In the matter of an arbitration under the 2013 UNCITRAL Rules

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Michael Ballantine
and Lisa Ballantine,
Claimants,

v.

The Dominican Republic,
Respondent.

PCA Case No. 2016-17

Rejoinder of the Dominican Republic on Jurisdiction and Merits

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19 March 2018

Arnold & Porter

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I. INTRODUCTION

1. In their two more recent pleadings — the Reply dated 9 November 2017 ("**Reply**"), and the Response on Admissibility dated 17 November 2017 ("**Admissibility Response**") — claimants Michael and Lisa Ballantine ("**the Ballantines**")[1] once again rely on the theme that they evidently are hoping will carry the day for them in this arbitration: the theme of the innocent missionaries versus the abusive State. However, as discussed herein, their commitment to this strategy has come at the cost of accuracy, internal consistency, and often logic. And while their approach might have some initial resonance or surface appeal, its impact dissipates once various strands of the real factual story are exposed. Such strands include the Ballantines' apparent misrepresentation of critical facts to this Tribunal (as well as, possibly, to the Dominican and U.S. tax authorities — more on this below).

2. But aside from their various factual distortions and elisions, the Ballantines have also fundamentally misrepresented — or perhaps misinterpreted — relevant legal standards. For example, the Dominican Republic's nationality-based jurisdictional objections require a determination of the dominant and effective nationality of the Ballantines at certain critical times, which involves an assessment of multiple factors in the aggregate. The Dominican Republic addressed each of those factors in its Statement of Defense. The Ballantines' response to this in their Reply was to isolate each factor, and then to suggest that such factor is irrelevant or unimportant. The Ballantines' treatment of the "State of habitual residence" factor is one illustration of that strategy. In its Statement of Defense, the Dominican Republic stressed (citing authority, including the Tribunal's own Procedural Order No. 2) that the State of habitual

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

residence at relevant times is a critical factor — albeit not the exclusive one — in determining dominant and effective nationality. The Ballantines' response to this point in their Reply was simply: "[R]esidency is not the test."[2] However, while it may not be the whole test, it is unquestionably an important part of the test.

3. Similarly, with respect to other relevant factors, the Ballantines seem to content themselves with characterizing as "silly" the Dominican Republic's factual submissions on each of those factors; it is as if the Ballantines attempt to make up with sarcasm what they lack in substantive argumentation. Similar strategies of distraction, and failures to engage on critical issues, afflict their arguments on the merits and damages.

4. The Ballantines relied on such tactics not only in their Reply, but also in their Admissibility Response. In both of those pleadings, they scoff at evidence,[3] sneer at science,[4] and even purport to base on mere "intuition" their interpretation of legal standards.[5] Further, mere beliefs are presented as facts;[6] allegations are not checked for accuracy;[7] and arguments are amended wherever an advantage can be gained.[8] To exacerbate matters, the Ballantines have

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[2] **Reply**, ¶ 37.

[3] *See, e.g.*, **Reply**, ¶ 58 (asserting that "[a]ny efforts to deem Lisa Ballantine's enthusiasm over voting in a Dominican election as proof of her dominantly Dominican nationality is silly and shows . . . desperation . . . .").

[4] *See, e.g.*, **M. Ballantine 3rd Statement**, ¶¶ 22, 46 (characterizing as "silly" and "comical" certain conclusions that, as discussed below, are in fact science-based and evidence-backed).

[5] *See, e.g.*, **Reply**, fn. 34 (attempting to refute a conclusion that follows from DR-CAFTA's plain text by asserting that "it seems more intuitive to evaluate a dual citizen's dominant nationality at the time of the alleged Treaty violations").

[6] For example, Michael Ballantine, who is not an engineer or environmentalist, and does not claim to have visited the sites of other projects or measured their slopes, contends in his witness statement that "every single mountain road [sic] (permitted or not) has made their roads by cutting into 60% slopes. It is physically impossible not to do so." **M. Ballantine 3rd Statement**, ¶ 25.

[7] *See, e.g.*, **Admissibility Response**, ¶¶ 82–83 (twice asserting — incorrectly — that the Dominican Republic's counsel in the present arbitration had made an argument in *Spence v. Costa Rica*, even though it was not involved in that arbitration).

[8] In their bifurcation submissions, for example, the Ballantines argued that "the country of residence of the Ballantines' immediate family" was relevant to the "dominant nationality" analysis. *See* **Bifurcation Response**, ¶ 24; **Bifurcation Rejoinder**, p. 4. But when the Dominican Republic then sought documents related to that issue, the

[FOOTNOTE CONTINUED ON NEXT PAGE]

displayed little regard for consistency, or for truth. This is reflected not only in the pleadings themselves, but even in certain exhibits. To give but one example: the Ballantines swore under penalty of perjury[9] — in ***five*** separate submissions to U.S. tax authorities — that their "home address"[10] in the U.S. was "3170 Airmans Drive[,] ***Apt. no. 3032*** [,] Ft. Pierce, FL 34946." However, and even though the Ballantines add a purported apartment number to it, that address corresponds not to any house or apartment, ***but rather to a Florida airport hangar***[11] — a place with no bedrooms or bathrooms.[12]

5. In sum, the Ballantines' pleadings are unreliable, and their testimony self-serving. The Dominican Republic therefore asks that the Tribunal approach with caution the contents of such pleadings, and that it seek to verify the Ballantines' factual assertions by reference to concrete evidence in the record, and similarly, that it verify the Ballantines' articulation of principles of law by reference to the relevant legal authorities.

6. The bottom line is that on each of the key issues for decision by the Tribunal — jurisdiction/admissibility, merits, and damages — the Ballantines' legal position has fundamental deficiencies that vitiate their arguments, and ultimately their case. The remainder of this Introduction briefly distills the current state of play on each of those key issues.

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
Ballantines belittled the request, and claimed that the information was immaterial. *See* **Redfern Schedule,** DR Requests and Ballantines' Responses, p. 70. Then, after convincing the Tribunal to reject the document Request, the Ballantines returned in their Reply to their initial position, arguing that the Tribunal ***should*** consider "the country of residence of the Ballantines' immediate family." **Reply**, ¶ 35.

[9] *See* **Ex. R-244**, Ballantines' U.S. Tax Return (2010), p. 8; **Ex. R-245**, Ballantines' U.S. Tax Return (2011), p. 8; **Ex. R-246**, Ballantines' U.S. Tax Return (2012), p. 6; **Ex. R-247**, Ballantines' U.S. Tax Return (2013), p. 5; **Ex. R-248**, Ballantines' U.S. Tax Return (2014), p. 5.

[10] *See* **Ex. R-244**, Ballantines' U.S. Tax Return (2010), p. 10; **Ex. R-245**, Ballantines' U.S. Tax Return (2011), p. 10; **Ex. R-246**, Ballantines' U.S. Tax Return (2012), p. 7; **Ex. R-247**, Ballantines' U.S. Tax Return (2013), p. 6; **Ex. R-248**, Ballantines' U.S. Tax Return (2014), p. 6 (all describing the "home address" as follows: "3170 Airmans Drive[,] Apt. no. 3032[,] Ft. Pierce, FL 34946").

[11] *See generally* **Ex. R-251**, Google Maps Results, 3170 Airmans Drive, Fort Pierce, Florida 34946 (Last Accessed 16 March 2018).

[12] *See* **Ex. R-253**, Property Card: 3170 Airmans Drive (last accessed 16 March 2018), p. 3.

Jurisdiction

7. A review of the Ballantines' own contemporaneous statements and actions confirms that, at the critical times, their Dominican nationality was their predominant one, and that therefore a claim by them at those points in time against the Dominican Republic would not have constituted an international claim, but rather more of a domestic one, and thus would be barred under the DR-CAFTA ("**DR-CAFTA**" or "**the Treaty**").

8. Among other things, the Ballantines misconstrue the relevant timing issues for purposes of the "dominant and effective nationality" analysis: they assert (incorrectly) that their U.S. nationality only had to be the dominant one *at the time of the making of the investment*. However, in reality the critical dates — under longstanding public international law principles and practice, and under DR-CAFTA itself — are the date of any alleged treaty breach and the date of submission of a claim to arbitration.

9. The Ballantines' mistaken interpretation of the timing issue causes them to over-rely on certain factors that are less relevant at the pertinent times, and to dismiss (or fail to address) other factors that are highly relevant. Further, their argumentation seems to start from the erroneous premise that the fact that the Ballantines continued to maintain ties to the U.S. throughout the relevant period somehow vitiates the thesis that, on the critical dates, the Ballantines' Dominican nationality was their dominant and effective one. As discussed in more detail below, when one focuses on the relevant factors and assesses them at the appropriate times, it becomes clear that, even as the Ballantines continued to retain certain links to the U.S. (as indeed occurs with most dual nationals), their predominant nationality was their Dominican one.

