[219] *AES Summit Generation Ltd. and AES-Tisza Erömü KRT v. Hungary*, ICSID Case No. ARB/07/22 (Award, September 23, 2010) ("*AES*"), ¶¶ 10.3.7, 10.3.9 (CLA-19).
[220] *AES*, ¶ 10.3.8 (CLA-19).
[221] *AES*, ¶¶ 10.3.7, 10.3.9 (CLA-19).
[222] *AES*, ¶ 10.3.35 (CLA-19).
[223] *AES*, ¶ 10.3.36 (CLA-19).

investor is not required to show that the less favorable treatment is a result of the investor's nationality; rather, it need show only that the elements of the test are met. That is, a claimant need not show nationality-based animus, or, indeed, any intent to discriminate.[224]

195. Tribunals have recognized that "requiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government. It would be virtually impossible for any claimant to meet the burden of demonstrating that a government's motivation for discrimination is nationality rather than some other reason."[225] A tribunal's discrimination inquiry must focus on the discriminatory effect of the alleged violation on the investor and its investment, and not the government's intent.[226]

196. To be sure, several tribunals have relied upon evidence of intent in finding the requisite discrimination.[227] Where the Government's intent to discriminate based on nationality is demonstrated, this can be dispositive in establishing discrimination based on nationality. Accordingly, proof of intent to discriminate based on nationality is sufficient to establish the requisite discrimination, but it is not necessary to the Tribunal's analysis.

B. The Respondent's Actions Constitute a Violation of the Fair and Equitable Treatment Obligation in Article 10.5 of CAFTA-DR

197. The Respondent's actions constitute a violation of the "fair and equitable" treatment obligation in clear contravention of Article 10.5 of CAFTA-DR, entitled "Minimum Standards of Treatment."

---

[224] *Feldman* (NAFTA), ¶ 183 (CLA-5); *see also International Thunderbird Gaming Corp. v. Mexico* (NAFTA), UNCITRAL (Award, January 26, 2006) ("*Thunderbird* (NAFTA)", ¶¶ 176-77 (CLA-20).
[225] *Feldman* (NAFTA), ¶ 183 (CLA-5); see also *Thunderbird* (NAFTA), ¶¶ 176-77 (CLA-20).
[226] *See, e.g.*, Kinnear, Meg N., et al., INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, Supplement No. 1 (Kluwer Law International 2006), at 1102-24 and 1102-41 (CLA-22).
[227] *Feldman* (NAFTA), ¶¶ 181-182 (CLA-5).

198. Article 10.5 provides that:

> "1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> "2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
>
> > "(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world"

199. As the U.S. Government and commentators have observed, Article 10.5 of the CAFTA-DR is substantively identical to Article 1105 of the NAFTA.[228] As explained below, the decisions of tribunals in NAFTA cases and other relevant cases establish that a State will be deemed to have violated the obligation to accord a foreign investor the minimum standard of treatment if it violates an investor's legitimate expectation on which the investor relied to make the investment, if it failed to act in good faith or with evident discrimination, or if it engaged in arbitrary conduct.

200. While bad faith on the part of the State necessarily will establish a violation of the minimum standard of treatment, an investor need not demonstrate bad faith to engage the

[228] *See*, *e.g.*, United States Trade Representative, The Dominican Republic – Central America – United States Free Trade Agreement: Summary of the Agreement, available at http://www.ustraderep.gov/assets/Trade_Agreements/Regional/CAFTA/Briefing_Book/asset_upload_file74_7284.pdf (observing that the provisions of CAFTA-DR "reflect traditional standards incorporated in earlier U.S. investment agreements (including those in the North American Free Trade Agreement and U.S. bilateral investment treaties) and in customary international law"); *see also Interpretation of the Free Trade Commission of Certain Chapter 11 Provisions*, 31 July 2001, available at http://www.state.gov/documents/organization/38790.pdf.

international responsibility of the State.

201. The minimum standard of treatment is not based on rules in place at the time of the *Neer* decision but instead on a developing body of law. In *Mondev v. United States*, for example, the tribunal found "no doubt" that the NAFTA's reference to the minimum standard of treatment refers to the standard under "customary international law as it stood no earlier than the time at which NAFTA came into force."[229] The *Mondev* tribunal acknowledged the considerable development over the years in both substantive and procedural rights under international law, as well as the state practice as reflected in the multitude of investment treaties that "almost uniformly provide for fair and equitable treatment of foreign investments."[230] Although *Mondev* is a NAFTA decision, the same concept is true of CAFTA-DR, which came into effect in 2009.

202. As further noted by *Mondev* tribunal, each State party to the NAFTA accepted that the minimum standard of treatment "can evolve" and "has evolved."[231] The *Mondev* tribunal thus concluded that in today's world "what is unfair or inequitable need not equate with the outrageous or the egregious," and "a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith."[232]

203. In *ADF v. United States*, another NAFTA case, the tribunal agreed with and quoted the *Mondev* decision.[233] The *ADF* tribunal observed that "the customary international law referred to in Article 1105(1) is not 'frozen in time' and that the minimum standard of

[229] *Mondev International Ltd. v. United States of America*, NAFTA, ICSID Case No. ARB(AF)/99/2 (Award, Oct. 11, 2002), at 125 ("*Mondev* (NAFTA)") (CLA-23).
[230] *Mondev* (NAFTA), ¶¶ 116-117 (CLA-23).
[231] *Mondev* (NAFTA), ¶ 124 (CLA-23).
[232] *Mondev* (NAFTA),. ¶ 116 (CLA-23).
[233] *ADF Group Inc. v. United States of America*, NAFTA, ICSID Case No. ARB(AF)/00/1 (Award, Jan. 9, 2003, 180-186 ("*ADF* (NAFTA)") (CLA-24).

treatment does evolve."[234] The *ADF* tribunal further observed that a State would be deemed to have violated the minimum standard of treatment if its measures were "idiosyncratic or aberrant and arbitrary."[235]

204. Bilateral investment treaties are evidence of state practice and evidence of customary international law. As explained by the *Mondev* Tribunal, these treaties incorporate the fair and equitable treatment standard in an attempt to incorporate customary international law; such adoption, as indicated by the United States, is both a matter of state practice and "can evidence opinio juris," or a sense of legal obligation under customary international law.[236] Decisions issued pursuant to these treaties can thus "serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation."[237] Thus, decisions of other tribunals can highlight the myriad of ways that a state can violate the minimum standard.

205. In *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, the Tribunal held that the minimum standard "is infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety."[238] The tribunal concluded that such is "the content of the minimum standard of treatment in customary international law."[239]

206. In *Waste Management v. Mexico (II)*, the tribunal, considering decisions that

[234] *ADF* (NAFTA), ¶ 179 (CLA-24).
[235] *ADF* (NAFTA), ¶ 188 (CLA-24).
[236] *Mondev* (NAFTA), ¶ 111 (CLA-23).
[237] *Glamis Gold v. United States*, NAFTA, UNCITRAL (Award, June 8, 2009) ("*Glamis Gold* (NAFTA"), ¶ 605 (CLA-25).
[238] *TECO Guatemala Holdings, LLC v. Guatemala*, CAFTA-DR, ICSID Case No. ARB/10/17 (Award, December 19, 2013), ("*TECO* (CAFTA-DR)"), ¶ 454 (CLA-26).
[239] *TECO* (CAFTA-DR), ¶ 455 (CLA-26).

came before it, illustrated some of the types of state action that would violate the minimum standard of fair and equitable treatment in its modern context:

> "The *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process."[240]

207. The tribunal in *Biwater* extensively cited *Waste Management II* in explaining that the general standard of fair and equitable treatment includes a number of components, including "Transparency, consistency, nondiscrimination: the standard also implies that the conduct of the State must be transparent, consistent and non-discriminatory, that is, not based on unjustifiable distinctions or arbitrary."[241]

208. One of the key pillars of the minimum standard is that the state's actions cannot be discriminatory. Here, as outlined below, the Respondent has openly and plainly discriminated against the Ballantines with respect their treatment, including but not limited to denying the Ballantines' permits while allowing Dominican developers to proceed ahead.

