In the matter of an arbitration under the 2013 UNCITRAL Rules

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Michael Ballantine
and Lisa Ballantine,
Claimants

v.

The Dominican Republic,
Respondent.

PCA Case No. 2016-17

The Dominican Republic's Statement of Defense

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25 May 2017
(Corrected Version)

ARNOLD & PORTER KAYE SCHOLER

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I. INTRODUCTION

1. The 4 January 2017 Amended Statement of Claim ("**Amended Statement of Claim**") of Michael and Lisa Ballantine ("**the Ballantines**")[1] reads like the script from a Broadway show. The curtains open on a pair of honest and well-meaning missionaries who travel to the Dominican Republic, spreading good works and goodwill everywhere they go. Act 1 (which the Ballantines refer to as "***Phase 1***") sees the Ballantines fall in love with the Dominican Republic and its people, decide to invest there and make it their home, and — with the help of amenable and cooperative government officials (at both the national and municipal levels) — make a wonderful initial investment. Just before intermission, the Ballantines settle down in the Dominican Republic with their children, and even become Dominican nationals. Life is good.

2. But in Act 2 (or "***Phase 2***," as the Ballantines have called it), things suddenly go horribly awry: Government officials and influential Dominican nationals conspire against the Ballantines, and create a national park through an elaborate and bureaucratically cumbersome exercise that involves the identification, evaluation, and recommendation for protection of 32 different areas, and the preparation and promulgation of a formal decree approved by the President and published in the Official Gazette. The officials who had been introduced in Act 1 as helpful and collaborative are unmasked in Act 2 as the proverbial "bad guys" — abusive officials who draw the boundaries of the park arbitrarily to discriminate against the Ballantines; who impose unprecedented and punitive fines; who incite the locals to physically attack the

[1] For convenience, the present submission also refers to the Ballantines on occasion as "Claimants." These references should not be construed as an admission by the Dominican Republic that the Ballantines in fact qualify as "claimants" within the meaning of DR-CAFTA.

Ballantines' property; who flippantly ignore the Ballantines' multiple reconsideration requests; who deprive the Ballantines' property of all its value; and who ultimately mistreat the Ballantines to such an extent that they have no choice but to abandon the Dominican Republic. The curtain closes with a plea to the Tribunal to award compensation as Act 3.

3. The Tribunal should not be swayed by this script. Reality is rarely that dramatic, or that simple to recount. It typically is more complicated, and far more mundane, and this case is no exception. To be fair, there certainly are kernels of truth in the Ballantines' story — for example, the Ballantines ***have*** done an enormous and quite admirable amount of good in their lives, including in the Dominican Republic. But their arbitration against the Dominican Republic is unfair; they have not been entirely truthful in the assertions in the Amended Statement of Claim and their witness statements (as will be demonstrated); and for the reasons explained below, and in the accompanying witness statements and expert reports, their arguments and claims are utterly unfounded.

4. Ultimately, the dispute in this arbitration centers on the denial by the Dominican Ministry of Environment and Natural Resources ("**Ministry**") of a single permit application submitted by the Ballantines, for a project that is part of what the Ballantines have referred to as "Phase 2." That permit application prompted a visit by Ministry officials to the site of the proposed project, as is customary, and the preparation of technical analyses. After considered analysis, the Ministry ultimately decided to deny the permit on various technical grounds (including mainly, that much of the land that the Ballantines had proposed for their project exceeded a slope of 60%, which was the legal limit). The Ballantines then sought reconsideration — on three different occasions — of that permit denial. The Ministry conducted new site visits and new technical studies, but ultimately found no reason to depart from its

original conclusion that the project was not viable. In its third reconsideration denial letter, in addition to reiterating the technical factors that had justified the original determination to deny the permit, the Ministry also alluded to the fact that the property proposed by the Ballantines for the project was within an environmentally-protected area known as the "**Baiguate National Park**" (hereinafter also "**the Park**"). However, the considerations relating to the Park were not the central ones motivating the reconsideration denial (or even the permit denial); the permit would not have been granted even if the Baiguate National Park had never existed.

5. Ultimately, this case is mainly about the propriety of the permit denial described above. All other aspects of the case are either derivative from, or ancillary to, that core issue, or are secondary. For example, as will be shown, the entire issue of the Baiguate National Park, which perhaps has been featured by the Ballantines for its optical or theatrical value, is ultimately a mere distraction or red herring.

6. One aspect of the case that is worth noting as an introductory matter is that the nomenclature that the Ballantines use with respect to the different projects ("Phase 1" and "Phase 2") is oversimplified, and designed to confuse, to their benefit. In reality, and as will be described below, the Ballantines had five separate projects, of differing scopes and degrees of gestation (imagined, proposed, and real). They claim damages even for the merely imagined ones, as well as for projects for which they never submitted any application for a permit to the Dominican authorities. To add color, the Ballantines add claims relating to titillating physical confrontations with private parties, which also make for good theater, but which (as will also be demonstrated) ultimately have nothing to do with the Dominican State. In the end, as in Shakespeare's Macbeth, the Ballantines' case is nothing but "sound and fury signifying nothing."

* * *

7. As the Tribunal will find, the structure of the present submission differs substantially from that of the Amended Statement of Claim. The latter began with, and was dominated by a lengthy (but ultimately unsubstantiated) recounting of the tale mentioned above, which features a confusing welter of projects, people, permits, and plots of land.[2] However, the Amended Statement of Claim pays scarcely any attention to the issue of jurisdiction;[3] it describes the merits claims primarily by means of bullet-point lists;[4] and its quantum section cites no genuine evidence of injury.[5] But it is precisely these issues of jurisdiction, merits, and quantum — so hastily addressed by the Ballantines — which are the determinant ones in this dispute.

8. Accordingly, instead of beginning this Statement of Defense with a lengthy, stand-alone exposition of the facts, and then repeating those facts in the various segments of the submission, the Dominican Republic has chosen simply to incorporate facts as relevant into each of the three Sections below (jurisdiction, merits, and damages, respectively). **Section II** explains that, as a threshold matter, the Tribunal lacks jurisdiction over all of the claims asserted by the Ballantines. **Sections III** and **IV** then show that, in any event, their merits claims and quantum arguments are unfounded. The submission concludes with **Section V**, which articulates the Dominican Republic's request for relief.

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[2] *See generally* **Amended Statement of Claim**, ¶¶ 17–153 (characterizing this discussion as a "Statement of the Facts").

[3] *See* **Amended Statement of Claim**, ¶¶ 154–67 (purporting to address "Jurisdiction," but neglecting even to quote the relevant DR-CAFTA provisions).

[4] *See, e.g.*, **Amended Statement of Claim**, ¶¶ 186, 211.

[5] *See* **Amended Statement of Claim**, § VI (¶¶ 275–323). The only factual exhibit cited in this section of the Amended Statement of Claim is a November 2016 press release from the Central Bank of the Dominican Republic, which the Ballantines' quantum expert used to calculate the proposed interest rate for their requested award of damages. *See id.*, ¶ 287, fn. 282.

II. JURISDICTION

9. In their various submissions and correspondence to date, the Ballantines have approached the issue of jurisdiction as if their burden were minimal, and the onus was on the Dominican Republic to prove that jurisdiction does not exist.[6] That is not correct. As with every other aspect of their claims, the Ballantines bear the burden of proof on jurisdiction,[7] and they have failed in that regard. To demonstrate that this is so, it seems useful to begin by addressing an issue that the Ballantines agree is "foundational,"[8] but then gloss over entirely — namely, the scope of the Dominican Republic's consent. Although this issue appears to be undisputed,[9] it is worth discussing again, since it provides important context for one of the key issues in this arbitration (*viz.*, the Ballantines' nationality, and the dates on which it should be examined).

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[6] *See, e.g.*, **Letter from the Ballantines to the Tribunal** (5 October 2016), p. 3 (asserting, incorrectly, that "a claimant [need only] establish jurisdiction *pro tem*"); **Letter from the Dominican Republic to the Tribunal** (12 October 2016) (explaining that there is no such thing as "establish[ing] jurisdiction *pro tem*," and that the authority that the Ballantines had cited stood for the proposition that, at the jurisdictional stage, a tribunal should accept a claimant's rendition of *merits*-related facts *pro tem*, in order to determine whether the claimant has a viable *merits* case); **Amended Statement of Claim**, ¶¶ 154–67 (attempting to establish jurisdiction without even quoting the relevant provisions of DR-CAFTA); **Bifurcation Response**, ¶ 14 (arguing, incorrectly that "[t]his Tribunal must consider the jurisdictional assertions made by the Ballantine [*sic*] to be true"), ¶ 50 (arguing, also incorrectly, that "the Tribunal must accept [the Ballantines' factual allegations] as true for purposes of ***any*** preliminary objection") (original emphasis omitted; new emphasis added).

[7] *See, e.g.*, **RLA-003**, *Spence International Investments, LLC, et al. v. Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (25 October 2016) (Bethlehem, Kantor, Vinuesa), ¶ 239 ("The burden is . . . on the Claimants to prove the facts necessary to establish the Tribunal's jurisdiction"); **RLA-004**, *Tulip Real Estate Investment and Development Netherlands B.V. v. Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue (5 March 2013) (Griffith, Jaffe, Knieper), ¶ 48 ("As a party bears the burden of proving the facts it asserts, it is for Claimant to satisfy the burden of proof required at the jurisdictional phase"); **RLA-005**, *National Gas S.A.E. v. Egypt*, ICSID Case No. ARB/11/7, Award (3 April 2014) (Veeder, Fortier, Stern), ¶ 118 ("Although it is the Respondent which has here raised specific jurisdictional objections . . . it is for the Claimant to discharge the burden of proving all essential facts required to establish jurisdiction for its claims").

[8] *See* **Bifurcation Response**, ¶ 17.

[9] *See* **Request for Bifurcation**, § II.A (explaining that the scope of the Tribunal's jurisdiction is coextensive with the scope of the Parties' consent, and identifying the terms and scope of such consent); **Bifurcation Response**, ¶ 17 ("[T]he Ballantines do not debate the extensive recitation in Respondent's Notice concerning the framework of CAFTA-DR and its foundation upon consent of the parties").

10. The Dominican Republic's consent is set forth in Article 10.17.1 of DR-CAFTA, which states that "[e]ach Party consents ***to the submission of a claim to arbitration under this Section*** in accordance with this Agreement."[10] Because the words "this Section" are a reference to Section B of Chapter Ten, and the term "Agreement," is a reference to DR-CAFTA itself, Article 10.17.1 should be understood to mean that the Dominican Republic's consent is "to the submission of a claim to arbitration under Section B of Chapter Ten in accordance with DR-CAFTA."

11. The "submission of a claim to arbitration under Section B of Chapter Ten in accordance with DR-CAFTA" entails a very specific process, involving submission by a specific type of person[11] of a specific type of claim[12] at a specific point in time,[13] by means of a specific type of document,[14] to a specific type of adjudicator.[15] The process, which moreover is only

[10] **Ex. R-010**, DR-CAFTA, Art. 10.17.1 (emphasis added). When capitalized, the word "Party means any State for which [DR-CAFTA] is in force. **Ex. R-010**, DR-CAFTA, Art. 2.1.

[11] *See* **Ex. R-010**, DR-CAFTA, Art. 10.16.1 (authorizing a "claimant" to submit a claim either on its own behalf, or "on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly").

[12] **Ex. R-010**, DR-CAFTA, Art. 10.16.1 (authorizing a claimant to submit "a claim that the respondent has breached an obligation under [Articles 10.1 to 10.14], an investment authorization, or an investment agreement") (internal numbering omitted).

[13] *See* **Ex. R-010**, DR-CAFTA, Arts. 10.16.2, 10.16.3 (requiring a claimant to wait "[a]t least 90 days" after "deliver[ing] to the respondent a written notice of its intention to submit the claim to arbitration," and "six months [from the time of] the events giving rise to the claim" before "submitting any claim to arbitration"), Art. 10.18.1 (stating that "[n]o claim may be submitted to arbitration under this Section if more than three years from the date on which the claimant first acquired, or should have first acquired, [knowledge of the alleged breach and injury]").

[14] *See* **Ex. R-010**, DR-CAFTA, Art. 10.16.4 (explaining that "[a] claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration [is received]").

[15] **Ex. R-010**, DR-CAFTA, Art. 10.16.3 (authorizing a claimant to submit a claim to an arbitral tribunal constituted under the ICSID Convention, ICSID Additional Facility Rules, or the UNCITRAL Arbitration Rules).

available if certain conditions have been satisfied,[16] is governed by several pages of detailed rules[17] — two of which rules are important here.

12. The ***first*** is that only a "***claimant***" can "submit [a claim] to arbitration under [Section B of Chapter Ten] . . . ."[18] This rule is plain from the text of Article 10.16,[19] and the Ballantines acknowledge it explicitly.[20] As the *matryoshka*-like definitions in Article 10.28 indicate,[21] and as Figure 1 below illustrates, in a DR-CAFTA case involving dual nationals,[22] a "claimant" is "a natural person whose dominant and effective nationality is that of a Party, that

[16] *See* **Ex. R-010**, DR-CAFTA, Art. 10.18 ("Conditions and Limitations on Consent of Each Party").

[17] *See, e.g.*, **Ex. R-010**, DR-CAFTA, pp. 10-10 to 10-12 ("Submission of a Claim to Arbitration"), 10-13 to 10-14 ("Conditions and Limitations on Consent of Each Party").

[18] **Ex. R-010**, DR-CAFTA, Art. 10.16.1; *see* **Bifurcation Response**, ¶ 17 ("The Ballantines also acknowledge that they must be 'claimants' as defined in CAFTA-DR in order to pursue relief under the Treaty . . . .").

[19] **Ex. R-010**, DR-CAFTA, Art. 10.16.1 ("***[A] claimant*** . . . may submit to arbitration under this Section a claim that the respondent has breached an obligation under Section A, an investment authorization, or an investment agreement; and that the ***claimant*** [or an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly] has incurred loss or damage by reason of, or arising out of, that breach") (emphasis added), Art. 10.16.2 ("At least 90 days before submitting any claim to arbitration under this Section, ***a claimant*** shall deliver to the respondent a written notice of its intention to submit a claim to arbitration . . . .") (emphasis added), Art. 10.16.3 ("Provided that six months have elapsed since the events giving rise to the claim, ***a claimant*** may submit a claim referred to in paragraph 1: [under the ICSID Convention, the ICSID Additional Facility Rules, or the UNCITRAL Arbitration Rules]") (emphasis added).

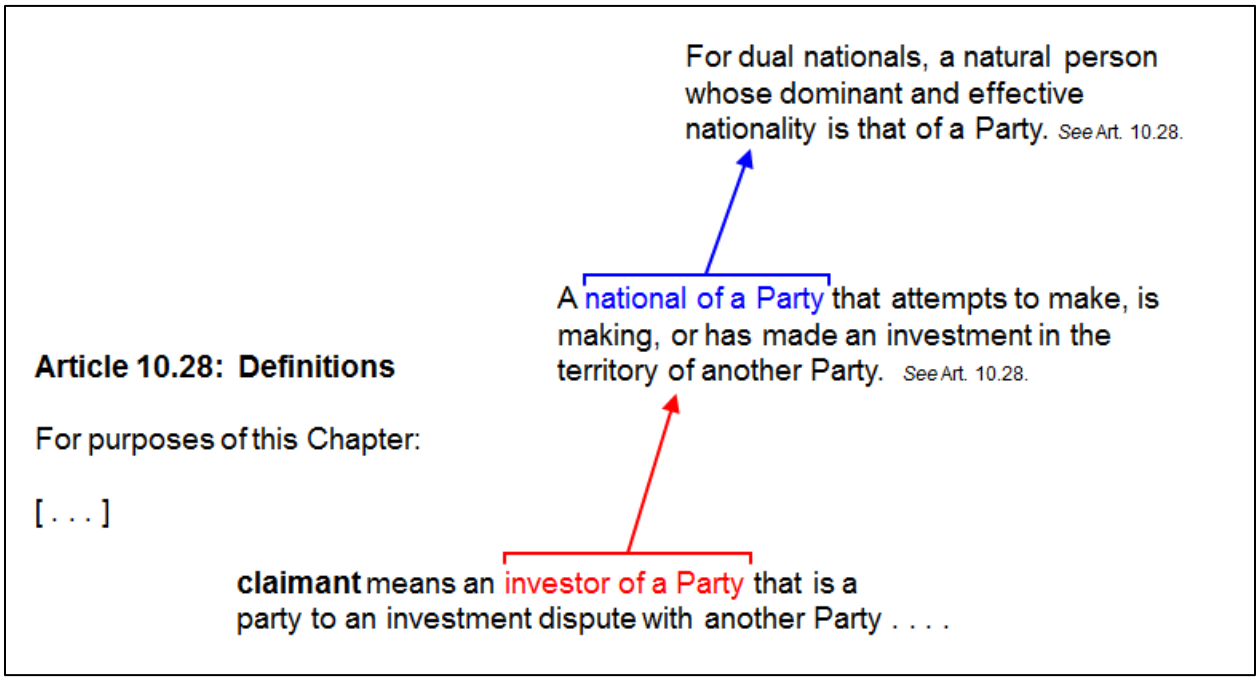
[20] **Bifurcation Response**, ¶ 17 ("The Ballantines also acknowledge that they must be 'claimants' as defined in CAFTA-DR in order to pursue relief under the Treaty . . . .").

[21] *See* https://en.wikipedia.org/wiki/Matryoshka_doll (last visited 27 April 2017) (explaining that *matryoshka* is the proper term for a Russian nesting doll). Just as, with a nesting doll, one figure unlocks to reveal another figure that in turn unlocks yet another figure, Article 10.28 of DR-CAFTA defines "claimant" by using another defined term ("investor of a Party"), which in turn is defined by using other defined terms. *See* **Ex. R-010**, DR-CAFTA, Art. 10.28 (defining "claimant" as "***investor of a Party*** that is a party to an investment dispute with another Party," stating that the term "investor of a Party means a Party or state enterprise thereof, or ***a national*** or an enterprise ***of a Party***, that attempts to make, is making, or has made an investment in the territory of another Party," explaining that the term "national means ***a natural person who has the nationality of a Party*** according to Annex 2.1" of DR-CAFTA, and clarifying that "***a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality***") (original emphasis omitted; new emphasis added).

[22] It is uncontested that the Ballantines are dual nationals of the United States and the Dominican Republic. *See* **Notice of Arbitration and Statement of Claim**, 11 September 2014, ¶ 21 ("The Ballantines . . . are citizens of both the United States and the Dominican Republic").

attempts to make, is making, or has made an investment in the territory of another Party, that is a party to an investment dispute with that other Party."

Figure 1



13. The *second* rule is that the only type of "claim" that a "claimant" may submit to arbitration under Section B of DR-CAFTA is "a claim that the respondent has breached an obligation under Section A [*i.e.*, Articles 10.1 to 10.14], an investment authorization, or an investment agreement."[23] This rule also is plain from the text of Article 10.16.[24] For present purposes, it means that the Tribunal only has jurisdiction over claims for alleged breach of an "obligation" under Articles 10.1 to 10.14, since this case does not involve either an "investment authorization" or an "investment agreement."

[23] **Ex. R-010**, DR-CAFTA, Art. 10.16.1.

[24] **Ex. R-010**, DR-CAFTA, Art. 10.16.1 ("[A] claimant . . . may submit to arbitration under this Section a claim that the respondent has breached an obligation under Section A, an investment authorization, or an investment agreement; and that the ***claimant*** [or an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly] has incurred loss or damage by reason of, or arising out of, that breach").

14. As discussed below, the claims in this case violate both rules. **Part A** explains how the claims violate the rule that only a "claimant" can submit a claim to arbitration; and **Part B** explains how the claims violate the rule that the claims must involve an "obligation" under Articles 10.1 to 10.14 of DR-CAFTA.

A. The Claims In This Case Violate DR-CAFTA's Rule That Only A Claimant Can Submit A Claim To Arbitration

1. The Implications Of This Rule Are That The Ballantines Must Prove That, When They Submitted Their Claims To Arbitration, Their Dominant And Effective Nationality Was Their U.S. Nationality

15. In its Request for Bifurcation, the Dominican Republic explained that one logical implication of the rule that only "claimant may submit [a claim] to arbitration under [Section B of Chapter Ten]"[25] is that the Ballantines must prove that they qualified as "claimants" when they submitted their claims to arbitration. The Dominican Republic also explained that, in practical terms, proving this would mean demonstrating that, on the specific date on which the Ballantines submitted their claims to arbitration (*viz.*, 11 September 2014),[26] their dominant and effective nationality was their U.S. nationality.

16. In the pleadings that the Ballantines submitted in response, the Ballantines "acknowledge[d] that they must be 'claimants' as defined in DR-CAFTA in order to pursue relief under the Treaty,"[27] accepted that the issue of whether they are "claimants" is linked to the

[25] **Ex. R-010**, DR-CAFTA, Art. 10.16.1; *see* **Bifurcation Response**, ¶ 17 ("The Ballantines also acknowledge that they must be 'claimants' as defined in CAFTA-DR in order to pursue relief under the Treaty . . . .").

[26] *See* **Ex. R-010**, DR-CAFTA, Art. 10.16.4 (explaining that, for purposes of the UNCITRAL Arbitration Rules, "[a] claim shall be deemed submitted to arbitration under this Section when the claimant's . . . notice of arbitration . . . , together with the statement of claim . . . are received by the respondent"); **Procedural Order No. 1** (21 October 2016), p. 9 ("Article 10.16.4(c) of the CAFTA-DR provides for the submission of the Notice of Arbitration together with the Statement of Claim. The Tribunal notes that the Claimants' submission dated 11 September 2014 includes both").

[27] **Bifurcation Response**, ¶ 17.

question of their dominant and effective nationality,[28] and did not contest that 11 September 2014 was the date on which their claims had been "submitted to arbitration." However, they ***did*** question whether the date of submission of a claim was even relevant in the first place.[29]

17. Their reasoning in this regard was quite scattered. Within the span of five paragraphs, the Ballantines argued simultaneously: (1) that the "Tribunal should ***not*** merely take a snapshot in time and, at any specific date, attempt to weigh the Ballantines' connections to the US against their connections to the DR,"[30] (2) that the "Tribunal need ***only*** look at the nationality of the Ballantines as of the specific date that they made their investment in the Dominican Republic,"[31] (3) that the part of DR-CAFTA that mentions dual nationality supports their assertion that the time of investment is the relevant date for analysis,[32] and (4) that "the minimal language [in DR-CAFTA] concerning dual citizenship is ***silent*** as to the timing of the evaluation."[33] In addition to being internally inconsistent, these arguments suffer from five main flaws — some of them conceptual, some factual.

[28] *See* **Bifurcation Response**, ¶¶ 18–19 (accepting that "[f]or purposes of Chapter 10 of CAFTA-DR, a 'claimant' is specifically defined as an 'investor of a Party that is a party to an investment dispute with another Party," that "an investor of a party is 'a national of a Party . . . that attempts to make, is making, or has made an investment in the territory of another Party," and that Article 10.28 states that "'a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality'") (ellipsis in original).

[29] *See* **Bifurcation Response**, ¶¶ 16–21.

[30] **Bifurcation Response**, ¶ 23 (emphasis added); *see also id.*, ¶ 23 (asserting that the "Tribunal should look at the Ballantines' ***entire life*** to determine whether or not they are more closely aligned with the United States or with the Dominican Republic") (original emphasis omitted; new emphasis added).

[31] **Bifurcation Response**, ¶ 19 (original emphasis omitted); *see also id.*, ¶ 18 note 14 (asserting that the issue of "'dominant and effective nationality' . . . becomes relevant only if the investor has dual nationality at the time that the investor 'has made an investment in the territory of a Party'") (original emphasis omitted).

[32] *See* **Bifurcation Response**, ¶¶ 18–19 (quoting, and purporting to analyze a passage from Article 10.28 of DR-CAFTA).

[33] **Bifurcation Response**, ¶ 20 (emphasis added).

18. ***First***, if DR-CAFTA were indeed silent as to the timing that is relevant for the nationality inquiry — which it is not, as discussed below — the Tribunal would be required to decide the issue on the basis of international law.[34] And, under international law, it is clear that one of the "critical dates" for purposes of jurisdiction is the date on which the moving party avails itself of a remedy.[35]

19. ***Second***, DR-CAFTA is ***not*** silent as to the relevant time period. This was why the Dominican Republic began above with the issue of "consent," instead of simply adverting to the part of DR-CAFTA that mentions dual nationality, as the Ballantines hastened to do.[36] The reason that that part of DR-CAFTA — and the broader issue of nationality — is relevant is because (i) consent is limited to "the submission of a claim to arbitration under [Section B],"[37] (ii) Article 10.16 states that only a "claimant may submit [a claim] to arbitration under [Section B],"[38] and (iii) the definition of "claimant" is linked to nationality.[39] The question here is not

[34] *See* **Ex. R-010**, DR-CAFTA, Art. 10.22.1 ("Subject to paragraph 3, when a claim is submitted under Article 10.16.1(a)(i)(A) [as the claims purportedly are here], the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law").

[35] *See*, *e.g.*, **RLA-019**, *Achmea B.V. v. Slovak Republic*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility (20 May 2014) (Lévy, Beechey, Dupuy), ¶ 267 ("It is an accepted principle of international law that jurisdiction must exist on the day of the institution of proceedings. As stated by the ICJ: 'The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed'"); **RLA-020**, Christoph H. Schreuer *et al.*, THE ICSID CONVENTION: A COMMENTARY (2d. ed. 2009), Art. 25, ¶ 36 ("It is an accepted principle of international adjudication that jurisdiction will be determined by reference to the date on which judicial proceedings are instituted. This means that on that date all jurisdictional requirement must be met"), ¶ 36 ("The International Court of Justice (ICJ) has developed a *jurisprudence constante* to this effect"). The date of submission of a claim is not the only "critical date" for purposes of jurisdiction. For example, in this case — and as discussed below in Part B — the date of each alleged treaty violation also is a "critical date."

[36] *See* **Bifurcation Response**, ¶¶ 17–18.

[37] **Ex. R-010**, DR-CAFTA Art. 10.17.1.

[38] **Ex. R-010**, DR-CAFTA Art. 10.17.1.

[39] *See* **Ex. R-010**, DR-CAFTA, Art. 10.28 (defining "claimant" as "***investor of a Party*** that is a party to an investment dispute with another Party," stating that the term "investor of a Party means a Party or state enterprise thereof, or ***a national*** or an enterprise ***of a Party***, that attempts to make, is making, or has made

[FOOTNOTE CONTINUED ON NEXT PAGE]

just one of nationality, in the abstract, but rather, one of consent: Were the Ballantines authorized to submit a claim to arbitration at the time that they did so? The logical way to answer this question is by examining the state of affairs on the date the claim was submitted (which, as noted above, was 11 September 2014).

20. ***Third***, the Ballantines' assertion that the issue of "'dominant and effective' nationality . . . becomes relevant only if the investor has dual nationality ***at the time that the investor 'has made an investment*** in the territory of a Party'"[40] cannot be squared with DR-CAFTA's definition of "claimant." Because the term "claimant means an investor of a Party that ***is*** a party to an investment dispute with another Party,"[41] the relevant time period by definition cannot have been earlier than the time that the relevant investment dispute arose.[42]

21. ***Fourth***, even if the Tribunal were to focus exclusively on the part of DR-CAFTA that raises the issue of dominant and effective nationality — namely, the definition of "investor of a Party" — it would not find support therein for the Ballantines' assertion that the nationality inquiry must be made as of the date of investment. Article 10.28 defines "investor of a Party" as follows:

> **investor of a Party** means a Party or a state enterprise thereof, or ***a national*** or an enterprise ***of a Party, that attempts to make, is making, or has made an investment in the territory of another party***; provided,

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
an investment in the territory of another Party; provided, however, that ***a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality***") (original emphasis omitted; new emphasis added). As explained in the Request for Bifurcation, and discussed again below in Part B, the Ballantines' nationality also is relevant for purposes of determining whether the claims in this case involve an "obligation" under Section A of DR-CAFTA Chapter Ten. In that context, a different time period is relevant (*viz.*, the time of the alleged breaches).

[40] **Bifurcation Response**, note 13 (emphasis added).

[41] **Ex. R-010**, DR-CAFTA, Art. 10.28 (emphasis added).

[42] As noted above, and explained below in Part B, a different time period is relevant to the question of whether the Ballantines' claims involve an "obligation" under Section A of DR-CAFTA Chapter Ten.

> however, that a natural person who is a dual national shall be deemed to be exclusively **a national** of the State of his or her dominant and effective nationality.[43]

22. As the part of the definition in red indicates, there are two cumulative requirements that must be satisfied: (1) there must be a "national of a Party," and (2) this "national" must be one "that attempts to make, is making, or has made an investment in the territory of another party." As the language in blue indicates, the "dominant and effective" nationality issue is only related to the first requirement (*i.e.*, "nationality"). It has nothing to do with whether a person attempts to make, is making, or has made an investment.

23. In any event, as the Ballantines correctly observe, the language in red signifies that "[t]his is a disjunctive definition."[44] This means that ***each*** of the options identified ("a national that attempts to make an investment," "a national that is making an investment," and "a national that has made an investment") renders the person eligible as an "investor."[45] However, if the evaluation were done by reference to the date of investment, as the Ballantines submit, the only options that could apply would be the present-tense options ("a national that attempts to make an investment" and "a national that is making an investment"). The third option — "a national that has made an investment," which is the option that the Ballantines say applies to them[46] — would never be available. Accordingly, the evaluation must be done by reference to some date that post-dates the investment.

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[43] **Ex. R-010**, DR-CAFTA, Art. 10.28 (emphasis added).

[44] **Bifurcation Response**, ¶ 19.

[45] *See* **Bifurcation Response**, ¶ 19 ("This is a disjunctive definition and any of the three tenses used in the definition can be used . . . .").

[46] *See* **Bifurcation Response**, ¶ 19.

24. ***Finally***, the Ballantines' assertion that the "Tribunal should ***not*** merely take a snapshot in time and, at any specific date, attempt to weigh [as of that date] the Ballantines' connections to the US against their connections to the DR"[47] is misguided. It is not even supported by the lone authority that the Ballantines cite, which is the *Malek* decision by the Iran-U.S. Claims Tribunal.[48] It is true, as the Ballantines note, that "[i]n *Malek v. Islamic Republic of Iran*, the [Iran-U.S. Claims] Tribunal interpreted the *A/18 Decision* as calling for the Tribunal to look at 'the entire life of the Claimant, from birth, and all the factors which, during this span of time, evidence the reality and sincerity of the choice of national allegiance.'"[49] However, as is clear from the sentences immediately preceding the ones that the Ballantines quoted, the goal of this process was to establish which nationality was dominant and effective ***at a particular time***:

> In Case No. A18, the Full Tribunal determined that it has jurisdiction over claims brought by Iran-United States nationals only when the "dominant and effective nationality" of the Claimant is that of the United States ***"during the relevant period*** from the date the claim arose until 19 January 1981." . . . Although ***this period of time is crucial for the determination of the Tribunal's jurisdiction***, it is not the only one to be considered in order to determine if the United States (or Iranian as the case may be) nationality of a Claimant is his "dominant and effective nationality" ***at the relevant time***. Obviously, ***to establish what is the dominant and effective nationality <u>at the date the claim arose</u>***, it is necessary to scrutinize the events of the Claimant's life preceding this date. Indeed, the entire life of the Claimant, from birth, and all the factors which, during this span of time, evidence the reality and the

[47] **Bifurcation Response**, ¶ 23.

[48] *See* **Bifurcation Response**, ¶ 23.

[49] As the Tribunal will recall, the *A/18* decision is an Iran-U.S. Claims Tribunal decision that the Dominican Republic had cited in its Request for Bifurcation. It stands for the proposition that, to determine which of a dual national's nationalities is dominant and effective, a range of factors should be considered, including: the State of habitual residence, the circumstances in which the second nationality was acquired, the individual's personal attachment for a particular country, and the center of a person's economic, social, and family life. **Bifurcation Response**, ¶ 23 (quoting **CLA-051**, *Reza Said Malek v. Iran*, IUSCT (Interlocutory Award, 23 June 1988), ¶ 14).

> sincerity of the choice of national allegiance he claims to have made, are relevant.[50]

25. Accordingly, there is no principled basis for departing from the conclusion identified by the Dominican Republic in the Request for Bifurcation — namely, that the Ballantines must prove that, on the date on which the Ballantines submitted their claims to arbitration, their dominant and effective nationalities were their U.S. nationalities.

2. At The Time The Ballantines Submitted Their Claims To Arbitration, Their Dominant And Effective Nationality Was That of The Dominican Republic

26. As the Tribunal rightly noted in its decision on bifurcation, a "key question before it is to ascertain the meaning of the words 'dominant and effective' in determining the nationality of the [Ballantines] in the context of the CAFTA-DR."[51] These words refer to two different concepts: "effective nationality" and "dominant nationality."

27. "Effective nationality" refers to the question of whether there is a genuine connection between a person and each State of nationality.[52] In this case, the question of "effectiveness" is not in play; the Dominican Republic does not dispute that the Ballantines have a genuine connection with the United States, and there should be no question (given the factors discussed below) that the Ballantines also have a genuine connection to the Dominican Republic.

28. "Dominant nationality" is a question of which connection is stronger — or, as the Ballantines, put it, "whether [the Ballantines] [we]re more closely aligned with the United States

[50] **CLA-051**, *Reza Said Malek v. Iran*, IUSCT (Interlocutory Award, 23 June 1988), ¶ 14 (emphasis added).

[51] **Procedural Order No. 2** (21 April 2017), ¶ 25.

[52] *See* **RLA-006**, *Nottebohm Case (Liechtenstein v. Guatemala) Second Phase*, ICJ, Judgment (6 April 1955), p. 22 ("*Nottebohm*").

or with the Dominican Republic."[53] The answer to this question could turn on a number of factors, and, as the Dominican Republic explained in its Request for Bifurcation, and the Tribunal expressly agreed, among the relevant factors are: the State of habitual residence, the circumstances in which the second nationality was acquired, the individual's personal attachment for a particular country, and the center of a person's economic, social, and family life.[54]

29. In their Bifurcation Response, the Ballantines asserted that "[t]he Tribunal . . . consider other factors as well, including but not limited to: a) the country of residence of the Ballantines' immediate family . . . ; b) where the Ballantines went to college; c) where their children were born; d) the primary language spoken in the home; [and] e) their religious faith and practice . . . ."[55] However, the Ballantines did not cite any authority to support this assertion, and some of the factors seem entirely irrelevant.[56] In any event, as the Dominican Republic explains below (after a brief summary of the facts), none of these factors justify the conclusion that the Ballantines' U.S. nationality was dominant as of 11 September 2014.

30. Michael and Lisa Ballantine were born in the United States, went to college there, and, as far as the Dominican Republic is aware, lived there until 2000, when they moved their

[53] **Bifurcation Response**, ¶ 23.

[54] *See* **RLA-006**, *Nottebohm*, p. 22; **RLA-007**, *Mergé Case*, Italian-United States Conciliation Commission, Decision No. 55 (10 June 1955), p. 247; **RLA-008**, *Case No. A/18*, IUSCT Case No. A/18, Decision No. DEC 32-A18-FT (6 April 1984), p. 12; *see also* **Procedural Order No. 2** (21 April 2017), ¶ 25 (stating that the "elements [that] . . . will certainly be relevant to the Tribunal's analysis includ[e], among others, the State of habitual residence, the circumstances in which the second nationality was acquired, the individual's personal attachment for a particular country, and the center of the person's economic, social and family life").

[55] **Bifurcation Response**, ¶ 24.

[56] For example, it is not clear how the Ballantines "religious faith" (as opposed to their "religious practice," which is mentioned separately) could possibly be used to determine whether the Ballantines are more closely connected to the United States or the Dominican Republic.

family to the Dominican Republic for a year to work as missionaries.[57] As Michael Ballantine has explained, "[t]his year in the Dominican Republic transformed our famil[y] and during that time we developed a deep love and passion for the people and culture of this beatiful [*sic*] island."[58] Thus, even though "[t]he Ballantines returned to their home in Chicago in 2001,"[59] they "continued their work in the Dominican Republic, visiting the country each year to further support the communities that they had begun to serve."[60] As the Amended Statement of Claim explains, the purpose of "the Ballantines' travels to the Dominican Republic [was] to be of service to the country and its people."[61]

31. Ultimately, "[a]fter several years visiting the Dominican Republic, coming to appreciate its natural beauty, and developing a fondness for its people, the Ballantines decided to deepen their personal and economic commitment to the country."[62] Michael announced to Lisa "that he had decided to sell his business and invest all of their life savings to develop a tropical mountain in the Dominican [Republic],"[63] and, "[i]n 2006, the family sold their home and sold or

[57] *See* **Amended Statement of Claim**, ¶ 18; *see also* **Ex. R-011**, Jamaca de Dios Website, "History" page (last visited 15 February 2017). As the fact that the Ballantines moved to the Dominican Republic illustrates, the assertion in the Response on Bifurcation that "[t]he Ballantines' residential connection to the United States has remained unbroken for the entirety of Michael's 52 years, and Lisa's 49 years, of life" (¶ 32) is not true.

[58] **Ex. R-011**, Jamaca de Dios Website, "History" page (last visited 15 February 2017); *see also* **Notice of Intent**, ¶ 10 ("The time the Ballantine family spent in the Dominican Republic was transformative for them, and the family developed a deep love and affection for the country's people and their culture").

[59] **Amended Statement of Claim**, ¶ 20.

[60] **Amended Statement of Claim**, ¶ 20; *see also* **Notice of Intent**, ¶ 11("Following the Ballantines' return to the United States in 2001, the family continued its work in the Dominican Republic, returning for several months each year to assist with the churches it helped to found").

[61] **Amended Statement of Claim**, ¶ 20.

[62] **Notice of Arbitration and Statement of Claim**, ¶ 30.

[63] **Ex. R-012**, Greg Wittstock, *A Man and His Mountain, A Woman and Her Heart* (last visited 15 February 2017) (explaining also that Greg Wittstock was a neighbor of the Ballantines). In their Bifurcation Request, the Ballantines asserted that "[t]he evidentiary value of [Mr. Wittstock's statement] is minimal because it is factually incorrect." **Bifurcation Response**, note 41. However, the only aspect of Mr. Wittstock's statement that the Ballantines contest is the precise time at which Michael Ballantine

[FOOTNOTE CONTINUED ON NEXT PAGE]

gave away many of their possessions,"[64] and, "[a]s a result of their affection for the country and its people, the Ballantines and their children moved to the Dominican Republic . . . ."[65] As the Ballantines themselves explained in their Notice of Intent, this move was "permanent"[66] — and officially so, as the Ballantines obtained "permanent resident" status in the Dominican Republic in 2006,[67] and this status was then renewed two years later, in June 2008.[68]

32. As the Ballantines began to move forward with their residential development project in the Dominican Republic, they apparently began to worry about how the project would fare if they were perceived as foreigners.[69] To combat this perception, they decided not only to live in the development complex they were building,[70] but also to become Dominican citizens — specifically so that their clients and the government would think of them as Dominican.[71] As

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made the announcement above to Lisa. *See id.* The Ballantines' own Notice of Intent confirms the substance of Mr. Wittstock's statement, if not the timing. **Notice of Intent**, ¶ 7 ("[T]he Ballantines have invested all of their efforts and money into planning and developing the Jamaca de Dios ('Hammock of God') gated community in the Dominican Republic").

[64] **Ex. R-012**, Greg Wittstock, *A Man and His Mountain, A Woman and Her Heart* (last visited 15 February 2017).

[65] **Notice of Arbitration and Statement of Claim**, ¶ 2. The Dominican Republic notes that after the Dominican Republic explained that personal attachment is one of the elements that is relevant to the analysis of dominant and effective nationality (which the Tribunal has now confirmed, *see* **Procedural Order No. 2** (21 April 2017), ¶ 25), the Ballantines changed their tune. *See* **Bifurcation Response**, note 41 (asserting that "the Ballantines' move to the DR was motivated by a need to advance their investment opportunity").

[66] **Notice of Intent**, ¶ 12 ("Michael and Lisa Ballantine as well as their four children moved ***permanently*** to the Dominican Republic to develop a gated community") (emphasis added).

[67] *See* **Ex. R-025**, Certificates of Permanent Residency: Michael and Lisa Ballantine.

[68] *See* **Ex. R-025**, Certificates of Permanent Residency: Michael and Lisa Ballantine.

[69] **Michael Ballantine's First Witness Statement** (4 January 2017), ¶ 29 ("Whenever an issue arose with any Jamaca investor, I did whatever I could to appease them, knowing I was the foreigner and I needed them on my side to succeed").

[70] **Michael Ballantine's First Witness Statement**, ¶ 20 ("Because we were foreigners, we wanted to live in the complex to show that we had a 100% commitment to what we were doing").

[71] **Michael Ballantine's First Witness Statement**, ¶ 88; *see also* **Michael Ballantine's Second Witness Statement** (6 March 2017), ¶ 2; **Response on Bifurcation**, ¶¶ 4, 25, 30.

explained below, and importantly for present purposes, they in fact became naturalized Dominican citizens.

33. In his witness statement, Michael Ballantine tries to downplay his and Lisa Ballantine's Dominican naturalization, stating that it "only" involved "pledging to uphold [the Dominican Republic's] laws and constitution."[72] However, as the ICJ explained in the famous *Nottebohm* case, "[n]aturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being. It involves his breaking a bond of allegiance and his establishment of a new bond of allegiance."[73] It is a serious event with significant legal consequences.

34. The naturalization process began in September 2009 when Michael[74] and Lisa[75] applied for Dominican citizenship, and involved not only the submission of documents and identification of Dominican citizens who could serve as references,[76] but also an assessment of the Ballantines' written and oral proficiency in Spanish (which was deemed "Good"),[77] and a standard naturalization interview, in which the applicants are asked questions like the following:

> "What are the patriotic symbols of our country?"
>
> "Who said 'The Republic will be free from any foreign power or the island will sink?'"

[72] **Michael Ballantine's First Witness Statement**, ¶ 88.

[73] *See* **RLA-006**, *Nottebohm*, p. 24.

[74] *See* **Ex. R-014,** Letter from the Dominican Ministry of Interior re Michael Ballantine (7 October 2009) (referencing the date of Michael Ballantine's naturalization application, *viz.* 12 September 2009)

[75] *See* **Ex. R-013,** Letter from the Dominican Ministry of Interior re Lisa Ballantine (7 October 2009) (referencing the date of Lisa Ballantine's naturalization application, *viz.* 16 September 2009).

[76] *See*, **Ex. R-016**, Michael and Lisa Ballantine, Sworn Statement of Domicile (7 September 2009) .

