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

MICHAEL BALLANTINE and LISA BALLANTINE

Claimants

v.

THE DOMINICAN REPUBLIC,

Respondent

CLAIMANTS' REPLY SUBMISSION

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

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

November 9, 2017

I. Nature of Reply

1. Despite more than 300 pages of memorial and witness statements, the Dominican Republic cannot refute the simple fact that mandates an award for the Ballantines: *not a single other mountain residential project in the entire country has been denied the opportunity to develop its land*. The Ballantines -- American citizens who envisioned and built the most commercially successful mountain community in the Dominican Republic -- stand alone, entirely refused the right to expand their development and ultimately driven from the country by the discriminatory and expropriatory acts of the Respondent, while each and every Dominican-owned project has been allowed to proceed.

2. The Statement of Defense entirely misses this forest while it searches for the trees. Its confused mischaracterization of the Ballantines' expansion plans and its attempt to equate the Ballantines' treaty claims to a Broadway show are standard obfuscation tactics, designed to draw this Tribunal's attention away from simple, and facially apparent, discrimination and expropriation that occurred here. Respondent feigns shock at the Ballantines' evidence that political favoritism and corruption drove the decision to refuse their expansion requests[1], insisting that rote application of Dominican environmental law and policy justified its repetitive and absolute denials. It maintains that the slopes on the Ballantines' Phase 2 land exceed those permissible under Dominican law, and thus its denial was appropriate.[2]

---

[1] See **Statement of Defense** ("**SOD**") at ¶ 2. Respondent is, of course, intimately familiar with claims of political corruption. It is well-known that the ill-gotten gains from the massive Odebrecht scandal were laundered through the DR. https://www.bloomberg.com/news/features/2017-06-12/odebrecht-corruption-machine-s-collapse-sows-chaos-in-the-dominican-republic. Moreover, the recently released World Economic Forum's Global Competitiveness Index ranked the Respondent 135th out of 137 countries with respect to Ethics and Corruption. http://reports.weforum.org/global-competitiveness-index-2017-2018/competitiveness-rankings/#series=GCI.A.01.01.02

[2] **SOD** at ¶ 4: "The Ministry ultimately decided to deny the permit on various technical grounds (including mainly, that much of the land that the Ballantines proposed for their project exceeded a slope of 60%, which was the legal limit)."

3. Respondent's Statement of Defense, with its 796 footnotes, does not deny or refute several key facts:

- Respondent denied the Ballantines the right to develop ***all of their purchase*** because some of that land included slopes exceeding 60%.
- Respondent has allowed every Dominican housing or resort development in its mountain regions to develop despite these projects having slopes in excess of 60%.
- Respondent has allowed many Dominican landowners to develop their property in the total absence of a permit.
- Respondent denied the Ballantines the right to develop because of the National Park while allowing Dominican-owned properties to develop in national parks., including Aloma Mountain which continues to develop without a permit to this day.
- Respondent excluded Dominican-owned properties from the National Park even though those properties affected the Baiguate River and were significantly environmentally sensitive and pristine than the Ballantines Phase 2.

Conspicuously absent from the Statement of Defense is any valid and supportable explanation as to why the MMA simply, fully, and repeatedly rejected the Ballantines' permitting efforts, while at the same time it affirmatively approved multiple Dominican-owned projects, despite similar if not steeper slopes, and allowed many others to develop with impunity despite the absence of any environmental license.

4. Jamaca de Dios Phase 2 is not unique or *sui generis*. All mountain residential projects have slopes. Mountains are not flat. To try and justify the differential treatment it imposed upon Jamaca de Dios, Respondent insists now that it is not "only" the specific measure of steepness that impacts the application of its law. It must say this because there is no evidence that the MMA actually took specific slope measurements at any other project, at any time,[3] ***and because it admits the***

[3] Required to produce evidence of slope measurements taken by the MMA at any other mountain project in the area, Respondent was unable to produce a single document. The only slope measurement document produced with respect to any project was part of the August 28, 2013 inspection of Jamaca de Dios, where five areas analyzed through satellite imagery all indicate phase 2 slopes ***of less than 60%.*** See **R-114**.

existence of slopes in excess of those permitted under Article 122 at later-approved projects -- including projects with steeper and more pervasive slopes than Phase 2 of Jamaca de Dios.[4]

5. This unavoidable fact is what forces the Statement of Defense to switch gears, and belatedly insisting that "one must also consider concentration, altitude and environmental impact."[5] Respondent's entire defense fundamentally boils down to this statement, which smacks loudly of "after-the-fact," fabricated justification, especially in light of 1) the absence of any contemporary discussion of these "concerns" in the evaluation of the Ballantines' expansion requests or in Respondent's multiple denial letters [6] 2) the absence of these factors in any Dominican regulations concerning the implementation of the law concerning slopes; and 3) the absence of any legitimate environmental differences between Phase 2 and the multiple Dominican projects that have been permitted or simply allowed to develop.[7]

6. Respondent works hard to try and distinguish the ecology of Jamaca de Dios from a dozen other mountain projects in La Vega province. The Ballantines' experts expose this failed and belated effort, noting with detail and pictures that the Ballantines' Phase 2 property is much less pristine and environmentally significant than the other projects that were permitted and/or left out of the National Park (or allowed to build without a permit).[8] But, even without competing environmental attestations, this Tribunal can see that ***it is absurd on its face to even contend that Jamaca was***

---

[4] See **Witness Statement of Zacarias Navarro Roa**, admitting the existence of slopes in excess of 60% at Paso Alto, Quintas Del Bosque, Mirador Del Pino and Jarabacoa Mountain Garden.

[5] **SOD** at ¶ 125

[6] See, e.g., **C-8**, **C-11**, **C-13**, and **C-15**.

[7] See **Expert Witness Statements of Jens Richter and Fernando Potes**.

[8] Id.

somehow so ecologically unique that only its development needed to be brought to a complete stop when every single other project could proceed.

7. Jarabacoa and its neighboring community of Constanza are booming as Respondent pushes these areas of La Vega province as the country's only mountain tourism poles.[9] The Ballantines were a primary fuel for this boom, developing Phase 1 of Jamaca de Dios as the premier luxury mountain residential community in La Vega (and the entire country), with more than 90 home sites, beautiful homes, common areas, a fine dining restaurant, and the highest quality private mountain road in the Dominican Republic. Having experienced demonstrated commercial success with the first phase of their project, the Ballantines sought to expand, to add at 70 more lots, a boutique hotel, and two condominium complexes -- a Mountain Lodge across from the restaurant as well as an Apartment Complex nearer to the base of the complex.[10]

8. But the MMA refused, first citing a little-known and never-invoked slope regulation for more than three years, and then finally telling the Ballantines in January of 2014 that, even without slope issues, their land ***had been placed in a national park more than four years earlier*** and could not be developed for that reason.[11] The Statement of Defense first calls any issues about the creation of the

---

[9] See Law 158-01 on October 8, 2001, declaring Jarabacoa to be a tourism pole, and offering tax incentives to investors. See also http://www.drlawyer.com/publication/tourism/tourism-incentive-law-158-01/ (last viewed 10-11-17).

[10] Respondent now insinuates that it was unaware of the scope of this expansion because the Ballantine only asked for 19 lots. See **SOD** at ¶ 79. That is false. The Respondent's CONFUTOR approval in 2010 (**C-52**), the Ballantines' request to the City of Jarabacoa for a no objection letter in 2010 (C-91), and its communications with the MMA as early as February of 2011 (**C-53**) make plain the Ballantines sought to develop at least 50 lots in Phase 2. Most tellingly, the Respondent's internal evaluation documents of the expansion request reveal its understanding that the Ballantines intended to build "60-70 lots" in Phase 2. See **C-92**.

[11] The full chronology of Respondents' four denial letters is set forth by the Ballantines in their Amended Statement of Claim and will not be repeated here except as necessary to establish the discriminatory, inequitable and expropriatory behavior of the Respondent.

Baiguate Park a "red herring,"[12] as Respondent chooses to doubles down on its insistence that its slope denial was somehow not discriminatory against the Ballantines. But it then goes on in great length to try to justify both the existence of the Park and the creation of its boundaries, boundaries that left out critically important land necessary to advance the stated purpose of the Park, boundaries that left out politically-connected Dominicans, but boundaries that somehow reached out over an unprotected mountain top to include these American developers. And the evidence is plain that ***this Park has not been a barrier to the development of other mountain projects***, as Aloma Mountain continues its march to create a 115-lot subdivision a little more than a stone's throw away from Jamaca despite being in the National Park.[13]

9. So this Tribunal is not confused: ***there are now more at least a dozen mountain residential projects in and around Jarabacoa -- all with slopes greater than 60% -- that have been granted permission to develop or that have been allowed to develop without a permit,***[14] as the MMA endorses or simply turns a blind eye to similar Dominican efforts to commercialize the beauty of the region. The second phase of Jamaca de Dios is the only mountain project that has been refused any opportunity to proceed. At the end of the day, it is as simple as that, and Respondent's belated environmental differentiation arguments cannot overcome this stark reality.

10. Indeed, the only real difference between all of these projects is the success attained by Phase 1, success that created the commercial resentment, coupled with the competing private economic interests of powerful government officials, that gave rise to the discriminatory and inequitable acts of

[12] **SOD** at ¶5.

[13] The attached video dramatically reveals the development that has occurred at Aloma Mountain even since the filing of this arbitration. Comparing footage of Aloma in December of 2015 against footage of Aloma from August of 2017 exposes any claim that the fine of Dominguez, or the denial of his permit, has stopped his development. See **C-93**.

[14] See section **III.A.1**, *supra*.

Respondent. The damages that the Ballantines have suffered as a result of this discrimination, and unjustified taking, have been fully established by reference to the successful commercial development of Phase 1 of Jamaca.[15] Respondent's insistent claims of speculation are ineffective in the face of these historical transactions, leaving its *quantum* expert left to simply repeat its legal defenses of causation and mitigation.[16]

11. Also ineffective is the Respondent's continued insistence that the Ballantines are "dominantly" Dominican and thus unable to invoke the protections of CAFTA. Faced with the overwhelming evidence of the primacy of the Ballantine's U.S. nationality, Respondent is now forced to troll the social media sites of the Ballantine children, citing jokes about fast food restaurants made by Tobi Ballantine (when she was a minor) as evidence that Michael and Lisa Ballantines should be deemed Dominican.[17] Importantly, Respondent never treated the Ballantines as Dominican or considered them as such, because it discriminated and treated them differently precisely because they were not Dominican. The U.S. also treated the Ballantines as their own, advocating to Respondent's officials on behalf of the Ballantines. Thus, the Tribunal should reject Respondent's jurisdictional objection.

II. This Tribunal Has Jurisdiction Over This Dispute as the Ballantines Are Dominantly and Effectively American Nationals

"*[F]ull of sound and fury, signifying nothing*."
Shakespeare, Macbeth

12. Respondent continues to insist that this American couple is "dominantly" Dominican and therefore should not be able to invoke the protections of CAFTA. Respondent first sought to slow and

[15] See Exhibit 2 to **Expert Report of James Farrell**.

[16] See **Expert Report of Michael Hart** at ¶32-47.

[17] **SOD** at ¶39.

multiply these proceeding by seeking a bifurcation to consider this issue. The Tribunal appropriately denied that request, stating (among other things) that "the conduct of the host state *vis-à-vis* the Ballantines ... will need to examined for the purposes of determining the dominant and effective nationality of the Ballantines."[18] The Tribunal further noted that "the timing of when the Ballantines acquired Dominican citizenship overlaps with the period in which the alleged unfair or discriminatory treatment occurred[.]" [19]

13. The Ballantines, having lived their entire lives in the United States, attained dual nationality in 2010 in a failed effort to protect its investment in Jamaca de Dios, seeking to avoid the discrimination from the market and from the government that attends to being an American in the Dominican Republic.[20] By this time, Jamaca had been shut down for months by government officials attempting (unsuccessfully) to force the purchase of a wastewater treatment plant that even the City of Jarabacoa does not have, and their project had been subject to militarized inspections that Dominican projects avoided.[21] The Ballantines wrongly believed that attaining citizenship might help level the commercial and political playing field.

14. Their voluntary naturalization required ***no*** renunciation of their lifelong and dominant US citizenship, notwithstanding Respondent's repeated insinuations to the contrary. The Ballantines have never considered themselves to be dominantly Dominican, and, critically, Respondent's officials never considered them to be dominantly Dominican either.

[18] **Procedural Order No. 2** at ¶26.

[19] P**rocedural Order No. 2** at ¶28.

[20] **Supplemental Michael Ballantine Witness Statement** ("Supp. M. Ballantine St") at ¶1.

[21] **Michael Ballantine Witness Statement** ("M. Ballantine St") at ¶40-43.

15. The facts demonstrating that the Ballantines are dominantly and effective Americans are overwhelming. Indeed, at all relevant times, the Ballantines continuously maintained residences in the United States, continuously maintained significant U.S. financial relationships, including retirement and educational accounts, continuously filed individual income tax returns in the U.S., continuously maintained U.S. nonprofit entities, [22] voted in U.S. elections, had U.S. health insurance, and all of their family ties were to the U.S.[23] The Ballantines were in the United States at least 30 separate times between 2010 and 2014.[24] They traveled internationally exclusively as U.S. citizens.[25] They attended an American church while residing in Jarabacoa, and their two school-age children attended an American school in Jarabacoa.[26] All of their children returned to the United States to continue their education, including their 16-year old daughter who left Jarabacoa for her final two years of high school in the U.S., and their 17-year old son who left Jarabacoa to attend college in the U.S., both only months after the Ballantines naturalized as Dominican citizens.[27]

16. As the Ballantines have made clear, had they understood that their expansion permits would be denied, and their, beautiful higher-elevation property rendered worthless, by the discriminatory application of the slope law or by the invocation of the Baiguate Park -- which had been created but not disclosed at the time of their naturalization -- as reasons to deny their permit, they would

[22] **Claimants' Response to Respondent's Notice of Intended Preliminary Objection and Request for Bifurcation**, at ¶34.

[23] Id. at ¶43.

[24] Id. at ¶37.

[25] Id. at ¶38

[26] Id. at ¶41-42

[27] Id.

never have acquired dual citizenship.[28] The Ballantines at no point had any family, cultural, or economic ties to the Dominican Republic apart from their investment, nor did they seek to develop such ties. At the end of the day, Respondent simply cannot present any compelling evidence to support the counterintuitive argument that it presents -- that the Ballantines' Dominican naturalization was actually undertaken to reflect some belief that they were no longer dominantly American.

A. Appropriate Time Frame for Evaluation of the Ballantines' Dominant Nationality

17. While the Statement of Defense argues that the Ballantines' contentions concerning the time frame for evaluating the Ballantines' dominant nationality are "quite scattered,"[29] this is not the case. The Ballantines' position is simple. For purposes of jurisdiction, the plain text of CAFTA allows this Tribunal to consider the nationality of an investor *immediately upon making the investment that it is at issue.*

18. Chapter 10 of CAFTA-DR defines a "claimant" as an "investor of a Party that is a party to an investment dispute with another Party."[30] As such, the Ballantines must be "investor[s] of a party" other than the Dominican Republic. The term "investor of a party" is also specifically defined:

> 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**; 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.

(emphasis added).[31] Thus, 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[.]" (emphasis added).

---

[28] **Reply Witness Statement of Michael Ballantine** ("Reply M. Ballantine St") at ¶1

[29] **SOD** at ¶17

[30] See CAFTA-DR, Art. 10-28, **R-10**.

[31] *Id.*

19. This is a disjunctive definition and thus any of the three tenses used in the definition can be used to determine who is a claimant. As such, an "investor of a Party" is a "national … that has made an investment in the territory of another Party." The reference in the concluding clause of the definition to "dominant and effective nationality" thus 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. As such, because the vast majority of the land at issue in this investment dispute *was acquired well before the Ballantines became dual citizens*,[32] the Ballantines have the explicit right under CAFTA-DR to make the claims it has asserted against Respondent and the jurisdictional objection of the DR fails without any consideration of the Ballantines' overwhelmingly dominant American ties.

20. Respondent's Statement of Defense insists that "the question here is not just one of nationality, in the abstract, but one of consent[.]"[33] Whatever that is supposed to mean, it is wrong; the question here is simply whether or not the Treaty -- to which Respondent irrefutably consented -- authorizes the Ballantines to be claimants. And it does because the plain definition of that term identifies disjunctively who can be a claimant. That definition gives the right to a "national that has made an investment in the territory of another party." The Ballantines were solely American citizens when they "made an investment" in the Dominican Republic and bought property at issue here. They can be claimants, and Respondents interpretive arguments to the contrary are unavailing.[34]

---

[32] Moreover, the Ballantines became dual citizens pursuant to Dominican Law No. 1683 of 16 April 1948 Relating to Naturalisation (**CLA-50**), which explicitly provides that a naturalized citizen can have their citizenship revoked if they move out of the country within 12 months of naturalization. This "probationary" period made the Ballantines' Dominican citizenship conditional, and certainly not dominant, during the 12-month period from February 2010 to February 2011, irrespective of any other links to the country. Virtually of the land at issue in this dispute was purchased before this 12-month conditional nationality period expired, further confirming that the Ballantines were "investors of a party" other than the DR at the time they "made an investment" in the DR.

[33] **SOD** at ¶19.

[34] Respondent takes issue with the Ballantines' assertion that CAFTA is "silent" on issues of timing for dual nationals. The Ballantines meant only to communicate that the Treaty does not explicitly define specific dates

21. But even assuming that the Ballantines must establish that they were dominantly US citizens *at the time of the filing* of their Notice of Arbitration, they can bring their claims because at all times, from their birth until today, the Ballantines have been dominantly and effectively United States citizens.

B. Factors for Determining Dominant Nationality

22. CAFTA-DR does not provide a defined test for measuring which of two nationalities should be considered dominant for purposes of Article 10-28. Respondent asserts that decisions of the US-Iran Claims Tribunal provide guidance in describing appropriate factors for a Tribunal to consider.[35] Although the Ballantines think that the decisions from the US-Claims Tribunal can provide some guidance, these decisions relate to an entirely different set of circumstances and arise under an entirely different treaty. For example, many (if not all) of these cases involved persons who were born and raised Iranian and had obtained U.S. citizenship later in life. That is not the case here. Many of these cases involved questions of whether the connection to the U.S. was *bona fide*. Here, there is no question of the Ballantines' *bona fide* connection to the United States.

23. Although the U.S. Claims Tribunal cases hare instructive and can be a guide in some parts, these cases do not obviously control or provide a precedent in this case. Thus, given the absence of examination of this issue under CAFTA-DR by other tribunals, this is essentially a case of first impression for this Tribunal.

---

upon which to conduct any dominance analysis. There is no express support in the language of CAFTA for Respondent's insistence that that date must be *the date of filing*. Indeed, such an insistence is counterintuitive. As of the date of any filing, any allegedly discriminatory acts have already occurred, and it seems more intuitive to evaluate a dual citizen's dominant nationality at the time of the alleged Treaty violations.

[35] See, e.g., US-Iran Claims Tribunal, *Decision*, Case No. A/18 (6 April 1984)(attached to Respondent's Notice as **RL-8**)*:* "In determining the dominant and effective nationality, the Tribunal will consider all relevant factors, including habitual residence, center of interests, family ties, participation in public life and other evidence of attachment."

24. In determining the dominant and effective nationality question, the Ballantines submit that the Tribunal should take into account the entire circumstances of the dual nationality situation. This means looking at a variety of evidence, such as (1) the motivation of the person(s) to become dual nationals, (2) the entire life of the person, which includes but is not limited to the facts at the relevant times (3) how these persons viewed themselves, (4) how the respective states and persons in those states viewed the individuals, and (5) the laws regarding nationality in the two states.

25. The Ballantines examine these various factors below.

1. Reasons for Ballantines Becoming Dominican Citizens

26. As the Ballantines have stated, they became nationals of the DR in the (unrealized) hope that Respondent's officials would treat them fairly and in the hopes that Dominicans would see that the Ballantines were making a commitment to the DR. As Michael Ballantine has testified, he and Lisa Ballantine became citizens of the Dominican Republic at a time when their project faced unfair resistance from Respondent's officials.[36] The Ballantines, rightly, viewed this resistance as emanating from the fact that they were American nationals and not Dominicans.

27. The Ballantines, wrongly, believed that taking Dominican citizenship would cause those officials to treat them in the same manner that the officials treated Dominican born persons. As explained below, the way that Respondent's officials view Dominicans depends on whether those persons are of Dominican heritage, and not because of whether a person has Dominican citizenship.

28. Growing up in the United States, as the Ballantines did, they viewed people from foreign countries who took U.S. citizenship as fellow countrymen or women. Although certainly not ubiquitous in the United States, especially (sadly) not in today's age, most U.S. citizens view naturalized citizens as

[36] **Supp. M. Ballantine St** at ¶1.

real citizens. That people would feel this way was certainly a substantial motivation and thought process for the Ballantines when they became Dominican citizens.

29. The Ballantines also considered other factors when deciding to become Dominican nationals, such as potential benefits of passing down property and the like.[37]

30. What is undisputable is what the Ballantines were not thinking when they became Dominican citizens. They were not thinking that they would obtain Dominican citizenship so that they would be able to sue the United States. They were not thinking that they wanted to turn their back on the U.S. where they had lived their entire life.[38]

31. The fact that the Ballantines were not trying to treaty shop is key here. They are not attempting to take advantage of a recently-acquired citizenship in order to have standing to sue its country of birth (or another country) under an investment treaty. The Ballantines have been U.S. citizens their entire lives. They have never "abandoned" their home country and culture and they have never become cultural Dominicans. They attained residency and then citizenship in the DR in an effort to help market and develop the significant commercial investment that they had made in the country.

32. Provisions like CAFTA-DR's dominant and effective nationality test is designed to prevent citizens from one country moving to another country to obtain treaty protection. This concern over "nationality shopping" was one of the reasons why states have started to include the dominant and effective nationality test in their BITs. Thus, the goal is to prevent situation where a claimant would acquire a nationality in bad faith solely for the purpose of having access to a dispute resolution mechanism contained in a treaty. The point has been well-explained by a writer:

> Yet, the EC [in the context of TTIP negotiations] overlooks the fact that, in addition to corporations, investment treaties might also be subject to **abuse by individual investors**. In

[37] **M. Ballantine St** at ¶88.

[38] **Reply M. Ballantine St.** at ¶2.

> this context, **a new type of BIT claim is now emerging in the field of investor-State arbitration**, whereby investors who hold the nationality of both contracting parties to the treaty (*i.e.* dual nationals) make their own State a respondent before an international tribunal. Indeed, over the past year, several individuals have initiated UNCITRAL arbitration proceedings against their State of nationality claiming compensation for alleged breaches of BIT provisions. The most recent example is a claim filed on 9 November 2015 by a French-Mauritian national against Mauritius under the France-Mauritius BIT (See *Dawood Rawat v. The Republic of Mauritius*, UNCITRAL, Notice of Arbitration and Statement of Claim). **These types of claims raise the question whether claims by individual investors holding two or more nationalities, including that of the host State, are an abuse of the rights conferred under investment treaties. This may be the case where, for instance, the investor acquires the second nationality to gain access to the dispute settlement mechanism contained in the relevant BIT, or when the only connection between the individual and the home State is a mere passport confirming his status as a national of that State.** This question is closely related to a more fundamental one, namely whether dual nationals qualify as 'investors' under investment treaties and are thus (in principle) entitled to sue their own State before an international tribunal. (…) It would therefore be plausible to argue that dual nationals should not be allowed to claim against their own State on the simple ground that there is no provision in the BIT prohibiting them from doing so. (…) In short, as a result of the decision of the tribunal in *Serafín*, individual investors now have a new way to 'internationalise' their claims against their own States through the acquisition of a second passport in order to take advantage of a BIT, and it is reasonable to expect that such claims will continue to increase. In this context, **TTIP negotiators may wish to consider addressing the issue of dual nationality in the relevant treaty with a view to avoiding potential abuse (as the USA has, for instance, done in its Model BIT of 2012).** In the meantime, it remains to be seen whether the tribunals deciding claims by dual nationals will follow the restrictive approach adopted in *Serafín* or if, on the contrary, they will apply the limitations imposed by customary international law when necessary in order to safeguard the object and purpose of investment treaties.[39]

33. There can be no question that the Ballantines did not take citizenship in the DR to obtain treaty protection. To the contrary, they were seeking to avoid the type of discrimination and mistreatment that such treaties protect against.

2. The Entire Life of Michael Ballantine and Lisa Ballantine

34. Although not binding, the US-Iran Claims Tribunal cases support this notion (either expressly or *de facto* by the factors examined) that the entire life of the person must be taken into

[39] Javier García Olmedo, "**Claims by Dual Nationals under Investment Treaties: A New Form of Treaty Abuse?**", **EJIL Talk!,** December 9, 2015: https://www.ejiltalk.org/claims-by-dual-nationals-under-investment-treaties-a-new-form-of-treaty-abuse/.

consideration. In *Malek v. Islamic Republic of Iran,* 19 Iran–U.S. Cl. Trib. Rep. 48, 49–50 (1988), the Tribunal created a framework to evaluate "***the entire life of the [c]laimant,*** from birth, and all the factors which, during this span of time, evidence the reality and sincerity of the choice of national allegiance." (emphasis added).[40]

35. Although not the only factor, the Tribunal should examine the Ballantines' *entire life* to determine whether or not they are more closely aligned with the United States or with the Dominican Republic. These factors include those previously identified by the Ballantines, such 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.[41]

36. When the life of the Ballantines is examined, it becomes increasingly clear that the Ballantines are dominantly and effectively U.S. citizens. The evidence demonstrates the Ballantines' unbroken residential, financial, and cultural connection to the United States, factors that overwhelm Respondents' insistence that the Ballantines' should be deemed more Dominican than American. That evidence is cited extensively in their submissions concerning bifurcation, and the Ballantines need not repeat it all here.

a) Residency

37. Ultimately, Respondent is forced to continue to rely upon its effort to equate "residency" with dominant nationality. But residency is not the test. And, even if it was, while the Ballantines built

[40] See **CLA-51**.

[41] Respondent wrongly contends that "the Ballantines offer no jurisprudential, doctrinal, or logical support for the asserted relevance of these factors." **SOD** at ¶29. But these factors are among many identified in Brower and Brueschke, ***The Iran-United States Claims Tribunal*** at 34-35 (1998). Respondent desperately wants this Tribunal to find determinative the fact that the Ballantines had a home in the Dominican Republic while they attended to their investment in the country. But that factor is of course not dispositive, and the evidence here is overwhelming that the Ballantines have at all times been dominantly American and not Dominican.

a residence in their development in 2007, they have at all times since their investment in the Dominican Republic continuously maintained at least one residence, and sometimes two residences, in the United States:

- From March 1, 1994 through August 18, 2011, the Ballantines owned a residence at 33w231 Brewster Creek Circle in Wayne, Illinois;
- On October 1, 2010 through December 31, 2011, the Ballantines rented a home at 1163 Westminster Avenue in Elk Grove Village, Illinois;
- On December 2, 2011, the Ballantines purchased a home at 850 Wellington Avenue, Unit 206, in Elk Grove Village, Illinois, and sold this home in November of 2015;
- On April 19, 2012, the Ballantines purchased a home at 3831 SW 49th Street, in Hollywood, Florida, and sold that home on March 28, 2014; and
- On July 15, 2015, the Ballantines rented a home at 505 N. Lake Shore Drive, Unit 4009, in Chicago, Illinois.[42]

38. Indeed, these were not simply empty homes with the heat turned down. The evidence presented by the Ballantines confirms that they were in the United States at least 30 separate times between 2010 to 2014.[43] This trips reveal not a couple that was "severing" its forty-plus years of American cultural heritage, but a family that was splitting time between its home country -- the United States -- and the country where it had made a significant economic investment that needed attention.

b) Travel

39. While the Statement of Defense argues that the Ballantines used their Dominican passports to travel, that use was exclusively for entry into the DR.[44] Respondent cannot counter the simple fact that at no time in their international travel during the period 2010 to 2014 did the Ballantines

[42] **Supp. M. Ballantine St** at ¶8 and see **C-75** to **C-78**.

[43] **Supp. M. Ballantine St** at ¶21.

[44] **Supp. M. Ballantine St** at ¶23

ever present themselves as Dominican citizens.[45] They exclusively used their US passports for travel everywhere other than to the DR, holding themselves out to the world as the Americans that they considered themselves to be.

c) Education

40. There is no dispute that Michael and Lisa Ballantine were educated in the United States. The Statement of Defense ignores the evidence surrounding the educational path taken by the Ballantine children, because those choices reflect Michael and Lisa Ballantines' continuing and unbroken desire to ensure their children were educated in a manner consistent with the family's dominant American nationality.

41. While Tobi and Josiah Ballantine did attend school in Jarabacoa while they lived with their parents in Jamaca de Dios, the school they attended was an American school. Attached here is the Witness Statement of Mike Zweber, Executive Director of the U.S.-based charity that established the Doulos Discovery School. His testimony makes plain that the core principles of the school aligned with U.S. educational ideologies. Indeed, many U.S. citizens attend the school because the classes are taught almost exclusively in English by U.S. citizens, and because the school is accredited in the United States, meaning its credits are transferrable when students return to America.[46] The mission and vision of the Christian school is to raise servant leaders who will be prepared for university in the US.[47]

42. To be clear, every Ballantine child returned to America for further education while Michael and Lisa worked to promote and expand their Dominican investment, while splitting time between the two countries. Tobi Ballantine returned permanently to the United States while still in high

[45] Id.

[46] **Witness Statement of Mike Zweber** at ¶3.

[47] Id.

school -- and while Michael and Lisa spent chunks of the year in the DR away from their youngest child -- because the Ballantines wanted her to be educated in the United States.[48] This single fact shows that the Ballantines at all times maintained their dominant American nationality -- and were not "breaking a bond of allegiance" to their home country when they acquired Dominican citizenship.

43. Respondent attempts to downplay the irrefutable evidence that the educational paths of the Ballantine children show a family centered in the United States -- including the fact that college tuitions were paid from U.S.-based college savings plans pursuant to IRS Section 529.[49] It asserts that "the relevant parties here are the Ballantines themselves, not their children[.]"[50] However, that sentiment apparently does not translate to Respondent's trolling of the Ballantine children's' social media accounts, as the Statement of Defense cites with a straight fact a few scattered postings from Tobi Ballantine as evidence of Michael and Lisa's alleged dominant Dominican nationality.

d) Religion

44. The Statement of Defense also tries to ignore the Ballantines' religious faith and practice as a factor for consideration. The reason is simple. At all times while in Jarabacoa, the Ballantines regularly attended an American church -- founded as part of an American educational institution for troubled American teens -- at which all services were conducted exclusively in English.

45. The attached witness statements of the executive director of the American nonprofit institution and of the chaplain of the church confirm the Ballantines' strong connection to the church and their strong connection to the American missionary community in Jarabacoa.[51]

---

[48] **Supp. M. Ballantine St** at ¶24-25.

[49] **Supp. M. Ballantine St** at ¶16.

[50] **SOD** at ¶51.

[51] See **Witness Statements of Scott Taylor and Jeffrey Schumacher.**

e) Cultural and Political Ties

46. The Ballantines considered themselves to be foreign investors in the Dominican Republic, and to be dominantly American. Their testimony to that end is of record. So is the testimony of their American friends and colleagues in the DR, who confirm the Ballantines' strong and continuing connection to the American community in and around Jarabacoa, and their continued alliance to key American cultural markers, such as religion and education.[52]

47. This testimony confirms the simple fact that the Ballantines considered themselves to be Americans. They continuously referred to Chicago as their "home" and socialized almost exclusively with Americans at their restaurant and home. There is simply no evidence to support Respondent's assertion that the Ballantines had voluntarily made a decision to discard their strong American cultural heritage in order to become dominantly Dominican; to the contrary, the evidence before this Tribunal rejects that any such contention.

48. Respondent vainly attempts to impeach that testimony in the Statement of Defense by pointing to statements in the Ballantines' arbitral submissions about "their affection for the country and its people" and their decision to "deepen their personal and economic commitment to the country" , and by pointing to their oath "to be faithful to the [Dominican] Republic."

49. The Ballantines do not deny the beauty of the country, and the kindness of local population, and that their desire to be of service is what drew them to invest in the Dominican Republic. They made a decision to move to the country to attempt to create from the ground up a luxury resort that would be the gold standard for residential mountain developments in the Dominican Republic. They succeeded, by converting a deforested mountain into the largest and most successful foreign investment project in the province, with scores of luxury homes and a fine-dining restaurant. However, that success

[52] Id.

came from hard work and a willingness to sacrifice; it did not come from an abandonment of their American roots and relationships.

3. How The Ballantines Viewed Themselves

"*[D]esperation is the mother-in-law of invention.*"
— Laura Marney, No Wonder I Take A Drink

50. There is no real issue but that the Ballantines viewed themselves continuously as U.S. citizens. The Ballantines have testified that they viewed themselves as U.S. citizens and Respondent has put forth no credible evidence to challenge that.

51. Instead, Respondent has desperately trolled the social media postings of Lisa Ballantine and her daughter (then a minor) to pull out casual, flippant, and/or sarcastic statements out of context.[53]

52. For example, Respondent cites a social media post from the Ballantines' youngest daughter Tobi (when she was a minor) asking "What the heck is chick-fil-a?". Respondent refers to this as "crowd-sourcing" and notes that Tobi refers to herself as a "foreigner". The context is obviously meant to be flippant and a joke. Respondent refers to other posts by Tobi Ballantine where she refers to the DR as "her country". A simple read of her Twitter feed shows that almost all of her posts are jokes or sarcasm. She is witty and has a good sense of humor, which apparently is not universal.[54]

53. But the real issue is so what. How is the view of how a 15 (or 24 year old) relevant to the issue of Michael and Lisa Ballantines' dominant and effective nationality? It is the latter's' long lives that must be examined and not the casual posts of a child or young adult who lived for several years in the DR during her formative years.

---

[53] **SOD** at ¶38.

[54] In addition to her Twitter account, you can sometimes catch Tobi Ballantine doing comedy for the Second City improv group in Chicago. Tickets can be purchased at a reasonable price through www.secondcity.com.

54. In any event, it is beyond astonishing that Respondent relies on the social media musings of a teenager as "evidence" of her parents' purported "dominant" Dominican nationality.[55] Respondent's desperation that required it to scrape the bottom of the barrel for Dominican "connections" says all that needs to be said about this jurisdictional defense.

55. Respondent's desperation also includes several Facebook post from Lisa Ballantine where she talks about the DR. Respondent notes that Lisa Ballantine's Facebook page was public when it obtained these Facebook postings.[56] Indeed it was. But in addition to the handful of posts that Respondent submitted, Lisa Ballantine has many other public posts that talked about the U.S. being her home or talking about her connection to the U.S. Respondent simply ignored all of those postings and instead tried to paint a false picture to the Tribunal.

56. As the Ballantines stated during the document exchange process, the Facebook postings of the Ballantines, their children, their children's fiancées, and others are not relevant. But, given that Respondent has unfairly selected some Facebook posts of Lisa Ballantine's public posts, we have included many others that were public when Respondent trolled her account. Here is a smattering of Lisa Ballantine's posts between 2010 and 2014 that show her talking about the U.S. as home:

(a) August 3, 2010 -- "Goin' home!" (*made while she was flying to the U.S.*)

(b) August 4, 2010 -- "Sweet Home Chicago!"

(c) January 30, 2011 -- "Home sweet home, with my babies, but sick again …" (*posted in Chicago*)

(d) December 17, 2011 -- "Snow today, Bears game tomorrow, yep, I am truly home."

(e) July 4, 2012 (Independence Day) -- "Missing the celebration of the freedom of my home."

(f) September 14, 2014 -- Met the American Ambassador today. Wonderful guy. Good to

[55] **SOD** at ¶39.

[56] **SOD** at footnote 92.

have the USA with you in a foreign country."[57]

57. Indeed, Lisa's posts indicate her enthusiasm for whatever she is undertaking, and her affection for all parts of the world. This is simply her personality and plainly not proof of any dominant nationality. For example:

(g) July 14, 2010 -- "Going to the border tomorrow. We are in Tonala' now. Crossing the border should be fun! i am sad though, i absolutely LOVE Mexico."

(h) July 22, 2010 -- "Costa Rica!!!!! i love it here! They need clean water too. Hmmmm"

(i) Sept 17, 2011 -- "enjoying Baden-Baden with my love, hot springs and the traditional German town. i feel as though i have come home.

(j) Jan 21 2012 -- "Here in my favorite city, Amsterdam. Tomorrow we will move on."

(k) October 31 2014 -- "Trick or treating with Grandbabies. Love Canada!"[58]

58. Lastly, Respondent talks about Lisa Ballantine's enthusiasm in voting in one Dominican election. All this shows is that Lisa Ballantine is civic minded and was hoping to effect positive change in the DR, where she had a substantial investment.[59] As stated above, Lisa Ballantine also voted in U.S. elections. Any efforts to deem Lisa Ballantine's enthusiasm over voting in a Dominican election as proof of her dominantly Dominican nationality is silly and shows the desperation of Respondent with respect to this issue.

4. How the U.S. and the D.R. Viewed The Ballantines

59. Another relevant factor is how the D.R. and the U.S., both the government officials and others, viewed the Ballantines. The dominant and effective nationality test is not just about an address,

[57] See **Reply Witness Statement of Lisa Ballantine** at ¶8.

[58] Id at ¶9.

[59] Unfortunately, Lisa Ballantine's civic action was likely wasted. The DR is rife with substantial allegations of voting irregularities and voter fraud. See, e.g., https://www.efe.com/efe/english/world/complaints-of-irregularities-increasing-after-dominican-elections/50000262-2934211. Bloomberg reported that people in the DR routinely sell their votes in elections. https://www.bloomberg.com/news/articles/2016-05-16/people-openly-sell-their-votes-for-20-in-the-dominican-republic.

schooling, or the amount of time one spends in a particular country. How the relevant countries view particular dual nationals is also relevant.

60. Of primary relevance here is how the U.S. officials viewed the Ballantines generally and, specifically, whether the Ballantines were entitled to diplomatic protection. The dominant and effective rule contained in the CAFTA-DR (and the U.S. Model BIT) is a codification of the existing rule of customary international law on effective nationally for duals nationals in the context of diplomatic protection.[60]

61. The rule of customary international in the context of diplomatic protection was defined in a recent UNCTAD Report:

> As noted earlier, **under customary international law**, a State could exercise diplomatic protection on behalf of one of its nationals with respect to a claim against another State, even if its national also possessed the nationality of the other State, **provided that the dominant and effective nationality of the person was of the State exercising diplomatic protection** (Nottebohm Case and Barcelona Traction Case). This test, however, typically is not found in existing IIAs, which, as noted, tend to be silent on the matter of dual nationality. The effective link test has also been rejected by arbitral tribunals which have had to determine whether the claimant, a natural person, possesses the nationality of a Contracting Party other than the host Contracting Party country for the purposes of the ICSID Convention.[61]

62. The basic reason why the dominant and effective nationality test emerged as a rule of custom is based on the conception that "nationality" embodies more than a tenuous legal bond asserted

---

[60] Kenneth J. Vandevelde, *U.S. International Investment Agreements,* p. 144; Kenneth Vandevelde, "A Comparison of the 2004 and 1994 US Model BITs" (2009), YIILP 2008-2009 at p. 294.

[61] UNCTAD, *Scope and Definition*, UNCTAD Series on Issues in International Investment Agreements II, 2001, p. 75-6 (CLA-72). The rule of international law at the origin of CAFTA Article 10.28 is to be found in the ILC Draft Articles on Diplomatic Protection: Article 7 (entitled "Multiple nationality and claim against a State of nationality"): "A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim". Text adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10).

by municipal law, and, according to the ICJ, requires "legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[62] The goal is to prevent an individual from shopping for a "better" nationality and receive diplomatic protection from a stronger state even when no genuine link of nationality exists between the individual and that state. Judge Jessup explained in the *Barcelona Traction* case that the rule of "continuous nationality" was adopted in the context of diplomatic protection to prevent a person who is a national of a 'weaker' State to change his/her nationality to that of a more powerful State in terms of representation against the State responsible for the wrongdoing.[63]

63. Here, the U.S. diplomatic officials unquestionably viewed the Ballantines U.S. citizens. This is evidenced, among other things, by the fact that the U.S. diplomatic officials advocated on behalf of the Ballantines to Respondent's officials. Beginning in July of 2013, until the time they left the Dominican Republic, the Ballantines met with officials from the U.S. Embassy on at least nine separate occasions to seek U.S. assistance with respect to the denied expansion permit and the expropriation of their investment. The U.S. Embassy wrote to the Respondent's MMA on behalf of the Ballantines to urge a resolution of the issue. This is only one example. The Reply Statement of Michael Ballantines documents the U.S. Embassy's unwavering support of the Ballantines as they attempted to mitigate and reverse the damage Respondent's Treaty violations had caused.[64]

---

[62] Nottebohm Case (Liecht. v. Guat.), 1955 I.C.J. 4, 23 (Judgment of Apr. 6).

[63] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Second Phase)* (Belgium v. Spain), Judgment of 5 February 1970, ICJ Rep. 1970, Separate opinion, Judge Jessup, separate opinion of Jessup [48]. See also: *Administrative Decision No. V*, United States-German Mixed Claims Commission, 31 October 1924, in 7 UNRIAA 141: 'any other rule would open wide the door for abuses and might result in converting a strong nation into a claims agency in behalf of those who after suffering injuries should assign their claims to its nationals or avail themselves of its naturalization laws for the purpose of procuring its espousal of their claims'.

[64] **Reply M. Ballantine St** at ¶4-10.

64. Of course, had the U.S. officials viewed the Ballantines as dominantly and effectively Dominicans, they would not have used their diplomatic positions to advocate on the Ballantines' behalf. This sort of diplomatic advocacy is precisely relevant to the dominant and effective nationality test. It would make no sense for the U.S. to advocate for Dominican investors to the Dominican government.

65. And equally as important, ***Respondent also considered the Ballantines to be foreign investors***, and to be dominantly American. The evidentiary record of contemporaneous communications -- during the time frame advanced by Respondent as relevant -- between these parties confirms this simple and dispositive fact:

- In 2010, shortly after the Ballantines became naturalized Dominican citizens, *they applied have* ***Jamaca de Dios registered as a foreign investment under the Dominican Foreign Investment Law 16-95***. This would have permitted the Ballantines to repatriate profits from JDD to the US without Central Bank approval. The Ballantines engaged Dominican counsel, who began the process with the Centro de Exportación e Inversión de la República Dominicana ("CEI-RD"). Although the Ballantines did not complete the registration process (as they were awaiting approval of their Phase 2 permitting request), their 2010 application to be deemed a foreign investment confirms the Ballantines' contemporaneous intention to return the anticipated profits from Phase 2 to the United States, their dominant nationality;[65]
- In May of 2013, Michael Ballantine met with Jean-Alain Rodriguez, the Executive Director of the CEI-RD, the official Dominican agency responsible for the promotion of international trade and *foreign direct investment*. Mr. Rodriguez understood that the Ballantines were dominantly US investors, and attempted to intervene on their behalf with the Ministry of Environment. Rodriguez wrote to the MMA in July of 2013:

  > I address to you in our capacity as Director of the Center of Exports and Investments of the Dominican Republic (CEI-RD), as you may know, part of the mission of this institution that we are honored to lead it is not only to attract Direct Foreign Investment (IED), but to cooperate to promote expansion of the IED as well as ***to grant support to the Foreign Investor with procedures required in any public institution***.[66]

- In July of 2013, Michael Ballantine became an associate member of the American

[65] See **Supplemental M. Ballantine St** at ¶28

[66] See **C-26** (emphasis added).