209. In sum, the minimum standard of treatment involves four pillars: protection against discriminatory,[242] arbitrary,[243] grossly unfair, unjust or idiosyncratic,[244] or

---

[240] Waste Management, Inc. v. Mexico, NAFTA, ICSID Case No. ARB(AF)/00/3 (Award, April 30, 2004) ("Waste Management II (NAFTA)"), ¶ 98 (CLA-27).
[241] *Biwater Gauff. v. Tanzania*, ICSID Case No. ARB/05/22 (Award with Dissent, July 24, 2008) ("*Biwater*"), ¶ 602 (CLA-21).
[242] *See Waste Management II* (NAFTA), ¶ 98 (CLA-27); GAMI Investments v. Mexico, NAFTA, UNCITRAL, (Award, November 15, 2004) ("GAMI (NAFTA)") ¶ 94 (CLA-49); *TECO* (CAFTA-DR), ¶ 454 (CLA-26).
[243] *See S.D. Myers I* (NAFTA), ¶¶ 262-263 (CLA-17); *Merrill* (NAFTA), ¶ 187 (CLA-16); *Waste Management II* (NAFTA), ¶ 98 (CLA-27); *GAMI* (NAFTA), ¶ 94 (CLA-49); *TECO* (CAFTA-DR), ¶ 454

nontransparent treatment.[245] A State may breach the standard with a single act involving the violation of at least one pillar, or the breach may be cumulative and become apparent only when considering the State's acts in the aggregate, under one or more pillars.[246]

210. Here, Respondent has violated each of these pillars. More troubling, when the entirety of the wrongs are considered as a whole – as the Tribunal must do – the fact that Respondent has violated the minimum standard of treatment for the Ballantines becomes even more evident.

1. Respondent Has Acted In A Discriminatory, Arbitrary, Unjust, And Non Transparent Manner Towards The Ballantines

211. As set out in detail above, Respondent's acts have violated each of the four pillars of fair and equitable treatment. Some examples of this include:

- **Discrimination re Slopes**: Respondent's application of its purported rules regarding slopes has been discriminatorily applied – even if this rule means what Respondent asserts it does. The Ballantines were restricted from building a road in Phase 2 and/or undertaking any development of the land while other projects were allowed to develop areas with slopes over 60 percent.

- **Discrimination re Creation of National Park**: Respondent discriminated against the Ballantines with the creation of the National Park. The National Park, as is evident from the boundaries, was drawn to encompass the Ballantines' property while excluding other Dominican owned properties. Moreover, the purported justification for the park – the protection of the Baiguate waterfall and river – would have required

---

(CLA-26). Some tribunals have stated that "manifest arbitrariness is required to violate the minimum standard. *See, e.g.*, *Glamis Gold* (NAFTA), at 22 (CLA-25). Whether a tribunal refers to "arbitrariness" or "manifest arbitrariness," tribunals have not been consistent in the application of these terms. *See id*., at 614. In any event, whether one uses the term arbitrary of manifestly arbitrary, Respondent has violated CAFTA Article 1105 by breaching the minimum standard.

[244] *Waste Management II* (NAFTA), ¶ 98 (CLA-27).

[245] *See TECO* (CAFTA-DR), ¶ 457 (CLA-26); *Merrill* (NAFTA), ¶ 187 (CLA-16); *Waste Management II* (NAFTA), ¶ 98 (CLA-27); Metalclad Corp. v. Mexico, ICSID Case No. ARB(AF)/97/1 Award, August 30, 2000) ("*Metalclad*"), ¶ 76 (CLA-29).

[246] *See TECO* (CAFTA-DR), ¶¶ 658, *et seq*. (CLA-26) (the state regulator's issuance of a resolution that disregarded, without providing reasons, a neutral (but non-binding) commission report was arbitrary and therefore breached the minimum standard of treatment under Article 10.5 of CAFTA-DR); *Cargill* (NAFTA), ¶¶ 297-305 (CLA-8) (finding that a single import permit requirement violated Article 1105 because it was "manifestly unjust").

the National Park to encompass these Dominican properties. Yet Respondent did not do so.

- **Discrimination re Permitting in Protected Areas**: Respondent discriminated against the Ballantines with respect to the permitting for the National Park, which is a "protected area" under Dominican law. While the Ballantines have been denied the right to conduct any development activities within Phase 2, other businesses have been allowed to conduct activities and develop properties in protected areas.

- **Discrimination re Inspections and Fines**: Respondent subjected the Ballantines to frequent, harassing inspections to which it did not subject Dominican-owned businesses. In addition, Respondent fined the Ballantines for activities that Dominican-owned businesses undertake regularly in the absence of permits.

- **Discrimination re Road**: Respondent discriminated against the Ballantines with respect to the road going through the Ballantines' resort. The Ballantines were forced by Respondent to make their road public while Dominican businesses have been allowed to maintain private roads.

- **Discrimination re Environmental Rules**: Respondent required the Ballantines to comply with purported Dominican laws and regulations that it did not require of Dominican-owned businesses. For example, Respondent required the Ballantines to submit extensive ICA reports every 6-month while other businesses had no such requirement.

- **Arbitrary Denial of Permit re Slopes**: The Ballantines were denied the right to do any develop portion of Phase 2 because, as Respondent asserts, a portion of that property contains slopes in excess of 60 percent. Unlike other properties, the Ballantines were not allowed to develop even areas of the property at all. Respondent has never explained – nor can it – why an entire area of land is rendered useless because some of that land purportedly has slopes exceeding 60 percent.

- **Arbitrary re Creation of National Park**: Respondent's creation of a National Park in the Ballantines' property it planned to develop was arbitrary. Respondent asserts that the National Park was necessary to protect the Baiguate Waterfall and River, as well as the purported protection of walnut trees. Yet the Ballantines' land faces away from the Baiguate Waterfall and River and, consequently, does not affect the Baiguate Waterfall and River as the runoff on the Ballantines' property goes elsewhere. In contrast, properties whose run off goes directly to Baiguate was left out of the protected area. In addition, there is no evidence that there are any walnut trees on the Ballantines' property.

- **Arbitrary Refusal to Issue No Objection Letter**: The Ballantines requested a No Objection Letter on October 1, 2013 from the City of Jarabacoa for the construction of a mountain lodge on Phase 1. To date, more than three years later, Respondent's officials have yet to issue the letter or to refuse to issue the letter. Respondent has

instead just decided not to act and leave the issue in complete limbo. During that time, the Ballantines understand that the City of Jarabacoa has issued many no objection letters to other projects.

- **Unjust Treatment re Slopes**: For similar reasons to the above, Respondent's denial of the permit for Phase 2 based on slopes was unjust. The Ballantines were denied the right to develop property while other mountain developments in Jarabacoa have slopes superior to 60 percent and were allowed to develop their properties.