[77] *See* **Ex. R-029**, Results of M. Ballantine Interview, *Secretaria de Estado de Interior y Policia* (10 May 2009); **Ex. R-030**, Results of L. Ballantine Interview, *Secretaria de Estado de Interior y Policia* (10 May 2009).

"What is the composition of the National Congress?"

"What are the principal economic resources in the Dominican Republic?"[78]

35. Once the Ballantines' applications were finalized, reviewed, and approved, the Ballantines appeared before the Ministry of Interior and Police to be "sworn in," and in that context pledged "***to be faithful to the [Dominican] Republic***, to respect and comply with the Constitution and the Laws of the Dominican Republic."[79]

36. The Ballantine's naturalization files — which are appended to this submission as Exhibits R-038 and R-039 — contradict many of the assertions in the Ballantines' witness statements and pleadings in this arbitration. Among the discrepancies between the Ballantines' assertions and their naturalization files are the following:

What The Ballantines Contend:	What The Naturalization Files Show"
"[T]he Ballantines' residential connection to the United States has remained unbroken for the entirety of Michael's 52 years, and Lisa's 49 years, of life."[80]	In support of their applications, the Ballantines submitted a sworn statement that their "domicile" was in the Dominican city of Jarabacoa.[81]
"There was never any cutting of old alliances or forging new ones by acquiring dual citizenship."[82]	Michael and Lisa Ballantine both swore "to be ***faithful*** to the [Dominican] Republic, to respect and comply with the Constitution and the Laws of the Dominican Republic."[83]

[78] **Ex. R-031**, List of Interview Questions for Dominican Nationality Interview, *Ministerio de Interior y Policia* (translation from Spanish; the original Spanish version reads as follows: "¿Cuáles son los Símbolos de la Patria?" "¿Quién dijo 'La República Dominicana será libre de toda potencia extranjera o se hunde la isla?'" "¿Cómo está compuesto el Congreso Nacional?" "¿Cuáles son los principales recursos económicos de la República Dominicana?"). The notes from Michael Ballantine's interview can be found at **Exhibit R-32**. The Dominican Republic has not located any notes from Lisa Ballantine's nationality interview.

[79] **Ex. R-033**, Record of Swearing-In Of Michael Ballantine (18 November 2010) (emphasis added) (translation from Spanish; the original Spanish version reads as follows: "***de ser fiel a la República [Dominicana]***, de respetar y cumplir la Constitución y las Leyes de la República Dominicana"); **Ex. R-34**, Record of Swearing-In Of Lisa Ballantine (18 November 2010) (emphasis added).

[80] **Response on Bifurcation**, ¶ 32.

[81] **Ex. R-016**, Michael and Lisa Ballantine: Sworn Statement of Domicile (7 September 2009).

[82] **Michael Ballantine's Second Witness Statement**, ¶ 4.

What The Ballantines Contend:	What The Naturalization Files Show"
The decision to naturalize "was not motivated whatsoever by any identification with Dominican culture."[84]	"Michael J. Ballantine and Lisa Marie Ballantine . . . identify closely with Dominican sentiment and customs given their longstanding respect for, and period living in, our country, for which reason they would be happy to confirm, legally, their Dominican sentiment."[85]

37. In their recent pleadings and witness statements, the Ballantines have claimed that even though they became Dominican citizens, they "did very little to even try to assimilate with Dominican culture,"[86] and "never felt like [they] were Dominicans, never acted like Dominicans, and [were never] perceived . . . as Dominicans."[87] However, the evidence shows otherwise.

38. In the years that followed their naturalization, the Ballantines exercised their Dominican nationality in various ways. For example, they used their Dominican passports to travel,[88] and they invoked their Dominican nationality in filing claims in 2013 in the Dominican courts.[89] They exercised their right to vote in a Dominican election in 2012,[90] even though they

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[83] **Ex. R-033**, Record of Swearing-In Of Michael Ballantine, *Secretaria de Estado de Interior y Policia* (18 November 2010) (emphasis added); **Ex. R-034**, Record of Swearing-In Of Lisa Ballantine, *Secretaria de Estado de Interior y Policia* (18 November 2010) (emphasis added).

[84] **Michael Ballantine's Second Witness Statement**, ¶ 3; *see also* **Bifurcation Response**, ¶ 25.

[85] **Ex. R-017**, Letter from G. Rodríguez to the President of the Dominican Republic (11 December 2009) (emphasis added) (translation from Spanish; the original Spanish version states as follows: "Michael J. Ballantine y Lisa Marie Ballantine . . . se encuentran muy identificada[s] con el sentir y las costumbres dominicanas ya que han tenido un estrecho vinculo [*sic*] de convivencia y respeto con nuestro país ***por lo que le será grato confirmar, de manera legal su sentir dominicano*** . . . .").

[86] **Michael Ballantine's First Witness Statement**, ¶ 88.

[87] **Michael Ballantine's Second Witness Statement**, ¶ 4.

[88] *See, e.g.*, **Ex. R-019**, Migratory Records for Michael and Lisa Ballantine.

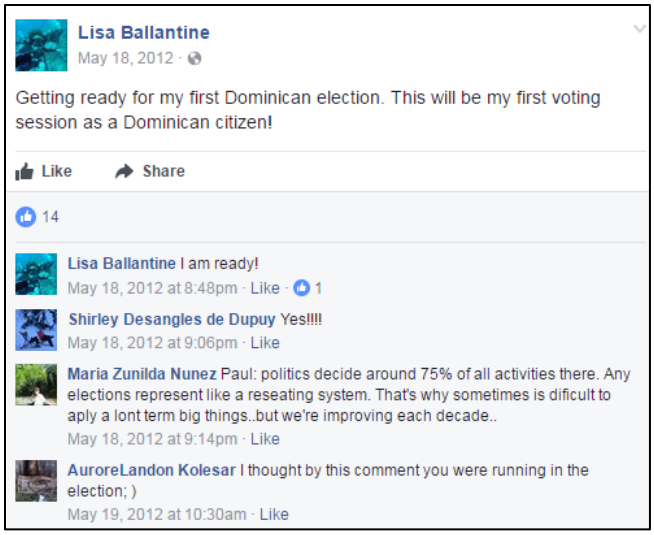
[89] *See, e.g.*, **Ex. R-026**, Hearing Minutes, La Vega Tribunal de Tierras (12 September 2013); **Ex. R-027**, Hearing Minutes, La Vega Tribunal de Tierras (21 November 2013).

[90] **Ex. R-020**, Jarabacoa Voting Records (showing that Michael and Lisa Ballantine both voted in the 2012 election in the Dominican Republic, and that they and their daughter Tobi were eligible to vote in the 2016 election).

"do not consider [themselves] to be very politically involved."[91] Lisa Ballantine then excitedly posted about it four times on the social media site Facebook,[92] expressly and enthusiastically stressing her Dominican citizenship:

[91] **Michael Ballantine's Second Witness Statement**, ¶ 26; *but see* **Ex. R-037**, Lisa Ballantine's Facebook Profile Page (last visited 27 April 2017), p. 180 ("Spent some time visiting with Reinaldo Pared Perez. He is a presidential candidate for 2016 for the PLD. He loved Jamaca de Dios and was very supportive. i want this country to have such wonderful success").

[92] *See* **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, pp. 444–447; *see also id.*, p. 508 (16 August 2012) ("Inaugurated the new president today in the DR. Let's hope for anti corruption [*sic*] and lots of growth!"). Although Lisa Ballantine's Facebook page is public, the pages of other members of the Ballantine family are not, and the Dominican Republic plans to request access during discovery. The Dominican Republic requests that, in the meantime, no old posts (from Facebook or any other social media site) be deleted.



39. The Ballantines even used their Dominican nationality in 2010 to seek Dominican nationality for their two youngest children, Josiah and Tobi,[93] and asserted in that context that they identified closely with Dominican sentiment and culture:

> We request that they be granted Dominican citizenship as well, given that they meet all of the requirements according to Law and we identify closely with Dominican sentiment and customs given our longstanding respect for, and period living in, this country, for which reason we would like to confirm, legally, their Dominican sentiment.[94]

Like their parents, Josiah and Tobi were interviewed, their written and spoken Spanish was deemed "Good,"[95] and they were granted Dominican citizenship. Although they thereafter moved back to the United States, it apparently took some time to assimilate. Tobi, for example,

[93] *See* **Ex. R-036**, Josiah and Tobi Ballantine Naturalization File (translation from Spanish; the original Spanish version reads as follows: "Queremos que le otorguen también la ciudadanía dominicana ya que reúnen todo los requisitos de acuerdo a la Ley y nos sentimos muy identificados con el sentir y las costumbres dominicanas ya que hemos tenido un estrecho vínculo de convivencia y respeto con este país por lo que nos será grato confirmar, de manera legal su sentir dominicano").

[94] **Ex. R-036**, Josiah and Tobi Ballantine Naturalization File, p. 24.

[95] *See* **Ex. R-036**, Josiah and Tobi Ballantine Naturalization File, pp. 13, 18.

crowd-sourced questions about American pop culture, justifying at least one such question on the basis that she was a "foreigner":[96]

And, despite moving to the United States, she continued to exhibit a strong connection to the Dominican Republic. For example, on 27 February 2011 — Dominican Independence Day — she wished a "feliz dia de independencia to my beautiful countryyy [sic]."[97] In 2012, she lamented that she was not yet old enough to vote in the Dominican Republic.[98] In February 2013, she wished her Dominican friends a happy Independence Day, and stated: "#imissmyhome."[99] The next year, Tobi revealed that she had not celebrated American Independence Day (a major U.S. holiday) for 15 years, confessing: "I don't even know how to

[96] **Ex. R-078**, Tobi Ballantine's Twitter Feed (21 October 2015).

[97] **Ex. R-078**, Tobi Ballantine's Twitter Feed (27 February 2011).

[98] **Ex. R-078**, Tobi Ballantine's Twitter Feed (20 May 2012) ("Ugh if I was ten days older I'd be voting in the DR right now").

[99] **Ex. R-078**, Tobi Ballantine's Twitter Feed (26 February 2013).

America on a day like today . . . ."[100] And, as recently as last summer (*i.e.*, the summer of 2016), Tobi referred to herself as "Dominican,"[101] responding to a post by stating: "[I]s this about me cuz I'm Dominican?"[102]

40. As the foregoing illustrates, the Ballantines had deep ties to the Dominican Republic at the time that they submitted their claims to arbitration on 11 September 2014. They had sworn fealty to the Dominican Republic,[103] manifested their dedication to that country,[104] underscored "a fondness for its people,"[105] and expressed a "personal and economic commitment to the country."[106] They had lived in the Dominican Republic for eight years, and it was their permanent residence in both law and spirit. Their money was in the Dominican Republic,[107] their business was conducted in the Dominican Republic,[108] and — according to their own public

[100] **Ex. R-078**, Tobi Ballantine's Twitter Feed (4 July 2014) ("Celebrating my first 4th of July in 15 years. I don't even know how to America on a day like today . . . .") (using the word "America" as a verb) (ellipses in original).

[101] **Ex. R-078**, Tobi Ballantine's Twitter Feed (1 July 2016).

[102] **Ex. R-078**, Tobi Ballantine's Twitter Feed (1 July 2016).

[103] **Ex. R-033**, Record of Swearing-In Of M. Ballantine, *Secretaria de Estado de Interior y Policia* (18 November 2010); **Ex. R-034**, Record of Swearing-In Of L. Ballantine, *Secretaria de Estado de Interior y Policia* (18 November 2010).

[104] **Notice of Intent**, ¶ 8 ("The dedication of the Ballantines to the Dominican Republic is . . . well understood and accepted by the many Dominicans who have built their homes in Jamaca de Dios or dined at the Ballantines' world-class restaurant, Aroma de la Montaña").

[105] **Notice of Arbitration and Statement of Claim**, ¶ 30.

[106] **Notice of Arbitration and Statement of Claim**, ¶ 30. Three weeks after the claims were submitted to arbitration, Lisa Ballantine also stated publicly that she wanted to see the Dominican Republic succeed: **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, p. 180 (28 September 2014) ("Spent some time visiting with Reinaldo Pared Perez. He is a presidential candidate for 2016 for the PLD. He loved Jamaca de Dios and was very supportive. i want this country to have such wonderful success").

[107] *See* **Notice of Intent**, ¶ 7 ("[T]he Ballantines have invested all of their efforts and money into planning and developing the Jamaca de Dios ('Hammock of God') gated community in the Dominican Republic").

[108] *See* **Amended Statement of Claim**, ¶ 4 (explaining that Jamaca de Dios is in the Dominican Republic").

statements — their hearts were in the Dominican Republic.[109] The Ballantines attended church in the Dominican Republic,[110] and sent their two youngest children to school there.[111]

41. They even stayed in the Dominican Republic after their children moved away[112] — even though doing so meant being apart from their youngest child while she was still a minor.[113] They thought of Jarabacoa as "home,"[114] and even came to think of themselves as Dominican: as Lisa Ballantine herself stated in June 2013, "[w]e love the Dominican Republic, ***it is our country, I am Dominican now*** . . . ."[115] In short, and, again, as Lisa Ballantine herself acknowledged in September 2012, "[their] lives [we]re in the Dominican Republic"[116]:

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[109] *See* **Ex. R-011**, Jamaca de Dios Website, "History" page (last visited 15 February 2017) (quoting Michael Ballantine as follows: "This year in the Dominican Republic transformed our families and during that time we developed a deep love and passion for the people and culture of this beatiful [*sic*] island"); **Ex. C-025**, Transcript of "Nuria" (29 June 2013), p. 10 (quoting Lisa Ballantine as follows: "We love the Dominican Republic, it is our country, I am Dominican now. . . ."); **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, p. 292 (13 July 2013) (posting a video from a concert in the Dominican Republic and stating "I love this country! No one is sitting down and everyone is over 30. Check him out. The new DR sensation"); *see also* **Amended Statement of Claim**, ¶ 322 (going so far as to claim moral damages for the fact that they allegedly "were forced to sell their home and leave their friends and colleagues in the Dominican Republic . . . .").

[110] **Michael Ballantine's First Witness Statement,** ¶ 89.

[111] **Michael Ballantine's First Witness Statement,** ¶ 90.

[112] *See* **Bifurcation Response**, ¶ 41 (explaining that Joshua Ballantine has not resided in the Dominican Republic since 2006-2007, and that Josiah and Tobi Ballantine moved back to Chicago in 2010). Notably, when Tobi Ballantine returned to the United States in 2010, she considered herself a "foreigner." *See* **Ex. R-078**, Tobi Ballantine's Twitter Feed (21 October 2015) (posting a picture of an October 2010 Facebook post in which she had asked what popular American fast food chain "Chick-Fil-A" was, and had justified her question by stating "um. well. im a foreigner" — describing the picture as "[a] real [Facebook] status [post] 3 months after moving to the United States.").

[113] *See* **Bifurcation Response**, ¶ 41(d).

[114] *See* **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, pp. 200–201 (15 May 2014), 246 (23 November 2013), 304 (30 January 2013), 305 (29 January 2013), 310 (19 January 2013), 373 (8 September 2012), 377 (24 August 2012), 417 (26 June 2012), 475 (15 March 2012), 483–484 (16 February 2012), 485 (6 February 2012), 491 (27 January 2012), 515 (30 November 2011), 522 (23 October 2011).

[115] **Ex. C-025**, Transcript of "Nuria" (29 June 2013), p. 10 (attributing the above-quoted statement to "Speaker 8," and identifying "Speaker 8" as Lisa Ballantine).

[116] **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, p. 373, (4 September 2012); *see also id.*, p. 245 (25 November 2013) ("[A]dapting back to Dominican life. Some of you may wonder what life is like

[FOOTNOTE CONTINUED ON NEXT PAGE]

The clear conclusion in these circumstances is that the Ballantines' dominant nationality as of 11 September 2014 was their Dominican nationality. Indeed, when the Ballantines moved back to the United States in the summer of 2015 — almost a year after they submitted their claims to arbitration — Lisa stated that she and Michael "have been gone for so long that I feel out of touch with american [*sic*] society. The culture is so different than when I left 10 years ago. I feel such a culture shock coming back."[117]

42. As demonstrated below, none of the factors identified above support the conclusion that the U.S. nationality was dominant as of 11 September 2014.

43. ***State of habitual residence***. This factor, which is among the most important in the analysis,[118] does not support the conclusion that the U.S. nationality was the Ballantines' dominant one. It is true, as the Bifurcation Response notes, that the Ballantines were born in the United States, and lived there for most of their lives. However, it is ***not*** true (as the Bifurcation Response contends) that "[t]he Ballantines' residential connection to the United States has

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
here. Every day is something unexpected in my life. There are beautiful aspects and very difficult ones"), 289 (24 July 2013) ("Those of you who wonder what my life is like in the DR, i want to share with you one of my favorite bloggers").

[117] **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, p. 109 (3 May 2015).

[118] *See* **RLA-010**, United States Department of State, Office of the Legal Adviser, *Digest of United States Practice in International Law 1991-1999*, p. 36.

remained unbroken for the entirety of Michael's 52 years, and Lisa's 49 years, of life."[119] As Lisa Ballantine herself noted in June 2015, "Almost one third of [her] life has been spent here in the Dominican Republic."[120]

44. Importantly, for present purposes, by September 2014, the Ballantines had already been living in the Dominican Republic for eight years, and considered Jarabacoa the "community that [they] live in."[121] The Dominican Republic had been their formal residence as a legal matter since 2006, when they obtained "permanent resident" status there,[122] and their travel records show that, during the period from 2010 to 2014, the Dominican Republic was their home base:

Year[123]	Days in the Dominican Republic	Days In the U.S.	Days Outside of the Dominican Republic And the U.S.
2010	101	145	119
2011	159	162	44
2012[124]	193	98	75
2013	238	127	0
2014	213	109	43
Total	**904**[125]	**641**	281

[119] **Bifurcation Response**, ¶ 32.

[120] **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, p. 98 (10 June 2015). The "About" section of Lisa Ballantine's website, www.mydoveceramics.com, states the same: "The first 50 years of my life have been dedicated to pouring into and adventuring with my four children and husband. We have homeschooled, performed, raced, and traveled the world together, ***spending the last 15 years in the Dominican Republic***." **Ex. R-079**, Lisa Ballantine's Website, "About" page (last visited 18 May 2017) (emphasis added).

[121] *See* **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, p. 507 (21 December 2011) (sharing a picture with the following caption: "The activity here was done by Jamaca de Dios. i am proud to be a part of this. Thank you Michael Ballantine for what you do for the community that you live in").

[122] *See* **Ex. R-025**, Certificates of Permanent Residency: Michael and Lisa Ballantine (8 September 2009).

[123] The information in this table is based on the figures that Michael Ballantine provided in Paragraph 21 of his Second Witness Statement, which reflect Lisa Ballantine's travel records.

[124] 2012 was a leap year.

[125] Since Michael Ballantine "travelled just slightly less than Lisa," this number would be higher for him. **Michael Ballantine's Second Witness Statement**, ¶ 21.

45. ***The circumstances in which the second nationality was acquired***. As explained above, the Ballantines acquired their second nationality voluntarily: the Ballantines chose to move to the Dominican Republic in the year 2000,[126] "developed a deep love and passion for the people and culture of [the] island,"[127] chose to "visit[] the country each year"[128] in order to "be of service to the country and its people,"[129] thereafter decided — "[a]s a result of their affection for the country and its people"[130]— "to deepen their personal and economic commitment to the country"[131] by "invest[ing] all of their efforts and money" into a project in the Dominican Republic[132] and moving there "permanently,"[133] obtained permanent resident status in the Dominican Republic,[134] renewed their permanent resident status in the Dominican Republic,[135] and then decided to become Dominican citizens — *precisely* so that their clients, the government and others in the Dominican Republic would think of them as Dominican.[136] The Ballantines took the time to learn the information required to pass the naturalization test, and formally and

[126] *See* **Amended Statement of Claim**, ¶ 18; *see also* **Ex. R-011**, Jamaca de Dios Website, "History" page (last visited 15 February 2017).

[127] **Ex. R-011**, Jamaca de Dios Website, "History" page (last visited 15 February 2017); *see also* **Notice of Intent**, ¶ 10 ("The time the Ballantine family spent in the Dominican Republic was transformative for them, and the family developed a deep love and affection for the country's people and their culture").

[128] **Amended Statement of Claim**, ¶ 20; *see also* **Notice of Intent**, ¶ 11("Following the Ballantines' return to the United States in 2001, the family continued its work in the Dominican Republic, returning for several months each year to assist with the churches it helped to found").

[129] **Amended Statement of Claim**, ¶ 20.

[130] **Notice of Arbitration and Statement of Claim**, ¶ 2.

[131] **Notice of Arbitration and Statement of Claim**, ¶ 30.

[132] **Notice of Intent**, ¶ 7.

[133] **Notice of Intent**, ¶ 12 ("Michael and Lisa Ballantine as well as their four children moved ***permanently*** to the Dominican Republic to develop a gated community") (emphasis added).

[134] *See* **Ex. R-025**, Certificates of Permanent Residency: Michael and Lisa Ballantine (8 September 2009).

[135] *See* **Ex. R-025**, Certificates of Permanent Residency: Michael and Lisa Ballantine (8 September 2009).

[136] *See* **Michael Ballantine's First Witness Statement**, ¶ 88; *see also* **Michael Ballantine's Second Witness Statement**, ¶ 2; **Response on Bifurcation**, ¶¶ 4, 30; **Sur-Reply on Bifurcation**, p. 5.

voluntarily swore "**to be *faithful* to the [Dominican] Republic**, to respect and comply with the Constitution and the Laws of the Dominican Republic,"[137] This oath was a formal and important one, and cannot be dismissed as insignificant as the Ballantines now purport to do. Of relevance in this context, the ICJ emphasized in the *Nottebohm* case that "[n]aturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being. It involves his breaking a bond of allegiance and his establishment of a new bond of allegiance."[138] For this reason, when a person voluntarily chooses to acquire a second nationality, that in itself is one of the indicia that the voluntarily acquired nationality has become the dominant one.[139]

46. Importantly in the present case, after acquiring the Dominican nationality themselves, the Ballantines took the additional step of formally and voluntarily seeking Dominican nationality for their two youngest children[140] — at least one of whom continues to embrace her Dominican nationality.[141] This factor, too, belies the Ballantines' assertion that their U.S. nationality was their "dominant" one.

47. ***Personal attachment for the Dominican Republic***. There can be no doubt that the Ballantines have a powerful personal attachment to the Dominican Republic, given that: (1)

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[137] **Ex. R-033**, Record of Swearing-In Of M. Ballantine, *Secretaria de Estado de Interior y Policia* (18 November 2010) (emphasis added); **Ex. R-034**, Record of Swearing-In Of L. Ballantine, *Secretaria de Estado de Interior y Policia* (18 November 2010) (emphasis added) (translation from Spanish; the original Spanish version reads as follows: "**de ser *fiel* a la República [Dominicana]**, de respetar y cumplir la Constitución y las Leyes de la República Dominicana").

[138] **RLA-006**, *Nottebohm*, p. 24.

[139] *See* **RLA-010**, United States Department of State, Office of the Legal Adviser, *Digest of United States Practice in International Law 1991-1999*, p. 36 (excerpt) (explaining that the "primary" and "more important" question in the analysis is "what nationality is indicated by the applicant's residence or other voluntary associations").

[140] *See* **Ex. R-036**, Josiah and Tobi Ballantine Naturalization File.

[141] **Ex. R-078**, Tobi Ballantine's Twitter Feed (1 July 2016) ("[I]s this about me cuz I'm Dominican?").

they have sworn fealty to the Dominican Republic,[142] (2) they stated in a formal application to the Dominican Republic that they identified closely with Dominican sentiment and culture,[143] (3) they have conceded in this arbitration that they were dedicated to the Dominican Republic,[144] had "a fondness for its people,"[145] and had a "personal and economic commitment to the country,"[146] (4) one of the exhibits that the Ballantines appended to their Notice of Arbitration quotes Lisa Ballantine as stating "[w]e love the Dominican Republic, ***it is our country, I am Dominican now***,"[147] and (5) the Ballantines have gone so far as to claim moral damages for the fact that they allegedly "were forced to sell their home and leave their friends and colleagues in the Dominican Republic . . . ."[148]

48. ***Center of economic life***. Although the Ballantines stated in their Notice of Intent that "the Ballantines have invested ***all of their*** efforts and ***money*** into planning and developing the Jamaca de Dios ('Hammock of God') gated community ***in the Dominican Republic***,"[149] they now claim that "the center of their financial life has remained at all time [*sic*] in the ***United States***."[150] The reason for this change in position is self-evident. However, it renders the Ballantines' testimony unreliable. The Dominican Republic intends to return to this issue following document production.

[142] **Ex. R-033**, Record of Swearing-In Of M. Ballantine, *Secretaria de Estado de Interior y Policia* (18 November 2010); **Ex. R-034**, Record of Swearing-In Of L. Ballantine, *Secretaria de Estado de Interior y Policia* (18 November 2010).

[143] **Ex. R-036**, Josiah and Tobi Ballantine Naturalization File, p. 24.

[144] **Notice of Intent**, ¶ 8 ("The dedication of the Ballantines to the Dominican Republic is . . . well understood and accepted by the many Dominicans who have built their homes in Jamaca de Dios or dined at the Ballantines' world-class restaurant, Aroma de la Montaña").

[145] **Notice of Arbitration and Statement of Claim**, ¶ 30.

[146] **Notice of Arbitration and Statement of Claim**, ¶ 30.

[147] **Ex. C-025**, Transcript of "Nuria" (29 June 2013), p. 10.

[148] **Amended Statement of Claim**, ¶ 322.

[149] **Notice of Intent**, ¶ 7 (emphasis added).

[150] **Bifurcation Response**, ¶ 34 (emphasis added).

49. ***Center of social and family life***. The Ballantines seem to believe that this factor supports the conclusion that their U.S. nationality was their dominant one. However, as best the Dominican Republic can discern, their argument rests solely on the following two assertions: (1) that "[they] had very few Dominican friends,"[151] and (2) that "[e]very Ballantine child returned to America for further education while Michael and Lisa worked to promote and expand their Dominican investment . . . ."[152] The first assertion is flatly contradicted by the fact that the Ballantines are seeking moral damages for allegedly being "forced to sell their home and leave their friends and colleagues in the Dominican Republic."[153] The second assertion is a *non sequitur*; the fact that the Ballantines' children left home for college does not mean that the Dominican Republic is not the Ballantines' home, or that the Dominican Republic does not remain the center of the family life (as is generally the case with the home of most parents, irrespective of where the children's lives may have led them geographically).

50. ***Other factors***. As noted above, the Ballantines insist that the Tribunal also should consider a) the country of residence of the Ballantines' immediate family . . . ; b) where the Ballantines went to college; c) where their children were born; d) the primary language spoken in the home; [and] e) their religious faith and practice . . . ."[154] As a threshold matter, the Ballantines offer no jurisprudential, doctrinal, or logical support for the asserted relevance of these factors. In any event, as explained sequentially below, none of these factors would support a conclusion that the Ballantines' U.S. nationality was their dominant nationality as of 11 September 2014.

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[151] **Michael Ballantine's Second Witness Statement**, ¶ 5.

[152] **Bifurcation Response**, ¶ 41.

[153] **Amended Statement of Claim**, ¶ 322.

[154] **Bifurcation Response**, ¶ 24.

51. *Country of residence of the Ballantines' immediate family*. It appears that the Ballantines' argument is that this factor favors their position because their children lived in the U.S.[155] However, the relevant parties here are the Ballantines themselves, not their children, and the fact that they (*i.e.*, the parents) chose to remain in the Dominican Republic when their children moved back to the U.S. shows a greater, rather than lesser, commitment and allegiance to the Dominican Republic. As the Ballantines have explained, in June 2010 — a mere four months after the Ballantines acquired their Dominican nationality — their daughter Tobi (whose name is misspelled in the Bifurcation Response) "moved back to the Chicago area,"[156] "at the age of 16."[157] Even though the Ballantines assert that "[i]t was difficult for [them] to be separated from their youngest daughter while [she was] still a minor,"[158] it remains the case that they chose to stay in the Dominican Republic despite that fact.

52. Moreover, not all of the Ballantines' children in fact lived in the U.S., and one of them even moved *back* to the Dominican Republic prior to 11 September 2014. As the Ballantines themselves explain, their daughter Rachel "move[d] to Alberta, ***Canada*** in June of 2008."[159] However, it appears that, two months later, she and a man named Wesley Proch (whose witness statement is appended to the Amended Statement of Claim) got married in the

[155] *See* **Amended Statement of Claim**, ¶ 41.
[156] **Bifurcation Response**, ¶ 41(d).
[157] **Bifurcation Response**, ¶ 41(d).
[158] **Bifurcation Response**, ¶ 41(d).
[159] **Bifurcation Response**, ¶ 41(b) (emphasis added).

Dominican Republic.[160] When Rachel and Wesley thereafter returned to Canada, the Ballantines posted a public video on Facebook, gloating about the beach in the Dominican Republic.[161]

53. As Mr. Proch explains, beginning in February 2010, Rachel and her "family spent 4 months at La Jamaca de Dios, . . . to spend quality time with her mother and father . . . ."[162] Further, Mr. Proch thereafter "returned to Jarabacoa from April 2011 until August 2011 to oversee the construction of a multi-use building in the recreational space of the development, as well as the administrative office of La Jamaca de Dios."[163] And, "[a]fter frequent travel back and forth to the DR, in March 2013, [the] family moved to Jarabacoa."[164]

54. *The place where the Ballantines went to college*. Although the Ballantines listed this item as one of the factors that the Tribunal should consider, they did not offer many details in this regard. Michael Ballantine has testified that he and Lisa "attended college in the United States,"[165] but did not say when or where. However, because Lisa Ballantine states that she "went ***back*** to Northern Illinois University"[166] sometime "***[a]fter*** visiting Jarabacoa"[167] — and given the Ballantines' age — the Dominican Republic assumes that they attended college sometime ***before*** they visited the Dominican Republic for the first time. If that is indeed the case, then the issue of where the Ballantines attended college (for the first time) is entirely

[160] *See* **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, p. 559 (16 August 2008); **Ex. R-035**, Video Posted by Lisa Ballantine on Facebook Posting (16 November 2008).

[161] *See* **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, p. 559 (16 August 2008).

[162] **Wesley Proch's First Witness Statement**, ¶ 2.

[163] **Wesley Proch's First Witness Statement**, ¶ 3.

[164] **Wesley Proch's First Witness Statement**, ¶ 5.

[165] **Michael Ballantine's Second Witness Statement**, ¶ 6.

[166] **Lisa Ballantine's First Witness Statement**, ¶ 2 (emphasis added).

[167] **Lisa Ballantine's First Witness Statement**, ¶ 2 (emphasis added).

irrelevant, since this would have taken place long before the Ballantines acquired their second nationality.

55. However, the fact that Lisa Ballantine "went back to Northern Illinois University"[168] after she had "visit[ed] Jarabacoa" ***is*** relevant — not because of ***where*** Lisa studied, but because of ***what*** she studied and ***why***. As Lisa herself explains, the reason she "went back to Northern Illinois University"[169] was to "stud[y] ceramic filter manufacturing"[170] and "the history of the Dominican Republic,"[171] so that she could "create a social entrepeneurial [*sic*] startup that would focus on clean water"[172] in Jarabacoa.[173] This indicates mainly a connection to the ***Dominican Republic***, rather than the United States.

56. *The place where the Ballantines' children were born*. As the Ballantines explain in their Bifurcation Response, their four children were born between 1987 and 1994. Given that 1994 was six years before the Ballantines first ***visited*** the Dominican Republic,[174] the issue is entirely irrelevant to the present analysis.

57. *The primary language spoken in the home*. The mere fact that the Ballantines spoke English in their home in the Dominican Republic is not relevant to the issue of which nationality was dominant. The Ballantines do not offer any authority to support a conclusion

[168] **Lisa Ballantine's First Witness Statement**, ¶ 2.

[169] **Lisa Ballantine's First Witness Statement**, ¶ 2.

[170] **Lisa Ballantine's First Witness Statement**, ¶ 2.

[171] **Lisa Ballantine's First Witness Statement,** ¶ 2.

[172] **Lisa Ballantine's First Witness Statement**, ¶ 2.

[173] **Lisa Ballantine's First Witness Statement**, ¶ 2 ("After visiting Jarabacoa, I realized that in addition to being a perfect location for our vision of a luxury residential community, it was also a perfect location for my desire to create a social entrepeneurial [*sic*] startup that would focus on clean water").

[174] *See* **Notice of Arbitration and Statement of Claim**, ¶ 2 ("The Ballantines, both U.S. citizens from Chicago, first visited the Dominican Republic in 2000 to work as Christian missionaries").

otherwise. Millions of immigrants world-wide are predominantly of one nationality but speak the language of a different nation at home.

58. *Religious faith and practice*. The Dominican Republic also fails to see how the Ballantines' "religious faith" — which the Ballantines deem separate from "religious practice" — could possibly be relevant to a determination of which of the Ballantines' *nationalities* was dominant. Even in States that formally embrace a particular religion, a person's adherence to that faith or a different one has no bearing on their nationality. Accordingly, the issue of "religious faith" is entirely irrelevant for purposes of the present analysis.[175]

* * *

59. In sum, the Ballantines have failed to demonstrate that their U.S. nationality was their dominant one as of 11 September 2014, and the Tribunal should therefore decline jurisdiction.

B. The Claims In This Case Violate DR-CAFTA's Rule That The Claims Must Involve Certain Specified "Obligations" Under DR-CAFTA

60. As the Dominican Republic explained in its Request for Bifurcation, and again above, DR-CAFTA establishes two rules that are important for this proceeding. The first, which was discussed in the preceding sub-section, is that only a "claimant" can "submit [a claim] to arbitration under [Section B of Chapter Ten] . . . ."[176] The second, discussed below, is that the only type of "claim" that a "claimant" may submit to arbitration under Section B of DR-CAFTA

[175] The Ballantines also assert that "religious ***practice***" is one of the issues that the Tribunal should consider for purposes of determining which of the Ballantines' nationalities was dominant. However, it is not clear how this would be relevant, and in any event, it would seem unwise for either a State or an investment tribunal to comment on the nature of a person's religious practice.

[176] **Ex. R-010**, DR-CAFTA, Art. 10.16.1; *see* **Bifurcation Response**, ¶ 17 ("The Ballantines also acknowledge that they must be 'claimants' as defined in CAFTA-DR in order to pursue relief under the Treaty . . . .").

is "a claim that the respondent has breached an obligation under Section A [*i.e.*, Articles 10.1 to 10.14], an investment authorization, or an investment agreement."[177] Because the Ballantines did not pay much attention to this issue in their submissions on bifurcation, the analysis below stands mostly unrebutted.

61. In their Amended Statement of Claim, the Ballantines summarize their asserted claims as follows:

> "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 [*sic*]
> - Article 10.7: Expropriation and Compensation
> - Article 10.18: Transparency."[178]

62. As the Dominican Republic explained in its Request for Bifurcation, there is no such thing as "Article 10.18: Transparency." Article 10.18 of DR-CAFTA is titled "Conditions and Limitations on Consent of Each Party."[179] What it appears likely that the Ballantines intended to assert in the paragraph quoted above (and what they in fact asserted later on in their Amended Statement of Claim) was that "[t]he Respondent's actions constitute a violation of transparency under Article ***18*** of CAFTA-DR."[180]

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[177] **Ex. R-010**, DR-CAFTA, Art. 10.16.1.

[178] **Amended Statement of Claim**, ¶ 15.

[179] **Ex. R-010**, DR-CAFTA, Art. 10.18.

[180] *See* **Amended Statement of Claim**, § V.F (emphasis added).

63. However, this claim clearly exceeds the scope of the Dominican Republic's consent to arbitration. The Bifurcation Response seems to acknowledge this implicitly when it asserts that "this Tribunal has jurisdiction under CAFTA-DR to issue an award with respect to the Section ***10*** claims presented by the Ballantines in their Amended Statement of Claim . . . ."[181] The Dominican Republic assumes that, by "Section 10," the Ballantines meant "Chapter Ten," since DR-CAFTA Sections are arranged by letter rather than number.

64. The remainder of the Ballantines' claims also exceed the scope of the Dominican Republic's consent to arbitration, for the following reasons (none of which the Ballantines have contested): (1) the Dominican Republic's consent to arbitration applies only to "claim[s] that the respondent has ***breached an obligation*** under [Articles 10.1 to 10.14]," [182] (2) State action can only be deemed a breach of an international obligation ***if*** "***the State is bound by the obligation in question at the time the act occurs***," [183] and (3) at the time of the various acts that the Ballantines have alleged, the Dominican Republic was not bound by any of the "obligations" the Ballantines attempt to invoke.

65. As a review of the relevant DR-CAFTA provisions makes clear, the obligations that the Ballantines purport to invoke apply only to "covered investments" and "investors of another Party":

> Article 10.3: National Treatment

[181] **Bifurcation Response**, ¶ 1.

[182] As noted above, Article 10.16 also allows a claimant to submit a claim that the respondent has breached either an "investment authorization" or an "investment agreement." However, because the Ballantines have not asserted that this case involves either an investment authorization or an investment agreement, for purposes of this case, the only claims that may be asserted are for breach of one or more of the obligations set forth in Articles 10.1 to 10.14 of DR-CAFTA.

[183] **RLA-011**, *Articles on State Responsibility*, Art. 13 (emphasis added).

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. . . .

Article 10.4: Most-Favored-Nation Treatment

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.

Article 10.5: Minimum Standard of Treatment

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. . . .

Article 10.7: Expropriation and Compensation

1. ***No Party may expropriate or nationalize a covered investment*** either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: . . . .[184]

[184] **Ex. R-010**, DR-CAFTA, Arts. 10.3, 10.4, 10.5, 10.7 (emphasis added); *see also* **Ex. R-010**, DR-CAFTA, Art. 10.1 ("Scope and Coverage") (stating in the first paragraph that "[t]his Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) covered investments; and (c) with respect to Articles 10.9 and 10.11 [neither of which have been invoked by the Ballantines], all investments in the territory of the Party").

66. The term "covered investment" is defined in DR-CAFTA Article 2.1 as an investment in the territory of one DR-CAFTA Party "of an investor of another Party."[185] And, as noted above, for purposes of the present case, the phrase "investor of another Party" refers to a person who attempts to make, is making, or has made an investment in the Dominican Republic, and whose dominant and effective nationality is his or her U.S. nationality.

67. Accordingly, to establish that consent to arbitration exists, the Ballantines must prove that their U.S nationality was their dominant and effective nationality at the time of the State conduct they allege. As the Dominican Republic explained in its Request for Bifurcation,[186] and the Ballantines have not refuted, such conduct allegedly occurred between **30 November 2010** (when the Ballantines requested permission from the Ministry of the Environment to expand their development project),[187] and **11 March 2014** (which is the latest possible date on which any event giving rise to a claim could have occurred — given that the Ballantines submitted their claims to arbitration on 11 September 2014, but were required before doing so to wait until "six months ha[d] elapsed since the events giving rise to the claim"[188]).

68. As noted above in Part A, the Ballantines have taken the position that "Tribunal need only look at the nationality of the Ballantines as of the time they made their investment in

[185] **Ex. R-010**, DR-CAFTA, Art. 2.1.

[186] *See* **Request for Bifurcation**, ¶ 30.

[187] *See* **Notice of Arbitration and Statement of Claim**, ¶ 4 ("For the first several years, the Ballantines had a productive relationship with government authorities . . . . The business was on an excellent financial trajectory when, as they had intended to do from the outset, the Ballantines requested approval in November 2010 to expand the project . . . ."); *see also* **Notice of Intent**, ¶ 22 (citing "the Investors' November 2010 application to extend their existing environmental permit for purposes of expanding Jamaca de Dios" as the earliest relevant date, in a section titled "The Dominican Republic's Unlawful and Otherwise Harmful Measures").

[188] **Ex. R-010**, DR-CAFTA, Art. 10.16.3.

the Dominican Republic."[189] However, as the Dominican Republic explained in its Reply on Bifurcation, it is well accepted that the date of an alleged treaty violation is one of the "critical dates" for purposes of jurisdiction.[190] For example, the *Pac Rim v. El Salvador* tribunal held that, for purposes of DR-CAFTA, the treaty's nationality requirements are among the jurisdictional requirements that must be fulfilled *at the time of the alleged breach*: "[W]hat CAFTA requires is not that the investor should bear the nationality of one of the Parties before its investment was made, but that ***such nationality should exist prior to the alleged breach of CAFTA by the other Party***."[191]

69. As explained, however, during the time period from November 2010 to March 2014, the Ballantines' dominant nationality was their Dominican nationality. This means: (i) that, at the time of the alleged breach(es), the Ballantines were not "investor[s] of [the United

[189] **Bifurcation Response**, ¶ 19 (original emphasis omitted).

[190] *See* **RLA-023**, *Serafín García Armas y Karina García Gruber v. Venezuela*, PCA Case No. 2013-3, Decision on Jurisdiction (15 December 2014) (Grebler, Oreamuno Blanco, Santiago Tawil) ¶ 214 (explaining that "the moments relevant for invoking protection of the BIT are: (a) the date on which the alleged violation occurred (in this case, the Measures); and (b) the date on which the arbitral proceeding resolving dispute between the investor and the investment host State, resulting from the alleged violation is initiated") (translation from Spanish; the original Spanish version states as follows: "los momentos relevantes para poder invocar la protección del APPRI son: (a) la fecha en la que ocurrió la alegada violación (en este caso, las Medidas); y (b) la fecha en la cual se inicia el procedimiento arbitral, tendiente a solucionar la controversia entre el inversor y el Estado receptor de la inversión resultado de la alegada violación"); **RLA-021**, *Mesa Power Group, LLC v. Canada*, PCA Case No. 2012-17, Award (24 March 2016) (Kaufmann-Kohler, Brower, Landau), ¶ 327 ("[T]his Tribunal's jurisdiction *ratione temporis* is limited to measures that occurred after the Claimant became an 'investor' holding an 'investment'"); **RLA-002**, *ST-AD GmbH v. Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction (18 July 2013) (Stern, Klein, Thomas), ¶¶ 299–300 ("*ST-AD*") (explaining that it was necessary to "ascertain[] whether the Claimant was an investor having made an investment in Bulgaria at the time of the events allegedly in breach of the BIT," since "a tribunal has no jurisdiction *ratione temporis* to consider claims arising prior to the date of the alleged investment, since a BIT cannot be applied to acts committed by a State before the claimant invested in the host country")).

[191] **RLA-022**, *Pac Rim Cayman LLC v. El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction (1 June 2012) (Veeder, Santiago Tawil, Stern), ¶ 3.34 (emphasis added). As the Dominican Republic explained in its Reply on Bifurcation (*see* note 39), in *Pac Rim*, there was no question that the claimant satisfied the nationality requirements at the time the claim was submitted to arbitration (*see* RLA-022, ¶ 1.3).