10. At the relevant times, the Ballantines were using their Dominican nationality to exercise various rights and privileges that attach exclusively to Dominican citizens *e.g.*, to vote in the Dominican Republic, to obtain Dominican passports, to travel abroad using such passports, and to avoid visa fees, among others. At such times they were also invoking their Dominican nationality when entering into contracts; signing a loan agreement; selling more than 40 different lots at Jamaca de Dios; obtaining a restaurant operating license; obtaining Dominican nationality for their children; registering one of the enterprises on whose behalf they assert claims under DR-CAFTA; and seizing the Dominican courts of Dominican law issues. All of this means that on the critical dates the Ballantines' dominant and effective nationality was their Dominican one, and that their claims are therefore barred under the dual nationality rules of DR-CAFTA.

11. Some of the Ballantines' claims, such as their purported "transparency"-based claims are jurisdictionally barred for a different reason, namely, the fact that the DR-CAFTA dispute resolution clause specifically enables arbitration only with respect to violations of certain specified clauses of the treaty. Since some of the claims are not based on those specific clauses, the Dominican Republic did not consent to arbitration of such claims, and they are therefore barred.

12. Further, with respect to admissibility, the Dominican Republic demonstrated that the Ballantines' claims based on the creation of the Baiguate National Park ("**Baiguate National Park**" or "**the Park**") were time-barred under the three-year statute of limitations contained in Article 10.18.1 of DR-CAFTA. The Ballantines respond to this by declaring that they never asserted any such claims in the first place. The Dominican Republic takes this to mean that the Ballantines have abandoned such claims (which were in fact asserted, at least initially, as discussed briefly below).

Merits

13. There is no evidentiary support whatsoever for the Ballantines' core merits assertion, which is that discrimination was to blame for the decision by the Dominican Ministry of Environment and Natural Resources ("**Ministry**") to reject the permit application that lies at the heart of this case. It is telling in this regard that the Ballantines have now also abandoned their most-favored nation ("**MFN**") treatment claim, and have minimized and significantly revised[13] their national treatment claim.

14. As discussed below, and in essence, the problem with the Ballantines' permit application was that the site that they had proposed for an expansion of their housing development was simply not environmentally suitable for the type and scope of construction that they envisioned. As the documentary evidence incontrovertibly shows, the Ministry informed the Ballantines, not once but *twice*, that it was open to considering alternative sites for the project,[14] and even granted the Ballantines a different permit in the meantime.[15] The Ballantines now deny this, arguing that it would "def[y] credulity" for them to have passed up an opportunity to carry out the project in an alternative site, if such opportunity had been granted to them.[16] And yet, the evidence demonstrates unequivocally that that is *precisely* what happened: the Ballantines were indeed offered two such opportunities, but for reasons that remain unclear, *they*

[13] *Compare, e.g.*, **Notice of Arbitration and Statement of Claim**, ¶ 77 ("The national treatment . . . obligation[] of the CAFTA-DR require[s] that governments not treat an investor of the other Party or its investments any worse than it treats its own investors . . . ***simply because of nationality***") (emphasis added) *with* **Reply**, ¶ 491 ("The Ballantines are ***not*** required to show that the less favorable treatment they [allegedly] received is a result of their nationality") (emphasis added).

[14] See **Ex. C-008**, Letter from Ministry to M. Ballantine (12 September 2011), ("[W]e inform you that the Ministry is more than willing to carry out any activity relevant to an evaluation, should you decide to submit another place(s) that is potentially viable"); **Ex. C-015**, Letter from Ministry to M. Ballantine (15 January 2014), p. 2 ("[A] new site alternative is hereby requested, otherwise your dossier is closed").

[15] *See generally* **Ex. C-017**, Project 2 Permit Renewal (20 June 2013).

[16] **Reply**, ¶ 365 ("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 [Ministry] to make sure there were no issues with the slopes, they certainly would have done so").

never proposed an alternative site, and instead repeatedly demanded that the Ministry reconsider its decision to reject the site that they originally proposed. It is for these reasons, among others, that the Ballantines' fair and equitable treatment claims fail.

15. Nor is there any merit to their discrimination claims. Their strategy on such claims is quite convenient and facile: they simply invoke a long list of real estate projects owned by other Dominican nationals, and declare: "All of those projects were treated better than ours." But the relevant test for discrimination is the disparate treatment *of similarly situated* comparators. The Ballantines simply disregard critical factors in the alleged comparator projects that they invoke — factors such as altitude, steepness of the relevant slopes, location within an environmentally protected area, and status as a mountain project.

16. Further, the Ballantines predicate part of their discrimination-based treaty claims on the allegation that the Dominican Republic applied the law (*e.g.*, penalties for violations of environmental regulations) to them but not to others. However, that cannot be a correct interpretation of the applicable treaty obligation: an investor cannot claim an investment treaty violation simply on the basis that although the law was (properly) applied to them, it was not similarly or evenly applied to all others. It is a reality of law enforcement — not just in the Dominican Republic, but in all nations — that the law is not uniformly applied, and that, for a variety of reasons, not all infractors end up being equally punished. "I cannot be declared guilty because other guilty parties are not being punished" is never a valid defense.

17. The Ballantines also invoke violations of other substantive protections of the DR-CAFTA, such as expropriation and fair and equitable treatment. But those claims, too, are fundamentally flawed, for the reasons discussed below and in the Statement of Defense. Ultimately, the Ballantines' key complaint in this arbitration appears to center on the Ministry of

Environment's rejection of the permit for the Ballantines' proposed expansion project for Jamaca de Dios. But the Ministry's decision to reject such permit was entirely justified, on the basis of the relevant environmental impact considerations presented, and of the significant damage that would have been caused to the Jamaca mountain if the project had been allowed. The foregoing is confirmed by the expert reports of Messrs. Pieter Booth and Peter Deming, respectively, which accompany this Rejoinder.

18. In sum, the Ballantines' merits claims are unfounded, and therefore should be dismissed in their entirety.

Damages

19. Remarkably, the Ballantines did not submit a single exhibit to attempt to corroborate the calculations set forth in Mr. Farrell's expert report. This is not only highly unusual, but also quite telling: Mr. Farrell asserts that his calculations are based on the past performance and historical sales of the Ballantines' Dominican Republic-based company, Jamaca de Dios Jarabacoa, S.R.L., and yet he attaches no documentary evidence of such performance and sales that could be used by the Tribunal to test his calculations. Nor have the Ballantines presented any such documentation as exhibits to their pleadings.

20. The upshot of the foregoing is that ***there is simply no evidence in the record on which the Tribunal could base an award of damages***. Ultimately all of the damages calculations are founded simply on naked assertions by the Ballantines and their expert, rather than on any objective documentary evidence. This deficiency warrants a determination by the Tribunal that, even if there were responsibility by the State — *quod non* — the Ballantines are entitled to zero damages.

21. The foregoing should be dispositive of the Ballantines' damages claims. However, it seems warranted to speculate about the possible ***reason*** for the otherwise seemingly inexplicable decision by the Ballantines and their expert not to substantiate their damages claims with any supporting documentation. The answer to this question may reside in an important new development that emerged during the document production phase of the proceeding (*i.e.*, after the first round of submissions by the Parties).

22. The documents disclosed by the Ballantines during the document production process revealed an extraordinary fact: there are *two different versions* of most of Jamaca de Dios's contracts for the sale of their lots. As discussed in greater detail in Section IV below, such versions are the following: (1) the versions that were presented to Dominican tax authorities; and (2) parallel versions, *reflecting a substantially higher price*.

23. Although perhaps the foregoing has a plausible explanation (which, if it exists, is not apparent to the Dominican Republic, and which it now behooves the Ballantines to articulate), it seems fair to wonder whether it might not be precisely *because* of the existence of these competing and inconsistent versions of the various contracts that in the end the Ballantines, as well as their expert, opted not to submit to the Tribunal either version of the contracts**.**

24. Further, while it remains unclear which version of the contracts, if either, accurately reflects the genuine sales prices, it is simply not possible for both versions to be accurate. The foregoing appears to present a fatal dilemma for the Ballantines: if the "*tax filing*" versions of the sales contracts are the genuine ones, that would mean that the expert Mr. Farrell's damages calculations rest on invented figures. On the other hand, if the "*parallel*" versions are the genuine ones, that would mean that the "tax filing" versions are <u>not</u> accurate, and that therefore the figures provided in the contracts to the tax authorities significantly under-reported

the sales amounts. This is relevant in turn because, as explained in detail below, the tax returns filed by the Ballantines — not only before the Dominican authorities, but also before the U.S. tax authorities — reflect the income derived from the sales *as reported in the contracts submitted to the Dominican tax authorities*. If that is the case, it would mean that the relevant tax authorities would have under-assessed the applicable income tax.