Chamber of Commerce in the Dominican Republic;[67]

- In May of 2014, Rodriguez wrote to the American Chamber of Commerce, reconfirming the Dominican government's view that the Ballantines were American investors:

> After greeting you, we would politely refer to you in relation to the copy sent by you about the document dated May 29th, 2014 directed to Mrs. Katrina Naut, Director of the ***Directorate of Foreign Commerce*** (DICOEX) of the Ministry of Industry and Commerce, [about] the request of expansion of the project from the company Jamaca de Dios, ***society formed in its totality by North American investors***.[68]

66. These communications make plain that as the Ballantines worked to try to reverse the discriminatory acts of Respondent, which began with the initial permit rejection in 2011, they did so as American citizens, not as Dominican citizens. Representatives of Respondent irrefutably understood that, as did the US Embassy, who also tried repeatedly to assist these American investors.

67. Now that the Ballantines have made their discrimination claims in this Arbitration, Respondent wants to shift gears and to contend that the Ballantines are really Dominican investors, and not US investors, and that this Tribunal should not hear the discrimination and expropriation claims that the Ballantines have asserted. The Statement of Defense is deafeningly silent about this evidence, implicitly asking this Tribunal to simply ignore the involvement of DICOEX and CEI-RD -- ***Respondent agencies tasked with dealing with foreign investors like the Ballantines*** -- in 2013 and 2104, the very point in time that Respondent argues is most relevant to the issue of dominant nationality.

68. In addition to the direct evidence of Respondent treating the Ballantines like not only foreigners but foreign investors, there is a mountain of circumstantial evidence that Respondent's officials viewed the Ballantines as U.S. citizens and not Dominicans. As stated below in more detail, Respondent treated the Ballantines differently than it did ***all*** of the Dominican investors with similar

[67] See **C-85**.

[68] See **C-86**.

projects. The below is a summary of the many ways in which the Ballantines were treated differently than the Dominican investors:

- The Ballantines were forced via a fine to submit ICA reports every six months whereas Dominican projects did not have to do so.

- The Ballantines were denied completely the ability to build on their Phase 2 property because of slopes whereas every Dominican project was allowed to not only build on land that contained slopes but almost all of those projects actually built on the slopes.

- The Ballantines' Phase 2 property was inexplicably put into the National Park while the Dominican-owned projects of Quintas del Bosque, Jarabacoa Mountain Garden, and Paso Alto, among others, were inexplicably left out.

- Dominican projects have been able to develop even where they do not have a permit while the Ballantines have not. This includes Aloma Mountain, which has similar slopes to the Ballantines' Phase 2 and is in the National Park, and Rancho Guaraguao.

- Dominican projects have not been subject to the militaristic actions that the Ballantines were subject to.

- Dominican projects and businesses have been allowed to operate in national parks whereas the Ballantines have been forbidden to do so.

- Dominican projects have received no objection letters without issue whereas the Ballantines have been denied a simple no objection letter from the City of Jarabacoa.

- Dominican projects have been allowed to keep their development roads private (which is evidenced by the exclusion of the Ballantines and their experts from the roads whereas the Ballantines' road has been made public.

- The Ballantines have been fined and forced to pay those fines whereas other Dominican projects have either not been fined at all or have not paid those fines.

69. Respondent has no explanation for the points noted in the above bullet points. Respondent talks about altitude or other arbitrary factors (for which there are no written policies). But the facts in this case are clear. Despite the Ballantines taking Dominican citizenship, Respondent's officials have never considered the Ballantines to be Dominicans.

70. Respondent knows the Ballantines were not dominantly Dominican. It knows that they were not connected politically. It knew that they were not connected culturally or socially. It knows

that the Ballantines had nowhere to turn, and believed that there would be no consequence from the actions that Respondent took. This Arbitration seeks to ensure that the Ballantines are provided the remedies to which they are entitled under CAFTA-DR.

5. The Laws Regarding Dual Nationality In The U.S. And The D.R.

71. Respondent's primary argument remains unchanged from its bifurcation efforts. Respondent asks this Tribunal to simply take a "last in time" approach: because the Ballantines acquired Dominican citizenship after having moved to the Dominican Republic, the Ballantines should be deemed by default to have been "breaking a bond of allegiance" with the United States and "voluntarily" choosing to be dominantly Dominican.[69] The Statement of Defense insists that "[i]t is a serious event with significant legal consequences."[70]

72. But Respondent overplays its hand by contending that that the Ballantines' decision to become dual citizens should be decisive, and that the Ballantines by definition "broke" their bond of allegiance to the United States. This is plainly not the case. U.S. law does not require the Ballantines to renounce their US citizenship to nationalize with Respondent, and they were not required to pledge greater fealty to Respondent than to the United States. The problem with Respondent's argument is that it assumes too much. The Statement of Defense insists that the Ballantines swore "to be faithful" to the DR and "to respect and comply with" its laws.[71] The Ballantines did swear this, but nowhere in that

[69] See **SOD** at ¶33, 45. Of course the decision to attain dual nationality was voluntary. The Ballantines have never asserted that they were forced to become Dominican citizens. They have repeatedly testified -- testimony that is unrebutted by any of Respondent's inferences, inferences drawn from websites and third-party blog posts and social media apps -- that their choice to become dual Dominican citizens was undertaken both to respond to market conditions at Jamaca de Dios and demonstrate commitment to their investment, as well as to facilitate estate planning. It was a business decision designed to minimize the effect of the discrimination by Respondent's officials against non-Dominicans. Unfortunately, that decision did not prevent the Treaty violations that are comprehensively presented here.

[70] **SOD** at ¶33.

[71] **SOD** at ¶35.

promise of faith and respect is there a renunciation of their life-long fidelity to America. Whenever an individual elects to become a dual national, she necessarily acquires one of those citizenships at a later time. If it were merely of question of which nationality one acquired most recently, there would be no need to consider other factors that reflect their dominant family and cultural ties.

73. Tellingly, Respondent's laws and actions show that it values Dominican citizenship (as compared to Dominican heritage) with very little regard. For example, unlike the U.S., naturalized Dominicans can have their citizenship taken away for a variety of reasons, including that they have criticized politicians.[72] Such tenuous citizenship is not a bond of strength that would show that the Ballantines were Dominican.

74. More tellingly, Dominican law and the courts do not even respect Dominican citizenship for citizens who were born and lived their lives in the D.R. One egregious example, and a humanitarian crisis of epic proportions, is the D.R. courts rendering tens of thousands of Dominicans stateless just because their parents are of Haitian descent. As reported by Human Rights Watch:

> "Pregnant women and young children, many stripped of their Dominican citizenship before being pushed across the border into Haiti, are living in deplorable conditions, Human Rights Watch said today. They are among thousands of Dominicans of Haitian descent who, since mid-2015, have been forced to leave the country of their birth, including through abusive summary deportations by the Dominican government.
>
> * * *
>
> "Six of the women Human Rights Watch interviewed had been deported by Dominican officials, apparently arbitrarily. They said that uniformed officials they thought were immigration officers did not make even cursory attempts to determine whether they should be deported, aside from checking whether they had national identity or work documents, and some were not even asked their names. All had been separated from some of

[72] Respondent's Naturalization Law allows the Executive to revoke naturalization if dual citizens commit acts of "ingratitude or indignity against the Republic." Law No. 1683 of 16 April 18948 Relating to Naturalization, Art. 12 (**CLA-50**).

> their children for days or weeks after they crossed the border and had no legal recourse or opportunity to challenge the deportations before a judge.
>
> * * *
>
> "In 2013, a Dominican court stripped tens of thousands of children of undocumented Haitian workers in the Dominican Republic of their Dominican citizenship, based on a retroactive reinterpretation of the country's nationality law. The changes were widely condemned and called discriminatory and an 'arbitrary deprivation of nationality' by the Inter-American Commission on Human Rights. UNHCR expressed concern about the statelessness created by the decision."[73]

75. If Respondent is happy to strip citizenship from thousands of people, including children and pregnant women, who were born and lived their entire life in the D.R., how much protection could a U.S. investor expect from taking Dominican citizenship in their 40s. There is simply no comfort a person who does not have Dominican heritage could take from having "citizenship" in the D.R.

III. Merits

76. The Ballantines' Amended Statement of Claim alleges violation of multiple provisions of CAFTA-DR, including:

- Article 10.3: National Treatment;
- Article 10.4: Most-Favored-Nation Treatment;
- Article 10.5: Minimum Standard of Treatment; and
- Article 10.7: Expropriation and Compensation[74]

77. The Amended Statement of Claim presented a comprehensive chronology of events that plainly demonstrated behavior by Respondent toward the Ballantines that violated these treaty obligations. Respondent endeavors to change the narrative by ignoring this simple timeline. Instead,

---

[73] *Haiti: Stateless People Trapped in Poverty: Victims of Dominican Republic's Arbitrary Deportations*, Human Rights Watch, 29 November 2016 (**C-87**).

[74] **ASOC** at ¶¶ 15-153.

Respondent has chosen to structure its Statement of Defense around a putative list of "ten unfounded allegations" which it claims are set forth in the ASOC.[75] This list is a mishmash of legal and factual arguments intended to distract this Tribunal from the simple and chronological structure of the Ballantines' presentation of facts.[76]

78. With respect to the primary issue before this Tribunal -- why Jamaca de Dios was the only one of at least a dozen similar mountain development projects to be explicitly denied its permit -- Respondent then attempts to explain and validate its actions by invoking a largely new set of putative environmental concerns.[77] However, Respondent simply brushes over the fact that these "concerns" were no part of the dialogue between the Ballantines and the Respondent at the time of Respondent's multiple denials. This belated effort can be fairly characterized as "ignore what we repeatedly and contemporaneously wrote, we really meant to deny you for *these* reasons." (To be clear, even the Respondent's reasons set forth for the first time in this Arbitration do not provide a defense under CAFTA-DR to Respondent.)

79. Respondent must make up new and belated arguments because of the undeniable fact that the slope law it repeatedly cited to refuse the Ballantines' expansion was ignored or disregarded in the approval process of several competing mountain residential projects -- ***even after the Ballantines were rejected.***[78] Every Dominican-owned project in these mountain regions had slopes in excess of 60%,

[75] **SOD** at ¶ 103.

[76] The ten "allegations" set forth in the Statement of Defense are not unfounded, and while the Ballantines will not structure their Reply brief in the same intentionally haphazard manner chosen by Respondent, the Reply will present evidence that plainly refutes Respondent's mischaracterization of the Ballantines' claims.

[77] See, e.g., **SOD** at ¶¶125, 158.

[78] See, e.g., **C-29** (Mirador Del Pino permit), **C-30**, (Jarabacoa Mountain Garden permit), **C-90** (Quintas Del Bosque II permit). Respondent also asserted concerns about Phase 2's impact on water sources, but cannot avoid the simple fact that there is no active water within the Jamaca project, and that other projects were allowed to develop despite active stream and rivers within their borders, and indeed were allowed to take water from those waterways for use at their developments!

which according to Respondent would have triggered Article 122 of Law 64-00. But for these Dominican projects, the Law was not used a hammer to nail shut the door on any development whatsoever. Instead, Respondent has allowed every single one of these Dominican projects to move forward.

80. On its face, this is a problem for Respondent. So they have gone back to the drawing board, after the fact, to argue there are other reasons why Jamaca cannot move forward. However, these additional "concerns" -- generated for purposes of this Arbitration -- are not unique to Jamaca de Dios and are shared by any number of the other mountain developments that are now moving forward in La Vega province.

81. For example, Respondent now claims that the altitude of Phase 2 of Jamaca was a significant concern,[79] but altitude has not prevented the development of Rancho Guaraguao, La Montana, Aloma Mountain, or Paso Alto, all of which are, or are to be, built at or above the altitude of Ballantines' Phase 2 property.

82. Moreover, this Tribunal can scour Respondents' contemporaneous evaluations of Jamaca Phase 2 and not find a single reference to its altitude as a point of concern.[80] And, no contemporaneous Dominican regulations prohibited development above any specific altitude.

83. The expert Witness Statements of Jens Richter and Fernando Potes fully catalogue the environmental attributes of Jamaca, comparing them to the competing projects that have been permitted, and confirm there is nothing unique about the Jamaca ecology that justifies the discriminatory treatment

[79] See, e.g. **SOD** at ¶125.

[80] See, **R-108** (Notes of February 17, 2011 inspection); **R-004** (Report of March 18, 2011 inspection); **C-92** (Notes of CTE meeting May 18, 2011); **C-8** (denial letter of September 12, 2011); **C-94** (Notes of CTE Meeting February 22, 2012); **C-11** (Second denial letter of March 8, 2012); **C-13** (Third rejection letter of December 18, 2012); **R-114** (Report of August 28, 2013 inspection); **C-96** (Notes of CTE Meeting September 18, 2013); **C-15** (Fourth rejection letter of January 15, 2014).

the Ballantines faced. Indeed, these reports show that the microenvironment surrounding the proposed expansion area of Jamaca was already fragmented due to years of agriculture use, as compared to the pristine forest environments of other approved mountain development projects.[81] These reports further show that the proposed Jamaca expansion is less pristine and less environmentally significant than the other competing projects that were approved or are building without a permit.

84. Realizing the futility of its environmental arguments, Respondent again shifts gears and claims with a straight face that it did not know that the Ballantines weren't going to build on slopes above 60%,[82] and that unlike other development projects, the Ballantines never expressed a willingness to work with the MMA, or to provide any revisions to their Phase 2 proposal that might make it more palatable to the MMA.[83] This is preposterous on several levels.

85. *First*, unlike its efforts to engage and cooperate with Dominican projects, the MMA's rejections to the Ballantines were curt, absolute and inflexible. Indeed, the first denial letter plainly told the Ballantines that the MMA would consider any additional property the Ballantines might own, but that the 283,000 square meters of Phase 2 land was good only for growing fruit trees.[84]

86. In incredibly stark contrast, the record reveals cooperative communication between Respondent and the Dominican owners of projects such like Mirador del Pino, Jarabacoa Mountain Garden and Quintas Del Bosque 2, advising on how the proposals might be slightly adapted to address any environmental issues.[85] ***Dispositively, Respondent now admits that all of these projects have***

[81] See **Expert Witness Statement of Jens Richter** and **Fernando Potes**. Additionally, Potes confirms that Paso Alto, Jarabacoa Mountain Garden and Quintas Del Bosque should all have been placed within the Baiguate National Park if the purpose of the Park was truly to protect the local ecology as claimed by Respondent.

[82] **SOD** at ¶173.

[83] **SOD** at ¶183.

[84] See **C-8**

[85] See detailed discussion these individual projects below in **III.A.1**.

slopes in excess of 60% and yet all of them have been approved for development -- after the Ballantines were denied. These projects were not abruptly denied and refused any dialogue. The evidentiary record of cooperation and engagement between the MMA and these projects is compelling and unavoidable. Respondent did not wait for the magic words -- "I promise not to build on slopes" -- before affirmatively advising these projects how to secure their permits, and then issuing those permits. This is discrimination and it is blatant and it is a violation of CAFTA-DR for which Respondent must be held accountable.

87. *Second*, the Ballantines desperately attempted to engage with the MMA to find a solution to any legitimate environmental concerns. Indeed, Michael Ballantine himself wrote the Minister of the MMA, making clear both that the Ballantines -- as they had done in Phase 1 -- ***would not build any structure on land with slopes in excess of 60%*** and that the Ballantines would work cooperatively with the MMA with respect to development of Phase 2: "We are very willing to work with the technicians of the Ministry of Environment, to execute what's necessary to make this project a landmark in the eco touristic offer" of the Dominican Republic.[86] But the MMA refused, reiterating its flat denial while ***at the very same time it was approvin***g similar Dominican projects with similar slopes.

88. Indeed, as early of 2009, the Ballantines had communicated to the MMA their desire "to carry out development in accordance with the state environmental laws, by means of a management plan with the aim of being a model Project, to the benefit of the environment as well as the community."[87] The Ballantines even hosted a workshop with local MMA officials to pursue this goal. [88]

---

[86] See **C-97** (Letter from M. Ballantine to B. Gomez dated June 4, 2013)

[87] See **C-95** (Letter from M. Ballantine to F. Santana dated August 18, 2009) . That invitation included a comprehensive agenda and planned discussion concerning JDD's commitment to the environment, including the following specific topics: "g) Protection of the inclines [and] h) Reforestation and its management."

[88] Id. The Ballantines were committed to the preserving the environment of its project. After learning in late 2010 that Respondent had created the Baiguate National Park, the Ballantines began to take action in harmony

89. Any arbitral claim that the Ballantines showed no willingness to engage with Respondent in the way that Respondent affirmatively engaged with Dominican project owners is simply false. Respondent must make this claim because they are desperate to justify the disparate treatment foisted on the Ballantines and to divert this Tribunal's attention away from Respondent's refusal to collaborate with the Ballantines.

90. The appeal "reconsideration" by the MMA of the Ballantines' project was simply for show. At no time during their three-year effort to obtain a permit did the MMA ever say to the Ballantines: "we are concerned that a small portion of your expansion area has slopes in excess of 60%. What is your plan to avoid development of these areas?" And yet this is manifestly how Respondent interacted with every Dominican project, issuing Reference Terms and using the corresponding environment study as a framework for collaboration and dialogue.[89]

91. "Don't look at the forest", Respondent tells this Tribunal in its Statement of Defense, "look at these trees instead." However, the trees it identifies either do not exist or do nothing to alter the unaltered landscape of discrimination that can be seen for miles. This section will begin with a discussion of key facts that expose the Respondent's alleged justifications for its actions to be nothing more than belated rationalizations that are inconsistent with its own laws, unsupported by the actions Respondent took with respect to other residential projects similar to Jamaca de Dios, and unsubstantiated by the contemporaneous evidentiary record before the Tribunal in in this dispute.

---

with the MMA's stated social reasons for creating the Park. The Ballantines conducted a survey of Nogal trees on their property, with a goal to plant thousands of these trees to help further the stated purpose for the Park. ***But there are no Nogal trees in la Jamaca de Dios***, and the trees did not prosper when planted in the Jamaca de Dios nursery. Similarly, to promote the preservation of the Taino Indian culture (another stated purpose behind the Park), the Ballantines engaged a expert in Taino culture to help their design of the Phase 2 hotel and spa, which was to be called the Taino Hotel. The individual units were to be round cottages similar to the homes -- called bohios -- in which the Taino Indians lived. The Ballantines at all times intended to work in harmony with Respondent's stated conservation goals for the Park. **Reply M. Ballantine** at ¶56.

[89] See **R-144, C-98, C-99**.

Respondent cannot avoid the simple fact that while it was issuing blanket denials to the Ballantines, it was at the same time affirmatively working with Dominican-owned projects to help formulate and modify development plans to ensure the issuance of their permits.

92. Respondent spends much of its Statement of Defense trying to prove that Jamaca is somehow different from all of the other mountain projects in the area. Its justifications here are untenable and quickly exposed; there simply is no viable environmental justification that supports refusing all development at Jamaca while allowing it at every other project.

93. Despite all of Respondent's witnesses and experts insisting that the rejection of Phase 2 of Jamaca de Dios was justified, the evidentiary record reveals the simple and unavoidable fact that the Ballantines' expansion request stands alone as the only mountain residential project in and around Jarabacoa that has been denied the right to develop.[90]

A. Key Facts

94. From its inception, Jamaca de Dios was intended to have at least two phases of development.[91] During Phase 1, the Ballantines would develop the lower portion of the property, creating more than 90 individual parcels of land to be sold to private buyers for the construction of luxury homes. The Ballantines also built a successful restaurant as part of Phase 1, and created the finest private mountain road in the Dominican Republic.

95. After proving market viability and creating the robust infrastructure necessary for continued development up the mountain, the Ballantines intended to expand their project by extending their road and pursuing Phase 2 of their ecotourism project, which included:

[90] Since the initiation of this arbitration, Respondent has been working hard to "paper its file" with other rejections to make the Ballantines' denial less singular. It will trumpet those denials in its Rejoinder. This Tribunal will not be swayed, because a simple review of the dates of these actions will reveal that they are inappropriate for consideration here and were done as part of Respondents' belated effort to minimize the stark evidence of its discrimination against the Ballantines.

[91] **M. Ballantine St** at ¶19.

- subdividing the even more desirable and valuable upper portion of their property into 70 developable lots for the construction of luxury residential properties. These lots would have higher sale prices than the scores of lots that the Ballantines had already sold on their mountain, because they had an even more temperate climate, more spectacular views, and more exclusivity.[92]
- constructing a luxury hotel and spa -- as part of their effort to expand the international reach of their brand -- which would contain a second restaurant.
- constructing of a "Mountain Lodge" of apartments, across from the restaurant and a slightly larger apartment complex nearer to the base of the property. This Tribunal has seen the evidence concerning the intended design and concept of the Mountain Lodge. [93] Architectural and engineering plans for this 12-unit condominium building were created,[94] and a substantial marketing campaign developed.
- constructing a slightly larger apartment complex nearer to the base of the property,[95] to further exploit the demonstrated market desire for properties at a lower price point than a standalone home, that could also be used to generate passive income.

96. The Ballantines' plans for the hotel, spa, a lower development project, ***and fifty additional lots*** were all contained in the Phase 2 submission by the Ballantines to Respondent's

[92] Respondent tries to constrain the damages arising from its discrimination and expropriation by arguing about the number of lots that the Ballantines intended to develop. They point to the initial Phase 2 application that mentions only 19 lots. ***But the contemporaneous evidentiary record reveals that Respondent was irrefutably aware of the Ballantines' intention to develop all of their Phase 2 land.*** First, the Ballantines' submission to CONFUTOR in 2010, prior to its request for MMA permission, seeks tax-free approval for at least 50 lots on the Ballantines' Phase 2 land. But even more importantly, the handwritten notes of the first technical committee meeting expressly note that the project sought to expand by 60-70 lots. See also **C-53.**

[93] See **C-49.**

[94] **C-100** (Mountain Lodge engineering drawings).

[95] See **C-51**.

CONFUTOR that sought tax-free status for the entire Jamaca project. This request was conditionally approved by four relevant ministries of Respondent, ***including MMA and Tourism***, in December of 2010. This approval appropriately caused the Ballantine to expect timely MMA approval of their formal permit application to begin the expansion of their property.

97. ***So the Tribunal is clear***: when the Ballantines sought approval from CONFUTOR for tax-free status for both the first and the second phase of their integrated ecotourism project, four ministries of Respondent quickly signed off on the expansion.[96] One of the ministries whose approval was required was the MMA, and Ernesto Reyna signed on its behalf. And yet, less than ten months later, the MMA flatly rejected any expansion whatsoever of Jamaca. The Statement of Defense is silent about this change of heart.

98. The Statement of Defense does seek to recharacterize the Ballantine's straightforward and unremarkable business plan into five distinct "projects", in an effort to muddy the waters. But this Tribunal need not and should not adopt that nomenclature.[97] It is done to try and bolster Respondent's arguments that portions of the Ballantines' damage claims are speculative. Respondent wants to claim the lower apartment complex was a "pipe dream"[98] and that the Ballantines' aborted purchase of Paso Alto is too far removed from Respondent's discrimination to allow for damages. But Respondent is wrong. These claims are not speculative. Respondent was aware that the Ballantines wanted to build additional residential units on the lower portion of its property.[99] It knows that the Ballantines had a

---

[96] See **C-52.**

[97] The Statement of Defense asserts that the Ballantines' ASOC "features a confusing welter of projects, people, permits and plots of land." (**SOD** at ¶7). While a nice use of alliteration, this contention is unfounded. The ASOC made plain the course of events that lead to this arbitration. It is the Respondent who tries to confuse the Tribunal by ignoring this simple timeline. Indeed, even Respondent's quantum expert, Mr. Hall, had no trouble understanding the simple, two-stage development plan intended by the Ballantines.

[98] **SOD** at ¶85.

[99] See **C-101**, a site plan submitted with the Ballantines' CONFUTOR request, which shows intended

letter of intent to purchase Paso Alto, and that the deal that was scuttled because the MMA refused Jamaca the permission it had given Paso Alto, which has similar altitudes and is more environmentally significant than Jamaca Phase 2.[100] Respondents' efforts to claim the development of Jamaca should be seen as five different projects is simply unsupportable.

99. It is also important to promptly address and rebut Respondents' claim that the Ballantines caused their own damage because they acquired some land for their Phase 2 development after learning that their development had been (wrongfully) placed in the Baiguate Park. Respondents make this claim to try to minimize its Award exposure, and will argue that not all of the Ballantines' Phase 2 land should be part of this Tribunal's calculation of damages. But Respondent is wrong, and the evidentiary record shows that the Ballantines acted conservatively and appropriately in their acquisition of property, and that all 283,000 square meters of land for which they seek damages should be considered:

(l) ***First***, the Ballantines did not learn of the existence of Baiguate Park until late September 2010, more than a year after it was created. The environmental consultant with whom the Ballantines were working in connection with their planned expansion told them that some of their land was within the boundaries of the Park.[101] In response, Michael Ballantine specifically asked what that meant to their expansion plans. The consultant expressly confirmed that Dominican law "permits projects of low impact ecotourism, such as yours" within protected areas, and explicitly recommended that the Ballantines

---

development at the lower elevations of Phase 1. The **Witness Statement of Bob Webb** describes the Ballantines' initial plan to build time share units, and the commercial justifications for the decision to instead build the Lower Apartment Complex.

[100] **M. Ballantine St** at ¶36. In fact, the Ballantines was working on several purchases of land in the area when Respondent denied the permits and violated its treaty obligations. See, e.g., C-153.

[101] **C-102** (Email from M. Arcia to M. Ballantine dated September 22, 2010).

seek Terms of Reference for their expansion.[102] The consultant indicated that "after receiving the opinion of MMA we will be able to define a line of more specific action ***and proceed as in other cases***."[103] The Ballantines followed this advice.

(m) ***Second***, as of this late September 2010 date, the Ballantines already owned more than 194,500 of the 283,000 square meters in Phase 2 for which they seek damages here.[104]

(n) ***Third,*** on December 21, 2010, the Ballantine received conditional CONFUTOR approval for their expansion -- including their request for 50 lots in Phase 2 -- which included the explicit approval of the MMA. This approval made no reference to the Baiguate Park and made no reference to any slope concerns in Phase 2.[105] The Ballantines had no reason to believe there would any issue with the expansion of their existing project. Indeed, the Ballantines' request for an environmental permit was lodged at the MMA one month later in January of 2011.[106]

(o) ***Fourth,*** on February 14, 2011, Michael Ballantine met with MMA Minister Jaime David, as well as the Vice Minister of Protected Areas, Bernabe Mañon, and the Director of Management of Protected Areas, Ekers Raposa, to discuss the expansion of Jamaca.[107] At no time during this meeting was there any mention of the Baiguate Park,

---

[102] **C-103** (Email from M. Mendez to M. Ballantine dated September 29, 2010).

[103] Id.

[104] Indeed, on May 12, 2010, the Ballantine received an official Dominican land title for 147,005.78 square meters of their Phase 2 land. **C-105**. The ownership rights to this land had been purchased in a series of transactions between 2004 and 2008. Additionally, the Ballantines had acquired 22,255.04 square meters from Federico Abreu, on June 25, 2007 (**C-106**), and 31,350 square meters from Wilson Duran on September 15, 2009 (**C-107**).

[105] See **C-52**.

[106] See **C-5**.

[107] **Reply M. Ballantine St** at ¶54.

> or that the Ballantines' proposed expansion could not proceed because of the Park.[108] An MMA inspection team visited Jamaca three days later and, again, no mention was made of the Baiguate Park or any issues concerning slopes.[109]

100. The Ballantines purchased their final tracts of Phase 2 land in January, February, and March of 2011, adding the last 88,500 square meters to their Phase 2 property.[110] These purchases were reasonable given the Ballantines' appropriate confidence that their expansion would move forward a) in light of the Respondent's silence about Baiguate National Park and any impact it might have on further ecotourism development by the Ballantines, b) in light of Dominican law promoting ecotourism projects like Jamaca, c) in light of the conditional CONFUTOR approval, d) in light of Aloma Mountain's continuing development in the Park, and e) in light of their historical permitting interaction with the MMA.

101. On September 12, 2011, Respondent sent their initial rejection letter, denying any expansion of Jamaca de Dios, but ***making no mention of the Baiguate Park***.[111] After receipt of that initial rejection letter, the Ballantines ceased all land purchases[112] and ceased further negotiation with

---

[108] Id.

[109] **Reply M. Ballantine St** at ¶55.

[110] Those purchases were as follows: a) 45,036.40 square meters from Ramón Amable Rodríguez on January 7, 2011 (**C-108**); b) 9,905.78 square meters from María Consuelo Rodríguez on January 14, 2011 (**C-109**); c) 15,130 square meters from Miguel Serrata Rodríguez on February 9, 2011 (**C-110**); and d) 18,582.99 square meters from Ana Lidia Rodríguez Serrata on March 29, 2011 (**C-111**).

[111] **C-8**.

[112] The Ballantines' conservatism is underscored by the fact, that although they were negotiating to acquire even more property at the top of their mountain, and had willing sellers (see, e.g., **C-104**), they did not move forward with additional purchases upon receiving their first rejection letter. This was the first indication of Respondent's discrimination against the Ballantines and the Ballantines acted appropriately to mitigate any damage suffered from what would ultimately become repeated Treaty violations. Again, in this proceeding, the Ballantines conservatively seek only damages arising from their inability to develop the Phase 2 land that they owned at the time of the initial denial.

Paso Alto about the purchase of that development. The Ballantines seek no damages for additional land that they intended to acquire adjacent to their Phase 2 land, but did not because of the MMA's rejection.

102. This chronology reveals an appropriately conservative record of land acquisitions by the Ballantines and refutes Respondents' claim that the Ballantines failed to mitigate the harm caused by Respondents' wrongful acts. The Ballantines had no way of knowing that in January 2014 -- ***three years after their final purchase of property*** -- Respondent would belatedly expropriate their land by invoking the Baiguate Park as a basis for denial, despite Dominican law permitting ecotourism in the Park.

103. What is not in dispute is that at the time of MMA's initial rejection in September 2011, the Ballantines owned more than 283,000 square meters of land above Phase 1 that they intended to develop and subdivide.[113] But the Ballantines' intentions to expand Jamaca were rejected, not once or twice or even three times, but on four separate occasions despite their repeated efforts to convince the MMA that the expansion would not violate applicable environmental regulations.[114]

1. At Least Eleven Comparable Dominican Projects Were Allowed to Develop While the Ballantines' Expansion Plans Entirely Rejected

104. No other mountain project in the area has been rejected based upon the slope law that was invoked to prevent the Ballantines from continuing the success that they achieved in Phase 1. To further highlight the inequitable and discriminatory treatment of the Ballantines, the Respondent affirmatively and cooperatively worked with many of these projects to ensure issuance of their permits, while at the same time simply rejecting the repeated requests of the Ballantines for reconsideration of their denial.

---

[113] Again, handwritten notes of the Technical Evaluation Committee's initial consideration of Jamaca Phase 2 in May of 2011 -- ***only a few months after the application was submitted*** -- make plain that Respondent fully understood the Ballantines' intention to subdivide Phase 2 into 70 lots. See **C-92**.

[114] Contemporaneously with these rejections, Respondent has refused the Ballantines request to construct the Mountain Lodge, despite the fact that it had already given them permission to develop the parcels upon which the Lodge would be constructed.

105. Indeed, Quintas Del Bosque ("QDB") -- a competing development on the same mountain ridge as Jamaca -- ***was approved only a few months ago to develop its own Phase 2***, allowed to expand its mountain project to create 26 additional residential lots, ***despite the existence of slopes greater than 60%.***[115] Respondent's own documents reveal the extent to which the MMA cooperatively and collaboratively worked with the Dominican owner of Quintas -- Jose Roberto Hernandez -- to ensure the issuance of his permit, despite the fact that Hernandez had already constructed several homes, and sold at least 10 of his Phase 2 properties, before receiving his approval.[116] It is perhaps telling that this approval was granted after Hernandez became a witness for Respondent in this Arbitration.

106. If not affirmatively providing permits, Respondent has simply turned a blind eye to these mountain projects, allowing them to be developed without any environmental license at all. Perhaps the most stunning example of this is Aloma Mountain, the neighboring development to Jamaca, owned by Juan Jose Dominguez. The Amended Statement of Claim documented the political connections of Dominguez, and Aloma Mountain continues its unabated development, despite the claims of Respondent that Aloma Mountain does not have permission to do so and has been fined for its environmental violations.[117] The video evidence of this is stark and overwhelming, verifying the dramatic deforestation of the property and the fractionalization of Aloma's microenvironment in only the last two years while this Arbitration has been pending, development that has taken place even after Respondent alleges to have fined Aloma Mountain.[118]

---

[115] See **C-90**. See **Reply Expert Report of Eric Kay,** confirming that at least 19% of Quintas Phase 2 has slopes in excess of 60%.

[116] This cooperation is detailed below. Document production from the Respondent reveals similar collaboration with Mirador Del Pino and Jarabacoa Mountain Garden. See **Witness Statement of Fernando Rivas** at ¶18, concerning Hernandez's pre-permit construction activities.

[117] See, e.g., **SOD** at ¶115.

[118] See **C-93**.

107. The Amended Statement of Claim presented several of these projects, but there are additional mountain residential projects in the province of La Vega[119] that have been officially permitted or have been allowed to develop despite the absence of a permit. *These projects are all owned by Dominicans*.[120] They include Sierra Fria, La Montana, Rancho Guaraguao, Los Auquellos, Alta Vista and Monte Bonito. These additional developments provide overwhelming further evidence of the discriminatory acts of the Respondent. A simple picture is revealed: Respondent seeks to encourage and promote mountain tourism throughout La Vega province, but only when those projects are owned by Dominican parties, and not by Americans like the Ballantines. Respondents' actions with respect to all of these properties prove its Treaty violations, and fully expose its catalogue of environmental concern, and purported differentiation among the projects, to be manufactured justifications in a belated effort to avoid liability.

108. It is critical to emphasize that not a single one of these mountain projects was met with the flat and irreversible rejection that Respondent gave the Ballantines, first in 2011 and continuing until 2014. While Respondent was tersely telling the Ballantines that they could do nothing but grow fruit trees, Respondent was working cooperatively with competing projects and issuing permits -- ***despite the fact that there is no dispute that these projects have slopes in excess of 60%.***

109. What remains most revealing of the simple fact that the MMA denial was not about environmental concerns, but was about ensuring the elimination of Jamaca as a commercial competitor for Dominican projects (including the neighboring Aloma Mountain development) is this lack of

[119] Respondent Witness Navarro confirms that Jarabacoa is part of La Vega province and indicates a single MMA representative oversees all projects in the area.

[120] The existence of these additional projects is unnecessary to prove the CAFTA violations of the Respondent here, as its discriminatory treatment of the Ballantines is established with reference only to the original projects described in the Amended Statement of Claim. However, these additional competitors of Jamaca provide additional, compelling, and irrefutable evidence of the Treaty violations that are so facially apparent to any objective observer.

communication. There was no instruction from MMA to the Ballantines that certain land needed to be removed from the proposal, and there was no discussion as to how the Ballantines might structure their Phase 2 layout to address what Respondent now identifies as its concerns. This irrefutable evidentiary record only highlights the facially discriminatory behavior of Respondent toward the Ballantines.

110. A description of the Dominican mountain developments that are approved (or have not needed formal approval) is appropriate and establishes the singular and illegal treatment received by the Ballantines.

a) Paso Alto

111. Located on the same mountain ridge as Jamaca De Dios,[121] Paso Alto sought and received permission from the MMA in 2006 to subdivide more than 50 lots. At no time during the permitting process did the MMA ever invoke slope regulations as a prohibition or a limitation in any way of the development of Paso Alto, despite an MMA inspector visiting the site and expressly commenting on the steepness of its slopes.[122] Indeed, Respondent Witness Navarro now ***confirms that at least 17% of the project has slopes in excess of 60%***.[123]

112. The project was promptly approved, but struggled to find commercial traction. Like other developers in the area, the owners of Paso Alto were aware of the success of Jamaca, and Omar Rodriguez has testified concerning his desire to sell his project to the Ballantines to be further

[121] Exhibit **C-38** is a series of maps of the mountain ridge that includes Paso Alto, Jamaca de Dios, Jarabacoa Mountain Garden, Quintas Del Bosque and Aloma Mountain.

[122] See **C-112**. Missing from Respondent's production is the actual Environmental Impact Study for the project. There are many missing documents from many of the project files that Respondent was ordered to produce. The Ballantines reserve all rights to seek adverse inferences with respect to the failure to produce these documents.

[123] **Witness Statement of Z. Navarro** at ¶ 65(a). Indeed, this calculation is slightly understated, and the **Reply Expert Report of Eric Kay** confirms that at least 19% of Paso Alto has slopes in excess of 60%.

developed.[124] The Ballantines signed a letter of intent to purchase the project on March 18, 2011.[125] The Ballantines did not immediately proceed with their acquisition of Paso Alto because they wanted to secure the expansion permit for Jamaca before investing in this project.[126] The MMA's refusal to permit Phase 2 of Jamaca ultimately killed the acquisition, causing significant economic damage to the Ballantines.[127]

113. Respondent Witness Navarro makes reference to the potential that the Phase 2 Jamaca road would have needed number of switchbacks, which he contends would makes the road less safe. He provides no support for this belated road critique, and there is not a single document in Respondent's Jamaca Phase 2 file that mentions the safety of the road as a concern of the MMA. Mountain road expert Eric Kay, who oversaw the construction of the Phase 1 road, has testified both to the ability to safely extend that road into Phase 2, and the ability to find alternate routes for the road that would avoid steeper terrain.[128] Had the MMA identified any specific path of the road as an issue, that issue could have been easily remedies

114. But even more telling than the absence of contemporary concern about the layout of any Phase 2 road is the MMA's own action. In 2009, the MMA allowed Paso Alto to build a shortcut road to its project starting at 850 meters above sea level through a pristine forest. That road contains some 20

[124] See **Rodriguez St** at ¶3: "We felt that with [Michael's] experience, knowledge and with his dedication to complete the project over time, this alliance would carry our vision into the future under the Jamaca de Dios brand which had respect and had been a success."

[125] Paso Alto Letter of Intent (March 18, 2011) (**C-39**)

[126] **M. Ballantine St** at ¶ 36.

[127] The **Expert of Report of James Farrell** documents those damages based on the lost sales of the Paso Alto lots. Although the Ballantines intended to build the houses at Paso Alto as well, they have chosen not to seek damages for their inability to exploit that commercial opportunity in order to present a conservative quantum number to the Tribunal.

[128] **Expert Witness Statement of Eric Kay** at ¶11-12; See also **Reply Expert Witness Statement of Eric Kay** at ¶12-14.

narrow switchbacks and proceeds up to an altitude of 1160 meters above sea level. The road cuts traverses through wide swaths of slopes over 60%.[129]

b) Quintas Del Bosque -- Phase 1

115. Located on the same mountain ridge as Jamaca De Dios, Hernandez began the development of his project and the construction of several homes before even seeking and obtaining in 2009 a license from the MMA, only a year before the Ballantines sought Phase 2 approval. That permit granted Hernandez the right to develop 60 lots, although the project now apparently has 83 lots despite no modification to its permit.[130]

116. At no time during the permitting process did the MMA ever invoke slope regulations as a limitation on the development of QDB I,[131] ***despite Respondent Witness Navarro now confirming that at least 15% of the project has slopes in excess of 60%***.[132]

c) Quintas Del Bosque -- Phase 2

117. In February of 2014, one month after Respondent's final rejection of the Ballantines' expansion request, Hernandez sought Terms of Reference to expand QDB beyond its current borders, seeking to develop an additional more than 30 lots for residential construction.[133] They were promptly issued by MMA (although MMA refused to even issue reference terms to the Ballantines).[134] Those

[129] **Reply M. Ballantine St** at ¶45. Additionally, the treacherous nature of the Aloma Mountain road is already of record before this Tribunal. See **C-47**.

[130] **C-115**, QDB Masterplan taken from www.quintasdelbosque.com.do.

[131] See **R-063.**

[132] **Witness Statement of Z. Navarro** at ¶ 65(b).

[133] See **C-113** (Request for QDB II Terms of Reference, February 25, 2014).

[134] See **C-98**.

terms indicated concern about potential lots in the buffer zone for the Baiguate Park, but mentioned no concern about slopes.[135]

118. The MMA file for the QDB Phase 2 expansion project reveals nearly three years of communications back and forth concerning the request and to what extent construction would be permitted on certain lots located within the buffer zone.[136] The contour map of two phases of Quintas plainly indicate steeper and more concentrated slopes in Phase 2 as opposed to Phase 1, ***and at least 19% of QDB Phase 2 has slopes in excess of 60%.***[137]

119. Despite this simple fact, and despite the Statement of Defense belatedly invoking slope "concentration" as an environmental concern -- notwithstanding the nonexistence of any Dominican regulation or legislation or policy addressing it -- the Respondent granted the expansion request ***and has issued a permit to develop an additional 26 lots.***[138]

120. This approval was granted despite MMA's express communication with Jose Roberto Hernandez about slopes that exceed 60% in the development.[139] At it was granted three weeks after this communication. By contrast, the only communication with the Ballantines about 60% slopes was as follows: "your project has some slopes that exceeds 60%. Permission to expand denied."

121. This should perhaps not be surprising given that Hernandez has agreed to be a witness for Respondent. Within three months of his signing a witness statement, Hernandez received his permit to expand, despite slope and park issues.[140]

---

[135] Id.

[136] See Exhibit **C-117**, aggregating many of those communications between Hernandez and Respondent.

[137] See **Reply Expert Report of Eric Kay**.

[138] **C-90.**

[139] See **C-116** (Letter from Z. Gonzalez to R. Hernandez July 31, 2017).

[140] This approval arrived after complaining to witness Francisco Rivas about the delay in receiving his permit due

122. In stark and dispositive contrast to the MMA's treatment of the Ballantines, who were simply and repeatedly told that their expansion request violated Law 64-00 and thus was rejected, the MMA wrote several times to Hernandez advising that small portions of his proposed development needed to be modified due to potential concerns about slopes and the existence of the Baiguate Park buffer zone. Indeed, on July 31, 2017, the MMA wrote to Hernandez, discussing modifications to his plan.[141] Astonishingly, less than four weeks later, QDB II received its environmental license.[142]

d) Jarabacoa Mountain Garden

123. Located on the same mountain ridge as Jamaca De Dios, Jarabacoa Mountain Garden is owned by Dominican national Santiago Canela Duran. It is located directly below Paso Alto. Its property soars up from the Baiguate River, just before the waterfall, through a rugged, mature forest to an altitude of 1060 meters, connecting at the top with the bottom of Paso Alto. It is entirely within the eastern Baiguate watershed. JMG built its road and infrastructure before seeking and obtaining a license from the MMA in December of 2013 to develop 115 residential lots.[143] That permit was granted (one month before the final rejection of the Ballantines) despite Respondent Witness Navarro now confirming that ***at least 43% of the project has slopes in excess of 60%.***

124. So the Tribunal is not confused about the importance of this comparator, Respondent admits that more than 40% of the entire property is on a slope greater than what is supposedly allowed pursuant to Law 64-00, and yet this property was fully licensed without any restriction at all on the development of the 115 lots. ***At the very same time that Respondent was denying U.S.-owned Jamaca***

---

to the Ballantines' initiation of this Arbitration. See **Witness Statements of Francisco Rivas** at ¶17.

[141] See **C-116**.

[142] See **C-90**.

[143] See **C-30**.

the right to develop, it was granting the Dominican-owned JMG the right to develop its entire property -- all 115 requested lots.