States]," (ii) that their supposed investments accordingly do not constitute "covered investments," (iii) that the "obligations" that the Ballantines purport to invoke therefore do not apply, and (iv) that, since the Dominican Republic has only consented to the submission of "a claim that the respondent has breached an obligation,"[192] the Tribunal lacks jurisdiction. As Article 44 of the Articles on State Responsibility confirms, "[t]he responsibility of a State may not be invoked if: (a) the claim is not brought in accordance with any applicable rule relating to the nationality of claims . . . ."[193]

III. MERITS

70. The Ballantines' merits claims involve four different provisions of Chapter Ten of DR-CAFTA,[194] and ten different sets of factual allegations,[195] all of which relate to the overall "residential and tourism"[196] complex named "**Jamaca de Dios**," which is located in the mountains above Jarabacoa in the central part of the Dominican Republic.

71. As the Tribunal will have seen, the Ballantines' discussion of Jamaca de Dios revolves around the notion that there were two "phases" involved in the development of the complex — "Phase 1" and "Phase 2." This nomenclature is designed to generate the impression of a simple dichotomy, and the Ballantines build on this theme throughout their Amended

[192] **Ex. R-010**, DR-CAFTA, Art. 10.16.1.

[193] **RLA-011**, *Articles on State Responsibility*, Art. 44.

[194] Specifically, the Ballantines invoke Articles 10.3, 10.4, 10.5, and 10.7 of DR-CAFTA ("National Treatment," "Most-Favored-Nation Treatment," "Minimum Standard of Treatment," and "Expropriation and Compensation," respectively). As explained above in **Section II**, the Ballantines also have purported to assert a claim under Article 18 of DR-CAFTA, but this claim plainly exceeds the scope of the Tribunal's jurisdiction, and the Ballantines appear to have abandoned that claim in their submissions on bifurcation. The Dominican Republic reserves its right to address this claim in its Rejoinder, to the extent that the Ballantines insist on maintaining it.

[195] *See generally* **Amended Statement of Claim**, ¶¶ 186, 211, 217, 224, 238, 239; *see also* **Part B**, below.

[196] **Amended Statement of Claim**, ¶ 21.

Statement of Claim, comparing "Phase 1" to "Phase 2." However, this strategy is facile, and glosses over the fact that the Ballantines' claims in this arbitration relate to as many as five separate and distinguishable projects, each of which, in order to move forward, would have to be assessed by the Dominican Republic's Ministry of Environment and Natural Resources ("**Ministry**") on the basis of its own merits and characteristics. Moreover, and independently of the foregoing, the Phase 1/Phase 2 nomenclature lends itself to confusion, given the following:

a. On some occasions, the Ballantines use the Phase 1/Phase 2 dichotomy to make a ***temporal*** distinction (the period of time leading up to and including completion of a housing development complex vs. the period of time after completion of that complex),[197]

b. On other occasions, the Ballantines use the Phase 1/Phase 2 dichotomy to make a ***physical*** distinction (land in one part of the mountain vs. land in another part of the mountain),[198] and

c. Some of the alleged events that, temporally, would be part of "Phase 2" relate to land that, physically, would be part of "Phase 1."[199]

75. For all of the reasons identified above, the present submission uses a different nomenclature. Since, as noted, the claims that the Ballantines are advancing in this arbitration relate to five different projects, on various different sites, which the Ballantines pursued (or simply ***considered*** pursuing) at five different points in time, the Dominican Republic's analysis centers on the various individual projects.

[197] *See, e.g.*, **Amended Statement of Claim**, ¶¶ 24–25, 51, 64, 68, 69, 74, 79, 87.
[198] *See, e.g.*, **Amended Statement of Claim**, ¶¶ 47, 48, 50, 57, 58, 59, 89, 113.
[199] *See, e.g.*, **Amended Statement of Claim**, ¶ 71.

76. According to the table of "Jamaca de Dios Land Purchases" that the Ballantines furnished with their Amended Statement of Claim[200] — which, incidentally, is both undated and unaccompanied by any supporting documentation — the Ballantines acquired the land associated with these five projects by means of at least 29 different transactions,[201] with at least 20 different people,[202] on 23 different dates between July 2004 and August 2012.[203]

77. The ***first*** project ("**Project 1**") was supposed to be a reforestation project. As the Ballantines themselves explain, "[i]n October of 2004, just after their purchase of more than 400,000 square meters [approximately 99 acres] of land,"[204] the Ballantines developed a plan to "plant more than 50,000 trees across their new property . . . ."[205] In order "[t]o implement this plan,"[206] the Ballantines wrote to the Ministry of Environment and Natural Resources ("**Ministry**") on 28 December 2004, seeking permission to build an "access road."[207] At the time, the Ballantines apparently already were planning to turn the land into a "resort."[208]

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[200] *See generally* **Ex. C-031**, Ballantines' Table of Jamaca de Dios Land Purchases.

[201] *See* **Ex. C-031**, Ballantines' Table of Jamaca de Dios Land Purchases. In determining this figure, the Dominican Republic accounted for the possibility that the two entries listed in the Table for land purchased from a "Carlos ML Duran" on 26 December 2005 were a single transaction. If those two entries were indeed two separate transactions, the figure listed above would be 30.

[202] *See* **Ex. C-031**, Ballantines' Table of Jamaca de Dios Land Purchases. In determining this figure, the Dominican Republic accounted for the possibility that the entries for "Ana Lidia Rodríguez" and "Ana Lidia Rodríguez Serrata" were intended to refer to the same person, and that the entries for "Miguel Rodríguez Serrata" and "Miguel Serrata Rodríguez" were intended to refer to the same person. If the entries were intended to refer to separate people, the figure listed above would be 22.

[203] *See* **Ex. C-031**, Ballantines' Table of Jamaca de Dios Land Purchases.

[204] **Amended Statement of Claim**, ¶ 28.

[205] **Amended Statement of Claim**, ¶ 28.

[206] **Amended Statement of Claim**, ¶ 29.

[207] *See* **Ex. C-033**, Request to Build Reforestation Access Road (28 December 2004).

[208] *See* **Amended Statement of Claim**, ¶ 28 (asserting that the Ballantines' "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"); **Michael Ballantine's First Witness Statement**, ¶ 11 ("I knew the primary thing I needed to do was build a great road that would allow people

[FOOTNOTE CONTINUED ON NEXT PAGE]

However, the Ballantines did not mention this in their letter to the Ministry, instead stating only that the access road was needed for the reforestation plan.[209] Thus, when the Ministry wrote back on 18 January 2005,[210] its response, too, was limited to the issue of the access road. There, the Ministry stated that it "ha[d] no objection" to the land being used to build an access road, so long as "there w[as] no cutting of trees,"[211] and explained that the fact that "[t]here [was] no objection does not signify an authorization for any activity of cutting, removal and/or transplanting of trees of any type nor the extraction and transport of sand or gravel."[212] The Ministry also "recommend[ed] that there is a constant supervision in the area . . . ."[213] According to the Amended Statement of Claim, construction of the road began in the summer of 2005,[214] and took more than a year to complete.[215]

78. The ***second*** project ("**Project 2**") involved the construction of a restaurant and a housing development, on part of the lower portion of the Ballantines' mountain property. As

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
to access their properties safely"), ¶ 12 ("I was very conscious that the key to success for la Jamaca de Dios was the road"); *see also generally id.*, ¶¶ 9–14.

[209] *See* **Ex. C-033**, Request to Build Reforestation Access Road (28 December 2004) ("It is necessary to state that this farm is being reforested in a large part of its area (390 tareas), and that ***in order to carry out this work***, it is necessary to build the aforementioned access road") (emphasis added); *see also* **Amended Statement of Claim**, ¶ 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***") (emphasis added).

[210] *See* **Ex. C-034**, Ministry's Response to the Request to Build Reforestation Access Road (18 January 2005).

[211] **Ex. C-034**, Ministry's Response to the Request to Build Reforestation Access Road (18 January 2005).

[212] **Ex. C-034**, Ministry's Response to the Request to Build Reforestation Access Road (18 January 2005). Despite this clear statement that the Ministry had not authorized "the extraction and transport of sand or gravel," Michael Ballantine has openly admitted in this arbitration that, "[d]uring the course of the construction [the Ballantines] spent significant sums on . . . earth moving . . . ." **Michael Ballantine's First Witness Statement**, ¶ 15.

[213] **Ex. C-034**, Ministry's Response to the Request to Build Reforestation Access Road (18 January 2005).

[214] *See* **Michael Ballantine's First Witness Statement**, ¶ 14.

[215] *See* **Michael Ballantine's First Witness Statement**, ¶ 17 (explaining that the Ballantines "decided to move to Jarabacoa in August 2006 to finish the road . . . .").

explained in more detail below, the Ballantines committed certain environmental violations during this Project, and were fined in connection therewith. This notwithstanding, by the Ballantines' own account Project 2 (including both the restaurant and the housing development) was a "dramatic"[216] and "resounding commercial success."[217] The restaurant, which the Ballantines named "Aroma de la Montaña" has, "[s]ince its establishment in May 2007, . . . 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."[218] Moreover, the Ballantines concede that all of the lots in the "[housing] development sold out, largely to a Dominican clientele."[219]

79. The ***third*** project ("**Project 3**") involved plans to extend the Project 1 road further up the mountain, and to use the land there (some of which the Ballantines seem to have purchased between 2004 and 2008, and some between August 2009 and February 2011)[220] to expand Jamaca de Dios. The Amended Statement of Claim describes this Project as involving the marketing and sale of "at least 70" additional lots for "luxury private homes"[221] and a "boutique hotel."[222] However, when the Ballantines sought permission from the Ministry to proceed with this Project,[223] they described the Project differently — stating that it was a

[216] **Amended Statement of Claim**, ¶ 43.

[217] **Amended Statement of Claim**, ¶ 5.

[218] **Amended Statement of Claim**, ¶ 50.

[219] **Amended Statement of Claim**, ¶ 5.

[220] *See* **Ex. C-031**, Ballantines' Table of Jamaca de Dios Land Purchases.

[221] *See* **Amended Statement of Claim**, ¶ 64.

[222] **Amended Statement of Claim**, ¶ 69.

[223] Although the Ballantines assert that they submitted a request to the Ministry on 30 November 2010, it is clear from the "receipt" stamp in Exhibit C-5 that the Ministry did not receive the request until 26 January 2011.

"tourism"[224] project that "consist[ed] in the construction of 10 cabins and sale of 19 lots for the construction of villas . . . ."[225]

80. In any event, the Project did not move forward. A site visit was conducted by Ministry officials on 17 February 2011, in which they noted, *inter alia*, that the land was very steep (over 40%),[226] that "[e]arth movements to be carried out in the construction phase are . . . major," [227] that the "[c]ondition of the area for the disposal of removed materials" were "[i]nadequate/harmful to the environment/[there were] risks,"[228] that "[t]he Project contaminates soil and subsoil . . . in a significant way,"[229] that, "[i]n the Project construction phase . . . the primary or secondary forest needs to be cleared,"[230] that "[d]evelopment of the Project will have a very strong adverse visual impact on the landscape,"[231] and that "diverse vegetation and a slope greater than 60% were observed in the proposed Project area."[232] The Ministry conducted

[224] *See* **Ex. R-049**, Project 3 Application Form, § 2.1.

[225] *See* **Ex. R-049**, Project 3 Application Form, § 2.1.

[226] *See* **Ex. R-108**, Notes from 17 February 2011 Site Visit, § 1.

[227] **Ex. R-108**, Notes from 17 February 2011 Site Visit, § 5 (translation from Spanish; the original Spanish version reads as follows: "[l]os movimientos de tierra que se realizarán en la fase de construcción son: . . . 'Muy grande"); *see also id.*, § 9 (stating that "[t]he construction/installation will produce impacts of [the following] magnitud: . . . High") (translation from Spanish; the original Spanish version reads as follows: "[l]a construcción /instalación producirá impactos de magnitud . . . [a]lta").

[228] **Ex. R-108**, Notes from 17 February 2011 Site Visit, § 7 (translation from Spanish; the original Spanish version reads as follows: "[c]ondición del área de disposición de materiales removidos" were"[i]nadecuado/daña el ambiente/[tenían] riesgos").

[229] **Ex. R-108**, Notes from 17 February 2011 Site Visit, § 10 (translation from Spanish; the original Spanish version reads as follows: "[e]l Proyecto contamina el suelo y subsuelo . . . de manera significativa").

[230] **Ex. R-108**, Notes from 17 February 2011 Site Visit, § 22 (translation from Spanish; the original Spanish version reads as follows: "[e]n la fase de construcción del Proyecto, se requiere eliminar . . . [b]osque primario o secundario").

[231] **Ex. R-108**, Notes from 17 February 2011 Site Visit, § 38 (translation from Spanish; the original Spanish version reads as follows: "[e]l desarrollo del Proyecto producirá un impacto visual negativo sobre el paisaje . . . [m]uy fuerte").

[232] **Ex. R-108**, Notes from 17 February 2011 Site Visit, Final Evaluation (translation from Spanish; the original Spanish version reads as follows: "[s]e observó en el área propuesto del Proyecto una diversidad

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another site visit on 18 March 2011.[233] After these visits, the Ministry technicians recommended declaring the project "not viable," given "the environmental fragility of the area and natural risk, the land topography and slope, which is over 60% in much of the area, . . . natural run-offs, the characteristics of the buildings being built in the Project area, and a possible violation of Art. 122, Law 64-00 . . . ."[234] The Ministry's Technical Evaluation Committee in turn accepted this recommendation.[235] Accordingly, on 12 September 2011, the Ministry formally rejected the Ballantines' permit application, on the basis that "the project [was] [n]ot viable environmentally for being in a mountain area with a slope higher than 60% . . . , likewise it is considered a [fragile area] environmentally and implies a natural risk."[236]

81. On 2 November 2011, the Ballantines requested reconsideration of the Ministry's decision on the basis that "the slope where we are trying to build a plain access [] is barely 34

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
de vegetación y una pendiente superior a los 60%."); *see also* **Ex. R-109**, Report on 17 February 2011 Site Visit.

[233] *See* **Ex. R-110**, Summary of Project 3 Evaluation Chronology (11 May 2011).

[234] **Ex. R-110**, Summary of Project 3 Evaluation Chronology (11 May 2011) (translation from Spanish; the original Spanish version reads as follows: "la fragilidad ambiental de la zona y el riesgo natural, la topografía y la pendiente de los terrenos, que en gran parte del área es superior a los 60%, . . . las escorrentías natural intervenidas de la zona, las características de las construcciones que se están edificando en el área [d]el Proyecto, y la posible violación del Art. 122 de la Ley 64-00 . . . ."). Article 122 of Law No. 64-00 (*i.e.*, the Environmental Law) states as follows: "Intensive tillage, like plowing, removal, or any other work which increases soil erosion and sterilization, is prohibited on mountainous soil where slope incline is equal to, or greater than, sixty percent (60%). Only the establishment of permanent plantations of fruit shrubs and timber trees is permitted." **Ex. R-003**, Environmental Law, Art. 122 (translation from Spanish; the original Spanish version reads as follows: "Se prohíbe dar a los suelos montañosos con pendientes igual o superior a sesenta por ciento (60%) de inclinación el uso de laboreo intensivo: arado, remoción, o cualquier otra labor que incremente la erosión y esterilización de los mismos, permitiendo solamente el establecimiento de plantaciones permanentes de arbustos frutales y árboles maderables").

[235] **Ex. R-112**, Acta del Comité Técnico de Evaluación, 18 de mayo de 2011.

[236] **Ex. C-008**, Letter from Z. González de Guitiérrez (Ministry of Environment) to M. Ballantine (12 September 2011). In their English translation of this document, which originally was transmitted in Spanish, the Ballantines state that the words which precede "environmentally" are illegible. However, it appears that the words used in the Spanish version were "área frágil ambientalmente," which means "environmentally fragile area."

degrees,"[237] and therefore "within the allowed margin . . . ."[238] However, as the Ministry explained in its 8 March 2012 response, the proposed Ballantines "project [wa]s located in lots with slopes between 20 and 37 degrees,"[239] which "[i]n ***percentage*** terms . . . means 36% and 75%, respectively."[240] The Ministry explained not only that Project 3 "would modify the natural runoff of the area and the local hydrological condition and the condition of the microbasin,"[241] but also that "[t]he cuts and leveling of lots required to establish the path requested and the constructions would have a great pressure over the mountain ecosystems proposed to be executed."[242] After citing the laws and regulations that Project 3 would violate,[243] the Ministry informed the Ballantines that their application file had been closed.[244]

82. However, the Ballantines — who now concede that they understood the Ministry's concerns that led to denial of the permit[245] — continued to push the issue. On 3

[237] **Ex. C-010**, Letter from M. Ballantine to E. Reyna (Ministry of Environment) (2 November 2011), p. 1 (emphasis added) (translation from Spanish; the original Spanish version reads as follows: "la pendiente donde estamos tratando de ubicar un simple acceso[] es a penas [sic] de 34 ***grados***").

[238] **Ex. C-010**, Letter from M. Ballantine to E. Reyna (Ministry of Environment) (2 November 2011), p. 1 (translation from Spanish; the original Spanish version reads as follows: "dentro del margen permitido . . . .").

[239] **Ex. C-011**, Letter from Z. González de Gutiérrez (Ministry of Environment) to M. Ballantine (8 March 2012), p. 1.

[240] **Ex. C-011**, Letter from Z. González de Gutiérrez (Ministry of Environment) to M. Ballantine (8 March 2012), p. 1 (emphasis added).

[241] **Ex. C-011**, Letter from Z. González de Gutiérrez (Ministry of Environment) to M. Ballantine (8 March 2012), p. 1.

[242] **Ex. C-011**, Letter from Z. González de Gutiérrez (Ministry of Environment) to M. Ballantine (8 March 2012), p. 2.

[243] *See* **Ex. C-011**, Letter from Z. González de Gutiérrez (Ministry of Environment) to M. Ballantine (8 March 2012), pp. 2–3.

[244] *See* **Ex. C-011**, Letter from Z. González de Gutiérrez (Ministry of Environment) to M. Ballantine (8 March 2012), p. 3.

[245] *See* **Michael Ballantine's First Witness Statement**, ¶ 13 (explaining that his "environmental lawyer Freddy Gonzalez from Jarabacoa helped consult [him] through the process"), ¶ 14 (explaining that "[his] lawyer advised that the road would have the biggest environmental impact"), ¶ 12 (explaining that "[he] was very conscious that the key to success for La Jamaca de Dios was the road"), ¶ 15 (explaining that "[t]he key to a mountain road in the tropics is storm water management," since "[t]he velocity and force

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August 2012, they again asked the Ministry to reconsider its decision, on the basis that "the extension of our current project is located in a zone with a pitch of 32 [degrees]."[246] The Ministry's 18 December 2012 response was the same as before — that "[t]he project is located in lots with slopes between 20 and 37 degrees,"[247] that "[i]n percentage terms this means 36% and 75%, respectively,"[248] and that the land identified therefore was not suitable for Project 3.[249]

83. On 4 July 2013, the Ballantines requested reconsideration for a third time, arguing once again that the Ministry's assessment was incorrect.[250] "[A]fter reexamining [the Ballantines'] case,"[251] which at that point "ha[d] been visited four times by several technical commissions,"[252] the Ministry sent a letter to the Ballantines on 15 January 2014, ratifying its earlier conclusion that the project was "not [environmentally] viable,"[253] and explaining yet again that "[t]he project is located in lots with slopes between 20 and 37 degrees. In percentage

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storm water creates coming off a mountain . . . will take out anything in its path if not directed and managed properly").

[246] **Ex. C-012**, Letter from M. Ballantine to E. Reyna (Ministry of Environment) (3 August 2012), p. 1. It is clear from the sentence of the document that precedes the one quoted above that the Ballantines were talking about "degrees."

[247] **Ex. C-013**, Letter from Z. González de Gutiérrez (Ministry of Environment) to M. Ballantine (18 December 2012), p. 1.

[248] **Ex. C-013**, Letter from Z. González de Gutiérrez (Ministry of Environment) to M. Ballantine (18 December 2012), p. 1.

[249] **Ex. C-013**, Letter from Z. González de Gutiérrez (Ministry of Environment) to M. Ballantine (18 December 2012), p. 1.

[250] *See* **Ex. C-014**, Letter from Jamaca de Dios to Ministry of Environment (4 July 2013). This time, the Ballantines argued that (1) most of the land contemplated in their application was not steeper than 60%, (2) they had no intention of building on the land that exceeded the 60% limit, (3) the project would not interfere with any water streams, (4) the project would not put pressure on the mountain's ecosystem, and (5) there was no legal bar to a project of this nature.

[251] **Ex. C-015**, Letter from Z. González de Gutiérrez (Ministry of Environment) to M. Ballantine (15 January 2014), p. 1.

[252] **Ex. C-015**, Letter from Z. González de Gutiérrez (Ministry of Environment) to M. Ballantine (15 January 2014), p. 1.

[253] **Ex. C-015**, Letter from Z. González de Gutiérrez (Ministry of Environment) to M. Ballantine (15 January 2014), p. 1.

terms this means 36% and 75%, respectively."[254] The Ministry also added that the Project 3 was "[i]nside the protected area 'Parque Nacional Baiguate,'"[255] and, for that reason, too, was unviable.

84. The ***fourth*** project ("**Project 4**") involved plans by the Ballantines to construct a "mountain lodge" on land above the restaurant that was the subject of Project 2.[256] The Ballantines asked the Municipality of Jarabacoa to supply a "no objection" letter for Project 4,[257] and have asserted that such project was derailed because they never received a response.[258] However, the record shows that on 11 December 2014, a representative of Jamaca de Dios raised the issue of the "Jamaca Mountain Lodge Project"[259] at a meeting of the Municipal Council of Jarabacoa; that the Municipal Council responded by explaining that it understood that there were environmental concerns with the expansion of Jamaca de Dios, and wanted to learn more;[260] and that the Jamaca de Dios representative then stated that the "no objection" letter was inapposite.[261] The record also shows that the Municipal Council subsequently informed the

[254] **Ex. C-015**, Letter from Z. González de Gutiérrez (Ministry of Environment) to M. Ballantine (15 January 2014), p. 1.

[255] **Ex. C-015**, Letter from Z. González de Gutiérrez (Ministry of Environment) to M. Ballantine (15 January 2014), p. 1 (original emphasis omitted).

[256] Temporally, this project would fall within what the Ballantines deem "Phase 2." Physically, however, the project was to be located on land that the Ballantines deem part of "Phase 1." *See* **Statement of Claim**, ¶¶ 25, 71.

[257] *See* **Amended Statement of Claim**, ¶ 149.

[258] *See* **Amended Statement of Claim**, ¶¶ 149, 211, 273, 303.

[259] **Ex. R-140**, Jarabacoa Municipal Council Meeting Minutes (11 December 2014), p. 9.

[260] **Ex. R-140**, Jarabacoa Municipal Council Meeting Minutes (11 December 2014), p. 9.

[261] *See* **Ex. R-140**, Jarabacoa Municipal Council Meeting Minutes (11 December 2014), p. 9 ("The Project Representative stated: I think that any decision you make will not affect it, because before giving us the definitive No Objection letter [,] we must contact the other institutions and carry out the relevant studies") (translation from Spanish; the original Spanish versión reads as follows: "La Representante del Proyecto expresa: Pienso que cualquier decisión que ustedes tomen no lo afectará, porque antes de darnos la carta de No Objeción definitiva[,] debemos dirigirnos a las demás instituciones y hacer los estudios de lugar").

Ballantines, by letter dated 16 February 2015, that if the Ballantines were to secure confirmation from the Ministry of the Environment that Project 4 did not give rise to environmental concerns, the Municipal Council would provide the "no objection" letter.[262] As far as the Dominican Republic is aware, the Ballantines did not pursue Project 4 any further after that letter.

85. The ***fifth*** and final project ("**Project 5**") was really just a plan, or a pipe dream, rather than a project as such. The Ballantines assert that at some point they "developed plans for . . . [an] apartment complex that would allow owners to rent their units to tourists."[263] However, they never sought permission from the Dominican Republic to build such complex (which supposedly would have been located "near[] to the base of the property"[264]), and they never began construction on it. Notwithstanding the fact that this plan therefore never transcended the merely notional, the Ballantines are seeking approximately US$ 1.5 million in damages for it.[265]

86. As demonstrated in the sub-sections that follow, the Dominican Republic's conduct in connection with the five projects identified above did not at any point violate any of DR-CAFTA Chapter Ten standards that the Ballantines have invoked. After briefly recalling Chapter Ten's instructions on "Investment and Environment" (**Part A**), and debunking the 10 sets of factual allegations that underlie the Ballantines' Chapter Ten claims (**Part B**), the Dominican Republic addresses each of those claims in turn. Thus, **Part C** addresses the "national treatment" claim advanced under Article 10.3; **Part D** addresses the "most-favored-nation Treatment" claim advanced under Article 10.4; **Parts E and F** address the "fair and

[262] *See* **Ex. R-093**, Letter from the Jarabacoa Municipal Council to M. Ballantine (16 February 2015).
[263] **Amended Statement of Claim**, ¶ 6.
[264] **Amended Statement of Claim**, ¶ 25.
[265] *See* **"Exhibit 2" to James Farrell's First Report**, Schedules 7, 8, and 11.A.

equitable treatment" and "full protection and security" claims advanced under Article 10.5; and **Part G** addresses the "expropriation" claim advanced under Article 10.7. As the Tribunal no doubt will come to appreciate as it reviews the discussion below, the Ballantines' merits claims are utterly unfounded.

A. The Ballantines' Claims Concern Implementation And/Or Enforcement Of Environmental Measures, And Are Therefore Excluded By Virtue Of DR-CAFTA Article 10.11

87. As the preamble of DR-CAFTA reveals, it was the desire of the Parties that the agreement be implemented "in a manner consistent with environmental protection and conservation."[266]

88. Environmental concerns are also prominent elsewhere in the DR-CAFTA preamble, which refers to the promotion of sustainable development and of strengthening cooperation in environmental matters.[267] The preamble also states that the contracting States resolved to "protect and preserve the environment and enhance the means for doing so, including through the conservation of natural resources in their respective territories."[268]

89. No doubt these environmental concerns, and the desire to protect and enhance the means for preserving the environment, led to the adoption of Chapter 17 of DR-CAFTA, which delineates the main undertakings of the parties concerning the environment.[269] These include

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[266] **Ex. R-010,** DR-CAFTA, Preamble.

[267] **Ex. R-010,** DR-CAFTA, Preamble ("The Government of the Republic of Costa Rica, the Government of the Dominican Republic, the Government of the Republic of El Salvador, the Government of the Republic of Guatemala, the Government of the Republic of Honduras, the Government of the Republic of Nicaragua, and the Government of the United States of America, resolved to: [. . .] IMPLEMENT [emphasis in original] this Agreement ***in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters***"**)** (emphasis added).

[268] **R-010,** DR-CAFTA, Preamble.

[269] **R-010,** DR-CAFTA, Chapter 17, Environment.

undertakings by each party to "ensur[e] that its laws and policies provide for and encourage high levels of environmental protection," and to "striv[e] to continue to improve those laws and policies."[270]

90. This arbitration was introduced pursuant to Chapter Ten of DR-CAFTA. Although Chapter Ten relates to investment, environmental concerns permeate the chapter, so much so that Article 10.11, titled "Investment and Environment," prescribes an exception to the application of investment protections with respect to environmental measures: "***Nothing in [Chapter Ten] shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure*** otherwise consistent with this Chapter that it considers appropriate ***to ensure that investment*** activity in its territory is ***undertaken in a manner sensitive to environmental concerns***."[271]

91. This provision makes it clear that, notwithstanding the protections afforded to investments under Chapter Ten of DR-CAFTA, the Parties preserve their right to pursue their environmental policy without breaching their substantive obligations.[272]

92. There has been some academic and jurisprudential debate regarding the extent and meaning of this type of provision.[273] As explained by Doctor Bryan Schwartz in his

[270] **R-010,** DR-CAFTA, Art. 17.1.

[271] **R-010,** DR-CAFTA, Art. 17.1 (emphasis added).

[272] **RLA-068,** Beharry, Christina L., and Melinda E. Kuritzky, "Going Green: Managing the Environment Through International Investment Arbitration," 30(3) AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 30 383, 392 (2015) ("These clauses intend to carve out regulatory space for States to achieve policy goals without breaching their substantive obligations"). Note that this particular citation refers to Article III(1) of Annex I of the Canada-Costa Rica Foreign Investment Promotion and Protection Agreement, the content of which is identical to Article 10.11 of DR-CAFTA.

[273] A similar provision can be found in Article 1114 (1) of the North America Free Trade Agreement ("Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure *otherwise consistent with this Chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns") (**RLA-083,** North

[FOOTNOTE CONTINUED ON NEXT PAGE]

Separate Opinion in the *S.D. Myers* case, provisions like DR-CAFTA Article 10.11 cannot be viewed as "empty rhetoric."[274] At minimum, provisions like Article 10.11 must be viewed as acknowledging and reminding interpreters of investment provisions that the parties to DR-CAFTA take both the environment and open trade very seriously, and that the means should be found to reconcile these two objectives and, if possible, to make them mutually supportive and reinforcing.[275] The foregoing is consistent with accepted general principles of treaty interpretation which disfavor interpretations that lead to a results that are manifestly absurd or unreasonable.[276] Thus, an interpretation that concludes that Article 10.11 is merely a redundancy would certainly be unreasonable, if not absurd.

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

America Free Trade Agreement, Chapter 11, Investment (8 December 1993)), and in (**RLA-070**, Agreement Between the Government of Canada and the Government of the Republic of Costa Rica for the Promotion and Protection of Investments (1999)) Article III(1) of Annex I of the Canada-Costa Rica Foreign Investment Promotion and Protection Agreement ("Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns"). The survey conducted by Kathryn Gordon and Joachim Pohl published under the OECD series of Working Papers on International Investment 2011/01, explains that this clause is used by Canada in 21 of its treaties and in the US Model BIT 2004 (**RLA-069,** Gordon, K. and J. Pohl (2011), "Environmental Concerns in International Investment Agreements: A Survey," OECD Working Papers on International Investment, 2011/01, OECD Publishing, p. 13).

[274] **RLA-071**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Separate Opinion by Dr. Bryan Schwartz, Concurring Except with Respect to Performance Requirements, Partial Award of the Tribunal (12 November 2000) ¶ 118 ("I do not think that Article 1114 [of NAFTA] must be viewed as empty rhetoric"). As explained above, Article 10.11 of DR-CAFTA and Article 1114 (1) of NAFTA are identical.

[275] **RLA-071**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Separate Opinion by Dr. Bryan Schwartz, Concurring Except with Respect to Performance Requirements, in the Partial Award of the Tribunal, 12 November 2000, ¶ 118 ("I view Article 1114 as acknowledging and reminding interpreters of Chapter 11 (Investment) that the parties take both the environment and open trade very seriously and that means should be found to reconcile these two objectives and, if possible, to make them mutually supportive").

[276] **RLA-072**, Vienna Convention on the Law of Treaties (VCLT), Article 32. The Dominican Republic is a Party to the VCLT; the United States of America signed the VCLT but has not ratified it, nonetheless it has recognized since at least 1971 that the Convention is the "authoritative guide" to treaty law and practice, and that it reflects customary international law. (**RLA-073,** *Aven v. Costa Rica*, ICSID Case No. UNCT/15/3, Submission of the United States of America, Note 2, which in turn refers to the Letter from

[FOOTNOTE CONTINUED ON NEXT PAGE]

93. DR-CAFTA Article 10.11 follows the formula adopted by Canada, Mexico, and the United States in NAFTA Article 1114 (1). According to Canada's Statement of Implementation, Canada saw the final article 1114 (1) as "[affirming] each Party's right to adopt and enforce environmental measures, consistent with the chapter (e.g., environmental measures must be applied on a national treatment basis)."[277] In an article published by Sanford E. Gaines, the then-Deputy Assistant U.S. Trade Representative for the Environment, Office of the U.S. Trade Representative, he too states that, in his understanding , Article 1114 (1) "expressly authorizes the parties to place conditions on investments for the purpose of environmental protection, provided only that they apply such conditions in a nondiscriminatory manner to domestic and foreign investors alike."[278]

94. Hence, pursuant to the understanding of representatives of the two parties that negotiated the provision, a regulatory measure adopted to protect environmental concerns could not breach the investment obligations under the treaty unless such measures were discriminatory.[279]

95. The foregoing is consistent with the United States' position in the *David Aven v. Costa Rica* case, where in a third-party submission the United States stated that "Article 10.11 informs the interpretation of other provisions of CAFTA-DR Chapter Ten, including Articles 10.5 and 10.7, and shows that Chapter Ten was not intended to undermine the ability of

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
Secretary of State Rogers to President Nixon, Transmitting the Vienna Convention on the Law of Treaties, Oct. 18, 1971, reprinted in 65 DEP'T OF ST. BULL. 684, 685 (1971)).

[277] **RLA-074**, Canadian Statement on Implementation of the NAFTA Chapter 11 (PDF Document - 2.36 MB) - January 1994, 147-160, 152.

[278] **RLA-075**, Sanford E. Gaines, Environmental Laws and Regulations After NAFTA (1 U.S.-MEX. L.J. 1993) 199-210, 207.

[279] The foregoing would apply *mutatis mutandis* to DR-CAFTA given the parity of the provisions of Article 10.11 with NAFTA Article 1114 (1).

governments to take measures otherwise consistent with the Chapter, including measures based upon environmental concerns, even when those measures may affect the value of an investment."[280] It is also consistent with the *Tamimi* award, upon which the U.S. draws support, explaining with respect to substantively identical provisions that "the State Parties intended to reserve a significant margin of discretion to themselves in the application and enforcement of their respective environmental laws" and that "[w]hen it comes to determining any breach of the minimum standard of treatment . . . the Tribunal must be guided by the forceful defence of environmental regulation and protection provided in the express language of the Treaty."[281]

96. It is important to point out, that in the case of DR-CAFTA, the deference afforded to environmental concerns in Chapter Ten, goes beyond Article 10.11. Thus, Annex 10-C, paragraph 4(b), for instance, establishes that "[e]xcept in *rare circumstances*, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, ***and the environment***, do not constitute indirect expropriations."[282]

97. A joint reading of Articles 10.11 and Annex 10-C, paragraph 4(b) reveals the very high threshold that must be reached to conclude that a nondiscriminatory environmental measure constitutes a breach of Chapter Ten.

98. The bulk of the allegations of the Ballantines relate to two measures: the application of the Dominican Republic's Environmental Law, (Law No. 64-00), adopted on 18

[280] **RLA-073**, *Aven v. Costa Rica*, ICSID Case No. UNCT/15/3, Submission of the United States of America, ¶ 5.

[281] **RLA-076,** *Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award ¶ 389.

[282] **R-010,** DR-CAFTA, Annex 10-C, paragraph 4(b) (emphasis added).

August 2000, [283] and the creation of the Baiguate National Park via Decree No. 571-09, which was promulgated on 7 August 2009.[284]

99. The Environmental Law is a general application law that establishes the framework of environmental protection in the Dominican Republic.[285] It was hardly specific to the Ballantines, and, as will be shown in the following sections, it has not been applied to the Ballantines in any way that could be fairly characterized as discriminatory.

100. Decree No. 571-09 is also a norm of general application.[286] In addition to Baiguate National Park, 31 other protected areas throughout the Dominican Republic were created pursuant to this decree. It applies equally to Dominicans and foreigners, and does not

[283] Amended Statement of Claim ¶¶ 186, 211, 219, 238, 239.

[284] Amended Statement of Claim ¶¶ 186, 211, 219, 238.

[285] **R-003**, Environmental Law, 18 August 2000.

[286] **R-077**, Decree No. 571-09 (7 August 2009) (as published in the Official Gazette No. 10535 dated 7 September 2009). Ex. R-077, Decree No. 571-09 (7 August 2008) (as published in the Official Gazette No. 10535, dated 7 September 2009). This Exhibit (R-077) is a copy of an authenticated version of Decree No. 571-09 as published in the Official Gazette of the Dominican Republic. Both the Ballantines and the Dominican Republic submitted incorrect versions of the Decree with their initial submissions (C-016 and R-008). The version of the document originally submitted by the Dominican Republic contained a watermark that stated "in the process of publication in the Gazette" ("en trámite de publicación en Gaceta," per its original in Spanish). Although signed, this version of the Decree was not the final published version. As explained in the enclosed First Witness Statement of Eleuterio Martínez, after the President of the Dominican Republic signed the first version of the Decree, but before it was published, officials at the Ministry realized that there were cartography errors that had caused the delimitation of certain areas to be incorrect. Before the Decree was published in the Official Gazette, the errors were corrected, and the Gazette version is the one that is being introduced into the record with this Statement of Defense as Exhibit R-077. The differences between the previous version and the published version include: (i) changes in the coordinates of certain protected areas; (ii) changes in the surface area of others; and (iii) the inclusion of an additional protected area — "Area Refugio de Vida Silvestre Gran Estero" — with a surface area of 151.5 km. In total, the description of 10 of 31 of the areas originally proposed for inclusion in the National System of Protected Areas were modified in the published version, including Monumento Natural el Saltadero, Parque Nacional Amina, Parque la Hispaniola, Parque Nacional Baiguate Monumento Natural Salto de Jimenoa, Monumento Natural Saltos de Jima and Monumento Natural Punta Bayahibe, and one more (no. 32) was added. Dominican law requires publication in the Official Gazette for a Decree to become legally effective, hence there was no need to adopt an amendment to the Decree. Instead, the corrected version of the Decree was signed and published, and it then came into effect. Any version other than the version in published in the Official Gazette is accordingly unofficial. For this reason, the Ex. R-077 version should be considered true and correct.

purport to apply to specific persons or properties;[287] rather, it applies to specific areas of land. It was not a discriminatory measure directed at the Ballantines, either on its face or in application.

101. Even when considering the Baiguate National Park in isolation — which is inappropriate as the Decree designated 32 different protected areas — including the Park — in an attempt to fill the "environmental gaps" identified in the country[288] — the creation of the park was reasonable, for the reasons articulated in the attached expert report of Mr. Sixto J. Inchaustegui, a biologist specializing in ecology and the environment, with more than 40 years of experience in environmental sciences and conservation.[289] Moreover, as Mr. Inchaustegui explains, the enactment of the Decree was in furtherance of global commitments related to biodiversity and environmental protection.[290]

102. Especially in light of the Preamble, Chapter 17, Article 10.11, and Annex 10-C, paragraph 4(b) of DR-CAFTA, the treaty's high threshold for a finding of a treaty violation on the basis of an environmental measure has not been met. Accordingly, the enactment and subsequent enforcement by the Dominican Republic of its environmental laws, and the adoption of measures to protect the environment, cannot be considered a breach of DR-CAFTA by virtue of application of the environmental carve-out provision contained in Article 10.11 of the treaty.

[287] *See* Part C, below.

[288] **R-077**, Decree No. 571-09, (7 August 2009) (as published in the Official Gazette No. 10535 dated 7 September 2009), "Whereas," p.4.

[289] *See* **Inchaustegui's First Expert Report**, ¶¶ 48–55.

[290] *See* **Inchaustegui's First Expert Report**, ¶ 33. The undertakings established in Chapter 17 are in line with such commitments.

B. The Ten Unfounded Allegations Underlying The Ballantines' Merits Claims

103. The Ballantines' merits claims rest on ten principal allegations, each of which is unfounded. Before turning to the merits claims themselves, these ten allegations are discussed chronologically below.

1. The First Unfounded Allegation

104. The first unfounded allegation has to do with the creation and demarcation of the Baiguate National Park ("**Baiguate National Park**," or "**Park**"),[291] which the Ballantines have characterized as "part of a corrupt scheme . . . to destroy the Ballantines' investment to the advantage of local interests."[292] The Ballantines contend that "[t]he Park's boundaries were drawn to prevent any expansion of Jamaca de Dios."[293] However, that cannot be true, for the reasons explained below.

105. As the Ballantines themselves acknowledge, the Baiguate National Park was formally created, and its boundaries were formally established, by means of a presidential decree known as "**Decree No. 571-09**," which was published on 7 August 2009.[294] The Ballantines have not provided any evidence whatsoever that on or prior to that date, the Dominican Republic was aware that the Ballantines were contemplating an "expansion of Jamaca de Dios."[295] In fact,

[291] The Ballantines contend that the creation and demarcation of the Baiguate National Park boundary was discriminatory, arbitrary, unfair, and non-transparent (*see* **Amended Statement of Claim**, ¶¶ 186, 211); contributed to an unstable business environment (¶¶ 215, 217); and deprived the so-called "Phase 2" land "of any use" (¶ 238).

[292] **Amended Statement of Claim**, ¶ 138.

[293] **Amended Statement of Claim**, ¶ 13.

[294] **Amended Statement of Claim**, ¶ 113 and note 142.

[295] **Amended Statement of Claim**, ¶ 13. The Ballantines have not provided any evidence that they informed the Dominican Republic at any time before January 2011 that they intended to pursue projects beyond the two that already had been completed at that time (*viz.*, Projects 1 and 2).

the Ballantines did not even *purchase* half of the land associated with their so-called "Second Phase" until *after* Decree No. 571-09 was published.[296]

106. As former Vice-Minister of Protected Areas and Biodiversity, Professor Eleuterio Martínez explains in the attached witness statement, the publication of Decree No. 571-09 (which created 31 protected areas in addition to the Baiguate National Park) represented the culmination of a nation-wide environmental protection initiative that began in October 2004,[297] and was conducted pursuant to the United Nations Convention on Biological Diversity.

107. By way of background, since 1997, the Dominican Republic has been a party to the United Nations Convention on Biological Diversity — a multilateral treaty dedicated to promoting sustainable development. In 2004, the Parties to the Convention agreed to an action plan aimed at "significantly reducing the rate of biodiversity loss by 2010."[298] To accomplish this plan, the Parties to the Convention first engaged in what is known in the conservation context as "gap analysis" — a specific method for "identifying biodiversity (*i.e.*, species, ecosystems and ecological processes) not adequately conserved within a protected area network or through other effective and long-term conservation measures."[299] They then worked toward "the establishment and maintenance by 2010 for terrestrial [areas] and by 2012 for marine areas[,] of comprehensive, effectively managed, and ecologically representative national and

[296] *See* **Ex. C-031**, Ballantines' Table of Jamaca de Dios Land Purchases (indicating that more than half of the "[l]and purchased for 2nd Phase" was purchased after the Baiguate National Park was created on 7 August 2009).

[297] *See* **Eleuterio Martínez's First Witness Statement**, ¶¶ 24–29.

[298] **Ex. R-146**, Conference of the Parties to the United Nations Convention on Biological Diversity, Decision VII/28, Annex, ¶ 2.