- **Unfair Treatment re National Park**: For similar reasons to the above, Respondent's creation of a National Park in the manner it did, purposefully excluding Dominican businesses, was unjust and unfair. Moreover, the manner in which Respondent created the national park – i.e., in an essentially secret process without any real opportunity to comment upon or challenge the creation of the National Park – was unfair and unjust. In addition, the failure of Respondent to have a meaningful mechanism to obtain adequate compensation for land expropriated by the park is unfair and unjust.

  In addition, the Respondent still to this day has not created a management plan for the Park, more than seven years later. This is a requirement of Dominican law that ostensibly tells the affected businesses what uses are permissible, among other things. The failure to develop this park management plan is unfair and unjust.

- **Non Transparency re Slopes**: Respondent has acted non transparently with respect to its denial of the permit based on the slopes. As stated above, Respondent denied the Ballantines the right to conduct any development of their Phase 2 property, irrespective of whether slopes exceeded 60 percent on those portions. The Ballantines never received an explanation as to why the overwhelming percentage of their property not exceeding 60 percent could not be developed.

- **Non Transparency re National Park**: Respondent essentially created a National Park in secret, without giving the Ballantines the right to comment upon or object to the Park. The boundaries of the Park were so opaque that even the local environmental officials were not sure of the Park's boundaries. Even – apparently – the national environmental officials were not sure of the boundaries of the Park as they did not assert the National Park as a basis to deny the Ballantines' permit until their fourth request.

The list above is not exhaustive of the ways in which the Respondent has violated its Minimum Standard obligation.

212. The Ballantines have laid out the examples of Respondent's actions above **individually** in order to provide illustrations of Respondent's actions. The Tribunal, however, should not examine each of Respondent's bad acts in isolation. Rather, the Tribunal should

examine the cumulative effect of the Respondent's actions when determining whether Respondent violated Article 10.5.[247]

2. Respondent Has Violated The Ballantines' Legitimate Investment-Backed Expectations

213. Some tribunals have also found that the minimum standard encompasses a protection of an investor's legitimate investment-backed expectations. The *Merrill & Ring* Tribunal, for example, applied its evolving reasonableness standard to arrive at a less definitive relationship between specific assurances and a breach of the minimum standard: "any investor will have an expectation that its business may be conducted in a normal framework free of interference from government regulations which are not underpinned by appropriate public policy purposes."[248]

214. It is not surprising, then, that several ICSID tribunals have explicitly stated that a stable legal and business environment is an essential element of fair and equitable treatment under both the so-called Treaty standard and the customary international law minimum standard of treatment.[249] As the *CMS* Tribunal explained:

> "[T]he Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law."[250]

215. This is precisely the situation under CAFTA. Just as the *CMS Gas* tribunal highlighted the subject BIT's preamble to give meaning to the "somewhat vague" fair and

---

[247] Any of these acts would be sufficient by itself to constitute a violation of Article 10.5. Nevertheless, when you examine the acts together, the unfair and inequitable treatment becomes all the more apparent.
[248] *Merrill* (NAFTA), ¶ 233 (CLA-16).
[249] *Rumeli Telekom, et al. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, ¶¶ 609-11 (CLA-50) (stating that the tribunal shares the view of several tribunals that have found that the "treaty standard of fair and equitable treatment is not materially different from the minimum standard").
[250] *CMS Gas v. Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 284 (CLA-7).

equitable treatment standard, so too CAFTA's Preamble includes among its principal objectives to "ENSURE a predictable commercial framework for business planning and investment."[251]

216. For several years, when the Ballantines were deciding whether to continue to invest, Respondent granted the necessary permits, no objection letters, and other legal effects necessary for the Ballantines to build, manage, and operate Phase 1. In addition, Respondent provided the appropriate police protections for the investment and allowed the road to remain private for the development.

217. With the *sub rosa*, arbitrary creation of the National Park, the various denials of the permit, the whipping up of local residents against the project, among other things, the Respondent turned a relatively stable environment into a Kafkaesque nightmare for the Ballantines. The Ballantines has every right to expect the Respondent to continue to grant permits as it had done before. This is especially true because Phase 1 included areas with a slope exceeding 60 percent.

218. Lastly, the standard of treatment primarily is focused on the effects State acts have upon a claimant, and not on the intentions of the State. Thus, for example, evidence of bad faith or willful neglect, while typically sufficient to establish a breach of the standard, is not necessary to establish that a breach has occurred.[252]

219. Through the actions described above, Respondent has violated Article 10.5 of CAFTA-DR and continues to impair the Ballantines' investments, rendering them economically useless.

---

[251] CAFTA Preamble.

[252] *Cargill* (NAFTA), ¶ 296 (CLA-8) ("The Tribunal observes that other NAFTA tribunals have expressed the view that the standard of fair and equitable treatment is not so strict as to require "bad faith" or 'willful neglect of duty'. The Tribunal agrees. However, the Tribunal emphasizes that although bad faith or willful neglect of duty is not required, the presence of such circumstances will certainly suffice."); *Glamis Gold*, ¶ 560 (NAFTA) (CLA-25) ("Although bad faith would meet the standards described, most tribunals agree that a breach of Article 1105 does not require bad faith.").

C. The Respondent's Actions Constitute a Failure to Provide Full Protection and Security under Article 10.5 of CAFTA-DR

220. As laid out above, Article 10.5 of CAFTA-DR obligates Respondent to provide investments with "full protection and security." Article 10.5 describes this obligation requiring "each Party to provide the level of police protection required under customary international law."

221. The "full protection and security" standard applies essentially when the foreign investment has been affected by civil strife and physical violence.[253]

222. *The American Manufacturing and Trading* ("*AMT*") Tribunal held that the host State "must show that it has taken all measures of precaution to protect the investments of [the investor] in its territory."[254]

223. The host State is required to exercise due diligence in proving such protection. As the *Wena* Tribunal stated, agreeing with the AMT Tribunal:

> "The obligation incumbent on the [host State] is an obligation of vigilance, in the sense that the [host State] shall take all measures necessary to ensure the full enjoyment of protection and security of its investments and should not be permitted to invoke its own legislation to detract from any such obligation."[255]

224. Here, not only did Respondent's officials fail to protect the Ballantines' investment but also it also purposefully created the situation that led to the need for protection. As stated above, officials from the City of Jarabacoa, after obtaining an illegal resolution opening the road that the Ballantines built, whipped up local townspeople to cause them to

[253] *See American Manufacturing & Trading, Inc. (AMT) (USA) v. Republic of Zaire*, ICSID Case No. ARB/93/1, February 21, 1997, pps. 29-30 (CLA-34) (lack of protection against loss of investment caused by widespread looting); *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, (ICSID Case No. ARB (AF)/00/2) Award, 29 May 2003 ("*Tecmed*"), ¶¶ 175-177 (CLA-30) (alleged lack of the host State's protection against interference with the investor's investment by adverse social demonstrations).
[254] *AMT*, ICSID Case No. ARB/93/1, ¶ 6.05; *see also Wena Hotels v. Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000 ("*Wena*") (CLA-40).
[255] *Wena*, , ¶ 84 (CLA-40).

attack the Ballantines' investment. On June 17, 2013, a group made up largely of local townspeople stormed Jamaca and proceeded to forcibly tear down three gates. This group, spurred on by Jarabacoa officials, burned objects, leveled death threats against the Ballantines, and harassed and terrified employees of Jamaca. Respondent's officials took no action to protect Jamaca and its owners and officials from the mob, which is not surprising given that officials had ginned them up in the first place.