125. The chronology of events leading to the approval of this project reveals the difference between being Dominican and American when it comes to dealing with Respondent. In June of 2013, JMG sought its Terms of Reference[144] and they were issued the following months (again, MMA refused to even issue reference terms to the Ballantines).[145]

126. On October 16, 2012, the MMA sent a denial letter that ***made no mention of the slope law*** (despite Respondent's confirmation now that more than 43% of the project exceeds the 60% slope limit), but instead initially refused the project because:

- the proposed project was within the ***water-producing*** area of the Baiguate Park.
- The project would affect local ***hydrology***.
- Given its steep topography and thick forest, the movement of the earth necessary to develop the project could lead to ***erosion*** and sedimentation in the water basin.
- Development of the project would lead to ***habitat destruction*** due to the elimination of vegetation, and the migration of ***fauna*** associated with such vegetation, as well as the contamination of the ***water*** and a reduction in the recharging of the ***aquifers*** and a change in the pattern of the ***run off***. [146]

127. Despite this daunting list of environmental concerns with this project,[147] JMG promptly sought reconsideration of the denial. It argued first that the Baiguate Park was more than 1.5 kilometers away from the boundary of the project, even though the Baiguate River was directly below the project.

[144] See **R-153**.

[145] See **R-144**.

[146] See **C-118** (Letter from Z. Gonzalez to S. Duran dated October 16, 2012).

[147] These concerns appear markedly similar to the checklist of items that the Statement of Defense continues to invoke to support why it refused any development at Jamaca: concerns about water sources and runoff, concerns about erosion, concerns about the microenvironment of the property.

It contended that the Park "does not apply to us, but clearly other currently active projects are indeed inside the area of the Baiguate Park," ***specifically noting Aloma Mountain*** as an "active" project.[148]

128. With respect to the forest and steepness of the terrain, JMG argued:

> According to a study by the Organization of American States, 67% of the country is of a forestry vocation, ***which is why if we take into account the slopes which there are and which some mountain projects are developing for ecological tourism, we would have to reinvent ourselves completely.*** In reality, not only in Jarabacoa, but in all of the municipalities suitable for mountain tourism, the land is of a forestry vocation. Giving better preservation of the land, than the cutting down and burning activities of raising livestock and agriculture.
>
> We are considering the implementation of a tree planting plan in the project which will mandate that 50% of the species in the green and common areas are native to the zone.
>
> All of the slopes will be replanted and protected with species which have a high capacity for securing the soil.
>
> In addition we will include a protection fringe for the river of more than 50 meters from its banks, which we will keep reforested and managed in order to have the best stream of the Baiguate River. [149]

129. JMG's appeal admitted the steepness of the property and indicated that was what made it valuable as a ecotourism property. Their contention was that if the forest itself made the land unsuitable for development there could be no mountain developments in the country, despite the fact that residential communities are better for the environment that the slash and burn agriculture of the past.

130. Throughout the appeal process, Respondent -- *including witness Navarro* -- worked cooperatively with JMG to ensure its complete approval. Indeed, during an initial technical visit in February of 2013, the technical analyst wrote the following:

> In that sense, and taking into account the conditions of the project, it is considered necessary to define the following measures:
>
> * To present by means of a letter, the portion of meters which each purchaser would use, as the information obtained during the follow up visit, the representative of the developer suggested

[148] See **C-119** (Letter from S. Duran to Z. Gonzalez dated October 26, 2012).

[149] Id.

that the total number of meters to be divided in lots, should be reduced by almost 80%, as a large number of the lots, would not be used for housing, but would be kept as part of the existing flora.

* To make an inventory of the possible number of trees to be moved.

* To define the method of provision of drinking water that is going to supply the project. To present the corresponding authorizations.

* To establish a minimum distance of 30 meters from the limits of the Baiguate River riverbank and the project, as well as the small internal streams and ravines.

* The waste water treatment system should be located more than 100 linear meters from the Baiguate River, with a difference of level in favor of the river, and waters below it.

* The developer should provide copies of the guiding regulations to each purchaser, in which the model of the building is established, the number of meters of each villa and a commitment to protect the flora.

* ***To adapt the slopes, in such a way that none exceed 30%***.

(emphasis added).[150] This inspection commission specifically proposed that the project work to "adapt the slopes" to ensure appropriate development. It remains unclear how this could be done given that more than 43% of the land in the project has slopes in excess of the limit of Article 122, but it is clear that the dramatically steep topography of Jarabacoa Mountain Garden was not a hindrance to its approval.

131. Of course, Jamaca was not given the option to "adapt" its manifestly less steep topography. It was simply told that its slopes were in excess of those permitted by law and no development could occur.

132. The inspection commission report continued:

Knowing the suggested conditions, and with the actual reality with which this province is living, ***with an extraordinary growth of individual constructions without authorizations from any institution, nor criteria for conservation of the environment, which could take Jarabacoa to the brink of a natural disaster,*** a product of improvisation and the opportunism of the human being. In that sense, the visiting commission considers that this Ministry should continue regulating this type of project, always and when possible, follow up and constant monitoring of

[150] See **C-120** (JMG Inspection Report of January 8, 2013).

> the work completed should be carried out, and the constructions which are not found to be in the process of environmental evaluation should be sanctioned. In that sense, and assuming the execution of the previous suggestions, this visiting commission considers the Mountain Garden project environmentally viable.[151]

133. This is a telling statement. The MMA contemporaneously admits the existence of mountain projects in Jarabacoa that are proceeding without a permit. It says that the MMA needs to "regulate" and "monitor" these projects and that noncompliant development should be "sanctioned." It then says that if its "previous suggestions" are implemented, the project is "viable."

134. Of course, JMG never "adapted" the steepness of its slopes. And the MMA did not regulate and monitor the development of JMG. By contrast, the Ballantines were never given any opportunity to even address any putative concerns of Respondents, and were not give any "suggestions" as to how to make their project "viable." This simple fact establishes the disparate treatment between these similarly-situated properties. Slopes that ostensibly prevented any development at all at Jamaca did not impact any development at JMG. Simply and unambiguously, the evidentiary record produced by the Respondents with respect to the approval process for JMG provides direct proof of the discriminatory treatment of the Ballantines.

135. A second inspection of JMG followed the next month, in March of 2013. That inspection team "noted that the tour took in 5% of the total of the surface area of said land, due to the fact that the topography is irregular" but even with that small slice of the project revealed "slopes varying between 40 to 70%."[152] Additionally, the inspector noted active waterways: "several ravines could be seen with permanent water in them (they had pipes in them and we asked what was the objective of the pipes, but

[151] Id.

[152] See **C-121** (JMG Inspection Report of March 8, 2013).

they did not know the explanation)."[153] Indeed, the inspection was cut short when the team realized that much of the "land could be impassable."[154]

136. However, despite the abbreviated inspection, the team confirmed certain "potential environmental impacts," including the "contamination of the ground and water due to earth movement … during the division into lots and construction of villas" and the "effects on the vegetation coverage due to the development of the project."[155] The inspection team "analyzed the negative impacts which this type of project would have on the productive sources of water which are born within it, and the environment," and decided to let the Technical Evaluation Committee make the final determination.[156]

137. And so, with these two inspections in hand, the project was visited by Zacarias Navarro, the MMA's Director of Environmental Evaluation and ***the very witness who now trumpets the supposed environmental concerns that prevented the expansion of Jamaca.*** His May 10, 2013 inspection report notes that:

- the project had already constructed roads and run electricity from Paso Alto despite no permit;
- there was erosion on the roads, which needed maintenance and stabilization work;
- water was to be supplied from the Artemisa Ravine, "which has water all year long";
- that project needed to "present" a design for rainwater drainage, to minimize effect on water sources, and avoid "erosion and contamination of the microbasin of the Baiguate River;"
- the project "needed to stabilize and reforest parts of the land where landslide issues existed or may exist";

[153] Id.

[154] Id.

[155] Id.

[156] Id.

- "In the areas considered for protection due to their location with steep slopes, or being close to a body of water" the project should not alter original vegetation. "In this way the conservation of the associated species of flora and fauna is guaranteed."[157]

These are the same environmental issues that Navarro now cites to support his denial of Jamaca de Dios. Yet they were no barrier to the permit issued to JMG.

138. On July 24, 2013 the Technical Evaluation Committee, including Navarro, signed off on the approval of 115 lots for Jarabacoa Mountain Garden.[158] And less than two months later, on September 23, 2013, Navarro visited Jamaca de Dios as part of its appeal for reconsideration. But as his Witness Statement now boldly states: "I explained to them that in addition to slope and earth movement issues, the area they proposed to develop was within the limits of the Baiguate National Park, an additional reason why the JDD Expansion Project" could not move forward.[159]

139. The differential treatment here is stunning and unavoidable. JMG has steeper slopes that JDD and yet this was not a barrier to approval. JMG had landslides, and inspectors repeatedly noted the certainty of erosion in connection with development, and yet this was not a barrier to approval. JMG has active water "all year long", and yet this was not a barrier to approval. Within two months of each other, Navarro was accepting the Dominican project's appeal of its original denial, and was rejecting the American project's appeal of its original denial. This is discriminatory, it is inequitable, it is arbitrary, and it is a blatant and irrefutable violation of the Treaty promises that Respondent made when it signed CAFTA-DR.

140. Respondent choose to ignore the dramatic slopes of JMG, to ignore its location in the watershed of the Baiguate River with water running through the project, to ignore the erosion that was

[157] See **C-122** (Navarro Inspection Report of May 10, 2013).

[158] See **C-123** (Technical Committee Approval July 24, 2013).

[159] **Witness Statement of Z. Navarro** at ¶48-49.

already evident on the property, to ignore the unpermitted development that was already evident, to ignore any effect upon the ecology of the forest, and to grant the politically-connected Dominican owner permission to develop.[160] Even if there were not a dozen other mountain projects that were allowed to proceed in and around Jarabacoa at the same time the Ballantines were being refused any right to expand, Respondent's acts with respect to Jarabacoa Mountain Garden would be sufficient to mandate an award for the Ballantines.

e) Mirador Del Pino

141. Located on a mountain ridge to the north of Jamaca de Dios, Mirador Del Pino is owned by Dominican Renan Van der Horst. Mirador was granted permission to subdivide its property into 77 buildable lots in December of 2012, ***despite Respondent Witness Navarro now confirming that at least 7% of the project has slopes in excess of 60%***.[161]

142. Mirador requested Terms of Reference in July of 2010, which were issued in January of 2011.[162] This began a two-year process of communication between Mirador and the MMA to define how many lots could be appropriately developed, despite environmental issues promptly identified by Respondent. Respondent first advised Mirador that several of its lots were too close to a ravine that was

[160] The ASOC documented the political influence and presidential intervention that helped to ensure this environmental permission. This influence extended to the ability to secure water for use at the project as well. Indeed, advised that he needed a No Objection letter from INDRHI take water from an active waterway for use at his development (**C-124**), Canela was promptly able to secure the assistance of the Minster of the Environment, Bautista Gomez Rojas, who himself wrote the letter to the Director of INDHRI seeking the permission to use the water (**C-125**). Not surprisingly, that no objection letter was issued by the Director to Gomez Rojas only eleven days later. (**C-126**). Needless to say, the Minister of the Environment did not intervene on behalf of the Ballantines.

[161] **Witness Statement of Z. Navarro** at ¶57.

[162] See **C-99**.

the source for a tributary of the North Yaque River.[163] The MMA identified a portion of the property, out of the 84 lots that Mirador sought to develop, that needed to be removed from the submission.[164]

143. MMA later identified concerns about the slopes at Mirador del Pino, but this too did not prompt a refusal of the request to develop. In January 12, 2012, Respondent wrote to the project requesting that it present a development design that reflected the exclusion of the lots related to the ravine issue, and stated that "in addition the lots with slopes equal to or more than 60% will be excluded, according to Art. 122 of the law 64-00."[165]

144. However this did not stall the approval. In April of 2012, a field inspection team visited Mirador and made these "observations": "we recommend that all of the lots which are on the banks of sources and water and have a very steep slope which is over the limits allowed by law 64-00 are not used for construction."[166] ***These inspectors did not recommend that the project be rejected.*** Unlike the inspectors at Jamaca, they did not say "your project has some slopes that exceeds 60%. Permission to expand denied." Rather, they simply "recommended" that the steep lots "are not used for construction."

145. Indeed, the December 2012 permission granting Mirador the right to develop its lots states only that the project must "comply" with the slope law.[167] To be clear, despite the fact that MMA acknowledged that portions of Mirador contained slopes in excess of 60%, it approved this Dominican-

[163] See **C-127** (Letter from E. Reyna to R. Van Der Horst dated March 28, 2011).

[164] Of course, a year earlier, in 2011, Respondent did not identify any specific portion of the Jamaca expansion area that needed to be removed from its application. It simply rejected the entire application.

[165] See **R-167**

[166] See **C-128** (April 17, 2012 Notes of Mirador Inspection).

[167] See **C-29**.

owned project, and merely instructed the developer to be sure to "comply" with the law.[168] ***Notwithstanding this "instruction," a home was promptly built in Mirador on a slope of 75%.***[169]

146. Once again, the evidentiary record produced by the Respondents with respect to the approval process for Mirador provides direct proof of the discriminatory treatment of the Ballantines. The MMA collaborated with Mirador, it collaborated with Quintas Del Bosque, and it collaborated with Jarabacoa Mountain Garden, asking the developers to adjust their development plans to address any environmental concerns at these mountain projects. The MMA did not collaborate with the Ballantines, choosing instead to simply deny their expansion request repeatedly and unconditionally.

f) Aloma Mountain

147. Aloma Mountain is owned by Juan Jose Dominguez and essentially borders Jamaca de Dios at the top of the two properties. Although Aloma is purportedly located in the Baiguate National Park, Respondent has allowed Dominguez to develop with impunity. Respondent insists that Dominguez has been denied his permit, but the MMA's website continues to show his project as under consideration.[170] Ultimately, Respondent simply cannot refute the stark video evidence that demonstrate the dramatic development efforts that have been undertaken by Dominguez in just the last two years alone.[171]

148. Respondent does not intend to prevent Dominguez from creating the mountain resort he so desperately wants. The Statement of Defense matter of factly announces that Aloma has been denied

[168] By contrast, MMA repeatedly rejected Jamaca's application in its entirety because some small portion of Phase 2 was claimed to have slopes beyond 60 percent. MMA did not grant permission to Jamaca and instruct the Ballantines to comply with Article 122, as they did for Mirador. Nor did they specifically refuse to permit development of defined areas in Phase 2 because of the alleged slopes. Instead, they prevented any expansion of Jamaca de Dios, while they expressly allowed development of both Mirador and Jarabacoa Mountain Garden.

[169] See **Reply Expert Witness Statement of Eric Kay**.

[170] The status of various projects can be found at www.ambiente.gob.do/consulta-general-de-proyectos/.

[171] See **C-93** and **C-129**.

its permit,[172] and trumpets the "fine" Respondent has imposed upon Dominguez for developing without a permit. But that fine was merely for show, ***as it was promptly reduced by more than 80%,[173] and to this very day there is no evidence that Dominguez has paid it.***

149. Indeed, Respondent submits its own exhibit R-159, which is a letter dated May 23, 2017 -- written almost four years after the fine was imposed and shortly before the Statement of Defense was filed -- asking Dominguez to pay the fine. The evidence before this Tribunal is plain -- neither his permit denial nor his unpaid fine has not stopped Dominguez from continuing to deforest and subdivide its land on the top of the mountain, directly adjacent to the dormant Phase 2 of Jamaca de Dios.

150. So there is no confusion, Aloma has now subdivided its property into 115 residential lots. Internal roads have been built, common areas - a lake, a park, a clubhouse -- are complete, and electric and water have been installed.[174] Indeed, Dominguez intends to build the a hotel just as the Ballantines has planned in Phase 2.[175]

151. Because the projects are at the same altitude, the Phase 1 road of Jamaca de Dios -- built to exacting international standards -- could easily be extended to connect to Aloma Mountain.[176] Dominguez is desperate for this because his current road averages a grade of 23%, with some portions at

[172] The ASOC identified the inconsistency concerning the status of Aloma Mountain. Exhibit R-6 is a letter from the Ministry to Juan Jose Dominguez dated December 5, 2013 which purports to deny permission to develop. However, Exhibit C-46 is a Letter from Silmer Gonzalez Ruiz to Arvi Marmol dated February 11, 2014 (68 days later) which indicates that Aloma remains in Environmental Technical Evaluation. Exhibit C-40 is a letter dated December 22, 2016 (***more than three years later***) that also indicates that Aloma Mountain remains under environmental review. Made aware of this inconsistency by the ASOC, MMA tried to clean up its file, issuing another denial in April of this year. See **R-142**.

[173] See **R-055**.

[174] See **Reply Expert Witness Statements of Eric Kay.**

[175] See **Reply Witness Statement of Lisa Ballantine** at ¶13-14.

[176] See **Reply M. Ballantine St** at ¶29.

nearly 30%.[177] There are ***18 switchbacks*** between the public road in Jarabacoa and the gates of Aloma Mountain, and travel without a four-wheel drive vehicle is difficult and dangerous.[178] This Tribunal has seen the video comparison of the Jamaca and Aloma roads.[179] Dominguez wants the Ballantines' road. Indeed, Jose Roberto Hernandez -- witness for Respondent -- has confirmed that things "would have gone easier" for the Ballantines if they would have allowed Dominguez to use their road.[180]

152. Dominguez instead used his significant political influence to fully stop the expansion of Jamaca de Dios.[181] He is the brother of Leonel Fernandez' first wife, and Fernandez was the President of the Dominican Republic from 1996-2000, and then again from 2004-2012, during which the Ballantines sought permission to expand Jamaca de Dios. Dominguez was the *de facto* spokesman and representative of Fernandez in Jarabacoa during all twelve years of his presidency.[182] Dominguez was also the son of Piedad Quezada Dominguez, who was the mayor of Jarabacoa from 2010-2016, again while the Ballantines were seeking permission to expand. Additionally, Dominguez had close ties to Bautista Gomez Rojas, who was Minister of the MMA from 2012-2016. Gomez Rojas had been Minister of Public Health from 2008-2012, and during that period Dominguez was the Vice Minister of Oral Health directly below Gomez Rojas. These political ties have allowed Dominguez to develop his property with immunity and to improperly use MMA as a barrier to the expansion of Jamaca.

---

[177] Id. at ¶45.

[178] Id.

[179] See **C-47**.

[180] See **Witness Statement of Jeffrey Schumacher** at ¶9.

[181] The Ballantines' acquisition of Paso Alto directly to the east, as well as Phase 2 properties to his west would have greatly hindered Dominguez's ability to compete.

[182] **Witness Statement of Z. Salazar** at ¶ 20.

153. Indeed, as set forth in the Amended Statement of Claim, the Nuria report -- broadcast across the DR -- highlighted the disparate treatment between Jamaca de Dios and Aloma Mountain and highlighted the political connections between Dominguez and MMA.[183] Her investigative work reveals how Dominguez used government employees to build his development, how he used government machinery to create his roads, how he stole electrical installations that were destined for a poor community, and how he went from being a dentist to a millionaire during the presidency of Leonel Fernandez.

g) La Montana

154. This project was identified by Respondent in the witness statement of Eleuterio Martinez, who presented a map of comparable projects to Jamaca. Located partially within the Baiguate Park, a few miles southwest of Jamaca, this residential project is being developed by Dominican David Jimenez.[184] ***The entire development is above 1300 meters***,[185] which is higher than the top of the denied Phase 2 of Jamaca de Dios, making a mockery of Statement of Defense's repeated invocation of altitude as a significant concern with the Ballantines' expansion request.

155. A site visit reveals significant slopes throughout the project.[186] There are subdivided lots staked out with lots numbers, and the property is entirely forested.[187] Although Respondent has refused to produce any documents concerning this project, it is intended to be the largest mountain project in the

[183] *See* "Nuria," https://www.youtube.com/watch?v=wYLsUM8Zax4_(Jun. 29, 2013)(last viewed 1-3-17); *see also* Transcript of "Nuria" (Jun. 29, 2013) (C-25).

[184] **Reply M. Ballantine** at ¶40-42.

[185] Id.

[186] **Reply Expert Witness Statement of Graviel Pena** at ¶4.

[187] Id. It is located at the southwest base of the Mogote Mountain at altitudes similar to those used in the *May and Peguero* study, which is the only contemporaneous study that Respondent has produced as scientific support for the demarcation of Baiguate National Park. By contrast, the altitudes of Jamaca are markedly lower.

country.[188] According to the MMA website, it is planned in three phases and it is more than three times as large as the proposed expansion of Jamaca.[189]

156. One of its investors has publicly bemoaned the fact that its permit was delayed due to the existence of this arbitration and the fact that it is not simply "business as usual" dealing with MMA, but. representatives of the project have confirmed that formal MMA approval is forthcoming.[190] Of course, it is puzzling why this project has been given reference terms, submitted an environmental study, and is being approved, when this project appears to be in plain violation of the new law Respondent issued earlier this year, Resolution 009-17, which forbids the development of residential communities at an altitude above 1300 meters.[191]

h) Sierra Fria

157. This project is owned by Dominican Daniel Espinal and his partners. Although it appears this project was initially denied by the MMA in November 2016 in part because of its slopes,[192] it has continued to sell property and now has been -- or is about to be -- fully permitted.

158. Indeed, as the Witness Statement of Calvin Byers makes clear, Sierra Fria has already sold several properties.[193] ***Sierra Fria has confirmed to potential buyers that the development will receive its permit no later than January 2018***[194] -- conveniently after this submission -- and it is

[188] **Witness Statement of F. Rivas** at ¶25.

[189] See www.ambiente.gob.do/consulta-general-de-proyectos/.

[190] **Witness Statement of F. Rivas** at ¶26.

[191] See **C-130** (Resolution 0009-17). This new regulation was written earlier this year perhaps to give credence to Navarro's belated reliance on altitude to support -- after the fact -- his denial of Jamaca Phase 2.

[192] Respondent produced this denial letter, which occurred after the constitution of this Tribunal, but has not produced any other evidence concerning the reconsideration and existing or pending approval of its development.

[193] See **Witness Statement of Calvin Byers** at ¶4.

[194] Id. at ¶2,5.

actively marketing the sale of condominiums with a rental management program, just as the Ballantines proposed to do as part of Phase 2.[195] Sierra Fria is even using the same management company. It holds open houses for potential investors each weekend,[196] trumpeting its property as similar in scope and luxury to Jamaca de Dios.[197] During a recent open house, Espinal give repeated assurances that the project had been approved by MMA and that a formal permit would be issued within months.[198]

159. Indeed, Respondent's Ministry of Tourism website publicly confirms that the project received its definitive CONFUTOR approval on July 27, 2017.[199] Tellingly, that approval was signed by Zoila Gonzalez, the very same MMA manager that signed the original "denial" of the Sierra Fria permit only eight months earlier. The MMA would, of course, not have signed off on the environmental viability of the project for CONFUTOR approval if it had fully and finally denied the same project months earlier.

160. Moreover, as its marketing brochure confirms, Sierra Fria continues to develop at full steam.[200] It intends to build 133 units.[201] It has launched a significant publicity campaign with current billboards in and around Jarabacoa. It has a robust website and a network of brokers working to sell its more than 113 condo units and villas, which will all be constructed by the developer.[202]

---

[195] See **C-131** (Sierra Fria brochure). See also **C-133** (Sierra Fria Deposit Agreement) and **C-134** (Sierra Fria Sales Agreement).

[196] See **C-132**.

[197] **Witness Statement of Calvin Byers** at ¶3.

[198] Id. at ¶5.

[199] See http://mitur.gob.do/configurar/2017-consejo-de-fomento-turistico/. See also **Reply Ballantine St** at ¶36.

[200] See **C-131**.

[201] **Reply M. Ballantine St** at ¶38.

[202] Id. at ¶38-39. The fact that Sierra Fria now intends, without any brand recognition, to construct and sell more than 4 times the number of condo units that Jamaca de Dios planned for its Phase 2 reveals the Ballantines'

161. Both Valentina Dominguez and Abelardo Melgen, former brokers for Jamaca de Dios, are now brokers for Sierra Fria, and they have confirmed that Daniel Espinal worked directly with Minister of Environment Dominguez Brito to secure the MMA approval for Sierra Fria.[203]

162. Sierra Fria is a copycat project of Jamaca de Dios. It has lifted the Ballantines' expansion plan and now has approval to pursue it. Indeed, Sierra Fria compares itself to Jamaca during its sales presentations to potential investors.[204]

163. Respondents' apparent effort to hide the fact that the project's original denial has been reversed makes plain that Respondent is simply attempting to generate documentation to "justify" their denial of Jamaca Phase 2, when it has no intention of preventing the development of this project.

i) Rancho Guaraguao

164. This project was developed almost entirely within the Valle Nuevo Category 2 National Park in Constanza after the Park was created,[205] and it is owned by Dominican Miguel Jimenez Soto, a major general of the Dominican armed forces. It is also a development similar to Jamaca de Dios, with 52 luxury villas, a restaurant, and common areas.[206] However, this project was built entirely without an

---

expansion proposal to be exceedingly conservative, and not the "pipe dream" that Respondent asserts.

[203] **Rivas St** at ¶20 and **Reply M. Ballantine St** at ¶36.

[204] **Byers St** at ¶3. Moreover, in an email exchange with Michael Ballantine, Abelardo Melgen joked that Michael should be considered the "godfather" of the project. **Reply M. Ballantine** at ¶34-35.

[205] Originally created in 1996 under the name Juan Bautista Pérez Rancier Category 2 National Park, (Presidential Decree 233-96) the name of the Park was changed in 2004 to Valle Nuevo, with the implementation of Protected Area Law 202-04, but its classification remained unchanged. Again, it is important to reiterate that there are two mountain tourism poles designated for mountain development by law in the Dominican Republic. One is Jarabacoa and the second one is Constanza. There are 32 provinces in the Dominican Republic and both of these cities are located in La Vega province. They are separated by less than an hour and fifteen minute drive on the new Odebrecht Road.

[206] *See* Exhibit C-152, which shows that Rancho Guaraguao is considered an eco tourism project. The accompanying pictures in Exhibit C-152 show that Rancho Guaraguao is at a high altitude, contains significant slopes, and has numerous houses and other structures on those slopes.

environmental permit, it expanded around 2010 without a permit, and it still does not have a permit.[207] It was also developed at an altitude between 1450 and 1900 meters,[208] *well above the proposed Phase 2 of Jamaca*. Just like La Montana, this development exposes Respondent's effort in the Statement of Defense to belatedly rely on altitude concerns as a critical factor driving the denial of Jamaca's expansion permit.

165. Tellingly, in 2015, Respondent paved a road from Constanza to the entrance of Rancho Guaraguao. Not surprisingly, the Respondent's Minister of Public Works, Gonzalo Castillo, is a property owner at this unpermitted, luxury mountain development built entirely within the boundaries of a national park.[209] It also has developed freely with slopes over 60%.

166. What Jamaca de Dios represents to Jarabacoa is exactly what Rancho Guaraguao represents to Constanza. The MMA now purports to be limiting new constructions in Rancho Guaraguao, *since the filing of this arbitration,* to try and minimize the previous history of unfettered development.

j) Los Auquellos

167. This 35-lot project is located in mountain range on the north side of Jarabacoa and is owned by Dominican Gerineldo de los Santos. He has built 14 homes since the mid 2000s without an environmental permit. An April 2016 site visit by the MMA revealed homes built on slopes well in excess of 60%, but no fine was issued and development was not halted.[210] However, after the

[207] Since Respondent produced no documents concerning any approval of this project within a Category 2 National Park, it apparently remains unlicensed to this day.

[208] **Reply M. Ballantine St** at ¶31.

[209] **Reply M. Ballantine St** at ¶32.

[210] See **C-135** (Los Auquellos Inspection Report, March 30, 2016).

submission of the Amended Statement of Claim, a second site visit was made in May of 2017.[211] Finally a third inspection was made July, 2017, resulting in a fine of merely US$6,000 for failing to obtain a proper permit and building homes on slopes over 60%.[212] This is simply another failed effort by Respondent to belatedly appear as though it is applying its laws equally without regard to nationality.

k) Alta Vista

168. Also located in the province of La Vega it is owned by Dominican Franklin Liriano. It is a mountain residential community approved by MMA in la Vega with slopes over 60%. Inspired by la Jamaca de Dios, it began with a beautiful mountain restaurant, in order to attract people in order to sell their real estate properties as well as their condominiums. Due to his success in marketing Jamaca de Dios, Mr. Liriano also approached Michael Ballantine several times to propose a joint venture where Mr. Ballantine would promote the real estate component of Alta Vista. Shortly after the opening of the Alta Vista project, the Ministry of Tourism paved the previous gravel road several kilometers to his front gate.

l) Monte Bonito

169. This gated mountain project is located on the other side of la Jamaca de Dios. It is owned by the Ramirez family, the owners of the largest coffee plantations in Jarabacoa. It is located on the other side of the North Yaque River. It has built both homes and roads on slopes over 60%. It has never been permitted, despite building dozens of vacation homes over the last twelve years.[213]

m) Other Unpermitted Projects in Jarabacoa

170. Environmental Law 64-00 was promulgated in 2000 and requires all property development to obtain a permit from MMA. But it has been largely ignored throughout the country and

[211] See **C-136** (Los Auquellos Inspection Report, May 31, 2017).

[212] See **C-137** (Los Auquellos Fine, July 31, 2017).

[213] **Reply Expert Witness Statement of G. Pena** at ¶21.

especially in and around Jarabacoa (as noted by the MMA's own inspectors). Presently, the following residential communities are operating without a permit: Jarabacoa Mountain Village, Cabaña Los Calabazos, Monte Sierra, Proyecto El Naranjo, Proyecto Santa Ana and Vista del Campo.[214] This is further evidence of the arbitrary application of Law 64-00 that freely allows Dominicans -- but not Americans -- to operate notwithstanding the lack of an environmental license.

2. Respondent's Efforts to Justify Disparate Treatment for Jamaca De Dios Is Unsupported

171. Respondent's Statement of Defense attempts to distinguish all of these projects from Jamaca de Dios, in a belated effort to justify their facially and undeniably different treatment of the Ballantines. Despite these efforts, the reasoning presented by Respondent is the epitome of "after the fact" rationalization. For example, although it insists now that altitude considerations are critical to the evaluation of mountain projects, and points to the altitude of Jamaca as a driving factor behind its refusal to license its expansion, there was absolutely nothing in Dominican law or regulation that identifies altitude as a consideration in the evaluation of a project's environmental viability.

172. Respondent's owns document production confirms this. Compelled to provide any documents that describe "guidance from MMA or another agency of Respondent regarding the altitude of a project being relevant for slope determination or project evaluation," it produced no documentation.

173. Instead, the DR is forced to rely upon the witness statement of Zacarias Navarro to trumpet the belated importance of altitude.[215] But there is absolutely no discussion of altitude in any of the contemporaneous documents concerning the Respondent's consideration of Jamaca's expansion request. ***During the course of five inspections, and four technical committee meetings, and***

[214] **Reply Expert Witness Statement of G. Pena** at ¶20.

[215] Respondent may invoked Resolution 009-17, **C-130**, but this new law prohibiting residential construction above 1300 meters was only passed this year, perhaps to try to add credence to Respondent's new concerns about altitude. And indeed, Phase 2 of Jamaca de Dios would have ended before 1300 meters.

throughout its repeated communications with the Ballantines, at no time did the MMA or its engineers cite altitude as a concern with respect to Phase 2. It is a brightly blinking beacon of *post hoc* rationalization that Navarro is forced to rely so heavily now on the altitude of Jamaca as primary support for his denial of Phase 2.

174. Indeed, there are other projects in and around Jarabacoa with similar altitudes that were approved by the MMA or allowed to proceed without a permit. According to Navarro, Phase 2 of Jamaca de Dios would climb to 1260 meters above sea level. However, Aloma Mountain (1230 meters), Paso Alto (1180 meters), Jarabacoa Mountain Garden (1060 meters), La Montana (above 1300 meters), and Rancho Guaraguao (1450-1900 meters) all have altitudes similar to or greater than the highest point of proposed Phase 2, and each of the projects has moved forward.

175. Fatally to this arbitration-created defense, Navarro can point to absolutely no contemporaneous consideration of altitude and can point to no regulations applicable to Phase 2 to support his claim now that the altitude of Jamaca Phase 2 supports Respondent's denials. Similarly, at no time did any MMA personnel invoke the "concentration" of the slopes as a reason for the singular and complete denial of Jamaca's expansion request. Indeed, the Respondent does not even clearly identify what it means when it refers to "concentration" of slopes.

176. Respondent also tries to put forward a patchwork series of general arguments about the differing environmental conditions at Jamaca to distinguish it from the approved projects of Mirador Del Pino, Paso Alto, Quintas Del Bosque I and Jarabacoa Mountain Garden. These are entirely unavailing.

177. The Statement of Defense feigns concern about "risks to the surrounding water resources" in the event of Phase 2 development.[216] But Respondent's own inspection of Phase 2 confirmed that

[216] **SOD** at ¶158.

there are there no active waterways in Jamaca,[217] unlike those that exist in Quintas, Mirador Del Pino, Jarabacoa Mountain Garden, Paso Alto, and Sierra Fria. This argument rings incredibly hollow and can be facially rejected given the MMA's approval in 2013 of 115 lots at JMG beginning ***only 30 meters above the Baiguate River***. Indeed, JMG is authorized to take water from an active waterway in their project, as are both Quintas and Mirador Del Pino.

178. Respondent then generically invokes concern about the "endemic species" and "biodiversity of the ecosystem" at Jamaca,[218] but does not even attempt to argue that other projects do not share similar ecologies. The evaluation files produced by Respondent for these projects proves that any such contention is silly. Indeed, the expert witness statements of Jens Richter and Fernando Potes note that the ecosystem of Jamaca Phase 2 is already fragmented more than the intact ecosystem of comparable projects, because of the land's prior agricultural use.[219] The pristine forests of JMG, Paso Alto, and Quintas did not experience the impact from farming and other uses that Phase 2 of Jamaca experienced prior to the Ballantines' purchase.

179. Finally, Navarro's contention that the proposed road for Phase 2 was potentially unsafe (apparently because it may require switchbacks) is entirely unsupported, and directly refuted by the expert testimony of mountain road engineer Eric Kay.[220]

3. Respondent's Post-Arbitration Efforts to Justify Its Treatment of the Ballantines Are Unavailing

"There are some things you can't cover up with lipstick and powder."
-- Elvis Costello

[217] See **R-108**, Point #4 showing the inspectors found no active water in Jamaca, or within 2 kilometers!

[218] **SOD** at ¶158.

[219] See **Expert Witness Statements of Jens Richter and Fernando Potes.**

[220] **Witness Statement of Eric Kay** at ¶11-12.

180. Respondent's "after the fact" efforts concern more than simply its arbitration-generated reasoning for its denial of Phase 2. Respondent is also trying to "cover up" other blatantly discriminatory and wrongful acts it undertook with respect to the Ballantines by levying belated fines against projects (that apparently have not been collected), issuing new laws, and (finally) creating a management plan for the eight-year old national park into which it drew the Ballantines' property.

181. The Amended Statement of Claim documented the MMA's armed inspection of Jamaca de Dios in May of 2009.[221] The MMA claimed that by creating access to and flattening a small space on three lots -- lots which had been approved for development -- and by removing a few small trees, Jamaca de Dios had violated environmental regulations.[222] Almost six months later, on November 19, 2009, on the basis of this purported inspection, MMA imposed a fine of almost one million DR pesos (more than US$27,500) on Jamaca de Dios.[223] The Ballantines' contention that the size of this fine was evidence of discriminatory treatment by Respondent has been met with a response that the fine was appropriate in part because the Ballantines had failed to submit environmental compliance reports (know as ICA reports), that were required semi-annually. But no Dominican-owned projects have been required to submit ICA reports and the Respondent has failed to present evidence that any of the eleven projects listed above have regularly, or even sporadically, submitted these reports.[224] Indeed, the only ICA reports that appear to have been submitted to Respondent are *three* from Paso Alto (in 2008 and 2009, prior to its efforts to sell to the Ballantines) and *one* from Quintas del Bosque, in 2014 at the time

[221] **ASOC** at ¶81-83.

[222] It must be noted that at the time of this fine, Jamaca had planted over 50,000 trees throughout its property, and by the time the Ballantines were forced to abandon their investment, they had planted more than 80,000.

[223] Resolución SGA No. 973-2009 (Nov. 19, 2009) (**C-7**).

[224] During the document production phase of this arbitration, Respondent was required to produce ICA reports for the various comparators identified in the Amended Statement of Claim.

of its expansion request.[225] Not a single report from Mirador or from Jarabacoa Mountain Garden, despite their approval for development after the denial of the Ballantines' request. By contrast, Jamaca has submitted its report every six months since the fine was levied, a total of 16 reports.

182. Not a single mountain project was similarly fined for its failure to submit these environmental reports. Insistent that "the Ministry has imposed fines on … entities when they have not submitted the required ICA reports," the Respondent can point only to a fine imposed in ***January of 2017*** against the owner of a service station.[226] Respondent has identified no other mountain projects having been fined as the Ballantines were for the failure to submit ICA reports ***until after*** receiving the Amended Statement of claim.[227] There can be no other explanation for this treatment other than that the Ballantines were targeted by the MMA for discriminatory treatment in an effort to deny the continued development by an American of a successful residential community in the heart of the DR.

183. Respondent insists that Aloma Mountain has been fined an even larger amount for building without a permit. But this "defense" fails because Aloma was allowed to operate with impunity for years -- despite the local MMA director filing at least two complaints about unauthorized building with the Respondent. These complaints, in May of 2011 and March of 2012, were ignored; indeed, they do not even appear in the produced MMA file for Aloma Mountain. Although the MMA did "fine" Aloma Mountain 1.7 million pesos in late 2013 for "conducting work without a permit", that fine was reduced in early 2014 to 350,000 pesos, an 80% reduction, ***and there is no evidence that Aloma Mountain has actually paid that fine.***

[225] **Reply Expert Witness Statement of G. Pena** at ¶8.

[226] See **R-072**.

[227] Respondent fined Paso Alto earlier this year, despite the fact that the project has been dormant since the plan to sell to the Ballantines fell apart because of Respondent's discrimination. This fine was issued against a witness for the Ballantines-- Omar Rodriguez -- who dared to testify on their behalf. Respondent did not fine Quintas del Bosque, which has only submitted one ICA report and has been active for the last nine years. Instead it rewarded Jose Roberto for being a witness on their behalf with his environmental permit for his expansion.

184. This feigned effort at showing "equal" treatment was a lame measure taken only after the MMA received formal complaints levied by the Ballantines concerning Aloma being freely being developed while they were shut down. Indeed, the MMA had to send a letter to Dominguez in May of 2017 -- after the filing of the Amended Statement of Claim was filed detailing Dominguez' illegal development -- requesting payment of the fine. Three years after the fine was levied and then reduced by 80%, the politically-connected Dominguez still had failed to pay it, while continuing to deforestation and develop his mountain.[228] It appears as though environmental licenses are not always required by Respondent and its MMA, depending upon how much political pull one has.

185. Respondent has even passed laws to assist it in the arbitration. Right as the Ballantines were making their document requests, the Respondent issued a Resolution asserting that MMA documents were private and could not be disclosed. Respondent actually sought to use this June 2017 Resolution as a basis to refuse to produce documents.

186. With respect to the Respondent's assertion that the MMA takes into account more than the slopes themselves, Respondent again creating a Resolution this year that asserts that this additional information should be considered.

187. Between the fines levied this year, the Park Management Plan made just before the Statement of Defense, the recent alleged denials of permits (even though the projects are still developing), the new Resolution regarding MMA documents, the new Resolutions covering up the fact that no documents exist regarding the additional considerations for slopes, Respondent has been very busy in the last year trying to cover up its behavior.

[228] The original site plan for Aloma Mountain reveals the extent to which Dominguez intends to develop his project. Dominguez intends to build a hotel, and it was Dominguez's desire to have the first mountain hotel in the region -- as well as access to the Ballantine's finely engineered Phase 1 road -- that drove his efforts to ensure that the Ballantines' expansion request was denied.

4. The Creation of Baiguate Park Does Not Justify a Denial of the Ballantines' Expansion Request Because Respondent Allows Development in Category 2 National Parks

188. But building without a permit is not the only development that Respondent allows and even encourages. When it realized after three years that its slope denial of Jamaca would not stand up to scrutiny, the DR pulled out its trump card -- the Baiguate National Park. It told the Ballantines *for the first time* in January of 2014 that they could not expand up the mountain because the mountain had been designated as a protected area more than 4 years earlier. This astonishingly belated justification for denial made the Ballantines realize that the only equitable treatment they could hope to receive was through invocation of CAFTA-DR.

189. Plainly the refusal to permit development was an expropriation. Respondent's Statement of Defense essentially admits that -- dedicating only six of its 178 pages to a half-hearted contention that because the DR did not put *all of the Ballantines' investment into the Park,* that this Tribunal cannot find an indirect expropriation. Indeed, Respondent insists the entire Park issue is simply a "red herring" because the real reason for its denial was the slope -- "the permit would not have been granted even if the Baiguate National Park had never existed."[229]

190. To reiterate, the Baiguate National Park was created in 2009 and it was not until almost five years later in 2014 that MMA, the Dominican agency tasked with managing protected areas, invoked the Park as a justification for why the Ballantines would be denied their expansion permit. If MMA had actually believed that a portion of the development of Jamaca de Dios could be restricted on the basis that it was located within Park boundaries, this concern should have been raised years earlier, and been relied upon by MMA in its earlier denials of the Ballantines' expansion request. The belated

[229] **SOD** at ¶4-5.

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

191. It remains puzzling even now why the Ballantines could not continue their successful ecotourism project within the Baiguate Park. Dominican law expressly permits ecotourism within a Category 2 National Park, ***as the Statement of Defense acknowledges***, and as the belatedly scrivened Park Management Plan makes plain. The MMA has always recognized Jamaca de Dios as ecotourism, as its own inspection notes confirm and the Statement of Defense acknowledges. When the Ballantines first learned about the Park in September 2010, their environmental company confirmed low density ecotourism like Jamaca de Dios is allowed in Category 2 Parks.[230] Moreover, in December 2010, the Ballantines received provisional CONFUTOR status to expand their project into the National Park, which confirmed that the MMA believed that the project (including portions within the Park) was environmentally viable. The Ballantines were given no reason to believe or anticipate that the existence of the Park would be a basis for denial their ecotourism expansion, especially with Dominguez building directly next door.[231]

192. And indeed it was not, as Respondent did not even invoke the Park as a denial basis until its final rejection letter in January 2014. To be clear, Dominican law allows ecotourism within protected areas. The Ballantines' permit could have and should have been granted despite the discriminatory and arbitrary creation of the boundaries for the Park. ***It was only when the MMA switched gears in 2014 and first invoked the Park to justify its denial that the illegal expropriation occurred.*** At that point, the Ballantines had owned all of their Phase 2 property for three years, and its value was dramatic.

---

[230] See **C-102** and **C-103**.

[231] The Ballantines intended to purchase even more of the land surrounding its current property boundaries, but when they received the first denial from Respondent in September of 2011, they chose to halt additional purchases to mitigate any additional losses that may result from Respondents' treaty violations.

193. It is understandable why Respondent seeks to downplay to the Park, because the evidence now makes clear that invoking the Park against the Ballantines was not only expropriatory, but it was also arbitrary, discriminatory, and inequitable, for multiple reasons.