25. In any event, whether on the basis of the foregoing, or on the basis of the absence of evidence that the Tribunal could use to corroborate or test the calculations and damages claims advanced by the Ballantines and their expert, the Tribunal has no choice but to dismiss such claims. Moreover, and leaving aside the foregoing (critical) factors, the calculations offered by the Ballantines and their expert suffer from various defects (including methodological ones) which render them unreliable.

* * *

26. In sum, along with the multiple additional evidentiary, conceptual, and legal problems discussed below, the foregoing discussion confirms that the Ballantines' case is unfounded on every level.

27. In the sections that follow, the Dominican Republic will demonstrate in greater detail: that the Ballantines' claims fail to satisfy the DR-CAFTA's requirements on jurisdiction and admissibility (**Section II**); that, in any event, such claims are unfounded on their merits (**Section III**); that the Ballantines' damages arguments are unsupported, and their expert's calculations are unreliable (**Section IV**); and that the Tribunal should therefore dismiss the totality of the Ballantines' claims, with an award of costs and legal fees to the Dominican Republic (**Sections V** and **VI**).

II. JURISDICTION AND ADMISSIBILITY

28. The Ballantines' arguments appear to change each time that they put pen to paper. For example, they have asserted claims[17] and later disclaimed them;[18] they have introduced certain glosses[19] and later deemed them immaterial;[20] and they have argued in favor of and against the very same legal test.[21] These inconsistencies make it difficult to discern the Ballantines' positive case (assuming that one even exists, after all of the contradictions cancel each other out).

29. However, it ***is*** clear that the Ballantines — who bear the burden of proving the facts necessary to establish jurisdiction[22] — have failed to demonstrate that the claims herein comply with DR-CAFTA's rules on jurisdiction and admissibility. In particular, as discussed below, such claims violate the following DR-CAFTA requirements: (1) the rule that only a "claimant" may submit a claim to arbitration,[23] (2) the rule that the only type of "claim" that a

[17] *See* **Amended Statement of Claim**, ¶¶ 13, 14, 116, 117, 120, 200, 205, 208 *and* **Reply**, ¶¶ 238, 252, 332, 357 (asserting claims based on the creation of the Baiguate National Park).

[18] *See* **Admissibility Response**, ¶ 2 ("As the Ballantines have previously explained, the creation of the National Park itself did ***not*** give rise to a claim for the Ballantines") (emphasis added), ¶ 72 ("Put simply, there was no breach by Respondent in September 2010 with regard to the Park . . . .").

[19] *See* **Bifurcation Response**, ¶ 24 (asserting, without citation, that in connection with the "dominant nationality" analysis, "[t]he Tribunal should consider . . . the country of residence of the Ballantines' immediate family . . . .").

[20] *See* **Redfern Schedule,** DR Requests and Ballantines' Responses, pp. 68, 70 (asserting, in response to a request for documents showing "the place of residence of the Ballantines' immediate family," that "[t]his information is also not material to the outcome. The residence of the Ballantines' brothers, sisters, and parents will not change the Tribunal's determination on jurisdictional matters").

[21] *Compare* **Reply**, ¶ 60 (asserting that "[t]he 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 nationality for dual[] nationals in the context of diplomatic protection") *with* **Reply**, ¶ 22 (questioning the relevance of prior decisions that apply the customary international law standard).

[22] *See, e.g.*, **RLA-003**, *Spence International Investments, LLC, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Bethlehem, Kantor, Vinuesa) (25 October 2016), ¶ 239 ("The burden is . . . on the Claimants to prove the facts necessary to establish the Tribunal's jurisdiction"); **RLA-005**, *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award (Veeder, Fortier, Stern) (3 April 2014), ¶ 118 ("Although it is the Respondent which has here raised specific jurisdictional objections . . . it is for the Claimant to discharge the burden of proving all essential facts required to establish jurisdiction for its claims").

[23] **Ex. R-010**, DR-CAFTA, Art. 10.16.1 (not quoted verbatim herein due to its length).

"claimant" may submit is "a claim that the respondent has breached an obligation under [Articles 10.1 to 10.14],"[24] and (3) the rule that "[n]o claim may be submitted to arbitration . . . if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged . . . and knowledge that the claimant . . . or the enterprise [on whose behalf a claim is asserted] has incurred loss or damage."[25]

A. The Claims In This Case Violate DR-CAFTA's Rule That Only A "Claimant" (As Defined in the Treaty) Can Submit A Claim To Arbitration

1. Under This Rule, The Ballantines Must Prove That, At The Time They Submitted Their Claims To Arbitration, Their Dominant And Effective Nationality Was Their U.S. Nationality

30. As the Dominican Republic has explained, because the text of DR-CAFTA explicitly provides that only a "claimant" is permitted to "submit [a claim] to arbitration,"[26] it follows that the Ballantines must demonstrate that they were "claimants," as defined by DR-CAFTA, on the date on which they submitted their claims to arbitration. Initially, the Ballantines conceded this, by "acknowledg[ing] that they must be 'claimants' as defined in CAFTA-DR in order to pursue relief under the Treaty . . . ."[27] In the Reply, however, they had an abrupt *volte face*. It therefore seems useful to recall the following key points concerning the jurisdictional requirements of DR-CAFTA, which are not simple to distill because there are a number of cross-references in the relevant provisions.

31. ***First***, the Dominican Republic's consent to arbitration under DR-CAFTA is limited to "the submission of a claim to arbitration under this Section in accordance with this

[24] **Ex. R-010**, DR-CAFTA, Art. 10.16.1(a).
[25] **Ex. R-010**, DR-CAFTA, Art. 10.18.1.
[26] **Ex. R-010**, DR-CAFTA, Art. 10.16.1(a).
[27] **Bifurcation Response**, ¶ 17.

Agreement."[28] The words "this Section" refer to Section B of DR-CAFTA Chapter Ten, and the words "this Agreement" refer to DR-CAFTA itself.

32. ***Second***, "the submission of a claim to arbitration" under Chapter Ten of DR-CAFTA is a very specific process, governed by many pages of detailed rules. As relevant to the present case, it entails the submission by a specific type of person (*viz.*, a "claimant"), on a specific date,[29] of a specific type of document (*viz.*, a notice of arbitration and statement of claim).[30]

33. ***Third***, the fact that only a "claimant" may "submit [a claim] to arbitration"[31] means necessarily that, at the time of "submitting a claim," a person must qualify as a "claimant" within the meaning of the Treaty. And because "submitting a claim" involves sending a "notice of arbitration" to the respondent, this means in turn that there must be a "claimant" on the date of the notice of arbitration. Article 10.6.4 confirms this by referring to "the ***claimant's*** notice of or request for arbitration . . . ."[32]

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

[29] *See* **Ex. R-010**, DR-CAFTA, Art. 10.16.4 (explaining that, for purposes of an UNCITRAL case, "[a] claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration . . . referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent").

[30] *See* **Ex. R-010**, DR-CAFTA, Art. 10.16.4 (quoted in the footnote immediately above); *see also id.*, Art. 10.16.3 ("Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1: . . . (c) under the UNCITRAL Arbitration Rules"); UNCITRAL Arbitration Rules, Art. 3(1) ("The party of parties initiating recourse to arbitration . . . shall communicate to the other party or parties . . . a notice of arbitration").

[31] **Ex. R-010**, DR-CAFTA, Art. 10.16.1(a).

[32] **Ex. R-010**, DR-CAFTA, Art. 10.16.4 (emphasis added).

34. ***Fourth***, DR-CAFTA defines the term "claimant" in *matryoshka*-like fashion,[33] with that definition using (and building on) other defined terms, which in turn are defined using still *other* defined terms:

> a. "[C]laimant means ***investor of a Party*** that is a party to an investment dispute with another Party . . . ."[34]
>
> b. "[I]nvestor 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 . . . ."[35]
>
> c. "[N]ational means ***a natural person who has the nationality of a Party*** according to Annex 2.1" of DR-CAFTA.[36]
>
> d. "[H]owever[,] . . . 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*** . . . ."[37]

35. As Figure 1 below illustrates, once all of the relevant defined terms are distilled, it is plain that, in a DR-CAFTA case involving dual nationals, the term "claimant" has four cumulative elements: there must be (1) a natural person, (2) whose dominant and effective nationality is that of a Party, (3) who attempts to make, is making, or has made an investment in the territory of another Party, (4) who also is a party to an investment dispute with that other Party.