[299] **Ex. R-156**, J. Parrish and N. Dudley, *What does gap analysis mean? A simple framework for assessment*, p. 1 (original emphasis omitted).

regional systems of protected areas . . . ."[300] Professor Martínez (a forest engineer specialized in ecology and environmental issues who represented the Dominican Republic during the negotiation of the Convention on Biodiversity, and who currently is the Vice-President of the Dominican Academy of Science) led these efforts in the Dominican Republic.[301]

108. From August 2008 until August 2009 (when Decree No. 571-09 was published), Professor Martínez led a team of government officials, scientists, and cartographers that — using a scientific procedure that the Dominican Republic had developed in cooperation with a German State agency — identified new areas for protection.[302] The team gathered existing information, verified it in the field, analyzed the environmental and biodiversity value of each site to determine whether protection was needed, and (if so) mapped out an area to be recommended to a high-level advisory panel for protection.[303] As noted above, when Decree No. 571-09 was published in August 2009, 32 new protected areas (including the Baiguate National Park) were created.[304]

109. In their Amended Statement of Claim, the Ballantines contend that "no significant study of the area [that became the Baiguate National Park] was undertaken by the [Ministry]."[305] That simply is not true. As Professor Martínez explains, his team of scientists, officials, and cartographers conducted site visits, and examined the area's resources, in order to determine its

[300] **Ex. R-146**, Conference of the Parties to the United Nations Convention on Biological Diversity, Decision VII/28, ¶ 18; **Eleuterio Martínez's First Witness Statement**, ¶ 26.

[301] **Eleuterio Martínez's First Witness Statement**, ¶ 10.

[302] **Eleuterio Martínez's First Witness Statement**, ¶¶ 33–36.

[303] **Eleuterio Martínez's First Witness Statement**, ¶¶ 33–36.

[304] **Eleuterio Martinez's First Witness Statement**, ¶ 4; **Ex. R-077**, Decree No. 571-09, (7 August 2009) (as published in the Official Gazette No. 10535 dated 7 September 2009).

[305] **Amended Statement of Claim**, ¶ 135.

environmental, biological, and biodiversity value.[306] They concluded that, from a preservation perspective, there were two reasons why the area was important. ***First***, it was a "botanical jewel"[307] with a sensitive and highly-fragile flora and fauna biodiversity.[308] As Professor Martínez explains, in the mountain range where the Baiguate National Park is now located (the "Cordillera Central"), "endemism" — which is a measure of the species and plants that can only be found in a particular geographical area[309] — increases with altitude.[310] The Park's borders were drawn to protect 275 botanical species.[311] ***Second***, the land was "essential for the preservation of ecosystemic services, especially in relation to the production and protection of water in order to avoid potential landslides, given the intense annual dry and rainy seasons."[312] In light of the foregoing, the land was deemed a "national park," consistent with the World Conservation Union's categories of protection.[313]

110. Professor Martínez confirms that the team surveying the area did not at any point consider either who owned the land in the area or what they might hope to do with it: "When [the team] drew the Park boundaries [it] did not take into account the location and/or boundaries of private property."[314] In fact, Professor Martínez attests that "[he] only came to know the

[306] *See* **Eleuterio Martinez's First Witness Statement**, ¶¶ 33–36.

[307] *See* **Eleuterio Martinez's First Witness Statement**, ¶ 39 (explaining that this observation was made in a 2000 survey by a scientist and researcher from the German University of Freiburg and a taxonomist and researcher from the Dominican University of Santo Domingo/National Botanical Garden).

[308] **Eleuterio Martinez's First Witness Statement**, ¶ 39.

[309] *See* http://biodiversitya-z.org/content/endemism (last visited 24 May 2017).

[310] **Eleuterio Martinez's First Witness Statement**, ¶ 43.

[311] **Eleuterio Martinez's First Witness Statement**, ¶ 43.

[312] **Eleuterio Martinez's First Witness Statement**, ¶ 42.

[313] **Ex. R-052**, International Union for the Conservation of Nature, *Management Categories for Protected Areas*, Category II (last visited 20 May 2017) ("**Category II: Conservation and protection of the ecosystem,** *National park*, Objective: To protect natural biodiversity along with its underlying ecological structure and supporting environmental processes, and to promote education and recreation").

[314] **Eleuterio Martinez's First Witness Statement**, ¶¶ 41, 46.

location of such projects and private properties when preparing for [his] testimonial statement [in this arbitration]."[315]

2. The Second Unfounded Allegation

111. The second unfounded allegation is that the Ballantines were subjected to discriminatory inspections and fines in connection with Project 2 (which, to recall, encompassed the housing development and restaurant).[316] There are two components to this allegation, neither of which is true: (1) that the Ministry supposedly conducted an improper, "unannounced," "unprecedented," and "militaristic" inspection of Project 2 on 22 May 2009;[317] and (2) that the Ministry imposed an "excessive and arbitrary" fine upon the Ballantines six months later, in November 2009.[318]

112. **The 22 May 2009 Inspection**. It is true, as the Ballantines assert, that Ministry officials conducted an inspection of Project 2 on 22 May 2009. However, this inspection simply could not have come as a surprise, given that: (1) the Ballantines' Project 2 license stated that the Ministry had the right to sanction any violations thereof,[319] and this implied that the Ministry also had the power to monitor compliance with the license; and (2) several weeks *before* the 22 May 2009 inspection, the Ballantines had been invited to the Ministry's office in Jarabacoa to

[315] **Eleuterio Martinez's First Witness Statement**, ¶ 41.

[316] *See* **Amended Statement of Claim**, ¶¶ 186, 211.

[317] **Amended Statement of Claim**, ¶¶ 83, 81.

[318] **Amended Statement of Claim**, ¶ 84.

[319] **Ex. C-004**, Project 2 Permit, p. 7 ("The Secretariat of State for the Environment and Natural Resources reserves the right granted by Law 64-00 to issue the relevant measures and/or sanctions in case of breach of this provision") (translation from Spanish; the original Spanish version reads as follows: "La Secretaria del Estado de Medio Ambiente y Recursos Naturales se reserva el derecho otorgado por la Ley 64-00 de dictar las medidas y/o sanciones pertinentes en caso de incumplimiento de esta disposición").

discuss unauthorized work that was being conducted in connection with Project 2,[320] and the Ballantines responded to this invitation by "expressing their intention to cooperate with the principles of environmental protection, and not violate the Environment Act."[321]

113. Nor could the inspection be considered "unprecedented."[322] The Ballantines' sole "evidence" to the contrary is based on pure hearsay — something that "Francis Santana, then the local director of [the Ministry]"[323] allegedly "told Michael Ballantine."[324] However, Ms. Santana, whose witness statement is appended to the present submission, flatly denies all of the statements that the Ballantines have attempted to attribute to her.[325] And, given that the Environmental Law states expressly that environmental permit-holders must allow monitoring by competent authorities,[326] the proposition that an inspection was "unprecedented" simply cannot be true.

114. As for the assertion that the inspection was "militaristic,"[327] and that "[Ministry] officials brought men brandishing automatic weapons,"[328] this appears to be a dramatized account of a routine procedure. As former Minister Jaime David Fernandez Mirabal explains in his attached witness statement, it is common for officers from the National Service for

[320] **Ex. R-068**, Letter from Francis Santana to Jamaca de Dios (16 April 2009).

[321] **Ex. R-065**, Minutes of Environmental Inspection (22 May 2009), p. 4 (translation from Spanish; the original Spanish version reads as follows: "expresando sus intenciones de colaborar con los principios de protección al ambiente y no faltar a la Ley de Medio Ambiente").

[322] **Amended Statement of Claim**, ¶ 83.

[323] **Amended Statement of Claim**, ¶ 83.

[324] **Amended Statement of Claim**, ¶ 83.

[325] **Francis Santana's First Witness Statement**, ¶ 13. Ms. Santana also testifies that she was approached in December 2016 by one of the Ballantines' expert witnesses (Mr. Graviel Peña), and offered compensation in exchange for her signature on a witness statement that had been drafted without her knowledge. **Francis Santana's First Witness Statement**, ¶ 15.

[326] **Ex. R-003**, Environmental Law, Art. 45(4); *see also* **Ex. C-004**, Project 2 Permit, p.6.

[327] *See* **Amended Statement of Claim**, ¶ 83.

[328] **Amended Statement of Claim**, ¶ 81.

Environmental Protection ("**SENPA**") — who wear distinctive green uniforms and (much like park rangers worldwide) carry non-automatic weapons — to accompany Ministry officials on site inspections.[329] Although the Dominican Republic has been unable to confirm whether any SENPA officers were present at the 22 May 2009 inspection, it would not be surprising if they were.

115. **The November 2009 fine**. Following the 22 May 2009 inspection, as the Ballantines explain, the "Ministry imposed a fine of almost one million DR pesos (more than US$27,500) on Jamaca de Dios."[330] In their Amended Statement of Claim, the Ballantines assert that this fine was "excessive and arbitrary,"[331] and "the largest fine the [Ministry] had ever assessed on a property owner in the region."[332] However, none of that is true. The fine was well within the scope of the Ministry's authority to impose, given that: (1) the Project 2 permit made it clear that the Ministry reserved the right to impose fines for breaches of the permit;[333] (2) the Project 2 permit also made it clear that the Ballantines were required to comply with environmental regulations and submit reports of their compliance every six months;[334] (3) the 22 May 2009 inspection revealed (and the minutes, report, and photographs of the inspection show) that the Ballantines had failed to submit the compliance reports, and, in violation of the Environmental Law, had cut certain species of tree, and engaged in ground excavations without

[329] *See* **Jaime David Fernandez Mirabal's First Witness Statement**, ¶ 22; **Ex. R-162**, Decree 561-06, Article 2 (21 November 2006).

[330] **Amended Statement of Claim**, ¶ 84.

[331] **Amended Statement of Claim**, ¶ 84.

[332] **Amended Statement of Claim**, ¶ 84.

[333] *See* **Ex. C-004**, Project 2 Permit.

[334] **Ex. C-004**, Project 2 Permit, p. 6.

authorization;[335] (4) Dominican law authorizes the imposition of fines of up to 3,000 times the minimum wage applicable at the time of the environmental violation;[336] and (5) the fine imposed was calculated in accordance with the guidelines existing at the time.[337] Moreover, the fine imposed on the Ballantines eventually was reduced by 50%.[338] However, even at its initial rate, it was not by any means the "largest fine" that the Ministry ever assessed in the region,[339] as the Ballantines have contended. For example, in 2013, a fine of more than 1.7 million pesos — almost double the amount of the fine initially imposed on Jamaca de Dios — was imposed on Aloma Mountain (one of the entities that the Ballantines claim is "in like circumstances" with Jamaca de Dios),[340] for conducting work without a permit.[341]

3. The Third Unfounded Allegation

116. The third unfounded allegation is that, following the 22 May 2009 inspection discussed above, the Dominican Republic "harass[ed]" the Ballantines,[342] and subjected them to

[335] *See* **Ex. R-065**, Minutes of Environmental Inspection (22 May 2009); **Ex. R-066**, Letter from Ministry to M. Ballantine (22 September 2009) and Report of Environmental Inspection (including photographs of land excavations and cut trees); **Ex. C-007**, Resolution SGA No. 973-2009 (19 November 2009) (stating that the Ballantines had cut trees of several species without permit, including "*capá, higo, yagrumo, cabra, cabirma, laurel silvestre, guama y guásuma*").

[336] **Ex. R-003**, Environmental Law, Art. 167.

[337] **Ex. R-066**, Cálculo Sanción Adminsitrativa, Residencial Jamaca de Dios (10 July 2009), p. 8.

[338] *See* **Amended Statement of Claim**, ¶ 86.

[339] **Amended Statement of Claim**, ¶ 84.

[340] *See* **Amended Statement of Claim**, § III.B.4

[341] **Ex. R-056**, Minutes of Environmental Inspection of Aloma Mountain (14 August 2013).; *see also* **Ex. R-142**, Ministry Letter Confirming Non-Viability of Aloma Mountain Project (21 April 2017). This fine also was eventually reduced, to RD$352,137.36. *See* **Ex. R-055**, Resolution on Reconsideration of Aloma Mountain Fine (20 January 2014).

[342] *See* **Amended Statement of Claim**, ¶ 77.

"disparate treatment,"[343] by requiring them to submit environmental compliance reports (known as "**ICA reports**") every six months.[344]

117. The Dominican Republic is puzzled by this allegation, since the obligation to submit ICA reports is plain not only from Law No. 64-00 ("**the Environmental Law**"),[345] but also from the text of the Project 2 permit itself, which states expressly that "from the time the environmental permit is issued, Mr. Ballantine [] shall submit every six months to the Ministry of Environment, reports of compliance with the environmental management."[346] Environmental permits granted to other entities contain the exact same obligation,[347] and the Ministry has imposed fines on such entities on occasions when they have not submitted the required ICA reports.[348]

4. The Fourth Unfounded Allegation

118. The fourth unfounded allegation has to do with Project 3, and — more specifically — with the Ministry's decision to reject the Ballantines' request for permission to extend the Project 1 road up the mountain. As explained above, this decision was based on site visits by Ministry officials which had identified the following concerns:

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[343] **Amended Statement of Claim**, ¶ 77.

[344] **Amended Statement of Claim**, ¶ 211; *see also id.*, ¶ 186 (asserting that the Dominican Republic "specifically required the Ballantines to complete an intensive Environmental ICA [*informe de cumplimiento ambiental*] report every 6 months," but "has not required any Dominican project in the area to file these reports, with the exception of [the project] Quintas del Bosque . . . .").

[345] *See* **Ex. R-003**, Environmental Law, Art. 9.

[346] **Ex. C-004**, Project 2 Permit, § 4.

[347] *See, e.g.*, **R-070**, Mountain Garden Environmental Permit, § 4; **R-063**, Quintas del Bosque Environmental Permit, § 4; **R-071**, Paso Alto Environmental Permit, § 4.

[348] *See, e.g.*, **R-072**, Fine On Estación de Servicios Reyna Durán (10 January 2017) (imposing a fine in the amount of RD$ 245,640.00 on Estación de Servicios Reyna Durán, which is a project owned by Dominicans).

a. that "on the land selected by the owners of the project in question[,] the slope is greater than 60%"[349] which was above the maximum established in the Environmental Law;[350]

b. that "[t]he Project will be built at an altitude over 900 meters above sea level,"[351] in "a zone of high environmental fragility and high natural risk," which was "unstable and extremely dangerous";[352]

c. that the Project 3 site was in an area in which "the alteration of . . . natural parameters creates landslides, with an aftermath of damages, loss of life, and loss of property";[353]

d. that "the [e]arth movements to be carried out in the construction phase are . . . major,"[354] and that "[t]he cuts and leveling of lots required to

[349] **Ex. R-004**, Report on 18 March 2011 Site Visit (21 March 2011), p. 5 (translation from Spanish; the original Spanish version states as follows: "en los terrenos elegidos por los propietarios del referido proyecto la pendiente es superior a 60%").

[350] **Ex. R-003**, Environmental Law, Art. 122.

[351] **Ex. R-004**, Report on 18 March 2011 Site Visit (21 March 2011), p. 6 (translation from Spanish; the original Spanish version states as follows: "[l]a construcción del Proyecto se ejecuta a una altura que supera los 900 metros sobre el nivel del mar").

[352] **Ex. R-004**, Report on 18 March 2011 Site Visit (21 March 2011), p. 7 (translation from Spanish; the original Spanish version states as follows: "zona de alta fragilidad ambiental y de alto riesgo natural" and "inestable y sumamente peligrosa").

[353] **Ex. R-004**, Report on 18 March 2011 Site Visit (21 March 2011), p. 7 (translation from Spanish; the original Spanish version states as follows: "la alteración de . . . parámetros naturales genera deslizamientos con sus secuelas de daños, en pérdidas de vidas y pienes materialies").

[354] **Ex. R-108**, Notes from 17 February 2011 Site Visit, § 5 (translation from Spanish; the original Spanish version states as follows: "[l]os movimientos de tierra que se realizarán en la fase de construcción son: . . . 'Muy grande[s],"); *see also id.*, § 9 (stating that "[t]he construction/installation will produce impacts of [the following] magnitud: . . . High") (translation from Spanish; the original Spanish version reads as follows: "[l]a construcción /instalación producirá impactos de magnitud . . . [a]lta").

> establish the path requested and the constructions would have a great pressure over the mountain ecosystems proposed to be executed."[355]

119. These concerns were eminently reasonable, for several reasons. ***First***, the construction of roads in areas where the altitude is high and the land is steep (like mountain ranges) is dangerous, particularly where there is high precipitation level.[356] As Michael Ballantine himself put it, in laymen's terms, "any grandmother would be concerned about their grandchildren falling off a steep mountain road."[357] As explained by Mr. Zacarías Navarro — an environmental engineer, and the current Director of Environmental Regulations and Investigations at the Ministry, whose witness statement is appended hereto — the Project 3 road was to be constructed in an area located approximately 900 to 1200 meters above sea level, in the northern face of the Cordillera Central mountain range, where precipitation levels exceed 1600 millimeters per year.[358] ***Second***, as Michael Ballantine also concedes, "the road would have the biggest environmental impact . . . ."[359] In order to build a safe road, the Ballantines would have had to level land that was steeper than 60%.[360] Mr. Navarro explains that "in such conditions the risk of periodic and irrecoverable environmental harm is significant."[361] ***Third***, as Michael Ballantine also admits, "[m]ountain road are difficult to build and to maintain,"[362] and the type of road that the Ballantines were contemplating was only the second of its nature that had ever

[355] **Ex. C-011**, Letter from Z. González de Guitiérrez (Ministry of Environment) to M. Ballantine (8 March 2012), p. 2.

[356] **Zacarías Navarro's First Witness Statement**, ¶ 24.

[357] **Michael Ballantine's First Witness Statement**, ¶ 12.

[358] **Zacarías Navarro's First Witness Statement**, ¶ 24.

[359] **Michael Ballantine's First Witness Statement**, ¶ 14.

[360] *See* **Zacarías Navarro's First Witness Statement**, ¶¶ 22–24.

[361] **Zacarías Navarro's First Witness Statement**, ¶ 24.

[362] **Amended Statement of Claim**, ¶ 45.

been attempted by a private enterprise in the Dominican Republic.[363] ***Fourth***, and again in the words of Michael Ballantine, "[t]he key to a mountain road in the tropics is storm water management,"[364] since "[t]he velocity and force [that] storm water creates coming off a mountain . . . will take out anything in its path if not directed and managed properly."[365]

120. In their Amended Statement of Claim, the Ballantines allege that the Ministry's decision not to authorize the Project 3 road was discriminatory,[366] on the asserted basis that "[t]he Ballantines were restricted from building a road in Phase 2 . . . while other projects were allowed to develop areas with slopes over 60 percent."[367] However, this is both an over-simplification and incorrect. As a threshold matter, it is not just the *existence* of land steeper than 60% that is important, but also the concentration and altitude of such land, and the level of intervention that would be necessary to develop it.[368] Accordingly, the question is not as simple as: "Is there land steeper than 60%?" And even if that ***were*** the relevant question (*quod non*), the Ballantines' allegation would still be unfounded, given that other projects were expressly restricted from developing areas of their land where the slopes exceeded 60%.[369]

[363] *See* **Michael Ballantine's First Witness Statement**, ¶ 15.

[364] **Michael Ballantine's First Witness Statement**, ¶ 15.

[365] **Michael Ballantine's First Witness Statement**, ¶ 15.

[366] *See* **Amended Statement of Claim**, ¶¶ 186, 211.

[367] **Amended Statement of Claim**, ¶ 211.

[368] *See* **Zacarías Navarro's First Witness Statement**, ¶¶ 57–64.

[369] *See, e.g.*, **Ex. C-29,** Environmental Permission No. 1956-12, Mirador Del Pino, Ministry of the Environment and Natural Resources (28 December 2012) p. 6, ("Twenty Second: the project director will comply in the project with Article 122 of the Law 56-00, where it is prohibited to use mountainous land with slopes equal to or more than sixty percent (60%) of incline, for intensive labor: plowing, earth removal or any other labor which increases the erosion and sterilization of said land, only allowing the establishment of permanent plantations of fruit trees and wood for timber").

5. The Fifth Unfounded Allegation

121. The fifth unfounded allegation also relates to Project 3. To recall, in Project 3, in addition to seeking permission from the Ministry to extend the Project 1 road up the mountain, the Ballantines also requested an environmental permit to complete a "tourism"[370] project that "consist[ed] in the construction of 10 cabins and sale of 19 lots for the construction of villas . . . ."[371] After conducting site visits on 17 February 2011 and 18 March 2011, the Ministry concluded on 12 September 2011 that, as a whole, "the project [was] [n]ot viable environmentally for being in a mountain area with a slope higher than 60% . . . , likewise it is considered a [fragile area] environmentally and implies a natural risk."[372] The Ministry stated, however, that it was willing to assess the viability of any other area that the Ballantines might select for Project 3.[373]

122. In their Amended Statement of Claim, the Ballantines allege that it was improper for the Ministry to use the slope as a basis for denying the permit application.[374] However, they do not contest that Dominican law in fact does restrict land use in mountain areas where the slope exceeds 60%. This restriction is specifically articulated in the Environmental Law:

> Art. 122. ***Intensive tillage, like plowing, removal, or any other work which increases soil erosion and sterilization, is prohibited on mountainous soil <u>where slope incline is equal to, or greater than, Sixty</u>***

[370] *See* **Ex. R-049**, Project 3 Application Form, § 2.1.

[371] *See* **Ex. R-049**, Project 3 Application Form, § 2.1.

[372] **Ex. C-008**, Letter from Z. González de Guitiérrez (Ministry of Environment) to M. Ballantine (12 September 2011). In their English translation of this document, which originally was transmitted in Spanish, the Ballantines state that the words which precede "environmentally" are illegible. However, it appears that the words used in the Spanish version were "área frágil ambientalmente," which means "environmentally fragile area."

[373] **Ex. C-008**, Letter from Z. González de Guitiérrez (Ministry of Environment) to M. Ballantine (12 September 2011).

[374] *See, e.g.*, **Amended Statement of Claim**, ¶¶ 186, 211, 217.

> ***percent (60%)***. Only the establishment of permanent plantations of fruit shrubs and timber trees is permitted.
>
> Paragraph I. Preference shall be given to maintaining a forest's native cover, developing a combination of perennial crops and forest cover, and forestry techniques to ensure crop protection and natural production and storage of water.
>
> Paragraph II. ***Land with a steep slope*** referred to in this Article shall not be subject to the provisions of the Law on Agrarian Reform. From the enactment of the present Act, said land ***shall not be subject to*** human settlement, or agricultural activity, or any other ***activity that may endanger soil stability or national infrastructure works***.[375]

As best the Dominican Republic can discern, the Ballantines' allegation of impropriety in connection with the 60% slope issue rests on four assertions, each of which is either unfounded or inapposite.

123. The ***first*** assertion is that there was no "substantive scientific support" for the conclusion that the land slated for Project 3 was steeper than 60%.[376] That simply is not true. Ministry technicians conducted ***five*** different site visits in connection with Project 3, and used measuring tools to analyze the slope of the land.[377] On each occasion, these experienced technicians concluded that the slopes exceeded 60%.[378]

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[375] **Ex. R-003**, Environmental Law, Art. 122 (emphasis added).

[376] **Amended Statement of Claim**, ¶ 99.

[377] **Ex. R-105,** Informe de Supervisión Proyecto Ampliación Jamaca de Dios, Codigo 6219 (23 January 2012) p. 3 ("In the field trip, we were able to verify with a Clinometer that slopes in the project had different ranges, with inclinations varying between 20 degrees and 37 degrees, which in percentage terms is equivalent to 36% and 75%, respectively") (translation from Spanish; the original Spanish version reads as follows: "En la visita de campo, utilizando un clinómetro, pudimos comprobar que las pendientes del área del proyecto eran de diferentes rangos, con inclinaciones entre 20 y 37grados, lo que en términos porcentuales serian 36% y 75% respectivamente").

[378] **Ex. R-108,** Report on 17 February 2011 Site Visit (17 February 2011); **Ex. R-004,** Report on 18 March 2011 Site Visit (21 March 2011); **Ex. R-105,** Informe de Supervisión Proyecto Ampliación Jamaca de Dios, Codigo 6219 (23 January 2012); **Ex. R-114,** Informe de Visita de Análisis Previo (28 August 2013) p. 3.

124. The ***second*** assertion is that Project 3 should not have been deemed unviable overall merely because some of the land was steeper than 60%,[379] since "Jamaca de Dios never sought to build homes on land with slopes exceeding 60 percent nor did it plan to do so."[380] As a threshold matter, this was something that the Ballantines only informed the Ministry in July 2013, when they submitted their third reconsideration request.[381] And, even if this issue had been raised earlier, it likely would have been of little import, since the Ballantines could not create home sites without also providing a way to access those sites (and, as explained above, there were significant concerns with the Project 3 road).

125. The ***third*** assertion is that other projects in Jarabacoa were granted licenses even though the land designated for those projects was steeper than 60%.[382] This, too, is an oversimplification; as noted above, it is too facile to compare projects based solely on slope. One also must consider concentration, altitude, and environmental impact.[383] It is these factors that distinguish the projects that the Ballantines mention (Paso Alto, Quintas del Bosque, Jarabacoa Mountain Garden and Mirador del Pino). For example, all of those projects are located at significantly lower altitudes than Project 3.[384] And, as compared to Project 3, there was a much easier way for people to access the exploitable land in the other projects.[385]

[379] *See* **Amended Statement of Claim**, ¶ 59.

[380] **Amended Statement of Claim**, note 64.

[381] *See* **Ex. C-010**, Letter from M. Ballantine to E. Reyna (Ministry of Environment) (2 November 2011); **Ex. C-012**, Letter from M. Ballantine to E. Reyna (Ministry of Environment) (3 August 2012); *compare with* **Ex. C-014,** Letter from Jamaca de Dios to Ministry of Environment (4 July 2013).

[382] *See* **Amended Statement of Claim**, ¶ 78.

[383] *See* **Zacarías Navarro's First Witness Statement**, ¶¶ 57–61.

[384] **Zacarías Navarro's First Witness Statement**, ¶¶ 57–60.

[385] **Zacarías Navarro's First Witness Statement**, ¶¶ 57–60.

Moreover, as Mr. Navarro explains, for most of those projects, the concentration of slopes was lower than it was for Project 3.[386]

126. The ***fourth***, and final, assertion by the Ballantines is that their own (earlier) Project 2 (*i.e.*, the housing development project) had received a permit even though some of the land in that area had slopes higher than 60%.[387] However, this assertion, too, is based on the notion that the only relevant question is the slope of the land itself. As Mr. Navarro explains, when the other important factors are taken into account — *viz.*, concentration, altitude, and the level of intervention necessary to complete the project — it is clear that there is a difference between the sites for Project 2 and Project 3.[388] Given its altitude and composition, the site for Project 3, which was further up the mountain from the site of Project 2, posed an increased risk of massive landslides.[389]

127. The Ballantines also ignore the fact that, for purposes of Project 2, the Ministry did not have to evaluate the environmental consequences of constructing a road. As explained above, the Ballantines sought and obtained permission to build the Project 1 road long before they sought permission for Project 2. (Though the Ballantines now claim that "[t]he importance of the road . . . cannot be overstated,"[390] and that "[i]ts quality was . . . a critical factor in the dramatic success of Phase 1,"[391] at the time the Ballantines applied for permission to construct the Project 1 road, they characterized it in their application as an "access road" for a reforestation

[386] **Zacarías Navarro's First Witness Statement**, ¶¶ 62–65.
[387] *See* **Amended Statement of Claim**, ¶ 97.
[388] **Zacarías Navarro's First Witness Statement**, ¶¶ 70–71.
[389] **Zacarías Navarro's First Witness Statement**, ¶ 64.
[390] **Amended Statement of Claim**, ¶ 43.
[391] **Amended Statement of Claim**, ¶ 43.

project,[392] and it is possible that the Ministry would have approached the application differently if it had been made aware of the Ballantines' true intentions.)

6. The Sixth Unfounded Allegation

128. The sixth unfounded allegation requires some background. As explained above, the Ballantines' alleged vision for Jamaca de Dios involved five different projects — two of which were authorized and subsequently completed (Projects 1 and 2), and three of which were not (Projects 3, 4, and 5). Projects 1 and 2 (the road and the housing complex) involved the same site, a diagram of which appears below:

[392] *See* **Ex. C-033**, Request to Build Reforestation Access Road (28 December 2004) ("It is necessary to state that this farm is being reforested in a large part of its area (390 tareas), and that ***in order to carry out this work***, it is necessary to build the aforementioned access road") (emphasis added); *see also* **Amended Statement of Claim**, ¶ 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***") (emphasis added); *see also* **Ex. C-034**, Ministry's Response to the Request to Build Reforestation Access Road (18 January 2005).

Figure 3

129. The **blue** line in the diagram represents the road that the Ballantines constructed in Project 1. The **red** line represents a "historical" road that the people of Palo Blanco (which is the part of Jarabacoa where Jamaca de Dios is located) had used for more than 80 years, pursuant to an easement.[393]

130. In 2011, citing robberies, the Ballantines erected gates at the end of the historical road ("**Historical Road Gates**").[394] In August of 2011, the townspeople of Palo Blanco petitioned the local District Attorney to have the Historical Road Gates opened.[395] The

[393] *See* **Ex. R-092**, Certification from *Alcalde de Palo Blanco* (22 May 2013); **Ex. C-069**, Final Judgment on Recognition of Easement and Removal of Gates, *Sala Tribunal de Tierras Jurisdicción Original-La Vega* (5 October 2015), pp. 11-12.

[394] *See* **Ex. C-022**, Ruling on Petition to Open Gates (13 September 2011), p.2.

[395] *See* **Ex. C-022**, Ruling on Petition to Open Gates (13 September 2011), p.1.

Ballantines responded to this petition by offering to let the townspeople access their property (*i.e.*, the townspeople's property) by means of the Ballantines' road (*i.e.*, the Project 1 road) instead of the historical road, and the District Attorney denied the petition on the basis of this offer.[396] The District Attorney also "ordered the Head of Police of the zone to give protection to Jamaca de Dios in order to guarantee the investments included in the touristic Project."[397]

131. For a time, the townspeople of Palo Blanco used the Ballantines' Project 1 road, as the Ballantines had offered. However, they soon found that the Ballantines' offer came with considerable limitations. For example, they were required to access the road through the main Jamaca de Dios gate ("**Main Gate**"), which had a guard, and were required to fill out paperwork every time they used the road. Moreover, they could only access the road on certain days at certain times. After a while, the townspeople raised a complaint with the Municipality of Jarabacoa, at a 17 April 2013 town hall meeting attended by representatives of Jamaca de Dios.[398] At the end of that meeting, the Municipality proposed that another meeting among the interested parties be held the next day at the site of the Historical Road Gates.[399] However, no Jamaca de Dios representatives appeared. Several days later, on 22 April 2013, the Municipality of Jarabacoa resolved to ask the Ballantines to open the Historical Road Gates, and to have the Commission of Public Works and the Prosecutor's Office work with "representatives of the Jamaca de Dios project, dwellers and owners of the lands in that zone" to find a solution.[400] When two months then passed without any solution, on 17 June 2013, a group of local townspeople apparently took it upon themselves to tear down the Historical Road Gates.

[396] *See* **Ex. C-022**, Ruling on Petition to Open Gates (13 September 2011).
[397] *See* **Ex. C-022**, Ruling on Petition to Open Gates (13 September 2011), p. 3.
[398] **Leslie Aimeé Gil Peña's First Witness Statement,** ¶ 11.
[399] *See* **Ex. R-074**, Video, *Le Niegan la Entrada a Jamaca de Dios a Los Regidores de Jarabacoa*.
[400] **Ex. C-23**, Jarabacoa Municipality Resolution, 22 April 2013.

132. In their Amended Statement of Claim, the Ballantines allege that the Municipality had "incited" this group.[401] However, apart from the fact that one member of the group was carrying the Municipality's 22 April 2013 resolution — which, incidentally, did not authorize the forcible removal of the Historical Road Gates — the Ballantines do not cite anything to support this serious accusation. Moreover, a video of the event (submitted herewith as Exhibit R-75) shows the municipal police ***stopping*** townspeople from damaging the property, and asking them to meet with the authorities to resolve the issue.[402]

133. On 17 June 2013 — the very same day of the above-described incident — the Ballantines petitioned an entity known as the Jarabacoa "Land Tribunal" for the immediate closure of the historical road.[403] The townspeople contested the petition, and the proceeding that followed lasted approximately two years. At the Ballantines' request, the historical road was closed pending resolution of their petition.[404]

134. Ultimately, after hearing evidence and argument from both sides, on 5 October 2015, the Land Tribunal concluded that the Ballantines should remove the barriers to the historical road (which included not just the Historical Road Gates at one end of the historical road, but also a wall of rocks and debris).[405] In their Amended Statement of Claim, the Ballantines refer to this ruling as a "resolution opening the road that the Ballantines built . . . ."[406]

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[401] **Amended Statement of Claim**, ¶ 150.

[402] **Ex. R-075**, Video of 17 June 2013 Incident.

[403] *See* **R-118**, Demanda, La Entidad Comercial La Jamaca De Dios Jarabacoa c. por. a. y Su Presidente Señor Michael J. Ballantine c. Tonito Duran Aquino y Compartes (19 June 2013).

[404] **Ex. C-024,** Ordinance, Decision No. 02062013000484, *Segunda Sala Tribunal de Tierras Jurisdición Original-La Vega Provincia, La Vega* (31 July 2013).

[405] **Ex. C-069**, Final Judgment, *Sala Tribunal de Tierras Jurisdicción Original-La Vega* (5 October 2015), pp. 11-12.

[406] **Amended Statement of Claim**, ¶ 224.

This clearly is a misstatement. The Government never declared the Project 1 road a public road, as the Ballantines contend.[407]

7. The Seventh Unfounded Allegation

135. The seventh unfounded allegation is that the Dominican Republic discriminated against the Ballantines because "[t]he President of the Dominican Republic rejected an appeal from the Ballantines regarding the permit denial,"[408] but supposedly intervened to favor a political ally.[409] The events underlying this allegation are as follows. On 1 October 2013, the Ballantines sent a letter to the Office of the President, seeking "guidance and [a] recommendation"[410] regarding "th[e] situation"[411] with Project 3. The Office of the Presidency then reviewed and acted upon the letter within ten days, forwarding it to the Minister of Environment on 10 October 2013 "for [his] consideration."[412] Two weeks later, the Office of the Presidency informed Michael Ballantine that the letter had been forwarded to the Minister of Environment,[413] and that "executives from the aforementioned Ministry will be in contact with their response in the coming days."[414] The foregoing hardly constitutes "rejecting" an "appeal." For its part, the assertion that the "President of the Dominican Republic . . . directly intervened

[407] *See* **Amended Statement of Claim**, ¶ 153.

[408] **Amended Statement of Claim**, ¶ 186.

[409] *See* **Amended Statement of Claim**, ¶ 186; *see also id.*, ¶ 111.

[410] **Ex. C-060**, Letter from M. Ballantine to the Office of the Presidency (1 October 2013), p. 3.

[411] **Ex. C-060**, Letter from M. Ballantine to the Office of the Presidency (1 October 2013), p. 3.

[412] **Ex. C-062**, Letter from the Office of the Presidency to the Minister of Environment (10 October 2013).

[413] **Ex. C-061**, Letter from the Office of the Presidency to M. Ballantine (28 October 2013).

[414] **Ex. C-061**, Letter from the Office of the Presidency to M. Ballantine (28 October 2013).

for a political crony to reverse a permit denial for Jarabacoa Mountain Garden"[415] is based purely on hearsay,[416] and thus has no evidentiary value.

8. The Eighth Unfounded Allegation

136. The eighth unfounded allegation involves Project 4 — *i.e.*, the Ballantines' plans to construct a "mountain lodge" on land (above the restaurant) which was the subject of Project 2.[417] As explained above, on 1 October 2013, the Ballantines asked the Municipality of Jarabacoa to supply a "no objection" letter for Project 4,[418] and claim that they never received a response,[419] which they assert was improper.[420]

137. However, the Ballantines did, in fact, receive a response. As explained above, on 11 December 2014, a representative of Jamaca de Dios raised the issue of the "Jamaca Mountain Lodge Project"[421] at a meeting of the Municipal Council of Jarabacoa. The minutes from that meeting show that the Municipal Council responded by explaining that it understood that there were environmental concerns with the expansion of Jamaca de Dios, and wanted to learn

[415] **Amended Statement of Claim**, ¶ 186.

[416] *See* **Amended Statement of Claim**, ¶ 111 (citing **Graviel Peña's First Expert Report**, ¶ 15; **Reynaldo del Rosario's First Witness Statement**, ¶ 9 (both of which refer to information supposedly relayed by other people).

[417] Temporally, this project would fall within what the Ballantines deem "Phase 2." Physically, however, the project was to be located on land that the Ballantines deem part of "Phase 1." *See* **Statement of Claim**, ¶¶ 67, 71.

[418] *See* **Amended Statement of Claim**, ¶ 150.

[419] *See* **Amended Statement of Claim**, ¶¶ 150, 211, 273, 303.

[420] *See* **Amended Statement of Claim**, ¶¶ 211, 239.

[421] **Ex. R-140**, Jarabacoa Municipal Council Meeting Minutes (11 December 2014), p. 9.

more.[422] The minutes also show that the Jamaca de Dios representative then stated that the "no objection" letter was inapposite, given the need to first obtain other permits from the Ministry.[423]

138. The record also shows that the Municipal Council subsequently informed the Ballantines, by letter dated 16 February 2015, that if the Ballantines were to secure confirmation from the Ministry of the Environment that Project 4 did not pose any environmental concerns, the Municipal Council would provide the "no objection" letter.[424] As far as the Dominican Republic is aware, the Ballantines did not pursue Project 4 any further after that letter.

9. The Ninth Unfounded Allegation

139. The ninth unfounded allegation has to do with an event that followed the Ministry's 12 September 2011 rejection of the Project 3 permit application. As explained above, the Ballantines asked the Ministry to reconsider its decision on three separate occasions. The first two times, their request for reconsideration was based on the notion that "the slope where we are trying to build a plain access [] is barely [sic] 34 ***degrees***,"[425] and therefore "within the margin permitted"[426] by the Environmental Law.[427] However, as the Ministry explained to the

[422] **Ex. R-140**, Jarabacoa Municipal Council Meeting Minutes (11 December 2014), p. 9.

[423] *See* **Ex. R-140**, Jarabacoa Municipal Council Meeting Minutes (11 December 2014), p. 9 ("The Project Representative stated: I think that any decision you make will not affect it, because before giving us the definitive No Objection letter[,] we must contact the other institutions and carry out the relevant studies") (translation from Spanish; the original Spanish version reads as follows: "La Representante del Proyecto expresa: Pienso que cualquier decisión que ustedes tomen no lo afectará, porque antes de darnos la carta de No Objeción definitiva[,] debemos dirigirnos a las demás instituciones y hacer los estudios de lugar").

[424] *See* **Ex. R-093**, Letter from the Jarabacoa Municipal Council to M. Ballantine (16 February 2015).

[425] **Ex. C-010**, Letter from M. Ballantine to E. Reyna (Ministry of Environment) (2 November 2011), p. 1 (emphasis added).

[426] **Ex. C-010**, Letter from M. Ballantine to E. Reyna (Ministry of Environment) (2 November 2011), p. 1 (translation from Spanish; the original Spanish version reads as follows: "la pendiente donde estamos tratando de ubicar un simple acceso[] es a penas [sic] de 34 ***grados***," and "dentro del margen permitido").

Ballantines both times, the figure calculated in "degrees" that the Ballantines had been using was equivalent to a slope of more than 60%.[428]

140. The Ballantines thereafter requested reconsideration a third time, arguing once again that the Ministry's assessment was incorrect.[429] But "after reexamining [the Ballantines'] case"[430] — which at that point "ha[d] been visited four times by several technical commissions"[431] — the Ministry decided to ratify its earlier conclusion that the project was "not environmentally viable."[432] Accordingly, in its 15 January 2014 letter to the Ballantines, the Ministry explained yet again that "[t]he project is located in lots with slopes between 20 and 37 degrees. In percentage terms this means 36% and 75%, respectively."[433] The letter also added because Project 3 was "[i]nside the protected area 'Parque Nacional Baiguate,'"[434] it was unviable for that reason as well. In their Amended Statement of Claim, the Ballantines allege

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

[427] **Ex. C-010**, Letter from M. Ballantine to E. Reyna (Ministry of Environment) (2 November 2011) (emphasis added), p. 1; *see also* **Ex. C-012**, Letter from M. Ballantine to E. Reyna (Ministry of Environment) (3 August 2012), p. 1.

[428] *See* **Ex. C-011**, Letter from Z. González de Guitiérrez (Ministry of Environment) to M. Ballantine (8 March 2012), p. 1; **Ex. C-013**, Letter from Z. González de Guitiérrez (Ministry of Environment) to M. Ballantine (18 December 2012), p. 1.

[429] This time, the Ballantines argued that (1) most of the land contemplated in their application was not steeper than 60%, (2) they had no intention of building on the land that exceeded the 60% limit, (3) the project would not interfere with any water streams, (4) the project would not put pressure on the mountain's ecosystem, and (5) there was no legal bar to a project of this nature.

[430] **Ex. C-013**, Letter from Z. González de Guitiérrez (Ministry of Environment) to M. Ballantine (18 December 2012), p. 1.

[431] **Ex. C-015**, Letter from Z. González de Guitiérrez (Ministry of Environment) to M. Ballantine (15 January 2014), p. 1.

[432] **Ex. C-015**, Letter from Z. González de Guitiérrez (Ministry of Environment) to M. Ballantine (15 January 2014), p. 1.

[433] **Ex. C-015**, Letter from Z. González de Guitiérrez (Ministry of Environment) to M. Ballantine (15 January 2014), p. 1.

[434] **Ex. C-015**, Letter from Z. González de Guitiérrez (Ministry of Environment) to M. Ballantine (15 January 2014), p. 1 (original emphasis omitted).

that the Ministry discriminated against them by mentioning the Park in this letter.[435] That is not true.