194. *First*, the Ballantines' property should never have been included within the boundaries of the park, and if it was to be included, then the property of other Dominicans should also have been included and it was not. *Second*, development is rampant throughout the protected areas of the Dominican Republic and only the Ballantines have been denied the right to development. *Third*, the expansion of Jamaca de Dios is exactly the type of eco-tourism that the DR seeks to promote, and yet it continues to fail to create standards for ecotourism -- waiting eight years to create the Management Plan for Baiguate, and then failing to define the ecotourism standards for that plan because it would reveal that development of Phase 2 would have been consistent with those standards. Conveniently, those ecotourism standards will be defined sometime in 2018 -- surely after the conclusion of this proceeding -- despite other management plans containing those simple standards at the time of plan issuance.

a) The Boundaries of Baiguate Park Are Discriminatory Because Those Boundaries Were Used To Deny the Ballantines the Right to Develop Their Property

195. The National Park was created by Presidential Decree No. 571-09, which describes the "social interests" that allegedly validate its creation. The text of the Decree states that a primary objective of the Park is to protect the Salto Baiguate, or Baiguate Waterfall, the endangered Nogal tree, and the "carpets of forest" along the river.[232] However, the Salto Baiguate falls some three kilometers **outside the boundaries of the national park**. Stunningly, the Baiguate River itself is not contained

[232] See **C-16**.

within the boundaries of the Park, forcing Respondents' witnesses to claim (with a straight face) that the River can be protected even though it is not park of the Park that is named after it.[233]

196. One hundred percent of the rainwater that falls on Jamaca de Dios flows not to the Baiguate River, but to the North Yaque River, although it is collected and used for agriculture before it reaches that river. As such, none of the rainwater that falls on Jamaca de Dios property has any bearing on the water levels or quality of either the Rio Baiguate or the Salto Baiguate.[234] By contrast, virtually all of the rainwater that falls on Jarabacoa Mountain Garden and most of the rainwater that falls on Paso Alto runs directly into the Rio Baiguate. And yet both of these two projects were specifically excluded from the boundaries of the Park.[235]

197. The Ballantines submit the expert reports of Jens Richter and Fernando Potes to specifically address the contentions of Eleuterio Martinez and expert Sixto Inchaustegui concerning the creation, definition and implementation of the Baiguate National Park. These reports expose as meritless the Respondent's belated efforts to assert that the Baiguate River itself does not need to actually be within the boundaries of the Park. But it really is simpler than that. One need not be an environmental expert to realize that Respondent's contention does not make sense. If one wishes to ensure that the "sacred" Baiguate Waterfall remains a natural treasure for generations of Dominicans, one should put the waterfall within the boundaries of the eponymous park. That was not done here.

198. It is unclear why. Indeed, compelled to produce documents relating to the scientific studies and bases for the creation and demarcation of the Baiguate Park, Respondent produced nothing

[233] **Witness Statement of E. Martinez** at ¶50.

[234] **Witness Statement of G. Pena** at ¶ 23.

[235] See **C-38**.

save for a ten-page survey of the trees on the Mogote Mountain performed years ago at altitudes much higher than all of Jamaca de Dios.[236]

199. What is clear is that none of what was declared as an ecological justification for the Park explains why Phase 2 of Jamaca was included. Those justifications would explain why comparator projects Paso Alto and Jarabacoa Mountain Garden, both of which lie plainly within the watershed of the Baiguate River, should be included in the Park. Mr. Potes explains in his report that it would make no sense to exclude Jarabacoa Mountain Garden and Quintas del Bosque from the park as those projects both run into the Baiguate waterfall but also have the endangered species and trees that the park was purportedly to protect.[237] Those justifications would also explain why the property of three other powerful Dominicans irrefutably within the watershed of the Baiguate River should be included within the Park boundaries. But none of those properties were included.

200. The creation of the National Park was part of a corrupt scheme, according to Reynaldo de Rosario and Daniel Jimenez, both former local MMA officials, who confirm that the decision to include Jamaca in the National Park and exclude other properties, such as Quintas del Bosque, was made in order in order to destroy the Ballantines' investment to the advantage of local interests.[238]

201. Witness Eleuterio Martinez alleges that putting Jamaca in the Baiguate Park "[w]as 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."[239] This is preposterous, because if this were the case, Martinez would necessarily have

[236] See **R-043**.

[237] See **Expert Witness Statement of Fernando Potes.**

[238] See **ASOC** at ¶138.

[239] See **Witness Statements E. Martinez** at ¶42.

protected the land at the same altitudes on the opposite side of the mountain from Jamaca -- ***land that is actually within the Baiguate watershed***. But that property is owned by Pedro Valerio.

202. Pedro Valerio is an agricultural titan in Jarabacoa. He has more than 500,000 square meters of his land in the Baiguate watershed dedicated to agribusiness, with massive greenhouses. [240] The large greenhouses are located directly behind la Jamaca de Dios on the other side of the mountain at an elevation just 90 meters below the top of the mountain. Indeed, Valerio has damned the natural spring in the Baiguate Park, east of the Mogote Mountain, along the south side of Loma La Pena.[241] He uses this damn to convey water to his greenhouses and agricultural fields, diminishing water flow to the Baiguate River. His projects are supported by Respondent and his land was left out of the Park.[242]

203. Other influential landowners were also left out of the Park. Victor Mendez Capellan is one of the wealthiest men in the Dominican Republic. His massive estate is entirely a semi-pristine forest. He borders Aloma Mountain to the east and his property descends to connect to the Baiguate River and the Baiguate Waterfall. He owns more than two linear kilometers of property along the Baiguate River and waterfall. This estate is nearly 2 million square meter and is almost entirely in the Baiguate watershed and not a single meter is within the Park.[243] Tellingly, in 2013, an MMA survey of the area recommended that Mendez' property be placed within the Park, but the recommendation was ignored and no action was taken.[244]

204. Felucho Jimenez is a founding member of the PLD Party that rules the Dominican Republic. He is a current Central Committee member and former Minister of Tourism. His large

[240] **Reply M. Ballantine St.** at ¶64

[241] Id.

[242] Id.

[243] **Reply M. Ballantine St.** at ¶65.

[244] See **C-138**, at page 47 (May 2013).

property is entirely within the Eastern Baiguate watershed and his entire estate was also left out of the Baiguate National Park.[245]

205. As the Ballantines' experts make plain, there are no environmental justifications for the borders of the Baiguate Park as they were drawn. Property that was purposefully left out had far more impact upon the ecological preservation goals that purportedly drove the creation of the Park. These stark examples of influential Dominicans being left out of the Park illustrate that the establishment of the Baiguate Park, and its use to deny development permission to the Ballantines, was not only expropriatory but also discriminatory.

b) Development is Rampant throughout Protected Areas in the Dominican Republic

206. The existence of a National Park has been no hindrance to property development by Dominican landowners. The most obvious example is of course Jamaca de Dios' neighbor, Aloma Mountain, which has continued to develop with impunity despite being within the boundaries of the Baiguate Park. But Juan Jose Dominguez is not the only Dominican that is allowed to exploit protected areas.

207. ***Rancho Guaraguao***. This project has 52 constructed luxury villas, a restaurant, and a paved road built by Respondent to goes from Constanza directly to the entrance to the development. It is built almost entirely within the Category 2 Valle Nuevo National Park, and it is built at an altitude between 1450 and 1900 meters.[246]

---

[245] **Reply M. Ballantine** at ¶66.

[246] Respondent objected to the production of material relating to this copycat project of Jamaca. As such, the Ballantines are cannot state with certainty as to whether or not this project does or does not have an environmental permit. If it ***does*** have a permit, it is a stunning refutation of the Statement of Defense's belated invoking of altitude as perhaps the most "critical" environmental factor in denying the Ballantines' expansion. This project does not even begin until well higher than Jamaca was to end. If it ***does not*** have a permit, it is yet another example that Dominicans are allowed to skirt the law -- laws which exist simply to allow those in power to deny an equal playing field to others.

208. ***Ocoa Bay***. This is a massive two-phase project located within the boundaries and buffer zones of the Francisco Alberto Camaaño Deño Category 2 National Park, which was created the same day as Baiguate National Park. The inauguration for Ocoa Bay was attended both by President Danilo Medina and the Minister of Environment Bautista Gomez Rojas.[247] Phase 1 was fully approved on December 28, 2011 despite the absence of a Park Management Plan.[248]

209. The approval permit for this project describes it in terms remarkably similar to what was planned for the Ballantines' Phase 2 (although Jamaca was on a smaller, less invasive scale), including a boutique hotel and spa, villas, apartments, townhomes, commercial outlets, a club house, a racquet club, parking, and other common areas.[249] Their planned expansion will be entirely within the Park.

210. It is now apparent that the Management Plan for this Park that was ratified four years later in January of 2016 was crafted specifically to accommodate Ocoa Bay. Tellingly, this Management Plan specifically defines permissible ecotourism standards,[250] whereas the Management Plan for Baiguate Park indicates those standards won't be defined until 2018 -- after the conclusion of this arbitration.

211. ***Cement Factory***.

"For my friends everything, for my enemies the law"
Óscar R. Benavides, Peruvian Military Dictator

212. The tale of the cement factory is a prototypical case study in Dominican political influence at work, and tellingly involves the very "stewards of the environment" that Respondent

[247] Respondent also failed to produce any documents concerning the development of Ocoa Bay, other than documents relating to a fine apparently for building outside of the area approved for development. That fine has not slowed this massive project.

[248] See **C-139 (**Ocoa Bay Permit, January 19, 2012).

[249] Id.

[250] See **C-140** (Francisco Alberto Camaaño Deño Management Plan, January 29, 2016)

presents as witnesses in this matter. Only the outrage of the Dominican public and the intervention of the United Nations prevented this environmental tragedy from moving forward.

213. On June 18, 2008, a large Dominican mining company applied for permission to construct a massive $300,000,000 cement factory within the buffer zone of the Category 2 Los Haitises National Park.[251] An initial inspection report by the MMA confirmed and documented the significant environmental impact this project would have and recommended that the project be denied.

214. On March 17, 2009, witness Eleuterio Martinez initially sent a letter to witness Jaime David Mirabal appending this report and recommending the project be denied. The letter cited numerous environmental reasons, including the project's location in the buffer zone of the Park, its effect upon the Park's underground aquifers, its "incalculable" impact on the soil and subsoil, and its negative impact on surrounding flora and fauna.[252]

215. Astonishingly, only one week later, Martinez apparently had a change of heart. On March 26, 2009, Martinez, and seven other MMA employees, confirmed their approval of the project,[253] and on April 14, 2009, a permit was issued, signed by Jaime David.[254]

216. Not surprisingly, this unleashed a firestorm of protest across the nation, with support from different Dominican environmental and community organizations, including the Academy of Sciences (of which Eleuterio Martínez has been a Member since 1996). This outcry ultimately forced Jaime

[251] This company, COMIDOM, is part of Estrella Group whose president, Manuel Estrella, is known as one of the largest contractors in the DR. He is a close friend of ex-president Leonel Fernandez and has been a local partner with Odebrecht since 2009 (see http://www.estrella.com.do/es/conocenos/historia). The Estrella Group has built several large government buildings, including the administrative building that houses the Ministries of Environment and Tourism.

[252] See **C-141** (Letter from E. Martinez to J. David dated March 17, 2009)

[253] See **C-142** (Validation Committee Approval dated March 26, 2009)

[254] See **C-143** (Cement Factory Permit dated April 14, 2009)

David, on June 22, 2009, to request that the United Nations Development Programme ("UNDP") independently evaluate how the permit was issued.[255]

217. In November 2009, the UNDP issued its final report, skewering the process by which the MMA issued the license, because it "was not rigorous and exhaustive ... and did not observe the principles and spirit of the environmental legal framework."[256] The report found that "taking into account the various factors considered, [the project] is not viable, and that it is only viable technically and economically from the point of view of the company."[257] The project was cancelled.

218. ***Deforestation for Charcoal Production.*** On May 16, 2011, Grupo Jaragua, a Dominican environmental NGO, filed a formal complaint with MMA that the Category 2 Lago Enriquillo y Isla Cabritos National Park was being deforested to manufacture charcoal for exportation to Haiti, with the full support of a general in the Dominican Army.[258] Grupo Jaragua also released a documentary, *Death by a Thousand Cuts*, at the 2017 Atlanta Film Festival highlighting the deforestation of additional protected areas for the manufacture of charcoal, including the Category 2 Sierra de Barohuco National Park. The documentary highlights Respondent's complicity in these environmental degradations.[259]

219. Indeed, the Dominican environmentalist group SOS Ambiental has filed a formal complaint against Respondent under Article 17 of CAFTA-DR for failing to enforce its environmental laws in the Sierra de Barohuco Park in connection with this rampant deforestation. The Secretariat of

[255] See **C-144** (Letter to UNDP from Jaime David dated June 22, 2009).

[256] See **C-145** (UNDP Report dated November 2009).

[257] Id.

[258] See https://recursos.dl-cdn24.com/contenidodl/denunciacarbonGJ.pdf.

[259] See https://vimeo.com/203024001 and http://deathbyathousandcutsfilm.com/.

the Environment determined the complaint could move forward, prompting discussions between SOS Ambiental and MMA and a provisional suspension of the CAFTA process.[260]

220. ***Villa Pajon*** -- this is an unpermitted, Dominican-owned is an ecotourism project entirely within the limits within the Valle Nuevo National Park, as it proudly trumpets on the front page of its website.[261]

221. What does this rampant development demonstrate? That Respondent's commitment to the environment is in name only. Respondent is not protecting Category 2 National Parks and they are simply "paper parks." The enforcement of the Protected Area Law 202-04 is applied in an arbitrary manner according to the interests of politicians.

c) Respondent Continues to Fail to Define Ecotourism to Avoid the Simple Fact that Jamaca Would Fit that Definition

222. Respondent waited *eight years before creating a management plan for the Baiguate National Park*. Indeed, it was only this arbitration that spurred the public meetings that revealed such community outrage at the process by which the Park and its boundaries were created. The management plan was created just prior to Respondent submitting its Statement of Defense.[262]

223. Although the Management Plan indicates a desire to create ecotourism opportunities within the Baiguate National Park, it states only that those ecotourism standards are still to be developed, promising only that Respondent will define ecotourism by 2018.[263] By contrast, the Camaaño National Park, which was created the same day as Baiguate, has released its management plan with a full definition of what ecotourism is to be allowed. Indeed, those standards include specific

[260] See https://www.diariolibre.com/medioambiente/ciudadanos-denuncian-ante-cafta-rd-la-destruccion-de-sierra-de-bahoruco-KB5434084. See also https://www.youtube.com/watch?v=wsRKg8Zmybs.

[261] See http://www.villapajon.do.

[262] See **R-084.**

[263] Id.

density restrictions and allows for the construction of residential homes, standards with which Phase 2 of Jamaca would comply.[264]

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

224. The Amended Statement of Claim detailed discriminatory acts by the City of Jarabacoa against the Ballantines. The Statement of Defense vainly and unsuccessfully tries to justify the facially disparate treatment that the City has foisted upon the only American investors seeking to develop in the mountains of La Vega.[265]

225. Although the Mountain Lodge was to be built on land within the area approved for development as part of Phase 1 directly across from Aroma Restaurant), the development plans required an amendment to the existing environmental permit. On October 1, 2013, the Ballantines requested a "no objection" letter for the proposed lodge from the Municipality of Jarabacoa.[266] Despite the passage of more than three years, and repeated attempts by the Ballantines to elicit any response from local authorities, the Municipality of Jarabacoa has still failed to act on their request.[267]

226. Respondent now apparently asserts that a representative of the Ballantines, Leslie Gil, verbally withdrew the request for a no objection letter during a meeting with the City, by "stat[ing] that

[264] See **C-140.**

[265] Although the City is reimbursed by the central government for the costs of streetlights, it has refused to pay for the streetlights within Jamaca. However, the City pays for the streetlights in Dominican-owned projects. Also, the City has refused to provide any maintenance on the public road leading to the Jamaca complex since it was built in 2005. **M. Ballantine St** at ¶ 76

[266] Letter from Rafelina Díaz to Lucía Sánchez (Oct. 1, 2013) (**C-20**). As discussed in the ASOC, this is the first step in obtaining approval from the MMA.

[267] **Gil St** at ¶ 27-36; **M. Ballantine St** at ¶ 39.

the "no objection" letter was inapposite."[268] This is entirely false and patently disproved by the very minutes of the meeting that Respondent has placed before this Tribunal.[269]

227. As an initial point, this meeting took place in December of 2014, ***more than 14 months after the Ballantines first made the request for the no objection letter***. Respondent has no answer for why it sat for more than a year on the Ballantines' request.[270] The letter should have been promptly issued, as it was for other projects in the City.

228. Additionally, as Ms. Gils' testimony confirms, she explained to the City that Jamaca was seeking a *conditional* no objection letter simply to allow it to continue pursuing the other necessary permissions for the Mountain Lodge, including permission for the MMA, before the definitive no objection letter could be issued. Ms. Gil ***never withdrew the request for the conditional no objection letter*** as her statement at the meeting, reflected in Respondent's own exhibit, makes abundantly clear:

> We want to ratify what we proposed ago, ***we are requesting the letter of No Objection, because the Environment is demanding it from us***, we also need it to do the corresponding studies and take the steps of place before the others competent institutions.[271]

Indeed, Ms. Gil's final statement to the City reiterated this simple point: "We dare to say that this project has improved the area of Palo Blanco. ***We request that you give us an answer as soon as possible.***"[272]

---

[268] **SOD** at ¶ 84.

[269] See **R-140**.

[270] Indeed, the Ballantines had filed their initial Statement of Claim in September of 2014, and it appears as thought Respondent has simply ignored the "no objection" letter in light of that filing. This meeting was held during an jointly-agreed abeyance of the arbitration proceeding , during which time Respondent indicated a willingness to consider approval of the Mountain Lodge. Unfortunately, that willingness proved fleeting.

[271] See **R-140**.

[272] Id.

229. The City even responded: "as you can see ***our will is to continue working in this direction***[.]"[273] However, that was a false statement and the City never moved forward to provide Jamaca with the no objection letter, which prevented the Ballantines from being able to even begin the process of seeking MMA approval for their Mountain Lodge.

230. This is not the only episode of egregiously discriminatory behavior against the Ballantines. Five months before they applied for the no objection letter, the City had manifested their antagonism toward the Ballantines by passing a resolution on April 22, 2013, authorizing the gates protecting Jamaca de Dios to be torn down.[274] This resolution was issued without any notice to the Ballantines and without granting them any opportunity to be heard.

231. The Statement of Defense grossly misstates the facts underlying this situation. First, the Statement of Defense claims that the Ballantines' road was a "historical" road that the people of Palo Blanco "had used for more than 80 years, pursuant to an easement."[275] ***This is entirely false.*** The "historical" road used for 80 years is an unpaved pathway that is outside the boundaries of Jamaca de Dios. There are no gates at that pathway and the Ballantines have never impeded access to any member of the community who wishes to use that pathway.

232. In 2005, the Ballantines built a new road entirely within their development. ***That road did not exist prior to 2005 and was built by the Ballantines to be a service entrance for Jamaca de Dios.***[276] Being good neighbors, the Ballantines allowed the landowners (all members of the large Rodriguez family) who owned the land to the west of Jamaca to use this road ("the 2005 Road") to

---

[273] Id.

[274] Resolución No. 005-2013 (Apr. 22, 2013) (**C-23**).

[275] SOD at ¶129.

[276] **Reply M. Ballantine St** at ¶11.

access the land that had previously been accessed by the historical pathway.[277] The 2005 Road was much safer and more convenient than the historic pathway, which was little more than a donkey path, and entirely impassable with a vehicle.[278] The Ballantines granted unfettered access to the 2005 Road for six years -- from the time it was built until 2011.[279] This gave the landowners safer and quicker access to their farms. But no good deed goes unpunished.

233. By 2011, Jamaca was thriving. To ensure the safety of its residents, the Ballantines built gates on its property at the terminus of 2005 Road, ***which was also entirely on its property***. Immediately upon the construction of these gates, the Ballantines offered the Rodriguez family the opportunity to use the main Jamaca road, where there was a security guard who would keep track of individuals accessing the development.[280]

234. The Rodriguez family did not like this and wanted to keep using the 2005 Road. They petitioned the local District attorney seeking the have the gates opened. Again, so there is no confusion, these were not gates to any "Historical Road" -- as Respondent now claims. They were gates to the 2005 Road. The "Historical Road" -- or more accurately, the "Historical Donkey Path" -- has never been gated.

235. In September of 2011, the District Attorney denied the request, expressly confirming that the gates were appropriately placed on the property of Jamaca and the "historic" pathway was not impeded in any way:[281]

---

[277] **Reply M. Ballantine St** at ¶13.

[278] Id.

[279] Id.

[280] **Reply M. Ballantine** at ¶14.

[281] Resolución de Interes Judicial (Sept. 13, 2011) (C-22).

> ***Hamaca de Dios has its registered and demarcated rights, the only thing its gates impede is the access to the lands of its own property, there is an old road already established and which allows community members access to their lands on plot No, 1541 in the Land Registry district 5 in Jarabacoa, by virtue of which their claims to break down gates should be rejected. …***
>
> **THE REQUEST TO BREAK DOWN THE GATES IS REJECTED** on the lands of Hamaca de Dios, as it is inappropriate and not well founded; the Police Commander of the area is instructed to provide police protection to Hamaca de Dios in order to guarantee the investments inside the tourist project.

236. Despite this ruling, which confirmed that there was a ***separate*** "old road .. which allows community members access to their lands" which remained available to the residents, and that the gates only appropriately restricted access to the newer 2005 Road built entirely on the property of Jamaca de Dios, the Ballantines continued to allow residents to use the Main Road of Jamaca but required that they register ***one time*** upon entering the development.[282] Jamaca guards knew who had land rights and those individual were never impeded. Since farmers do not work at night, Jamaca logically dissuaded nighttime traffic for security reasons, but with advanced permission, it allowed evening access.[283]

237. However, this situation did not sit well with the Rodriguez family -- who apparently did not like an American dictating how they could access their property -- and ultimately in April of 2013, the City's resolution was passed in spite of the September 2011 ruling.[284]

238. This resolution was passed without the knowledge of the Ballantines. The Statement of Defense states that immediately prior to the April 22 resolution, "the Municipality proposed that another meeting amount the interested parties be held" at the Ballantines' gates.[285] Beyond this being a surprising place to convene a City meeting, a mob of more than 30 locals gathered at the gates to simply

[282] **Reply M. Ballantine** at ¶15.

[283] Id.

[284] Resolución de Interes Judicial (Sept. 13, 2011) (C-22).

[285] **SOD** at ¶131.

intimidate and verbally abuse the female representatives of the Ballantines who wished to discuss the confirmed land rights of Jamaca de Dios.[286]

239. No progress was made and the resolution was passed without the Ballantines' knowledge. City officials then incited local townspeople to attack the project. On June 17, 2013, in actions partially recorded on video, a group of local townspeople stormed Jamaca and proceeded to forcibly tear down the gates, with their leader -- Salomon Gutierrez -- waving a copy of the City's resolution in support of the violence.[287]

240. Respondent asserts that the City had nothing to do with the riot, but the evidence is plain. A City truck was used transport the mob to the scene. The backhoe used to tear down the gates was owned by a construction copy that worked extensively with the City. And Gutierrez had just left his job as the Director of Maintenance for Jarabacoa. Indeed, Gutierrez has no land ownership next to Jamaca, and thus no right to claim access to that property.[288] He was simply a puppet for Juan Jose Dominguez.

241. Although the Police did finally disperse the crowd, that was only after the Ballantines' lawyer arrived from La Vega.[289] The video submitted as Exhibit C-68 with the ASOC makes plain that the Police did nothing to stop the riot. This entire mob action was created, provoked, and empowered by the city of Jarabacoa.

242. After the gates were stormed, the Ballantines sough immediate redress in the Respondent's judicial system. On July 31, 2013, the Ballantines succeeded in obtaining a preliminary injunction from the Land Tribunal to prohibit the City from entering the Ballantines' property and

[286] **Gil Statement** at ¶15-16.

[287] Video of Events at Jamaca Gates (June 17, 2013) (**C-68**).

[288] **Reply M. Ballantine** at ¶16.

[289] **Reply M. Ballantine** at ¶17.

allowing the gates to be rebuilt.[290] But when the Ballantines began that process, the mob returned and immediately destroyed the provisional gates that had been put in place, and death threats were made against Michael Ballantine. The Police were called, but refused to come without the authorization of the City.[291]

243. The Ballantines were optimistic that they could receive impartial treatment by Respondent's judicial system. But a new judge was assigned to the case, who held no hearings on the matter, and simply ruled against the Ballantines in October of 2015, almost a year after the initiation of this arbitration.[292]

244. This ruling -- which is plainly defied by satellite evidence before this Tribunal -- simply and wrongly conflates the old, "historic" pathway with the 2005 Road and grants public access to the private Jamaca road.[293] All Dominican-owned mountain projects are allowed to have private roads, whereas Jamaca has been denied that right. Respondent has never compensated the Ballantines for the expropriation of their road for public use.

B. The Ballantines Have Established Violations of CAFTA-DR

245. Before addressing Respondent's various legal arguments, we note that Respondent's arguments about the environmental provision in Chapter 10 are unavailing. Respondent asserts that the Ballantines' claims cannot be maintained here because of CAFTA Section 10.11. When Respondent cited this passage in the Statement of Defense, it italicized and bolded most of the language but omitted the key portion. Here, we italicize and bold the relevant portion that Respondent chose not to:

---

[290] Ordenanza de 2da Sala Tribunal de Tierras Jurisdicción Original – La Vega Provincia La Vega (Jul. 31, 2013) (**C-24**)

[291] **Ballantine St.** at ¶81-82.

[292] Sala Tribunal de Tierras Jurisdicción Original – La Vega Final Judgment (October 5, 2015) (**C-69**).

[293] See **C-147** and **C-148**.

> "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."[294]

246. In other words, this provision speaks to measures that are consistent with Respondent's obligations under CAFTA. This means that if the measure or measures are expropriatory, fall below the minimum standard, or violate national treatment, these measures are violations of CAFTA even where those measures relate to environmental concerns.

247. Here, however, as demonstrated above, Respondent's measures are not taken with the benevolent intention of protecting the environment. Far from it. Rather, these measures are applied to the Ballantines property while Dominican-owned projects with similar to or even greater slopes have either been permitted or are allowed to build on land over 60%, even without permits. These projects, as discussed above, include but are not limited to Jarabacoa Mountain Garden, Mirador Pino, Paso Alto, Aloma Mountain, Quintas del Bosque 1 and 2, Rancho Guaraguao, Alta Vista, Los Auquellos, Sierra Fria, Monte Bonita, and La Montaña amongst others.

248. It is not the case that Respondent has a facially neutral environmental law that it applies in a non-discriminatory and transparent way. It has a law regarding slopes that is ignored when it comes to Dominican-owned projects but is applied in an entirely different way to the Ballantines.

249. With regard to the Baiguate National Park, even had it been done in a transparent and non-discriminatory way, which it was not, section 10.11 would not prevent the Ballantines from maintaining a claim. This is because the National Park has independently destroyed the value of the Ballantines' Phase 2 property. Respondent used the existence of the National Park as a basis to deny the

[294] CAFTA, at Section 10.11.

Ballantines the right to build their road while allowing Dominicans to develop their property in the same and similar national parks.

250. To be clear, the creation of the National Park was not transparent and non-discriminatory. The Park creation was an arbitrary and opaque enterprise. In addition, Respondent intended the Park's borders to include the Ballantines' Phase 2 and to leave out key properties owned by powerful Dominicans. These Dominican-owned excluded properties were central to the stated purpose of the Park and were much more pristine and environmentally significant.

251. But, again, the arbitrary, opaque, and discriminatory manner in which the Park was created is not the only issue that makes Section 10.11 relevant. The fact is that even when a Dominican-owned property is in a national park, those property owners are allowed to develop with impunity in the absence of a license. This includes, for example, Aloma Mountain, which continues developing to this day in Baiguate National Park.[295] This also includes Rancho Guaraguao and Villa Pajón in Valle Nuevo. Other projects in national parks, such as Ocoa Bay in Francisco Alberto Camaaño Deño National Park, were given permits to build.

252. Thus, even though theoretically Section 10.11 would allow a state to maintain certain environmental measures, the manner in which Respondent has applied the slope law and the National Park rules, as well as the circumstances surrounding the creation of the National Park, are all inconsistent with Chapter 10 of CAFTA-DR and thus not affected by the environmental statements in Section 10.11.

[295] *See, e.g.*, **Reply Expert Report of Eric Kay** at ¶ 9; and Exhibit B.

1. Fair and Equitable Treatment

253. The parties agree in some ways about the legal issues surrounding the FET provision. The parties differ, however, with regard to the application of the facts to the provision and the manner in which the Tribunal should view this provision.

254. First, however, the points of agreement. Respondent does not contest the Ballantines' position that Article 10.5 of the CAFTA-DR is substantively identical to Article 1105 of the NAFTA.[296] Respondent thus acknowledges that decisions of NAFTA tribunals have some relevance to determine the content and the scope of the FET obligation under Article 10.5 CAFTA-DR.

255. In addition, both parties agree that the applicable standard regarding the FET obligation is the minimum standard of treatment ("MST") under customary international law.

256. The parties disagree, however, on the content of the MST. Respondent bases its views of the MST on the *Neer* decision, which dates to 1926.[297] Based on the *Neer* decision, Respondent asserts that 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'."[298]

257. Respondent's heavy reliance on *Neer* is misplaced for two reasons. First, the antiquated *Neer* decision does not reflect the current state of the law. To the contrary, numerous NAFTA tribunals have shown that the level of protection offered to foreign investors under the MST has significantly evolved since the *Neer* decision. Second, Respondent has no support for its assertion that an 'extremely high' threshold of seriousness necessary to show a breach of the MST exists.

---

[296] **ASOC** at ¶ 199.

[297] **SOD** at ¶ 209, referring to: *L.F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States* (1926) 4 *R.I.A.A*, p. 61, para. 4.

[298] **SOD** at ¶ 215.

a) The *Neer* Decision is not Relevant Today to Determine the Content of the MST

258. For several reasons, this Tribunal should reject Respondent's proposition that the standard of protection here should be the one set out by the *Neer* decision almost 90 years ago.

259. First, the *Neer* case dealt with a question entirely *different* from the question about the appropriate level of protection that should be accorded to foreign investors, much less foreign investors under CAFTA-DR. As explained by the *Mondev* Tribunal:

> The Tribunal would observe, however, that the *Neer* case, and other similar cases which were cited, concerned not the treatment of foreign investment as such but the physical security of the alien. Moreover the specific issue in *Neer* was that of Mexico's responsibility for failure to carry out an effective police investigation into the killing of a United States citizen by a number of armed men who were not even alleged to be acting under the control or at the instigation of Mexico. In general, the State is not responsible for the acts of private parties, and only in special circumstances will it become internationally responsible for a failure in the conduct of the subsequent investigation. Thus there is insufficient cause for assuming that provisions of bilateral investment treaties, and of NAFTA, while incorporating the *Neer* principle in respect of the duty of protection against acts of private parties affecting the physical security of aliens present on the territory of the State, are confined to the *Neer* standard of outrageous treatment where the issue is the treatment of foreign investment by the State itself.[299]

260. More recently, the NAFTA *Windstream* Tribunal also concluded that the *Neer* decision did not "deal with the treatment of foreign investors, and consequently the factual circumstances of the [*Neer*] case are in any event not directly relevant here."[300] A number of scholars have also highlighted

---

[299] *Mondev International Ltd. v. United States*, ICSID No. ARB(AF)/99/2, Award, (2 October 2002), ¶ 115 (CLA-23). *See also*: *Merrill & Ring Forestry L.P. v. Canada* [hereinafter *Merrill & Ring v. Canada*], UNCITRAL, Award, (31 March 2010), ¶ 197 (CLA-16) (noting that the *Neer* and others cases were 'dealing with situations concerning due process of law, denial of justice and physical mistreatment, and only marginally with matters relating to business, trade or investments'), ¶ 204 ('No general rule of customary international law can thus be found which applies the *Neer* standard, beyond the strict confines of personal safety, denial of justice and due process').

[300] *Windstream Energy LLC v Canada,* Award, 27 September 2016, UNCITRAL, ¶ 352 (CLA-52)

the limited relevance of this decision given the fact that it does not involve any issue related to the protection of investments *per se*. Thus, according to Paulsson, the *Neer* award is only relevant for 'cases of failure to arrest and punish private actors of crimes against aliens'.[301]

261. Second, the Tribunal should give no weight to this three-page award as its general statement stands in contrast to state practice.[302] This same conclusion was reached by the CAFTA-DR *Railroad* Tribunal. It stated that the Commission in the *Neer* case "did not formulate the minimum standard of treatment after an analysis of State practice" and further noted that it was "ironic that the decision considered reflecting the expression of the minimum standard of treatment in customary international law is based on the opinions of commentators and, on its own admission, went further than their views without an analysis of State practice followed because of a sense of obligation".[303]

262. In sum, the *Neer* case provides no relevant guidance to determine the actual content of the MST in the context of contemporary international investment law.[304]

b) Respondent's Inaccurate Assertion that the MST Has not Evolved Since the 1926 Neer Decision

263. Even if one were to consider (for the sake of argument) that the *Neer* decision is relevant to assess the content and scope of the MST for foreign investors in the investment treaty context, the

---

[301.] Jan Paulsson, *Neer-lv Misled?,* Miami Law Research Paper, at 247 (CLA-53) (*see also*: J. Paulsson & G. Petrochilos: Neer-ly Misled? 22(2) ICSID Rev. 242-257 (2007)) (CLA-54). *See also*: Stephen M. Schwebel, *Is Neer far from Fair and Equitable?* 27(4) Arb. Int'l (2011), at 555–561 (CLA-55).

[302.] Stephen M. Schwebel, *Is Neer far from Fair and Equitable?* 27(4) Arb. Int'l (2011), at 555–561 (CLA-55).

[303.] *Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, Award (29 June 2012) (CLA-56), at para. 216. The tribunal also added that 'by the strict standards of proof of customary international law applied in *Glamis Gold*, *Neer* would fail to prove its famous statement (...) to be an expression of customary international law'.

[304.] Many writers have reached the same conclusion: Andrew Newcombe & Luis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer 2009) (CLA-57), p. 237; Ionna Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law* (Oxford U. Press 2008) (CLA-58), at 64: Paulsson, *supra*, at 257.

standard of protection accorded to foreign investors has undeniably evolved in a significant way in the almost 100 years since that decision.

264. Surprisingly, Respondent in its Statement of Defense seeks to refute this undeniable fact:

> 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. However, at least three recent NAFTA decisions have concluded the opposite, explicitly endorsing the *Neer* standard.[305]

265. Respondent asserts here (incorrectly) that the straightforward proposition put forward by the Ballantines, invoking that the MST "has evolved" since the 1926 *Neer* decision, is somewhat controversial in NAFTA case law. As further examined below, this is clearly not the case. Respondent also seems to be suggesting that only one 'old' precedent (the *Mondev* award) has endorsed the evolutionary nature of the MST. Respondent also indicates that recent NAFTA awards have adopted the opposite conclusion, stating that no such evolution has taken place since the *Neer* decision. As explained in the following paragraphs, these statements are misleading and factually incorrect:

- Numerous NAFTA tribunals have affirmed that the MST *has* evolved since the 1926 *Neer* decision;
- Recent NAFTA awards have *not* endorsed the standard set out in the *Neer* decision requiring "shocking or egregious misconduct"[306] to establish a breach of the MST; and
- The *Railroad* award has definitively settled the controversy under CAFTA-DR by adopting the evolutionary approach.

[305] **SOD** at ¶ 210.

[306] **SOD** at ¶ 215.

c) Numerous NAFTA Tribunals Have Affirmed that the MST has Evolved Since the 1926 *Neer* Decision

266. Since the *Mondev* award was rendered in 2002, numerous NAFTA tribunals have repeatedly affirmed in unambiguous terms that the MST has evolved significantly since the 1926 *Neer* decision. Apart from the 2003 *ADF* award (already mentioned in the Claimants' Amended Statement of claim[307]), the following NAFTA awards have reached the same conclusion regarding the evolution of the MST since the 1920s.

- *Waste Management II* (2004):

> Both the ***Mondev* and *ADF* tribunals rejected** any suggestion that the standard of treatment of a foreign investment set by NAFTA **is confined to the kind of outrageous treatment referred to in the *Neer* case**, i.e. to treatment amounting to an 'outrage, to bad faith, to willful neglect of duty, or to an in insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.[308]

- *Gami* (2004):

> The ICSID tribunal in Waste Management II made what it called a "survey" of standards of review applied by international tribunals dealing with complaints under Article 1105. It observed the emergence of a "general standard for Article 1105." It noted that a violation does not require proof of "the kind of outrageous treatment referred to in the Neer case." Neer envisaged conduct that amounted 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 any reasonable and impartial man would readily recognize its insufficiency." **Neer was decided more than half a century before NAFTA saw the light of day. The ADF award observed that customary international law as reflected in Article 1105 is "constantly in a process of development.**" The standard which emerged from the Waste Management II tribunal's study has been properly identified by GAMI and is reproduced in Paragraph 89 above.

---

[307] ASOC at ¶ 203.

[308] *Waste Management, Inc. v. Mexico* ("Number 2"), ICSID No. ARB(AF)/00/3, Award, (30 April 2004) (CLA-27), ¶ 93.

GAMI contends that its claim satisfies this standard.[309]

- *Thunderbird* (2006):

> The content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law. Notwithstanding the **evolution of customary law since decisions such as *Neer Claim* in 1926**, the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence.[310]

- *Chemtura (2010):*

> In line with Mondev, the Tribunal will take account of the **evolution** of international customary law in ascertaining the content of the international minimum standard. Such inquiry will be conducted, as necessary, in analyzing each specific measure allegedly in breach of Article 1105 of NAFTA.[311]

- *Merrill and Ring* (2010):

> the restrictive *Neer* standard **has not been endorsed** or has been much qualified;[312]
>
> the applicable minimum standard of treatment of investors is found in customary international law and that, except for cases of safety and due process, today's minimum standard **is broader than that defined in the *Neer* case** and its progeny.[313]

- *Apotex* (2014):

> The Tribunal initially considers whether the specific procedural rights invoked by the Claimants are part of any **evolving** "customary international law minimum standard of treatment of aliens" that a NAFTA

[309] *Gami Investments, Inc. v. Mexico*, UNCITRAL, Award, (15 November 2004) (CLA-49), ¶ 95.

[310] *International Thunderbird Gaming Corporation v. Mexico,* UNCITRAL, Award, (26 January 2006) (CLA-20), ¶ 194.

[311] *Chemtura Corporation v. Canada,* UNCITRAL, Award, (2 August 2010) (CLA-59), ¶ 122.

[312] *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL, Award, (31 March 2010) (CLA-16), ¶ 209.

[313] Id., ¶ 213.

Party must accord to the investments of another Party's investors as required by NAFTA Article 1105(1).[314]

- *Bilcon* (2015) :

> NAFTA awards make it clear that the international minimum standard is **not limited to conduct by host states that is outrageous**. The contemporary minimum international standard involves a more significant measure of protection."[315]
> "Many tribunals have reviewed the historical development of the international minimum standard, so that the present Tribunal can focus on the aspects that are particularly important for the present case. The starting point is generally the *Neer* case. (…) The NAFTA tribunal in ***Glamis*** **considered that the *Neer* articulation is still the standard**, although notions may have changed about what in the circumstances constitutes outrageous conduct.[316]
>
> **NAFTA tribunals have, however, tended to move away from the position more recently expressed in *Glamis***, and rather move towards the view that the international minimum standard **has evolved over the years towards greater protection for investors**.[317]
>
> In order to strike an appropriate balance and taking into account the FTC Notes, a number of NAFTA tribunals have attempted to identify a "threshold of seriousness" that an alleged breach of equity, fairness or law must attain before constituting a breach of the international minimum standard. **Many NAFTA tribunals have shared the emerging consensus that the *Neer* standard of indisputably outrageous misconduct is no longer applicable**, but there is no consensus yet on a formulation that best suits the modern evolution of the standard.[318]

[314] *Apotex Holdings Inc & Apotex Inc. v. United States*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, part IX (CLA-60), ¶ 9.15.

[315] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton And Bilcon of Delaware, Inc v Canada*, UNCITRAL PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 (CLA-61), ¶ 433.

[316] Id., ¶ 434.

[317] Id., ¶ 435 (referring to the *ADF* and *Merrill and Ring* awards).

[318] Id., ¶ 440.

- *Mesa Power* (2016):

> A number of Chapter 11 tribunals have since set out the content of the customary international law minimum standard of treatment in Article 1105. Broadly, two lines of decisions can be discerned: decisions questioning the relevance and applicability of the *Neer* standard, and decisions applying it with a number of important qualifications.[319]
>
> Tribunals following the first approach emphasize that *Neer* did not deal with investment protection, but concerned Mexico's alleged failure to carry out an effective investigation of the killing of a US citizen by armed men who were not even alleged to be acting under Mexico's control or direction. (…)[320]
>
> Tribunals adopting the second approach apply the stringent requirements of *Neer* for purposes of breaches of Article 1105 [referring to Cargill and *Glamis]*. However, even under this approach, they consider that the principles of customary international law are not understood to be "frozen in amber at the time of the *Neer* decision." They observe that the *Neer* test of severity is easier to satisfy now than it was at the time of the *Neer* decision. Canada itself does not rely on the *Neer* decision; it rather invokes the articulation of the minimum standard as it was set out in *Glamis*, *Cargill* and *Mobil*.[321]
>
> In practice, these two approaches have much in common. Most importantly, they both accept that the **minimum standard of treatment is an evolutionary notion, which offers greater protection to investors than that contemplated in the *Neer* decision.**[322]

---

[319] *Mesa Power Group, LLC v Canada*, UNCITRAL PCA Case No. 2012-17, Award, 24 March 2016 (CLA-62), ¶ 497.

[320] Id., ¶ 498, referring to *Merrill & Ring,* para. 197, 204; *Mondev,* para. 115 (CLA-23); *ADF* para. 181 (CLA-24); *Loewen Group Inc. and Raymond L. Loewen v. United States,* ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 (CLA-63), ¶ 132.

[321] *Mesa Power Group* (CLA-62), ¶ 499 (footnotes omitted).

[322] *Mesa Power Group (CLA-62), ¶. 500,* referring to: *Mondev,* ¶ 115; *ADF (CLA-24)*, ¶ 79; *Waste Management, Inc, (CLA-27),* ¶ 98; *Merrill & Ring, (CLA-16),* ¶ 92-193; *Bilcon, (CLA-61),*¶ 435-438. Also referring to: Gabrielle Kaufmann-Kohler, Interpretive Powers of the Free Trade Commission, Fifteen Years of NAFTA Chapter 11 Arbitration 175, 184 (2011) (CLA-64) ("Essentially, most tribunals have considered that the minimum standard of treatment is an evolutionary notion, which applies as it stands today and not at the time of the *Neer* decision in 1926 – requiring outrageous conduct.").

267. The many tribunals cited above who have recognized the evolving MST standard since *Neer* are simply recognizing the reality that investor protection today requires more than it did when airplanes were in their infancy and frozen food had yet to be invented. The standard set out in *Neer*, although it is inapposite in any event, is not a static standard that remains fixed in time for all eternity. It is not meant to be a "minimum standard" from ages past, but a minimum standard based on state practice and the behavior of states in the modern age.

d) Recent NAFTA Awards Have Not Endorsed the Standard Set Out in the *Neer* Case Requiring "Shocking or Egregious Misconduct"

268. Respondent's assertion that 'at least three recent NAFTA decisions have concluded the opposite, explicitly endorsing the *Neer* standard'[323] is misleading and factually incorrect.