225. In addition, although not required to find a violation, Respondent's actions targeted the foreign Ballantines to the advantage of local, competing businesses. Respondent has not ordered the expropriation of other roads, such as the roads of Quintas del Bosque, Jarabacoa Mountain Garden, Paso Alto, Mirador del Pino, nor the Aloma Mountain project owned by the politically connected Juan Jose Dominguez. Respondent's officials likewise have not whipped up the townspeople to destroy these other properties.

226. By engaging in the actions described above, Respondent has violated this obligation owed to the Ballantines.

D. The Respondent's Actions Constitute an Expropriation in Violation of Article 10.7 of CAFTA-DR

227. The Respondent has expropriated the Ballantines' investment directly through specific measures and indirectly through a series of measures designed to deprive the Ballantines of the use and enjoyment of their investment.

228. Article 10.7 of CAFTA-DR, entitled "Expropriation and Compensation," states in relevant part that

> "No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:
>
> (a) for a public purpose;

(b) in a non-discriminatory manner;

(c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and

(d) in accordance with due process of law and Article10.5.62."

1. Respondent's Acts Have Substantially Deprived the Ballantines of Their Investment

229. Article 10.7 refers to both direct and indirect expropriation. Direct expropriation has been described as the compulsory transfer of title to property to the State or a third party, or the outright seizure of property by the State. By contrast, a measure or measures tantamount to expropriation is an interference with an investment that deprives the investor of the possibility to utilize the investment in a meaningful way. When measures are tantamount to expropriation, "there may have been no actual transfer, taking or loss of property by any person or entity, but rather an effect on property which makes formal distinctions of ownership irrelevant."[256]

230. Tribunals have found that a substantial deprivation amounting to expropriation occurs where:

- the investment is no longer capable of generating a commercial return;[257]
- the investor has lost, in whole or in significant part, the use or reasonably-to-be expected economic benefit of the investment;[258]
- the most economically optimal use of the investment has been rendered useless;[259] or

[256] "*Waste Management II*" (NAFTA), ¶ 143 (CLA-27).
[257] *Burlington Resources v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, December 14, 2012, ¶ 398 (CLA-28).
[258] *Metalclad* ¶ 103 (CLA-29); *ADM* (NAFTA), ¶ 240 (CLA-6)..
[259] *ADM* (NAFTA), ¶ 246 (CLA-6).

- the investment's economic value has been neutralized or destroyed, as if the rights related thereto had ceased to exist.[260]

231. Under CAFTA, an indirect expropriation occurs where a Government action or series of actions has an "effect equivalent to direct expropriation without formal transfer of title or outright seizure."[261] By definition, the Ballantines are not required to show that the Respondent has ever formally seized their investments – e.g., the land or company – but, rather, must only demonstrate that an indirect expropriation occurred under the three-factor test set forth in CAFTA Annex 10-C.

232. CAFTA Annex 10-C states that, in order for a State action or series of actions to constitute an expropriation, it must "interfere[] with a tangible or intangible property right or property interest in an investment."[262] For a claim of indirect expropriation, Annex 10-C sets forth three specific factors this Tribunal must consider as part of its fact-based inquiry:

> (i) the economic impact of the government action . . . (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action."[263]

233. It is well established that "[a] taking of property includes … any such unreasonable interference with the use, enjoyment or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference."[264] How long is

[260] *Tecmed*, ¶ 115 (CLA-30); *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012 ("*Electrabel*"), ¶ 6.62 (CLA-31); *CME Czech Republic B.V. v. The Czech Republic* (UNCITRAL) Partial Award, September 13, 2001 ("*CME*, Partial Award") ¶ 604 (CLA-32).
[261] CAFTA Annex 10-C, ¶ 4 (CLA-33).
[262] CAFTA Annex 10-C, ¶ 2 (CLA-33).
[263] CAFTA Annex 10-C, ¶ 4(a) (CLA-33).
[264] Louis B. Sohn and R. R. Baxter, "*Responsibility of States for Injuries to Aliens*," 55 Am. J. Int'l L. 545, 553 (1961).

"reasonable" will "depend on the specific circumstances of the case."[265] As the tribunal in *Azurix Corp. v. Argentine Republic* noted:

> "Arbitral tribunals have considered that a measure is not ephemeral if the property was out of the control of the investor for a year (Wena) or an export license was suspended for four months (Middle East Cement), or that the measure was ephemeral if it lasted for three months (S.D. Myers). These cases involved a single measure. When considering multiple measures, it will depend on the duration of their cumulative effect. Unfortunately, there is no mathematical formula to reach a mechanical result. How much time is needed must be judged by the specific circumstances of each case. As expressed by the tribunal in Generation Ukraine: 'The outcome is a judgment, i.e., the product of discernment, and not the printout of a computer program.'"[266]

234. International jurisprudence has consistently held that the standard for indirect expropriation is whether the State measure resulted in "substantial deprivation" or "substantial impairment" of the investor's economic rights or reasonably expected economic benefits from its investment, even if the investor still retains nominal or legal ownership of the investment or investment assets. As the tribunal in *Vivendi III* explained:

> "International tribunals treat the severity of the economic impact caused by a regulatory measure as an important element in determining if the measure constitutes an expropriation requiring compensation. One question often asked is whether the challenged governmental measure resulted in "substantial deprivation" of the investment or its economic benefits. . . .Thus, in applying the provisions of the three BITs applicable to these cases, this Tribunal will have to determine whether they effected a substantial, permanent deprivation of the Claimants' investments or the enjoyment of those investments' economic benefits."[267]

235. In applying customary international law, tribunals have held that the

[265] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006) ("*Azurix*"), ¶ 313 (CLA-35).
[266] *Azurix*, ¶ 313 (CLA-35).
[267] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Award, July 30, 2010) ("*Vivendi III* Award"), ¶ 134 (CLA-36).

deprivation must be both lasting and substantial to constitute an expropriation.[268] For example, the *Pope & Talbot* tribunal stated:

> "While it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been "taken" from the owner. Thus, the Harvard Draft defines the standard as requiring interference that would justify an inference that the owner will not be able to use, enjoy, or dispose of the property. . . The Restatement, in addressing the question whether regulation may be considered expropriation speaks of "action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property." Indeed . . . under international law, expropriation requires a "substantial deprivation."[269]

236. In *Azurix*, the tribunal phrased the standard as whether the State measure deprived the investor "in whole or significant part, of the use or reasonably-to-be-expected economic benefit of its investment."[270] *Middle East Cement* describes measures constituting indirect expropriation as measures with the effect of "depriv[ing] the investor of the use and benefit of its investment."[271] And the tribunal in *Metalclad* stated that an indirect expropriation under NAFTA involves "covert or incidental interference with the use of the property which has the effect of depriving the owner, in whole or significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[272]

237. The Ballantines have been substantially deprived of their investments by Respondent's expropriatory acts. Although the Ballantines maintained legal ownership of the

[268] *Pope & Talbot Inc. v. Government of Canada*, Interim Award (26 June 2000) ("*Pope & Talbot* Interim Award") (CLA-10).
[269] *Pope & Talbot* Interim Award. at ¶ 102 (CLA-10).
[270] *Azurix* Award, ¶ 316 (CLA-35).
[271] *Middle East Cement Shipping and Handling Co. S.A. v. Egypt*, ICSID Case No. ARB/99/6, Award, April 12, 2002, ¶ 107 ("*Middle East Cement*") (CLA-37).
[272] *Metalclad*, ¶ 103 (CLA-29).

land, the concessions, and other investments, the Respondent's acts deprived those investments of any value.