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[33] *See* https://en.wikipedia.org/wiki/Matryoshka_doll (last visited 18 March 2018) (describing the Russian nesting doll, in which one figure unlocks to reveal another figure that in turn unlocks yet another figure).

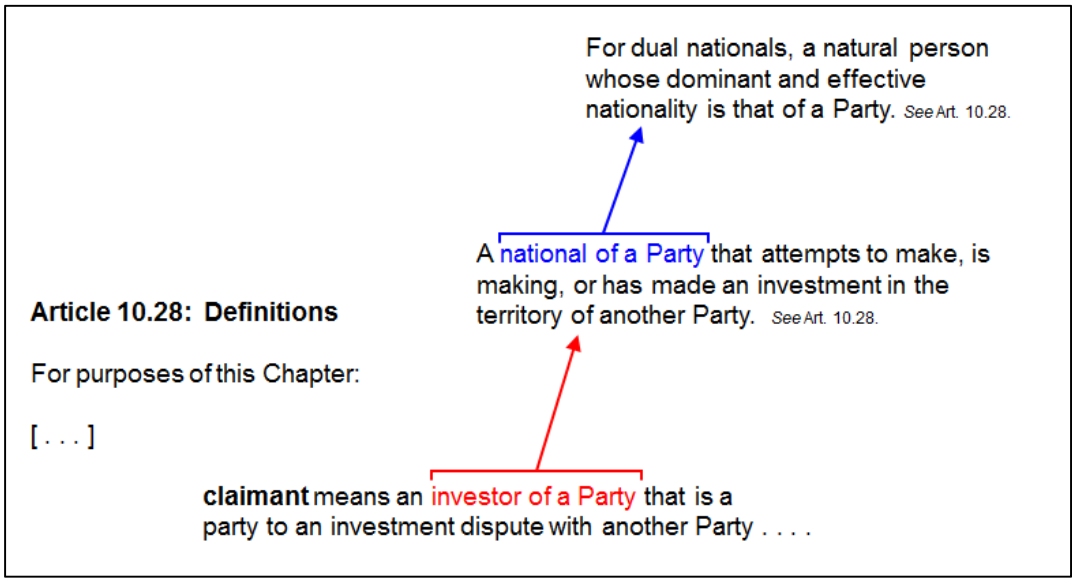
[34] **Ex. R-010**, DR-CAFTA, Art. 10.28 (original emphasis omitted; new emphasis added).

[35] **Ex. R-010**, DR-CAFTA, Art. 10.28 (original emphasis omitted; new emphasis added).

[36] **Ex. R-010**, DR-CAFTA, Art. 10.28 (original emphasis omitted; new emphasis added).

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

Figure 1



36. ***Fifth***, taken together, the foregoing means in practical terms that the Ballantines (who are dual nationals of the Dominican Republic and the United States)[38] must demonstrate that, on 11 September 2014 (*i.e.*, the date of their Notice of Arbitration and Statement of Claim), their dominant and effective nationality was their U.S. nationality.

37. Despite having had three opportunities to do so (*viz.*, the Bifurcation Response, the Bifurcation Rejoinder, and the Reply), the Ballantines have been unable to rebut the proposition that they are required to demonstrate that their dominant and effective nationality as of 11 September 2014 was their U.S. nationality. Their latest attempt was mostly relegated to a footnote,[39] and consisted of:

a. the protestation that "[t]here is no express support in the language of CAFTA for [the notion] that the date of filing" is one on which the Ballantines'

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

[39] *See* **Reply**, fn. 34.

nationality matters[40] (which, as demonstrated above and in the Statement of Defense,[41] is plainly not true);

b. an unsubstantiated assertion that it would be "counterintuitive" to assess the Ballantines' nationality as of the date of submission of their claims[42] (which ignores not only the Treaty text discussed above, but also the well-accepted principle under international law that the moving party must satisfy all jurisdictional requirements (including those relating to diversity of nationality)[43] on the date on which it avails itself of a remedy);[44] and

[40] **Reply**, fn. 34 (emphasis omitted).

[41] *See generally* **Statement of Defense**, ¶¶ 10–12, 15–23.

[42] **Reply**, fn. 34.

[43] *See, e.g.*, **RLA-109**, International Law Commission, Draft Articles on Diplomatic Protection (2006), Art. 7 ("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***") (emphasis added); **RLA-023**, *Serafín García Armas y Karina García Gruber v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-3, Decision on Jurisdiction (Grebler, Oreamuno Blanco, Tawil) (15 December 2014), ¶ 214 (explaining that "the moments relevant for invoking protection of the BIT are: (a) the date on which the alleged violation occurred (in this case, the Measures); and (b) the date on which the arbitral proceeding resolving dispute between the investor and the investment host State, resulting from the alleged violation is initiated") (translation from Spanish; the original Spanish version states as follows: *"los momentos relevantes para poder invocar la protección del APPRI son: (a) la fecha en la que ocurrió la alegada violación (en este caso, las Medidas); y (b) la fecha en la cual se inicia el procedimiento arbitral, tendiente a solucionar la controversia entre el inversor y el Estado receptor de la inversión resultado de la alegada violación"*).

[44] *See, e.g.*, **RLA-019**, *Achmea B.V. v. Slovak Republic*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility (Lévy, Beechey, Dupuy) (20 May 2014), ¶ 267 ("It is an accepted principle of international law that jurisdiction must exist on the day of the institution of proceedings. As stated by the ICJ: 'The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed'"); **RLA-020**, Christoph H. Schreuer, *et al.*, The ICSID Convention: A Commentary (Second Edition), Cambridge University Press (31 August 2009), Art. 25, ¶ 36 ("It is an accepted principle of international adjudication that jurisdiction will be determined by reference to the date on which judicial proceedings are instituted. This means that on that date all jurisdictional requirement must be met"), ¶ 37 ("The International Court of Justice (ICJ) has developed a *jurisprudence constante* to this effect").

c. the argument that evaluating the Ballantines' nationality as of the date of submission of their claims to arbitration would be inconsistent with the "disjunctive" nature of DR-CAFTA's definition of "investor of a Party."[45]

38. With respect to this last point, the Ballantines' argument appears to be that, because "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'"[46] — and the term "investor of a Party," in turn, "'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'"[47] — it supposedly follows that any "'national that has made an investment in the territory of another party [sic]'"[48] automatically qualifies as a "claimant."[49] Because of this — the argument continues — the question of the Ballantines' "'dominant and effective nationality' . . . becomes relevant only if the investor has dual nationality ***at the time*** that the investor 'has made an investment' in the territory of a Party."[50]

39. However, as Figure 2 below illustrates, to reach these conclusions, one would need to delete the vast majority of the relevant Treaty text.

[45] **Reply**, ¶¶ 18–20.
[46] **Reply**, ¶ 18.
[47] **Reply**, ¶ 18 (quoting **Ex. R-010**, DR-CAFTA, Art. 10.28) (emphasis omitted).
[48] **Reply**, ¶ 20.
[49] *See* **Reply**, ¶ 20.
[50] **Reply**, ¶ 19 (emphasis in original).

Figure 2

	DR-CAFTA Text	The Ballantines' Interpretation	Revisions Needed to Obtain the Ballantines' Result
Rule 1	A "claimant" must be the one to "submit [a claim] to arbitration."[51]	The Ballantines must be "claimants."[52]	A "claimant" must **exist** ~~be the one to "submit [a claim] to arbitration."~~
Rule 2	"A claim shall be deemed submitted to arbitration . . . when the claimant's notice of . . . arbitration . . . together with the statement of claim . . . are received by the respondent."[53]	(Not addressed)	~~"A claim shall be deemed submitted to arbitration . . . when the claimant's notice of . . . arbitration . . . together with the statement of claim . . . are received by the respondent."~~
Definition of "Claimant" for Natural Persons	"[A]n investor of a Party [*i.e.*, 'a national . . . that attempts to make, is making, or has made an investment in the territory of another Party'[54]] that is a party to an investment dispute with another Party."[55]	"[A] 'national that has made an investment in the territory of another party [sic].'"[56]	"~~[A]n investor of a Party [*i.e.*, '~~a national . . . that attempts to make, is making, or has made an investment in the territory of another Party~~'] that is a party to an investment dispute with another Party.~~"

40. It is clear that the Ballantines would prefer a standard that would only require them to demonstrate that they were "nationals" of the United States at the time they "made an investment in the territory of another Party." But they cannot simply delete whatever other parts of DR-CAFTA they do not like. The words that the Ballantines would prefer to ignore have meaning.[57] In "Rule 1" in Figure 2 above, for example, the words "must be the one to 'submit [a claim] to arbitration'" make it clear that the rule is that a claimant not only must exist, but also must be the person to submit a claim to arbitration. "Rule 2," which the Ballantines overlook

[51] **Ex. R-010**, DR-CAFTA, Art. 10.16.1(a).