269. Respondent first refers to *Pope and Talbot* award.[324] It is true that the Tribunal does use the words "shock and outrage" in its Award in Respect of Damages.[325] That being said, the award (which was rendered in May 2002) can hardly be qualified as a 'recent' decision. Regardless, this award was rendered *before* the *Mondev* award (issued in October 2002). Most importantly, Respondent omits the fact that the *Pope and Talbot* Tribunal explicitly *rejected* in its previous award rendered in 2001 that a breach of the FET standard of protection required showing any egregious, outrageous or shocking State conduct:

> The Tribunal interprets Article 1105 to require that covered investors and investments receive the benefits of the fairness elements under ordinary standards applied in the NAFTA countries, **without any threshold limitation that the conduct complained of be "egregious/,**

[323] **SOD** at ¶ 210.

[324] **SOD** at fn 533.

[325] *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award in Respect of Damages (31 May 2002) (CLA-65), ¶ 68.

"outrageous" or "shocking," or otherwise extraordinary.[326]

270. Respondent next refers to the *Eli Lilly* award.[327] Contrary to what Respondent asserts, the *Eli Lilly* award *does not* take a position on the question of the evolution of the standard of protection since the *Neer* decision. The Tribunal simply 'accepts in principle the analysis and conclusions' reached by the *Glamis Gold* tribunal regarding the content of the FET standard and the question of the threshold of liability. The award is silent on the issue of whether the *Neer* standard applies today in the context of investment arbitration.

271. Finally, Respondent refers to the *Glamis Gold* award.[328] Although it is true that the Tribunal stated that "the fair and equitable treatment standard is that as articulated in Neer",[329] Respondent omits the most relevant part of the award that *does* refer to the evolutionary nature of the standard since the 1926 *Neer* decision was rendered:

> It therefore appears that, although 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 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). The Tribunal notes that one aspect of evolution from *Neer* that is generally agreed upon is that bad faith is not required to find a violation of the fair and equitable treatment standard, but its presence is conclusive evidence of such. Thus, an act that is egregious or shocking may also evidence bad faith, but such bad faith is not necessary for the finding of a violation. **The standard for finding a breach of the customary international law minimum standard of treatment therefore remains as stringent as it was under**

[326] *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award on the Merits of Phase II (10 April 2001) (CLA-9), ¶ 118.

[327] **SOD** at fn 533.

[328] **SOD** at fn 533.

[329] *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009) (CLA-25), ¶ 612.

> ***Neer*; it is entirely possible, however that, as an international community, we may be shocked by State actions now that did not offend us previously**.[330]

272. The *Glamis* Tribunal essentially thus made two complementary propositions:

- On the one hand, the "fundamentals" of the *Neer* standard still apply today. Thus, to prove a violation of the MST, an investor must show that the conduct was "egregious" and "shocking".

- On the other hand, what is considered today as "egregious" and "shocking" is far different than what it was in the 1920s.

273. Thus, according to the *Glamis* Tribunal, while the "test" may not have changed, it nevertheless remains that the *perception* regarding what is "egregious" and "shocking" has evolved over time. In other words, the type of State conduct that would have not been considered as a breach of the MST in the past may be deemed so today. This reasoning illustrates that, ultimately, the *Glamis* Tribunal did acknowledge the undeniable fact that an evolution has taken place since the *Neer* decision. At the end of the day, the practical differences between the reasoning adopted by the *Glamis* Tribunal and that of the *Mondev* and *ADF* tribunals may be more apparent than real. In this context, the *Glamis* award can hardly be considered, as Respondent asserts, as an award 'explicitly endorsing the *Neer* standard'.

274. In any event, Respondent's assertion that the MST standard has not involved is refuted by Respondent itself. Later in its Statement of Defense, the Respondent admits that the perception of what is considered "egregious" and "shocking" has indeed evolved since the 1920s.[331]

---

[330] *Id*., ¶ 616.

[331] **SOD** at ¶ 210: "And a review of the 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."

e) The *Railroad* Award Has Definitively Settled the Controversy under the CAFTA-DR by Adopting the Evolutionary Approach

275. In its attempt to refute the Ballantines' proposition that the MST has evolved since the *Neer* decision, Respondent does not mention a single CAFTA-DR award. This omission is rather surprising given the fact that the CAFTA-DR 2012 *Railroad* award definitively settled all controversy. Having examined the NAFTA case law on the matter, the Tribunal clearly took the position that the MST *has* evolved since the *Neer* decision:

> The parties have taken opposite stands on whether the minimum standard of treatment has evolved since *Nee*r's formulation. This matter has been dealt with extensively by previous tribunals in cases under NAFTA. **The Tribunal refers positively in particular to the *ADF* award which accepts the evolution of customary international law noted in *Mondev* and records the NAFTA parties' views in this respect**: "[...] it is important to bear in mind that the Respondent United States accepts that the customary international law referred to in Article 1105(1) is not 'frozen in time' and that the minimum standard of treatment evolves. The FTC Interpretation of 31 July 2001, in the view of the United States, refers to customary international law 'as it exists today'. It is equally important to note that Canada and Mexico accept the view of the United States on this point even as they stress that 'the threshold [for violation of that standard] remains high.' Put in slightly different terms, **what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case was rendered**. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development." **The Tribunal adopts this reasoning in *ADF* and shares the conclusion that the minimum standard of treatment is "constantly in a process of development," including since *Neer*'s formulation**.[332]

276. In view of the unequivocal position adopted by the *Railroad* tribunal, the question of the scope and evolutionary character of the MST over the last 90 years should now be considered as settled under the CAFTA-DR. Indeed, proof of egregious, outrageous or shocking State conduct is not required to establish a breach of the FET standard.

[332] *Railroad Development Corporation v. Guatemala*, supra, ¶ 218.

f) There is No Support for the DR's Affirmation of the Existence of an 'Extremely High' Threshold of Seriousness Necessary to Show a Breach of the MST

277. Respondent has asserted that "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".[333] This statement is misleading.

278. In fact, not a single CAFTA-DR tribunal has set the threshold of seriousness to establish a breach of the MST at the level of "extremely high" as claimed by Respondent. A good illustration is the *TECO* case where Guatemala argued that "under the minimum standard, the State conduct must be 'extreme and outrageous' in order to constitute a breach of Article 10.5".[334] The Tribunal did not endorse that proposition and defined the content of the MST without making reference to an "extremely high" threshold of seriousness requiring "extreme and outrageous" State conduct:

> The Arbitral Tribunal considers that the minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety.[335]

279. Similarly, the CAFTA-DR *Railroad* Tribunal has endorsed the definition of the MST adopted by the NAFTA *Waste Management II* case, one that does *not* refer to any "extremely high" threshold of seriousness.[336]

---

[333] **SOD** at ¶ 210.

[334] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (19 December 2013) (CLA-26), ¶ 449. The Tribunal added that the claimant "relie[d], in this respect, on several [NAFTA] awards" (para. 450).

[335] Id., ¶ 454.

[336] *Railroad Development Corporation v. Guatemala*, supra, para. 219.

280. No NAFTA tribunal has affirmed the existence of an "extremely high" threshold of seriousness. It is true that a number of NAFTA tribunals have referred to the existence of a high threshold. However, Respondent fails to mention that a significant number of other NAFTA tribunals have in fact *rejected* the existence of such a high threshold of gravity or seriousness to show a breach of the MST. It is therefore incorrect to affirm that "NAFTA tribunals have **consistently** stressed"[337] the existence of an "extremely high" threshold of seriousness because in fact, they have not.

281. The NAFTA *Pope and Talbot* tribunal was the first tribunal to explicitly reject the existence of any such high threshold:

> the Tribunal interprets Article 1105 to require that covered investors and investments receive the benefits of the fairness elements under ordinary standards applied in the NAFTA countries, **without any threshold limitation that the conduct complained of be "egregious/, "outrageous" or "shocking," or otherwise extraordinary**. For this reason, the Tribunal will test Canadian implementation of the SlA against the fairness elements **without applying that kind of threshold.** [338]

282. More recently, in its 2010 award, the *Merrill & Ring* tribunal also applied a much lower threshold by referring to the requirement for States to provide protection to foreign investors 'within the confines of reasonableness'[339]. Thus, for the *Merrill & Ring* tribunal, any 'unreasonable' act committed by a state should be considered as a violation of the MST under international law. As shown by the following two extracts, the Tribunal sets the threshold at a level of gravity *much lower* than the "extremely high" threshold claimed by the DR:

> What matters is that the standard protects against all **such acts or behavior that might infringe a sense of fairness, equity and reasonableness**. Of course, the concepts of fairness, equitableness and

[337] **SOD** at ¶ 210.

[338] *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award on the Merits of Phase II (10 April 2001) (CLA-9), ¶ 118.

[339] *Merrill & Ring Forestry L.P. v. Canada*, Award, 31 March 2010, UNCITRAL (CLA-16), ¶ 213.

> reasonableness cannot be defined precisely: they require to be applied to the facts of each case. In fact, the concept of fair and equitable treatment has emerged to make possible the consideration of inappropriate behavior of a sort, which while difficult to define, may still be regarded as unfair, inequitable or unreasonable. [340]
>
> In conclusion, the Tribunal finds that the applicable minimum standard of treatment of investors is found in customary international law and that, except for cases of safety and due process, today's minimum standard is broader than that defined in the *Neer* case and its progeny. Specifically this standard provides for the fair and equitable treatment of alien investors **within the confines of reasonableness**.[341]

283. Two recent NAFTA awards have also adopted the same lower threshold of gravity required to find a breach of Article 1105. This is in fact one of the most notable features of recent NAFTA case law.

284. In its 2015 award, the majority of the *Bilcon* Tribunal first referred to the existence of a high threshold based on the previous findings of other NAFTA tribunals.[342] However, most importantly, the majority held that State conduct does *not* need to reach "the level of shocking or outrageous behaviour" in order to be considered as in breach of NAFTA Article 1105. In fact, the *Bilcon* Tribunal sets the threshold of gravity at a much lower level: the existence of an "injustice":

> The list conveys that there is a high threshold for the conduct of a host state to rise to the level of a NAFTA Article 1105 breach, **but that there is no requirement in all cases that the challenged conduct reaches the level of shocking or outrageous behavior**. The formulation also recognises the requirement for tribunals to be sensitive to the facts of each case, the potential relevance of reasonably relied-on representations by a host state, and a recognition that **injustice in either procedures or outcomes can constitute a breach**.[343]

[340] Id., ¶ 210.

[341] Id., ¶ 213.

[342] *Bilcon,* supra, ¶ 441 ("The Tribunal in the present case agrees that there is indeed a high threshold for Article 1105 to Apply"), ¶ 443 ("Acts or omissions constituting a breach must be of a serious nature").

[343] Id., ¶ 444.

285. Thus, for the majority of the *Bilcon Tribunal,* a mere "injustice" in "either procedures or outcomes" can be considered as a violation of the MST under international law. This is undeniably a threshold of seriousness much lower than that of "shocking or egregious misconduct" put forward by Respondent.[344] Elsewhere, the majority also highlights the fact that "NAFTA awards make it clear that the international minimum standard is not limited to conduct by host states that is outrageous."[345] The standard referred to and concretely applied by the *Bilcon* tribunal is clearly not the "extremely high" threshold that the DR suggests NAFTA tribunals have "consistently" held.

286. The trend that was started by the *Bilcon* award was later continued by the NAFTA *Windstream* tribunal in its 2016 award.[346] The *Windstream* tribunal did not mention the existence of a high threshold of severity, nor did it refer to any NAFTA awards that do. Moreover, the tribunal did not identify the elements that are considered to be in breach of the FET standard (despite the parties having argued the case from this perspective[347]). Instead, it referred on several occasions to the fact that a breach of Article 1105 requires showing that a state's conduct is 'unfair' and 'inequitable'.[348] The tribunal held that its task was to determine whether conduct could be "considered 'unfair' or 'inequitable' in accordance with the customary international law minimum standard of treatment"[349]:

> Given that the Claimant invokes the "fair and equitable" treatment element, but not the "full protection and security" element of Article

[344] **SOD** at ¶ 215.

[345] *Id.* ¶ 433.

[346] *Windstream Energy LLC v Canada,* supra.

[347] Id., ¶ 298 (indicating the position of the claimant as follows: 'moratorium was arbitrary, grossly unfair and contrary to the Respondent's commitments and representations and the Claimant's legitimate expectations').

[348] Id., ¶¶ 376, 379.

[349] Id., ¶ 358.

> 1105(1) of NAFTA, in support of its Article 1105 claim, the Tribunal must determine whether the Respondent's conduct that the Claimant alleges as a breach of Article 1105(1) of NAFTA may be considered "unfair" or "inequitable" in accordance with the customary international law minimum standard of treatment. This determination is best done, not in the abstract, but in the context of the facts of this particular case, taking into account the indirect evidence of the content of the customary international law minimum standard of treatment as evidenced in the decisions of other NAFTA tribunals.[350] (…)
>
> In other words, just as the proof of the pudding is in the eating (and not in its description), the ultimate test of correctness of an interpretation is not in its description in other words, but in its application on the facts.[351]

287. The reasoning of the *Windstream* tribunal suggests that, in the circumstances, it applied a relatively lower threshold of severity. Thus, any "unfair" or "inequitable" conduct could be considered as a violation of the MST under international law. This is undeniably not the "extremely high" threshold of gravity referred to by Respondent.

288. In sum, NAFTA tribunals have *not* "**consistently** stressed" the existence of an "extremely high" threshold of gravity for a state's conduct to be qualified as a violation of the MST. Many of them, including two very recent awards, have applied a much lower threshold. It is therefore misleading for Respondent to conclude its analysis by stating that "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'."[352] While some tribunals have indeed used such qualifiers, others have instead set the threshold much lower to include "acts or behavior that

[350] Id., ¶ 358.

[351] Id., ¶ 362.

[352] **SOD** at ¶ 215.

might infringe a sense of fairness, equity and reasonableness" (*Merrill and Ring*[353]), the existence of any "injustice in either procedures or outcomes" (*Bilcon*[354]), or even, more generally, any conduct that is "unfair" or "inequitable" under the MST (*Windstream*[355]). This Tribunal should apply the lower threshold of gravity rather than the "extremely high" one suggested by Respondent, as this is representative of the evolving MST standard as demonstrated by recent awards.

2. The Respondent's Measures, Individually and Collectively, Breached The Minimum Standard Of Treatment

289. No matter what standard is applied, the Respondent has breached its fair and equitable treatment obligation in many ways. Respondent's measures are discriminatory, both in the creation of the Park and in their application to the Ballantines (the slope law and the Park). Respondent's measures are arbitrary, both in the creation of the Park and in their application to the Ballantines (the slope law and the Park). Respondent measures lacked transparency, both in the creation of the Park and in their application to the Ballantines (the slope law and the Park). And Respondent's measures lacked due process.

a) The Discriminatory Measures Adopted by the DR

290. Before examining the specific discriminatory measures adopted by the DR, we address Respondent's arguments that CAFTA-DR Article 10.5 does not include a prohibition of discrimination. To the contrary:

- Discrimination is prohibited under CAFTA-DR Article 10.5;
- This provision covers discriminatory conduct based on grounds other than nationality; and
- There is no high threshold required to prove discriminatory conduct.

---

[353] *Merrill & Ring, supra,* ¶ 210.

[354] Bilcon, *supra,* ¶ 444.

[355] Windstream, *supra,* ¶ 358.

(1) Discrimination Is Prohibited under CAFTA-DR Article 10.5

291. Respondent asserts (incorrectly) that "the fair and equitable provision in CAFTA-DR (equivalent to its counterpart in NAFTA) does not in itself protect foreign investors against discrimination" because "other Articles of DR-CAFTA address discriminatory treatment directly".[356] Respondent refers to two cases (including the *Methanex* award) to support its contention. Respondent also added, as it must, that it "is aware that some tribunals have concluded" that the MST *does* prohibit discriminatory treatment.[357] In fact, Respondent specifically refers to three cases that have taken this position (*Eli Lilly,*[358] *GAMI*[359] and *Waste Management II*[360]*).*[361] Respondent, however, fails to mention that four other NAFTA tribunals have come to the same conclusion: *Merrill & Ring,*[362] *Mobil,*[363] *Glamis,*[364] *and Mesa.*[365]

---

[356] **SOD** at ¶ 218.

[357] **SOD** at ¶ 220.

[358] *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2 Award (16 March 2017) (CLA-66), ¶ 440.

[359] *GAMI*, supra, ¶ 94.

[360] *Waste Management, Inc*, supra, ¶ 98.

[361] **SOD** at ¶ 220.

[362] *Merrill & Ring,* supra, ¶. 208: "Conduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process has also been noted by NAFTA tribunals as constituting a breach of fair and equitable treatment, even in the absence of bad faith or malicious intention on the part of the state".

[363] *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (22 May 2012) (CLA-67), ¶ 152: "the fair and equitable treatment standard in customary international law will be infringed by conduct attributable to a NAFTA Party and harmful to a claimant that is arbitrary, grossly unfair, unjust or idiosyncratic, or is **discriminatory and exposes a claimant to sectional or racial prejudice**, or involves a lack of due process leading to an outcome which offends judicial propriety."

[364] Glamis, supra, ¶ 616: "The fundamentals of the *Neer* standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 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

292. When taking into account the awards that Respondent failed to mention, the overall picture becomes starkly different from the one portrayed by Respondent. Thus, at least seven NAFTA tribunals have concluded that MST *does* prohibit discriminatory treatment; only two have adopted the opposite conclusion. Given these figures, Respondent's claim that "the jurisprudence also underscores that discrimination is not part of Article 10.5."[366] appears (at best) to be grossly misleading. In fact, NAFTA case law shows the exact opposite.

293. In any event, it is somewhat surprising that Respondent does not refer to a single CAFTA-DR case in support of its (misleading and inaccurate) contention that the "FET provision in DR-CAFTA (like its counterpart in NAFTA) does not itself protect foreign investors against discrimination".[367] This is probably because ***all CAFTA-DR awards*** that have dealt with the issue till the present date have concluded that discrimination is prohibited under Article 10.5.

294. The CAFTA-DR *Railroad* Tribunal endorsed the definition of the MST that was adopted by the NAFTA *Waste Management II* case. It stated that the *Waste Management II* definition "persuasively integrates the accumulated analysis of prior NAFTA Tribunals and reflects a balanced

---

international standards and constitute a breach of Article 1105(1)". See also at para. 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—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."

[365] Mesa, supra para. 502: "the Tribunal considers that the following components can be said to form part of Article 1105: arbitrariness; "gross" unfairness; **discrimination**; "complete" lack of transparency and candor in an administrative process; lack of due process "leading to an outcome which offends judicial propriety"; and "manifest failure" of natural justice in judicial proceedings."

[366] **SOD** at ¶ 219.

[367] **SOD** at ¶ 218.

description of the minimum standard of treatment."[368] Importantly, the *Waste Management II* refers explicitly to discrimination as being part of the MST:

> "[...] 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.[369]

295. When stating that it "accordingly adopts the *Waste Management II* articulation of the minimum standard for purposes of this case", [370] the *Railroad* tribunal is acknowledging that discrimination *is* covered by Article 10.5.

296. The CAFTA-DR *TECO* Tribunal also explicitly refers to discrimination as being within the boundaries of the MST under Article 10.5:

> The Arbitral Tribunal considers that the minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is **discriminatory** or involves a lack of due process leading to an outcome which offends judicial propriety.[371]

---

[368] *Railroad Development Corporation v. Guatemala*, supra, ¶ 219.

[369] *Waste Management II,* supra, ¶ 98.

[370] *Railroad Development Corporation v. Guatemala*, supra, ¶ 219.

[371] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, supra, ¶ 454. In the context of the annulment proceedings, the Committee endorsed the definition of the content of the provision which was adopted by the Tribunal: "In the case before the Committee, the Tribunal correctly identified the applicable law. Moreover, within its analysis, the Tribunal referred to the text of the Treaty, to the Parties' submissions, to five arbitral awards and to at least five doctrinal commentaries. The two awards with which the Tribunal agreed with had been invoked by both Parties. Referring to these sources, the Tribunal found that "the minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety" (at ¶ 313).

297. A number of other tribunals (outside the context of NAFTA or CAFTA-DR arbitration) have also highlighted the importance of prohibiting discrimination when analyzing FET clauses. Some of the tribunals that adopted this position when dealing with FET provisions that did not explicitly use the word "discrimination".[372] For instance, the *Pakerings-Compagniet* tribunal stated that "The principle of fair and equitable treatment is violated where a host State's conduct is grossly unfair or discriminatory", adding that "discrimination is a significant element in determining whether the standard of fair and equitable treatment has been breached".[373] The *Pey Casado* tribunal came to the same conclusion.[374] The *CMS* tribunal (examining an FET clause that made explicit reference to the word "discrimination") also noted that "any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment".[375]

298. In sum, as shown by the vast majority of NAFTA awards and all CAFTA-DR awards, it now is well-established that discrimination is prohibited under Article 10.5.

---

[372] Stephan W, Schill, Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law, International Law and Justice Working Papers, Institute for International Law and Justice, New York University School of Law (CLA-68), 2006, p. 19: "The protection of foreign investors against arbitrary and discriminatory treatment also plays a major role in the operation of fair and equitable treatment. While sometimes international investment treaties contain a specific provision prohibiting such treatment, arbitral tribunals also ground this aspect in free-standing guarantees of fair and equitable treatment".

[373] *Pakerings-Compagniet AS v. Republic of Lithuania,* ICSID Case No. ARB/05/8, Award, 11 Sept. 2007 (CLA-69), ¶¶ 280.

[374] *Victor Pey Casado and President Allende Foundation v. Chile,* ICSID No. ARB/98/2, Award, (8 May 2008) (CLA-70), ¶¶ 670-1: « Il est constant dans la jurisprudence internationale et dans la doctrine qu'un traitement discriminatoire de la part d'autorités étatiques envers ses investisseurs étrangers constitue une violation de la garantie de traitement « juste et équitable » inclus dans des traités bilatéraux d'investissement. (…) Un comportement discriminatoire sera couvert comme violation du traitement « juste et équitable » notamment dans les cas où le traité bilatéral en question ne contient pas de garantie expresse contre des actes arbitraires ou discriminatoires. »

[375] *CMS Gas Transmission Company v. Argentina*, Award, (12 May 2005) (CLA-7), ¶ 290. It should be added that the FET in this case did include a specific reference to discriminatory measures.

(2) Article 10.5. Covers Discriminatory Conduct Based on Grounds Other than Nationality

299. Respondent rightly admitted that "other Articles of DR-CAFTA address discriminatory treatment directly".[376] Yet, because Article 10.5 "does not mention the word 'discrimination', or any other related term or synonym, at all",[377] Respondent draws the incorrect conclusion that this provision "does not itself protect foreign investors against discrimination".[378] No such conclusion should be drawn from the fact that the provision does not refers explicitly to "discrimination". By analogy, Article 10.5 does not explicitly mention the word "arbitrary". Yet, it is well-established (as acknowledged by the DR[379]) that FET clauses include a protection against arbitrary conduct. In other words, the absence of the word "discrimination" in Article 10.5 is not particularly significant to assess whether this provision covers this specific type of breach.

300. Respondent's assertion that discrimination is not covered by the FET clause is in any event absurd. This assertion would mean that a state could discriminate in any manner it wished with regard to protected foreign investors and not violate this clause. Such discriminatory treatment, if it rose to the level of a treaty violation, as it does here, would not violate this provision under Respondent's reading. It cannot be the case that there is no discriminatory behavior that could be actionable under Article 10.5.

[376] **SOD** at ¶ 218, referring to Article 10.3 (National Treatment); Article 10.4 (Most-Favored-Nation Treatment); Article 10.7(1)(b) (expropriation).

[377] **SOD** at ¶ 218.

[378] **SOD** at ¶ 218.

[379] **SOD** at ¶ 223: "DR-CAFTA and NAFTA tribunals agree that the minimum standard of treatment protects a foreign investor from a State's arbitrary conduct".

301. In any event, there is a wide consensus amongst scholars that the MST covers specific types of 'discrimination' (*other* than nationality-based).[380] An authoritative UNCTAD report of 2012 also came to the same conclusion:

> Tribunals have held that the **FET standard prohibits discriminatory treatment** of foreign investors and their investments. The **non-discrimination standard that forms part of the FET standard** should not be confused with the treaty obligation to grant the most favourable treatment to the investor and its investment (UNCTAD, 2010a, pp.15–16). While the national treatment and MFN standards deal with nationality-based discrimination, the non-discrimination requirement as part of the FET standard appears to **prohibit discrimination in the sense of specific targeting of a foreign investor** on other manifestly wrongful grounds such as gender, race or religious belief, or the types of conduct that amount to a "deliberate conspiracy […] to destroy or frustrate the investment". A measure is likely to be found to violate the FET standard if it evidently singles out (de jure or de facto) the claimant and there is no legitimate justification for the measure.[381]

302. A number of NAFTA tribunals have concluded that the FET provision covers certain forms of 'discrimination' (*other* than nationality-based). For instance, the *Glamis* tribunal made the following distinction between different types of discrimination: "The Tribunal notes that, as exhibited under the NAFTA, there are two types of discrimination: nationality-based discrimination and

---

[380] Andrew Newcombe & Luis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, (Kluwer 2009) 289-291; Roland Kläger, *Fair and Equitable Treatment in International Investment Law*, (Cambridge U. Press 2011) 187; G. Schwarzenberger, *The Abs-Shawcross Draft Convention on Investments Abroad*, 14 C.L.P. 221 (1961); Stephen Vasciannie, The Fair and Equitable Treatment Standard in International Investment Law and Practice, 70 British YIL 137 (1999) at 133 ('if there is discrimination on arbitrary grounds, or if the investment has been subject to arbitrary or capricious treatment by the host State, then the fair and equitable standard has been violated'); Barnali Choudhury, Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law, 6(2) J. World Invest. & Trade 297 (2005) 311-314; S. Schill, Revisiting a Landmark: Indirect Expropriation and Fair and Equitable Treatment in the ICSID Case Tecmed, 3(2) Transnational Disp. Mgmt. 19 (2006); Alexandra Diehl, *The Core Standard of International Investment Protection: Fair and Equitable Treatment* (Wolters Kluwer 2012), 448; Ionna Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law* (Oxford U. Press 2008) at 177-179, 182 ('A breach of [the non-discrimination] obligation triggers almost automatically a breach of FET since a discriminatory treatment could not possibly be fair and equitable');; Kenneth J. Vandevelde, A Unified Theory of Fair and Equitable Treatment, 43(1) N.Y.U. J. Int'l L. & Pol. (2010) 65. (CLA-71).

[381] UNCTAD, *Fair and Equitable Treatment* 7 (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012), at 82. (CLA-72).

discrimination that is founded on the **targeting** of a particular investor or investment".[382] While the *Glamis* tribunal mentioned that nationality-based discrimination "falls under the purview" of the national treatment provision (NAFTA Article 1102), [383] its reasoning suggests that targeted discrimination is covered by Article 1105. Thus, the Tribunal referred 11 times to the terms 'evident discrimination' in its award alongside other elements of the FET standard such as denial of justice, arbitrariness and due process.[384]

303. The *Waste Management II* award also specifically indicated that conduct that is 'discriminatory and exposes the claimant to sectional or racial prejudice'[385] is in violation of the FET standard. This quotation has subsequently been endorsed by a number of other NAFTA tribunals[386] as well as by the CAFTA-DR *Railroad* Tribunal.[387]

304. Respondent refers to the *Methanex* award in support of its (incorrect) assertion that case law "underscores that discrimination is not part of Article 10.5".[388] Such reference to the *Methanex* award is misleading. While the *Methanex* tribunal held that nationality-based discrimination was not covered by the FET clause, it is important to highlight that it refused to take position on the *other* question of whether or not 'sectional or racial prejudice' (mentioned in the *Waste Management II* award)

---

[382] Glamis, *supra*, fn. 1087.

[383] Id.

[384.] Id., ¶¶ 22, 24, 616, 627, 762, 765, 776, 779, 788, 824, 828 616. The Tribunal also explained the reasons why it examined this discrimination-related allegation in the context of arbitrariness (see, fn. 1087 and ¶ 559, fn. 1128).

[385.] *Waste Management,* supra ¶ 98.

[386.] *See: Mobil* supra ¶ 152; *Mesa*, supra ¶ 502; *Eli Lilly*, supra ¶¶ 416, 431.

[387] *Waste Management,* supra ¶ 98.

[388] **SOD**, ¶ 219.

could be considered as one prohibited form of discrimination under Article 1105.[389] In any event, the *Methanex* award has been criticized by scholars for having adopted a "very restrictive" and "narrow" view of the FET standard,[390] which "misconstrued the principle of non-discrimination"[391] and therefore "must be considered as a rather isolated view within arbitral jurisprudence".[392]

305. One form of 'discrimination' (*other* than nationality-based) that has been recognized by scholars is **targeted** discrimination.[393] In fact, the 2012 UNCTAD report expressly refers to the "prohibition of targeted discrimination" as one of the five existing elements of breach of the FET standard.[394] Targeted discrimination is also explicitly listed as one of the elements of breach of the FET standard under Article 8.10.2(d) of the CETA.[395] Two NAFTA awards have also considered targeted discrimination (on grounds other than nationality) as being prohibited under the FET Standard.[396]

---

[389] *Methanex v. United States*, Award, (3 August 2005), Part IV, Ch. C, para. 26: "The [*Waste Management II*] tribunal, presumably deriving this part of its synthesis from *Loewen*, opined that the conduct must have been "discriminatory *and* expose[d] the claimant to sectional or racial prejudice". The Tribunal need not comment on the accuracy of the cumulative requirement in this part of the *Waste Management* synthesis, since Methanex failed, as explained in Part III of this Award, to establish that California and the California ban on MTBE was discriminatory or in any way exposed it to "sectional or racial prejudice". Methanex offered no other authority for its assertion." (CLA-11).

[390] Klager, supra p. 191-2.

[391] Id. p. 193.

[392] Id, p. 195.

[393] Andrew Newcombe & Luis Paradell, supra p. 289-291.

[394] UNCTAD, *supra* p. xv-xvi.

[395] *Comprehensive Economic and Trade Agreement* (CETA) signed between Canada and the EU. The final text of the agreement was released, following legal review, on February 29, 2016: http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/index.aspx?lang=eng (last accessed on 6 June 2017). (CLA-73).

[396] *Cargill Inc. v. Mexico*, ICSID Case no. ARB(AF)/05/2, Award, (18 September 2009), para. 2. 300, 303, 387, 550 ('With respect to Article 1105, the Tribunal finds that Respondent, in an attempt to further its goals regarding United States trade policy, targeted a few suppliers of HFCS, all but annihilating a series of investments for the time that the permit requirement was in place. The Tribunal finds this willful targeting to breach the obligation to afford Claimant fair and equitable treatment'); Glamis, supra, fn. 1087, ¶¶ 681, 789, 791. (CLA-8).

(3) No High Threshold of Gravity Is Required to Prove Discrimination

306. Respondent asserts that "the threshold to prove a discrimination claim would be high, and would require 'more than different treatment'."[397] This statement is inaccurate. No NAFTA or CAFTA-DR tribunal has ever mentioned the existence of a high threshold that would be required to establish discriminatory conduct. The *Glamis* award refers to "evident discrimination".[398] Yet, this qualifier refers to the obvious and clear nature of the discriminatory conduct rather than to its gravity or seriousness.

307. Contrary to Respondent's assertion, the *Eli Lilly* award does *not* support the proposition that "when a measure is not discriminatory on its face, the claimant must prove discriminatory *intent"*.[399] In the quotation mentioned by Respondent, the Tribunal is simply referring to the position *of the claimant* in this case, who alleged the existence of "discriminatory intent" by Canada.[400] Nowhere does the tribunal mention in the award the existence of any requirement to prove an *intention* to discriminate in order to establish a breach of the FET standard. In fact, throughout the award the tribunal refers plainly to "discriminatory measures"[401] or "allegations of discrimination"[402] without using any other qualifier.

308. Thus, the Ballantines do not have to show discriminatory intent in order to succeed on its discriminatory FET claim.

---

[397] **SOD** at ¶ 220.

[398] *Glamis* supra, ¶¶ 22 24, 627, 762, 765, 776, 779, 788, 824, 828.

[399] **SOD** at ¶ 220 (emphasis in the original).

[400] This is clear from para. 438 of the award: "Claimant also asks the Tribunal to infer discriminatory intent for the reasons set out in paragraph 400 above. (…) Therefore, the Tribunal does not see how the court's reference to pharmaceuticals, in a pharmaceutical patent case, expresses discrimination. Claimant's remaining criticisms of the doctrine simply do not speak to discriminatory intent."

[401] *Eli Lilly, supra*, ¶ 416.

[402] *Eli Lilly, supra*, ¶ 442.

b) Specific Discriminatory Measures Adopted by the DR Against the Claimants

309. This section examines specifically the various discriminatory measures adopted by the Respondent against the Ballantines. Respondent alleged that the Ballantines are "simply" arguing that "they were treated differently as compared to other 'businesses' or 'projects', and making little of no effort to show intent, or at least something more than differential treatment".[403] As an initial matter, as mentioned above, there is no need under Article 10.5 to show any discriminatory *intent*. This is not the "test" that CAFTA-DR tribunals should apply.

310. The one test that the tribunal should apply is the one developed by the *Saluka* Tribunal:[404] "State conduct is discriminatory, if (i) similar entities are (ii) treated differently (iii) and without reasonable justification".[405] In the words of one writer, the FET "requests that, if a distinction is made between foreign investors and others, these distinctions have to be made without arbitrariness and based upon a rational foundation".[406]

311. As further explained in the following paragraphs, the different discriminatory measures that were adopted by the DR were ***specifically targeted*** towards the Ballantines. Respondent treated the Ballantines in a significantly different manner than all the other investors who were similar entities.

---

[403] **SOD** at ¶ 222.

[404] *Saluka v. Czech Republic*, UNCITRAL, Partial Award, (17 March 2006). It should be noted that the FET clause in the Japan-Czech Rep. BIT does refer explicitly to "discriminatory measure": Art. 3(1): "Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors" (See ¶ 180). (CLA-74).

[405] Id. ¶ 313.

[406] Klager, supra, p. 193.

Respondent has failed to provide any reasonable justification for treating the Ballantines different than other projects or persons in the DR.

(1) Slope Restrictions

312. One of the most evident elements of targeted discrimination suffered by the Ballantines is related to the slope restrictions. The MMA rejected in total the Ballantines' request for the Phase 2 expansion on the grounds that the land contained slopes in excess of 60%, which was purportedly not allowed under Article 122 of the Environmental Law.[407] Prior to this denial, the MMA never mentioned the issue of slope restrictions, even though the land that MMA had already approved for development in Phase 1 had slopes in excess of 60%.

313. Importantly, other entities that had slopes over 60% on their property were nevertheless granted licenses to develop their projects by the government.[408] In fact, six other projects (Jarabacoa Mountain Garden, Mirador del Pino, Quintas 2, Lotification Consuela Alvarez, La Montaña, and Sierra Fria) were granted permits to build on land with slopes in excess of 60% *after* MMA had denied the request to the Ballantines.[409] In addition, the Ballantines know of 3 projects (Jamaca 1, Paso Alto, Quintas del Bosque 1) that were granted licenses despite having slopes greater than 60% prior to Respondent's denial of the Ballantines' permit. Given the many mountainous areas in the DR, there is, undoubtedly, many more projects that have received permission to develop property that included slopes in excess of 60%.[410] Yet, according to the documents (or lack thereof) produced by Respondent, the

[407] **ASOC** at ¶ 94.

[408] **ASOC** at ¶ 56.

[409] **ASOC** at ¶ 98.

[410] The DR has four significant mountain ranges.

Ballantines are the only resort or housing project in all of the DR that has been denied a permit because of slopes. All of the projects listed above are similar entities to JDD Phase 2.

314. Even more stunning, Respondent has allowed many projects to notoriously develop their properties that include slopes in excess of 60% **in the absence of a permit altogether**. For example, the Ballantines know of three projects that have never been permitted and have been able to develop on land that included slopes greater than 60%. These properties are Rancho Guaraguao, Monte Bonito, and Aloma Mountain, which is right next door to JDD Phase 2. All of these are Dominican-owned. Respondent cannot claim that it was unaware that these projects were developing without a permit. These are mountainside projects where land was cleared, roads put in, and structures built. This is hardly something of which Respondent was not aware.

315. These are clear examples where the Ballantines were treated differently than similar entities. Respondent has failed to provide any reasonable justification for providing the Ballantines with a harsher treatment.

316. Respondent asserts that the Ballantines' facts regarding slopes restrictions is an "oversimplification", adding that "it is too facile to compare projects based solely on slope" and that "one also must consider concentration, altitude, and environmental impact."[411] It is allegedly for these reasons that the other projects were approved while the Claimants' Phase 2 expansion was denied. This assertion that other considerations are necessary for the slope analysis fails for many reasons.

317. First, this excuse by Respondent was created for this arbitration. Prior to the witness statement for this arbitration asserting that other factors are taken into consideration when considering slopes, no document has been produced by Respondent showing that these other factors existed. None. Notably, Respondent never mentioned any of these other alleged factors to the Ballantines in the letters

[411] **SOD** at ¶ 125.

denying the permit. In fact, the Respondent after receiving the Ballantines' Amended Statement of Claim tried to cover this up in a ham-handed way by passing Resolutions 005-17 and 009-17, which for the first time includes altitude as a consideration.[412] This is a fantasy created to distract from the fact that the Ballantines were in fact discriminated against in a manner than totally destroyed the value of their property.

318. Second, Respondent's assertion that the altitude of the project was determinative in its slope denial is also a creation for the arbitration. Again, such an assertion is not in any document prior to the witness statement in this arbitration. More damningly, the following projects in the DR are similar in altitude to JDD Phase 2, have slopes in excess of 60%, and were not denied on the basis of the slope law:

- Rancho Guaraguao, 1450-1900 meters, no permit needed;
- La Montaña, over 1300 meters;
- Paso Alto, 1231 meters;
- Aloma Mountain, 1230 meters, no permit needed ; and
- Jarabacoa Mountain Garden, 1060 meters.

This is compared with Jamaca de Dios Phase 2, which is 1260 meters (1260). Even if Respondent's assertions regarding were actually a bona fide regulation, which it is not, there is no explanation as to why these other projects have been allowed to build on property containing slopes in excess of 60%. All of these have been granted permits or been free to develop in the absence of a permit whereas only the U.S. owned JDD Phase 2 has been prohibited. Respondent simply has no answer as to why these other

[412] Of course, these new resolutions have not kept the politically-connected Aloma Mountain project from continuing to develop on property where the slopes exceed 60%. Since Respondent's MMA does not take these resolutions seriously, neither should this Tribunal.

projects at high altitudes and with slopes in excess of 60% were granted permits so that their land could be developed while the Ballantines were denied a permit.

319. Third, Respondent's assertion that concentration and environmental impact should be considered is also a creation for this arbitration. To be clear, just like with altitude, these purported considerations are found in no contemporaneous documents, including the many denials to the Ballantines. In addition, just like with altitude, these purported additional considerations cannot be found in the law regarding slopes in excess of 60%. These additional considerations are pure fiction in this arbitration.

320. Such considerations, even if they were to be found in the law, which they are not, would not explain the discrimination faced by the Ballantines' JDD Phase 2 project. As set out by Fernando Potes, Jens Richter, and Eric Kay, the Ballantines' JDD Phase 2 is less pristine and environmentally significant than all of the other projects that were granted permits despite having slopes. For example, Mr. Potes discusses how the other projects that were allowed to develop has more pristine forests, significant flora and fauna, and other environmentally sensitive concerns. These experts identified the following properties as both being more environmentally important and pristine than JDD Phase 2 and having slopes in excess of 60%: Quintas 2, Paso Alto, Jarabacoa Mountain Garden, La Montaña, as well as all of the aforementioned comparators all with slopes over 60%. The Respondent cannot rely on this attempted cover up to explain

321. Also very telling, in terms of discrimination, the MMA did not deny the Ballantines a permit only for those Phase 2 areas that have a slope exceeding 60%. Instead, the MMA denied the Ballantines the right to develop *any part* of the land, even those parts (the vast majority of the land) that

have slopes *not* exceeding that limit.[413] Phase 2 was rejected altogether even though the Claimants never had the intention to build on land with slopes exceeding 60 percent.

322. Again, here, the Respondent attempts to use its own discriminatory acts as a defense. The Respondent asserts that "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 [Phase 2] or to affirmatively pledge that in their project they would not develop any land with slopes in excess of 60%."[414] With the Dominican-owned projects, the MMA officials encouraged these projects to resubmit plans so that they could be approved. The Ballantines were never given this opportunity, instead just hit with repeated denials. In any event, Michael Ballantine on several occasions told Respondent's officials that he would not build structures on land where the slopes exceeded 60%.

323. The Dominican-owned projects were not denied the licenses for their *entire* projects as Respondent did to the Ballantines. The Respondent asserts in the Statement of Defense that "other projects were expressly restricted from developing areas of their land where the slopes exceeded 60%".[415] The Ballantines know of only know of two resort projects where the developer was told not to build on slopes in excess of 60%, that is Mirador and Quintas 2. Given that Respondent allows Dominican projects to build in the absence of a permit, we can have no assurance that these projects will actually not build on these slopes. But, importantly, with the exception of these two, the Ballantines believe that everyone else fully approved for what they solicited.

---

[413] **ASOC** at ¶ 100.

[414] **SOD** at ¶ 183.

[415] **SOD** at ¶ 120.

324. Even if this were true, meaning that Respondent had conditioned these two approvals on the projects not building on slopes in excess of 60%, Respondent has nevertheless allowed ***twelve projects to build actually on slopes in excess of 60%***. To be clear, this does not mean that these developers built structures on land that otherwise contained slopes in excess of 60%. Respondent allowed these twelve developers to build structures or roads on the specific area where the slopes exceed 60%. As detailed in the Second Expert Report of Eric Kay, the following projects have roads and/or buildings specifically built on land where the slopes are in excess of 60%:

- Quintas del Bosque 1
- Quintas del Bosque 2
- Rancho Guaraguao
- Jarabacoa Mountain Garden
- Paso Alto
- La Montaña
- Alta Vista
- Lotification Consuelo Alvarez,
- Aloma Mountain
- Monte Bonito, amongst others.

The fact that Dominican-owned projects were allowed to physically build on slopes in excess of 60% while the Ballantines were denied the ability to develop any part of their 29 hectares of land demonstrates the discrimination that the Ballantines faced at the hand of Respondent.

325. In sum, the Ballantines were singled out for no reasonable or credible reason. This was evident discrimination. Whether the Respondent was acting of national origin animus, corruption, political reasons, or pure commercial targeting of a successful development does not matter. There is no justification for the treatment that the Ballantines received. Their project is the only residential project to

be fully denied permission to develop due to slope restrictions, anywhere in the DR.[416] In other words, Respondent specifically targeted the Ballantines by providing them with a treatment different from all other projects in similar circumstances. Respondent asserts (falsely) that it is simply applying Article 122 of the Environmental Law, which restricts land use in mountain areas where the slope exceeds 60%.[417] Yet, the law – or better yet, the implementation of the law – seems to be fully implemented only for the Claimants' project not for others. This is a clear case of discrimination prohibited under Article 10.5.

> "It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair…"
> -- Charles Dickens, **Tale of Two Cities**

326. Before we leave the issue of discrimination and slopes, it is instructive to look at the tale of two projects, JDD Phase 2 and Jarabacoa Mountain Garden, to appreciate the pernicious discrimination at work here.