238. For example, Respondent's creation of the National Park in Phase 2 has deprived that land of any use – according to Respondent's denial. Thus, the Ballantines are left with title to land that has no value. Prior to the denial based on the National Park, the Respondent had already denied the Ballantines' efforts to develop Phase 2 because – purportedly – some of the land had slopes exceeding 60 percent. This denial likewise deprived the Ballantines' Phase 2 of all substantial value as it could not be developed. These are expropriatory acts.

239. Another example of expropriation is the Respondent's refusal to issue a no objection letter for the Mountain lodge. Although the Ballantines still hold title to the land on which the Mountain Lodge was to be built, that land has been deprived of its value because the development cannot take place.

2. Respondent's Expropriatory Acts Were Illegal

240. Even were the Respondent's expropriations legal, which they were not, the Respondent would still be obligated to pay compensation for the expropriation.[273] Here, however, the Respondent's various expropriatory acts amounted to an illegal expropriation.

241. In order to constitute a legal expropriation, the acts must be (a) for a public purpose; (b) non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; **and** (d) in accordance with due process of law.[274] If Respondent's acts do not satisfy all these criteria, the expropriation is *de facto* illegal.

242. Here, the Respondent's acts do not satisfy any of these requirements, thus

[273] *Tidewater v. Venezuela*, ICSID Case No. ARB/10/5, Award, March 13, 2015 (CLA-38).
[274] CAFTA, Article 10.7.

making the acts an illegal expropriation.

243. First, the Respondent's acts were not for a public purpose. Although, facially, Respondent's denials of the permit were purported to be for a public purpose – *i.e*., the environment – those reasons were pretextual and cannot be credited. Had the basis for the pretextual acts been to protect the environment, Respondent would have enforced these purported rules to other resorts – which it did not. Other businesses have been allowed to develop areas that contain slopes exceeding 60 percent and/or in protected areas.

244. The same is true of the expropriation of the Ballantines road. Although the expropriation of this road is purportedly to allow persons to use the road, the Respondent has not made private roads owned by Dominican citizens public.

245. The refusal of the City of Jarabacoa to act on the Ballantines' request for a no objection letter cannot be argued to be in the public interest. The officials have simply refused to act at all, preventing the Ballantines from using that land.

246. Second, for the same reasons as above, the expropriatory acts are discriminatory. Respondent has rendered the Ballantines' land useless while allowing Dominican citizens to develop areas that include slopes of 60 percent and/or that are in national parks. In addition, the City of Jarabacoa apparently continues to issue non objection letters to Dominican projects and developments, while refusing to answer the Ballantines.

247. Third, Respondent has paid the Ballantines no compensation for the expropriation, much less prompt, adequate, and effective compensation.

248. Under CAFTA, in the event of an expropriation, the expropriating state must compensate Claimants as follows:

> "Compensation shall:

> "(a) be paid without delay;
>
> "(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation");
>
> "(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
>
> "(d) be fully realizable and freely transferable."

249. Not only has Respondent paid no compensation for its expropriation, Respondent does not have a meaningful mechanism for the Ballantines to seek compensation for these acts. For example, Dominican law does not allow for compensation for the creation of a national park unless the government decides to take title to the land. Here, the Respondent has not after six years even made a management plan for the park. So long as the government does not take title of the property, it can avoid the payment of compensation under its own laws. This legal regime violates Respondent's expropriation obligations under CAFTA.

250. Fourth, Respondent's expropriatory acts violate due process of law. As stated immediately above, Respondent does not have a valid mechanism to challenge the lack of compensation for the taking of land pursuant to a National Park. In addition, Respondent's failure to issue a non objection letter (or a denial of same) also lacks a valid mechanism for challenge. Moreover, Respondent's purported resolution declaring the Ballantines' road public was made by an entity not permitted under Dominican law to make those determinations.

251. In this case, Respondent has not satisfied any of the elements to make this a legal expropriation, much less all of the elements.

252. Through the actions described above, the Respondent has expropriated and continues to deprive the Ballantines of their investment.

E. Respondent Should Be Estopped From Relying On Its Alleged Laws Regarding Slopes To Escape Liability

253. The Respondent should not be heard to use its interpretation of its laws regarding slopes as a defense to its liability.

254. As a factual matter, Respondent approved the development of Phase 1 of Jamaca de Dios even though that phase appears to have slopes in excess of 60 percent. The Ballantines relied on this approval when they continued to invest and purchase additional property for Phase 2.

255. More importantly, to the Ballantines' knowledge, based on attempts to acquire information about competing projects, Respondent has not prohibited development completely on any property using this law as a basis. Prior to the denial based on slope, the Ballantines watched as other properties with slopes in excess of 60 percent were allowed to develop.

256. Even if Respondent was correct about the law, which it is not, and the denial was not pretextual, which it was, the Respondent should be estopped from seeking to apply its interpretation of the law to escape liability for its denial to the Ballantines.

257. Estoppel prevents the Respondent from using this defense when it has sanctioned the legality of Phase 1 and Dominican-owned projects. In Middle East Cement v. Egypt, the tribunal prevented Egypt from denying the ownership of the investment by Middle East Cement.[275] The Tribunal held that when "Respondent treat[s] Claimant as the owner of the Poseidon when collecting the auction price, they are barred from disputing its ownership under the BIT."[276]

258. In *CME v. Czech Republic*, the tribunal noted the effect of the investor's

[275] *Middle East Cement*, ¶ 135 (CLA-37).
[276] *Middle East* Cement, ¶ 135 (CLA-37).

reliance on the determination of the state's prior affirmation of legality. The Tribunal noted:

> "This change of the legal position of the host State towards the foreign investor is in the eyes of this Tribunal unacceptable and cannot be given credence or effect. It cannot be easily reconciled with the principle that a party cannot be heard to deny that which it has previously affirmed and on which the other party has acted in reliance."[277]

259. Putting aside the national treatment and expropriation issues, Respondent cannot now claim that its slopes determination is proper when it has let every other mountain project with slopes in excess of 60 percent develop on their property.

F. The Respondent's Actions Constitute a Violation of Transparency Under Article 18 of CAFTA-DR

260. Article 18 of CAFTA-DR provides a series of obligations of Respondent regarding transparency. Specifically, among other things, Article 18.2 obligates Respondent to:

> "ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them."

261. Article 18.2 further obligates Respondent, to the extent possible, to:

> "(a) publish in advance any such measure that it proposes to adopt; and
>
> (b) provide interested persons and Parties a reasonable opportunity to comment on such proposed measures."

262. Respondent thus has an obligation to promptly publish changes to its laws, procedures, etc. Respondent is likewise obligated to provide interested persons with a reasonable opportunity to comment on these proposed measures.

263. With respect to the creation of the National Park, the Respondent utterly failed

[277] CME, Partial Award (CLA-32).

to do either of these things in violation of its CAFTA obligations.

264. The Ballantines, like apparently all landowners within the Baiguate National Park, were given no advance notice of the expropriation of their land. To the contrary, neither the Ballantines, nor other landowners with the newly designated National Park, were notified by Respondent that a National Park had been created on their land even after the Park was created.

265. Accordingly, the Ballantines were provided no opportunity – much less a reasonable opportunity – to be heard with respect to the inclusion of their property within the boundaries of Park.

266. Even had Respondent published the planned creation of the National Park in a reasonable manner, which it did not, Respondent did not create any legitimate process by which the Ballantines could challenge the purported rationale for the park or the inclusion of their land in the park.

267. Importantly, Respondent has created no mechanism for the Ballantines to obtain compensation of any type for this taking of their land. Thus, and in fact because of this, Respondent has not paid the Ballantines for this taking.