[52] **Reply**, ¶ 20 ("[T]he question here is simply whether or not the Treaty . . . authorizes the Ballantines to be claimants").

[53] **Ex. R-010**, DR-CAFTA, Art. 10.16.4(c).

[54] **Ex. R-010**, DR-CAFTA, Art. 10.28.

[55] **Ex. R-010**, DR-CAFTA, Art. 10.28.

[56] **Reply**, ¶ 20 (asserting that "the Treaty . . . authorizes the Ballantines to be claimants . . . because the plain definition of that term . . . gives th[at] right to a 'national that has made an investment in the territory of another party [sic]'").

[57] *See, e.g.*, **RLA-108**, *Eureko B.V. v. Poland*, UNCITRAL, Partial Award (Fortier, Rajski, Schwebel) (19 August 2005), ¶ 248 ("It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless").

entirely, confirms that the party that files a "notice of arbitration" must be a "claimant" (and therefore qualify as such on the filing date).

41. In the definition of "claimant," the words "***an investor of a Party*** that ***is*** a party to an investment dispute with another Party"[58] make it clear that a person must be "an investor of a Party" at a time when it is also "a party to an investment dispute." This belies the Ballantines' assertion that the "critical" date is exclusively the date on which the investment was made.[59] And the language that they elide from the definition of "investor of a Party" also has important consequences. To recall, that definition is as follows:

> **investor of a Party** means a Party or a state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another party; provided, 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.[60]

42. In the Reply, the Ballantines make much of the fact that the phrase "national . . . of a Party, that attempts to make, is making, ***or*** has made an investment" is "disjunctive."[61] This is true as far as it goes: the phrase is indeed disjunctive. What does not follow, however, is the conclusion that the Ballantines purport to draw from that fact — namely, that "[t]he reference in the concluding clause . . . to 'dominant and effective nationality' thus becomes relevant only if the [national] has dual nationality ***at the time*** that the [national] 'has made an investment' in the territory of a Party."[62] This is a complete *non sequitur*; the fact that the investor is a person "who has made an investment" does not mean that such person's

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

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

[60] **Ex. R-010**, DR-CAFTA, Art. 10.28.

[61] **Bifurcation Response**, ¶ 19; **Reply**, ¶¶ 19–20.

[62] **Reply**, ¶ 19 (emphasis in original).

nationality *a fortiori* has to be assessed *as of the time* that the investment was made. Moreover, on its face, this particular clause ("national . . . that . . . has made an investment") logically suggests that the nationality inquiry occurs ***after*** the investment was made. In any event, for the reasons identified above, the other clauses in Chapter Ten — the ones that the Ballantines simply disregard, as illustrated in Figure 2 above — mandate the conclusion that one of the critical dates for purposes of the "dominant and effective nationality" assessment is *the date on which the claim was submitted to arbitration.* Such conclusion is also consistent with the general principles of public international law (a) that jurisdiction must exist *at the time the claim is filed*; and (b) that a State cannot be the subject of claims in an international forum by its own nationals (from which it follows necessarily that the claimant cannot be a national, or predominantly a national, of the respondent State at the time that it files the relevant claim).

43. For all of the foregoing reasons, which are both treaty-based and practice-based, the Ballantines are required to prove that, on the date on which they submitted their claims to arbitration (*i.e.*, 11 September 2014), their dominant and effective nationality was their U.S. nationality rather than their Dominican nationality.

2. The "Dominant And Effective Nationality" Standard

44. Typically, the first step in the "dominant and effective nationality" analysis is to identify a person's "effective" nationalities (*i.e.*, any nationalities for which there exists a *bona fide* connection between the person and the State of nationality).[63] In the present case, however, this first step is unnecessary, as it is uncontested that the Ballantines — who are nationals of both

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

the Dominican Republic and the United States[64] — have genuine connections to both States.[65] Accordingly, the Tribunal can proceed directly to the second (and final) step, which involves determining which of the Ballantines' two effective nationalities was "dominant" as of 11 September 2014.

45. In their Reply, the Ballantines contend (citing a blog post that, for some reason, they decided not to submit as an exhibit or authority)[66] that the goal of the "dominance" inquiry — and of the "dominance" requirement itself — is to ensure that the moving party did not "acquire a nationality in bad faith solely for the purpose of having access to a dispute resolution mechanism contained in a treaty."[67] That is not correct. The issue they identify is indeed important to the question of "dominance and effectiveness." However, it falls on the "effectiveness" side of the ledger (as that is the side which considers whether or not the person's connection to a particular State is *bona fide*). The "dominance" side simply asks which nationality connection is stronger; as the Ballantines themselves had put it in an earlier pleading in this proceeding, the question underlying the "dominant nationality" inquiry is "whether [the Ballantines] [we]re more closely aligned with the United States or with the Dominican Republic."[68]

[64] *See* **Notice of Arbitration and Statement of Claim**, 11 September 2014, ¶ 21 ("The Ballantines . . . are citizens of both the United States and the Dominican Republic").

[65] The Dominican Republic made this point in its **Statement of Defense** (*see* ¶ 27), and the Ballantines have not argued otherwise.

[66] *See* **Reply**, ¶ 32 and fn. 39.

[67] **Reply**, ¶ 32 (which is part of a broader section on "Factors for Determining Dominant Nationality").

[68] **Bifurcation Response**, ¶ 23.

46. The purpose of this question is to resolve a conceptual paradox. As the blog post cited by the Ballantines explains (in a paragraph that they declined to quote),[69] "it must be recalled that one of the main objectives of BITs is to protect investments made by nationals of the ***other*** State party — that is, ***foreign*** investors."[70] BITs are not intended to protect domestic investors. But that presents a dilemma in the case of a dual national, because a dual national is at once foreign ***and*** domestic. To resolve this problem, the "dominant nationality" test asks: Which descriptor governs? Is the dual national "foreign" enough to render "international" a dispute with the respondent State?

47. To answer these questions, past tribunals (like the Iran-U.S. Claims Tribunal,[71] which has addressed this issue often) have conducted an objective assessment of a variety of different factors.[72] The Tribunal itself recognized in Procedural Order No. 2 that such factors include "the State of habitual residence, the circumstances in which the second nationality was

[69] In their Reply, the Ballantines use an ellipsis in place of the above-quoted passage. *Compare* **Reply**, ¶ 32 *with* **RLA-110**, J. García Olmedo, Claims by Dual Nationals under Investment Treaties: A New Form of Treaty Abuse?, EJIL Talk (9 December 2015), p. 3.

[70] **RLA-110**, J. García Olmedo, Claims by Dual Nationals under Investment Treaties: A New Form of Treaty Abuse?, EJIL Talk (9 December 2015), p. 3 (emphasis in original) (continuing on to state that, "[i]n this respect, one may question whether an individual claimant who holds the nationality of the host State should qualify as a 'foreign' investor under the BIT, especially if he has substantial connections with that State. By the same token, it is difficult to see how the expectations of contracting parties to promote and protect foreign investments will be fulfilled if the such investments are made in the host State by a national of that State").

[71] Although the Ballantines initially conceded "that decisions of the US-Iran Claims Tribunal [sic] provide guidance in describing factors that may be considered in evaluating which of two nationalities should be deemed 'dominant'" (**Bifurcation Response**, ¶ 22), in the Reply they then took the position that "[they] think that the decisions from the US-Claims Tribunal [sic] can [only] provide ***some*** guidance, [because] these decisions relate[d] to an entirely different set of circumstances and arise under an entirely different treaty." **Reply**, ¶ 22 (emphasis added). It is not clear what this gloss adds, or how it squares with the Ballantines' reliance on Iran-U.S. Claims Tribunal jurisprudence (*see, e.g.*, **Reply**, ¶ 34). However, the alleged distinction — *i.e.*, that "many (if not all) of these cases involved persons who were born and raised Iranian and had obtained U.S. citizenship later in life" (**Reply**, ¶ 22) — is not actually a basis for distinction at all, as the Ballantines, too, were "born and raised" in the United States, and "obtained" Dominican citizenship "later in life."