141. As a threshold matter, the Dominican Republic observes that the Ballantines have characterized the Ministry's reference to the Park as "[the Ministry using] the National Park as a basis to deny the Ballantines' permit . . . ."[436] That is not correct. The permit application had been rejected formally more than two years earlier, by means of the Ministry's 12 September 2011 letter. Since the Ministry was willing (as it had mentioned in that letter) to assess the viability of some other area that the Ballantines might select,[437] the Ballantines' application file remained open for several months. But when, instead of identifying an alternative site, the Ballantines chose to contest the Ministry's decision on the basis that the slope was 34 degrees,[438] the Ministry formally closed their file on 8 March 2012.[439] When the Ballantines protested again, on the very same basis, the Ministry reminded the Ballantines that it had already examined their case "exhaustively,"[440] and "repeated that after the aforementioned reassessments this dossier is definitely closed."[441] When the Ministry mentioned the Baiguate National Park in its 15 January 2014 letter, it was simply providing an additional basis for rejecting the Ballantines' third request for reconsideration; however, the application had long since then been denied on

[435] **Amended Statement of Claim**, ¶¶ 186, 211

[436] **Amended Statement of Claim**, ¶ 211.

[437] **Ex. C-008**, Letter from Z. González de Guitiérrez (Ministry of Environment) to M. Ballantine (12 September 2011).

[438] *See* **Ex. C-010**, Letter from M. Ballantine to E. Reyna (Ministry of Environment) (2 November 2011), p. 1.

[439] *See* **Ex. C-011**, Letter from Z. González de Guitiérrez (Ministry of Environment) to M. Ballantine (8 March 2012), p. 3 ("[T]he Ministry hereby informs you that after the assessment of this case your dossier is definitely closed").

[440] **Ex. C-013**, Letter from Z. González de Guitiérrez (Ministry of Environment) to M. Ballantine (18 December 2012), p. 1.

[441] **Ex. C-013**, Letter from Z. González de Guitiérrez (Ministry of Environment) to M. Ballantine (18 December 2012), p. 1.

other grounds — grounds which, moreover, remained applicable through the denial of the third (and final) request for reconsideration.

142. In any event, there is no basis for the Ballantines' allegation that the Dominican Republic "discriminated against the Ballantines with respect to the permitting for the National Park"[442] on the asserted basis that "[they] were denied the right to conduct any development activities within Phase 2, [but] other businesses have been allowed to conduct activities and develop properties in protected areas."[443] As an initial matter, the Ballantines have not been "denied the right to conduct any development activities within [what they call] Phase 2 . . . ." Rather, only some limitations apply. Under Law 202-04 on Protected Areas, land in a "Category II" protected area like the Baiguate National Park can be used for many purposes, including ecotourism.[444]

143. The Ballantines' assertion that "other businesses have been allowed to conduct activities and develop properties in protected areas"[445] is a red herring. Not all protected areas are alike. Consistent with Guidelines Established by the International Union for Conservation of

[442] **Amended Statement of Claim**, ¶ 211.

[443] **Amended Statement of Claim**, ¶ 211.

[444] **Ex. C-071,** Law No. 202-04, Ley Sectorial de Áreas Protegidas, National Congress (24 July 2004). Art. 14 ("Category II. National Parks: [] The following use is allowed under this category: scientific research; education; recreation; nature tourism or ecotourism; protection or investigation infrastructure; public use and ecotourism infrastructure, in zones with specific characteristics as described by the Management Plan, and authorized by the Secretariat of State for the Environment and Natural Resources") (translation from Spanish; the original Spanish version reads as follows: "Categoría II. Parques Nacionales: "En esta categoría están permitidos los siguientes usos: investigación científica, educación, recreación, turismo de naturaleza o ecoturismo, infraestructuras de protección y para investigación, infraestructuras para uso público y ecoturismo en las zonas y con las características específicas definidas por el plan de manejo y autorizadas por la Secretaría de Estado de Medio Ambiente y Recursos Naturales").

[445] **Amended Statement of Claim**, ¶ 211.

Nature,[446] Dominican Law 202-04 identifies five different categories of protected areas.[447] The "Punta Alma" development that the Ballantines cite in support of their allegation[448] is located in the "Bahía de Luperón Protected Area,"[449] which has different ecological and physiographical conditions from the Baiguate National Park,[450] and falls within a different category of protection[451] — one which allows for greater levels of human activity therein.[452]

10. The Tenth Unfounded Allegation

144. The Ballantines' tenth, and final, unfounded allegation is that the Dominican Republic has "require[d] the Ballantines to obtain permits from the Ministry of Environment in order to construct a road and buildings,"[453] but "[o]ther projects (Dominican) have been allowed

[446] **Ex. R-164,** Guidelines for Protected Area Management Categories, IUCN Commission on National Parks and Protected Areas, IUCN/UICN (1994).

[447] **Ex. C-071,** Law No. 202-04, Ley Sectorial de Áreas Protegidas, National Congress (24 July 2004). Art. 14.

[448] **Amended Statement of Claim**, ¶ 127, note 153; ¶ 144.

[449] **Amended Statement of Claim**, ¶ 144.

[450] **Sixto Inchaustegui First Report,** ¶ 71.

[451] **Ex. C-071,** Law No. 202-04, Ley Sectorial de Áreas Protegidas, National Congress (24 July 2004). Art. 37, ¶ 49 ("Article 37. The Protected Areas National System is made up of all publicly owned protected areas for public use, established by this law, or other legal and/or administrative instruments, and the following corresponding conservation categories, areas, locations and limits: Category IV: Habitat/Species Management Areas, Wild Life Refuge [] 49) Luperón Bay") (translation from Spanish; the original Spanish version reads as follows: "Artículo 37.- El Sistema Nacional de Áreas Protegidas está formado por todas las áreas protegidas de propiedad y uso público establecidas por vía de la presente ley u otras piezas legales y/o administrativas, con las correspondientes categorías de conservación, superficies, ubicaciones y limites, descritos a conservación: Categoría IV: Áreas de Manejo de Hábitat/Especies Refugio de Vida Silvestre [] 49) Bahía de Luperón").

[452] **Sixto Inchaustegui First Report,** ¶ 71; *see also* **Ex. C-071,** Law No. 202-04, Ley Sectorial de Áreas Protegidas, National Congress (24 July 2004). Art. 14 ("Category IV. Natural Reserve: []The following use is allowed under this category: controlled use of resources; traditional uses and activities; education; recreation; nature tourism or ecotourism; sustainable use of infrastructures under a management plan") (translation from Spanish; the original Spanish version reads as follows: "Categoría IV. Reserva Natural: [] En esta categoría se incluyen los siguientes usos permitidos: aprovechamiento controlado de sus recursos, usos y actividades tradicionales, educación, recreación, turismo de naturaleza o ecoturismo, infraestructuras de aprovechamiento sostenible bajo un plan de manejo").

[453] **Amended Statement of Claim**, ¶ 186.

to build without such a permit."[454] The only evidence of such "other projects" that the Ballantines offer — beyond unauthenticated pictures — is "the neighboring Aloma project,"[455] which is shorthand for the project at Aloma Mountain. The record shows, however, that the Dominican Republic fined Aloma more than 1.7 million pesos in 2013 precisely for conducting work without a permit.[456] Hence, these assertions are completely baseless.

C. The Dominican Republic Did Not Breach Its National Treatment Obligations under Article 10.3 of DR-CAFTA

145. To prove that the Dominican Republic has not violated the obligation to accord national treatment set forth in Article 10.3 of DR-CAFTA, the section below will examine the specific measures challenged by the Ballantines under the above-referenced treaty provision. The section is divided in four parts: (i) an analysis of the scope and meaning of Article 10.3; (ii) an analysis of whether or not the Dominican comparators suggested by the Ballantines are in like circumstances as the Ballantines' Jamaca de Dios project; (iii) an analysis of whether or not the Dominican Republic accorded treatment to the Ballantines that was, in fact, less favorable than that provided to one or more Dominican nationals; and (iv) an analysis of whether or not there are reasonable justifications to explain any differences that may have existed in such treatment.

[454] **Amended Statement of Claim**, ¶ 186.

[455] **Amended Statement of Claim**, ¶ 186.

[456] **Ex. R-056**, Minutes of Environmental Inspection of Aloma Mountain (14 August 2013).; *see also* **Ex. R-142**, Ministry Letter Confirming Non-Viability of Aloma Mountain Project (21 April 2017). This fine also was eventually reduced, to RD$352,137.36. *See* **R-055**, Resolution on Reconsideration of Aloma Mountain Fine (20 January 2014).

1. Article 10.3 Is Designed To Guard Against Discrimination Against Foreign Investors As Compared To Similarly Situated Domestic Investors

146. Article 10.3 sets out the obligation to accord national treatment to "investors" and "covered investments":

> "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."
>
> (emphasis added).

147. Accordingly, Article 10.3 is intended to protect foreign investors and investments against discrimination as compared to domestic investors or investments who are "in like circumstances."

148. Past investment arbitration tribunals have used a three-part test to assess a host state's obligation under the national treatment clause: (1) whether the domestic investor is an appropriate comparator to the disputing investor or covered investment; (2) whether the disputing investor was in fact accorded a less favorable treatment than its domestic comparator;

and (3) whether any differential treatment that may have existed was justified on the basis of legitimate policy and/or legal reasons.[457]

149. This three-prong test imposed on the Ballantines a double burden. *First*, they were required to identify at least one Dominican comparator who was situated "in like circumstances. *Second*, the Ballantines had the burden of proving that the Dominican Republic actually treated the Dominican comparator(s) more favorably than the Ballantines (or their investment). As shown immediately below, the Ballantines failed to identify any comparator who was in like circumstances, and similarly failed to prove that they (or their investment) received less favorable treatment than that accorded to any Dominican comparator.

2. The Ballantines Failed To Identify Any Domestic Comparator That Is "In Like Circumstances"

150. The Ballantines have challenged the following nine different measures under Article 10.3: (i) the denial of permission to develop their property on grounds that the area has slopes over 60%; (ii) the denial of permission to build a road and sell property that is within the boundaries of the Baiguate National Park; (iii) the requirement of environmental permits to construct a road and buildings; (iv) the inclusion of the Ballantines' property in the Baiguate National Park; (v) the rejection by the President of the Dominican Republic of the appeal against the permit denial; (vi) the non-issuance of a non-objection letter required from municipal authorities to proceed with a proposed mountain lodge project; (vii) the loss of control or dominion over the roads in the Ballantines' project; (viii) inspections and fines imposed on the

[457] *See* **Amended Statement of Claim**, ¶¶ 174-187 (explaining the three different steps in this test). *See also*, **CLA-012**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 January 2011), (Nariman, Anaya, Crook), ¶ 163; **CLA-009** , *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Phase 2 Merits Award (10 April 2001) (Dervaird, Greenberg, Belman), ¶¶ 73-104.

Ballantines; and (ix) the imposition on the Ballantines of a requirement to submit environmental compliance reports every six months.[458]

151. To establish a violation of the Dominican Republic's obligation under the national treatment clause in Article 10.3 in connection with the above-listed measures, the Ballantines were required to identify at least one Dominican comparator that was in like circumstances as the Jamaca de Dios project. The Ballantines purport to identify five such comparators: Jarabacoa Mountain Garden, Mirador Del Pino, Aloma Mountain, Paso Alto, and Quintas Del Bosque (jointly, the "**Alleged Comparators**").[459] However, the Ballantines failed to properly identify the investors or projects that they deem to be the relevant Dominican comparators, for at least two reasons. *First*, they do not specify whether each of these five projects should be interpreted as comparators for *all* of the measures challenged, or whether specific ones serve as comparators for particular measures. *Second*, their list excludes other projects that they later appear to treat as comparators, such as Los Aquellos and Punta Alma.[460] Concerning the latter two projects, there is a total lack of identification by the Ballantines of the characteristics of these projects, or of the reasons for which they should be considered appropriate comparators.[461]

152. In any event, even if the Tribunal were to conclude that the Ballantines have carried their burden of identifying specific comparators, none of the projects they have identified are in like circumstances as Jamaca de Dios. The Ballantines assert that three factors must be

[458] **Amended Statement of Claim**, ¶ 186.

[459] **Amended Statement of Claim**, ¶ 183.

[460] **Amended Statement of Claim**, ¶ 186 ("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**") (emphasis added); ft. 153 ("**Punta Alma is a development located wholly within the Luperon Bay protected area**. It has been approved for development by MMA").

[461] **Amended Statement of Claim**, ¶ 186; ft. 153.

taken into account to identify comparators who can be deemed to be "in like circumstances": (1) whether they operate in the same business or economic sector; (2) whether they produce competing goods or services; and (3) whether they are subject to a comparable legal regime.[462] However, as the Ballantines themselves recognize, "[t]he concept of 'like circumstances' is not rigid,"[463] and it is "context[-]dependent [with] no unalterable meaning across the spectrum of fact situations."[464]

153. Prior tribunals have applied one or the other of the three factors mentioned by the Ballantines to determine whether a foreign investor or investment is in like circumstances as domestic investors or investments. However, such tribunals have not applied all three of those factors as a tripartite test, as the Ballantines seem to imply. Some of the cases cited by the Ballantines on this point are *Pope & Talbot v. Canada*, *Corn Products v. Mexico* and *Grand River v. United States*. A close reading of these decisions reveals that in those cases, each of the tribunals applied one of the three factors (not all the same one), on the basis that such factor was appropriate under the circumstances of the respective case, rather than because the tribunal thought that any (or all) of the factors should be strictly applied in all cases.

154. In *Pope & Talbot v. Canada*, for example, the tribunal observed that the treatment of foreign investments should be compared with that accorded [to] domestic investments in the same business or economic sector.[465] However, the tribunal also noted that "the meaning of the

[462] **Amended Statement of Claim**, ¶ 177.

[463] **Amended Statement of Claim**, ¶ 175 (citing **CLA-009** , *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Phase 2 Merits Award (10 April 2001) (Dervaird, Greenberg, Belman)).

[464] **Amended Statement of Claim**, ¶ 175.

[465] *See* **CLA-009** , *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Phase 2 Merits Award (10 April 2001) (Dervaird, Greenberg, Belman), ¶.

term ['in like circumstances'] will vary according to the facts of a given case."[466] It also observed that, while assessing whether the relevant entity was in the same business or economic sector was a pertinent factor, it was only the "first step."[467]

155. In *Corn Products v. Mexico*, the tribunal determined that the production of competing goods was a relevant factor to determine whether two investments could be deemed to be in like circumstances.[468] However, that tribunal explicitly noted that the fact that a foreign investor and a domestic investor are producing competing products does not necessarily mean that they should be considered as being in like circumstances, and that this factor is relevant only if the measure at issue directly concerns the competing products.[469]

156. Finally, in *Grand River v. United States*, the tribunal concluded that the fact that the same legal regime was applicable to the foreign investor as well as to domestic comparators

[466] **CLA-009** , *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Phase 2 Merits Award (10 April 2001) (Dervaird, Greenberg, Belman), ¶ 75.

[467] **CLA-009** , *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Phase 2 Merits Award (10 April 2001) (Dervaird, Greenberg, Belman), ¶ 78.

[468] **CLA-013**, *Corn Products International v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility (15 January 2008) (Greenwood, Lowenfeld, de la Vega), ¶ 122 ("[T]he Tribunal does not accept that the fact that HFCS and sugar are like products for the purposes of GATT is irrelevant to the application of the Article 1102 test. On the contrary, it considers that this fact is highly relevant to the application of that test").

[469] **CLA-013**, *Corn Products International v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility (15 January 2008) (Greenwood, Lowenfeld, de la Vega), ¶ 122 ("While the Tribunal would not suggest that the fact that a foreign investor and a domestic investor are producing like products will necessarily mean that they are to be considered as being in like circumstances for the purposes of Article 1102, or that differential treatment will necessarily entail a violation of that provision, where the measure said to constitute the violation of Article 1102 is directly concerned with the products and designed to discriminate in favour of one and against the other then that is a very strong indication that there has been a breach of Article 1102").

was "a compelling factor" ─ albeit not the only one ─ to assess whether the relevant entities were in like circumstances.[470]

157. The Dominican Republic does not dispute that one or more of the three factors enunciated by the Ballantines can be relevant in a given case to a comparator analysis. However, they are not the only factors that should be taken into account. The Dominican Republic submits that, considering the specific characteristics of the case at hand, the Tribunal in this case should give primary consideration to other factors. Specifically, since this case is about measures that the Dominican Republic adopted and implemented to enforce environmental policy objectives, the most relevant factor to determine whether a given alleged comparator is in fact in like circumstances to the Jamaca de Dios project should be the environmental impact of the comparators' projects.

158. Here, the risks posed to the environment by the Ballantines' proposed project (for which a permit was denied) include risks to the surrounding water resources, risks of erosion and mudslides, risks of adversely impacting the biodiversity of the ecosystem where the land of the project was located, and risk of affecting endemic species of the Cordillera Central.[471] With the lone exception of Aloma Mountain, the environmental impact and risks of the projects that have been identified by the Ballantines as comparators are in fact *not* comparable to the environmental impact and risks posed by the Jamaca de Dios project. In particular, as concluded by the expert Prof. Incháustegui, "the risks of allowing [the Ballantines'] Project 3 to proceed would have "increased fragmentation of natural habitats in the area, negatively impacting its biodiversity.

[470] **CLA-012**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 January 2011) (Nariman, Anaya, Crook), ¶ 167.

[471] **Inchaustegui Expert Report**, ¶ 81(c) (explaining the negative consequences that authorizing Project 3 would have caused to the environment).

Beside, erosion of soil would have led to a series of process that would have decreased the potential of water production and catchment, and increased propensity to natural disaters."[472]

159. Moreover, for each specific measure challenged by the Ballantines, other specific factors should be taken into account. For example, with respect to the measures related to the creation of the Baiguate National Park, a key factor to determine whether other projects are in like circumstances is their location. If the relevant projects are located *inside* the Baiguate National Park, they are far more likely to be valid comparators than projects that are far away from the park.

160. Location within the Park is indicative of the significant environmental value of the relevant property. For example, the land for Project 3 of Jamaca de Dios is located at an altitude of between 900 and 1260 meters above sea level, and is located on Loma La Peña, which is part of the set of mountains Loma El Mogoto — Loma La Peña — Alto De La Bandera which are collectively known as the "El Mogote System." Because of its altitude, water sources, and biodiversity, this system has unique environmental value and requires special protection.[473]

161. All of the other projects identified as comparators by the Ballantines ─ again, with the sole exception of Aloma Mountain ─ are outside the El Mogote System, and not surprisingly, are located at much lower altitudes (starting at 620 meters above sea level, with most of the relevant land being below 800 meters above sea level).[474] The environmental impact on water production and water collection of the land involved in the asserted comparator projects

[472] **Inchaustegui's First Expert Report**, ¶ 81(c) (English translation from original in Spanish).
[473] **Martínez's First Witness Statement**,¶¶, 42-43.
[474] **Martínez's First Witness Statement**, ¶¶ 52-56.

is far less pronounced than that of the land for Project 3 of Jamaca de Dios.[475] Since the Ballantines have largely ignored the critical factors described above, such as environmental impact and location, the comparators suggested by the Ballantines (which include, mainly, Jarabacoa Mountain Garden, Mirador Del Pino, Paso Alto and Quintas Del Bosque) cannot be considered to be in like circumstances to the Jamaca de Dios project. With respect to Aloma Mountain, the land involved in that project has similar environmental and altitude-related characteristics as the proposed Project 3 at Jamaca de Dios; however, it is far different in the scope of the services that it offers, as explained below.

162. Even assessing the factors that the Ballantines themselves emphasize as relevant, the Alleged Comparators (Jarabacoa Mountain Garden, Mirador Del Pino, Paso Alto, Quintas Del Bosque and Aloma Mountain) are still distinguishable from the Jamaca de Dios project, and are not in like circumstances. Specifically, the Alleged Comparators (i) do not produce competing goods or services, and (ii) are not subject to the same legal regime.

163. None of the Alleged Comparators ─ not even Aloma Mountain ─ produce competing goods or services. The Ballantines themselves admit this point when they devote a large portion of their Amended Statement of Claim to the proposition that the Alleged Comparators did not really qualify as genuine competitors, since those projects were "struggling" or "moribund,"[476] whereas Jamaca de Dios was the self-proclaimed "gold standard."[477]

[475] **Martínez's First Witness Statement**, ¶¶ 52-56.

[476] **Amended Statement of Claim**, ¶ 39 (labeling the Paso Alto Project as "commercially moribund"); ¶ 56 (similarly describing the Jarabacoa Mountain Garden as "commercially moribund"); ¶ 59 (characterizing the Mirador del Pino project as one that was "struggling commercially" and "abandoned"); ¶ 60 (stating that the Aloma Mountain project "has not flourished"). *Contrast* **Amended**

[FOOTNOTE CONTINUED ON NEXT PAGE]

164. Moreover, the evidence offered by the Dominican Republic shows that the Ballantines' project was far more ambitious than other projects in the area, since it was far larger in size and planned to offer a greater number of services than the other Alleged Comparators. Specifically, the Ballantines' project was intended to offer a completely different range of services and facilities, including housing (92 houses), two restaurants (one of which was assertedly the only restaurant in the Caribbean with a rotating floor[478]), a mini-market, hiking trails, organic gardens, a spa and hotel services, additional houses (more than 50), and an apartment complex (*i.e.*, the "Mountain Lodge").[479] The Ballantines have been unable to prove that any of the Alleged Comparators provide, or planned to provide, services of anywhere near the same scope.

165. Finally, the Alleged Comparators are not subject to exactly the same legal regime as the Ballantines' project, once again with the exception of Aloma Mountain (which, like part of Jamaca de Dios, is located inside the Baiguate National Park). For example, the Ballantines have argued that the fact that part of their land was within the Baiguate National Park should not have been an impediment to the development of their project, insofar as there are other projects that are located in protected areas but that nevertheless have been endowed with environmental permits.[480] They mention, as an example, the Punta Alma project in the Luperón Bay area.[481]

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
Statement of Claim, ¶ 182 (asserting that "[the Ballantines] resort property is known as the gold standard").

[477] **Amended Statement of Claim**, ¶ 182.

[478] **Amended Statement of Claim**, ¶ 5.

[479] **M. Ballantine's Witness Statement**, ¶¶ 22-28; *see* **Amended Statement of Claim**, ¶¶ 5, 7, 33.

[480] **Amended Statement of Claim**, ¶ 186.

[481] **Amended Statement of Claim**, ¶ 127 ("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 ecotourism"); ft. 153 ("**Punta Alma is a development located wholly within the Luperon Bay protected area**. It has been approved for development by MMA").

However, the Luperón Bay area is subject to a different legal regime, as it is classified as a Category IV protected area (established in Article 13 of the Law on Protected Areas, Law 202-04). That is a different classification from the one that was assigned to the Baiguate National Park, which is Category II. Importantly, a greater level of human activities is allowed in Category IV areas than in Category II areas.[482]

166. In light of the foregoing, the Ballantines have failed to establish that the Alleged Comparators are in fact "in like circumstances" to the Ballantines' project (not even Aloma Mountain, which is the most similar project to Project 3 of Jamaca de Dios). For this reason alone, their discrimination/national treatment claim must be dismissed.

3. The Dominican Republic Accorded No Less Favorable Treatment To The Ballantines Than That Provided to Others

167. Even if the comparators identified by the Ballantines could be deemed to be in like circumstances with Jamaca de Dios, the Ballantines' claim under Article 10.3 should be dismissed because there is no showing that the Dominican Republic actually accorded a less favorable treatment to the Ballantines than it did to Dominican nationals.

168. As noted above, the second prong of the test to assess whether the Dominican Republic's conduct breached the national treatment clause consists of an inquiry into whether the investor or the covered investment was treated less favorably than a domestic comparator. Tribunals have generally held that, to show less favorable treatment, a claimant has the burden of proving discrimination *de iure* or *de facto*.[483] If a claimant alleges *de facto* discrimination, as

[482] **Inchaustegui's First Expert Report**, ¶ 71.

[483] **CLA-005**, *Marvin Roy Feldman Kapa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (Keramaeus, Covarrubias Bravo, Gantz), ¶ 173.

the Ballantines have in this case, it has the burden to prove that the practical effect of the measure is to create a disproportionate benefit for nationals over non-nationals.[484]

169. The Ballantines allege that they have been subject to deliberate measures to destroy their investment and favor politically connected Dominicans.[485] However, the facts show that the measures they challenge have not created any benefit for Dominicans that was not conferred on similarly situated non-nationals. In fact, no benefit has resulted for the competitors of the Ballantines, considering the allegations that their competitors are commercially and financially unviable.[486]

[484] **CLA-017**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000) (Hunter, Schwartz, Chiasson), ¶ 252 (stating that "in assessing whether a measure is contrary to a national treatment norm, the following factors should be taken into account: whether the practical effect of the measure is to create a disproportionate benefit for nationals over non-nationals; whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty").

[485] **Amended Statement of Claim**, ¶ 323.

[486] **Amended Statement of Claim**, ¶ 39 (labelling the Paso Alto Project as "commercially moribund"); ¶ 56 (similarly labeling the Jarabacoa Mountain Garden as "commercially moribund"); ¶ 59 (stating that the Mirador del Pino project is "abandoned" and "struggling commercially"); ¶ 60 (stating that the Aloma Mountain project "has not flourished").

PROJECT	PERMIT Granted?	INSIDE BAIGUATE NATIONAL PARK	FINES Imposed?	WORKS STOPPED BY AUTHORITIES?
Project 2 Jamaca de Dios (Owned by Ballantines)	Permit was issued for the proposed project.	Mostly not covered by the Park. The portion covered by the Park is being respected based on the acquired rights of the Ballantines, including the permit.[487] (Low altitude - most of the land below 800 masl)	Yes. Fined for violations of environmental regulations.	No
Mountain Garden (Dominican-owned)	Permit was issued after slope-related conditions were imposed[488]	Not covered by the Park Outside *Mogote-Peña-Alto Bandera* Mountains (Low altitude - most of the land below 800 masl)	Yes. Fined for violations of Law 64-00.[489]	Unknown
Quintas del Bosque (Dominican-owned)	Issued.	Not covered by the Park (Outside *Mogote-Peña-Alto Bandera* Mountains) (Low altitude - most of the land below 800 masl)	Unknown	Yes. Road work stopped by Ministry for lack of permit.[490]
Mirador del Pino (Dominican-owned)	Permit provides that house may not be built in lots located at the birthplace of a stream, and the project may not use those portions of land with slopes in excess of 60%, except for fruit and timber trees.[491]	Not covered by the Park (Outside *Mogote-Peña-Alto Bandera* Mountains) (Low altitude - most of the land below 800 masl)	Unknown	Unknown

[487] *See* **Ex. R-163**, Memorandum Environmental Permits - Acquired Rights (17 May 2017).

[488] *See* **Ex. R-144**, Letter from Zoila González to Santiago Canela Durán, DEA-2869-12 (25 July 2012) ("[T]he Ministry excluded the area from the Development of the project any component within the geographical boundaries of water surfaces, thus maintaining a 30 meter strip due to topographical conditions of the land with slopes of 30% close to water courses").

[489] *See* **Ex. R-145**, Mountain Garden's Payment of Fine for Violation of Law 64-00 (23 May 2012)

[490] *See* **Ex. R-057,** Minutes Environmental Inspection (16 April 2007) (ordering road work to be stopped); **Hernández's First Witness Statement**, ¶ 23.

[491] *See* **Ex. R-165**, Environmental Permit Mirador del Pino, Clause 22 (28 December 2012); *see* **Ex. R-167**, Letter Ministry of Environment to Mirador del Pino (12 January 2012) (requesting that they exclude from the Project the land with slopes in excess of 60%.)

Paso Alto (Dominican owned)	Issued but restricted.[492]	No Outside *Mogote-Peña-Alto Bandera* Mountains		
Aloma Mountain (Dominican owned)	Permit denied	Yes (altitude 900-1230masl)	Yes	Yes. Project stopped and fined for construction without permit.
Project 3 **Jamaca de Dios** (Owned by Ballantines)	Permit denied	Yes (altitude 900-1260 masl)	Yes[493]	Yes. Recommendation of fine for beginning road work of access road of Project 3 without permit[494]

[492] *See* **Ex. R-166**, Letter of Paso Alto to Ministry of Environment (14 July 2015) (committing not to build house of more than 2 floors, and not to make constructions in areas in excess of 60%).

[493] *See* **Ex R-143**, Fine imposed on Jamaca de Dios for starting access road of Project 3 without permit (15 October 2012).

[494] *See* **R-048,** Letter of Graviel Peña e Informe Técnico (8 October 2012).

171. To make their claims of national treatment the Ballantines have chosen an approach whereby they individualize measures or only parts thereof, which distorts the facts. An example of this approach is the Ballantines' claim that the Dominican Republic imposed an aggressive fine of RD$1,000,000.00 on the Ballantines for not submitting ICAs every six months.[495] The reality is that the fine included several other violations of environmental regulations, which account for a significant portion of the amount of the fine. The Dominican Republic addresses each of the differential treatment allegations in the following subsection.

172. However, to ensure that the Tribunal is able to understand the broader context of the measures and able to make an informed determination about the alleged differential treatment, the Dominican Republic explains in the following table the principal measures of the Dominican Republic with respect to which the Ballantines assert discrimination claims. Those measures are shown with respect to each of the Third-Party Projects as well as with respect to Jamaca de Dios' Projects 2 and 3. Concerning the treatment, the horizontal axis of the table includes whether an environmental permit was granted, whether the Baiguate National Park covered the land of the project, whether there was any fine imposed on the developer of the project, and whether the Ministry ordered the suspension of the works of the project.

173. As an initial observation, there are two groups. *First*, the group of *projects at lower altitude*, which is comprised of Project 2 of Jamaca de Dios, Mountain Garden, Quintas del Bosque, Mirador del Pino, and Paso Alto. Within that group, all the projects received permits, including Project 2 of Jamaca de Dios. Of those projects, Mountain Garden, Mirador del Pino, and Paso Alto received permits that imposed slope-related restrictions, e.g., in Paso Alto

[495] *See* **Michael Ballantine's First Witness Statement**, ¶ 43.

excluding from the project any land with slopes in excess of 60%. Therefore, the Dominican Republic has been enforcing the 60% slope rule concerning Third-Party Projects. Concerning Project 3 of Jamaca de Dios, the Ballantines have not submitted any evidence that they were willing to exclude from the project parts of land with slopes over 60%, or that they were willing not to build a road on land with such steep slopes.

174. *Second*, with respect to those projects inside the Park, *i.e.*, Aloma Mountain and Project 3 of Jamaca de Dios, their high altitude is a common denominator as well as being part of *El Mogote System of mountains.* As explained by Prof. Eleuterio Martínez, the boundaries of the Park were determined by that set of mountains.[496] He also elaborates on the water sources and the biodiversity of Project 3, which is comparable to Aloma Mountain (but not to the remaining projects). As a result, the land of these two projects is within the boundaries of the Park.[497] Here again the treatment accorded to Project 3 of Jamaca de Dios was similar to the treatment given to a similar project (Aloma Mountain) as the land of both of these projects was included inside the Park. The treatment accorded to Project 3, was different vis-à-vis different projects (*i.e.*, Project 2 of Jamaca de Dios, Mountain Garden, Quintas del Bosque, Mirador del Pino, and Paso Alto) as the latter projects were clearly not comparable.

175. *Third*, concerning the imposition of fines, the table shows that the Ministry imposed fines on Dominican-owned projects as well as on the Ballantines' Jamaca de Dios Project 2 and 3, when there were violations of environmental regulations. *Fourth*, the Ministry has stopped work of both Dominican-owned projects and the Ballantines for violations of environmental regulations.

[496] *See* **Martinez's First Witness Statement.**

[497] *See* **Martinez's First Witness Statement.**

176. Considering the aforementioned projects, measures and acts of the Dominican Republic, the treatment given by the Dominican Republic to the Ballantines and their projects cannot be said to have been less favorable than that accorded to Dominican nationals and their projects.

177. Because the Ballantines have not demonstrated that any similarly situated Dominican project received benefits from the Dominican State that were not conferred upon the the Ballantines, it cannot be said that there is a breach of Article 10.3.

4. The Dominican Republic Has Valid Justifications For Whatever Differential Treatment Was Given To The Ballantines

178. Even if one or more of the Alleged Comparators could be considered to be in like circumstances, and even if there were any differences in the treatment of one or more of those projects as compared to that of the Ballantines, such differences were justified since they were based on objective distinctions between the Ballantines' property and those of the comparators. Moreover, the relevant State actions were motivated by legitimate policy and/or legal reasons.

179. Differential State conduct has been justified in instances in which the State has demonstrated that there are legitimate policy and/or legal reasons for the relevant measures. For example, the tribunal in *Gami v. Mexico* held that the Mexican government did not breach its national treatment obligations under NAFTA when it expropriated the claimant's sugar mills, on the basis that the underlying State policy of seizing insolvent mills was "in the interest of the national economy," and was "not itself discriminatory." [498] The tribunal reasoned that the "measure was plausibly connected with a legitimate goal of policy (ensuring that the sugar

[498] **CLA-049**, *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Award (15 November 2004) (Reisman, Muró, Paulsson), ¶¶ 114.

industry was in the hands of solvent enterprises) and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity."[499] The tribunal in *S.D. Myers* similarly found that legitimate policy reasons can justify differentiated treatment, concluding that Canada's desire "to maintain the ability to process [certain chemical waste] within Canada in the future . . . was a legitimate goal."[500]

180. In the present case, the Ballantines have alleged nine forms of disparate treatment, which, to recall, are the following: (i) the denial of permission to develop the Ballantines' property, on the grounds that the relevant area had slopes over 60%, whereas other projects with slopes in excess of 60% were allowed to develop; (ii) the denial of permission to build a road and to sell property that is within the boundaries of the Baiguate National Park, while other developers were granted permits to develop in protected areas, or have conducted development activities in protected areas without a permit; (iii) the imposition on the Ballantines of requirements for environmental permits to construct road and buildings which were not imposed on other developers; (iv) the inclusion of the Ballantines' property within the boundaries of the Baiguate National Park and the exclusion of the property of others; (v) the rejection of the Ballantines' various requests for reconsideration of the permit denial (even though permit denials for other projects were reversed); (vi) the non-issuance by municipal authorities of a No Objection letter that was required for the permitting of a mountain lodge project proposed by the Ballantines (whereas analogous Non-Objection letters were granted to other applicants); (vii) the loss of control or dominion over the roads in the Ballantines' project; (viii) inspections and fines

[499] **CLA-049**, *Gami Investments, Inc. v. United Mexican States*, UNCITRAL, Award (15 November 2004) (Reisman, Muró, Paulsson), ¶¶ 114.

[500] Nonetheless, the tribunal in that case found that the particular measures that Canada had taken in that case — orders banning the export of certain substances — had not been appropriate for achieving that goal.

imposed on the Ballantines; and (ix) the imposition on the Ballantines ─ but allegedly not on others ─ of a requirement to submit environmental compliance reports every six months.[501]

181. Of the foregoing, some are simply not true, and others, as discussed below, are justified because they are based on a legitimate policy and/or legal reasons related to the protection of the Dominican environment. Each of them is discussed in turn below.

182. With respect to the ***first*** alleged differentiation ― denial of the environmental permits for Project 3 due to the prohibition to construct on land with slopes with an incline in excess of 60% ― the Dominican Republic has shown that the reason that it denied the relevant permit was because the Ballantines' request for terms of reference did not make it clear that they intended to limit their development of the land to areas whose slope did *not* exceed 60%.[502] Of course, whenever there is even the slightest chance that a developer will build on slopes greater than 60%, the Dominican Republic has no choice but to deny the environmental viability of the project (as in fact occurred here).

183. Accordingly, the Dominican Republic has only granted permits to developers whose plans show that the areas in their properties which have slopes greater than 60% will <u>not</u> be developed.[503] By contrast, neither in their original application nor in any of the multiple reconsideration request letters that the Ballantines submitted to the Dominican Government did the Ballantines offer either to change the location of their proposed Project 3, or to affirmatively pledge that in their project they would not develop any land with slopes in excess of 60%.

[501] **Amended Statement of Claim**, ¶ 186.

[502] **Navarro's First Witness Statement**, ¶ 20.

[503] **Navarro's First Witness Statement**, ¶ 66; *See* **Ex. R-165**, Environmental Permit Mirador del Pino, Clause 22 (28 December 2012); *see* **Ex. R-167**, Letter Ministry of Environment to Mirador del Pino (12 January 2012) (requesting that they exclude from the Project the land with slopes in excess of 60%.).

184. The ***second*** alleged differentiation is that the Ballantines were prohibited from conducting activities in Baiguate National Park even though other parties were allowed to do so in other environmental protected areas (even in the absence of permits). As explained below, in some instances, the alleged differentiation did not in fact exist. But in those instances where a difference in treatment did in fact exist, it was attributable to the different legal restrictions that applied to the relevant protected area; in other words, the applicable legal frameworks were different.

185. Such differences existed because there are different types of environmental protected areas under Dominican law. As explained above, the Baiguate National Park belongs to Category II, which prohibits a wider range of project development activities. However, other protected areas — such as the Luperon Bay area, invoked by the Ballantines ─ belong to Category IV, which imposes fewer restrictions on business activities.[504] Accordingly, to the extent there were in fact differences in treatment with other projects, it was due to the fact that those projects were located in a different protected area, which was subject to different legal restrictions.

186. As to the allegations concerning Jamaca de Dios' neighboring project, Aloma Mountain, it is simply not true that there was any difference in treatment *vis-á-vis* the Jamaca de Dios project. The Dominican Republic has ***not*** allowed construction of the Aloma Mountain project. To the contrary, the Ministry explicitly *rejected* the request for environmental permit submitted by Aloma Mountain, and furthermore, in response to a reconsideration request,

[504] **Incháustegui's First Expert Report**, ¶¶ 70-72.

confirmed the permit denial.[505] Even further, the Ministry imposed a significant fine on Aloma Mountain precisely for undertaking works without a permit.[506] The amount of the fine was RD$1,703,977.75 ─ almost twice as high as the fine imposed on the Ballantines (which fine forms part of the latters' claims in this arbitration).[507]

187. With respect to the ***third*** differentiation ― a requirement to obtain environmental permits to construct road and buildings which was allegedly not imposed on other developers (in particular the roads in Aloma Mountain and Los Aquellos), two aspects must be considered. With respect to Aloma Mountain, in the preliminary assessement of the project requested by its owner, the Ministry found that a road had been built between 2004-2005 without a permit, and it thus recommended that Aloma Mountain receive a fine, which was imposed.[508] Concerning Los Aquellos, the Ballantines have not even met the threshold requirement of comparing that project to Jamaca de Dios in terms of location, services provided, or characteristics of the project.

188. Regarding the ***fourth*** differentiation ─ inclusion of the Ballantines' property within the boundaries of Baiguate National Park and the alleged exclusion of the property of certain Dominicans ― there is a legitimate basis for this differentiation. The Dominican Republic's environmental experts and witnesses have shown that the boundaries of the park were ***not*** delineated to disfavor the Ballantines, or to favor particular parties, but rather to accomplish

[505] **Ex. R-142**, Letter of Ministry confirming non-environmental viability of Aloma Mountian Project (21 April 2017)

[506] **R-055,** Resolución VGA No. 016-2014 (20 January 2014).

[507] **Ex. R-142**, Letter of Ministry confirming non-environmental viability of Aloma Mountian Project (21 April 2017).

[507] Note, however, that the amount of the fine was later reduced to RD$352,137.36. **R-055**, Resolución VGA No. 016-2014 (20 January 2014); **Ex. R-159**, Request for payment of fine to Aloma Mountain served via bailiff act (23 May 2017).

[508] **Ex. R-120**, Preliminary Analysis by the Ministry of Environment of environmental viability of Aloma Mountain project (20 August 2013) (recommending that a fine be imposed on Aloma Mountain for constructing a road without permits), p.9.

a legitimate environmental purpose.[509] Furthermore, the Dominican Republic's environmental expert and witnesses have explained why it was necessary to include certain portions of the Ballantines' property within the park's boundaries to achieve the ultimate goal pursued by the decree that created the park (along with 31 other protected areas).[510]

189. Moreover, as explained above, inclusion within the Baiguate National Park of part of the Ballantines' property was based on scientific reasons related to the protection of the environment, water resources, biodiversity, and endemism of the Cordillera Central. Had the park borders been delimited in such a way as to discriminate against the Ballantines in favor of Dominicans, the Decree that created the Baiguate National Park (Decree 571) would have *excluded* from the park limits the Aloma Mountain project ─ which is owned by Juan José Domínguez, who according to the Ballantines is an influential Dominican citizen. And yet, because the Aloma Mountain property has environmental and altitude-related characteristics that are similar to those of the land proposed by the Ballantines for Project 3 of Jamaca de Dios, that property, too, was included within the park (just like that of the Ballantines). In sum, the Dominican-owned Aloma Mountain property and the Ballantines-owned Jamaca de Dios property for Project 3 were both included within the Baiguate National Park boundaries by Decree 571, for similar environmental reasons.

190. As to the ***fifth*** alleged differentiation ― allegedly discriminatory rejection of the Ballantines' requests for reconsideration ― the claim has no factual basis. Relying on the testimony by their fact witness Mr. De Rosario and their expert Mr. Peña, the Ballantines aver that Mountain Garden received a permit — following an initial denial — after its owner met with

[509] **Martínez's First Witness Statement**,¶¶ 40, 44, 45; **Incháustegui's First Expert Report**, ¶ 55..
[510] **Incháustegui's First Expert Report**, ¶¶ 60-62; **Martínez's First Witness Statement**,¶¶ 41.

officials at the Presidency of the Dominican Republic.[511] However, such assertion is based on pure hearsay. Neither Mr. De Rosario nor Mr. Peña have any direct knowledge of what they assert. Mr. De Rosario claims that the permit for Mountain Garden was ultimately approved after the owner of the project, Mr. Raul Canela (a Dominican national) and Mr. Edwin Mejía (a Dominican politician) met with a contact at the Presidency. [512] However, Mr. De Rosario explains that he heard this from Messrs. Canela and Mejía,[513] and he provides no evidence substantiating the allegation (beyond the hearsay from Messrs. Canela and Mejía). For his part, Mr. Peña testifies similarly that the Mountain Garden permit was granted only after Messrs. Canela and Mejía had a meeting at the Presidency,[514] but he asserts that this was told to him by Mr. Mejía,[515] and he, too, provides no other evidence. Accordingly, the testimony of both Mr. De Rosario and Mr. Peña is pure hearsay. They were not present at the meeting, and therefore they do not know firsthand whether there was even a meeting to begin with, and to the extent that there was one, they do not know what was discussed at such meeting.

191. Moreover, the facts in the Mountain Garden case are different because Mountain Garden was denied a permit for the project *as initially proposed by the promoters*. However, as reflected in a letter dated 25 July 2012, the Ministry imposed slope-related conditions on the project.[516]

[511] **De Rosario's Witness Statement**, ¶ 9; *see* **Peña's Expert Report**, ¶ 15.

[512] **De Rosario's Witness Statement**, ¶ 9; *see* **Peña's Expert Report**, ¶ 15.

[513] **De Rosario's Witness Statement**, ¶ 9.

[514] **Peña's Expert Report**, ¶ 15.