327. JMG began its project by constructing two kilometers of roads without a permit. Respondent never fined them for this. Respondent now admits that over 43% of its approved developable land in JMG has slopes over 60%. This land is also fully within the Eastern Baiguate Watershed, which is directly above the river and waterfall. This project was fully approved for the 115 lots it requested, even though there was an initial denial.

328. When the Ballantines requested reference terms, Respondent refused to provide them. they were never even given these. In contrast, Respondent gave JMG terms of reference when they requested them and made no issue of the extensive slopes in excess of 60%. This approval was made after the Ballantines had been completely rejected three times. Even though Respondent's MMA

[416] ASOC at ¶ 79.

[417] **SOD** at ¶ 122.

recognized that the land was very steep (between 40%-70%), Respondent simply encouraged JMG to make some small adjustments in order to receive their permits – and JMG received the permits and never made the adjustments.

329. The Ballantines requested 70 lots in a less pristine environment and were 100% denied. JMG requested 115 lots in a semi pristine forest and were approved for all 115 properties. Respondent even gave JMG special permission to withhold free flowing water on their project that flows to the Baiguate River and waterfall.

330. The treatment the Ballantines received compared to these other projects was not accidental or slight. Respondent simply singled out the Ballantines while allowing the politically connected projects and other Dominican projects to do almost anything. This is exactly the type of discriminatory treatment that the investment protections of CAFTA-DR are designed to protect against.

(2) National Park

331. Both the creation of the National Park and the manner in which the purported restrictions were applied to the Ballantines also are cases of discrimination under Article 10.5.

332. First, the creation of the National Park itself was discriminatory. The purported purpose of the Park was to protect the Baiguate river and for other reasons. While the Ballantines Phase 2 was included in the Park, certain Dominican-owned properties were purposefully excluded from the Park. As testified by the Ballantines' experts, Fernando Potes and Jens Richter, the Dominican properties that were excluded were much more worthy of being included in the Park rather than JDD Phase 2. The following are the Dominican-owned competing properties that were not included in the Park:

- Jarabacoa Mountain Garden in its entirety within the Eastern Baiguate watershed. It is directly above the Baiguate River and Waterfall. JMG has active waterways feeding the Baiguate River. JMG is also in a dense, semi pristine forest.

- Paso Alto is almost entirely within the Eastern Baiguate Watershed. It likewise has a dense, semi-pristine watershed.
- Dr Victor Mendez Capellan, one of the richest Dominicans in the country and owner of Grupo Vimenca, owns an approximately 2,000,000 meters of land that is a semi-pristine forest that borders the Baiguate Waterfall and has 2 kilometers of riverfront property. Most of his property is in the Northern Baiguate Watershed. Mr. Potes was especially concerned that Mr. Capellan's land was not included in the Baiguate National Park given the purported reasons for creating the park.
- Dr. Felucho Jimenez, a founding member of the PLD Party, and a member of its Central Committee, is the owner of the Jarabacoa Country Club and Hotel Carmen. His expansive property is entirely within the Easter Baiguate Watershed and has been completely left out of the Park by Respondent.
- Dominican Pedro Valerio has large greenhouses that have been expanded since 2009. His property is located in its entirety within the Northern Baiguate Watershed. It is located on the south ridge of Loma La Peña and directly on the other side of la Jamaca de Dios, a mere 90 meters below. Mr. Valerio has dammed up the largest natural spring on the Mogote Mountain, along Loma La Peña. He has directed a 6 inch pvc pipe towards his large greenhouses and is using his land for large agricultural projects that require the withholding of large quantities of water from the Baiguate River.

333. If Respondent really wanted to protect the Baiguate Waterfall and achieve its other objectives, these other properties would certainly have been included in the Park. As testified to by Mr. Potes and Mr. Richter, these properties are more environmentally significant and their failure to be in the Park is without any justification or explanation.

334. Even if the manner in which the Park's boundaries were drawn was not discriminatory, which they were, the manner in which Dominican-owned properties have been allowed to build in national parks is discriminatory. The most glaring example, of course, is that Aloma Mountain, the project owned by the politically-connected Dominguez, continues to develop its property even though it is in the same national park as the Ballantines. As noted as Jens Richter, and confirmed by drone footage and pictures, Dominguez has stepped up his efforts in the last two years to develop his property in the Park. While the Ballantines have been prevented from doing anything with their land in Phase 2, Dominguez has lost no time by continuing to develop his property. This smacks of discrimination against the Ballantines.

335. In addition to Aloma Mountain, other projects either in a national park or in the buffer zone have been allowed to build in these national parks. The following are some examples of which the Ballantines are aware that have been allowed to build in national parks of buffer zones:

- Villas Pajon is an unpermitted, Dominican-owned is an ecotourism project entirely within the limits within the Valle Nuevo National Park, as it proudly trumpets on the front page of its website.
- Rancho Guaraguao is developed almost entirely within the Valle Nuevo Category 2 National Park in Constanza and is owned by Dominican Miguel Jiminez Soto, a major general of the Dominican armed forces. It is a copycat development of Phase 1 of Jamaca de Dios, with 52 luxury villas, a restaurant, and common areas. This project was built entirely without an environmental permit after the national park where it resides was created.
- Ocoa Bay is a massive two-phase project located within the boundaries and buffer zones of the Francisco Alberto Camaaño Deño Cat 2 National Park, which was created the same day as Baiguate National Park. The inauguration for Ocoa Bay was attended both by President Danilo

Medina and the Minister of Environment Bautista Gomez Rojas.[418] Phase 1 was fully approved on December 28, 2011 despite the absence of a Park Management Plan. The entire second phase is in a national park.

336. This is not a case where the claimant has adduced one example of disparate or discriminatory treatment. To be clear, that would be enough. But here there are many examples of discriminatory treatment with respect to the Ballantines.

3. The Arbitrary Measures Adopted by Respondent

337. Respondent acknowledges, as it must, that arbitrary conduct is prohibited under CAFTA-DR Article 10.5.[419]

338. Before examining the specific arbitrary measures adopted by Respondent, a few words should be said about two preliminary issues that have been raised in the Statement of Defense in relation to this claim: (1) the question of whether there exists any specific threshold of severity necessary to establish arbitrary conduct, and (2) the soundness of the "two-prong test" put forward by Respondent to determine whether any conduct should be considered as "arbitrary".

a) CAFTA-DR Tribunals Have Not Recognized the Existence of any Specific Threshold of Severity Necessary to Establish Arbitrary Conduct

339. As a starting point, Respondent notes that the reasoning of some NAFTA tribunals suggests the existence of a high threshold of severity. Some of these tribunals have used the expression "manifest" arbitrariness.[420]

---

[418] Respondent failed to produce any documents concerning the development of Ocoa Bay, other than documents relating to a small fine apparently for building outside of the 71,220 meter polygon approved for development. That fine has not slowed this massive project.

[419] **SOD** at ¶ 223.

[420] **SOD** at ¶ 223.

340. It should be highlighted, however, that a number of other NAFTA tribunals have *not* endorsed the existence of any such high threshold of severity. Thus, the *Merrill & Ring,*[421] *Mobil,*[422] *Mesa*[423] and *Bilcon*,[424] tribunals refer simply to "arbitrary" conduct, *without* using any other qualifier.

341. For instance, in *Bilcon* the majority of the tribunal clearly adopted a much lower threshold when concluding that the conduct of an administrative authority was arbitrary: "JRP [Joint Review Panel] effectively created, without legal authority or fair notice to Bilcon, a new standard of assessment [i.e. the 'community core values' factor] rather than fully carrying out the mandate defined by the applicable law".[425] The majority of the Tribunal further described the arbitrary nature of the conduct as follows:

> Viewing the actions of Canada as a whole, it was unjust for officials to encourage coastal mining projects in general and specifically encourage the pursuit of the project at the Whites Point site, and then, after a massive expenditure of effort and resources by Bilcon on that basis, have other officials effectively determine that the area was a "no go" zone for this

[421] *Merrill & Ring v. Canada* (NAFTA), UNCITRAL (Award, March 31, 2010), ¶ 208: « Conduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process has also been noted by NAFTA tribunals as constituting a breach of fair and equitable treatment (…)."(CLA-16).

[422] *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada,* Decision on Liability and on Principles of Quantum, 22 May 2012, ICSID No. ARB(AF)/07/4, ¶ 152: "the fair and equitable treatment standard in customary international law will be infringed by conduct attributable to a NAFTA Party and harmful to a claimant that is arbitrary, grossly unfair, unjust or idiosyncratic, or is discriminatory and exposes a claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety." (CLA-67).

[423] *Mesa Power Group, LLC v Canada*, Award, 24 March 2016, UNCITRAL PCA Case No. 2012-17, ¶ 502: "the Tribunal considers that the following components can be said to form part of Article 1105: arbitrariness; "gross" unfairness; discrimination; "complete" lack of transparency and candor in an administrative process; lack of due process "leading to an outcome which offends judicial propriety"; and "manifest failure" of natural justice in judicial proceedings". See also, at ¶ 566: "The Tribunal cannot find that the conclusion of the GEIA was 'arbitrary', 'grossly unfair, or 'unreasonable'." See also at ¶ 579, 633. (CLA-62).

[424] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton And Bilcon Of Delaware, Inc v Canada*, Award on Jurisdiction and Liability, 17 March 2015, UNCITRAL PCA Case No. 2009-04, ¶ 591: "The *Waste Management* test mentions arbitrariness. The Tribunal finds that the conduct of the joint review was arbitrary." (CLA-61).

[425] Bilcon, Id, ¶ 591.

> kind of development rather than carrying out the lawfully prescribed evaluation of its individual environmental merits.[426]

342. In any event, *no* CAFTA-DR tribunal has so far endorsed the existence of any such high threshold of severity adopted by a few NAFTA tribunals.

343. Thus, the *Railroad* tribunal said that "regarding the content of the standard", it "refers to and adopts the conclusion reached by the tribunal in *Waste Management II*" because it "persuasively integrates the accumulated analysis of prior NAFTA tribunals and reflects a balanced description of the minimum standard of treatment".[427] The *Railroad* tribunal then referred to a passage from the *Waste Management II* award which mentions "conduct" that "is arbitrary" without using any qualifier. Later in the award, the *Railroad* tribunal again refers simply to the adjective "arbitrary" without more.[428]

344. Similarly, the *TECO* tribunal explicitly mentioned that it "considers that the minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct is **arbitrary**, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety."[429] Elsewhere,

---

[426] Bilcon, Id, ¶ 592.

[427] *Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, Award (29 June 2012), ¶ 219. (CLA-56).

[428] *Railroad,* Id ¶ 235: "In the Tribunal's view, the manner in which and the grounds on which Respondent applied the *lesivo* remedy in the circumstances of this case constituted a breach of the minimum standard of treatment in Article 10.5 of CAFTA by being, in the words of *Waste Management II*, "arbitrary, grossly unfair, [and] unjust." In particular the Tribunal stresses the following facts, which taken together demonstrate the arbitrary, grossly unfair, and unjust nature of *lesivo* in this case, including by evidencing that *lesivo* was in breach of representations made by Guatemala upon which Claimant reasonably relied (…)".

[429] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (19 December 2013), ¶ 454. See also, at ¶465 ("There is in fact no doubt in the eyes of the Arbitral Tribunal that, if the Claimant proves that Guatemala acted **arbitrarily** and in complete and willful disregard of the applicable regulatory framework, or showed a complete lack of candor or good faith in the regulatory process, such behavior would constitute a breach of the minimum standard."), ¶ 587 ("Under the minimum standard, international law prohibits State officials from exercising their authority in an abusive, **arbitrary** or discriminatory manner"). (CLA-26).

the *TECO* tribunal mentions that "under the minimum standard, international law prohibits State officials from exercising their authority in an abusive, **arbitrary** or discriminatory manner", adding that "a **lack of reasons** may be relevant to assess whether a given decision was arbitrary and whether there was lack of due process in administrative proceedings".[430] The *TECO* tribunal thus refers to "arbitrary" conduct and "lack of reasons" without using a qualifier.

345. In *TECO*, the tribunal found that Guatemala had breached CAFTA-DR because it had failed to give reasons for departing from a recommendation from an expert commission that was involved in setting electricity tariffs. Failing to give reasons for departing from a recommendation is hardly something that can be considered as shocking the conscience or otherwise extraordinary. Compared with the extraordinary discriminatory and arbitrary acts, among other wrongs, in this case, TECO is a minor blip of wrongdoing.

346. In sum, CAFTA-DR tribunals have *not* recognized the existence of any particular threshold of severity necessary to establish arbitrary conduct in violation of Article 10.5.

b) The "Two-Prong" Test Put Forward by the D.R. to Determine Whether a Conduct Should be Considered as "Arbitrary"

347. Respondent has put forward the following "two-prong test" to determine whether a conduct should be considered as "arbitrary":

> 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.[431]

[430] *TECO*, Id, ¶ 587.

[431] **SOD** at ¶ 229.

348. Elsewhere, Respondent asserts that under this test the Ballantines are required 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."[432]

349. Respondent further asserts that the "two-prong test" was adopted by the NAFTA *Glamis* tribunal, which referred to the requirement that a conduct be "rationally related to its stated purpose and reasonably drafted to address its objectives".[433] Respondent could have also made reference to the more recent NAFTA *Mesa* award where the Tribunal also used the "two-prong test":

> [I]t is for the Tribunal to examine whether, as the Claimant alleges, the beneficial treatment was granted to the Korean Consortium arbitrarily, or in any other way that contravened Article 1105. In particular, the Tribunal must determine whether Canada's conclusion of the GEIA [i.e. the "Green Energy Investment Agreement" signed by the government of Ontario and the Korean Consortium] **lacked a justification**, and whether there was a **reasonable relationship between the justification supplied and the terms of the GEIA**. For the reasons discussed above, the Tribunal comes to the conclusion that such justification and reasonable relationship did exist.[434]

350. A more comprehensive and sophisticated "two-prong test" test has been developed by Heiskanen. Yet, it should be highlighted that the author used the test in the reverse order than that proposed by the D.R.:

> The decision-maker assesses the international legality of the governmental measure in question by focusing on the relationship between the measure and its underlying policy justification. Has any rationale or justification been put forward in support of the measure in the first place? In the affirmative, is such a rationale or justification related to a legitimate governmental policy? If the answer to the first question is in the negative, and if there is no conceivable

[432] **SOD** at ¶ 227.

[433] *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009) ¶ 803. (CLA-25).

[434] *Mesa*, supra, ¶ 579.

> rationale that could justify it, the measure can be classified as 'arbitrary'. This 'definition' of arbitrary is also largely in line with the standard definition of arbitrary in legal dictionaries - an arbitrary measure can indeed be defined as a measure taken without any justification, actual or conceivable. If the answer to the first question is yes - if a rationale or justification has in fact been put forward for the measure - then the relevant question is whether there is a reasonable relationship between such a purported justification and a legitimate governmental policy. If there is no such relationship (e.g. if the measure discriminates between investors based on their eye colour), then the measure in question can be considered 'unreasonable.[435]

351. The Ballantines essentially agree with the D.R. that the "two-prong test" it has identified is ***one*** method the Tribunal could use to determine whether the Respondent's conduct is "arbitrary". The test consists of two distinct questions determining between, on the one hand, the "measure" adopted by the DR and, on the other hand, the underlying "policy" under which the measure was adopted.

352. It should be noted that the term "measure" is not restricted to the laws and/or policies of the D.R. It is not only the law that can be a measure but the actions which Respondent's officials take in purported compliance with these laws that can be measured. Accordingly, the Tribunal has to consider the actions of Respondent in interpreting these laws and not just the laws itself when determining what constitutes a measure for the purpose of CAFTA-DR generally and the FET provision specifically.

353. With regard to the arbitrary analysis, the first question which needs to be asked is whether there is any rational reason or any logical justification behind the *policy* which was adopted by Respondent. If the answer to this first question is negative, the analysis does not need to be further pursued. In the words of Heiskanen, in such a case there is no "legitimate governmental policy".[436] Any

---

435. V. Heiskanen, "Arbitrary and Unreasonable Measures, in Standards of Investment Protection", in: A. Reinisch (ed.), *Standard of Investment Protection*, Oxford U. Press 2008, 111, 104. The same test is put forward by Alexandra Diehl, *The Core Standard of International Investment Protection: Fair and Equitable Treatment* (Wolters Kluwer 2012) 453. (CLA-75).

436. Heiskanen, ibid.

such policy should be considered arbitrary in violation of Article 10.5. Thus, the Ballantines will prevail if the Tribunal finds that the policy in question have no rational reason or logical justification.

354. In the event that the answer to the first question is positive (*i.e.*, that there exists some rational justification behind the *policy*), one should ask a second question regarding the *measures* which was adopted by Respondent in application of this underlying policy. The question to be asked is the following: is there any reasonable relationship between the measure which was adopted by Respondent and the policy underlying such measure. To paraphrase the Respondent's own terms, it needs to be shown that the "measure was not reasonably correlated or tailored to such policy".[437] The 2012 UNCTAD Report explained the second part of the test in the following terms:

> Arbitrariness in decision-making has to do with the motivations and objectives behind the conduct concerned. A measure that inflicts damage on the investor without serving any legitimate purpose and without a rational explanation, but that instead rests on prejudice or bias, would be considered arbitrary.[438]

355. Although the Respondent has identified the nature and the content of this particular arbitrary test, it has clearly misunderstood how that test should be applied in practice. Thus, Respondent asserts that "so long as a measure is reasonable — and certainly not manifestly *un*reasonable — it cannot be considered arbitrary."[439] As mentioned above, there is clearly no basis for requiring that a measure be "manifestly *un*reasonable" for it to be considered as arbitrary in violation of the MST under custom. Moreover, it does not matter whether the "measure is reasonable" in the abstract. The reasonableness of a measure can only be assessed when taking into account the policy objectives underlying it.

---

[437] **SOD** at ¶ 227.

[438] UNCTAD, Fair and Equitable Treatment (UNCTAD Series on Issues in International Investment Agreements II, United Nations 2012), p. 78. (CLA-72).

[439] **SOD** at ¶ 226 (emphasis in the original).

356. In any event, Respondent argues that the Ballantines' claim should be rejected on the ground that they 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".[440]

357. This is a rather awkward assertion. Respondent does not explain what those "other reasons" are. In fact, there are no such "other reasons". To be clear, the Ballantines are challenging the two measures adopted by Respondent in light of the "two-prong test" put forward by the Respondent, among other formulations of arbitrary conduct. The following sections will show that even if there were some rational *policy* reasons behind the slopes restrictions and the creation of the National Park, or the policy regarding slopes, it is nevertheless undeniable that the actual *measures* adopted by the DR bear no reasonable relationship whatsoever with any such policies. Moreover, with respect to the national park, the purported measure of creating the park is itself a violation of arbitrary conduct with respect to CAFTA-DR.

c) Specific Arbitrary Measures Adopted by the DR Against the Claimants

358. The section examines specifically the two arbitrary measures adopted by Respondent against the Ballantines.

(1) Slope Restrictions

359. Respondent rejected the Ballantines' request for the Phase 2 expansion on the grounds that a small portion of the property included slopes on the upper portion of the property that exceeded the maximum grade of 60% permitted under Article 122 of the Environmental Law.[441] Respondent

[440] **SOD** at ¶ 229.

[441] **ASOC** at ¶ 94.

denied the Ballantines the right to develop *any* part of the land, even those parts which have slopes *not* exceeding that limit.[442] In contrast, other projects in similar circumstances with slopes above 60 percent were granted licenses by the government.[443] Many of these projects included no restrictions on slopes whatsoever – meaning that these properties that included slopes in excess of 60% were granted permits that did not restrict them from building on these slopes. In two circumstances, projects were only required not to develop the part of the land where slopes exceeded the maximum grade of 60%. These two projects were *not* denied the licenses for their *entire* projects as the D.R. did regarding the Claimants' project. And, as stated above, these projects were ultimately allowed to build on the areas where the slopes exceeded 60%.

360. Respondent completely mischaracterized the Claimants' arbitrariness claim as being one about a failure by Respondent to explain the reason why the project had been rejected: "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%."[444] As further explained below, the Ballantines' arbitrariness claim regarding slopes restrictions has nothing to do with a simple "miscommunication" problem, although the failure to provide a legitimate rationale for the denial is one of many bases to find arbitrariness. .

361. In any event, Respondent argues that the claim should be rejected on the ground that it "did not establish a complete bar to the project", but "simply asked the Ballantines to adapt it, and invited them to present alternative plans for [Phase 2]", which they apparently never did.[445]

---

[442] **ASOC** at ¶ 100.

[443] **ASOC** at ¶ 56.

[444] **SOD** at ¶ 228. See also, ¶ 231: "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%."

[445] **SOD** at ¶ 231.

362. Respondent's statement that it "did not establish a complete bar to the project" is incorrect. In contrast to the other projects, Respondent never asked the Ballantines to adapt the project and to present alternative plans for Phase 2. In fact, the following description of the sequel of events mentioned by the Respondent itself clearly shows that it simply rejected the project without asking the Ballantines to adapt it:[446]

- "[O]n 12 September 2011, the Ministry **formally rejected** the Ballantines' permit application (…)";[447]
- "On 2 November 2011, the Ballantines requested reconsideration of the Ministry's decision (…)."[448] In response, the Ministry explained in a letter dated 8 March 2012 the reasons for rejecting the project and "informed the Ballantines that their application **file had been closed**";[449]
- However, the Ballantines "continued to push the issue" and "on 3 August 2012, they again asked the Ministry to reconsider its decision (…)".[450] The "Ministry's 18 December 2012 response was the same as before (….) and that the land identified therefore was **not suitable** for Project 3";[451]
- "On 4 July 2013, the Ballantines requested reconsideration for a third time, arguing once again that the Ministry's assessment was incorrect".[452] The "Ministry sent a letter to the Ballantines on 15 January 2014, ratifying its earlier conclusion that the project was "**not [environmentally] viable**"".[453]

[446] **SOD** at ¶ 80.

[447] **SOD** at ¶ 80.

[448] **SOD** at ¶ 81.

[449] **SOD** at ¶ 81.

[450] **SOD** at ¶ 82.

[451] **SOD** at ¶ 82.

[452] **SOD** at ¶ 83.

[453] **SOD** at ¶ 83.

363. In addition to the above, which puts the lie to Respondent's assertion that MMA officials were trying to work with the Ballantines, the Ballantines on several occasions stated that they would not build on areas of Phase 2 where the slopes exceeded 60%. The Tribunal should ask what purpose would there be to restrict development of property based on slopes where the project proponent has stated that they would not build on property that exceeded these 60% slopes.

364. In any event, the different letters sent by Respondent show a very clear and undeniable pattern of firm rejection of the project. Respondent never asked the Ballantines to change their project or to provide alternative plans for Phase 2. Respondent simply rejected the project. Thus, the two letters referred to above state in unambiguous terms that that the Ministry "**formally rejected**" the project and that their "application file **had been closed**". It is hard to imagine a more vivid example of the Respondent establishing a "complete bar to the project". To confirm this, Respondent's final letter talked about the project not being environmentally viable.

365. To be clear, every other project – despite having slopes over 60% – solicited and received reference terms in order to create an Environmental Impact Study. In all other cases the environmental impact study became the basis for dialogue with the Ministry of Environment to ensure compliance with the issuing of its environmental permit. This simple step was never given to the Ballantines; and so they never had the opportunity to work with the MMA to make sure that any issues were addressed. There was never any dialogue, nor were the Ballantines even offered an alternative. It defies credulity that had the Ballantines been told that they needed to consider a revised plan that they would not have done so. How silly is that? Had the Ballantines been given the opportunity to work with the MMA to make sure there were no issues with the slopes, they certainly would have done so. Something else is certainly going on here. Unlike the other projects, the Ballantines were given a flat denial without any opportunity to work with the MMA.

366. The Tribunal should recall that the Ballantines submission to the MMA that solicited these complete and absolute denials was for a road in part of Phase 2. The Ballantines needed to obtain the road permit in order to continue the preparations for the housing sites. This was the process the Ballantines implemented in Phase 1, which was agreed to with the inspectors on the February 17, 2011 preliminary visit. Thus, when Respondent states that the project was not environmentally viable and the case had been closed, this was not a judgment based on a permit request to build houses on slopes. Rather, it was just in response to the road request.

367. In any event, the question as to whether or not a measure adopted by Respondent is arbitrary can be assessed based on the "two-prong" test put forward by the Respondent.

368. The first question is whether there is any rational reason or logical justification behind the *policy* which was adopted by Respondent towards the Ballantines and the Ballantines only. As an initial matter, the Ballantines do dispute that the slope policy might have been based on logical reasons. According to Respondent, the project was rejected because of the "environmental fragility of the area" and the "natural risk" related to "the land topography and slope, which is over 60% in much of the area".[454] The Respondent asserts that the slope restriction is necessary for these reasons. But the policy, as written in Article 122 of the Environmental Law, does not include the elements asserted by Respondent in this arbitration. Rather, the policy in the law purports to restrict any development on land where slopes exceed 60%. This, as written in the law, is not a rational policy. Disallowing all development in land which contain slopes in excess of 60% is too broad a policy to protect certain areas. It would be different if the policy allowed for development on the areas where the slopes were not in excess of 60%. But that is not the case here. Had the law been written to allow for development on

[454] **SOD** at ¶ 80.

areas within the property where the slopes did not exceed 60%, this might be allowable under CAFTA-DR.

369. In any event, even if the policy was rational and had a logical justification, which it did not as written, there is no reasonable relationship between the measure which was actually adopted by Respondent with respect to the Ballantines and the policy underlying such measure. If the goal of the slopes restriction policy is to protect the "environmental fragility of the area" or to prevent landslides,[455] Respondent should have adopted the following simple and reasonable measure: preventing ***all* investors** from developing project where slopes are exceeding 60 per cent. Yet, as mentioned above, Dominican investors have *not* been prevented from developing their projects in areas even if slopes were exceeding 60%. And, as the Kay Report sets out, many of these mountain projects in the DR (if not all)[456] built structures or roads on specific plots of land that exceeded the 60% threshold.

370. Respondent for some reason denies this obvious fact and asserts that "other projects were expressly restricted from developing areas of their land where the slopes exceeded 60%".[457] But this is incorrect. As Mr. Kay's report shows, many other projects built on land that contained slopes in excess of 60%. Even Respondent knows this is the case. Respondent's witness Mr. Navarro states that projects had land that included a certain percentage of land with slopes over 60%. Mr. Navarro's analysis shows that these projects had slopes similarly to JDD Phase 2. Mr. Kay's report shows that Mr. Navarro's report overstates the slopes located in the JDD Phase 2 area. Even if JDD Phase 2 had slightly more

[455] **SOD** at ¶ 80.

[456] Mr. Kay had to use drone and some pictures to show these slope measurements. He and others were not allowed to visit the private property of various projects. Given the amount of projects that Mr. Kay was able to show with limited access, the Tribunal should conclude that Respondent allowed many other projects to build on slopes in excess of 60%.

[457] **SOD** at ¶ 120.

slopes in excess of 60% than other projects, which it does not, that still does not explain Respondent's flat out rejection of JDD Phase 2 while it allows these other projects to develop.

371. For Respondent to allow other projects to develop, but to deny the Ballantines to do the same in the exact same circumstances is not only discriminatory (as already demonstrated above), but it is also arbitrary. There indeed is no reasonable relationship between the adoption of different treatment to different investors and the purported policy goal of slopes restrictions. Given the fact that the goal of the slopes restriction policy is to protect the "environmental fragility of the area",[458] the DR should have **refused *all*** developing project in areas where slopes are exceeding 60%, not just the Ballantines' project.

372. Moreover, there is no logical reason for Respondent to have adopted the radical measure of denying the Ballantines' *whole* project because of slopes exceeding 60% on a small portion of its land. Indeed, there is no reasonable relationship between the adoption of such an all across the board denial and the policy goal to protect the "environmental fragility of the area".[459] Logically, that goal is achieved by simply preventing any development on those parts of the land where the slopes ***are* exceeding** 60%. Protecting the "fragility of the area" is clearly **not** improved at all by denying development on land with slopes ***not* exceeding** 60%. To paraphrase the terms used by Respondent, rejecting the Ballantines' *entire* project is "not reasonably correlated or tailored"[460] to the policy of slopes restrictions said to be pursued by Respondent.

373. As correctly noted in the 2012 UNCTAD Report, any measure adopted which is motivated by reasons *other* than to pursue reasonable and legitimate policy goals should be considered

[458] **SOD** at ¶ 80.

[459] **SOD** at ¶ 80.

[460] **SOD** at ¶ 227.

as arbitrary: "A measure that inflicts damage on the investor without serving any legitimate purpose and without a rational explanation, but that instead rests on prejudice or bias, would be considered arbitrary".[461] The measure concretely adopted by Respondent against the Ballantines regarding slopes restriction is clearly not "serving any legitimate purpose" and is "without a rational explanation".[462] (This is true even if the law itself was neutral and rational.) It can only be explained by a "prejudice or bias" against the Ballantines which have been arbitrarily targeted by Respondent. As such, the slopes restriction measure adopted by the Respondent against the Ballantines is a school-book example of an arbitrary measure in violation of the MST under Article 10.5.

374. Putting aside the two-prong test, Respondent's measures are violative of CAFTA-DR under other measures of arbitrariness. For example, Respondent's assertion that its officials used altitude, concentration, and environmental impact when determining the slope issues was arbitrary. When the Ballantines invested in the DR, it was obvious to them (and anyone) that there were no restrictions on the development of these projects based on slopes. This was further confirmed when the Ballantines were given a permit to develop Phase 1 – leading to the Ballantines purchasing more land for Phase 2.

375. The new justification for this arbitration regarding altitude and other issues is further arbitrary because it finds no place in the law or anything else for that matter. The Ballantines asked for documents showing the guidance or information given to MMA officials regarding the questions of altitude and other considerations, other than the slopes themselves. Respondent produced nothing in response to this request. To the extent that Respondent asserts that it was using other criteria regarding

[461] UNCTAD, *supra*, p. 78.

[462] Id.

these projects, these criteria were not only unknown to the Ballantines, they were apparently unknown to the MMA officials.

376. Even to the extent there was a law involving slopes, that law was not applied in a manner that restricted the Ballantines' Phase 1 or other properties from development. To the Ballantines knowledge this law, which in context applies more to agriculture, has never been invoked against any development to prevent any development. The Ballantines watched as competing projects on mountains all around the area began to be built, capitalizing on the Ballantines' success. As discussed above, the application of the Law to the Ballantines was arbitrary given the treatment of competing, Dominican-owned projects.

377. In addition to that arbitrariness, the application of the law was further arbitrary in that the purported mechanism by which Respondent's officials appears to have vested complete discretion in the MMA official in determining whether to grant the permit. Although Respondent asserts in this Arbitration that the MMA official would look at a variety of factors, those factors are not listed in the Law and are not otherwise contained in any materials available to the public. In addition, these factors are not even available to the persons considering the permit. Rather, even under Respondent's own newly-found defense, the MMA official was entitled to make an arbitrary decision to decide whether or not to grant a permit. It is just this type of arbitrariness that leads to absurd results like we have here where the Ballantines were denied a permit while others were not.

(2) National Park

378. According to Respondent, the National Park was created to protect the Baiguate Waterfall and River, the protection of walnut trees, and the carpets of forest that run along the Baiguate River[463]

[463] **ASOC** at ¶ 211.

379. For the purposes of analyzing this arbitrariness claim only, the Ballantines do not take issue with the rational reasons behind a policy (as it were) of the creation of the National Park. (To be clear, we do not take exception with regard to the reasons for the creation of the National Park for the arbitrary prong. The mechanics behind the boundaries of the Park is what the Ballantines rightly take issue with.) The Ballantines would not likely be able to advance a successful arbitrary claim regarding the policy of the Park had the boundaries of the Park been drawn to reflect that legitimate policy goal. But they were not.

380. The purported policy goal underlying the creation of the Park would have logically and reasonably required Respondent to draw the boundaries of the Park in a suitable way to protect the Baiguate waterfall, the river, and its corresponding flora and fauna and species. But this measure, as applied to the Ballantines' property, is not what happened in practice.

381. The boundaries were drawn in an arbitrary manner, completely disconnected and without any reasonable relationship with the policy goal for which the Park was created in the first place. For example, as explained by Mr. Potes and Mr. Richter, the Park includes the Ballantines' land, even though it faces away from the Baiguate Waterfall and River and, consequently, does not affect them as the runoff from the Ballantines' property goes elsewhere.

382. The arbitrariness of this measure becomes even more apparent when the Tribunal considers that the properties that do affect (greatly, in fact) the Baiguate Waterfall and River were expressly excluded from the Park. That is, to the extent the policy of the Park was rational to protect the Baiguate Waterfall and River, the measure of drawing the boundaries was arbitrary given the failure to connect the policy with the measure.

383. In addition, the other assertions for the Park – many of which have been made just in the Arbitration – are likewise not connected to the purported policy of the Park. As explained by Mr. Potes

and Richter, the projects left out the Park were substantially more worthy of protection of JDD Phase 2. As explained, Phase 2 had been used primarily for agriculture before being purchased by the Ballantines. This land was not pristine environmentally, except in small parts, and did not contain dense forests, unique flora and fauna, or any special endangered species that were not contained in other areas excluded from the Park. The Park as drawn, based on the purported policy goals, was arbitrary given the inclusion of the Ballantines coupled with the exclusion of the other properties. Also, the Park includes the Claimants' land even though there are no walnut trees on the property. Therefore, the inclusion of the Claimants' property within the boundaries of the Park does *not* in any way help to achieve the policy goals which are said to be underlying the creation of the Park.

384. In sum, other properties of Dominican nationals whose run off goes directly to Baiguate and whose land was more pristine and dense were left out of the protected area. The protection of the Baiguate Waterfall and River would have logically called for these properties to be included within the boundaries of the Park.[464] They were not.

385. To paraphrase the UNCTAD Report mentioned above, the drawing of the boundaries of the Park is clearly not "serving any legitimate purpose" and it is also "without a rational explanation".[465] It can only be explained by a "prejudice or bias" against the Claimants which have been arbitrarily targeted by Respondent. As such, the measure adopted by the DR against the Claimants is arbitrary in violation of the MST under Article 10.5.

4. Due Process and Fair and Equitable Treatment

386. In the previous sections, the Ballantines have explained the DR's violations of two important elements of the FET standard: arbitrary conduct and discrimination. The present section will

[464] **SOD** at ¶ 232.

[465] UNCTAD, supra, p. 78.

examine several breaches committed by the DR in violation of its due process obligation under the CAFTA-DR.

387. The Ballantines believe that it is also necessary to examine under the umbrella of the principle of 'due process' the following breaches which were already identified in the Amended Statement of Claim, as these due process violations create independent wrongful acts under Article 10.5:

- Respondent's Arbitrary Refusal to Issue No Objection Letter;
- Respondent's Unjust Treatment of the Ballantines re Slopes;
- Respondent's Unjust Treatment of the Ballantines re the National Park;
- Respondent's Non Transparency re Slopes; and
- Respondent's Non Transparency re National Park.[466]

388. CAFTA-DR Article 10.5(2)a) refers explicitly to the 'due process' obligation which the parties have to respect regarding foreign investors:

> "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;

389. It is well-established that the FET standard contains an obligation for host States to provide foreign investors with due process. Recent treaties recognizing this obligation include the EU-Canada Comprehensive Economic and Trade Agreement (CETA), the US Model BIT, as well as the United States' most recent BITs and FTAs. The 2012 authoritative UNCTAD Report on the FET standard expressly includes "flagrant violations of due process" as one of the five elements of the FET standard.

[466] These transparency issues are examined in the transparency portion of the FET clause below. The opaqueness here is a treaty violation, but given the differing views tribunals have taken, the Tribunal could find the lack of transparency a violation of the due process or the transparency requirements of the FET provision.

390. NAFTA tribunals have consistently recognized the existence of a due process obligation under Article 1105 as part of the FET standard. The same conclusion has also been reached by CAFTA-DR tribunals. The TECO tribunal mentioned that it "considers that the minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety." The TECO *ad hoc* annulment committee agreed with this finding and stated that "the Tribunal correctly identified the applicable law". The Spencer tribunal also referred expressly to the due process obligation. Similarly, the *Railroad* tribunal endorsed the definition of the minimum standard of treatment adopted by the NAFTA *Waste Management II* case, which refers explicitly to the obligation of due process as being part of the MST:

> Taken 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 candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[467]

a) Specific Violations of the Due Process Obligation Committed by the DR Against the Claimants

391. This section examines specifically three measures adopted by the DR against the Claimants which are in violation of the due process obligation:

- The refusal by the City of Jarabacoa to issue a "No Objection" letter leaving the Ballantines in a complete legal limbo;

[467] *Railroad Development*, supra (CLA-26).

- The failure to provide reason for the arbitrary and discriminatory slopes policy specifically adopted against the Ballantines; and
- The failure to adopt a transparent process for the creation of the National Park and to provide the Ballantines with the opportunity to challenge its boundaries and requirements.

(1) Refusal by the City of Jarabacoa to Issue a No Objection Letter leaving the Ballantines in a Complete Legal Limbo

392. As explained in the Amended Statement of Claim, the Ballantines requested a "No Objection" letter from the City of Jarabacoa for the construction of a mountain lodge on Phase 1. To date, the Ballantines have not yet received this letter. Respondent denies that they should have issued the letter and instead assert that the "Municipality simply informed the Ballantines that it was aware that the Ministry had concerns with the project site, and wanted to be sure that such concerns had been addressed before it provided the "no objection" letter."

393. What is clear is that such a continuous refusal by the authorities to timely provide such a letter is in violation of the due process obligation. The obligation imposes on the host State to duty to respond swiftly to an investor's request and to prevent prolonged and unnecessary situation of uncertainty regarding its legal rights. To put it simply, the host State cannot leave the investor in a legal limbo as the Respondent has done here. The Ballantines have been left with nothing to challenge because there was no denial of the letter (nor, of course, was there a granting of the letter).

394. Recently, the NAFTA *Windstream* tribunal criticized the conduct of the government of Ontario leading to its decision to impose a moratorium on the development of offshore wind for being not "transparent" precisely because the investor "was kept in the dark as to the evolving policy position of the Government while [it] continued to invest in the Project". For the *Windstream* tribunal, the government had failed to undertake appropriate scientific studies on offshore wind, and, most importantly, it "did little to address the legal and contractual limbo in which Windstream found itself

after the imposition of the moratorium". The Tribunal concluded that such conduct was "unfair and inequitable". It also stated that the failure of the Government "to take the necessary measures (…) within a reasonable period of time after the imposition of the moratorium to bring clarity to the regulatory uncertainty surrounding the status and the development of the Project created by the moratorium, constitutes a breach of Article 1105(1) of NAFTA".

395. These passages from the *Windstream* award show the existence of a broad obligation to maintain a stable legal and business environment for investors. Specifically, Respondent is required to prevent any situation where an investor is "kept in the dark as to the evolving policy position of the Government" and to promptly address and correct any legal limbo in which the investor finds itself. The continuous refusal by Respondent's municipal authority to provide the Ballantines with a "No Objection" letter resulted in them being in a legal limbo in clear violation of the Respondent's due process obligation.

(2) Failure to Provide Reason for the Arbitrary and Discriminatory Slopes Policy Specifically Adopted by the DR against the Ballantines

396. As mentioned above, the Ballantines were denied the right to develop property while all other mountain developments in Jarabacoa and Constanza have slopes exceeding 60% and were allowed to develop their properties. Moreover, the Ballantines were denied the right to develop property even where the slopes did not exceed 60%.

397. Such conduct is not only arbitrary and discriminatory, it is also in breach of the Respondent's due process obligation. Respondent has the obligation to explain to an investor the reasons why specific measures affecting its interests were adopted. This is part of the broad obligation of "transparency", which the NAFTA *Metalclad* tribunal defined as follows:

> The Tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of

> another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party (whose international responsibility in such matters has been identified in the preceding section) become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.

398. As supported by the reasoning of the *Metalclad* tribunal, Respondent cannot leave any "room for doubt or uncertainty" regarding its slopes policy. It has the duty to prevent, and eventually correct, any "misunderstanding or confusion" regarding that policy. Whenever any such confusion exists (which was the case here regarding the slopes if you accept the Respondent's explanation), Respondent has a duty to "ensure that the correct position is promptly determined and clearly stated" to the investor. Respondent has taken none of these necessary steps and has adopted no measure to correct the undeniable "misunderstanding or confusion" arising from its arbitrary and discriminatory policy on slopes.

399. As explained by the CAFTA-DR *TECO* tribunal, "a willful disregard of the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on the part of the regulator in its dealings with the investor, as well as a total lack of reasoning, would constitute a breach of the minimum standard."

400. This is a "heads I win, tails I win" situation for the Ballantines. If Respondent did not have all these additional considerations regarding slopes that it claims to have had, such as altitude, environmental condition, then it plainly and simply discriminated against the Ballantines or treated them in an arbitrary fashion for refusing to issue the permit. If Respondent did in fact have these other considerations and used them as the basis to deny the Ballantines' permit, then this was a due process violation of the FET claim (or a transparency violation, as explained below).

401. This is not an empty or meaningless wrong of Respondent. Again, assuming for a moment that Respondent did in fact use those additional considerations to deny the permit for slopes, Respondent never communicated any of this to the Ballantines. Rather, the Respondent sent several letters back generally stating that the permit was denied for slopes. Had Respondent communicated any of this to the Ballantines at the time, rather than in its second Statement of Defense (this issue was not mentioned in Respondent's original Statement of Defense), the Ballantines could have challenged these findings and explained that their project had similar altitudes to permitted projects and that it was not as environmentally significant as properties such as Jarabacoa Mountain Garden and Quintas del Bosque. Instead, if Respondent is to be credited with its arbitration assertion regarding the additional considerations, the Ballantines were trying to address a situation in which the Respondent was hiding the basis of the denial from them.

402. If Respondent had these additional considerations and actually used them, it should have communicated these considerations at the time to all potentially affected landowners. That is just good governance and appropriate. But with respect to the Ballantines, who are foreign investors and have the benefit of the protections of CAFTA-DR, this becomes an international obligation. And this is an obligation that Respondent failed to uphold.

(3) Failure to Adopt a Transparent Process for the Creation of the National Park and to Provide the Ballantines with the Opportunity to Challenge its Boundaries

403. The creation of the National Park was not only arbitrary and discriminatory against the Ballantines, but the manner in which it was created was also in breach of Respondent's due process obligation.

404. The creation of the Park was essentially a secret process where the stakeholders and investors affected were given no opportunity to discuss, comment, or challenge the measure unilaterally

adopted by Respondent. Moreover, the actual boundaries of the Park were so opaque that they were not known to the local and national environmental officials when the Ballantines' permit was rejected.

405. According to Respondent, the creation of the Park was "completely transparent" since it 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". This completely misses the point. This purported publication of course came ***after*** the Park was created. This publication has nothing to do with the transparency – or lack thereof – with respect to the creation of the Park.

406. There can be no doubt that Respondent did not consult with the Ballantines prior to the creation of the Park (or for well after the creation of the Park for that matter). The Ballantines have testified to this. But one need to look no further for proof than Respondent's own witness, Mr. Martinez. He makes it very clear that he did not care who owned the property and that it had no consideration with regard to the park boundaries. Again, although it is poor governance, Respondent is free to not consult with Dominican nationals who have no protection under CAFTA-DR. But Respondent owed an obligation to the Ballantines to consult with them.