268. In addition, the City of Jarabacoa specifically passed a resolution making public the Ballantines' road. Even though this legislation was specifically targeted at the Ballantines, Respondent did not publish this proposed law in advance and, consequently, the Ballantines were unable to comment on the proposed law.

269. Respondent has also flouted its obligations under Article 18.7 with regard to corruption. Article 18.7 provides that the "Parties affirm their resolve to eliminate bribery and corruption in international trade and investment." Respondent has shown that this is yet another CAFTA obligation that it does not take seriously.

270. As an initial matter, one just has to read the news to see the endemic corruption of Respondent's officials. The U.S. Justice Department recently revealed that the Brazilian firm Odebrecht had paid bribes to Respondent's officials of US$92 million in order to obtain large contracts. After the U.S. Justice Department released report, Respondent's Attorney General opened an investigation. But this is too little too late. The knowledge of Odebrecht's contracts in the DR were well known to Respondent's officials. For example, one of the Odebrecht contracts in question was the building of a mountain road in Jarabacoa that cost US$100 million to build. Reports in the DR at that time noted that other contractors had offered to construct the road at a fraction of that price.

271. One of Respondent's Senators, Felix Bautista, was finally charged with money laundering after having alleged for years to be corrupt. Respondent's courts dismissed the charges in a manner that led Respondent's own Attorney General to declare that impunity has triumphed. These are but a small portion of the flood of stories of Respondent's corrupt officials.

272. Such corruption has the effect of harming investment and creating disparities and unfairness throughout the country. This can be seen, in a small part, with regard to the Ballantines' investment. DR officials have allowed politically connected Dominicans to build without permits, excluded their property with precision from the National Park, while destroying the Ballantines' investment in order to eliminate the competition.

273. Jarabacoa City Council Members demanded that taxes be paid to them instead of the city and, when the Ballantines refused to do so, refused to take any action on the Ballantines' request for a no-objection letter for the Mountain Lodge.

274. These acts are pernicious and created the situation where the Ballantines have

come before this Tribunal to seek relief.

VI. QUANTUM OF DAMAGE

275. Respondent's violations of CAFTA-DR have caused the Ballantines direct damages of US$37.5 million. The Respondent's bad acts, individually and collectively, had the effect of depriving the Ballantines the fruits of their investment and hard work. These direct damages will wipe out the consequences of Respondent's illegal acts and put the Ballantines in the financial position they would have been in had these breaches not occurred.

276. In addition, Respondent should be liable for moral damages in the amount of US$4 million to the Ballantines, which is roughly 10% of the Ballantines' commercial damages.

A. Respondent Must Compensate the Ballantines for Any Financially Assessable Damage

277. The customary international law standard for the assessment of damages resulting from an unlawful act is set out in the decision of the PCIJ in the *Chorzów Factory* case. As noted by the Court:

> "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[278]

278. The Tribunal in *Metalclad v. Mexico*, among many others, used the *Chorzów Factory* standard:

> "where the state has acted contrary to its obligations, any award to the claimant should, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would in all probability have existed if that act had not been committed (the status quo ante)."[279]

279. The *Chorzów Factory* standard is reflected today in the ILC's Articles on State Responsibility, and in particular in their compensation provision, which provides as follows:

[278] *Factory at Chorzów* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 at 47 (Sept. 13) (CLA-39).
[279] *Metalclad*, at 122 (CLA-29).

> "Article 36. Compensation 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation *shall cover any financially assessable damage including loss of profits* insofar as it is established."[280]

The Articles expressly contemplate the awarding of damages based on lost profits. This is further confirmed by Commentary to Article 36, which states that lost profits is an appropriate measure:

> "(21) The reference point for valuation purposes is the loss suffered by the claimant whose property rights have been infringed. This loss is usually assessed by reference to specific heads of damage relating to (i) compensation for capital value; (ii) compensation for loss of profits; and (iii) incidental expenses."[281]

280. Here, as set out below, the Ballantines seek compensation for profits they lost as a result of Respondent's breach of CAFTA-DR.

B. The Ballantines Have Suffered Severe Economic Damage as a Result of the Respondent's Violations of CAFTA

281. Prior to the Respondent's measures, the Ballantines had a thriving, expanding operations. The Respondent's measures had the effect of all but destroying the Ballantines' investment. Taken in isolation, the discriminatory denial of the permit or the creation of a national park in order to exclude favored properties destroyed the Ballantines' project. When all the Respondent's acts are considered, however, it becomes even more evident as to the damages the Ballantines have suffered.

282. Respondent's pattern of harassment and disparate treatment affected the Ballantines' investment as a whole. For example, the negative press attention that followed the

---

[280] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-Third Session 56 U.N. GAOR Supp. (No. 10) at art. 35, U.N. Doc. A/56/10 (2001)* ("Draft ILC Articles") (CLA-41) (emphasis added).
[281] Commentary to Responsibility of States for Intentionally Wrongful Acts ("ILC Commentaries) , p. 238 (CLA-42).

resolution of the road being made public and the physical threats and verbal harassment of Jamaca's residents and employees, created significant uncertainty about the project's future.

283. In contrast, prior to Respondent's bad acts, the Ballantines' success in developing the first phase of Jamaca De Dios gave them reasonable and appropriate expectations and confidence with respect to the economic prospects concerning their Phase 2 plans. Respondent's *volte face* destroyed the Ballantines' expansion efforts and consequently affected the value of the Ballantines' continuing investments in Phase 1 of Jamaca. The Ballantines have been forced to leave the Dominican Republic and to abandon their dream of completing the Jamaca de Dios development, and expanding the Jamaca De Dios brand to specific additional opportunities in Jarabacoa.

284. The US$37.5 million in direct damages suffered by the Ballantines as a result of the Respondent's acts includes damages as follows from the following:

a. distributable cash flows from Phase 2 land;
b. distributable cash flows from the construction of luxury homes in Phase 2;
c. distributable cash flows from remaining lots in Phase 1;
d. expansion cost of the Aroma restaurant;
e. distributable cash flows from the Mountain Lodge;
f. distributable cash flows from the Apartment Complex;
g. distributable cash flows from the Phase 2 boutique hotel and spa;
h. distributable cash flows from development of the Paso Alto project;
i. loss of future investment and brand diminution;
j. loss of the value of the Phase 1 expropriated road; and
k. prejudgment interest compounded monthly.

285. Included with this Amended Statement of Claim is the expert report of James Farrell from Berkeley Research Group. Mr. Farrell quantifies the damage done to the

Ballantines' investment by reference to the various elements of damage. The assumptions and predictions that underlie Mr. Farrell's valuation are well articulated, rational, conservative, and based on the proper exercise of professional judgment.

286. Mr. Farrell took great care to not overstate the damage amounts. This can be seen, for example, that Mr. Farrell found that the Hotel Taino would have resulted in negative cash flows over the examined period of the investment. Mr. Farrell's other figures likewise reflected a fair and reasoned examination of the predictive elements.

287. Mr. Farrell also included a conservative interest figure of 5.5%, which was based on the Central Bank of the Dominican Republic's "Monetary Policy Rate."[282] This figure is far below the standard consumer-borrowing rate in the Dominican Republic, which regularly exceeds 15%. Again, Mr. Farrell took great effort to provide as unbiased and fair report as possible.[283]

288. The damages outlined in Mr. Farrell's report are available to the Ballantines irrespective of how this Tribunal characterizes Respondent's CAFTA-DR violations. These damages flow equally from the inequitable and discriminatory treatment of the Ballantines, and from the illegal expropriation of the Ballantines property.