[72] *See* **RLA-006**, *Nottebohm*, p. 22; **RLA-007**, *Mergé Case*, Italian-United States Conciliation Commission, Decision No. 55 (Messia, Matturri, Sorrentino) (10 June 1955), p. 247; **RLA-008**, *Case No. A/18*, IUSCT Case No. A/18, Decision No. DEC 32-A18-FT (6 April 1984), p. 12.

acquired, the individual's personal attachment for a particular country, and the center of a person's economic, social, and family life."[73]

48. In their pleadings, the Ballantines have insisted that "[t]he Tribunal should consider other factors as well."[74] However, it is not clear precisely what factors they are referring to; as illustrated in Figure 3 below, the Ballantines take alternative positions. Nor is it clear how such additional factors (whatever they may be) would square with the Ballantines' (erroneous and unsubstantiated) assertion that the "dominant nationality" standard is a self-judging one, and thus depends in this case on whether or not "the Ballantines have []ever considered themselves dominantly Dominican."[75]

Figure 3: The Ballantines' Ever-Changing Arguments

	Bifurcation Submissions	Submissions on Document Production	Reply
1	"The Tribunal should consider . . . the country of residence of the Ballantines' immediate family . . . ."[76]	"How is that material to the outcome, which is required by the IBA Rules?"[77] "The residence of the Ballantines' brothers, sisters, and parents will not change the Tribunal's determination on jurisdictional matters."[78]	"[T]he Tribunal should [consider] . . . the country of residence of the Ballantines' immediate family . . . ."[79] However, a separate passage of the Reply asserts that only the Ballantines' lives should be examined.[80]

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

[74] **Bifurcation Response**, ¶ 24; *see also* **Bifurcation Rejoinder**, p. 4.

[75] **Bifurcation Response**, ¶ 4.

[76] **Bifurcation Response**, ¶ 24.

[77] **Redfern Schedule,** DR Requests and Ballantines' Responses, p. 69 (responding to a request for information about the location of the Ballantines' immediate family members).

[78] **Redfern Schedule,** DR Requests and Ballantines' Responses, p. 70.

[79] **Reply**, ¶ 35.

[80] *See* **Reply**, ¶ 53.

	Bifurcation Submissions	Submissions on Document Production	Reply
2	"The Tribunal should consider . . . where the Ballantines went to college . . . ."[81]	"How could college transcripts from the 1980s be relevant to this dispute? (Spoiler alert: they are not.)"[82]	"[T]he Tribunal should [consider] . . . where the Ballantines went to college . . . ."[83]
3	"The Tribunal should consider . . . where [the Ballantines'] children were born. . . ."[84]	Events prior to the acquisition of the second nationality are irrelevant to the analysis.[85]	"[T]he Tribunal should [consider] . . . where [the Ballantines'] children were born . . . ."[86] However, a separate passage of the Reply asserts that only the Ballantines' lives should be examined.[87]
4	The Tribunal should consider "where the Ballantine children went to school . . . ."[88]	"Respondent pretends as if this means that the question of dominant and effective nationality is dependent upon the school of the children. ***It is not***."[89] "To assert that [the school records of the Ballantine children] are material documents that would change the outcome of the case is folly."[90]	"The Tribunal should take into account the entire circumstances of the dual nationality situation."[91] However, a separate passage of the Reply asserts that only the Ballantines' lives should be examined.[92]
5	The Tribunal should consider the fact that the Ballantines "joined a health club in Elk Grove Village [in Illinois] and were members from 2009 to 2013 . . . ."[93]	Information about the Ballantines' gym memberships "is not material to the outcome."[94]	
6		"How are the 'circumstances' surrounding the naturalization relevant?"[95]	"[T]he Tribunal should . . . look[] at . . . the motivation of the person(s) to become dual nationals . . . ."[96]

[81] **Bifurcation Response**, ¶ 24.
[82] **Redfern Schedule,** DR Requests and Ballantines' Responses, p. 53.
[83] **Reply**, ¶ 35.
[84] **Bifurcation Response**, ¶ 24.
[85] *See* **Redfern Schedule,** DR Requests and Ballantines' Responses, pp. 34–35.
[86] **Reply**, ¶ 35.
[87] *See* **Reply**, ¶ 53.
[88] **Bifurcation Rejoinder**, p. 4.
[89] *See* **Redfern Schedule,** DR Requests and Ballantines' Responses, pp. 46–47.
[90] *See* **Redfern Schedule,** DR Requests and Ballantines' Responses, p. 47.
[91] **Reply**, ¶ 24.
[92] *See* **Reply**, ¶ 53.
[93] **Bifurcation Response**, ¶ 33.
[94] **Redfern Schedule,** DR Requests and Ballantines' Responses, p. 74.
[95] **Redfern Schedule,** DR Requests and Ballantines' Responses, p. 41.
[96] **Reply**, ¶ 24.

	Bifurcation Submissions	Submissions on Document Production	Reply
7	"[T]his Tribunal should look at the Ballantines' *entire life* . . . ."[97]	The factors listed above are irrelevant. Events prior to the acquisition of the second nationality are also irrelevant to the analysis.[98]	"[T]he Tribunal should examine the Ballantines' *entire life* . . . ."[99] This "includes but is not limited to the facts at the relevant times . . . ."[100]

49. In any event, as shown below, even if all of the above-mentioned factors were considered, the conclusion would still be that the Ballantines' Dominican nationality was their dominant one as of 11 September 2014.

50. Before demonstrating that such is the case, however, it seems useful to recall that the question here is not — as the Ballantines contend — whether or not "the Ballantines . . . abandon[ed] their significant US connections and renounce[d] their lifelong US citizenship . . . to exclusively and singularly embrace a Dominican citizenship."[101] If that were true, then the "dominant nationality" inquiry would be rendered meaningless. The test is not whether the person has ***exclusive*** ties to one or the other State. Rather, the question here is whether the Ballantines' daily lives were more closely connected to the Dominican Republic or the United States as of the critical date.

51. As the U.S. State Department itself[102] has confirmed, the answer to that question can be "the Dominican Republic" even if the Ballantines kept and continued to use their U.S.

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[97] **Bifurcation Response**, ¶ 23 (emphasis in original). The Ballantines contend immediately thereafter that "[t]he Tribunal should consider other factors as well . . . ." **Bifurcation Response**, ¶ 24. However, it is not clear what "other factors" might exist, beyond a person's "entire life." The Ballantines make a similar (and similarly bizarre) assertion in their Reply. *See* **Reply**, ¶ 35 ("Although not the ***only*** factor, the Tribunal should examine the Ballantines' ***entire life*** to determine whether or not [sic] they are more closely aligned with the United States or with the Dominican Republic") (emphasis added).

[98] *See* **Redfern Schedule**, DR Requests and Ballantines' Responses, pp. 34–35.

[99] **Reply**, ¶ 35 (emphasis in original).

[100] **Reply**, ¶ 24. The phrase "not limited to" seems to imply that facts at ***ir***relevant "times" could also be relevant to the analysis; it is unclear how that could be so.

[101] **Bifurcation Response**, fn. 1.

[102] The U.S. State Department is the U.S. agency responsible for determining U.S. nationality.

nationality, and even if they maintained significant contact with the United States.[103] This is so because — again in the words of the U.S. State Department — "[t]he primary question to be asked is what nationality is indicated by the applicant's residence or other voluntary associations."[104] In this case, as discussed below, the Ballantines' residence and voluntary associations (and the vast majority of other factors) support a conclusion that the Ballantines' dominant nationality on the relevant date was that of the Dominican Republic.