[515] **Peña's Expert Report**, ¶ 15.

[516] **Ex. R-144**, Letter from Zoila González de Gutiérrez to Santiago Canela Durán, DEA-2869-12 (25 July 2012) ("[T]he Ministry excluded the area from the Development of the project any component within the geographical boundaries of water surfaces, thus maintaining a 30 meter strip due to topographical conditions of the land with slopes of 30% close to water courses").

192. As to the ***sixth*** differentiation — the allegedly discriminatory non-issuance of a No Objection letter required from the Municipality of Jarabacoa to obtain a permit for the construction of a mountain lodge — the Dominican Republic has shown that the Municipality's conduct was entirely rational, considering that the Ballantines did not request the No-Objection letter until *after* they were already aware that the Ministry had expressed concerns about the viability of the project.

193. Furthermore, it is simply not true that the Ballantines did not receive a response to their request for a No-Objection letter. The Municipality of Jarabacoa responded to the Ballantines by letter dated 16 February 2015, explaining (i) that it could not issue a letter of No Objection since the Municipality was aware of the Ministry's concerns about the slopes of the land in Jamaca de Dios, the Baiguate National Park, and the classification of use of their land, and (ii) accordingly conditioning the no objection letter on the Ministry's grant of a certificate confirming that the project would not be contrary to the three above-mentioned concerns of the Municipality.[517]

194. The foregoing simply illustrates that that the State's different organs were acting in concert, thereby avoiding the generation of false expectations by the investor. Had the Municipality granted the no-objection letter knowing that the three issues discussed above were under consideration by the Ministry, the Ballantines likely would have argued that the grant of the No Objection letter by the Municipality generated a legitimate expectation by the Ballantines that they could move forward with their project. Moreover, the Muncipality was aware of substantive reasons that could prevent the Ballantines from obtaining an environmental permit;

[517] **Ex. R-093**, Letter from Jarabacoa Municipality Council to Michael Ballantine (16 February 2015).

for example, the proposed Mountain Lodge would be a three-story building that would put considerable weigh on the underlying surface. [518]

195. The Municipality acted in the most diligent way possible. The Ballantines suggest that the Municipality should have made an afirmative decision either to grant or deny the No Objection letter, rather than conditioning the No Objection letter on a Ministry decision on the three issues discussed above. However, the Ballantines fail to invoke any authority in support of the proposition that the Municipality could not legally provide a merely conditional response.

196. Similarly, with respect to the ***seventh*** alleged differentiation — that the Government forced the Ballantines to turn their private road into a public one, whereas other businesses were allowed to maintain their private roads — the allegation is simply not true. *First*, the Ballantines do not own the road at issue. Once a residential community is legally created, the law stipulates that the roads are automatically ceded to the public domain.[519] *Second*, it was the Ballantines themselves who decided to open the road to the public (after blocking a public easement that existed on a different road on their property,[520] even though such

[518] **Ex. R-140**, Jarabacoa Municipal Council Meeting Minutes No. 024-2014 (11 December 2014), p. 9.

[519] **Ex. R-097**, Law No.675, *Urbanización, Ornato Público y Construcciones* (14 August 1944), Article 6 "Cuando una persona o entidad someta al Consejo Administrativo del Distrito de Santo Domingo o a la autoridad municipal un proyecto de ensanche o urbanización, se entenderá de pleno derecho que lo hace renunciando en favor del dominio público, en el caso de que el proyecto sea aprobado, de todos los terrenos que figuren en el proyecto destinado para parques, avenidas, calles y otras dependencias públicas. Aprobado el proyecto, las autoridades podrán utilizar inmediatamente dichos terrenos para tales finalidades, sin ningún requisito"); see also **Ex. R-160**, Resolution Num. 628-2009, *Reglamento General De Mensuras Catastrales*, *Suprema Corte de Justicia* (23 April 2009) , Article 161, defining the concept of urbanization as "el acto de levantamiento parcelario que tiene por fin la creación de nuevas parcelas por división de una o más parcelas registradas, con apertura de calles o caminos públicos" and Paragraph IV ("El registro de los títulos de las parcelas resultantes implica automáticamente el traspaso de las calles, pasajes, avenidas, peatonales, espacios destinados a zonas verdes, etc., al dominio público").

[520] **Ex. R-075**, Video of 17 June 2013 Incident (published on 17 June 2013).

easement was officially protected by the Land Court).[521] Accordingly, the Ballantines voluntarily decided to open the road to the public, so it is unclear how they can claim discrimination in relation to the public or private nature of other roads.

197. *Third*, in no way has the Dominican Republic "forced" the Ballantines to turn their private road into a public road. The fact that members of the Palo Blanco community currently use that road is not evidence of the proposition. By blocking the long-standing public easement on their property, the Ballantines gave the Palo Blanco community no choice but to use the new road that the Ballantines had built.

198. In sum, sinced the circumstances relating to the road were caused by the Ballantines themselves, they are estopped from blaming the Municipality, or the Dominican Republic.

199. Regarding the ***eighth*** alleged differentiation — the imposition on Jamaca de Dios of inspections and fines that the Ballantines assert were not imposed on other projects — there was in fact no differentiation at all. The Dominican Republic has conducted inspections for other projects in the same manner as for that of the Ballantines, and fines have been imposed on other mountain projects in Jarabacoa, real estate developments outside Jarabacoa, and businesses in general.[522] Moreover, there were good reasons for imposing the particular fine that was imposed on the Ballantines, since they were in violation of their environmental permit. The

[521] **Ex. C-069**, Final Judgment on Recognition of Easement and Removal of Gates, *Sala Tribunal de Tierras Jurisdicción Original-La Vega* (5 October 2015).

[522] **Ex. R-145**, Mountain Garden's Payment of Fine for Violation of Law 64-00 (23 May 2012); *see* **R-073**, Resolution No. 445-2016-VGA (8 December 2016) (imposing a fine in the amount of RD$2,742,980.00 on Ocoa Bay Town Village Fase 1 for building structures within a national park and outside the area approved for construction); *see*, e.g., **Ex. R-072**, Fine On Estación de Servicios Reyna Durán (3 March 2017) (imposing a fine in the amount of RD$ 245,640.00 on Estación de Servicios Reyna Durán, a project owned by a Dominican).

Dominican Republic merely followed its standard penalty procedures, and moreover the Ballantines had an opportunity to be heard in connection with their fine.

200. Finally, the ***ninth*** and last alleged differentiation — the notion that a requirement was imposed on the Ballantines to complete environmental compliance reports that was not imposed on others — is unsupported. The obligation to submit ICA reports is imposed by law on all projects developers, and it has been enforced equally. Environmental permits granted to other developers — including mainly Dominican developers — contain exactly the same obligation to submit ICAs every six months.[523] Most importantly, the Ministry has fined businesses in instances in which they have not submitted the required ICAs.[524]

201. With regard to the requirement that the Ballantines submit an ICA every 6 months, it bears emphasizing also that the Ministry did not impose any greater of a burden on the Ballantines than already applied to them pursuant to Clause 4 of their original Project 2 environmental permit.[525] Lastly, it is worth noting that the fine imposed on the Ballantines in connection to the obligation to submit ICAs was also imposed for a series of additional violations of environmental regulations.[526]

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[523] *See, e.g.*, **Ex. R-070**, Mountain Garden Environmental Permit (30 December 2013), Clause 4; **Ex. R-063**, Quintas del Bosque Environmental Permit (2 February 2009), Clause 4; **Ex. R-071**, Paso Alto Environmental Permit (1 September 2006), Clause 4.

[524] *See, e.g.*, **R-072**, Fine On Estación de Servicios Reyna Durán (3 March 2017) (imposing a fine in the amount of RD$ 245,640.00 on *Estación de Servicios Reyna Durán*, which is a project owned by a Dominican).

[525] **Ex-C-004**, Project 2 Permit (7 December 2007), Clause 4 (providing that "from the time the environmental permit is issued, Mr. Ballantine [] shall submit every six months to the Ministry of Environment, reports of compliance with the environmental management program"). (English translation from original in Spanish).

[526] Ex **C-007**, Resolución SGA No. 973-2009 (19 November 2009) (stating that in Jamaca de Dios the Ballantines had cut trees of several species without permit, including "*capá, higo, yagrumo, cabra, cabirma, laurel silvestre, guama y guásuma*").

202. In sum, with respect to all of the alleged differences in treatment of the Ballantines *vis-a-vis* Dominican investors, either (i) there was in fact no difference at all in treatment; or (ii) there were differences in treatment, but there were legitimate policies and/or legal reasons justifying such differences. Accordingly, the Dominican Republic has not breached the national treatment obligation enshrined in Article 10.3 of the DR-CAFTA.

D. The Ballantines' Most-Favored-Nation Treatment Claim Is Unfounded

203. The Ballantines have alleged violations by the Dominican Republic of the obligation to accord most-favored nation ("MFN") treatment set forth in Article 10.4 of DR-CAFTA. Article 10.4 sets out the obligation to accord most-favored nation treatment to "investors" and "covered investments," as follows:

> 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.[527]

204. Article 10.4 is thus designed to guard against discrimination of foreign investors and their investments as compared to investors or investments of another Party or of another non-Party, in like circumstances. In this case, an investor "*of any other Party*" includes an investor of any State Party to the DR-CAFTA other than the U.S. and the Dominican Republic, while any investor "of a non-Party" includes investors from any State other than the Parties to

[527] **Ex. R-010**, DR-CAFTA, Art. 10.4 (emphasis added).

the DR-CAFTA. Hence, the MFN provision in essence bars discrimination as compared to third-party (*i.e.*, non-U.S., non-Dominican) investors.

205. Tribunals have used a three-part test to assess a host State's obligation under MFN treatment clauses: (1) whether the investor/investment of any third party are appropriate comparators to the disputing investor or the covered investment; (2) whether the disputing investor was in fact accorded less favorable treatment than the third-party comparator; and (3) whether any differential treatment can be justified by legitimate policy reasons.[528]

206. Pursuant to this three-prong test, the Ballantines as threshold matter have the burden of identifying a comparator investor who is neither a U.S. nor a Dominican investor. In their submission, the only comparators that the Ballantines purport to identify are Dominican investors.[529] Since they have not identified any alleged comparators of a third-party nationality, the first prong of the three-part MFN test is not satisfied, and the other two prongs are therefore not even reached. In other words, the MFN clause is rendered inapposite by the fact that there is no allegation by the Ballantines of discriminatory conduct in relation to any third-party investor. Accordingly, the Tribunal should summarily dismiss the Ballantines' MFN claim.

[528] *See* **Amended Statement of Claim**, ¶¶ 174–87 (explaining the three different steps in this test). *See also* **CL-RLA-077**, *Apotex Holdings Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, (Award, 25 August 2014) (Veeder, Rowley, Crook), ¶¶ 8.27, 8.28, 8.61, 8.62, 8.77; **RLA-078**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8 (Award, 11 September 2007) (Lévy, Lew, Lalonde), ¶ 371 (identifying the following conditions, and comparing the Norwegian claimant's subsidiary in Lithuania to a Dutch investor in Lithuania: (1) the comparator "must be a foreign investor"; (2) the comparator and the claimant "must be in the same economic or business sector"; (3) "[t]he two investors must be treated differently"; and (4) "[n]o policy or purpose behind the said measure must apply to the investment that justifies the different treatments accorded").

[529] *See* **Amended Statement of Claim**, ¶¶ 39, 56–60; *see also* **Ex. R-147**, Cedula - Nationality José Roberto Hernández - Quintas del Bosque; **Ex. R-148,** Cedula - Nationality Juan José Domínguez - Aloma Mountain; **Ex. R-149,** Cedula - Nationality Renan Vanderhorst - Mirador del Pino; **Ex. R-150,** Cedula - Nationality Santigo Canela - Mountain Garden; **Ex. R-151,** Information on Nationality Omar Rodríguez - Paso Alto.

E. The Ballantines' Fair And Equitable Treatment Claims Are Unfounded

207. The Ballantines have also alleged violations by the Dominican Republic of the minimum standard of treatment obligation set forth in Article 10.5 of DR-CAFTA. The section below addresses the "fair and equitable treatment" component of those allegations, and is divided into two sections: (i) identification of the relevant legal standard; and (ii) analysis of the particular measures challenged in the Ballantines' fair and equitable treatment claims.

1. The Relevant Legal Standard For Fair And Equitable Treatment Under Article 10.5 Is The Minimum Standard Of Treatment

208. With respect to the obligation to provide fair and equitable treatment, Article 10.5 states:

> 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, <u>paragraph 1 prescribes the customary international law minimum standard of treatment of aliens</u> 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 . . . .[530]

Accordingly, the plain text of the treaty establishes that the applicable standard for purposes of the fair and equitable treatment obligation is the minimum standard of treatment under customary international law.

[530] **Ex. R-010**, DR-CAFTA, Art. 10.5 (emphasis added).

209. In 1926, the commission in the *Neer* case ruled that a breach of the minimum standard of treatment "should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[531]

210. In their Amended Statement of Claim, citing a NAFTA decision from almost 15 years ago (*viz.*, *Mondev*), the Ballantines contend that the minimum standard of treatment "has evolved" since the *Neer* decision.[532] However, at least three recent NAFTA decisions have concluded the opposite, explicitly endorsing the *Neer* standard.[533] And a review of the

[531] **RLA-085**, *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, United States – Mexico Commission, Decision (15 October 1926), pp. 61-62.

[532] **Amended Statement of Claim**, ¶ 202. However, to establish that the minimum standard truly has evolved since *Neer*, the Ballantines would need to prove that there has been an evolution in international customary law, which is defined in Annex 10-B of DR-CAFTA as a "general and consistent practice of States followed by the parties to DR-CAFTA from a sense of legal obligation." The cases cited by the Ballantines do not establish a general and consistent practice of States that signal a change in the *Neer* standard. *See e.g.*, **RLA-086**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Dominican Republic Non-Disputing Party Submission (5 October 2012), ¶¶ 4-5; **CLA-025**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009) (Young, Hubbard, Caron), ¶¶ 600–01 ("[W]hat does this customary international law minimum standard of treatment require of a State Party vis-à-vis investors of another State Party? Is it the same as that established in 1926 in *Neer v. Mexico*? Or has Claimant proven that the standard has "evolved"? If it has evolved, what evidence of custom has Claimant provided to the Tribunal to determine its current scope? As a threshold issue, the Tribunal notes that it is Claimant's burden to sufficiently answer each of these questions"); ¶ 614 ("As regards the second form of evolution—the proposition that customary international law has moved beyond the minimum standard of treatment of aliens as defined in *Neer*—the Tribunal finds that the evidence provided by Claimant does not establish such evolution"). As in *Glamis Gold*, the Ballantines have failed to make the relevant showing.

[533] **RLA-045**, *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2 Award (16 March 2017) (van den Berg, Born, Bethlehem), ¶ 222 ("[T]he Tribunal accepts in principle the analysis and conclusions [] in *Glamis Gold* on the content of the customary international law minimum standard of treatment . . . and, in particular, its conclusion as follows: '[A] violation of the customary international law minimum standard of treatment, as codified in Article 1105 of the NAFTA, requires an act that is sufficiently **egregious and shocking**") (emphasis added); **CLA-025**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009) (Young, Hubbard, Caron), ¶ 612 ("It appears to this Tribunal that the NAFTA State Parties agree that, at a minimum, the fair and equitable treatment standard is that as articulated in Neer"); ¶ 627 ("The Tribunal therefore holds that a violation of the customary international law minimum standard of treatment, as codified in Article 1105 of the NAFTA, requires an act that is sufficiently **egregious and shocking**") (emphasis added); **RLA-056**, *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award in Respect of Damages (31 May 2002)

[FOOTNOTE CONTINUED ON NEXT PAGE]

jurisprudence confirms that, even though what may have "amount[ed] to an outrage," or "to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency" may have evolved somewhat over the past 90 years, the fact remains that it is only when government conduct rises to that level that it breaches the minimum standard of treatment has not changed. The standard is, and always has been, very stringent — one that is not easily satisfied, and that confers on States a significant degree of latitude. Both DR-CAFTA and NAFTA tribunals have consistently stressed that the threshold for showing a breach of the customary international law minimum standard of treatment is extremely high. For instance, the *SD Myers* tribunal explained that a determination of a breach of this standard "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."[534] The tribunal in *Waste Management II*, for its part, noted that

> [t]aken together, 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.[535]

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

(Dervaird, Greenberg, Belman), ¶ 68 ("One would hope that these actions by the SLD would **shock and outrage** every reasonable citizen. of Canada; they did shock and outrage the Tribunal") (emphasis added).

[534] **CLA-017**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000) (Hunter, Schwartz, Chiasson), ¶ 263 ; *see also* **CLA-049**, *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Award (15 November 2004) (Paulsson, Reisman, Lacarte), ¶¶ 93-94.

[535] **CLA-027**, *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (Crawford, Civiletti, Magallón), ¶ 98 (emphasis added). *See also* **RLA-086**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Dominican Republic Non-Disputing Party Submission (5 October 2012), ¶ 6.

[FOOTNOTE CONTINUED ON NEXT PAGE]

211. The standard as defined in *Waste Management II* has been widely accepted and followed by other DR-CAFTA and NAFTA tribunals that have addressed fair and equitable treatment claims.[536] The *GAMI* tribunal, for example, stressed four implications of the *Waste Management II* that underscore the stringency of the standard:

> Four implications of *Waste Management II* are salient even at the level of generality reflected in the passages quoted above. (1) The failure to fulfil the objectives of administrative regulations without more does not necessarily rise to a breach of international law. (2) A failure to satisfy requirements of national law does not necessarily violate international law. (3) Proof of a good faith effort by the Government to achieve the objectives of its laws and regulations may counter-balance instances of disregard of legal or regulatory requirements. (4) The record as a whole — not isolated events — determines whether there has been a breach of international law.[537]

212. Similarly, the tribunal in *International Thunderbird* held that the acts that give rise to a breach of the minimum standard of treatment should "amount to a ***gross*** denial of justice or ***manifest*** arbitrariness falling below acceptable international standards."[538]

213. More recently, the *Glamis Gold* tribunal adopted an even more forceful position:

> [A]lthough situations may be more varied and complicated today than in the 1920s, the level of scrutiny is the same. The fundamentals of the *Neer* standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

[536] **RLA-024**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (29 June 2012) (Rigo Sureda, Eizenstat, Crawford), ¶¶ 219, 235; **CLA-026**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (19 December 2013) (Mourre, Park, von Wobeser), ¶ 454; **CLA-049**, *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Award (15 November 2004) (Paulsson, Reisman, Lacarte Muró), ¶¶ 95-96; **CLA-011**, *Methanex Corporation v. United States of America*, UNCITRAL, Award(3 August 2005) (Veeder, Rowley, Christopher), Part IV - Chapter C - ¶ 11.

[537] **CLA-049**, *Gami Investments, Inc. v. The United Mexican States*, UNCITRAL, Award (15 November 2004) (Paulsson, Reisman, Lacarte), ¶ 97.

[538] **CLA-020**, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award (26 January 2006) (van den Berg, Wälde, Portal), ¶ 194 (emphasis added).

> 1105 of the NAFTA, an act must be sufficiently egregious and shocking — a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons — so as to fall below accepted international standards and constitute a breach of Article 1105(1).[539]

The *Glamis* tribunal then further clarified:

> The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community.[540]

214. Other non-NAFTA or CAFTA decisions have upheld a similarly high threshold. In *Alex Genin v. Estonia*, the tribunal explained that acts violating the minimum standard of treatment are those "showing a willful neglect of duty, an insufficiency of action falling far below international standards or even subject to bad faith."[541] For its part, the *Tamimi v. Oman* tribunal in its recent award held that the threshold to show a breach of the minimum standard is "particularly" high in cases involving environmental measures:

> [T]o establish a breach of the minimum standard of treatment . . . , the Claimant must show that Oman has acted with a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law. Such a standard requires more than that the Claimant point to some inconsistency or inadequacy in [the host State's] regulation of its internal affairs: a breach of the minimum standard requires a failure, willful or otherwise egregious, to protect a foreign investor's basic rights and expectations. It will certainly not be

[539] **CLA-025**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009) (Young, Hubbard, Caron), ¶ 616.

[540] **CLA-025**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009) (Young, Hubbard, Caron), ¶ 615; *see also* **CLA-017**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000) (Hunter, Schwartz, Chiasson), ¶ 259; **RLA-086**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Dominican Republic Non-Disputing Party Submission (5 October 2012), ¶ 7.

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[541] **RLA-056**, *Alex Genin et al. v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2010) (Fortier, Heth, van den Berg), ¶ 367.

> the case that every minor misapplication of a State's laws or regulations will meet that high standard. ***That is particularly so . . . where the impugned conduct concerns the good-faith application or enforcement of a State's laws or regulations relating to the protection of its environment***.[542]

215. Accordingly, the jurisprudence clearly establishes that the standard for finding a breach of the customary international law minimum standard of treatment is an extremely restrictive one, as illustrated by the abundant use in the relevant arbitral awards of adjectives such as "gross," "shocking," "manifest," "flagrant," and "egregious." Therefore, to show a breach of the minimum standard, the Ballantines must prove that the Dominican Republic engaged in shocking or egregious misconduct that goes well beyond a mere "inconsistency or inadequacy in regulation of [] internal affairs."[543]

216. In any event, as explained immediately below, the measures at issue did not breach Article 10.5 — irrespectively of how stringently the minimum standard is interpreted.

2. The Measures Did Not Breach The Minimum Standard Of Treatment

217. The Ballantines challenge eight measures under the fair and equitable treatment standard articulated in Article 10.5: (i) the denial of an environmental permit based on the slope of the land; (ii) the creation of Baiguate National Park; (iii) the supposed denial of a permit on the basis of the Baiguate National Park; (iv) the inspections conducted on the Ballantines' property; (v) the fines imposed on the Ballantines; (vi) the alleged order that the Project 1 road be made public; (vii) the application of environmental rules such as ICA-related obligations; and (viii) the Municipality of Jarabacoa's refusal to issue a "no objection" letter in connection with

[542] **RLA-058**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (3 November 2015) (Williams, Brower, Thomas), ¶ 390 (emphasis added).

[543] **RLA-058**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (3 November 2015) (Williams, Brower, Thomas), ¶ 390.

the Mountain Lodge.[544] According to the Ballantines, these measures were discriminatory, arbitrary, non-transparent, unfair, and/or in breach of their legitimate expectations. However, the record shows otherwise, as discussed below.

a. The Dominican Republic Did Not Discriminate Against The Ballantines

218. The Ballantines allege that some of the measures identified above amount to discrimination in violation of the fair and equitable treatment standard of Article 10.5. However, as a threshold matter, the fair and equitable provision in DR-CAFTA (like its counterpart in NAFTA) does not itself protect foreign investors against discrimination. In fact, Article 10.5 does not mention the word "discrimination," or any other related term or synonym, at all. Instead, other Articles of DR-CAFTA address discriminatory treatment directly,[545] and Article 10.5.3 expressly states that "[a] determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article."[546]

219. The jurisprudence also underscores that discrimination is not part of Article 10.5. For example, the *Methanex* tribunal observed the following with respect to Article 1105 of NAFTA (which, as the Ballantines themselves recognize, is "substantively identical" to Article

[544] **Amended Statement of Claim**, ¶ 211. The Ballantines state that these eight measures are part of a list of measures that is "not exhaustive." *Id.* However, the Tribunal lacks jurisdiction over any claims that are not based on acts or conduct specifically identified by the Ballantines. Article 10.16.2 of DR-CAFTA requires a claimant to deliver a notice of intent at least 90 days before submitting any claim to arbitration which shall specify, among other, "the legal and factual basis for each claim." **Ex. R-010**, **DR-CAFTA**, Article 10.16.2.

[545] **R-010**, DR-CAFTA, Article 10.3 (National Treatment); Article 10.4 (Most-Favored-Nation Treatment); Article 10.7(1)(b) (stating that "[n]o Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: . . . ***in a non-discriminatory manner***"); Article 10.8(4) (stating that "a Party may prevent a transfer through the equitable, ***nondiscriminatory***, and good faith application of its laws" in certain circumstances).

[546] **Ex. R-010**, DR-CAFTA, Art. 10.5.3.

10.5 of DR-CAFTA):[547] "[T]he text of NAFTA indicates that the States parties explicitly excluded a rule of non-discrimination from [Article 10.5]"[548] The *Methanex* tribunal further noted that "the plain and natural meaning of the text of [Article 10.5] does not support the contention that the 'minimum standard of treatment' precludes governmental differentiations."[549] Other tribunals have emphasized the same point.[550]

220. However, assuming *arguendo* that the minimum standard of treatment *does* prohibit discriminatory treatment — and the Dominican Republic is aware that some tribunals have concluded that this is the case[551] — the threshold to prove a discrimination claim would be high, and would require "more than different treatment."[552] The recent *Eli Lilly* tribunal explained that when a measure is not discriminatory on its face, the claimant must prove discriminatory *intent*.[553]

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[547] **Amended Statement of Claim**, ¶ 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").

[548] **CLA-011**, *Methanex Corporation v. United States of America*, UNCITRAL, Award (3 August 2005) (Veeder, Rowley, Christopher), Part IV - Chapter C - ¶ 25.

[549] **CLA-011**, *Methanex Corporation v. United States of America*, UNCITRAL, Award (3 August 2005) (Veeder, Rowley, Christopher), Part IV - Chapter C - ¶ 14.

[550] *See, e.g.*, **CLA-012**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 January 2011) (Nariman, Anaya, Crook), ¶ 208 ("The language of Article 1105 does not state or suggest a blanket prohibition on discrimination against alien investors' investments, and one cannot assert such a rule under customary international law. States discriminate against foreign investments, often and in many ways, without being called to account for violating the customary minimum standard of protection").

[551] **RLA-045**, *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2 Award (16 March 2017) (van den Berg, Born, Bethlehem) ¶ 440; **CLA-049**, *GAMI*, ¶ 94; **CLA-027**, *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (Crawford, Civiletti, Magallón), ¶ 98.

[552] **RLA-038,** *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18 (Award, 28 March 2011), ¶ 261 (Fernández-Armesto, Paulsson, Voss).

[553] **RLA-045**, *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2 Award (16 March 2017) (van den Berg, Born, Bethlehem), ¶ 440 ("Claimant does not allege that the promise utility doctrine discriminates against foreign patent holders on its face, or that Canadian courts have shown any intent to discriminate against foreign patent holders").

221. In their discussion of the alleged breach of fair and equitable treatment, the Ballantines ignore the foregoing framework for the analysis of discrimination claims, contenting themselves simply with arguing that they were treated differently as compared to other "businesses"[554] or "projects,"[555] and making little of no effort to show intent, or at least something more than differential treatment. Their claims can and should be rejected on that basis alone.

222. In any event, as discussed above in Part C, on national treatment, the Ballantines have not even proven that there has in fact been any unjustified differential treatment. That discussion will not be repeated here, except to stress the conclusion of that section, which is that the Ballantines' allegations of differential treatment with respect to particular investors or projects either (i) are not true; or (ii) are true, but are justified on the basis of legal or policy considerations.

b. The Dominican Republic Did Not Act In An Arbitrary Manner Towards The Ballantines

223. DR-CAFTA and NAFTA tribunals agree that the minimum standard of treatment protects a foreign investor from a State's arbitrary conduct.[556] Some tribunals have noted that foreign investors are only protected from State conduct that is "***manifestly*** arbitrary."[557]

224. In this case, the Ballantines have not identified any particular standard for arbitrary treatment, and do not discuss the standard developed by various tribunals. The Oxford

[554] **Amended Statement of Claim**, ¶ 211.

[555] **Amended Statement of Claim**, ¶ 211.

[556] **CLA-027**, *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (Crawford, Civiletti, Magallón), ¶ 98; **CLA-020**, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award (26 January 2006) (van den Berg, Wälde, Portal), ¶ 194.

[557] **CLA-025**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009) (Young, Hubbard, Caron), ¶ 626 (emphasis added).

Dictionary defines "arbitrary" as "derived from mere opinion," "capricious," "unrestrained," "despotic."[558] Likewise, Black's Law Dictionary defines the term "arbitrary" as "depending on individual discretion; . . . founded on prejudice or preference rather than on reason or fact."[559] DR-CAFTA and NAFTA tribunals have considered a State's action to be arbitrary when there is a "lack of reasons," [560] or in stricter terms "a ***manifest*** lack of reasons."[561] The recent decision in *Glamis v. Unites States* defined the term "arbitrary" in the context of the minimum standard of treatment:

> Previous tribunals have indeed found a certain level of arbitrariness to violate the obligations of a State under the fair and equitable treatment standard. Indeed, arbitrariness that contravenes the rule of law, rather than a rule of law, would occasion surprise not only from investors, but also from tribunals. This is not a mere appearance of arbitrariness, however—a tribunal's determination that an agency acted in a way with which the tribunal disagrees or that a state passed legislation that the tribunal does not find curative of all of the ills presented; rather, this is a level of arbitrariness that, as *International Thunderbird* put it, amounts to a "***gross denial of justice or manifest arbitrariness falling below acceptable international standards***."[562]

225. In the foregoing passage, the *Glamis* tribunal appeared to be alluding to *Elettronica Sicula S.p.A. (ELSI) v. Italy*, where the International Court of Justice held that arbitrariness under customary international law "is not so much something opposed to ***a*** rule of

[558] **R-086**, "Arbitrary," OXFORD ENGLISH DICTIONARY.

[559] **R-087**, BLACK'SLAWDICTIONARY (9th ed. 2009).

[560] **CLA-026**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23 Award (19 December 2013) (Mourre, Park, von Wobeser), ¶ 587.

[561] **CLA-005**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (Kerameus, Gantz, Covarrubias), ¶ 627; **CLA-025**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009) (Young, Hubbard, Caron), ¶ 803 (emphasis added).

[562] **CLA-025**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009) (Young, Hubbard, Caron), ¶ 625 (emphasis added).

law, as something opposed to ***the*** rule of law. . . . It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[563]

226. Based on the above, so long as a measure is reasonable — and certainly not manifestly ***un***reasonable — it cannot be considered arbitrary. As articulated in *Glamis*, State conduct is reasonable when it is "[(1)] rationally related to its stated purpose and [(2)] reasonably drafted to address its objectives."[564]

227. The foregoing imposes a heavy burden on the Ballantines, requiring them to demonstrate that the Dominican Republic's actions either bore no relationship with a rational policy, or were not reasonably tailored to such a policy. To make this showing, "mere illegality"[565] is insufficient. So, too, is mere disagreement with the Government's policy choices and technical conclusions. As the *Glamis* tribunal explained, "[i]t is not the role of this Tribunal, or any international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency."[566] What the Ballantines must demonstrate is State conduct that is "manifestly arbitrary, so unjust and surprising as to be unacceptable from the international perspective."[567]

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[563] **RLA-059**, *Elettronica Sicula S.p.A. (ELSI) v. Italy (United States v. Italy)*, International Court of Justice, Judgment (20 July 1989), ¶ 128 ("*ELSI*") (emphasis added).

[564] **CLA-025**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009) (Young, Hubbard, Caron), ¶ 803.

[565] **CLA-025**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009) (Young, Hubbard, Caron), ¶ 626.

[566] **CLA-025**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009) (Young, Hubbard, Caron), ¶ 779.

[567] **CLA-025**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009) (Young, Hubbard, Caron), ¶ 626; *see also* **RLA-060,** A. Newcombe & L. Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (2009), p. 302 (stressing that investment treaty tribunals "have consistently held that the threshold for what constitutes arbitrariness is high").

228. The Ballantines have not made this showing. There appear to be three parts to the Ballantines' "arbitrariness" claim: (1) that the denial of the environmental permit for Project 3 was arbitrary because the Dominican Republic did not explain why Project 3 could not proceed in those parts of the parcel of land that had slopes under 60%;[568] (2) that the boundaries of the Baiguate National Park are inconsistent with the purpose for which the Park was created;[569] and (3) that the refusal by the Municipality of Jarabacoa to issue the "no objection" letter that the Ballantines requested in 2013 was arbitrary because "no objection" letters were granted to other projects since that time.[570] These claims fail because the Dominican Republic's conduct was in fact reasonable and proportionate.

229. As explained above, to show arbitrariness, the Ballantines must satisfy a two-prong test. Under *Glamis*, the first step is to show a lack of rationality of the policy underlying the measure; the second step is to show that the measure was not reasonably correlated or tailored to such policy. In this case, the Ballantines have not even made out a *prima facie* case for arbitrary conduct, because they are not challenging the three measures mentioned above on the basis that there was no rational policy underlying them, or because they did not bear a reasonable relationship with such policy, but rather for other reasons.

230. The ***first*** measure that is challenged is the denial of the environmental permit to develop Project 3 because some portions of the land had slopes greater than 60%.[571] The ***second*** measure is the creation of the Baiguate National Park, which is challenged on the basis that the contours of the Park were allegedly not delineated in such a way as to accomplish the Park's

[568] **Amended Statement of Claim**, ¶ 211.
[569] **Amended Statement of Claim**, ¶ 211.
[570] **Amended Statement of Claim**, ¶ 211.
[571] **Amended Statement of Claim**, ¶ 211.

ostensible environmental purposes. The ***third*** measure is the non-issuance of a "no objection" letter by the Municipality of Jarabacoa.

231. The Ballantines not only do not present a *prima facie* case for arbitrary conduct with respect to any of these challenged measures, but they also support their allegations with misleading facts. With respect to the ***first*** measure, the Ballantines assert that the Dominican Republic did not explain to the Ballantines why development of the project was forbidden in areas with slopes under 60%.[572] However, that is not correct. To begin with, the Dominican Republic did not establish a complete bar to the project. Rather, it simply asked the Ballantines to adapt it, and invited them to present alternative plans for Project 3; however, the Ballantines never followed up on that.[573]

232. With respect to the ***second*** measure, it is not true that the boundaries of the Baiguate National Park have no appropriate correlation with the purposes for which the Park was created. The Dominican Republic has offered extensive evidence showing that the creation of the Baiguate National Park responds to legitimate environmental purposes, and that the boundaries of the park do indeed help achieve such purposes.[574]

233. With respect to the ***third*** measure, the Municipality simply informed the Ballantines that it was aware that the Ministry had concerns with the project site, and wanted to

[572] **Amended Statement of Claim**, ¶ 211.

[573] **Ex. C-008**, Letter from Ministry to M. Ballantine, 12 September 2011 ("[W]e inform you that this Ministry is available to carry out any activity relevant to an evaluation, should you decide to submit another place (s) that is potentially viable") (translation from Spanish; the original Spanish version reads as follows: "[L]es informamos que este Ministerio está en la mejor disposición de realizar las actividades pertinentes para la evaluación, en caso que usted decida presentar otro(s) lugar(es) con potencialidades viables"); **Zacarías Navarro First Witness Statement**, ¶¶ 35-36.

[574] **Eleuterio Martínez First Witness Statement**,¶¶ 34, 40, 44, 45; **Sixto Incháustegui First Expert Report**, ¶ 55; **Jaime David Fernández Mirabal First Witness Statement**, ¶¶ 12–19.

be sure that such concerns had been addressed before it provided the "no objection" letter.[575] It was entirely rational — and responsible — for the Municipality to act in this manner, and to avoid giving any conflicting message.

234. In sum, the Ballantines have failed to show that the Dominican Republic has violated the minimum standard of treatment on the basis of arbitrary conduct.

c. The Dominican Republic Did Not Act In A Non-Transparent Manner Towards The Ballantines

235. In addition to claiming that the Dominican Republic acted in an arbitrary and discriminatory fashion, the Ballantines also contend that the Dominican Republic violated the minimum standard of treatment by acting in a non-transparent manner on two occasions. The ***first*** was an alleged failure of the Dominican Republic to explain why the Ballantines cannot develop the parts of the land in Project 3 that have a slope lower than 60%. The ***second*** was the creation of Baiguate National Park, which the Ballantines characterize as having been secretive.[576]

236. These transparency claims fail as a threshold matter because the minimum standard of treatment creates no particular obligation of "transparency." The award in *Metalclad*

[575] **Ex. R-140**, Jarabacoa Municipal Council Meeting Minutes (11 December 2014), p. 9. There is no question that the Ballantines also were aware of the Ministry's concerns at the time they requested the "no objection" letter. *See e.g.*, **Ex. C-008**, Letter from Ministry to M. Ballantine, 12 September 2011.

[576] **Amended Statement of Claim**, ¶ 211.

v. Mexico was partially set aside for concluding otherwise.[577] Subsequently the 2010 *Merrill & Ring* tribunal confirmed that transparency was not part of the customary law standard.[578]

237. In any event, even assuming *arguendo* that the minimum standard of treatment *did* include a transparency obligation, the Ballantines' claim would fail. Contrary to what the Ballantines allege, the Dominican Republic does not have a "secretive" regulatory system.[579] Concerning the ***first*** measure — the alleged failure of the Dominican Republic to explain why the Ballantines could not develop the parts of the land in Project 3 with a slope lower than 60% — there is no issue of transparency, but rather simply a misleading rendition of the facts by the Ballantines. The Dominican Republic did not categorically prohibit the Ballantines from developing the lands with slopes lower than 60%. It simply stated that the project, as presented, was not viable because of the slope issue. The Ballantines were given the option of identifying an alternative site for the project, [580] and also could have modified the scope of their project and asked the Ministry to re-evaluate the Project on that basis; however, they chose not to.[581]

238. With respect to the ***second*** measure, the creation of the Baiguate National Park, the Ballantines simply assert — without explaining — that such creation involved an "essentially

[577] *See* **CLA-005**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (Keramaeus, Covarrubias Bravo, Gantz), ¶ 133 (citing *United Mexican States v. Metalclad*, Supreme Court of British Columbia, Reasons for Judgment of the Honorable Mr. Justice Tysoe, 2 May 2001, ¶¶ 70-74).

[578] **CLA-16**, *Merrill & Ring Forestry LP v. Canada*, ICSID Case No. UNCT/07/1, Award (31 March 2010) (Orrego, Kenneth, Rowley) ("*Merrill*"), ¶ 231.

[579] **CLA-016**, *Merrill*, ¶ 231.

[580] **Ex. C-008**, Letter from Z. González de Gutiérrez (Ministry of Environment) to M. Ballantine (12 September 2011) ("[L]es informamos que este Ministerio está en la mejor disposición de realizar las actividades pertinentes para la evaluación, en caso que usted decida presentar otro(s) lugar(es) con potencialidades viables").

[581] **Zacarías Navarro First Witness Statement**, ¶ 35-36.

secret process."[582] However, the Ballantines must do more than merely label a process "secretive" in order to carry their burden of proof.[583] Moreover, contrary to the Ballantines' contention, the creation of this Park was completely transparent: the creation of the Park, including the establishment of its boundaries, was effected pursuant to a formal decree signed by the President of the Republic and published in the Official Gazette, and the promulgation of such decree was widely publicized in the media.[584] The fact that, in its original permit denial, the Ministry had not identified the Baiguate National Park as a basis to deny the Ballantines' request for an environmental permit is irrelevant to the issue of whether the boundaries were clear and were adequately publicized. Decree No. 571-09 explicitly defined the boundaries of the Park,[585] as confirmed by the Dominican Republic's fact witnesses.[586]

239. Further, under Dominican law, at no time was the Executive under any obligation to consult with the Ballantines (or any other private entity or individual) concerning the creation of the Park, because there is no such requirement under Dominican law.[587] Finally, it is not true that the Ballantines did not have the opportunity to object to the creation of the Park, because

[582] **Amended Statement of Claim**, ¶ 211.

[583] **RLA-062**, *Robert Azinian et al. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (1 November 1999) (Paulsson, Civiletti, von Wobeser), ¶ 90 ("*Azinian*") ("labeling is . . . no substitute for analysis").

[584] **Ex. R-077**, Certification of the Gaceta Oficial No. 10535 (7 September 2009) containing Decree No. 571-09 (7 August 2009); **Ex. R-060**, Parque Nacional Baiguate, *Fundación Ambiental Acción Verde* (22 October 2009); **Ex. R-061**, *Poder Ejecutivo crea mediante decreto 37 nuevas áreas protegidas en todo el país*, Listin Diario (14 October 2009); **Ex. R-062**, *Poder Ejecutivo crea 37 nuevas áreas protegidas*, Diario Libre (14 October 2009).

[585] **Ex. R-077**, Certification of the Gaceta Oficial No. 10535 (7 September 2009) containing Decree No. 571-09 (7 August 2009).

[586] *See i.e.*, **Eleuterio Martínez First Witness Statement**, Annex B (annexing the data sheet of the Baiguate National Park, which shows that the boundaries of the Park were clearly defined since May 2009).

[587] **Jaime D. Fernández Mirabal's First Witness Statement**, ¶ 19.

Dominican administrative law allows private parties to resort to the judicial courts to challenge any decree of general application.[588]

240. In conclusion, the Dominican Republic did not breach any obligation of transparency toward the Ballantines (to the extent such an obligation even existed, which it did not).

d. The Dominican Republic Did Not Otherwise Act In An Unfair or Unjust Manner Towards The Ballantines

241. Beyond their allegations of discrimination, arbitrariness, and lack of transparency, which were discussed above, the Ballantines make two additional allegations of unfair and inequitable treatment. The ***first*** allegation is that the application of the rules on slopes to deny the environmental viability of Project 3 was "unjust,"[589] "[f]or similar reasons to the above,"[590] which appears to be a cross-reference to their bullet-points on discrimination and arbitrariness. This claim accordingly should fail for the same reasons discussed above.

242. The ***second*** allegation is that the creation of Baiguate National Park was "unjust and unfair" because, according to them, the Dominican Republic (i) created the Park in secret, (ii) did not provide compensation for the portions of land that were "expropriated" by means of their inclusion within the boundaries of the Park; and (iii) did not create a management plan for the Park.[591] As discussed immediately above, however, the Dominican Republic did ***not*** create the Park in secret. And, as discussed below in Part G, the creation of the Baiguate National Park

[588] For example, Law 137-11 allows for challenges to laws, decrees, regulations, and other type of rules on constitutional grounds. *See e.g.*, **Ex. R-161**, *Ley No. 137-11 Orgánica del Tribunal Constitucional y de los procesos constitucionales* (15 June 2011), Articles 36 and 51.

[589] **Amended Statement of Claim**, ¶ 211.

[590] **Amended Statement of Claim**, ¶ 211.