289. A brief description of each damage element follows.

290. **Phase 2 Lot Sales**. At the time that the Dominican Republic first denied the Ballantines' request to develop Phase 2, the Ballantines owned approximately 283,000 square

[282] *See* Banco Central de la Republica Dominicana press release (November 30, 2016) (C-72).

[283] The perception that tribunals "split the baby" with regard to damages amount is ever present. *See, e.g.*, Kevin T. Jacobs & Matthew G. Paulson, The Convergence of Renewed Nationalization, Rising Commodities, and "Americanization" in International Arbitration and the Need for More Rigorous Legal and Procedural Defenses, 43 TEX. INT'L L.J. 359, 365 (2007) (CLA-43) (noting a "perceived tendency of arbitrators to 'split the baby'") (quoting Robert B. von Mehren, An International Arbitrator's Point of View, 10 AM. REV. INT'L ARB. 203, 208 (1999). The Ballantines did not want to engage in a game of trying to inflate the damages figures in order to obtain a better "baby splitting" result. The Ballantines have confidence in the Tribunal to award actual damages based on the Respondent's breaches.

meters of land in Phase 2. Although they were in the process of negotiating and purchasing approximately 200,000 additional square meters in parcels 1541 and 1542 as part of their expansion plans, the Ballantines chose not to purchase any additional property until they were able to reverse the wrongful denial of their expansion license. Unfortunately, they were unable to do so.

291. Of that 283,000 square meters, the Ballantines planned that 20,000 square meters would be needed for the boutique hotel and spa they intended to build, approximately 8% of the land would be needed for the Phase 2 road and 10% would be dedicated to green space (which includes areas in Phase 2 where the slope exceed 60 percent). This would leave roughly 210,000 square meters of developable property, which would be divided into 70 lots with an average size of nearly 3,000 square meters.

292. The value of these Phase 2 lots was dramatic. Lots near the top of Phase 1 sold between 2012 and 2014 in amounts ranging from $78 per square meter to $107 per square meter, and the higher elevations of phase 2 would support even higher prices, especially as one moved up to the ridgeline of the mountain that would have panoramic views to the north and south. The addition of the Mountain Lodge and the boutique hotel and spa would have increased valuations as well. Mr. Farrell has performed an analysis of relevant Phase 1 lot sales to determine an economically conservative price per square meter for lots at three different elevations within the contemplated Phase 2 development. The projected hotel location acts as an appropriate marker delineating different Phase 2 zones. The Ballantines were to subdivide 28 lots up to the altitude where the hotel would be built, 14 additional lots between the hotel and the top of the mountain, and 28 lots at the top of the mountain. Mr. Farrell's analysis, which considers both existing Phase 1 sales and the opinions of local Jarabacoa real estate

experts, calculates the net present value of the loss of these Phase 2 sales lot sales at US$ 12,990,326.

293. It is important to emphasize that these are conservative projections. Phase 2 lots could be sold for amounts well in excess of $100 per square meter. Nevertheless, the Ballantines have chosen instead to base their damage projections based upon the actual sales experience of Jamaca De Dios, which reveal an expected increase in land values as one moves higher up the mountain.[284]

294. **Lost Profits on Phase 2 Construction**. The Ballantines had acquired engineering and construction experience in building the restaurant, other buildings in the complex, and several of the luxury houses that were sold in Phase 1. Jamaca de Dios had established a construction division and hired a full time construction manager, as well as a licensed civil engineer and administrative staff, to manage the construction of Phase 2 homes. The Ballantines were requiring all the purchasers of Phase 2 lots to use the Ballantines' construction company.

295. The attached witness statement of Wesley Proch confirms the substantial preparations made by Jamaca de Dios for this effort, which included purchasing heavy equipment, hiring and training employees, and selecting subcontractors.

296. Mr. Farrell has calculated the net EBT for constructing the Phase 2 houses at US$5,186,845. His detailed and conservative analysis utilizes expected construction costs, local comparables, and prior experience at Jamaca de Dios.

297. **Phase 1 Lot Sales**. The Ballantines had sold almost all of Phase 1 prior to the

[284] The cost to subdivide the property must be subtracted from the gross lot sale revenue. Mr. Farrell's analysis evaluates the anticipated cost to extend the road to the top of Phase 2, and to prepare and bring other utilities to the individual lots.

Respondent's wrongful actions – specifically the resolution ordering the Phase 1 road made public and inciting the townspeople to storm the project and tear down the gates. Following these acts, and the uncertainty following the denials and creation of a National Park, the Ballantines have been unable to sell the remaining lots in Phase 1.

298. As discussed in the Witness Statement of Ms. Zuleika, the Respondent's targeted harassment and denials greatly affected the situation in Phase 1 for Jamaca, much less Phase 2. Potential buyers expressed concern about the long term viability of the project given the Respondent's actions.

299. Mr. Farrell calculates the loss of sales for the remaining Phase 1 lots (excluding the lot for the Mountain Lodge) at US$218,920. This is a conservative figure based on previous lot sales, with expenses deducted for the cost of sales.

300. **Expansion Cost of Aroma Restaurant**. The Ballantines expanded their restaurant entirely in anticipation of expanding their complex. As testified by Mr. Ballantine, the expansion was to account for the increased sales as a result of the additional 70 home sites in Jamaca. Had the Ballantines known that Respondent would deny their permit while allowing Dominican owned projects permits under similar circumstances, the Ballantines would have never spent the money to expend the restaurant.

301. As testified by Mr. Ballantine and as evidenced by C-48, the Ballantines spent US$1,201,001 to expand the Aroma restaurant. The Ballantines are entitled to compensation for these expansion costs of US$1.2 million.

302. **Lost Profits from the Mountain Lodge, the Apartment Complex, and the Boutique Hotel and Spa.** The success of the Phase 1 development revealed the market need for additional forms of upscale accommodation in the Jarabacoa area. The Ballantines invested

significant time, effort, and money in developing plans for the construction of three different multi-unit buildings throughout the complex. The Ballantines intended to build a boutique hotel with a spa near the middle of the upper portion of the property. The attached analysis shows that although the project was unlikely to create significant profit for Jamaca de Dios, but the Ballantines believed that it was a critical element to their expanded complex and would further distinguish the development for its competitors, would further support the value of the lots in the upper phase, and further drive income to the Aroma restaurant.

303. The Ballantines also affirmatively sought permission to build the Mountain Lodge and the evidentiary record reveals the failure of Respondent to even act on that request. The Ballantines also planned to build an apartment complex in Phase 1.

304. Mr. Farrell's report calculates the damages as a result of Respondent's actions as follows: (US$ 372,497) for the Hotel, US$1,315,624 for lost Mountain Lodge sales, US$512,499 net EBT for Mountain Lodge management fees, US$901,499 for lost Apartment sales, and US$326,942 net EBT for Apartment management fees.

305. **Lost Profits associated with the Development of the Paso Alto project.** The value of the Paso Alto complex is significant. The addition of the Jamaca name and development experience to the topographical beauty of Paso Alto would have allowed that project to commercially flourish. Jamaca had a letter of intent to purchase the property and the final terms of acquisition were close to complete. Respondent's discriminatory and harassing acts against the Ballantines made any further development impossible.

306. Mr. Farrell's analysis presents the lost profits to Jamaca de Dios as a result of its inability to acquire and develop Paso Alto because of the Respondent's bad acts. Mr. Farrell calculates this loss at US$4,268,891. As part of this calculation, Mr. Farrell deducted the

engineering and infrastructure expenses necessary to complete the project.