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

52. As the Tribunal will recall, Michael and Lisa Ballantine were born in the United States, went to college there, and appear to have lived there until 2000, when they and their family spent a "transformative"[105] year in the Dominican Republic[106] and "developed a deep love

[103] **RLA-010**, United States Department of State, Office of the Legal Adviser, Digest of United States Practice in International Law 1991-1999, International Law Institute (2005), pp. 4–5 (noting, with approval, that in *Sadat v. Mertes* — a case on which the Ballantines rely — "it was the plaintiff's voluntary associations with the [State of naturalization] that led the court to find that his dominant nationality was [that of the State of naturalization]" and that "he had not sought to terminate or avoid his [original] nationality, and had in fact maintained significant contacts with [his country of origin]"); **RLA-010**, United States Department of State, Office of the Legal Adviser, Digest of United States Practice in International Law 1991-1999, International Law Institute (2005), p. 5 (concluding that, "***[c]onsequently, we believe that a dual national can be found to have a dominant, effective nationality of one country, even if he takes no affirmative steps to terminate or avoid the nationality of the other — indeed, even if he or she makes a conscious decision to retain the latter nationality***") (emphasis added); *see also* **CLA-051**, *Reza Said Malek v. Islamic Republic of Iran*, IUSCT Case No. 193, Award No. ITL 68-193-3 (Virally, Allison, Ansari) (23 June 1988), ¶ 25 (concluding that the claimant, a dual national of Iran and the United States, had a dominant U.S. nationality, because "[a]lthough the Claimant never wholly severed his cultural and sentimental ties with [the] country of his birth [Iran], as evidenced by his marriage and his visits to Iran, his conduct since the time he settled in the United States, in 1966, demonstrates that he fully and deliberately integrated into United States society. It shows also that his acquisition of United States citizenship was the result of a firm decision officially expressed in 1972").

[104] **RLA-010**, United States Department of State, Office of the Legal Adviser, Digest of United States Practice in International Law 1991-1999, International Law Institute (2005), p. 4.

[105] **Ex. R-011**, History, Jamaca de Dios Website (15 February 2017), p. 1 ("This year in the Dominican Republic transformed our famil[y] . . . ."); *see also* **Notice of Intent**, ¶ 10 ("The time the Ballantine family spent in the Dominican Republic was transformative for them . . . ."); **M. Ballantine 1st Statement**, ¶ 4 (explaining that "that year . . . transformed me. . . . I returned to the United States and my day-to-day business routine, but was unsatisfied").

[106] *See* **Amended Statement of Claim**, ¶ 18; *see also* **Ex. R-011**, History, Jamaca de Dios Website (15 February 2017), p. 1.

and affection for the country's people and their culture."[107] Although they then "returned to their home in Chicago in 2001,"[108] they subsequently continued to visit the Dominican Republic "for several months each year"[109] in order "to be of service to the country and its people."[110]

53. Eventually, "[a]fter several years visiting the Dominican Republic, coming to appreciate its natural beauty, and developing a fondness for its people, the Ballantines decided to deepen their personal and economic commitment to the country"[111] by moving their family there "permanently"[112] in 2006. Michael sold his business,[113] "the family sold their home and sold or gave away many of their possessions,"[114] and the Ballantines "invest[ed] all of their life savings to develop a tropical mountain in the Dominican [Republic],"[115] using land that they had purchased during one of their many visits.[116] In the words of the Ballantines' "friend and business colleague"[117] Greg Wittstock, this move was a "huge" "commitment."[118] However, as

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[107] **Ex. R-011**, History, Jamaca de Dios Website (15 February 2017), p. 1; *see also* **Notice of Intent**, ¶ 10 ("The time the Ballantine family spent in the Dominican Republic was transformative for them, and the family developed a deep love and affection for the country's people and their culture").

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

[109] **Notice of Intent**, ¶ 11; *see also* **Amended Statement of Claim**, ¶ 20.

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

[111] **Notice of Arbitration and Statement of Claim**, ¶ 30; *see also id.*, ¶ 2 ("As a result of their affection for the country and its people, the Ballantines and their children moved to the Dominican Republic . . . .").

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

[113] **Ex. R-012**, Greg Wittstock, A Man and His Mountain, A Woman and Her Heart (27 February 2013), p. 3; *see also id.*, p. 1 (explaining that Greg Wittstock was a neighbor of the Ballantines); **D. Almanzar 1st Statement**, ¶ 5 (confirming that Mr. Wittstock knows the Ballantines).

[114] **Ex. R-012**, Greg Wittstock, A Man and His Mountain, A Woman and Her Heart (27 February 2013), p. 4; *see also* **Ex. R-242**, Letter from M. Ballantine to J.A. Rodriguez (CEI-RD) (30 May 2013), p. 2 ("In the year 2006, my wife and I sold all of our properties in the United States and we moved to the Dominican Republic . . . .").

[115] **Ex. R-012**, Greg Wittstock, A Man and His Mountain, A Woman and Her Heart (27 February 2013), p. 3; *see also* **Notice of Intent**, ¶ 7 ("[T]he Ballantines have invested all of their efforts and money into planning and developing the Jamaca de Dios ('Hammock of God') gated community in the Dominican Republic").

[116] *See* **Notice of Arbitration and Statement of Claim**, ¶ 4.

[117] **Bifurcation Response**, fn. 41.

[118] **Ex. R-012**, Greg Wittstock, A Man and His Mountain, A Woman and Her Heart (27 February 2013), p. 3 ("Moving there [*i.e.*, to the Dominican Republic] to serve a one year mission trip was a big commitment, moving there permanently was a huge one!").

Michael himself later recounted, "the nature and the kindness of the people made [them] feel ***at home*** from the first day."[119]

54. The Ballantines "felt attracted to the idea of putting down roots in the [Dominican] community of Palo Blanco,"[120] and quickly began to do so. They built a house,[121] opened bank accounts,[122] made friends,[123] connected with their neighbors,[124] joined a church,[125] initiated a charitable venture,[126] and sent their children (whom Lisa previously had taught at home)[127] to a local school.[128] They started a local business literally intended to create a "community"[129] around them — a "place of rest and peace"[130] with its own "social life,"[131] where "private individuals" would own homes,[132] and "domestic and international tourists"

[119] **Ex. R-242** Letter from M. Ballantine to J.A. Rodriguez (CEI-RD) (30 May 2013), p. 2 (emphasis added).

[120] **A. Escarraman 1st Statement**, ¶ 1.

[121] **Reply**, ¶ 37 ("[T]he Ballantines built a residence in their development in 2007 . . . ."); **M. Ballantine 1st Statement**, ¶ 20 ("We finished building our beautiful home, which had been designed by Lisa . . . .").

[122] *See* **Ex. R-221**, Letter from Banco Popular Dominicano (4 April 2012) (indicating that the Ballantines opened a bank account at Banco Popular in 2005; **Ex. R-223** Letter from Banco BHD to Jamaca de Dios SRL (16 January 2013) (indicating that the Ballantines opened a savings account at Banco BHD in 2006).

[123] **L. Ballantine 2nd Statement**, ¶ 7.

[124] *See* **M. Ballantine 3rd Statement**, ¶ 13 ("To be good neighbors, we immediately allowed the landowners to our west . . . to use th[e] 2005 Road to access their farms").

[125] **Reply**, ¶ 44 (explaining that the Ballantines attended that church "[a]t all times while in Jarabacoa").

[126] *See* **Notice of Arbitration and Statement of Claim**, ¶ 29.

[127] *See* **Ex. R-250**, From art to intervention, Chicago Tribune (23 March 2011), p. 1 (explaining that "[Lisa] Ballantine . . . home-schooled her four children"); *see also* **Ex. R-079**, About the Artist, Lisa Ballantine, My Dove Ceramics (last visited 20 May 2017) ("The first 50 years of my life have been dedicated to pouring into and adventuring with my four children and husband. We have ***homeschooled***, performed, raced, and traveled the world together, spending the last 15 years in the Dominican Republic") (emphasis added). This may explain why the Ballantines argued so strenuously against the Dominican Republic's document production request for school records. *See* **Redfern Schedule, DR Requests and Ballantines' Responses,** pp. 43–49.

[128] **M. Ballantine 1st Statement**, ¶ 90.

[129] *See* **M. Ballantine 1st Statement**, ¶ 6 ("Lisa and I discussed at length the concept of a luxurious gated community unlike the single family houses that were slowly appearing throughout the mountains of Jarabacoa"), ¶ 22 ("I was trying to achieve something much more comprehensive than simply selling a lot of land").

[130] **Amended Statement of Claim**, fn. 13.

[131] **Amended Statement of Claim**, ¶ 42.

[132] **Notice of Arbitration and Statement of Claim**, ¶ 31.

would visit.[133] They registered a local company, hired employees, (whom they "made to feel like family"),[134] and even took the formal step of becoming permanent residents of the Dominican Republic.[135] After renewing that status once, in 2008,[136] they then deepened ties even further, by "bec[oming] nationals of the DR" — specifically "in the hopes that Dominicans would see that the Ballantines were making a commitment to the DR."[137]

55. As the ICJ explained in the famous *Nottebohm* case, "[n]aturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being. It involves his breaking a bond of allegiance and his establishment of a new bond of allegiance."[138] However, the Ballantines knew what they were doing when they chose to become naturalized Dominican nationals: before doing so, they consulted an attorney,[139] and considered the issue carefully.[140] Ultimately, they chose voluntarily[141] to naturalize in the Dominican Republic. As the Ballantines themselves explain, one "substantial motivation" for this decision was their desire to be perceived as Dominican.[142] However, the

[133] **Notice of Arbitration and Statement of Claim**, ¶ 31.