[591] **Amended Statement of Claim**, ¶ 211.

did ***not*** constitute an expropriation. As for the management plan, it is not true that the Dominican Republic has not created one. It simply took time to put together, as the Dominican Republic first had to undertake an intensive process of socio-economic studies, public workshops, and cartographic surveys (among other things).[592] The management plan ultimately was approved on 20 March 2017.[593] Notably, the plan allows for ecotourism projects within the Park. [594]

e. The Dominican Republic Did Not Violate Any Legitimate Expectations Held by The Ballantines

243. In addition to the foregoing, the Ballantines also allege that (1) they had the expectation that the Dominican Republic would grant the permits for the development of Project 3 simply because the government had previously granted all permits for the development of Projects 1 and 2;[595] and (2) that the Dominican Republic frustrated this expectation and is therefore responsible for a violation of the minimum standard of treatment under Article 10.5.[596]

244. This argument fails for two reasons. ***First***, the minimum standard of treatment does not protect legitimate expectations. The Ballantines attempt to argue otherwise,[597] by reference to (1) the *Merrill & Ring* award,[598] and (2) a passage from the *CMS Gas* award that

[592] **Ex. R-084**, *Resolution No. 0010-2017, Plan de Manejo del Parque Nacional Baiguate* (20 March 2017), with *Plan de Manejo Parque Nacional Baiguate*, p. 13-14 of the plan.

[593] **Ex. R-084**, *Resolution No. 0010-2017, Plan de Manejo del Parque Nacional Baiguate* (20 March 2017), with *Plan de Manejo Parque Nacional Baiguate*.

[594] *See* **Ex. R-084**, *Resolution No. 0010-2017, Plan de Manejo del Parque Nacional Baiguate* (20 March 2017), with *Plan de Manejo Parque Nacional Baiguate*, pp. 43–46 of the plan.

[595] **Amended Statement of Claim**, ¶ 217 ("The Ballantines ha[d] 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").

[596] **Amended Statement of Claim**, ¶ 217.

[597] *See* **Amended Statement of Claim**, ¶¶ 199, 213.

[598] **Amended Statement of Claim**, ¶ 213.

does not even discuss the concept of legitimate expectations,[599] and is therefore inapposite. The *Merrill & Ring* award has no bearing on the question of whether the minimum standard of treatment protects legitimate expectations — since, in that case, the tribunal could not even agree on the scope of the minimum standard.[600] Moreover, the tribunal's decision was not even based on the application of the minimum standard of treatment itself, but rather on the fact that the claimant had not proven that it suffered damages as a result of the challenged measures.[601]

245. But even if legitimate expectations were indeed protected by the minimum standard of treatment (*quod non*), the Ballantines could not substantiate a breach of Article 10.5 for the frustration of any legitimate expectations. The Ballantines advance the proposition that the standard to prove a frustration of legitimate expectations is low.[602] However, that is not true, as an unsatisfied expectation is not enough to meet the relevant standard. As the *Glamis* tribunal unequivocally stated, "[m]erely not living up to expectations cannot be sufficient to find a breach of [the minimum standard of treatment]. Instead, [it] requires the evaluation of whether the State made any specific assurance or commitment to the investor so as to induce its expectations."[603] The tribunal later clarified that a specific assurance "requires, as a threshold circumstance, at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment."[604] In this case, the Dominican Republic did

[599] **Amended Statement of Claim**, ¶ 214.

[600] **CLA-016**, *Merrill*, ¶ 219.

[601] **CLA-016**, *Merrill*, ¶ 266.

[602] **Amended Statement of Claim**, ¶ 213 (stating that the *Merrill & Ring* tribunal supported "a less definitive relationship between specific assurances and a breach of the minimum standard").

[603] **CLA-025**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009) (Young, Hubbard, Caron), ¶ 620.

[604] **CLA-025**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009) (Young, Hubbard, Caron), ¶ 766.

not make any specific assurance or commitment that generated any expectations by the Ballantines, and in fact, the Ballantines have not even attempted to argue otherwise.

246. Instead, the Ballantines postulate that, as a result of the Dominican Republic's approval of environmental permits in Projects 1 and 2, they had developed a legitimate expectation that the relevant permits would similarly be granted during Project 3.[605] But Project 3 was a separate project, with different characteristics. The Ballantines themselves knew that the project was a separate and independent one, which is why they applied for new terms of reference in the first place.[606] The approval of Projects 1 and 2 could not, without more, have generated an internationally-protected expectation — or even a reasonably-held expectation — that the Project 3 permits would also be approved. The fact that a permit is granted on one occasion does not guarantee that other permits will similarly be granted forevermore going forward. The proposition itself defies logic, and while perhaps it is conceivable that someone could form such an expectation, it would clearly not amount to a legitimate expectation for investment treaty purposes. Otherwise, investment treaties would operate as the functional equivalent of insurance policies for every possible disappointment an investor may suffer, and such cannot be a proper interpretation.[607] The foregoing applies with even greater force in the

[605] **Amended Statement of Claim**, ¶ 217.

[606] **Zacarías Navarro's First Witness Statment**, ¶ 18 ("When requesting Terms of Reference for a new project, the developer is aware that the JDD Expansion Project is equal to, or greater than, the existing project and, therefore, requires the submission of an environmental study") (translation from Spanish; the original Spanish version reads as follows: "Al solicitar Términos de Referencia como proyecto nuevo el promotor es consciente que el Proyecto Ampliación JDD es igual o mayor que el existente, y por tal razón requiere de presentar un estudio ambiental").

[607] *See, e.g.*, **RLA-063**, *Emilio Agustin Maffezini v. The Kingdom of Spain*, ICSID Case No ARB/97/7, Award (13 November 2000) (Vicuña, Buergenthal, Wolf), ¶ 64 ("Maffezini") ("Bilateral Investment Treaties are not insurance policies against bad business judgments"), **RLA-064,** *MTD Equity Sdn Bhd & MTD Chile S.A. v. Chile*, ICSID Case No ARB/01/7, Award (25 May 2004) (Sureda, Lalonde, Oreamuno), ¶ 178 ("The BITs are not an insurance against business risk and the [t]ribunal considers that the [c]laimants should bear the consequences of their own actions as experienced businessmen"); **RLA-**

[FOOTNOTE CONTINUED ON NEXT PAGE]

present case because the Dominican Republic explicitly informed the Ballantines that any future or supplemental project would require separate review and approval by the Ministry.[608]

3. The Ballantines Cannot Base Their Claim On The Alleged "Cumulative Effect" Of The Challenged Measures

247. Finally, the Dominican Republic notes that, as part of their claim under Article 10.5, the Ballantines argue that the Tribunal "should not examine each of the [Dominican Republic's] bad acts in isolation. Rather, the Tribunal should examine the cumulative effect of the [Dominican Republic's] actions."[609] Strangely, however, the Ballantines only discuss the Dominican Republic's various alleged actions individually (and their respective allegedly offending characteristics), but never attempt to explain how such actions supposedly operated collectively in such a way as to breach the Ballantines' treaty rights. As explained by the *Glamis* tribunal, "for acts that do not individually violate [Article 10.5] to nonetheless breach that article

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
026, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) (Caflisch, Bernardini, Stern), ¶ 365 (explaining that a BIT is not a "guaranty to foreigners concerning its economic health and the maintenance of the economic condition for business prevailing at the time of the investment").

[608] **Ex. R-002**, Environmental Permit No. 0649-07, *Secretaria de Estado de Medio Ambiente y Recursos Naturales* (7 December 2007), p. 2 ("This environmental permit is exclusively for the aforementioned activities, carried out within the designated area. Any change in technology, substantive incorporation of new works, or expansion, shall be submitted to an Environmental Impact Assessment process, in accordance with Law 64-00") (translation from Spanish; the original Spanish version reads as follows: "Este permiso ambiental es exclusivo para las actividades antes indicadas realizadas dentro del área señalada. Cualquier cambio de tecnología, incorporación sustantiva de nuevas obras o ampliación deberá ser sometida al proceso de evaluación de impacto ambiental conforme a la Ley 64-00"); **Ex. C-004**, Project 2 Permit (7 December 2007), p. 7 ("This provision is exclusively for the aforementioned works. Any substantive modification or incorporation of new works, or expansion, shall be submitted to the Environmental Impact Assessment process, managed by the Under Secretariat of Environmental Impact in accordance with Law 64-00") (translation from Spanish; the original Spanish version reads as follows: "Esta disposición es exclusiva para las obras indicadas anteriormente. Cualquier modificación o incorporación sustantiva de nuevas obras o ampliaciones deberán ser sometidas al proceso de Evaluación de Impacto Ambiental que administra la Subsecretaría de Gestión Ambiental conforme a la Ley 64-00").

[609] *See* **Amended Statement of Claim**, ¶ 212; *see also id.*, ¶ 210 ("[W]hen 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").

when taken together, there must be some additional quality that exists only when the acts are viewed as a whole."[610] The Ballantines do not even attempt to explain what this quality purports to be. It is therefore unclear precisely what the nature of the asserted claim based on "cumulative" effects consists of, or what the relevant cause of action is.[611]

248. In light of the foregoing, it is impossible for the Dominican Republic to respond meaningfully to the claim at this time, beyond simply responding to the allegations concerning each of the various individual measures. The Dominican Republic reserves the right to respond further, as necessary, at a later stage of this proceeding.

F. The Ballantines' Full Protection And Security Claim Is Unfounded

249. As noted above, the Ballantines assert two claims under Article 10.5 of DR-CAFTA. That provision is entitled "Minimum Standard of Treatment," and states as follows, in relevant part:

> Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.[612]

The Ballantines' first claim under this Article, which is based on the fair and equitable treatment standard, was addressed above in Part E. The second claim, which is predicated on the full protection and security standard, is addressed herein.

250. As the Ballantines correctly observe, "[t]he 'full protection and security' standard applies essentially when the foreign investment has been affected by civil strife and physical

[610] **CLA-025**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009) (Young, Hubbard, Caron), ¶ 825.

[611] It is unclear, for example, whether the Ballantines purport to be asserting a "composite breach" under customary international law.

[612] **Ex. R-010**, DR-CAFTA, Art. 10.5.1.

violence."[613] In accordance with Article 10.5.2, the standard "requires each Party to provide the level of police protection required under customary international law."[614] In practical terms, this means that if a State Party to the treaty is, or should be, aware that a covered investment in its territory is at risk of physical harm from third parties, it is required to take reasonable steps to prevent such harm, and/or to punish its perpetrators.[615] Importantly, however, the "guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it."[616]

251. In their Amended Statement of Claim, the Ballantines contend that the Dominican Republic violated its full protection and security obligation by "whipp[ing] up local townspeople"[617] and encouraging a "mob"[618] to tear down gates on their property.[619] The

[613] **Amended Statement of Claim**, ¶ 221.

[614] **Ex. R-010**, DR-CAFTA, Art. 10.5.2(b); *see also* **Amended Statement of Claim**, ¶ 220.

[615] *See*, **RLA-025**, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (12 October 2005) (Böckstiegel, Lever, Dupuy), ¶ 164 ("[I]t seems doubtful whether [the FPS] provision can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the ***customary international law*** of aliens. The latter ***is not a strict standard, but one requiring due diligence to be exercised by the State***") (emphasis added); **RLA-026**, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) (Caflish, Bernardini, Stern), ¶ 523 (explaining, in the context of a full protection and security claim, that "[a] well-established aspect of the international standard of treatment is that States must use 'due diligence' to prevent wrongful injuries to the person or property of aliens caused by third parties within their territory, and, if they did not succeed, exercise at least 'due diligence' to punish such injuries. . . . [T]he obligation to show 'due diligence' . . . is generally understood as requiring that the State take reasonable actions within its power to avoid injury when it is, or should be, aware that there is a risk of injury. The precise degree of care, of what is 'reasonable' or 'due,' depends in part on the circumstances").

[616] **CLA-030**, *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003) (Grigera Naon, Fernandez Rozas, Bernal Verea), ¶ 177.

[617] **Amended Statement of Claim**, ¶ 224.

[618] **Amended Statement of Claim**, ¶ 224.

[619] *See* **Amended Statement of Claim**, ¶ 224. The Ballantines also attempt to supplement this argument by alleging that the Dominican Republic discriminated against them in connection with the road, and implying (though not actually asserting) that the road had been expropriated. In addition to being unfounded (*see* Part B, above), this allegation and this implication are utterly irrelevant, given that "discrimination" and "expropriation" are separate Chapter Ten standards, and that Article 10.5.3

[FOOTNOTE CONTINUED ON NEXT PAGE]

Ballantines claim that "Respondent's officials took no action to protect Jamaca and its owners and officials from the mob . . . ."[620] However, that is simply not true.

252. As explained above in Part B, the plot of land where the Project 2 is located included a historical road that, pursuant to an easement, had been used for more than 80 years by the townspeople of Palo Blanco (the part of Jarabacoa where Jamaca de Dios is located).[621] In 2011, citing robberies, the Ballantines erected the Historical Road Gates, which blocked access to the historical road.

253. In August of 2011, the townspeople of Palo Blanco petitioned the local District Attorney to have the Historical Road Gates opened.[622] The Ballantines responded to this petition by offering the townspeople the alternative of gaining access to their respective properties by means of the road that the Ballantines had built (*i.e.*, the Project 1 road), which they would be allowed to access through the Main Gate of Jamaca de Dios, which had a guard hired by the Ballantines. On the basis of this alternative offered by the Ballantines, the District Attorney denied the townspeople's petition, by resolution dated 13 September 2011.[623] The resolution, which "order[ed] the Head of Police of the zone to give protection to Jamaca de Dios in order to

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expressly states that "[a] determination that there has been a breach of another provision of this Agreement . . . does not establish that there has been a breach of this Article." **Ex. R-010**, DR-CAFTA, Art. 10.5.3.

[620] **Amended Statement of Claim**, ¶ 224.

[621] *See* **Ex. R-092**,Certification from *Alcalde de Palo Blanco* (22 May 2013); **Ex. C-069**, Final Judgment on Recognition of Easement and Removal of Gates, *Sala Tribunal de Tierras Jurisdicción Original-La Vega* (5 October 2015), pp. 10–11.

[622] **Ex. C-022**, Ruling on Petition to Open Gates (13 September 2011).

[623] **Ex. C-022**, Ruling on Petition to Open Gates (13 September 2011).

guarantee the investments included in the touristic Project,"[624] confirms the Government's commitment to protecting the Ballantines' property.

254. Thereafter, and for a time, the townspeople of Palo Blanco used the alternative route that the Ballantines had offered (*i.e.*, the Project 1 road). However, they soon realized that the alternative route — which was significantly further away from the historical road — came with considerable limitations; for example, they could only use the Project 1 road on certain days at certain times, and had to fill out paperwork every time they went through the Main Gate. Eventually, they raised a complaint with the Municipality of Jarabacoa at a town hall meeting on 17 April 2013, which representatives of Jamaca de Dios also attended.[625] At the end of the meeting, the Municipality scheduled another meeting for all the relevant parties to discuss the issue, to be held the very next day at the Historical Road Gates. The meeting took place, but no Jamaca de Dios representatives appeared.[626]

255. Concerned that the residents and owners of land in Palo Blanco could not easily reach their properties or efficiently pursue their livelihoods,[627] on 22 April 2013, the Municipality of Jarabacoa resolved to request that the Ballantines remove the Historical Road Gates, and to have certain Municipality officials work with "representatives of the Jamaca de Dios project, dwellers and owners of the lands in that zone," to find a mutually convenient solution.[628]

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[624] **Ex. C-022**, Ruling on Petition to Open Gates (13 September 2011) (translation from Spanish; the original Spanish versión reads as follows: "[S]e instruye al Comandante Policial de la zona a brindar la protección policial a la Hamaca de Dios a los fines de garantizar las inversiones del Proyecto turístico").

[625] **Leslie Aimeé Gil Peña's First Witness Statement,** ¶ 11.

[626] *See* **Ex. R-074**, Video, *Le Niegan la Entrada a Jamaca de Dios a Los Regidores de Jarabacoa*.

[627] **Ex. C-023**, Jarabacoa Municipality Resolution (22 April 2013), p. 2.

[628] **Ex. C-023**, Jarabacoa Municipality Resolution (22 April 2013), "Article Second."

256. But when two months passed without any solution, a group of local townspeople apparently took the matter into their own hands, and tore down the Historical Road Gates on 17 June 2013. However, this was not in any way an action that Government officials had suggested, incited, or encouraged. To the contrary, they acted diligently to protect the Ballantines' property. As the video footage submitted as Exhibit R-75 shows, on the day of the event, municipal police arrived on the scene, and ordered the townspeople to stop.[629] And the justice system stood ready to assist the Ballantines afterwards. The record shows, for example, that the Ballantines initiated three separate legal proceedings in connection with this incident. They filed: (1) criminal complaint against some of the perpetrators, who, as a result "were kept in prison overnight, fined heavily, were given a restraining order, and ordered to regularly appear before the tribunal";[630] (2) a "request for damages," which, following a hearing, was rejected for lack of evidence;[631] and (3) a "request to close access to the easement," which was rejected on the basis that the Ballantines had failed to demonstrate any interference with their property rights.[632]

257. In sum, as the foregoing should amply demonstrate, the Dominican Republic took reasonable steps to protect the Ballantines' investment from third-party injury. It therefore did not breach its full protection and security obligation under Article 10.5, and the Ballantines' claim under that provision of DR-CAFTA should be dismissed.

[629] *See* **Ex. R-075**, Video of 17 June 2013 Incident.

[630] **Michael Ballantine's First Witness Statement**, ¶ 82.

[631] *See* **Ex. R-117**, Sentencia Civil No. 215 (Final Judgment on Damages Request), Caso No. 208-2013-01475 (7 February 2014).

[632] **Ex. C-069**, Final Judgment on Recognition of Easement and Removal of Gates, *Sala Tribunal de Tierras Jurisdicción Original-La Vega* (5 October 2015).

G. The Ballantines' Expropriation Claim Is Unfounded

258. It is clear from the Amended Statement of Claim that the Ballantines are alleging that the Dominican Republic expropriated their investment, both directly and indirectly,[633] in asserted violation of Article 10.7.1 of DR-CAFTA.[634] However, the Ballantines' explanation as to how the expropriation supposedly was committed is limited to the following three brief paragraphs:

> 237. The Ballantines have been substantially deprived of their investments by Respondent's expropriatory acts. Although the Ballantines maintained legal ownership of the 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 [L]odge. 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.[635]

[633] *See* **Amended Statement of Claim**, ¶ 227.

[634] Article 10.7.1 states as follows: "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 Article 10.5."

[635] **Amended Statement of Claim**, ¶¶ 237–39. Elsewhere in their Amended Statement of Claim, the Ballantines also allege that the Dominican Republic "lost control over their road," and that the road therefore was "expropriated." *See id.*, ¶¶ 186, 153. As explained above in **Part B**, however, the Ballantines never "lost control" (or "lost dominion," as they also put it) over the road that they

[FOOTNOTE CONTINUED ON NEXT PAGE]

259. It is not clear from the foregoing which acts by the Dominican Republic supposedly effected a direct expropriation. As the Ballantines themselves explain — and as the text of DR-CAFTA itself makes clear — "[d]irect 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."[636] Here, however, the Ballantines freely admit that "the Ballantines maintained legal ownership of the land, the concessions, and other investments . . . ."[637]

260. It also is not clear what ***in***direct expropriation the Ballantines are alleging. They appear to be claiming that the Dominican Republic expropriated the very same land (*viz.*, the so-called "Phase 2" land) on four separate occasions — first by means of the creation in 2009 of the Baiguate National Park, then by means of the 12 September 2011 rejection of the Project 3 permit, then ***again*** in January 2014 by issuing a "denial based on the National Park," and yet ***again*** at some unidentified point thereafter by supposedly "refus[ing] to issue a no objection letter for the Mountain lodge."[638] However, as the *Víctor Pey Casado and President Allende Foundation v. Chile I* tribunal explained, "it is impossible to expropriate the same assets two consecutive times."[639]

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
constructed. Rather, they simply were ordered to remove barriers to a historic road, or easement, that they had erected.

[636] **Amended Statement of Claim**, ¶ 229; *see also* **Ex. R-010**, DR-CAFTA, Annex 10-C, ¶ 3 ("Article 10.7.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated ***through formal transfer of title or outright seizure***") (emphasis added).

[637] **Amended Statement of Claim**, ¶ 237; *see also id.*, ¶ 238 (similarly explicitly conceding that the Ballantines continue to have title to the land they claim was expropriated).

[638] **Amended Statement of Claim**, ¶ 239; *see also id.*, ¶ 25 (describing the "Mountain Lodge" as being part of "the second phase").

[639] **RLA-043**, *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (8 May 2008) (Lalive, Chemloul, Gaillard), ¶ 622 (translation from Spanish; the original Spanish version reads as follows: "es imposible expropiar dos veces seguidas los mismos bienes").

261. In any event, regardless of the particular act or acts that the Ballantines may be claiming as indirectly expropriatory, there was no indirect expropriation of any sort. This is for one simple reason: the Ballantines have not established that there has been a "substantial deprivation" of the entire investment (which, as the Ballantines themselves concede, is the applicable standard).[640] The phrase "substantial deprivation" is a measure of the level of interference with an investor's property rights.[641] In order to qualify as "substantial deprivation," the alleged interference must be so severe that it is tantamount to the direct expropriation of the entire investment. This is clear not only from the text of DR-CAFTA's annex on "Expropriation,"[642] but also from the investment arbitration jurisprudence, which requires "a virtual taking or sterili[z]ing of the enterprise,"[643] such that "the investor no longer [is] in control of its business operation, or that the value of the business [is] virtually annihilated."[644] In the present case, the Ballantines cannot establish any such interference — in fact, they cannot establish ***any*** interference with their investment at all.

[640] *See* **Amended Statement of Claim**, ¶¶ 230, 234.

[641] **CLA-025**, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Final Award (8 June 2009) (Young, Caron, Hubbard), ¶ 356 ("In the case of an indirect taking or an act tantamount to expropriation such as by a regulatory taking, however, the threshold examination is an inquiry as to the degree of the interference with the property right. This often dispositive inquiry involves two questions: the severity of the economic impact and the duration of that impact").

[642] **Ex. R-010**, DR-CAFTA, Annex 10-C, ¶¶ 3–4 ("Article 10.7.1 addresses two situations. The first is direct expropriation . . . . The second situation . . . is ***indirect expropriation***, ***where an action or series of actions by a Party has an effect equivalent to direct expropriation*** without formal transfer of title or outright seizure") (emphasis added).

[643] **CLA-027**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (Crawford, Civiletti, Magallón Gómez), ¶ 160.

[644] **RLA-079**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 September 2007) (Söderlund, Edward, Jacovides), ¶ 285.

262. In order to make that showing, the Ballantines would need to demonstrate, at the very least, that the Dominican Republic interfered with a property right that they possessed.[645] Logically, there can be no "deprivation" of a right that the Ballantines did not actually possess.[646] This issue is not addressed in the Amended Statement of Claim, and it therefore is not clear what property right of the Ballantines would have been infringed. However, since the Ballantines have conceded that they "maintain[] legal ownership of the land, the concessions, and other investments"[647] — and given the description of the claim quoted above — it seems reasonable to assume that the right that they claim was indirectly expropriated is an asserted "right" to carry out the so-called "Phase 2."

263. If that is in fact Claimants' position, the problem with this argument would be that no such right exists. As the Ministry made clear to the Ballantines[648] — and the Ballantines in any event appear to have known — any "expansion" of Jamaca de Dios beyond Projects 1 and 2 was subject to the Ministry's approval. Because no such approval was ever given — or even

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[645] *See* **RLA-080**, *Emmis International Holding, B.V.* et al. *v. Hungary*, ICSID Case No. ARB/12/2, Award (16 April 2014) (McLachlan, Lalonde, Thomas), ¶ 159 (explaining that when the "cause of action . . . is that of expropriation, Claimants must have held a property right of which they have been deprived"); *see also id.*, ¶ 168 (citing and describing the facts of seven other investor-State decisions that support this proposition).

[646] Numerous expropriation claims have been rejected on this basis. *See, e.g.*, **RLA-080**, *Emmis International Holding, B.V.* et al. *v. Hungary*, ICSID Case No. ARB/12/2, Award (16 April 2014) (McLachlan, Lalonde, Thomas), ¶¶ 168–170, 265(1); **RLA-081**, *Accession Mezzanine Capital L.P.* et al. *v. Hungary*, ICSID Case No. ARB/12/3, Award (17 April 2015) (Rovine, Douglas, Lalonde), ¶ 185; **RLA-082**, *Swisslion DOO Skopje v. Macedonia*, ICSID Case No. ARB/09/16, Award (6 July 2012) (Guillaume, Thomas, Price), ¶ 320; **CLA-016**, *Merrill & Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award (31 March 2010) (Orrego Vicuña, Dam, Rowley), ¶¶148–49.

[647] **Amended Statement of Claim**, ¶ 237.

[648] *See* **Ex. C-004**, Project 2 Permit, §10 ("This ruling is exclusively for the aforementioned works. Any substantive modification or incorporation of new works, or expansion, shall be submitted to the Environmental Impact Assessment process, managed by the Under Secretariat of Environmental Impact, in accordance with Law 64.00") (translation from Spanish; the original Spanish version reads as follows: "Esta disposición es exclusiva para las obras indicadas anteriormente. Cualquier modificación o incorporación sustantiva de nuevas obras o ampliaciones deberán ser sometidas al proceso de Evaluación de Impacto Ambiental que administra la Subsecretaria de Gestion Ambiental conforme a la ley 64.00").

requested, in the case of the Mountain Lodge (Project 4) — the Ballantines' indirect expropriation claim must fail. It makes no difference to the analysis whether the Ballantines believe that approval *should* have been given; if that were the relevant standard, every permit denial — on any grounds — could be construed as an expropriation.

264. In any event, even assuming *arguendo* that the Ballantines could identify ***some*** form of interference (*quod non*), it would not rise to the level of "substantial deprivation" of the entire investment, for two reasons. ***First***, the Ballantines have described their investment as an investment in "Jamaca de Dios,"[649] and their indirect expropriation claim only relates to a ***portion*** of that "investment" — namely, what the Ballantines deem "Phase 2." As the *Electrabel v. Hungary* tribunal explained, what must be examined under the "substantial deprivation" test is the *entire* investment — not just a portion thereof.[650] If each element of an investment were examined separately, "it would render meaningless [the notion that] indirect expropriation . . . [is] similar in effect to a direct expropriation or nationalisation. It would also mean, absurdly, that an investor could always meet the test for indirect expropriation by slicing its investment as finely as the particular circumstances required, without that investment as a whole ever meeting that same test."[651] When the Ballantines' overall investment in Jamaca de Dios is taken into

[649] *See, e.g.*, **Statement of Claim**, ¶ 7 (referring to "[the Ballantines'] investment in Jamaca de Dios"), ¶ 22 (asserting that DR-CAFTA's definition of "investment" is satisfied on the basis that "[t]he economic commitment that the Ballantines made to create and develop Jamaca de Dios and Aroma de la Montaña reflects many of [the listed] forms of 'investment,' including enterprises, equity interests, debt instruments, licenses and permits, and more"), ¶ 73 (adverting to "the value of the Ballantines' investment in Jamaca de Dios").

[650] *See* **CLA-031**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law, and Liability (30 November 2012) (Veeder, Kaufmann-Kohler, Stern), ¶ 6.57.

[651] **CLA-031**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law, and Liability (30 November 2012) (Veeder, Kaufmann-Kohler, Stern), ¶ 6.57.

account, it is clear that no expropriation has occurred: by the Ballantines' own admission, "Jamaca de Dios proved to be a resounding commercial success."[652]

265. ***Second***, the Ballantines have not even demonstrated that they have been "substantially deprived" of the portion of the investment that they invoke — namely, the land associated with the so-called "Phase 2."[653] It is not clear from the passage of the Amended Statement of Claim quoted above what land specifically the Ballantines' indirect expropriation claim addresses. (As explained, the Ballantines sometimes use the term "Phase 2" to describe projects that they had envisioned on land that falls within what they deem "Phase 1."[654])

266. In any event, irrespective of the land to which the claim purports to apply, Claimants simply cannot corroborate their assertion that such "land . . . has no value"[655] and "c[an]not be developed"[656] as a result of the Dominican Republic's actions. It is true that the Ballantines cannot develop the land in the way that they had hoped. But that is a risk that the Ballantines assumed when they purchased land on the top of the mountain that had a slope steeper than 60%, at a time when the Environmental Law expressly stated that that type of land could only be used to grow fruit trees and timber.[657] Furthermore, the fact that the land cannot be used for one purpose does not mean that is devoid of any use whatsoever. For example, as

[652] **Amended Statement of Claim**, ¶ 5; *see also id.*, ¶¶ 10, 38, 43, 51, 54, 56, 61, 65, 78, and § II.E.

[653] *See* **Amended Statement of Claim,** ¶¶ 238–239.

[654] *Compare* **Amended Statement of Claim**, ¶ 25 ("[T]he second phase would include building a 'mountain lodge' . . . .") *with id.*, ¶ 71 ("The Ballantines also developed plans to construct a mountain lodge ('Mountain Lodge') at the top of Phase 1 . . . .").

[655] **Amended Statement of Claim**, ¶ 239; *see also id.*, ¶ 238.

[656] **Amended Statement of Claim**, ¶ 239.

[657] *See* **Ex. R-003**, Environmental Law, Art. 122 ("Intensive tillage . . . is prohibited on mountainous soil where slope incline is equal to, or greater than, sixty percent (60%). Only the establishment of permanent plantations of fruit shrubs and timber trees is permitted") (translation from Spanish; the original Spanish version reads as follows: "Se prohíbe dar a los suelos montañosos con pendientes igual o superior a sesenta por ciento (600/0) de inclinación el uso de laboreo intensivo . . . permitiendo solamente el establecimiento de plantaciones permanentes de arbustos frutales y árboles maderables").

Decree No. 571-09 states, the land could still be used for ecotourism purposes,[658] which is something that the Ballantines seem to have been interested in all along.[659] The land also can be used to for other cultural, recreation and scientific activities.

267. Given the foregoing, there simply is no basis on which to conclude that an indirect expropriation has occurred, and if no expropriation occurred, there is no need to address the Ballantines' arguments about the follow-on issue of alleged "illegality" of the expropriation that they claim occurred.

IV. QUANTUM

268. As a threshold matter, the Ballantines are not entitled to the damages they seek in this arbitration because, as explained in Section II, the Tribunal lacks jurisdiction over all of the Ballantines' claims, since, due to their Dominican nationality, they did not qualify as "claimants" under DR-CAFTA when they submitted their claim to arbitration. Moreover, as explained in Section III, even if the Tribunal were to find jurisdiction over any of the Ballantines' claims, the Ballantines have failed to show that the Dominican Republic is liable for any violation of DR-CAFTA on the merits, and therefore cannot owe them compensation for any damages. However,

[658] *See* **Ex. R-077**, Decree No. 571-09, Art. 14, ¶ I ("This conservation unit of the National Protected Areas System shall be studied in detail, to develop its potential in the field of culture, recreation and biodiversity, with a view to enabling its beach resorts and make the most of any space offering optimum conditions for ***mountain ecotourism*** and scientific research, among other activities compatible with its management category and primary allocation of its resources") (emphasis added) (translation from Spanish; the original Spanish version reads as follows: "Se dispone que esta unidad de conservación del Sistema Nacional de Áreas Protegidas sea estudiada minuciosamente para desarrollar sus potencialidades en el campo de la cultura, la recreación y su biodiversidad, con miras a habilitar sus balnearios y aprovechar aquellos espacios que reúnen las mejores condiciones para destinarse al ***ecoturismo de montaña*** y la investigación científica, entre otras actividades compatibles con su categoría de manejo y la vocación primaria de sus recursos").

[659] *See* **Ex. R-157**, Jamaca de Dios Application (30 November 2010) (explaining that the project that they intended to develop was "touristic"); **Ex. R-158**, Jamaca de Dios Website, "Home" page (last visited on 24 May 2017) ("We are an *eco-tourist mountain resort* . . . .").

even assuming, , that the Dominican Republic has breached its obligations under DR-CAFTA *vis-a-vis* the Ballantines — *quod non* —the Ballantines are not entitled to the amounts they seek.

269. This Section examines the Ballantines' damages claims and demonstrates that (i) the Ballantines bear the burden of proof for any damages; (ii) the Ballantines have failed to show causation; (iii) the Ballantines are not entitled to speculative damages; (iv) the Ballantines' approach to the damages calculations is not appropriate; (v) the calculations of the Ballantines and their expert are unreliable and erroneous; (vi) the Ballantines failed to mitigate their harm, and contributed to their own alleged losses; (vii) the Ballantines are not entitled to the pre-judgment interest that they are requesting; (viii) the Ballantines are not entitled to have interest compounded monthly, as they have requested; and (ix) the Ballantines are not entitled to moral damages.

A. Summary Of The Ballantines' Allegations

270. The Ballantines allege that the Dominican Republic's acts — individually and collectively — had the effect of depriving them of the fruit of their investment.[660] As compensation for the damages allegedly suffered from those supposed acts, they claim an amount of US$41.5 million, which is comprised of a claim of US$31.8 million for alleged violations of DR-CAFTA, US$5.7 million for prejudgment interest, and US$4 million for alleged moral damages.[661]

271. The Ballantines suggest that the appropriate standard for the assessment of damages is the *Chorzów Factory* standard, and rely on their own interpretation of that standard to

[660] **Amended Statement of Claim**, ¶¶ 275, 281.

[661] **Amended Statement of Claim**, ¶¶ 275, 276; **James Farrell's First Expert Report**, Exhibit 2, p. 1.

support their claims for compensation for loss of profits.[662] James Farrell, the Ballantines' damages expert, submits that the "*but-for*" damages analysis is appropriate to assess such damages,[663] and applies the discounted cash flow ("DCF") method in his assessment.[664]

272. The Ballantines also seek prejudgment interest, which they and their expert calculate at a 5.5% interest rate, compounded on a monthly basis.[665] Further, they request that the Tribunal award them US$4 million in moral damages.[666]

B. The Ballantines Bear The Burden Of Proof For Any Damages

273. Chapter Ten of DR-CAFTA allows for the submission to arbitration of a claim "(i) that the respondent has breached an obligation under Section A [of Chapter Ten]," ***and*** (ii) that the [claimant or enterprise] has incurred loss or damage by reason of, or arising out of, that breach."[667] The implications of the foregoing are threefold: (1) there must be a loss; (2) the loss must be suffered by the claimant and/or its enterprise; and (3) that loss must have been *caused* by the alleged breach.

274. Article 27 of the UNCITRAL Rules (which apply in this proceeding), provides that "[e]ach party shall have the burden of proving the facts relied on to support its claim or

[662] **Amended Statement of Claim**, ¶¶ 277–80.

[663] **James Farrell's First Expert Report**, p. 7.

[664] **James Farrell's First Expert Report**, p. 8; *see also* **Amended Statement of Claim**, ¶ 284. The vast majority of the Ballantines' damages claims stem from alleged lost profits (US$25.35 million out of the US$31.80 million claimed as direct damages). *See* James Farrell's First Expert Report, Exhibit 2, p. 1.

[665] **James Farrell's First Expert Report**, p. 8; *see also* **Amended Statement of Claim**, ¶¶ 287, 311, 312.

[666] **Amended Statement of Claim**, ¶¶ 276, 323.

[667] **Ex. R-010**, DR-CAFTA, Art. 10.16.1.(a), Art. 10.16.1.(b) (emphasis added)

defense."[668] This means that, as noted by the *Grand River* tribunal, under UNCITRAL Rules "a claimant has the burden of proving both the breach ***and the claimed loss or damage***."[669]

275. Accordingly, in the present case the Ballantines must prove (i) that the loss claimed has arisen from a breach of the treaty, and not from other causes; [670] (ii) that the causal relationship between the alleged breaches and their alleged loss is sufficiently close, *i.e.*, "not too remote";[671] and (iii) the quantum of the asserted loss.[672]

276. To be recoverable, the alleged damages have to be proven with a reasonable degree of certainty; therefore, damages that are speculative, contingent or merely possible cannot form the basis of an award.[673]

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[668] **RLA-044**, UNCITRAL Arbitration Rules, Art. 27.

[669] **CLA-012**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 January 2011) (Nariman, Anaya, Crook), ¶ 237 (emphasis added).

[670] **CLA-017**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000) (Hunter, Schwartz, Chiasson), ¶ 316 ("[T]he economic losses claimed by [the claimant] must be proved to be those that have arisen from a breach of the treaty, and not from other causes").

[671] *See* **RLA-038**, *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (28 March 2011) (Fernández-Armesto, Paulsson, Voss), ¶155 ("[I]t is a general principle of international law that injured claimants bear the burden of demonstrating that the claimed quantum of compensation flows from the host State's conduct, and that the causal relationship is sufficiently close (i.e. not 'too remote')); *see also* **CLA-017**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000) (Hunter, Schwartz, Chiasson), ¶ 316 ("[C]ompensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific [treaty] provision that has been breached"); **RLA-011**, Articles on the Responsibility of States for Internationally Wrongful Acts, International Law Commission (2001), Art. 31.1 ("The responsible State is under an obligation to make full reparation for the injury *caused by* the internationally wrongful act") (emphasis added).

[672] **CLA-017,** *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000) (Hunter, Schwartz, Chiasson), ¶ 316 ("[T]he burden is on [the claimant] to prove the quantum of the losses in respect of which it puts forward its claims").

[673] *See* **RLA-040**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014) (Bernardini, Williams, Dupuy), ¶ 685 ([T]he appropriate standard of proof [for damages] is the balance of probabilities. This, of course, means that damages cannot be speculative or merely 'possible'"); *see also* **RLA-039**, *Rudloff Case (Merits)*, US-Venezuela Mixed Claims Commission, (1903-5) DC UNRIAA 255, 258-59 ("Damages to be recoverable must be shown with a reasonable degree of certainty, and cannot be recovered for an uncertain loss . . . [D]amages claimed in this item are speculative and contingent, and can not form the basis of an award").

277. As discussed below, the Ballantines failed to meet their burden to establish any of the foregoing elements.

C. The Ballantines Have Failed To Show Causation

278. The *LG&E* tribunal explained that in determining compensation it had to address the issue of "identification of the 'actual loss' suffered by the investor '*as a result*' of [Respondent's] conduct," and clarified that the question was one of "'*causation*': what did the investor lose by reason of the unlawful act?"[674] The tribunal further explained that "[t]he starting point of [the] analysis [was] to recall what the unlawful acts were" and second, to determine "[w]hat was the loss suffered by [the claimants] as a result of [those] measures."[675]

279. The Ballantines here have not even attempted to individualize the specific injury allegedly associated (or resulting from, each of the alleged measures. Instead, they seem content to assert that "damages flow equally from the inequitable and discriminatory treatment of the Ballantines, and from the illegal expropriation of the Ballantines Property."[676]

280. As a threshold matter, it is established precedent that the damages that stem from *expropriatory* measures and *non-expropriatory* measures might differ.[677] Moreover, precise identification of the measure that caused the alleged harm is necessary, to assess issues like the admissibility of the claim, in addition to that of causation.

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[674] **RLA-041**, *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Award (25 July 2007) (Maekelt, Rezek, van den Berg), ¶ 45 (emphasis in original).

[675] **RLA-041**, *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Award (25 July 2007) (Maekelt, Rezek, van den Berg), ¶¶ 46, 47.

[676] **Amended Statement of Claim**, ¶ 288.

[677] **RLA-042**, *Vivendi v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 August 2007) (Rowley, Kaufmann-Kohler, Bernal Verea), § 8.2.8 ("[T]he level of damages necessary to compensate for a breach of the fair and equitable treatment standard could be different from a case where the same government expropriates the foreign investment. The difference will generally turn on whether the investment has merely been impaired or destroyed").

281. The Ballantines' sweeping allegations[678] are insufficient, and fall short of the burden imposed on them to prove every aspect of their theory of damages, including the origin or source of the asserted damages.[679]

282. The Ballantines allege to have "suffered severe economic damage as a result of respondent's violations of DR-CAFTA," [680] and proceed to describe each of the damage elements as follows:

i. Lost Profits [Project 3] Lot Sales[681]

ii. Lost Profit on [Project 3] Construction [682]

iii. Lost Profits [Project 2] Lot Sales[683]

iv. Expansion Costs of Aroma Restaurant[684]

v. Lost Profits from the Mountain Lodge, the Apartment Complex and the Boutique Hotel and Spa (Hotel Taino)[685]

vi. Lost Profits associated with the development of the Paso Alto Project[686]

vii. Future Investment and Brand Diminution[687]

[678] **Amended Statement of Claim**, ¶ 288.

[679] **RLA- 044**, UNCITRAL Arbitration Rules, Art. 27 ("Each party shall have the burden of proving the facts relied on to support its claim or defense"); **CLA-012**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 January 2011) (Nariman, Anaya, Crook), ¶ 237 ("Under [UNCITRAL Rules] a claimant has the burden of proving both the breach and the claimed loss or damage"); **RLA-046**, Meg Kinnear, *Damages in Investment Treaty Arbitration*, ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES, Oxford University Press (7 April 2010), p. 556 ("The investor bears the burden of proving causation, quantum and the recoverability of the loss claimed").

[680] **Amended Statement of Claim**, § VI.B.

[681] **Amended Statement of Claim**, ¶¶ 290–293.

[682] **Amended Statement of Claim**, ¶¶ 294–296.

[683] **Amended Statement of Claim**, ¶¶ 297–299.

[684] **Amended Statement of Claim**, ¶¶ 300–301.

[685] **Amended Statement of Claim**, ¶¶ 302–304.

[686] **Amended Statement of Claim**, ¶¶ 305–306.

[687] **Amended Statement of Claim**, ¶ 307.

viii. Lost Value of the Expropriated Road[688]

283. As explained by the Dominican Republic's damages expert, Mr. Tim Hart, the Ballantines fail to identify a causal link between the alleged breaches and the claimed damages, especially with respect to the following: (i) Project 2 Lot Sales; (ii) Expansion Costs of Aroma Restaurant; (iii) Lost Profits associated with the development of the Paso Alto Project; (iv) Loss of Profits related to the Apartment Complex; and (v) Lost Value of the Expropriated Road.[689] Each of these alleged categories of damages is discussed sequentially below.

284. Project 2 Lot Sales. The Ballantines allege that they have been unable to sell four lots in Project 2 (lots 16, 19, 26-A and 26-B).[690] This seems to be inconsistent with the Ballantines own assertion elsewhere in their Amended Statement of Claim where they indicate that as of the date of the Amended Statement of Claim, "all of the lots [in Project 2] have been sold, and the small remaining inventory consists of reacquisitions by Jamaca."[691]

285. *If* in fact any Project 2 lots were never sold, the Ballantines offer no evidence (i) to support that such sales were actually lost *as a result* of any action or inaction by the Dominican State, or (ii) to exclude other causes.[692]

286. The Ballantines submit that the sales in Project 2 were lost either because of (a) "the resolution ordering [that the Project 1 Road be] made public" or (b) "the uncertainty following the denials and creation of the National park."[693] Tellingly, the Ballantines allege that

[688] **Amended Statement of Claim**, ¶ 308.
[689] **Tim Hart's First Expert Report**, ¶ 13.
[690] **Amended Statement of Claim**, ¶ 297.
[691] **Amended Statement of Claim**, ¶ 51.
[692] **Tim Hart's First Expert Report**, ¶¶ 32, 35.
[693] **Amended Statement of Claim**, ¶ 297.

between December 2013 and June 2014 — *after* resolution 05-2013[694] — the permit denials and the creation of the National Park[695] — the Ballantines had obtained commitments to buy several units in their prospective project Mountain Lodge (Project 4).[696] The Mountain Lodge (Project 4) was to be constructed within the area where Project 2 was developed, so if there had been such "concern" or "uncertainty" regarding measures taken by the Dominican Republic leading to the inability to sell lots on Project 2, presumably there would not have been any buyers for Mountain Lodge, either. The foregoing confirms that the Dominican Republic's actions did not cause potential buyers' "concern" or "uncertainty" leading to any inability by the Ballantines to sell the remaining Project 3 lots.