307. **Loss of Future Investment and Brand Diminution.** As explained by Mr. Farrell, the Ballantines' future investment opportunities and their brand have been adversely impacted, both financially and reputationally, from Respondent's actions and inactions. Mr. Farrell calculated the future earnings of the Ballantines' properties and examined how those earnings were affected by the damage from Respondent. Mr. Farrell calculates the loss of future investment and brand diminution at US$2,168,500.

308. **Lost Value of the Expropriated Road.** The Ballantines paid for the construction of the Phase 1 Road. This road was built to be a private road by the Ballantines. The Resolution by the Municipality of Jarabacoa changed the private road into a public road, thereby expropriating the road that the Ballantines had built for public use. The Ballantines are entitled to the value of the road that was made public.

309. Mr. Farrell examined the investment cost and replacement cost of both phases of the expropriated road. He calculates the loss resulting from the expropriation of the road at US$1,894,147.

310. **Prejudgment Interest.** Mr. Farrell calculated prejudgment interest from January 15 2014, when the Ministry of Environment sent its final denial notice.

311. As discussed above, Mr. Farrell used an interest figure of 5.5%, which is significantly below the commercial borrowing rate for the Dominican Republic.

312. Mr. Farrell further compounded the interest on a monthly basis.

313. Interest compounded monthly is the appropriate standard to use for this calculation. As an initial matter, there is little uncertainty with respect compound interest being the appropriate measure in investor-state. As the Tribunal in *Siag v. Egypt* recently noted, the

claimants "submitted that since 2000, no less than 15 out of 16 tribunals have awarded compound interest on damages in investment disputes."[285]

314. The reason tribunals use compound interest is that "compound interest is a closer measure to the actual value lost by an investor."[286] This justification exists in the instant case as well. The Ballantines would have had instant access to profits resulting from lot sales, restaurant income, etc. The Ballantines would have been able to invest that income. Those invested amounts would have similarly generated returns. Thus, in this case, lost most investor-state cases, compound interest is appropriate in order to put the Ballantines in the position they would have been had Respondent not engaged in its unlawful acts.

315. Mr. Farrell calculates the prejudgment interest of 5.5% compounded monthly at US$5,691,429.

l. The Ballantines Have Suffered Moral Damages as a Result of the Respondent's Bad Acts

316. Although not the primary purpose, compensation in investor-state arbitration is said to deter inefficient state actions.[287] Respondent has engaged in a pattern (not limited to the Ballantines) of mistreating foreign investors to the advantage of Dominican interests. Respondent's actions with respect to the Ballantines not only harmed the Ballantines but harmed its own economy and the people of the Dominican Republic.

317. In any event, Respondent's acts have greatly harmed the Ballantines above and beyond the commercial economic damages outlined above. In addition to the commercial damages, this Tribunal has the authority to assess moral damages as a result of Respondent's

[285] *Siag v. Egypt*, ICSID Case No. ARB/05/15, Award, May 11, 2009, at ¶ 595 (CLA-44).
[286] *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award, February 6, 2007, at ¶ 399 (CLA-45).
[287] *See, e.g.*, Pierre Bienvenu & Martin J. Valasek, *Compensation for Unlawful Expropriation, and Other Recent Manifestations of the Principle of Full Reparation in International Investment Law, in 50 YEARS OF THE NEW YORK CONVENTION*, 231-37 (Albert Jan van den Berg ed. 2009) at 237 (CLA-46).

wrongful actions.

318. Article 31 of the ILC provides that a State must make full reparation for any 'injury' caused to another State by an internationally wrongful act.[288] This provision further indicates that the concept of injury includes "any damage, whether material or moral, caused by the internationally wrongful act of a State."[289]

319. The work of the ILC on State Responsibility makes clear that monetary compensation is the appropriate remedy for moral damages affecting individuals, such as the Ballantines.[290] This is because moral damages suffered by individuals are clearly 'financially assessable'. As mentioned by the ILC, "no less than material injury sustained by the injured State, non-material damage is financially assessable and may be the subject of a claim of compensation, as stressed in the Lusitania case."[291]

320. Tribunals have awarded moral damages in less compelling cases. In *Desert Line v. Yemen*, the tribunal awarded moral damages to a juridical person. The tribunal, after noting that the treaty did not exclude moral damages, concluded that:

> "It is generally accepted in most legal systems that moral damages may also be recovered besides pure economic damages. There are indeed no reasons to exclude them."[292]

The *Desert Line* tribunal further noted that:

> "it is difficult, if not impossible, to substantiate a prejudice of the kind ascertained in the present award. Still, as it was held in the Lusitania cases, non-material damages may be 'very real, and the mere fact that they are difficult to measure or estimate by monetary standards makes them none the less real and affords no reason why

[288] Draft ILC Articles (CLA-41).
[289] Draft ILC Articles (CLA-41).
[290] ILC Commentaries (n 11) p 252, indicating that "compensable personal injury encompasses not only associated material losses" but also "non-material damage suffered by the individual" (CLA-42).
[291] ILC Commentaries (n 11) p 252 (CLA-42).
[292] *Desert Line Projects LLC v Yemen*, ICSID, Case No ARB/05/17, Award, February 6, 2008, at 289 (CLA-47).

> the injured person should not be compensated.'"[293]

The *Desert Line* tribunal thus held that the respondent state was "liable to reparation for the injury suffered by the Claimant, whether it be bodily, moral or material in nature."[294]

321. Here, the Ballantines have suffered moral damages as a result of Respondent's bad acts. Wittich has summarized the considerations that make up moral damages:

> "First, it includes personal injury that does not produce loss of income or generate financial expenses. Secondly, it comprises the various forms of emotional harm, such as indignity, humiliation, shame, defamation, injury to reputation and feelings, but also harm resulting from the loss of loved ones and, on a more general basis, from the loss of enjoyment of life. A third category would embrace what could be called non-material damage of a 'pathological' character, such as mental stress, anguish, anxiety, pain, suffering, stress, nervous strain, fright, fear, threat or shock. Finally, non-material damage would also cover minor consequences of a wrongful act, e.g. the affront associated with the mere fact of a breach or, as it is sometimes called, 'legal injury'."[295]

322. The Respondent's actions inflicted almost every aspect of these types of damages on the Ballantines. The Ballantines lived daily under the threat of government retribution and were subject to harassment, angry mobs, death threats, loss of reputation, and emotional harm. The Ballantines were forced to abandon the efforts of ten years of hard work in the prime of their lives. Lisa Ballantine was forced to surrender her internationally-recognized water project. They were forced to sell their home and leave their friends and colleagues in the Dominican Republic in order to escape the harassment. All of this because Respondent wanted to enrich local Dominican interests with similar projects who could not compete commercially with Jamaca de Dios.

---

[293] *Id*.
[294] *Id. at 290.*
[295] Dumberry, Patrick, *Satisfaction as a Form of Reparation for Moral Damages Suffered by Investors and Respondent States in Investor-State Arbitration Disputes* (January 31, 2012), Journal of International Dispute Settlement, p. 4, 2012 (CLA-48) (quoting S. Wittich, 'Non-Material Damage and Monetary Reparation in International Law' (2004) 15 Finnish Yearbook of International Law pp 329–30).

323. The Ballantines are not here to complain about petty slights and indignities. These are part of life. The Ballantines' complaints in this regard are about a systematic and deliberate effort to destroy their investment to favor politically-connected persons, as well as punishing the Ballantines for not enriching local officials. The Tribunal should not let the Respondent's bad behavior go unanswered and should therefore assess moral damages against Respondent.

Respectfully submitted,

DATED: January 4, 2016

s / Matthew G. Allison
One of the Attorney for Claimants