407. Of course, Mr. Martinez's assertion that he did not take into account property ownership cannot be the case. Given that the alleged basis for creating the Park was primarily to protect the Baiguate Waterfall, it would have made no sense to exclude from the Park three properties (JMG and QDBI and II) whose development greatly affects the waterfall. It would have also made no sense to exclude the property of the influential businessman Dr. Victor Mendez Capellan, whose property borders the Baiguate river and is much more pristine and environmentally significant than the Ballantines' Phase 2 property. But, nevertheless, to the extent that Mr. Martinez asserts that he did not

consider the private property, the failure to discuss this with the Ballantines prior to creating the Park, and failing to discuss it for the years following the creation of the Park, is a violation of Article 10.5.

408. Under the principle of due process, Respondent had the obligation to consult with the Ballantines before creating the Park and to give them the opportunity to address the issue of its boundaries. As explained by the NAFTA *Thunderbird* tribunal, the host state must give to an investor the "full opportunity to be heard and to present evidence" at the administrative hearing whenever its rights are directly affected by a measure. This requirement includes the obligation for the host State not only to conduct such a public hearing, but also to timely inform an investor that it is taking place and to invite it to appear and present evidence at that hearing. Respondent took none of those essential steps required under the due process obligation.

409. Lastly, with regard to this issue, Respondent's assertion that it published the creation of the Park in a gazette does not relieve Respondent's of its CAFTA-DR obligation. Such notification may be sufficient under Dominican law with respect to domestic landowners, but an obscure publication in a gazette that purports to nationalize or render useless a foreign investor's property is not sufficient generally. More is required, as explained by the *Metalclad* and *TECO* tribunals.

410. Even had the publication of a gazette been sufficient to meet the Respondent's obligations of the notice requirement of due process and the FET claim, which it was not, such notice of the existence of the Park does nothing to allow the Ballantines to understand the effect of the Park's creation. Respondent asserts that the Park does not restrict all uses of the land. Respondent asserts that the Park Management Plan allows for certain uses, such as eco tourism. But this Management Plan came 7 years after the creation of the Park, and only just before the Respondent's second Statement of Defense. Again, the Ballantines were left in legal limbo from the time of the rejection based on the National Park and the creation of the Park Management Plan. In fact, the Ballantines remain in legal

limbo today as this Plan is not a final and complete document and does not provide sufficient guidance to understand what it allowed in the Park. (The Tribunal should recall that the Ballantines were requesting a permit to build a road in Phase 2, not at that time to build houses. Thus, if the National Park allows for eco tourism, why would a road allowing access to these eco tourism projects be disallowed. Still today this is not clear, although we suspect that Respondent will issue a resolution on this subject just before their Rejoinder is due.)

411. Additionally, the Park's creation document did not provide precise boundaries that would allow the Ballantines to know the scope and extent of the Park. Respondent asserts that "Decree No. 571-09 explicitly defined the boundaries of the Park". As explained by Mr. Richter and Mr. Potes, this is not the case. The Decree creating the Park did not define precise boundaries and the boundaries that were put forth had no relation to how national park boundaries are typically drawn. So, even were this Decree notice, the failure to identify precise boundaries is insufficient to satisfy Respondent's Article 10.5 requirement.

412. Respondent's argument that the National Park does not matter because it was not in the original denial is without merit.[468] The National Park issue is in fact very relevant to determine whether or not Respondent fulfilled its due process obligation. The National Park was invoked by Respondent as an independent basis to deny the Ballantines the permit to build their Phase 2 road.

413. Tribunals have found states liable in similar circumstances. The NAFTA Metalclad Tribunal affirmed that a state breaches its due process obligation whenever an investor is denied a permit based on reasons that are unrelated to specific existing requirements for issuing that permit. Moreover, according to the NAFTA *Thunderbird* award, a breach of due process is committed whenever

[468] Respondent asserted that "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."

an administrative order is not "adequately detailed and reasoned", such as, for instance, when the order does not discuss the legal grounds on which that administrative body has based its decision.

414. The CAFTA-DR TECO Tribunal also held that "a lack of due process in the context of administrative proceedings such as the tariff review process constitutes a breach of the minimum standard". The TECO Tribunal added that "in assessing whether there has been such a breach of due process, it is relevant that the Guatemalan administration entirely failed to provide reasons for its decisions or disregarded its own rules". The TECO Tribunal further explained the nature of this obligation:

> Article 10.5 CAFTA-DR also obliges the State to observe due process in administrative proceedings. A lack of reasons may be relevant to assess whether a given decision was arbitrary and whether there was lack of due process in administrative proceedings.

415. Here, Respondent's failure to identify the Baiguate National Park as a basis to deny the Ballantines' permit in the first three denials is a clear example of a decision failing to provide reason in violation of the due process obligation.

416. In sum, the three measures adopted by the DR against the Claimants were in violation of its due process obligation under Article 10.5.

5. Transparency and FET Analysis

417. The Respondent misunderstands the Ballantines' transparency arguments. Respondent asserts that the Ballantines are seeking a claim under Chapter 18 of CAFTA-DR. The Ballantines are not. Rather, the Ballantines are making a transparency claim under Article 10.5.

418. Transparency is one of the bases under which a claimant can seek relief pursuant to an FET clause. NAFTA and CAFTA-DR tribunal's have held that transparency is in element of the FET provision. The CAFTA-DR *Railroad* Tribunal endorsed the definition of the MST that was adopted by

the NAFTA *Waste Management II* case. The *Waste Management II* tribunal refers to transparency as being an one of the bases of claim for the MST:

> "[...] 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**.[469]

419. In *Metalclad v. Mexico*, the claimant alleged that Mexico had violated its transparency obligations. Specifically, the claimant alleged that the alleged lack of transparency surrounding the municipality's exercise of authority breached Article 1105 of the NAFTA.

420. In defining the scope and nature of Mexico's obligations under Article 1105, the *Metalclad* tribunal cited a number of other NAFTA provisions **including the preamble and NAFTA's Chapter 18 on transparency requirements**.[470] The *Metalclad* tribunal held that the transparency obligation was a part of the FET clause in that ensured that investors received the minimum standard of treatment as guaranteed under NAFTA Article 1105. The tribunal found that "Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment", and had accordingly violated Article 1105.[471]

421. To be clear, the Ballantines are not asking this Tribunal to find that the Respondent's breaches of Chapter 18's transparency obligations create a *de facto* violation of the transparency obligation under the MST. Rather, the Tribunal should consider the obligations under Chapter 18 as the

---

[469] *Waste Management II,* supra, para. 98.

[470] ICSID case No ARB/AF/97/1, Tribunal Decision August 30, 2000. (CLA-29).

[471] Id. Ultimately, the *Metalclad* award was vacated in the seat. The court found that the Chapter 18 did not create independent obligations. To be clear, the Ballantines are not asking the Tribunal to find a violation of Chapter 18 but to use this Chapter as a guide when determining the MST claim.

types of transparency obligations that CAFTA (and NAFTA) states view as necessary in the investment context.

422. Other tribunals have likewise found a transparency requirement as part of the FET provision. In *Tecmed v Mexico*,[472] the tribunal found that transparency was required. The *Tecmed* tribunal noted that the transparency requirement has to be gauged against the circumstances of the case so that the state is not subject to undue obligations.[473]

423. Here, the Respondent's opaqueness falls well below the minimum standard. With regard to the slopes, Respondent asserts that there exists a whole manner of considerations regarding whether to approve the project. But that is not what the law on slopes says. It refers only to slope percentage being over 60%. None of these alleged considerations are known the project proponents. None are enshrined in law or regulations. And when asked to provide documents supporting these considerations, Respondent produced nothing. We also have no information as to when these alleged considerations were added. (It appears that these considerations were added the day the Ballantines sought their permit and were ended the following day, given that the Ballantines were the only development rejected for slopes.) A law, regulation, or policy that results in the complete destruction of the value of someone's land requires more than a set of considerations with no documentation, no guidelines, etc.

424. With regard to the creation of the National Park, this was also an opaque exercise, both in the creation process itself, as well as the existence of the Park and the effect on the landowners. Respondent's witness E. Martinez asserts that he consulted studies to create the National Park. Even if everything Mr. Martinez states about the process was accurate, which it was not, this process would violate the Respondent's FET transparency obligations. When a state takes an action to nationalize a

[472] ICSID Case No. (AF)/00/2. (CLA-30).

[473] Id.

foreign investor's project, there should be documents showing that the investor's property was considered and the investor consulted. As testified by the Ballantines' expert Mr. Potes, stakeholder consultations prior to the creation of a park are absolutely necessary. Mr. Potes lists the various reasons for this, which include the ability to consider ways to mitigate any harm to the stakeholder or to create boundaries that account for these properties. Respondent did none of that.

425. Respondent's creation of the National Park was so exceedingly opaque that the affected landowners, not just the Ballantines, had no idea that the Park had been created. In addition, it took Respondent 8 years to create an initial park management plan, with that plan coming just before Respondent submitted its Statement of Defense in this case. Such actions violate Respondent's transparency obligation under the FET.

6. National Treatment

"Such then is the human condition, that to wish greatness for one's country is to wish harm to one's neighbors." -- Voltaire

426. The facts underlying the Ballantines' National Treatment claim fits squarely with what tribunals and commentators have stated with regard to this claim.

427. As explained by the *Pope & Talbot* tribunal,[474]

> The Tribunal also interprets both standards to mean the right to treatment equivalent to the "best" treatment accorded to domestic investors or investments in like circumstances. The Tribunal thus concludes that "no less favorable" means equivalent to, not better or worse than, the best treatment accorded to the comparator.

Thus, in the context of this case, Respondent is obliged to provide treatment to the Ballantines comparable to the "best" treatment it provides to any of the comparators (not all of them, but any one of them).

[474] *Pope & Talbot Inc. v. Government of Canada* (NAFTA), UNCITRAL (Phase 2 Merits Award, April 10, 2001), ¶ 79. (CLA-9).

428. The *Pope & Talbot* tribunal further explained that

> Differences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign–owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.[475]

Again, the focus here is on the *treatment*, not the policy. Even if the policy regarding the Law on slopes or the policy behind the Park's creation do not violate National Treatment, the relevant question is whether the measures taken against the Ballantines (i.e., the refusal to grant a permit because of these policies) violates National Treatment. In addition, the *Pope & Talbot* tribunal notes here that the measures cannot unduly undermine the investment liberalizing goal of NAFTA (the same would apply to CAFTA).[476]

429. In addition, a National Treatment claim does not require that the investor demonstrate an overt bias against the nationality of the investor. As explained in a separate opinion in *UPS v. Canada*,[477]

> The national treatment obligation is not discharged merely by refraining from overt discrimination against non-national investors or investments. Such a limited undertaking would be of little value to investors.

a) The Investor Only Needs To Show Better Treatment For *One* Comparator

430. It is important to note that the Ballantines do not have to show that several comparators received better treatment than the Ballantines. They do not even have to show that two or three

[475] Id. at ¶ 78.

[476] Respondent appears to assert in its Statement of Defense that CAFTA is an environmental agreement that also might mention something about investment. This is, of course, absurd. CAFTA is not the Paris Accord. Although CAFTA does contain statements about the importance of the environment, CAFTA's purpose is to advance and liberalize investment and trade.

[477] *United Parcel Service of America Inc v Canada* UNCITRAL/NAFTA, Award on the Merits, Separate Statement of Ronald A Cass, 24 May 2007. (CLA-15).

comparators received better treatment. Instead, importantly, the Ballantines only have to show that a single comparator received more favorable treatment in order to prevail on the claim. As commentators have noted:[478]

> Investment tribunals (in particular, the *Pope & Talbot* tribunal) have correctly decided that it is enough for a foreign investor to prove that it was treated less favorably than ***a single domestic*** investor in like circumstances. The objective of BITs is, after all, the protection of individual investors. If a government's decision to favor a domestic investor over a foreign investor is based upon the foreign investor's nationality, it is no less discriminatory just because other domestic investors are denied the same advantage);

431. As stated by Meg Kinnear and others :[479]

> Like circumstances seemed to play a two-fold role in the *Pope & Talbot* analysis. First, the tribunal would compare the foreign-owned investment with a domestic investment in like circumstances, which was defined very broadly as operating in the same economic sector. Once the investor could identify ***another investor*** or investment that had received different treatment, a low hurdle to overcome given the breadth of the comparator, the burden would shift to the respondent government to show that it bore a "reasonable relationship to rational policies" and was "not motivated by preference of domestic over foreign owned investments." The *Pope & Talbot* tribunal described this in terms of a "like circumstances" analysis: "once a difference in treatment between a domestic and a foreign-owned investment is discerned, the question becomes, are they in like circumstances?"

432. And again:[480]

> The national treatment analysis requires a tribunal to compare the treatment of one foreign investor or investment with **at least one domestic investor** or investment. Some national treatment provisions refer to 'investments' and 'investors' rather than the singular 'investment' and

[478] Nicholas DiMascio & Joost Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin', 102 Am. J. Int'l L. 48, 89 (2008) p. 82. (CLA-75).

[479] M. Kinnear, A. Biorklund & J.F.G. Hannaford, Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11 (Kluwer Law International, 2006), section on Article 1102, p. 27(CLA-76).

[480] Andrew Newcombe & Luis Paradell, Law and Practice of Investment Treaties: Standards of Treatment, (Kluwer 2009), p. 181 (CLA-57).

> 'investor'. In *Pope & Talbot*, Canada argued that national treatment did not apply where there is only a single foreign investor because the provision refers 'to investors of another Party' and that this required a comparison amongst many similarly-situated foreign investors. The tribunal rejected this argument and found that an individual foreign investor can maintain a claim based on a comparison of treatment with **only one** host state investor. The same logic applies to domestic investment. Generally, the national treatment obligation will apply where a foreign investor or investment can identify **at least one domestic** investor or investment that is, or could be, in like circumstances.

433. Thus, the analysis is between only one foreign and one domestic entity.[481]

434. Both parties generally agree on the existence of the following three-part test to determine whether a State has breached its 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.[482]

435. Each element of the three-part test will be examined in the following sections.

b) Like Circumstances

436. Under the first element of the three-part test, the Ballantines have to identify one (and one only) domestic comparator that is "in like circumstances" to the Jamaca de Dios project.

437. Both parties generally agree on the relevance of three factors to determine whether a foreign investor is in "like circumstances" with domestic investors.[483] These factors are: (1) whether

[481] Federico Ortino, "From 'non-discrimination' to 'reasonableness': a paradigm shift in international economic law?", Jean Monnet Working Paper 01/05, April 2005, NYU School of Law, p. 23. (CLA-77). See also T Grierson-Weiler and I Laird, 'Standards of Treatment' in P Muchlinski, F Ortino, and C Schreuer (eds), The Oxford Handbook of International Investment Law (2008) 293 (CLA-78).; Jürgen Kurtz, 'The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO', in S.W. Shill (ed) International Investment Law and Comparative Public Law (Oxford UP 2010), p. 266 (CLA-79).

[482] **SOD** at ¶ 148.

[483] **SOD** at ¶ 153.

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.[484]

438. While Respondent "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", it nevertheless argues that "they are not the only factors that should be taken into account" by a tribunal.[485] Specifically, "considering the specific characteristics of the case at hand", the Respondent believes that the Tribunal "should give primary consideration to other factors" than these three.[486] For the Respondent, 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'.[487]

439. As further explained in the following paragraphs,

- Comparing the "environmental impact" of different projects is not the proper comparator factor for the "in like circumstances" analysis;
- Under any reasonable criteria, Jamaca de Dios Phase 2 has many comparators;
- In any event, Respondent identified the Aloma Mountain project as the domestic comparator that is "in like circumstances" to the Jamaca de Dios Phase 2 project; and
- At any rate, what really matters is that both projects are operating in the same resort/restaurant/hotel business sector in the same environmentally sensitive geographic area.

[484] **ASOC** at ¶ 177.

[485] **SOD** at ¶ 157.

[486] **SOD** at ¶ 157.

[487] **SOD** at ¶ 157.

(1) Comparing the "environmental impact" of different projects is not the proper comparator factor for the "in like circumstances" analysis

440. As explained below, JDD Phase 2 has many comparators even were the Tribunal to accept Respondent's criteria that the "environmental impact" is the proper comparator factor. But this is not the proper factor. The "environmental impact of the comparators' projects" put forward Respondent simply is not a relevant factor to determine whether the Ballantines and Dominican investors are in "like circumstances".

441. There is, of course, nothing inherently wrong with a tribunal taking into account legitimate concerns regarding the potential environmental impacts of the investor's activities in the context of the "like circumstances" analysis. Thus, as noted by two writers, "the identification of the relevant subject for comparison must take into account the ***regulatory purpose*** of the treatment in question and who or what is affected".[488] Also, it goes without saying that "determining the appropriate comparator for the like circumstances analysis cannot be divorced from the reasons for the treatment in question".[489]

442. Yet, the factor put forward by Respondent (i.e. comparing the "environmental impact" of different projects) is both **too narrow** and **too subjective**.

443. First, as noted by two writers, "tribunals have been cautious not to construe the basic of comparison for the applicability of the national treatment standard **too narrowly**", adding that "consistent with the purpose of the rule, conditions such as 'like situations' or 'like circumstances' should be interpreted **broadly** in order to open the way for a full review of the measure under the

[488] Andrew Newcombe & Luis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, (Kluwer 2009), p. 163. (CLA-57).

[489] Ibid, pp. 163.

national treatment clause".[490] Thus, comparing the Ballantines' project with that of Dominican investors **solely** based on their "environmental impact" is unnecessarily narrow.

444. Such a narrow approach is not helpful for the Tribunal in its "like circumstances" analysis. The Tribunal should instead (at a very minimum) focus on comparing the different projects operating in similar **environmentally sensitive areas**, such as developments or road projects in mountainous areas in the DR. Importantly, the use of this more general comparator is entirely compatible with the factor put forward by Respondent. Thus, the exercise of comparing different projects operating in the same area and which are facing similar environmental situations necessarily entails taking into account their 'environmental impact'.

445. Second, comparing the Ballantines' project with that of other domestic investors solely based on their 'environmental impact' is a very *subjective* exercise. It would be tantamount to determining who are the comparators for the "like circumstances" analysis based on whether their activities are "good" or "bad" for the economy.

446. In any event, determining whether one specific project results in a positive or negative 'environmental impact' is in itself a complex and multifaceted exercise. Comparing the negative impact of different projects is an even more complicated exercise. A tribunal cannot realistically be asked to perform such a comparative exercise in the context of its "like circumstances" analysis as a starting point. This would stop any national treatment analysis before the analysis was done. Rather, when examining comparators, the Tribunal can consider whether Respondent had a right to treat the Ballantines differently because of environmental impact. Thus, the environmental impact relates to the defense of Respondent to show it had a basis to treat the Ballantines differently and not whether a project is a comparator.

[490] R. Dolzer & C. Schreuer, *Principles of International Investment Law*, (Oxford U. Press 2008), p. 180. (CLA-80).

447. To do otherwise would allow the Respondent to simply chose the comparators by asserting that other projects do not have the same environmental impact. A tribunal should not rely on what Respondent perceives to be the "environmental impact" of the different projects. Respondent is obviously not a "neutral" observer regarding this question in the context of the present on-going arbitration proceedings. Its characterization of the (alleged) negative "environmental impact" of the Ballantines' project can certainly not be taken at face value by the Tribunal.

448. We note that even were the "environmental impact" the comparator, Mr. Potes and Mr. Richter have demonstrated that many other projects were (at a minimum) as environmentally significant as JDD Phase 2 or, in several cases, more environmentally significant that JDD Phase 2. Thus, if environmental impact were the only comparator, there would still be many comparators. For example Mr. Potes and Mr. Richter identified the following properties are being more environmentally sensitive than JDD Phase 2 and their development having more of an environmental impact than JDD Phase 2: Quintas del Bosques I, Quintas del Bosques II, Paso Alto, Mirador del Pino and Jarabacoa Mountain Garden. To be clear, there are many other comparators, as explained below. But the point here is that even if environmental impact was the basis of whether a project was a comparator, which it should not be, there would still be several comparators. (Mr. Potes and Mr. Richter could not examine every project and compare them with JDD Phase 2. Thus, lots of other properties would be likewise as environmentally significant or more than JDD Phase 2. This is the problem with Respondent's argument about environmental sensitivity or impact being the basis for the comparator – it prejudges the question it seeks to answer.)

449. In any event, the environmental impact criterion is misplaced. Ultimately, the "like circumstances" analysis must be based on an *objective* criterion which can easily be assessable by a neutral observer. This is why the Tribunal should base its comparisons of projects on the fact that they

are operating in the same environmentally areas, which includes essentially any mountain area in the DR.

450. At any rate, Respondent does not refer to a **single** award which has adopted this narrow comparator in the context of its "like circumstances" analysis. Indeed, **no** investment arbitration tribunal has ever used the "environmental impact" of the activities of investors as the proper comparator to determine whether they should be considered in "like circumstances".

451. It is quite telling that tribunals examining claims of violation of the national treatment dealing with the protection of the environment have simply **never used** this factor. One good example is the case of *S.D. Myers*, where a U.S. investor alleged that Canada's closing of its border to exports of polychlorinated biphenyls ("PCB") waste was contrary to NAFTA Article 1102. S.D. Myers wanted to transport the waste from Canada to its PCB remediation facility in Ohio. As clearly shown from the following passage, the protection of the environment was a central part of the Tribunal's analysis of the "like circumstances" test:

> The Tribunal considers that the interpretation of the phrase "like circumstances" in Article 1102 **must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment** and the need to avoid trade distortions that are **not justified by environmental concerns**. The assessment of "like circumstances" must also take into account **circumstances that would justify governmental regulations that treat them differently in order to protect the public interest**.[491]

452. While taking into account any such legitimate environmental concerns, the *S.D. Myers* Tribunal nevertheless adopted an *objective* comparator for its "like circumstances" analysis. Significantly, the Tribunal did not examine the environmental impact of the activities of these different

[491] *S.D. Myers Inc. v. Government of Canada*, Partial Award (13 November 2000), ¶ 250. (CLA-17).

investors to determine who was a comparator, but focused instead on the fact that they were operating **in the same business sector**:

> The concept of "like circumstances" invites an examination of whether a non-national investor complaining of less favourable treatment is **in the same "sector" as the national investor**. The Tribunal takes the view that the word "sector" has a **wide connotation** that includes the concepts of "economic sector" and "business sector".[492]

453. The *S.D. Myers* Tribunal concluded that the U.S. investor and the U.S.-owned Canadian investment were in "like circumstances" with the Canadian PCB remediation industries:

> From the business perspective, it is clear that SDMI and Myers Canada were in "like circumstances" with Canadian operators such as Chem-Security and Cintec. They all were engaged in providing PCB waste remediation services. SDMI was in a position to attract customers that might otherwise have gone to the Canadian operators because it could offer more favourable prices and because it had extensive experience and credibility. It was precisely because SDMI was in a position to take business away from its Canadian competitors that Chem-Security and Cintec lobbied the Minister of the Environment to ban exports when the U.S. autorités opened the border.[493]

454. In sum, the proper comparator for the "like circumstances" analysis is whether the different projects are in the same business sector (a point examined below) or operating in the same environmentally area, among other possible comparative bases, and not the assessment of their "environmental impact".

(2) Under Any Use Of Objective Criteria, The Ballantines Have Many Comparators

455. Before discussing the Ballantines' comparators, we have to dispel with the Respondent's attempt at logical jujitsu. Knowing that the Ballantines have many competitors, Respondent seeks to distinguish some of these comparators by asserting that they are not as big as Jamaca de Dios I and II.

[492] Id, ¶ 250.

[493] Id ¶ 251.

But this is not a proper basis of comparison (even were overall size a proper factor). The comparison is not between, on the one hand, an existing JDD Phase 1 project coupled with a planned Phase 2 project and, on the other hand, a planned project elsewhere. JDD Phase 1 was already fully permitted, except for the Mountain Lodge. The proper comparison is between the planned Phase 2 project and any other planned or existing project in the mountains or environmentally sensitive area. Thus, the fact that Aloma Mountain or Paso Alto do not have a large amounts of existing homesites or other amenities, these projects will (or would have) had those things.

456. With regard to comparators, at a minimum, the proper comparators would be those developments planned or already built in the mountains around Jarabacoa or Constanza. These include the following projects:[494]

- **Quintas del Bosques I**: existing gated community which was granted permits to build 60 homes, which it then expanded to 83 houses without a license; contains common amenities and open space, just like the planned JDD Phase 2; you can see QDBI with the naked eye from JDD Phase 1; Mr. Potes and Mr. Richter note that the this property is more environmentally sensitive that JDD Phase 2.

- **Quintas del Bosques II**: planned gated community which was recently granted a permit to develop 23 homesites; Mr. Potes and Mr. Richter note that the this property is more environmentally sensitive that JDD Phase 2; and at least 19% of QDB Phase 2 has slopes in excess of 60%..

- **Jarabacoa Mountain Garden**: located on the same mountain ridge as Jamaca De Dios; next to Baiguate River just before the waterfall; contains a rugged, mature forest at an altitude of 1060 meters; approved for 115 homesites; Mr. Potes and Mr. Richter note that the this property is more environmentally sensitive that JDD Phase 2; and 43% of the project has slopes in excess of 60%.

- **Aloma Mountain**: as discussed below, Respondent agrees that Aloma is a comparator; it is located right next to the planned JDD Phase 2; built and developed on a mountain side facing the city of Jarabacoa without a permit; similar slopes to JDD Phase 2; continues to develop its property to the present day with impunity.

[494] All of the comparators below, with the exception of Rancho Guaranguoa, are located in or around Jarabacoa. Rancho Guaranguoa is located in a mountain in Constanza, which is about 23 miles from JDD.

- **Paso Alto**: located on the same mountain ridge as Jamaca De Dios; received permission from the MMA in 2006 to subdivide more than 50 lots; Respondent Witness Navarro now ***confirms that at least 17% of the project has slopes in excess of 60%***.

- **Mirador del Pino**: Located on a mountain ridge to the north of Jamaca de Dios Phase 2; granted permission in December 2012 to subdivide its property into 77 buildable lots; ***Respondent's Witness Navarro confirms that at least 7% of the project has slopes in excess of 60%***.

- **Sierra Fria**: although initially denied by the MMA in November 2016 in part because of its slopes, it has continued to sell property and now has been -- or is about to be -- fully permitted; selling more than 113 condo units and villas, which will all be constructed by the developer.

- **La Montana**: identified by Respondent in the witness statement of Eleuterio Martinez, as a comparable project to JDD Phase 2; located partially within the Baiguate Park; entire development is above 1300 meters; subdivided lots staked out with lots numbers; property is entirely forested; three times as large as the proposed expansion of Jamaca with slopes similar to JMG.

- **Rancho Guaraguao**: project developed almost entirely within the Valle Nuevo Category 2 National Park in Constanza after the Park was created; 52 luxury villas, a restaurant, and common areas; built entirely without an environmental permit, expanded around 2010 without a permit, and still does not have a permit; developed at an altitude between 1450 and 1900 meters, with slopes in excess of 60%.

- **Alta Vista**: mountain residential community approved by MMA in la Vega with slopes over 60%.

- **Monte Bonito**: gated mountain project located on the other side of la Jamaca de Dios; built both homes and roads on slopes over 60%; has never been permitted, despite building dozens of vacation homes over the last twelve years.

- **Los Aquellos**: 35-lot project located in mountain range on the north side of Jarabacoa; built 14 homes since the mid 2000s without an environmental permit; April 2016 site visit by the MMA revealed homes built on slopes well in excess of 60%, but no fine was issued and development was not halted.

- **Ocoa Bay**: massive two-phase project located within the boundaries and buffer zones of the Francisco Alberto Camaaño Deño Cat 2 National Park; in addition to homesites, includes a boutique hotel and spa, villas, apartments townhomes, commercial outlets, a clubhouse, a racquet club, parking, and other common areas.

457. Everyone of these are development projects that include luxury housing of some type. Many of these are planned gated communities with common amenities, just like the planned JDD Phase

2. All of them have slopes in excess of 60% and are in mountainous areas. Several of them are in Category 2 national parks. They are all environmentally significant. Many of these projects are at altitudes at or above JDD Phase 2. There is simply no justification to assert that these are not comparators.

458. Despite these all being comparators, every one of them either received a permit from Respondent or has notoriously been allowed to develop in the absence of a permit. If the Tribunal finds that any of these projects is a comparator, and Respondent has not presented an adequate justification for the disparate treatment, the Tribunal must find for the Ballantines. The Tribunal need only find one in order for their to be a national treatment violation, although there are here an embarrassment of riches.

(3) The DR identified the Aloma Mountain project as the domestic comparator that is "in like circumstances" to the Jamaca de Dios project

459. Even though there are many comparators, Respondent has identified Aloma Mountain as a comparator. Therefore, the section below demonstrates how Aloma Mountain has been treated differently (in a favorable way) to the Ballantines.

460. The Respondent's position is that "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'.[495] (As shown above, this is not true and is not the sole proper basis for a comparator.) In other words, according to Respondent, the Aloma Mountain project *has* an environmental impact and poses risks which Respondent considers to be 'comparable' to that of the Jamaca de Dios project (Phase 2). Moreover, Respondent expressly admits that 'the land involved in [the Aloma Mountain] project has

[495] **SOD** at ¶ 158.

similar environmental and altitude-related characteristics as the [] Jamaca de Dios' Phase 2.[496] Respondent therefore openly acknowledges that the Aloma Mountain and the Jamaca de Dios projects **are in "like circumstances"** based on the "environmental impact" factor.

461. As noted by Respondent itself, the Ballantines have to "identify **at least one Dominican comparator** who was situated in like circumstances".[497] Respondent acknowledges that this one 'Dominican comparator' is the Aloma Mountain project. Tribunals (notably *Pope and Talbot*[498]) have consistently held that the burden on the claimant is to identify only **one** domestic comparator which was given a different treatment. Scholars have also supported this view.[499]

462. Given the fact that Respondent identified at least one domestic comparator that is "in like circumstances" to the Jamaca de Dios project, the conditions for establishing the first-prong of the test with regard to this comparator should be considered as fulfilled. The Tribunal should therefore move to

---

[496] **SOD** at ¶ 161.

[497] **SOD** at ¶ 149.

[498] *Pope & Talbot Inc. v. Government of Canada* (NAFTA), UNCITRAL (Phase 2 Merits Award, April 10, 2001) ("*Pope & Talbot II* (NAFTA)"), ¶ 79. (CLA-9).

[499] See, for instance, Nicholas DiMascio & Joost Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin', 102 *Am. J. Int'l L.* 48, 89 (2008) p. 82 ('investment tribunals (in particular, the *Pope & Talbot* tribunal) have correctly decided that it is enough for a foreign investor to prove that it was treated less favorably than a single domestic investor in like circumstances. The objective of BITs is, after all, the protection of individual investors. If a government's decision to favor a domestic investor over a foreign investor is based upon the foreign investor's nationality, it is no less discriminatory just because other domestic investors are denied the same advantage) (CLA-81); Newcombe & Paradell, *supra*, p. 181 (noting that the *Pope & Talbot* tribunal 'found that an individual foreign investor can maintain a claim based on a comparison of treatment with only one host state investor. The same logic applies to domestic investment. Generally, the national treatment obligation will apply where a foreign investor or investment can identify at least one domestic investor or investment that is, or could be, in like circumstances'); F. Ortino, 'Non-Discriminatory Treatment in Investment Disputes', in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds) *Human Rights in International Investment Law and Arbitration,* (Oxford UP, 2009) p. 358 ('Most of the cases so far decided (in particular under NAFTA Chapter 11) seem to have established a violation of the NT obligation simply by showing that the national measure under review affords less favourable treatment to the foreign investor (who has brought the claim) compared to the treatment afforded to at least one domestic investor in like circumstances') (CLA-82).; T Grierson-Weiler and I Laird, 'Standards of Treatment' in P Muchlinski, F Ortino, and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008) 293. (CLA-79).

the second stage of the analysis comparing the treatment received by the Aloma Mountain project with that of the Ballantines.

463. Trying to create additional hurdles that do not exist, Respondent additional asserts that Aloma Mountain is not in "like circumstances" because the Aloma Mountain project "do[es] not produce competing goods or services" and is not "subject to the same legal regime" as the Ballantines' project.[500]

464. Respondent's very limited reasoning on the question of the legal regime is blatantly contradictory. Thus, Respondent explains (a few paragraphs later) that '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)'.[501] Respondent therefore expressly admits that the Aloma Mountain and the Ballantines' projects **are**, in fact, subject to **the same** legal regime. For that reason, this point does not need to be further examined.

465. The following section will focus on the DR's (inaccurate) arguments about the Aloma Mountain and the Ballantines' projects apparently not producing "competing goods".

(4) <u>The Aloma Mountain project is in a competition relationship with the Ballantines' planned Phase 2</u>

466. According to Respondent, 'none of the Alleged Comparators ─ not even Aloma Mountain ─ produce competing goods or services'.[502] The main reason mentioned by Respondent is the following:

> 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

[500] **SOD** at ¶ 162.

[501] **SOD** at ¶ 165.

[502] **SOD** at ¶ 163.

> those projects were "struggling" or "moribund," whereas Jamaca de Dios was the self-proclaimed "gold standard."[503]

467. The argument is on its face obviously flawed. The fact that an investor is more successful than others is simply irrelevant to assess whether they are in a competitive relationship. To make a simply analogy, from the mere fact that the Jamaican athlete Usain Bolt often wins the 100 meters sprint race at the Olympics does not mean that he is not in a competition relationship with the other runners! He is clearly in competition with the others. He is just better than them! Similarly, the fact that the other projects are "struggling" or "moribund" does not mean that they are not in a competition relationship with the Ballantines planned Phase 2. In addition to Aloma, as noted in the section above, all the comparators identified by the Ballantines are all in a direct competition with Jamaca de Dios Phase 2.

468. In any event, it is undeniable that the Aloma Mountain project is clearly producing 'competing goods or services' and that it is in a direct competition relationship with the Ballantines. They are both competing in the resort sector and operating in the same environmental area. Aloma Mountain Project is building roads (as an ongoing enterprise) and planning to construct the same luxury housing and services that the Ballantines planned for Phase 2.

469. Respondent mentioned another argument which (allegedly) supports its conclusion that the comparators referred by the Ballantines are not producing competing goods or services. Respondent asserts that "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".[504]

470. This argument is obviously baseless. The size and magnitude of an investment is not relevant per se to the "like circumstances" analysis. What matters is to compare different projects that

[503] **SOD** at ¶ 163.

[504] **SOD** at ¶164.

are operating in the same environmental areas notwithstanding their sizes. The *Pakerings-Compagniet* case provides a good illustration of this rather obvious proposition. In the context of its analysis of allegation of violation of the MFN clause, the *Pakerings-Compagniet* Tribunal concluded that the claimant (a Norwegian company) and Pinus Proprius (a Dutch company) were in 'similar economic and business sector' because they 'engaged in similar activities', both 'acting in the construction and management of parking garages' and 'competitors for the same construction of two multi-storey car parks ("MSCP") project'.[505] In the context of its "like circumstances" analysis, the Tribunal noted that the 'Claimant's project is considerably bigger than the MSCP constructed by Pinus Proprius' (the construction of a garage comprising over 500 parking slots compared to only 233 slots).[506] The Tribunal also noted that both projects "show obvious similarities", including being located in the Old Town district of the City of Vilnius.[507] The Tribunal concluded on this point by making this important statement: "The **difference in size** of the two MSCPs also is, in and by itself, **not decisive** either to establish that the two investors were **not in like circumstances** but it may be one of the factors to take into consideration".[508]

471. Respondent's comment focusing on the differences between the projects seems to suggest that they would somehow have to be *perfectly identical* to be considered in a competition relationship.

[505] *Pakerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8 (Award, September 11, 2007) ("*Pakerings*"), ¶ 373. (CLA-14).

[506] Id, ¶ 380.

[507] Id, ¶ 381.

[508] Id, ¶ 391. The Tribunal considered that 'the fact that BP's MSCP project in Gedimino extended significantly more into the Old Town as defined by the UNESCO, is decisive' and added that 'The historical and archaeological preservation and environmental protection could be and in this case were a justification for the refusal of the project' (¶ 392). The Tribunal concluded that the projects were not in like circumstances: 'the Tribunal has concluded, on balance, that the differences of size of Pinus Proprius and BP's projects, as well as the significant extension of the latter into the Old Town near the Cathedral area, are important enough to determine that the two investors were not in like circumstances' (¶ 396).

The *ADM* Tribunal has well-explained why the "like circumstances" analysis does not require the comparators to be identical:

> ALMEX and the Mexican sugar industry are in like circumstances. Both are part of the same sector, competing face to face in supplying sweeteners to the soft drink and processed food markets. The competitive relationship between them was confirmed by Mexico's administrative and judicial authorities, (…) Notwithstanding the fact that fructose and cane sugar producers **are not identical comparators**, even though they compete face-to-face in the same market, it is the Tribunal's view that **when no identical comparators exist**, the foreign investor **may be compared with less like comparators**, if the overall circumstances of the case suggest that they are in like circumstances.[509]

472. Thus, even if there were no "identical" comparators, a tribunal should compare the foreign investor with the "less like comparators" provided, of course, that "the overall circumstances of the case suggest that they are in like circumstances".[510] (Here, however, the Ballantines have several comparators that can be said to be identical.) Thus, the Aloma Mountain and other comparators do not have to be perfectly identical with JDD Phase 2 to be deemed in "like circumstances".

473. The same conclusion was reached by the *Methanex* tribunal. The dispute concerned California's ban on the gasoline additive methyl tertiary-butyl ether ("MTBE"), an oxygenate added to gasoline to improve air quality. The aim of the ban was to protect the purity of water and to guard against potential health risks. The main competitor for MTBE is ethanol, which is also used as an oxygenate added to gasoline. Methanex (a Canadian company) is a producer of methanol, a feedstock for MTBE. Methanex argued that California's ban was favoring US domestic producers of *ethanol* by discriminating against foreign producers of *methanol*. Methanex argued that it was in "like circumstances" with producers of ethanol.

---

[509] *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (NAFTA), ICSID Case No. ARB(AF)/04/05 (Award, November 21, 2007), ¶ 201-2. (CLA-6).

[510] Id.

474. In its analysis of "who is the proper comparator"[511], the Tribunal first stated that: 'In ideal circumstances, the foreign investor or foreign-owned investment should be compared to a domestic investor or domestically-owned investment that is **like it in all relevant respects, but for nationality of ownership**'.[512] In other words, in an ideal world, a foreign investor should be compared to an **identical** comparator. Importantly, the Tribunal also added that 'it would be as perverse to ignore identical comparators if they were available and to use comparators that were less 'like', as it would be **perverse to refuse to find and to apply less 'like' comparators when no identical comparators existed**."[513] In other words, when no identical comparators exist, a tribunal should compare the treatment received by a foreign investor with that of "less 'like' comparators". Ultimately, the Tribunal held that Methanex had some 'identical' comparators, i.e. other producers of methanol (not ethanol), many of which were owned by U.S. investors. The approach adopted by *Methanex* Tribunal has been described as an 'exceedingly **narrow** reading that … will fail to capture typical embodiments of nationality-based discrimination'.[514] In any event, what matters for the present purpose, is that the award shows that the comparators and the Ballantines' Phase 2 project do not have to be perfectly identical to be compared and deemed in "like circumstances".

475. Lastly, an obvious point must be raised as Respondent attempts to obscure it. The comparison between JDD and Aloma Mountain is not a comparison between the mostly complete Phase 1 property with the mostly planned Aloma Mountain project. Rather, the appropriate comparator is the

---

[511] *Methanex Corp. v. United States of America* (NAFTA), UNCITRAL (Final Award, August 3, 2005) ("*Methanex* (NAFTA)"), Part IV, Ch. B, ¶ 17. (CLA-11).

[512] Id, ¶ 14.

[513] Id, ¶ 17.

[514] Jürgen Kurtz, 'The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO', in S.W. Shill (ed) *International Investment Law and* Comparative Public Law (Oxford UP 2010), p. 259. (CLA-79).

planned Phase 2 project with the planned Aloma Mountain project. Given that Aloma Mountain continues to build and develop its road, Aloma Mountain is actually a more developed property than Phase 2, which was never allowed to develop. Thus, the comparison here is quite apt.

476. In any event, the following section will show that the question of the existence of any competition relationship is of *secondary* importance to the "like circumstances" analysis.

(5) What matters is that the Comparators and the Ballantines' Phase 2 Project are operating in the same business sector and in the same environmentally sensitive geographic area

477. Whether or not the comparators produce "competing goods or services" is in fact of secondary importance to the "like circumstances" analysis. What really matters is that they are operating in the same business/economic sector and in the same environmental area.

478. Operating in the same business or economic sector is indeed the principal comparator factor which has been used by tribunals conducting their "like circumstances" analysis. Thus, apart from the *Pope & Talbot v. Canada* already mentioned by the parties,[515] many other tribunals have used that comparative element.[516]

479. In fact, some tribunals have used a very **wide interpretation** of what should be considered as the same economic/business sector. Thus, the *Cargill v Poland* Tribunal concluded that the different products of sugar and isoglucose were in "a common market" and did not have to be part of the *same* sector to be considered in "like circumstances" as long as they were in "different sectors which

[515] *Pope & Talbot,* supra, ¶ 78.

[516] See, *inter alia*: *Corn Products International v. Mexico* (NAFTA), ICSID Case No. ARB(AF)/04/01 (Decision on Responsibility, January 15, 2008) ¶ 120(CLA-13).; *Marvin Feldman v. Mexico*, Case No. ARB(AF)/99/1 (NAFTA), ¶ 137 ("…the 'universe' of firms in like circumstances are those foreign-owned and domestic-owned firms that are in the same business…")(CLA-5).; *S.D. Myers*, supra, ¶ 250-1; *Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award, 27 October 2006, ¶ 130. (CLA-83).

overlap each others".[517] The *Occidental v Ecuador* Tribunal went further and compared investments which were in very different economic sectors and were *not* in a competitive relationship.[518] The case involved a challenge by the claimant (an oil producer) to Ecuador's imposition and assessment of value-added-tax (VAT). The Tribunal considered entities operating in very different spheres (oil exporters, exporters of seafood, flowers, mining, lumber and even bananas) to be in "like circumstances".

480. Several scholars have highlighted that the vast majority of awards have not endorsed the rather extreme position adopted by the *Occidental* Tribunal,[519] and have instead "preferred a relatively simple test of comparison with the more directly comparable local investor of investors in the **same business sector**".[520] The interaction between the concepts of activities of investors in an economic

[517] *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Award, 5 March 2008, ¶ 317. It should be added that later in the award the Tribunal concluded that "sugar and isoglucose producers are in the same economic or business sector since sugar and isoglucose are substitutable and competing· products" (¶ 139). (CLA-84).

[518] See analysis of M. Kinnear, A. Biorklund & J.F.G. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer Law International, 2006), section on Article 1102, p. 41 ("The *Occidental* tribunal appears to have rejected an approach under which comparisons between foreign- and domestic-controlled enterprises would be considered valid only if they were between firms operating in the same sector")(CLA-76).

[519] DiMascio & Pauwelyn, *supra*, p. 76 ("The tests devised by investment tribunals have differed along several important factors. Most apparently, the tribunals have taken various positions on the breadth of the domestic investments to be compared. At one extreme, the *Occidental* tribunal compared all foreign and domestic exporters. At the other extreme, the *Methanex* tribunal compared only identical foreign and domestic exporters. The majority have fallen between these two extremes, comparing foreign and domestic investments in the same business or economic sector based upon the presumption that such investments raise similar public policy concerns"). .