287. Expansion Costs of Aroma Restaurant. The Ballantines allege that they incurred in significant expenditures to expand the Aroma de la Montaña Restaurant, in anticipation of Project 3, and they are claiming reimbursement of the costs for the expansion.[697] As a threshold matter, one fatal problem with respect to the Ballantines' claim for damages related to the Aroma Restaurant is that, contrary to their assertions, [698] the Ballantines simply do not own or control Restaurante Aroma de la Montaña, E.I.R.L. [699] That entity is solely owned by Rachel Ballantine, who is not a party to this dispute. [700]

[694] **Ex. C-023**, Jarabacoa Municipality Resolution (22 April 2013).

[695] **Ex. R-077**, Certification of the *Gaceta Oficial No. 10535 (7 September 2009)* containing Decree No. 571-09 (7 August 2009) ; **Ex. C-008**, Letter from Z. González de Guitiérrez (Ministry of Environment) to M. Ballantine (12 September 2011); **Ex. C-011**, Letter from Z. González de Guitiérrez (Ministry of Environment) to M. Ballantine (8 March 2012); **Ex. C-013**, Letter from Zoila González de Gutiérrez to Michael Ballantine (18 December 2012); **Ex. C-015**, Letter from Z. González de Guitiérrez (Ministry of Environment) to M. Ballantine (15 January 2014).

[696] **Amended Statement of Claim**, ¶ 71; *see also* **Ex. C-050**, Mountain Lodge Purchase Commitments.

[697] **Amended Statement of Claim**, ¶ 68.

[698] **Amended Statement of Claim**, ¶ 159.

[699] **Ex. R-096**, Share Transfer Agreement (*Contrato de Venta Bajo Firma Privada*) (18 May 2010).

[700] **Ex. R-096**, Share Transfer Agreement (*Contrato de Venta Bajo Firma Privada*) (18 May 2010).

288. Aside from the lack of ownership of the relevant asset (*i.e.*, the Aroma Restaurant), and the total lack of support for any specific alleged costs incurred in that project, as discussed in Part F, it is unclear why or how the Ballantines consider those costs as losses.[701] The Ballantines assert that "[h]ad the Ballantines known that Respondent would deny their permit [for Project 3] . . . the Ballantines would have never spent the money to expand the restaurant."[702] The foregoing seems counterfactual when compared to the "Restaurant Expansion Report" submitted by the Ballantines with their Amended Statement of Claim.[703] Such report reflects sums allegedly invested by the Ballantines in the Aroma Restaurant from 2010 to 2016. Since the permit for Project 3 was originally denied on 12 September 2011, it defies all logic that the Ballantines would have continued to expend sums on the expansion of the restaurant for an additional five years — until 2016 — "to account for the increased sales as a result of the additional 70 home sites in Jamaca."[704] The Ballantines have failed to demonstrate any causal link between, on the one hand, any actions or omissions by the Dominican Republic, and on the other, the Ballatines' alleged losses related to the Aroma Restaurant expansion (and

[701] In his first witness statement, Michael Ballantine states that operation of the Aroma de la Montaña Restaurant was suspended at some point, and a rental contract with a new operator was entered into (**Michael Ballantine's First Statement**, ¶ 85). It stands to reason that the operator pays rent for the entirety of the renovated and expanded restaurant, and that therefore benefited from these alleged expansions either through their own operation of Aroma in the expanded space or through the rental income received from the current operator. *See* **Tim Hart's First Expert Report**, ¶¶ 36, 37.

[702] **Amended Statement of Claim**, ¶ 300; *see also id.*, ¶ 68 ("The Ballantines undertook the restaurant expansion solely in anticipation of the increasing number of homeowners and visitors to Jamaca De Dios with its [Project 3] expansion").

[703] **Ex. C-048**, Restaurant Expansion Cost Report.

[704] **Amended Statement of Claim**, ¶ 300.

much less the losses stemming from their further expansions works after they learned that there were impediments to the development of Project 3).[705]

289. Loss of Profits Associated with the development of Paso Alto Project. The Ballantines allege that "the [Ministry's] refusal to allow [Project 3] ultimately killed the joint venture plans between Paso Alto and Jamaca, causing significant economic damage to the Ballantines."[706] As evidence of this the Ballantines submit an unsigned draft of a Letter of Intent they had an agreement with Faszinatour, S.A. — the owner of the Paso Alto project— to purchase such project ("**Letter of Intent**").[707]

290. Even if that Letter of Intent was indeed entered into on 18 March 2011,[708] per its own terms the option to purchase established therein was valid, at the latest, until 18 April 2011.[709] This means that the Ballantines would have had to enter into the definitive agreements or decide not to close on the purchase only 3 months after having submitted their terms of reference request for Project 3.[710] Hence, it becomes impossible to understand how the rejection of Project 3, which occurred in 12 September 2011,[711] could have caused the Ballantines not to proceed with the Palo Alto venture in April 2011. The foregoing appears corroborated by

[705] There is no record of the Ballantines having sought, much less received, the required permits for their expansion works. As an additional threshold matter the principle of *ex turpi causa non oritur actio* would bar recovery of damages related thereto.

[706] **Amended Statement of Claim**, ¶ 39 (a).

[707] **Ex. C-039**, Paso Alto Letter of Intent from Michael Joseph Ballantine to Faszinatour, S.A. (18 March 2011); *see also* **Amended Statement of Claim**, ¶ 39 (a).

[708] **Amended Statement of Claim** ¶ 39 (a).

[709] **Ex. C-039**, Paso Alto Letter of Intent from Michael Joseph Ballantine to Faszinatour, S.A. (18 March 2011), § 7 (translation from Spanish reads "Signature of Final Agreements and Collateral Acts. The contractual operations provided for herein […] shall be implemented within a 30-day period"; the original Spanish version reads as follows: "Suscripción Acuerdos Definitivos y Actos Colaterales. Las operaciones contractuales aquí previstas [. . .] serán implementadas dentro de un plazo de 30 días").

[710] *See* **Tim Hart's First Expert Report**, ¶ 38.

[711] **Ex. C-008**, Letter from Z. González de Gutiérrez (Ministry of Environment) to M. Ballantine (12 September 2011).

Michael Ballantine's own witness statement, wherein he reveals that he "decided not to execute the final sale and stock transfer while still waiting for the [Project 3] approvals."[712]

291. Further, although the Letter of Intent was crafted with care to establish condition precedents for the implementation of the operations provided therein,[713] there is no mention of anything being contingent on approval of Project 3.

292. Moreover, as will be addressed below in Part D, the Ballantines' profits from the Paso Alto project are speculative and unsubstantiated, and as such cannot be subject to compensation.

293. Loss of Profits related to the Apartment Complex [Project 5]. The Ballantines claim damages for the lost profits on an Apartment Complex that was to be developed in the lower part of the mountain.[714] However, the Ballantines have not even suggested that they undertook any steps to obtain any permit for such Apartment Complex or liaised with governmental authorities in any way regarding that new development.[715] It is unclear how the actions of the Dominican Republic could have caused any damage, since it was the Ballantines' own decision to decline to seek regulatory approval for such project.

294. Expansion Value of the Expropriated Road. The Ballantines assert that they are entitled to damages for loss caused by an alleged expropriation resulting from "the Resolution of the Municipality [that] changed the private road into a public road."[716] In their assessment of

[712] **Michael Ballantine's First Witness Statement**, ¶ 36.

[713] **Ex. C-039**, Paso Alto Letter of Intent from Michael Joseph Ballantine to Faszinatour, S.A. (18 March 2011), § 4 ("Condición Determinante para Realizar Contratos Definitivos").

[714] **Amended Statement of Claim**, ¶ 303.

[715] **Amended Statement of Claim**, ¶¶ 6, 25, 75. The Ballantines' statements regarding the "Apartment Complex" are limited to an assertion that they had planned to build it.

[716] **Amended Statement of Claim** ¶ 308.

quantum regarding the road, they include alleged replacements costs for "both phases of the expropriated road."[717] As a threshold matter, no authorization was ever given to the Ballantines to build the "Phase 2" road. In fact, the Ballantines were fined in 2012 for commencing construction on an illegal road.[718] The principle *ex turpi causa non oritur actio* would bar recovery of damages related thereto.

295. Moreover, with respect to the Project 1 road, it is important to bear in mind that damages are assessed in relation to a particular claimant. [719] *First*, the Ballantines do not own the road. Once a residential community is legally created, the law stipulates that the roads are automatically ceded to the public domain.[720] *Second*, the Ballantines are no longer the owners of

[717] **Amended Statement of Claim** ¶ 309.

[718] **R-143**, Administrative Resolution No. 566-2012 (15 October 2012); **R-048**, Letter from Graviel Peña to José Alarcon Mella, with *Informe Técnico*, 8 October 2012.

[719] **Ex. R-010**, DR-CAFTA, Art. 10.16.1.(a) (ii) ("That the claimant has incurred loss or damage by reason of, or arising out of, that breach"); Art. 10.16.1.(b) (ii) ("That the enterprise has incurred loss or damage by reason of, or arising out of, that breach").

[720] *See* **Ex. R-097**, Law No.675, Urbanización, Ornato Público y Construcciones (14 August 1944), Article 6 ("When a person, or entity, submits an expansion, or urbanization project, to the District of Santo Domingo's Administrative Council, or to a municipal authority, it will be understood, as a matter of law, that should the project be approved, the person or entity shall waive in favor of the public domain all the land that is contained in the project but destined to become a park, avenue, street, or other public dependence. Once the project is approved, the authorities may make immediate use of said land for such purposes, without any requirement") (translation from Spanish; the original Spanish version reads as follows: "Cuando una persona o entidad someta al Consejo Administrativo del Distrito de Santo Domingo o a la autoridad municipal un proyecto de ensanche o urbanización, se entenderá de pleno derecho que lo hace renunciando en favor del dominio público, en el caso de que el proyecto sea aprobado, de todos los terrenos que figuren en el proyecto destinado para parques, avenidas, calles y otras dependencias públicas. Aprobado el proyecto, las autoridades podrán utilizar inmediatamente dichos terrenos para tales finalidades, sin ningún requisito"); *see also* **Ex. R-160**, Reglamento General De Mensuras Catastrales, Resolution Num. 628-2009, Article 161 (defining the concept of urbanization as: "The act of land division, for the purpose of creating new plots by dividing one or more registered plots, and opening streets or public roads") (translation from Spanish; the original Spanish version reads as follows: "el acto de levantamiento parcelario que tiene por fin la creación de nuevas parcelas por división de una o más parcelas registradas, con apertura de calles o caminos públicos"); *id.*, Paragraph IV ("Registration of the titles to the resulting plots of land automatically implies a transfer of any street, passage, avenue, pedestrian area, green area, etc., to the public domain") (translation from Spanish; the original Spanish version reads as follows: "El registro de los títulos de las parcelas resultantes implica automáticamente el

[FOOTNOTE CONTINUED ON NEXT PAGE]

the vast majority of the lots comprised in Project 2, and in fact it is possible they no longer own any. If that is correct, it is not clear how they would have been affected by any "expropriation" of the road ─ even if that had occurred, which it did not.[721]

296. Finally on the point of the existence of damages, it can reasonable be presumed that when the Ballantines sold those lots — the vast majority of which were sold two years before the Resolution complained of[722]— they recovered at least some (if not all) of the costs incurred to construct the Project 1 road. The sale price of the lots would of course have been significantly lower if there was no easy way to reach them. As the Dominican Republic's expert explains, "the road currently still exists today with its value intrinsically tied to the [Project 3] lots and the [Project 3] land owners, including the Ballantines, who still have use of the road today."[723]

297. The above is in addition to the Ballantines' total lack of support for the alleged costs incurred in the construction of the road, which will be addressed below in Part F.

298. In sum, the Ballantines have failed to show causation in regard to any of the elements of damages claimed with respect to (i) Project 3 Lot Sales; (ii) Expansion Costs of Aroma Restaurant; (iii) Lost Profits associated with the development of the Paso Alto Project; (iv) Loss of Profits related to Project 5; or (v) Loss Value of the Expropriated Road.

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
traspaso de las calles, pasajes, avenidas, peatonales, espacios destinados a zonas verdes, etc., al dominio público").

[721] See **Amended Statement of Claim**, ¶ 51 ("Between 2007 and 2011, the Ballantines sold 75 lots [ ] as of the date of this Memorial, all of the lots have been sold, and the small remaining inventory consists of reacquisitions by Jamaca").

[722] **Ex. C-023**, Jarabacoa Municipality Resolution (22 April 2013); **Amended Statement of Claim** ¶ 51 ("Between 2007 and 2011, the Ballantines sold 75 lot")

[723] **Tim Hart's First Expert Repor**t, ¶ 40 (citing Video of Jamaca Road and Aloma Mountain Road, February 2016, (Ex. C-047)).

299. The Dominican Republic will now explain to why the Ballantines are not entitled to compensation for any of their damages claims, because they are speculative.

D. The Ballantines Are Not Entitled To Speculative Damages

300. All three of the sources that the Ballantines refer to in support of the proposition that the Dominican Republic must compensate them for financially assessable harm[724] recognize the principle that, to be recoverable, damages have to be proven with a reasonable degree of certainty. [725]

301. In explaining the type of damages that are due as a consequence of "illegal acts," the ICJ in *Chorzow* established that in such cases "reparations must, 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."[726]

302. The *Metalclad* tribunal followed the *Chorzow* precedent, referring to "the situation which would in all probability have existed if that act had not been committed" as *the status quo ante*.[727] Further, Article 36 of the Draft Articles of State Responsibility, also cited by

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[724] **Amended Statement of Claim** ¶ 277 (citing **CLA-039**, *Case Concerning The Factory at Chorzów (Case for Indeminity)(Merits)*, PCIJ Series A No. 17, Judgment No. 13 (13 September 1928), p. 47); ¶ 278 (citing **CLA-029**, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 Award (30 August 2000) (Lauterpacht, Civiletti, Siqueiros), ¶ 122); ¶ 279 (citing **RLA-011**, *Articles on State Responsibility*, Art. 36).

[725] *See* **RLA-039**, Rudloff Case (Merits), US-Venezuela Mixed Claims Commission, (1903-5) DC UNRIAA 255, 258-59 ("Damages to be recoverable must be shown with a reasonable degree of certainty, and cannot be recovered for an uncertain loss . . . [D]amages claimed in this item are speculative and contingent, and cannot form the basis of an award"); *see also* **RLA-040**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014) (Bernardini, Dupuy, Williams,), ¶ 685 ("[T]he appropriate standard of proof [for damages] is the balance of probabilities. This, of course, means that damages cannot be speculative or merely 'possible'").

[726] **CLA-039**, *Case Concerning The Factory at Chorzów (Case for Indeminity)(Merits)*, PCIJ Series A No. 17, Judgment No. 13 (13 September 1928), p. 47 (emphasis added).

[727] **CLA-029**, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 Award (30 August 2000) (Lauterpacht, Civiletti, Siqueiros), ¶ 122 ("The award to Metalclad of the cost of its

[FOOTNOTE CONTINUED ON NEXT PAGE]

the Ballantines, speaks of financially assessable damage including lost profit "*insofar as it is established.*"[728] And Sergei Ripinsky, in his treatise on Damages in International Investment Law, observes that "the cornerstone principle that determines the recoverability of lost profits is whether they can be established with reasonable certainty."[729]

303. As will be explained below, the Ballantines alleged damages for lost profits, including lost profits from alleged lost opportunities, are entirely speculative, and as such cannot form the basis of an award.

1. The Ballantines Are Not Entitled To Damages For Speculative Loss Of Profits

304. The principle that lost profits must be reasonably certain was interpreted by the *Metalclad* tribunal to mean that future profits cannot be used to assess quantum of compensation "[w]here the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit."[730] Furthermore, as observed by the tribunal in

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investment in the landfill is consistent with the principles set forth in *Chorzow Factory (Claim for Indemnity) (Merits), Germany v. Poland*, P.C.I.J. Series A., No. 17 (1928) at p.47, namely, that where the state has acted contrary to its obligations, any award to the claimant should, as far as is 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*)").

[728] **RLA-011**, *Articles on State Responsibility*, Art. 36 ("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*") (emphasis added).

[729] **RLA-047**, Sergey Ripinsky and Kevin Williams, Damages in International Investment Law, British Institute of International and Comparative Law (November 2008), p. 280.

[730] **CLA-029**, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) (Lauterpacht, Civiletti, Siqueiros), ¶ 120.

Autopista Concesionada de Venezuela "tribunals are reluctant to award lost profits for a beginning industry and unperformed work."[731]

305. The Ballantines here are claiming loss profits stemming from: (i) [Project 3] Lot Sales;[732] (ii) [Project 3] Construction;[733] (iii) [Project 2] Lot Sales;[734] and (iv) Mountain Lodge, the Apartment Complex and the Boutique Hotel and Spa (Hotel Taino).[735]

306. As a threshold matter, the Ballantines have not produced any evidence to demonstrate that Jamaca de Dios was indeed a profitable venture — at any time. Hence, there is no basis to conclude that any new projects would have been profitable. On the contrary, financial statements filed by the Ballantines with the Mercantile Registry show that at least as of 30 June 2010, the company operated at a loss.[736]

307. Moreover, as stated above in Section III, what the Ballantines refer to "Phase 1" and "Phase 2," in reality Project 2 and Project 3, are actually two entirely separate projects. There is no record at all of profitability for Project 3, as the development was in its inception stage. Even the Ballantines themselves have not alleged to have had anything but "plans" and raw land with respect to "Phase 2" — Project 3.

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[731] **RLA-048**, *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award (23 September 2003) ¶ 360.

[732] **Amended Statement of Claim**, ¶¶ 290–293.

[733] **Amended Statement of Claim**, ¶¶ 294–296.

[734] **Amended Statement of Claim**, ¶¶ 297–299.

[735] **Amended Statement of Claim**, ¶¶ 302–304.

[736] **Ex. R-098**, Interim Financial Statements of Jamaca de Dios as of 30 June 2010, p.2 . The Balance Sheet shows accumulated losses in the amount of RD$9,775,234.50 (approx. US$266,000 at the-then current exchange rate) and period loss of RD$245,317.48 (approx. US$6,000 at the-then current exchange rate). *See* http://www.bancentral.gov.do/tasas_cambio/TAC4009_BC_2010.pdf?s=1494992196523 for exchange rate.

308. Nor have the Ballantines submitted any evidence that they had any prior experience in (a) building homes,[737] apartment complexes, hotels or spas; (b) managing rental properties; or (c) operating hotels or spas.

309. Also, the Ballantines did not make any significant investments or perform any significant work[738] on Project 3, the Mountain Lodge (Project 4), the Apartment Complex (Project 5) and the Boutique Hotel and Spa in Project 3 that would merit an award of lost profits.

310. With respect to claimed damages for the "Apartment Complex" (Project 5),[739] the Ballantines devote only three lines of their 100-page brief to that prospective development. All three lines merely contain a bare statement that they planned to build another apartment building.[740] The Ballantines do not claim to have ever attempted to obtain the permits required to develop that complex and only submit 6 pages of drawings as documentary proof that such plan ever even existed.[741] However, they seek a cumulative sum of US$1.5 million from lost profits and future investments stemming from this "Apartment Complex" (Project 5).[742]

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[737] Michael Ballantine declares that they built 5 homes (*see* **Michael Ballantine's First Witness Statement**, ¶ 28). However he does not clarify if those homes were built for third party purchasers of lots, for personal use, or for family members. He also provides no indication of whether those homes were profitable. In any event, the building of 5 homes would not constitute an adequate historical track record in the business of constructing homes for sale.

[738] Note that, legally, they were not allowed to perform any works without the required permits.

[739] **Amended Statement of Claim**, ¶ 302–304.

[740] **Amended Statement of Claim**, ¶ 6 ("The Ballantines developed plans for [an] apartment complex that would allow owners to rent their units to tourists"); ¶ 25 ("[T]he second phase would include [] a slightly larger apartment complex nearer to the base of the property); ¶ 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").

[741] **Ex. C-051,** Design for Apartment Complex.

[742] **James Farrell's First Expert Report**, Exhibit 2, Schedule 7 (US$901,499 from sales); Schedule 8 (US$326,942 from rental management Net EBT); Schedule 11.A. (US$261,007 as a component of loss of future investment using residual earnings of rental management Net EBT).

311. Finally, the Ballantines cannot claim for lost profits for the sale of Project 2 lots because the inability to sell those lots cannot be causally linked to the Dominican Republic's alleged conduct,[743] and because the claimed damages are wholly speculative. [744]

2. The Ballantines Are Not Entitled To Damages For Alleged Loss Of Opportunities

312. The Ballantines seek loss profits stemming from the following alleged lost opportunities: (i) lost profits associated with the development of the Paso Alto Project[745] and (ii) lost profits related to future investment and brand diminution.[746]

313. As explained in Part C, the proposition that the Dominican Republic's actions caused the Ballantines to abandon the Paso Alto Project is untenable. The Ballantines' decision not to proceed with the project was made before any of the measures alleged by the Ballantines were adopted.[747]

314. Notwithstanding the foregoing, and despite the fact that the Letter of Intent only mentions the Paso Alto project, the Ballantines expert, Mr. Farrell, explains in his report that the development would be carried out in Phases, with Phase 1 being Paso Alto and Phase 2 being Las Tetas.[748] Mr. Farrell's damages calculations for loss of profit include "distributable earnings" for both phases of the Paso Alto project.[749]

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[743] *See* Part C, above.

[744] *See* **Tim Hart's First Expert Report**, § IV.C.2 on Failure to Prove Damages to a Reasonable Degree of Certainty.

[745] **Amended Statement of Claim**, ¶¶ 305–306.

[746] **Amended Statement of Claim**, ¶ 307.

[747] **Michael Ballantine's First Witness Statement**, ¶ 36.

[748] **James Farrell's First Expert Report**, p. 20.

[749] **James Farrell's First Expert Report**, Exhibit 2, Schedule 10 (calculating damages from the Paso Alto "lost opportunity" as US$4,268,891).

315. As will be further discussed in Part F, the projections made by the Ballantines' expert are unreliable and wholly lacking in support. The lost profits sought by the Ballantines in connection with the Paso Alto venture must be dismissed as speculative.

316. The Ballantines' other claim under the lost opportunity head of damages is for lost profits related to what they term "future investment" and "brand diminution." The "future investment" claim relates to the *residual earnings* of rental management EBT of Mountain Lodge (Project 4), Hotel Taino (part of Project 3) and the Apartment Complex (Project 5).[750] For all the reasons articulated in Section IV.D.1 above, damages for lost profits stemming from those prospective developments are untenable due to lack of certainty.[751]

317. The Ballantines' "brand diminution" claim, for its part, projects earnings over 20 years under the dubious assumption that every 10 years they would be able to mount future projects consistent with the Project 2 development.[752] As stated by the Dominican Republic's damages expert, "no documentary evidence has been provided to show that such future investments were even considered or planned for by [the Ballantines]."[753] In essence, for the claimed "brand diminution" damages, the Ballantines are asking the Tribunal to assume that the Ballantines will acquire property in as yet unidentified lands; that they will have the means to develop such land in a way comparable to Project 2; that there will be a market for such individualized lots; that they will successfully sell the lots at a profit; and that they will do all of

[750] **James Farrell's First Expert Report**, Exhibit 2, Schedule 11.A (calculating damages from "future investment" at US$1,802,594).

[751] *See* **Tim Hart's First Expert Report**, ¶ 58.

[752] **James Farrell's First Expert Report**, Exhibit 2, Schedule 11.B (calculating damages from "brand diminution" as US$1,558,036).

[753] **Tim Hart's First Expert Report**, ¶ 39.

that all over again in 10 years. The foregoing is unreasonable as it amounts to nothing more than pure conjecture, and thus cannot lead to an award of damages.

E. The Ballantines' Approach To The Damages Calculations Is Not Appropriate

318. The Ballantines posit that the appropriate standard for the assessment of damages is the *Chorzow Factory* standard, and rely on their interpretation of that standard as support for its claims for compensation of loss of profits.[754] James Farrell, its damages expert, submits that a "*but-for*" damages analysis is appropriate to assess such damages,[755] and follows the discounted cash flow ("DCF") method in his assessment. The vast majority of the Ballantines' damages claims stem from alleged loss of profits (US$28.7 million out of the US$31.80 million claimed as direct damages).[756]

319. However, DCF is not an appropriate method of assessment of the quantum of damages on the present facts. A DCF analysis can yield an unreliable conclusion as to value when key assumptions are not well-reasoned or properly supported.[757] That is why tribunals generally disfavor it in cases like this one in which there is no principled basis for an assessment of lost profits.[758]

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[754] **Amended Statement of Claim**, ¶¶ 277–280.

[755] J**ames Farrell's First Expert Report**, p. 7.

[756] **James Farrell's First Expert Report**, Exhibit II, p. 1; *see also* **Amended Statement of Claim**, ¶ 284. (US$12,990,326 in "Phase II" Lot Sales; US$5,186,845 in "Phase II" Builder Net EBT; US$218,920 in Phase I lots available for sale; (US$375,479) in Hotel Taino Net EBT; US$1,315,624 in Mountain Lodge Unite Sales; US$512,499 in Mountain Lodge Unite Sales; US$901,499 in Lower Apartment Complex Unit Sales; US$326,942 in Lower Apartment Complex Net EBT; US$4,268,891 in Paso Alto Lost Opportunity; and US$3,360,630 in Lost of Future Investment and Brand Diminution).

[757] **RLA-049**, Neal Mizrahi, Compensation in Complex Construction Disputes, Arbitration Review of the Americas 2012, Global Arbitration Review (1 November 2011).

[758] **RLA-042**, *Compañía de Aguas de Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 August 2007) (Rowley QC, Kaufmann-Kohler, Bernal Verea), §§ 8.3.3, 8.3.8 ("[T]he net present value provided by a DCF analysis is not always appropriate and

[FOOTNOTE CONTINUED ON NEXT PAGE]

320. Instead, as the Dominican Republic's damages expert suggests, the only appropriate, non-speculative approach to assess the alleged damages (if any) in this case is by reference to the investment amounts.[759] Mr. Hart explains that the investment amounts should represent fair compensation for the undeveloped land because, presumably, they reflect market transactions between willing buyers and willing sellers.[760]

321. The proposed approach is consistent with that adopted by the *Metalclad* tribunal, which, after concluding that "any award based on future profits would be wholly speculative,"[761] agreed with the parties that "fair market value [was] best arrived [] by reference to [Claimant's] actual investment in the project."[762]

322. Thus far the Ballantines have failed to provide adequate documentation of such invested amounts.[763]

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
becomes less so as the assumptions and projections become increasingly speculative [. . .] In these circumstances, we conclude that Claimants' evidence of the value of the concession [] based on its lost profits analysis cannot be relied upon and need not be further analysed"); *see also* **CLA-044**, *Wagiuh Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (1 June 2009) (Williams, Pryles, Vicuña), ¶ 570 (acknowledging that there is "wisdom in the established reluctance of tribunals such as this one to utilise DCF analyses for "young" businesses lacking a long track record of established trading [. . .] [A]uthorities are generally against the use of a DCF analysis in circumstances such as the present, and further [] the DCF analysis presented by LECG is an insufficiently certain basis upon which to calculate damages in the present case"); **CLA-040**, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award (8 December 2000) (Leigh, Fadlallah, Wallace), ¶¶ 123, 124 (The tribunal in *Wena* determined that there was an "insufficiently solid base on which to found any profit ... or for predicting growth or expansion of the investment made" (¶ 124) and stated that "In this case, Wena's claims for lost profits (using a discounted cash flow analysis), lost opportunities and reinstatement costs are inappropriate-because an award based on such claims would be too speculative" (¶123)).

[759] **Tim Hart's First Expert Report**, ¶ 63.

[760] **Tim Hart's First Expert Report**, ¶ 63.

[761] **CLA-029**, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) (Lauterpacht, Civiletti, Siqueiros), ¶ 121.

[762] **CLA-029**, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 Award (30 August 2000) (Lauterpacht, Civiletti, Siqueiros), ¶ 122.

[763] **Tim Hart's First Expert Report**, ¶ 63.

323. Further, Mr. Hart explains that the invested amounts would need to be offset by the current assessed market value of the land.[764]

F. The Calculations Of The Ballantines And Their Expert Are Unreliable

324. As stated above, the Ballantines have the burden of proving their claimed loss or damage.[765]

325. Independent of the method or approach to quantum, the calculations of the Ballantines and their expert are unreliable and erroneous, and cannot serve as a basis for determining any loss allegedly suffered.

326. The Ballantines have submitted no evidence to confirm allegedly invested amounts, to substantiate their projections or to support the notion that they had the means to develop the projects for which they are claiming damages.[766] Nor have they submitted evidence to substantiate the alleged costs for which they are claiming reimbursement.

327. The Ballantines' damages expert has failed to demonstrate independent validation of the inputs and assumptions used in his calculations, rather, he seems to have performed such calculations simply on the basis of inputs given to him by the Ballantines themselves without any supporting documents. [767]

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[764] **Tim Hart's First Expert Report**, ¶ 63.

[765] **CLA-012**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 January 2011) (Nariman, Anaya, Crook), ¶ 247 ("Under UNCITRAL Rules [. . .] a claimant has the burden of proving both the breach and the claimed loss or damage").

[766] As a threshold matter, no evidence has been submitted to confirm ownership of the assets over which damages are sought or the invested amounts, they have not submitted evidence to show if they in fact own the lands where they proposed to develop Project 3, Mountain Lodge (Project 4) and the Apartment Complex (Project 5), or if they continue to own unsold Project 2 lots.

[767] **Tim Hart's First Expert Report**, ¶ 65.

328. The damages calculations submitted by the Ballantines must therefore be disregarded as unreliable.[768]

G. The Ballantines Failed To Mitigate Their Damages And Contributed To Their Own Alleged Losses

329. It is widely accepted that a failure to mitigate to damages, as well as willful or negligent contribution to the harm suffered, are factors that can limit a claimant's entitlement to damages.[769]

330. As noted in the commentary to the ILC Draft Articles on State Responsibility, "[e]ven the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury."[770] The foregoing is considered a "well-established principle in investment arbitration."[771] The *EDF* tribunal explained that whether or not the aggrieved party has taken reasonable steps to reduce the loss is a question of fact, not of law. [772]

331. Contributory negligence may preclude full or any recovery, where, through the willful or negligent act or omission of the claimant state or person, that state or person has contributed to the injury for which reparation is sought from the respondent state.[773] This, too, must be evaluated on the facts.

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[768] *See* **Tim Hart's First Expert Report**, ¶ 65.

[769] **RLA-084**, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, International Law Commission, United Nations (2001), Art. 31, Comment 11; Art. 39, Comment 2.

[770] **RLA-084**, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, International Law Commission, United Nations (2001), Art. 31, Comment 11.

[771] **RLA-050**, *EDF International S.A., et al. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award (11 June 2012) (Park, Kaufmann-Kohler, Remón), ¶ 1302.

[772] **RLA-050**, *EDF International S.A., et al. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award (11 June 2012) (Park, Kaufmann-Kohler, Remón) ¶ 1306.

[773] **RLA-051**, *Gemplus S.A., et al. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award (16 June 2010) (Veeder, Fortier, Magallón Gómez), ¶ 11.12 ("Article 39 of the

[FOOTNOTE CONTINUED ON NEXT PAGE]

332. In the present case, according to their own admissions, the Ballantines both failed to mitigate their damages and contributed to their injury, due to the following actions or inactions:

i. Failing to stop expansion works in Aroma Restaurant once it became aware of the denial of the permits for Project 3 and continuing to undertake such works until 2016.[774]

ii. Continuing to acquire lands for Project 3 and lands on the "Lower Portion" once it became aware of the denial of the permits for Project 3.[775]

iii. Undertaking works concerning the Road in Project 3 without a permit and, even more so, once it became aware of the denial of the permits for Project 3.[776]

333. The Ballantines knew or should have known, as from 12 September 2011 — the date of the original rejection of the permit[777] — that it was possible that it would not be able to overturn the decision of the Ministry, and thus at that point should have started taking appropriate measures to mitigate their losses, and to avoid contributing to any further damage.[778] The Ballantines cannot recover the portion of the damages they have caused to themselves.

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

ILC's Articles on State Responsibility precludes full or any recovery, where, through the willful or negligent act or omission of the claimant state or person, that state or person has contributed to the injury for which reparation is sought from the respondent state. The ILC's Commentary on Article 39 refers to like concepts in national laws referred to as "contributory negligence," "comparative fault," "*faute de la victime*" etc. The common feature of all these national legal concepts is, of course, a fault by the claimant which has caused or contributed to the injury which is the subject-matter of the claim; and such a fault is synonymous with a form of culpability and not any act or omission falling short of such culpability").

[774] *See* **James Farrell's First Expert Report**, Exhibit 2, Schedule 9.

[775] *See* **Ex. C-031**, Ballantines' Table of Jamaca de Dios Land Purchases.

[776] *See* **James Farrell's First Expert Report**, Exhibit 2, Schedule 12.

[777] Ex. **C-008,** Letter from Z. González de Guitiérrez (Ministry of Environment) to M. Ballantine (12 September 2011).

[778] *See* **RLA-052**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award (31 May 2016) (Dupuy, Mantilla-Serrano, Thomas), ¶ 212–218 ("[T]he relevant date of knowledge for the purpose of Article 10.18.1 is the date on which the Claimant first acquired, or should have first acquired, knowledge of the Respondent's decision not to grant the environmental license for

[FOOTNOTE CONTINUED ON NEXT PAGE]

H. The Ballantines Are Not Entitled To The Compound Pre-Judgment Interest That They Have Requested

334. The Ballantines are seeking an award of pre-judgment interest in the amount of 5.5% compounded monthly.[779]

335. They argue that an interest rate of 5.5% is appropriate because it is significantly below the commercial borrowing rate in the Dominican Republic. [780] However, as explained by the Dominican Republic's expert on damages, an interest rate based on rates in the Dominican Republic and for Dominican Pesos is not appropriate for an award requested in U.S. Dollars.[781] Moreover, a rate of 5.5% is grossly inflated and disproportionate given applicable interest rates over the last 10 years.[782]

336. Moreover, in conformity with what is observed by the Dominican Republic's damages expert, compounding the interest on a monthly basis is unsupported and will result in overcompensation to the Ballantines. As explained by Mr. Hart, generally compounding, if awarded, is assessed based on the interest rate applied and a reasonable assessment of the claimant's investment strategy. [783] In order for monthly compounding to be appropriate, the prejudgment interest rate would have to be appropriate and the Ballantines must provide evidence that they had a history of depositing all profits into an investment vehicle returning 5.5

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
the Claimant's project "). If the foregoing is true for statute of limitation purposes, it should also hold true for mitigation and contribution purposes.

[779] **Amended Statement of Claim**, ¶¶ 310–315.

[780] **Amended Statement of Claim**, ¶ 311.

[781] *See* **Tim Hart's First Expert Report**, ¶ 71.

[782] *See* **Tim Hart's First Expert Report**, ¶ 72; *see also* **Ex. R-136**, Credibility ICSID Damages Study (June 2014) pp. 18-20.

[783] *See* **Tim Hart's First Expert Report**, ¶ 76.

percent on a monthly basis.[784] The Ballantines have not provided such evidence, hence their interest claim cannot be awarded.

I. The Ballantines Are Not Entitled To Moral Damages

337. The Ballantines also request moral damages in the amount of US$4 million,[785] as a result of the Dominican Republic's alleged "bad acts."[786]

338. The Ballantines' request for moral damages is no more than a thinly veiled attempt to extort *punitive* damages from the Dominican Republic. DR-CAFTA is clear: "a tribunal is not authorized to award punitive damages."[787] Black's Law Dictionary defines "punitive damages" as damages assessed to penalize the wrongdoer or make an example to others; they are intended to punish and thereby deter blameworthy conduct.[788] The Oxford English Dictionary defines "punitive" as inflicting or intended to inflict punishment; retributive, punishing; "punishment" in turn means the infliction of a penalty or sanction in retribution for an offense or transgression.[789]

339. In light of the unambiguous terms of the treaty, and both the legal and plain meaning of what the Ballantines are asking for, the discussion should be settled and this head of damage should be dismissed entirely.

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[784] *See* **Tim Hart's First Expert Report**, ¶ 76.

[785] **Amended Statement of Claim**, ¶ 276.

[786] **Amended Statement of Claim**, ¶ 321.

[787] **Ex. R-010**, DR-CAFTA, Art. 10.26.3.

[788] **Ex. R-099**, Punitive Damages, Black's Law Dictionary (10th ed. 2014).

[789] **Ex. R-100**, Punitive, Black's Law Dictionary (10th ed. 2014); **Ex. R-102**, Punishment, Oxford English Dictionary (10th ed. 2014).

340. In any event, on the facts, Claimant would not be entitled to compensation for moral damages. The *Arif v. Moldova* tribunal stressed the exceptional nature of moral damages in investment treaty cases:

> The element of exceptionality must be acknowledged and respected [. . .] The Tribunal is therefore aligning itself to the majority of arbitral decisions and holds that compensation for moral damages can only be awarded in exceptional cases, when both the conduct of the violator and the prejudice of the victim are grave and substantial.[790]

341. The *Lemire* tribunal, drawn from prior case law, expressed the following general rule:

> "[M]oral damages [are] not available to a party injured by the wrongful acts of a State, but moral damages can be awarded in exceptional cases, provided that:
>
> [1] the State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act;
>
> [2] the State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position [to the claimant]; and
>
> [3] both [the] cause and effect [of these actions] are grave or substantial."[791]

Tribunals interpreting and applying the *Lemire* test have emphasized that it establishes a very high threshold.[792]

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[790] **RLA-054**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 April 2013) (Cremades, Hanotiau, Knieper), ¶ 592; *see also* **RLA-053**, *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (16 September 2015) (Kaufmann-Kohler, Lalonde, Stern), ¶ 618 ("Tribunal shares the opinion of other tribunals according to which moral damages are an exceptional remedy").

[791] R**LA-038**, *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (28 March 2011) (Fernández-Armesto, Paulsson, Voss), ¶ 333. The case law reviewed by the *Lemire* tribunal to reach its conclusion included *Desert Line v. Yemen*, *the Lusitania cases*, and *the Siag* case.

[792] **RLA-038**, *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, (Award, 28 March 2011) (Fernández-Armesto, Paulsson, Voss), ¶ 344 ("[T]he extraordinary tests required for the recognition of

[FOOTNOTE CONTINUED ON NEXT PAGE]

342. The Ballantines based their moral damages claims on the following allegations: they claim to have "lived daily under threat of government retribution;" to have been "subject to harassment, angry mobs, death threats, loss of reputation, and emotional harm;"[793] to have been "forced to abandon the efforts of [their] work in the prime of their lives . . . [and] to sell their home and leave their friends and colleagues . . . in order to escape the harassment." [794]

343. The Ballantines' portrayal of the facts is wholly misleading. First, it is unclear what threat of government retribution the Ballantines are referring to or how the government directly or through its agents caused them harm within the parameters of any of the three strands of the *Lemire* test. Second, as explained in Section III it is a known fact that some of the townspeople of Jarabacoa and Jamaca de Dios had a private dispute regarding an access road. As the record shows, whenever the townspeople protested, the police intervened to de-escalate the situation.[795] Also, as Michael Ballantine himself admits, when he was allegedly threatened by some of the townspeople, the State, through its Police, apprehended the implicated

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
separate and additional moral damages have not been met in this case"); RLA-054, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 April 2013) (Cremades, Hanotiau, Knieper), ¶ 615 (finding that acts of harassment attributed to the host State did not rise to "a level of gravity and intensity which would allow [the tribunal] to conclude that there were exceptional circumstances which would entail the need for a pecuniary compensation for moral damages"); **RLA-055**, *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6 , Award (7 July 2011) (Kessler, Otero, Fernández-Armesto), ¶ 282 ("[T]he acts of State are not serious enough to meet the first requirement and third requirement [for moral damages]"; Original Spanish:[L]os actos del Estado no están revestidos de la gravedad necesaria para cumplir con el primer y tercer requisito [para daños morales]").

[793] **Amended Statement of Claim**, ¶ 322.

[794] **Amended Statement of Claim**, ¶ 322.

[795] *See* **Ex. R-074**, *Le Niegan la Entrada a Jamaca de Dios a Los Regidores de Jarabacoa*, YouTube (published on 20 April 2013); **Ex. R-075**, *Jarabacoa, Suspende Ejecución De Orden Derriba Puerta En Jamaca de Dios*, YouTube (published on 17 June 2013); **Ex. R-076**, *Derriban Nuevamente La Puerta a la Jamaca de Dios*, YouTube (published 12 July 2013).

individuals, and through its Judiciary, afforded Mr. Ballantine protection in the form of a restraining order against those who had allegedly threatened him.[796]

344. Here, too, the Ballantines have the burden of proving their case, and they have failed to do so. There is therefore no basis whatsoever to award moral damages to the Ballantines.

J. Conclusion on Quantum: The Tribunal Has No Basis To Grant Damages

345. The Ballantines have failed to satisfy their burden of proving damages. They have not shown causation, and the damages they claim are speculative and/or based on unreliable or erroneous calculations. Accordingly, The Ballantines' damages claims must be dismissed.

V. REQUEST FOR RELIEF

346. For the reasons articulated above, the Dominican Republic respectfully requests:

a. That the Tribunal dismiss all of the Ballantines' claims, on the basis of lack of jurisdiction and/or lack of merit;

b. That, in the event that it were to decide that one or more claims are meritorious, the Tribunal decline to grant any damages to the Ballantines, on the basis that their damages calculations are unreliable, erroneous, and/or speculative;

c. That the Tribunal grant to the Dominican Republic all of the costs of the proceeding, as well as the full amount of the Dominican Republic's legal fees and expenses; and

[796] **Michael Ballantine's First Witness Statement**, ¶ 82.

d. That the Tribunal award to the Dominican Republic such other relief as may deem just and proper.

Respectfully submitted,

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