[520] C. McLachlan, L. Shore & M. Weiniger, *International Investment Arbitration: Substantive Principles* 239 (Oxford UP 2007), p. 253. (CLA-85) See also: Newcombe & Paradell, *supra*, p. 165 ("The NAFTA national treatment cases generally illustrate a tendency to narrowly define the comparator to similarly situated domestic investments, i.e., in the same economic sector, where there is a high degree of competition between the investments in question"); A. Reinisch, 'National Treatment', in Marc Bungenberg, Jörn Griebel, Stephan Hobe, August Reinisch (eds) *International Investment Law: A Handbook*, (Beck, Hart, Nomos,. 2015) p. 856 (noting that 'in general investment tribunals appear to regard the fact that a claimant foreign investors operates in the same business sector and is in competitive relationship with domestic investors as a clear indication that it is in 'like circumstances', but adding, at p. 857, that the "operation in the same "economic" and "business" sector need to be decisive for a determination that investors are in "like circumstances"") (CLA-85).

sector and that of the degree of competitive relationship between them is complex.[521] Importantly, as noted by two writers, 'investment tribunals have overwhelmingly decided that, as opposed to WTO jurisprudence on "like products," a competitive relationship is **not** the **most fundamental** ingredient of foreign and domestic investments "in like circumstances".[522]

481. In sum, even if the comparators and Jamaca de Dios phase 2 are clearly producing 'competing goods or services', the most important element to the "in like circumstances" analysis is the undeniable fact that they are both operating in the same resort/restaurant/hotel business sector.

482. This is the most important factor because these projects are necessarily **raising similar public policy issues**. Thus, it has been convincingly argued that there is a "presumption that all investments in the same business or economic sector raise similar public policy issues, regardless of their nationality".[523] This presumption is strongly reinforced when different projects are not only operating in the same resort/restaurant/hotel business sector, but doing so in the same environmentally sensitive geographic area.

---

[521] Newcombe & Paradell, *supra*, p. 164-5, explaining that while it is true that "When investments are in the same economic sector, there will usually be some degree of competitive relationship between them – often direct competition", it remains that the mere fact that two investors are in competitive relationship does not necessary means that they should be considered to be in like circumstances. This is indeed the conclusion reached by NAFTA tribunals in the *Pope & Talbot*, *Feldman* and *UPS* cases. Conversely, the absence of any competitive relationship does not necessarily mean that two investors are not in like circumstances: "in assessing like circumstances, it is not necessary for a claimant to establish a competitive relationship between investments. Where a foreign investment produces the same types of goods or services as a domestic investment and there is a competitive relationship between these goods and services, the investments will invariably be in the same economic sector or subsector. This may be an important factor (and in some cases a determinative one) in establishing that the investments are in like circumstances. However, the absence of a competitive relationship between the investments in question does not conclude the analysis" (Id. p. 173-4).

[522] DiMascio & Pauwelyn, *supra*, p. 71.

[523] DiMascio & Pauwelyn, *supra*, p. 73 (referring to the reasoning of the S.D. Myers Tribunal). See also at p. 86 ("More often than not, investments in the same business or economic sector will be treated equally by a nondiscriminatory regulation since they will raise similar regulatory issues").

483. In conclusion, the Ballantines have identified many comparators and shown above how these comparators were treated more favorably. Given that Respondent has essentially conceded that Aloma Montain is a comparator, the Ballantines will show how they have received less favorable treatment than Aloma Mountain.

7. Less Favorable Treatment

484. According to Respondent, the Ballantines' claim 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".[524] In this section, the Ballantines will show that Respondent has clearly accorded a much less favorable treatment to the Jamaca de Dios phase 2 when compared to the Aloma Mountain project first, and likewise with the other projects in the area.

485. According to Respondent, "the treatment accorded to [Phase 2] of Jamaca de Dios was **similar** to the treatment given to a similar project (Aloma Mountain)".[525] Thus, Respondent denies that there is 'any difference in treatment' between the Aloma Mountain project and that of the Ballantines.[526]

486. As further demonstrated in the following paragraphs, the Jamaca de Dios Phase 2 clearly received a **different** treatment when compared to that given to the Aloma Mountain project. It should be recalled that Aloma Mountain is a development project located on the same mountain ridge as Jamaca De Dios, which is owned by Mr. Juan Jose Dominguez. He is the former brother-in-law of then Dominican President Lionel Fernandez, and the son of the Mayor of Jarabacoa. He has used his

[524] **SOD** at ¶ 167.

[525] **SOD** at ¶ 174.

[526] **SOD** at ¶ 186.

significant political influence within the government to stop the expansion of the Jamaca de Dios project.[527]

487. To assert that Aloma Mountain is not treated any differently is to deny what the eyes can plainly see – *i.e.*, that Dominguez has continued to develop his property throughout this Arbitration even though he has very similar slopes to JDD Phase 2 and even though his property is in the national park. Here, with regard to the Aloma Mountain comparator, the treatment violation being raised by the Ballantines is not the creation of the park, but the simple fact that Respondent continues to allow Dominguez to develop Aloma Mountain despite the slopes and despite the National Park while the Ballantines are prevented from all development.

488. Respondent claims that it has imposed a 'significant fine on Aloma Mountain precisely for undertaking works without a permit'.[528] Even if true, there is no indication that this fine has been paid at the significant value, if at all. It should not surprise the Tribunal that the Respondent would "impose" a fine on the politically powerful Dominguez but not require him to pay it. In addition, even after this fine was "imposed," Dominguez has continued his developing unabated. We note also that he is doing so notoriously, one the side of a mountain that is easily visible from the town of Jarabacoa. Thus, Respondent cannot deny that it has allowed Aloma Mountain to continue to develop in the Parks and on land with similar slopes as JDD Phase 2.

489. In fact, under the national treatment provision contained in the CAFTA-DR, the Ballantines are entitled to receive the **best treatment** which is offered by Respondent to any domestic investor which is in "like circumstances". Several NAFTA awards have emphasized this important

[527] **ASOC** at ¶ 61.

[528] **SOD** at ¶ 186.

point.[529] Thus, according to the NAFTA *Pope and Talbot* Tribunal "'no less favorable' means equivalent to, not better or worse than, **the best treatment** accorded to the comparator'.[530] The *ADM* Tribunal also stated that 'Claimants and their investment are entitled to the **best level** of treatment available to any other domestic investor or investment operating in like circumstances…".[531] The 'best treatment' approach has been rightly described as the 'prevailing approach in arbitral jurisprudence, having been affirmed in successive cases (…).[532] This is also the approach supported by writers.[533]

490. In practical terms, this means that the Ballantines are entitled to be treated just like the Dominican comparator receiving the **best** treatment accorded by Respondent. The Ballantines are entitled to this best standard of treatment even if Respondent actually accords it to *only one* investor, and treats all other Dominican investors in "like circumstances" with a much lower level of treatment.[534]

---

[529] It should be noted, however, that the *Feldman* award, *supra*, did not take position on the matter, noting that it was "unclear as to whether the foreign investor must be treated in the most favourable manner provided for *any* domestic investor, or only with regard to treatment generally accorded to domestic investors, or even the least favorably treated domestic investor." (at ¶ 185).

[530] *Pope & Talbot II,* supra, ¶ 42.

[531] *Archer Daniels Midland, supra,* ¶ 205. Similarly, the *Methanex* Tribunal, supra, stated: "if a component state or province differentiates, as a matter of domestic law or policy, between members of a domestic class, which class happens to serve as the comparator for an Article 1102 claim, the investor or investment of another party is entitled to the most favourable treatment accorded to some members of the domestic class." (part. IV, ch. B, ¶ 21).

[532] Kurtz, *supra*, p. 266.

[533] DiMascio & Pauwelyn, *supra*, p. 78 ("Because their goal is to protect individual investors from injury, national treatment provisions in investment agreements entitle foreign investments to the best treatment afforded to comparable domestic investments").

[534] Newcombe & Paradell, *supra*, p. 187 ("The *Pope & Talbot* tribunal, relying in part on GATT jurisprudence, concluded that the national treatment obligation in the NAFTA provides for the best treatment afforded to any one national. If a national investor in like circumstances is provided preferential treatment (i.e., better than other nationals), the foreigner is entitled to no less favourable treatment, even if other similarly situated national investors are not provided comparable treatment. This approach means that a state cannot aggregate the favourable and non-favourable treatment that it accords to national investors and then compare the average treatment afforded to nationals with the treatment afforded to foreign investors. Nor would the state be able to pick a national champion and provide it super-preferential treatment, while according less favourable treatment to domestic and foreign investors. This approach is consistent with the purpose of protecting the individual foreign investor or investment from injury caused by nationality-based discrimination").

491. The Ballantines are not required to show that the less favorable treatment they received is a result of their nationality.[535] As already noted, proof of intent to discriminate based on nationality is sufficient to establish the requisite discrimination, but it is not necessary to the Tribunal's analysis.[536] As noted by two writers, 'in the absence of a legitimate rationale for discrimination between investors in like circumstances, a tribunal will presume – or at least infer – that the differential treatment was a result of the claimant's nationality'.[537]

492. As Aloma has repeatedly been allowed to develop in the absence of a permit, and he continues to do so, the Ballantines received a less favorable treatment.

493. In addition to Aloma Mountain, which Respondent has admitted is a comparator, Respondent has treated JDD Phase 2 less favorably than it has many other comparators in the area. As noted by Mr. Potes, Mr. Richter, and Mr. Kay, the other projects near to JDD Phase 2 are likewise comparable from an environmental standpoint. These are all projects that have slopes in excess of 60% and are environmentally sensitive. And these comparable projects, listed above, have all received permits or been allowed to develop without a permit. Thus, every one of these comparators (even though only one comparator is required) has been treated more favorably than the Ballantines' Phase 2 Project. Every. Single. One.

494. Again, to the extent that Respondent argues that these projects are not comparators because they were not as robust or advanced as JDD, this misses a fundamental point: the comparison is not between the entire JDD project (built and planned) but instead with the planned Phase 2. The Phase

[535] *Feldman, supra*, ¶ 183: "requiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government. It would be virtually impossible for any claimant to meet the burden of demonstrating that a government's motivation for discrimination is nationality rather than some other reason."

[536] **ASOC** at ¶ 196.

[537] Newcombe & Paradell, *supra*, p. 183.

1 permit had already been granted and mostly developed. The issue is not the fact that the Ballantines had built a robust and successful Phase 1. The issue is that the Ballantines were denied from building a Phase 2. It is that planned property that is the comparator of the other protean, incipient, planned, and even moribund projects. It should be remembered that the Ballantines' Phase 2 project is likewise moribund as Respondent has refused to allow development.

8. Legitimate Policy Justifications

495. The Ballantines having established that they were treated less favorably than the Dominican comparator in "like circumstances", the burden shifts to the Respondent to justify such less favorable treatment. The Respondent must show that the differential treatment received by the Ballantines "bears a reasonable relationship to rational policies not motivated by [nationality-based preferences]."[538]

496. In fact, the differential treatment received by the Ballantines clearly does not bear any reasonable relationship with any legitimate policy objective.

497. As already explained in the Amended Statement of Claim, a justification defense under the third part of the test requires that the DR proves (1) "the existence of a rational policy", and (2) an "appropriate correlation between the state's public policy objective and the measure adopted to achieve it".[539]

498. The Respondent alleges that the '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.'[540] As mentioned above, the

[538] *Pope & Talbot II,* supra, ¶¶ 79, 88.

[539] *AES Summit Generation Ltd. and AES-Tisza Erömü KRT v. Hungary*, ICSID Case No. ARB/07/22 (Award, September 23, 2010) ("*AES*"), ¶¶ 10.3.7, 10.3.9 (CLA-19).

[540] **SOD** at ¶ 189.

Ballantines' experts show that these motives do not withstand scrutiny. Their property should not have been included within the boundaries of the Park ***or*** the other properties which actually affect the water resources and are more environmentally significant should have been included.

499. In addition, any legitimate policy justification would require that the Respondent actually prevent Aloma Mountain and others from building in the Park and on land where slopes are in excess of 60%.

500. In any event, the measures concretely adopted by Respondent regarding the protection of the Baiguate National Park and the slopes simply bear no reasonable relationship whatsoever with its proclaimed rational policy.

501. Thus, had the policy objective of Respondent truly been to protect the environment, it would not have allowed the owners of Aloma Mountain, Rancho Guaraguao, and Ocoa Bay, among others, to continue to develop his project in national parks *without having the proper permits.*[541] There is no possible justification for Respondent to allow any such development in the Park or on slopes that exceed 60% while at the same time denying the Ballantines a similar permit. There is simply no 'appropriate correlation' [542] between Respondent's purported public policy and the arbitrary and discriminatory measure Respondent concretely adopted regarding permits.

502. To paraphrase the *Pope and Talbot* Tribunal, there is no 'reasonable nexus between the measure' adopted by the DR and the 'rational, non-discriminatory government policy' which it alleges to be pursuing.[543]

---

[541] **ASOC** at ¶ 60, 78, 186.

[542] *AES, supra,* ¶¶ 10.3.7, 10.3.9.

[543] *Pope & Talbot*, supra, at ¶ 78, 81.

503. In conclusion, the Ballantines have established that they were treated less favorably than the Dominican comparator in 'like circumstances' and the DR has failed to demonstrate that such treatment was justified by any legitimate policy reason. Therefore, the DR's actions constitute a violation of the national treatment obligation under CAFTA-DR Article 10.3

9. Expropriation

504. The Ballantines' expropriation claim is a simple one, despite Respondent's protestations. Respondent has prevented any reasonable commercial use of the Ballantines' property. Yes, the Ballantines hold title to the property. But Respondent's rejections of the Ballantines' multiple efforts to development the land constitutes an expropriation.

505. This is an expropriation of the Ballantines' property, absent any defenses by Respondent. To put it simply:

- The final denial of the Respondent of the Ballantines' permit to develop Phase 2 due to the slopes constituted an indirect expropriation of the planned business and development of the Phase 2 property.
- The denial of the Respondent of the Ballantines' permit to develop phase 2 due to the fact that the land has been turned into a national park was a direct expropriation.
- The refusal of the town of Jarabacoa to issue a no objection permit to develop the mountain lodge (or anything) was an indirect expropriation of that property.

506. As an initial matter, Respondent lays out a rule based on one case that does not express the law in this area. Respondent asserts that an indirect expropriation requires a "virtual taking" such that "the investor no longer [is] in control of its business operation, or that the value of the business [is] virtually annihilated."[544] Although this was statement made in one arbitration, the bulk of Tribunals have not held that it needs to virtually annihilate the person's business. *See, e.g.*, *Metalclad*

[544] **SOD** at ¶ 261.

(expropriation … includes… interference with the use of property which has the effect of depriving the owner, in whole or in significant part, or the use or reasonably-to-be-expected economic benefit of property . . . .); *see also CMS* ("The essential question is therefore to establish whether the enjoyment of the property has been effectively neutralized . . . .").

507. CAFTA Annex 10-C lays out the requirements for an indirect expropriation. It provides that:

> (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
>
> > (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
> >
> > (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
> >
> > (iii) the character of the government action.

508. Examining these factors, Respondent's actions have violated CAFTA-DR's expropriation provision. Respondent's final denial of the Ballantines' permit request for Phase 2 ended any opportunity to develop this property, expropriating the Ballantines' project. Certainly, as Respondent notes, the Ballantines still hold title to this property. But that is not the issue. The Ballantines' rights with regard to the property have been taken away.

509. In addition, this was an illegal expropriation. First, the expropriation was discriminatory. As stated above, Respondent has granted permits for other properties with slopes more steep than Phase 2. In addition, Respondent has allowed projects to develop with slopes and even in the absence of a permit. Respondent has further allowed projects to develop in national parks, including allowing Aloma Mountain to continue to develop in the Park and without a permit. Thus, the expropriation by Respondent here is discriminatory.

510. Further, Respondent has not paid compensation. Nor has Respondent even put a mechanism into place in an effort to pretend that compensation would be paid at some point in the future. Respondent believes it has no obligation to pay compensation despite the fact that it took the Ballantines land and transferred into a National Park.

IV. QUANTUM

511. The evidence presented to the Tribunal makes plain that Respondent, among other wrongs, discriminated against the Ballantines with respect to the application of its environmental laws. These treaty violations, each individually, destroyed the value of the Ballantines' investments in the DR, which included the Phase 2 Property, the Mountain Lodge and Hotel, the Paso Alto venture, and the Jamaca Brand. The damages outlined in James Farrell's report should be awarded to the Ballantines irrespective of how this Tribunal characterizes or categorizes Respondent's wrongful acts – meaning which Treaty provision was breached. The damages presented in the ASOC flow equally from the unfair and inequitable and treatment of the Ballantines, the national treatment violations, and the expropriation of the Ballantines' investment. The initial expert report of Mr. Farrell identified several elements of those damages and conservatively calculated their quantum.[545]

512. Respondent's expert, Timothy Hart, takes little issue with the actual calculation of the damages presented by Mr. Farrell, other than to debate 1) the appropriate amount of the discount rate

[545] It is important to emphasize the conservative nature of the Ballantines' damage presentation. The Ballantines have elected not to seek damages for every aspect of the economic harm that has flowed from the discrimination and expropriation that drove them from the country. For example, they have chosen **not** to seek damages flowing from 1) the roughly 40,000 meters of additional developable land in Phase 1 that they intended to divide into lots after first expanding up the mountain; 2) the builder's profit associated with constructing homes on Paso Alto after consummation of the intended purchase of that project; 3) the inability to reacquire lots upon which homes had not been built within the two-year window set forth in the Jamaca purchase contract, and to resell those lots at an increased value; 4) the reduced value of the final lots in Phase 1 that were sold after the Ballantines were forced to initiate this arbitration. Indeed, the ASOC sought damages for the four Phase 1 lots that remained in inventory at the time of the ASOC. Those lots have been sold - for less than what they are worth -- but the Ballantines are withdrawing any claim for damages associated with those lots to keep their damage presentation straightforward and conservative. Indeed, the Ballantines admit to the Tribunal that the Phase 2 hotel and spa would potentially be a present value loss and have reduced that loss from their damage presentation.

used in Mr. Farrell's cash flow projections and 2) the prejudgment interest rate that should be awarded to the Ballantines. Rather, Mr. Farrell's report focuses primary on his contentions that the Ballantines have failed to establish causation, and that the Ballantines have allegedly failed to mitigate their damages.

513. Both of these arguments are simply *factual* and *legal* arguments that double down on Respondent's claims that it did not discriminate against the Ballantines, and that it did not expropriate their property. ***The arguments do nothing to critique the calculation of quantum by Mr. Farrell*** -- who, like most damages experts, was simply and appropriately instructed to assume breach and causation.[546] This Tribunal will view the evidence and determine whether or not the inability of the Ballantines to monetize their investment was the result of Respondent's bad acts. It is not for Mr. Hart, or for Mr. Farrell, to give an opinion as to whether or not the evidence supports the breaches claimed by the Ballantines.[547]

514. Prior to Respondent's Treaty violations, the Ballantines had a thriving, expanding development and brand. The Ballantines' success in developing the first phase of Jamaca De Dios gave

[546] That a damages expert "does not seek to opine that the assumptions underlying her analysis are true in fact" is "beyond serious challenge" in U.S. federal courts. Robroy Indus. — Tex., LLC v. Thomas & Betts Corp., 2017 U.S. Dist. LEXIS 54230, *11-14 (E.D.Tex. 2017). See also Luitpold Pharms., Inc. v. Ed. Geistlich Sohne A.G. für Chemische Industrie, 2015 U.S. Dist. LEXIS 123591, at *10 (S.D.N.Y. Sept. 16, 2015) ("a damages expert does not need to perform her own causation analysis to offer useful expert testimony"); Gaedeke Holdings VII, Ltd. v. Baker, 2015 U.S. Dist. LEXIS 182550, at *3 (W.D. Okla. Nov. 30, 2015) ("it is appropriate for expert witnesses to assume causation will be established and then proceed to calculate the damages"); RMD, LLC v. Nitto Ams., Inc., 2012 U.S. Dist. LEXIS 158107, at *10 (D. Kan. Nov. 5, 2012) (the quantum expert "is not a causation expert. His expert testimony relates only to damage calculation, not to causation[.] For purposes of presenting his damage calculation methods [he] is permitted to presume causation") CRST Van Expedited, Inc. v. J.B. Hunt Transport, Inc., 2006 U.S. Dist. LEXIS 50764, at *4 (W.D. Okla. July 24, 2006) (a quantum expert "is entitled to presume causation").

[547] Mr. Hart chooses not to submit *his own calculation of what damages* would flow from a finding of liability, apparently choosing to wait for the Rejoinder -- so that there can be no response from Claimants -- to take issue with Mr. Farrell's projections for Phase 2 lots sales and other damage elements. Mr. Farrell of course stands by his individual calculations of specific damage elements and reserves the right to debate -- during his testimony at Hearing -- any competing analyses presented by Mr. Hart. This Tribunal should take note of the paucity of economic -- as opposed to unnecessary evidentiary -- analysis in the Hart report.

them reasonable and appropriate expectations and confidence with respect to the economic prospects concerning their Phase 2 plans. Respondent's *volte face* destroyed the Ballantines' expansion efforts and consequently affected the value of the Ballantines' continuing investment in Jamaca. The assumptions and predictions that underlie Mr. Farrell's valuation are well-articulated, rational, conservative, and based on the proper exercise of professional judgment.

515. This Reply need not reiterate the detailed presentation of damages contained in the ASOC, which is fully incorporated here. Instead, it will simply and briefly respond to the contentions of Respondent emphasized in their Statement of Defense, which are primarily generalized legal defenses -- "the Ballantines haven't proven *causation*, the Ballantines failed to *mitigate*, the Ballantines' claims are *speculative*" -- as opposed to any substantive economic critique of the projected value of the Phase 2 land and the homes that would have been built there but for the discrimination and expropriation of Respondent. Respondent is unable to specifically attack these projections because the numbers used by the Ballantines are largely ***based upon the historical performance of their existing investment.***

516. Respondent of course invokes a standard speculation defense. ***But it is critical to emphasize that Jamaca de Dios was not a "new business."*** The Ballantines are not attempting to convince the Tribunal with an argument that "although we've never done this before, we swear we could have divided this property and sold these lots and built these homes and managed this hotel." ***The Ballantines had done it before – and done it well***. Jamaca de Dios had already sold 90 lots in Phase 1; it had already built a half dozen homes, administrative buildings, and the best private mountain road in the country; it had already built, managed and expanded the fine dining restaurant that was a cornerstone of the development. It had created a brand that was associated with quality and led multiple other project investors to seek affiliations with Jamaca. The damages that the Ballantines seek are of course not the speculative claims of an untested and untried business that never get off the ground. They are

based in historical and economic fact -- as the defined outgrowth of the success of Phase 1 -- success which would have been promptly replicated in Phase 2, and then expanded through the exploitation and extension of the Jamaca brand.

A. Respondents' Causation Arguments Are Unavailing

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

> "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[548]

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

> "where the state has acted contrary to its obligations, any award to the claimant should, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would in all probability have existed if that act had not been committed (the status quo ante)."[549]

519. This is not a difficult, remarkable, or controversial standard. Respondent does not appear to take issue with it, encapsulating it as attempting to determine "what did the investor lose by reason of the unlawful act."[550] The Ballantines have identified the "consequences" of Respondent's Treaty violations, and ask this Tribunal to "reestablish the situation which would in all probability have existed" had the Ballantines been granted permission to expand their development.

520. Instead, Respondent complains that the Ballantines have failed to identify which specific items of damage flow from Respondent's acts of discrimination as opposed to which items flow from

---

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

[549] *Metalclad*, at 122 (**CLA-29**).

[550] **SOD** at ¶ 278

Respondent's acts of expropriation.[551] But the Ballantines were clear in their ASOC: the damages asserted by the Ballantines "flow equally from the inequitable and discriminatory treatment of the Ballantines, and from the illegal expropriation of the Ballantines property."[552] To reiterate this point here, the damages that flow from the various treaty violations do not depend on the specific violation but rather from what is necessary to wipe out the consequences of these wrongful acts.

521. Respondent generically argues that "[t]he Ballantines' sweeping allegations 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."[553] It appears as though Respondent thinks that each element of the Ballantines' damage claim must necessarily include repetition of the following statement:

> "the losses described and calculated below were caused by Respondent's discriminatory and expropriatory acts. Had Respondent not wrongfully denied the Ballantines' expansion request based upon a slope law (which did not prevent any other mountain project from proceeding) or based upon the existence of a National Park (which also did not prevent any other mountain project from proceeding), the Ballantines would not have suffered these specific losses."

522. This of course is nonsensical. Respondent then moves to more specific elements of the damage presentation and claims that the claimed damages do not flow from Respondents' breaches. Respondent is wrong. We address these contentions in turn.

523. ***Expansion of Aroma Restaurant***. The testimony before this Tribunal is clear and unrebutted. The Aroma Restaurant was expanded in anticipation of the enlargement of the Jamaca de Dios and the expectation of additional residents in the upper lots, and additional patrons visiting the

---

[551] **SOD** at ¶279-281.

[552] **ASOC** at ¶ 288.

[553] **SOD** at ¶ 281.

hotel or renting at the Mountain Lodge or lower apartment complex.[554] Had the Ballantines known that they were be denied their Phase 2 (when no other mountain development has been denied a right to develop), they would not have made the significant investment to expand the size of the restaurant.[555]

524. Respondent asserts that the report of expansion costs details sums invested by the Ballantines between 2010 and 2016, and that it "defies all logic" that the Ballantines would have continued to invest in the restaurant after receipt of the initial denial letter. *First*, the Ballantines had no reason believe that the initial rejection letter -- which invoked a slope law that at that time had never been cited by Respondent for any other mountain project in the country even as the Ballantines watched these projects notoriously develop on land including these slopes -- would ultimately result in a ***complete denial of any right to expand*** their development, even preventing the construction of the Mountain Lodge on lots that had been previously approved for development!

525. *Second*, at the time that the Ballantines received this initial rejection letter in September of 2011, they already expanded the back offices and kitchen, torn the roof off of the building, reinforced its columns, signed a contract with the rotating floor company, signed a contract with Acero Estrella for the steel fabrication which had been installed, and poured contract for the second floor.[556] The expansion could not simply have been abandoned at this time.

526. Respondent also hints that no damages can be awarded because that the restaurant is owned by Rachel Ballantine, who is not a party to this dispute. However, Rachel Ballantine issued

---

[554] Respondent insinuates that the expansion was not appropriately licensed but that is inaccurate. Unlike the majority Dominican projects, who simply developed and then on occasion asked for permission after the fact, the Ballantines sought permission to conduct development activity in their project.

[555] Again, the Ballantines have been conservative here. They have elected not to seek the present value of the restaurant revenue that has been lost as a result of the permit denial. And they have not sought the decreased market value of the restaurant as a going concern. Instead, they seek only to recoup the costs they incurred to expand their restaurant, which they would not have done is they had known of the discrimination they would face.

[556] **Reply Ballantine St** at ¶68.

Michael Ballantine a power of attorney in 2013 to represent the ownership interests of Restaurante Aroma de la Montana, E.I.R.L, and it is an investment that the Ballantines directly control (and always have).[557] It is therefore is a covered investment under CAFTA.[558]

527. ***Lost Profits from Paso Alto***. Again the testimony before this Tribunal is clear and unrebutted. The Ballantines did not move forward with the acquisition of the Paso Alto development because it wanted to first obtain its own license to allow for a coordinated exploitation of the two projects.[559] Respondent appears to suggest that that could not be the case because the Letter of Intent between the Ballantines and Paso Alto expired in April of 2011. But this chronology actually supports the testimonial evidence that consummation of the transaction was contingent upon the receipt of the Phase 2 permit, which was expected in 2011.

528. Had Respondent not discriminated against the Ballantines by refusing their expansion license, among other things, negotiations between Paso Alto and the Ballantines would have resumed -- whether that was in May of 2011, September of 2011, or May of 2012. As the testimony of Paso Alto founder and president Omar Rodriguez makes clear, speaking of Michael:

> "We felt that with his experience, knowledge and with his dedication to complete the project over time, this alliance would carry our vision into the future ***under the Jamaca de Dios brand which had respect and had been a success***. The shareholders agreed unanimously that this alliance would be a good option for us to follow. At this time, Paso Alto had been approved for development, with permission number 492-2006. We had built our internal roads and started the necessary infrastructure. ***But having seen what Michael had done with Jamaca de Dios, we believed that a coordinated development effort would be a more beneficial route***."[560] (emphasis added)

[557] **Reply Ballantine St** at ¶67.

[558] CAFTA-DR, Article 10.28.

[559] **M. Ballantine St.** at ¶36

[560] **Omar Rodriguez Statement** at ¶3.

529. ***Lost Profits from Lower Apartment Complex***. Respondent asserts here that 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." This is not accurate.

530. In August of 2010, the Ballantines submitted their request for tax-free status for their entire development. Included in that request to CONFUTOR was a description of the Ballantines' intention to build time share villas on the lower portion of their property, a concept entitled Valy's at Jamaca.[561] That project was conditionally approved by CONFUTOR,

531. However, as the witness statement of Bob Webb, an international real estate consultant who worked for Jamaca from 2010-2012, confirms, the Ballantines ultimately decided that a time share concept was not appropriate for Jamaca and they simply transformed this concept to the lower apartment complex, for which they commissioned the architectural renderings that already presented to this Tribunal.[562]

532. Both projects planned common areas, with a pool, bathrooms, a BBQ area, a clubhouse, and a parking lot. As Webb testifies, the apartment complex would be preferred by international buyers who want to own their properties and rent them out as they see fit. The Ballantines were very interested in expanding to the international market after the success they had had with the Dominican population in Phase 1.[563] Additionally, by creating a land plan that included a hotel, free-standing whole ownership

[561] See **C-101**.

[562] **Witness Statement of Bob Webb** at ¶3.

[563] **Witness Statement of Bob Webb** at ¶3-4.

homes, and condominium units, marketing costs could be reduced, since timeshare marketing requires a far greater investment than whole-ownership sales.[564]

533. The Ballantines had always intended to create additional ownership opportunity on the lower portion of Phase 1, but decided to simply build condo units on its lower property that could be part of a rental program, which was similar to the plans for the Mountain Lodge further up the hill.

B. The Ballantines Can Recover Damages for Brand Diminution

534. Respondent argues that the Ballantines should not be entitled to seek damages for the damage done to the Jamaca brand as a result of Respondent's Treaty violations, asserting their losses here are "pure conjecture." They are not. As the testimony of Omar Rodriguez -- *a Dominican competitor of the Ballantines* -- confirms, the Jamaca brand had "respect" and was a "success." Phase 1 of Jamaca stands as the largest, most commercially successful, residential mountain community in the Dominican Republic, with luxury homes throughout.

535. David Almanzar -- who helped design the Mountain Lodge -- has testified about his plans to form a join venture with Jamaca to bring similar construction to more of the mountain. His family owns some 700,000 square meters just to the west of Jamaca de Dios and expressly discussed a multi-year project to expand the Jamaca brand to his property such that it "could enjoy the economic prosperity of la Jamaca de Dios" and "add tremendous value" to his land.[565]

536. Michael Ballantine has testified concerning other Dominican landowners who wanted to utilize the Jamaca brand to improve the economic prospects of their development. Indeed, Jarabacoa Mountain Garden owner Raul Canela even approached Jamaca to take over JMG, shortly after it became

[564] Id.

[565] **Witness Statement of D. Almanzar** at ¶6-7.

known that Jamaca was in the process of buying Paso Alto. As described above, these two projects connect above the Baiguate River.[566]

537. Abelardo Melgen, with whom the Ballantines worked with extensively during the development of la Jamaca de Dios, encouraged the Ballantines to take over the project of his aged uncle, Dr. Acra. Dr. Acra was the owner of a beautiful project right on the North Yaque River that was approved by the MMA and had installed water and electric. e specifically discussed licensing the Jamaca brand with a simple revenue sharing agreement, between friends and trusted partners, who already had years of history working together.[567]

538. The owner of Alta Vista, Franklin Liriano, approached the Ballantines numerous times to discuss a revenue sharing agreement for Jamaca to take over the sales component of Alta Vista, understanding that Jamaca had the brand, marketing, and sales structure in place.[568]

539. Simply stated, the loss of future investment and brand diminution claim expressed by the Ballantines recognizes that something of significant value has been lost as a result of Respondent's discriminatory acts, which forced the Ballantines out of the market and the country. James Farrell's expert report conservatively and appropriately quantifies that loss by reference to the present value of future expected economic benefits from the continued operation of Hotel Taino, the Mountain Lodge, and the lower apartment complex.

C. Respondents' Mitigation Arguments Are Unavailing

540. Mr. Hart asserts that the Ballantines failed to mitigate their damages because they invested relatively small amounts after receiving the first rejection notice or after their Phase 2 land was placed in the National Park. Of course, Mr. Hart is free to have his view. But this is a legal question

[566] **M. Ballantine St.** at ¶30.

[567] **M. Ballantine St.** at ¶31.

[568] Id.

that is reserved for the Tribunal, and not a question of quantum. Mr. Hart's cheerful willingness to delve into legal questions based on a variety of facts calls into question whether he has written an independent economic report or an advocacy piece. Given how he selectively chooses facts and does not examine how those facts fit into the requirements of CAFTA, the Tribunal should assume that his report is the latter.

541. To be clear, Mr. Hart's advocacy on behalf of Respondent is misplaced. With regard to the National Park, Mr. Hart must not have read the Respondent's own positions. Respondent asserts here that activity is in fact allowed in the Park. Sure, after 8 years, Respondent has finally created a Park Management Plan to purports to allow ecotourism in the Park. Although this Plan is an arbitration cover-up, the Ballantines had no idea that the National Park would be used as a basis to deny any development in Phase 2. And, of course, neither did Respondent's MMA officials, as they never mentioned the Park in the first three denials. After receiving the first denial and making no mention of the National Park, how would this put the Ballantines on notice that the Park would restrict their development.

542. More fundamentally, another fact that Mr. Hart leaves off in order to advocate for a result is that the Ballantines could look next door and see that Aloma Mountain, which was also in the Park, was developing away. One is acting rational and would not know to mitigate damages when one sees the mayor's son notoriously developing his property in the same Park. Of course, the Ballantines did not know at the time that Aloma Mountain did not even have a permit. But they could see the development talking place on a mountain side in full view of the city in an area that was the same National Park.

543. Mr. Hart's advocacy also fails with respect to the slopes. The Ballantines likewise could see that every other mountain project in the neighboring areas were developing even though all of them

contained lands with slopes exceeding 60%. Even after receiving the initial denial, the Ballantines were well in their rights (and acting rationally) to assume that the denial was incorrect and that they would ultimately be able to develop their property.

544. What is perverse about Mr. Hart's view on this is that he seeks to reward Respondent for acting in a discriminatory fashion. Given that others were developing in the National Park and on slopes, Mr. Hart's position would mean that the Ballantines should have recognized that they were being singled out and should have cut their losses. Rather, the Ballantines continued to press their rights expecting the Respondent to abide by its commitments and treat the Ballantines fairly. And Mr. Hart would assert that the Ballantines' expectations that they would be treated the same as the Dominican-owned businesses means that the Ballantines should be punished for failing to mitigate.

D. The Use of a Discounted Cash Flow Model to Calculate Damage is Appropriate

545. Respondent takes exception to the DCF model, alleging that the inputs are not certain. As an initial matter, the Ballantines note again that the primary inputs for the DCF model come from actual performance in Phase 1. These are sales that occurred on the very same mountain, just at lower altitudes that are not as valuable as the higher properties. The Discounted Cash Flow (DCF) method has been used by many tribunals in the past.[569] Tribunals have recognized that the DCF is not an "exact science" and necessarily involves a certain degree of estimation. What matters is that the method is based on an "informed estimation" . In *Tidewater*, the tribunal stated that:

> The Tribunal has already observed that the determination of an appropriate level of compensation based upon a discounted cash flow analysis of this kind **is not and cannot be an exact science, but is rather a matter of informed estimation**.[570]

[569] See *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd v. Republic of Kazakhstan,* SCC Case No. V116/2010, Award, 19 December 2013, ¶ 1617 (CLA-86); Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 793 (CLA-21).

[570] *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015, ¶ 202 (CLA-38).

546. In *Flemingo Duty Free*, the tribunal likewise noted that

> approximation in DCF calculations is inherent and inevitable, as has been recognised by the tribunal in Himpurna v PT, among others. The determination of future expected cash flows is not "rocket science". However, the Tribunal is of the view that the DCF method remains an adequate way to assess the net present value of the income produced under BH Travel's Lease Agreements for their remaining terms.[571]

547. The Tribunal here does not need to find an exact figure for the DCF calculation. There will, of course be uncertainty, in the calculation. But Respondent should not escape the payment of the damages because it took steps to destroy the investment. In this case, the DCF calculation provides the best method to uphold the Chorzow standard to wipe out the consequences of Respondent's unlawful acts.

E. The Ballantines' Prejudgment Interest Demand is Appropriate

548. Mr. Farrell also included a conservative interest figure of 5.5%, which was based on the Central Bank of the Dominican Republic's "Monetary Policy Rate."[572] This figure is far below the standard consumer-borrowing rate in the Dominican Republic, which regularly exceeds 15%.[573]

549. Mr. Hart takes issue with that rate, arguing that it would overcompensate the Ballantines. Mr. Hart here provides no evidence that this would overcompensate the Ballantines. Mr. Hart bases his assertion regarding overcompensation on the fact that the majority of the awards he studied provided for

---

[571] *Flemingo DutyFree Shop Private Limited v. Republic of Poland*, UNCITRAL, Award, 12 August 2016, para. 910 (CLA-87).

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

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

some fixed rate. Putting aside the fact that Mr. Hart omitted a key point from his study when addressing the compound interest below, the fact that more tribunals have used floating rates instead of fixed rates does not mean that the Ballantines are being overcompensated. It is not surprising to see, for example, that a Tribunal might award a company like Cargill the US monthly bank loan prime rate. What Mr. Hart fails to note is that several of the awards that do include a floating rate, also include a political risk component that makes the number quite higher. For example, according to Mr. Hart's study but omitted in his report here, the *Alpha Projektholding GmbH* tribunal awarded the claimant a 10 year US Treasury bond rate plus a market risk premium for the Ukraine, resulting in an interest rate of 9.11%.

550. Interest compounded monthly is the appropriate standard to use for this calculation. As an initial matter, there is little uncertainty with respect compound interest being the appropriate measure in investor-state. As the Tribunal in *Siag v. Egypt* recently noted, the claimants "submitted that since 2000, no less than 15 out of 16 tribunals have awarded compound interest on damages in investment disputes."[574]

551. Mr. Hart omits the fact that his own study shows that compound interest is the method used in the majority of cases. According to the "Credibility" study, only 7 out of the 24 awards (or 29%) examined awarded simple interest.[575] That means that 71% of the awards studied by Mr. Hart awarded compound interest. This is certainly the standard. And Mr. Hart, while omitting the fact that the vast majority of tribunals award compound interest, offers no rationale why the Tribunal should depart from this norm in investor-state arbitration. Given Mr. Hart's sole reliance on his 2014 study to argue that the interest rate should be lower and his omission of the study when discussing the compound

[574] *Siag v. Egypt*, ICSID Case No. ARB/05/15, Award, May 11, 2009, at ¶ 595 (CLA-44).

[575] **R-136**, at pps. 18-19.

interest, the Tribunal should view Mr. Hart's arguments on these point as advocacy for the Respondent and not an independent view.

552. In any event, the reason tribunals use compound interest is that "compound interest is a closer measure to the actual value lost by an investor."[576] This justification exists in the instant case as well. The Ballantines would have had instant access to profits resulting from lot sales, restaurant income, etc. The Ballantines would have been able to invest that income. Those invested amounts would have similarly generated returns. Thus, in this case, like 71% of most investor-state cases according to Mr. Hart's study, compound interest is appropriate in order to put the Ballantines in the position they would have been had Respondent not engaged in its unlawful acts.

F. The Ballantines Should be Awarded Moral Damages

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

554. Article 31 of the ILC provides that a State must make full reparation for any 'injury' caused to another State by an internationally wrongful act.[577] This provision further indicates that the concept of injury includes "any damage, whether material or moral, caused by the internationally wrongful act of a State."[578]

555. The work of the ILC on State Responsibility makes clear that monetary compensation is the appropriate remedy for moral damages affecting individuals, such as the Ballantines.[579] This is

[576] *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award, February 6, 2007, at ¶ 399 (CLA-45).

[577] Draft ILC Articles (CLA-41).

[578] Draft ILC Articles (CLA-41).

[579] ILC Commentaries (n 11) p 252, indicating that "compensable personal injury encompasses not only associated material losses" but also "non-material damage suffered by the individual" (CLA-42).

because moral damages suffered by individuals are clearly 'financially assessable'. As mentioned by the ILC, "no less than material injury sustained by the injured State, non-material damage is financially assessable and may be the subject of a claim of compensation, as stressed in the Lusitania case."[580]

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

> "It is generally accepted in most legal systems that moral damages may also be recovered besides pure economic damages. There are indeed no reasons to exclude them."[581]

The *Desert Line* tribunal further noted that:

> "it is difficult, if not impossible, to substantiate a prejudice of the kind ascertained in the present award. Still, as it was held in the Lusitania cases, non-material damages may be 'very real, and the mere fact that they are difficult to measure or estimate by monetary standards makes them none the less real and affords no reason why the injured person should not be compensated.'"[582]

The *Desert Line* tribunal thus held that the respondent state was "liable to reparation for the injury suffered by the Claimant, whether it be bodily, moral or material in nature."[583]

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

> "First, it includes personal injury that does not produce loss of income or generate financial expenses. Secondly, it comprises the various forms of emotional harm, such as indignity, humiliation, shame, defamation, injury to reputation and feelings, but also harm resulting from the loss of loved ones and, on a more general basis, from the loss of enjoyment of life. A third category would embrace what could be called non-material damage

[580] ILC Commentaries (n 11) p 252 (CLA-42).

[581] *Desert Line Projects LLC v Yemen*, ICSID, Case No ARB/05/17, Award, February 6, 2008, at 289 (CLA-47).

[582] Id.

[583] Id. at 290.

> of a 'pathological' character, such as mental stress, anguish, anxiety, pain, suffering, stress, nervous strain, fright, fear, threat or shock. Finally, non-material damage would also cover minor consequences of a wrongful act, e.g. the affront associated with the mere fact of a breach or, as it is sometimes called, 'legal injury'."[584]

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

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

G. The Respondent Should Pay The Fees And Costs of the Arbitration

560. There can be no doubt that the Respondent treated the Ballantines drastically different than it did all the other comparators. This is not the case, unlike in TECO for example, where Guatemala was trying to prevent a commission from unjustifiably raising electricity prices. In TECO, Guatemala was found to have failed to give reasons to depart from the recommendations of an

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

admittedly non-binding commission regarding tariffs. Yet, in that case, Guatemala was ordered to pay most of the fees and costs of the Arbitration, including professional fees.

561. Here, Respondent's officials did not simply fail to give reasons or want to make sure that electricity tariffs were low. Certain of Respondent's officials took deliberate actions to harm the Ballantines' investment through a barrage of discriminatory, arbitration, and expropriatory measures. This was no accident, mistake in judgment, or simple zeal. This was corrupt and targeted.

562. To be sure, not all of Respondent's officials are corrupt or discriminatory. There are always faithful civil servants trying to do the best they can. But Respondent has failed to reign in the bad actors that destroyed the Ballantines' investment and has in fact allowed these powerful persons to do just that.

563. Whether it is engaging in extensive corruption with Odebrecht or other companies, or forcing Dominican born children and women of Haitian heritage into horrific circumstances, Respondent allows its officials to engage in these sort of acts.

564. Given the harm done to the Ballantines, who had their investment destroyed, and given the Respondent's efforts to try to cover that up in this Arbitration, among other reasons, the Tribunal should order that Respondent pay all the costs and fees in this Arbitration.

Respectfully submitted,

DATED: November 9, 2017 _____s / Matthew G. Allison_____

One of the Attorney for Claimants