[134] **L. Gil 1st Statement**, ¶ 2.

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

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

[137] **Reply**, ¶ 26. The Ballantines have confirmed on multiple occasions that their objective was to have their clients and the government perceive them as Dominican. *See* **M. Ballantine 1st Statement**, ¶ 88; **M. Ballantine 2nd Statement**, ¶ 2; **Response on Bifurcation**, ¶¶ 4, 25, 30.

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

[139] *See, e.g.,* **Ex. R-225**, Email from M. Ballantine to B. Guzman (22 July 2008).

[140] *See* **Reply**, ¶ 28 (explaining that the decision was the product of a "thought process"), ¶ 29 ("The Ballantines also considered other factors when deciding to become Dominican nationals, such as potential benefits of passing down property and the like").

[141] **Reply**, fn. 69 ("Of course the decision to attain dual nationality was voluntary").

[142] **Reply**, ¶ 28 ("Growing up in the United States, . . . the Ballantines . . . viewed people from foreign countries who took U.S. citizenship as fellow countrymen or women. . . . That people would feel this way [about them] was certainly a substantial motivation and thought process for the Ballantines when they became Dominican citizens").

Ballantines also believed that naturalization might present commercial and legal advantages.[143] Michael, moreover, was keen on having a Dominican passport.[144]

56. In his most recent witness statement, Michael refers to naturalization as a "routine" and "simple administrative procedure."[145] However, the preparation and formal process for the Ballantines' naturalization in the Dominican Republic cost them thousands of dollars,[146] took more than two years to complete,[147] and required them (1) to track down and submit various documents,[148] (2) to identify Dominican citizens who could serve as references,[149] (3) to pass an examination of their written and oral proficiency in Spanish,[150] (4) to study for[151] and pass a test (conducted in Spanish) on Dominican history and culture,[152] and (5) to pledge "***to be faithful to the [Dominican] Republic***, to respect and comply with the

[143] *See* **Reply**, ¶ 31 ("They attained . . . citizenship in the DR in an effort to help market and develop the significant commercial investment that they had made in the country"); **Amended Statement of Claim**, ¶ 155 (asserting that the Ballantines "became citizens of the Dominican Republic in 2010 for purposed [sic] of asset protection and to assist their marketing efforts at Jamaca"); **J. Schumacher 1st Statement**, ¶ 8 (explaining that "[d]uring one of our many conversations, I asked Michael why he had both a U.S. and Dominican passport. He explained that he thought that having a Dominican passport might make it easier to do business in the Dominican Republic, especially owning land and developing his residential project").

[144] **Ex. R-225**, Email from M. Ballantine to B. Guzman (22 July 2008), p. 10.

[145] **M. Ballantine 3rd Statement**, ¶ 2.

[146] *See* **Ex. R-225**, Email from M. Ballantine to B. Guzman (6 February 2009), p. 9.

[147] *Compare* **Ex. R-225**, Email from M. Ballantine to B. Guzman (22 July 2008) (inquiring about the process for obtaining a Dominican passport) *with* **Ex. R-033**, Record of Swearing-In of M. Ballantine, *Secretaria de Estado de Interior y Policia* (18 November 2010); **Ex. R-034**, Record of Swearing-In of L. Ballantine, *Secretaria de Estado de Interior y Policia* (18 November 2010).

[148] *See* **Ex. R-225**, Email from M. Ballantine to B. Guzman (11 August 2009), p. 6.

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

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

[151] *See* **Ex. R-225**, Email from M. Ballantine to B. Guzman (29 September 2009), p. 12 (inquiring about the naturalization exam).

[152] *See* **Ex. R-225**, Email from B. Guzman to M. Ballantine (10 September 2009), p. 13 (sharing "interview questions & answers for naturalized citizenship" with the Ballantines, and explaining that "[t]he interview will be conducted in Spanish").

Constitution and the Laws of the Dominican Republic."[153] Approval of the Ballantines' naturalization applications required input and sign-off from national drug authorities,[154] the Ministry of Police,[155] the office of the Attorney General,[156] the local branch of INTERPOL,[157] and — ultimately — the President of the Republic, who approved the applications by means of a formal decree.[158]

57. In their Reply, the Ballantines somehow insist once again that they did not seek to develop ties to the Dominican Republic,[159] and that they were not "connected culturally or socially" or "politically" to the country.[160] That is just not true. As the Ballantines' attorney explained in support of their naturalization applications, even as early as December 2009 — *i.e.*, approximately five years before the Ballantines submitted their claims to arbitration on 11 September 2014 — "Michael J. Ballantine and Lisa Marie Ballantine . . . identif[ied] closely with Dominican sentiment and customs given their longstanding respect for, and period living in,

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

[154] *See* **Ex. R-038**, M. Ballantine's Naturalization File, p. 5; **Ex. R-039**, Lisa Ballantine's Naturalization File, p. 3.

[155] *See generally* **Ex. R-038**, M. Ballantine's Naturalization File (which was compiled and evaluated by the Ministry of Police); **Ex. R-039**, Lisa Ballantine's Naturalization File (same).

[156] *See* **Ex. R-038**, M. Ballantine's Naturalization File, p. 20; **Ex. R-039**, Lisa Ballantine's Naturalization File, p. 15.

[157] *See* **Ex. R-038**, M. Ballantine's Naturalization File, p. 8.

[158] *See* **Ex. R-018**, Decree No. 931-09 (30 December 2009) (signed by President Leonel Fernández, awarding Dominican citizenship to the Ballantines).

[159] *See* **Reply**, ¶ 16; **M. Ballantine 1st Statement**, ¶ 88 (asserting that the Ballantines "did very little to even try to assimilate with Dominican culture"); **M. Ballantine 2nd Statement**, ¶ 4 (asserting that the Ballantines "never felt like [they] were Dominicans, never acted like Dominicans, and [were never] perceived . . . as Dominicans").

[160] **Reply**, ¶ 70.

[that] country,"[161] and were "happy to confirm, legally, their Dominican sentiment."[162] Their connection grew even stronger after that.

58. In the years that followed their naturalization, the Ballantines used their Dominican nationality in multiple contexts: for civic purposes,[163] legal purposes,[164] travel purposes,[165] and financial purposes.[166] They used it when applying for business licenses,[167] signing loan agreements,[168] and selling plots of land.[169] In 2010, they even used it to obtain the Dominican nationality for their children Josiah and Tobi.[170] In that context, and in direct contradiction to their assertions in this proceeding,[171] they stated: "[W]e identify closely with

[161] **Ex. R-017**, Letter from G. Rodriguez to the President of the Dominican Republic (11 December 2009) (translation from Spanish; the original Spanish version states as follows: *"Michael J. Ballantine y Lisa Marie Ballantine . . . se enc[ontraron] muy identificada[s] con el sentir y las costumbres dominicanas ya que han tenido un estrecho vinculo [sic] de convivencia y respeto con [ese] país . . . ."*).

[162] **Ex. R-017**, Letter from G. Rodriguez to the President of the Dominican Republic (11 December 2009) (translation from Spanish; the original Spanish version states as follows: *"le será grato confirmar, de manera legal su sentir dominicano . . . ."*).

[163] *See* **Ex. R-020**, Jarabacoa Voting Records (10 January 2017) (showing that Michael and Lisa Ballantine both voted in the 2012 election in the Dominican Republic, and that they and their daughter Tobi were eligible to vote in the 2016 election); **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, Facebook Website, pp. 444–447 ("Placed our votes today as Dominican citizens!"); *see also* **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, Facebook Website, p. 379 (16 August 2012) ("Inaugurated the new president today in the DR. Let's hope for anti corruption [*sic*] and lots of growth!").

[164] *See, e.g.*, **Ex. R-228,** Notarial Promissory Note (8 February 2011); **Ex. R-229,** Draft of Acknowledgement of Payment (18 March 2011); **Ex. R-289,** Jamaca de Dios Listing in Commercial Registry, Cámera de Comercio y Producción de La Vega Real (23 May 2005); **Ex. R-026**, Hearing Minutes, La Vega Tribunal de Tierras (12 September 2013); **Ex. R-027**, Hearing Minutes, La Vega Tribunal de Tierras (21 November 2013).

[165] *See, e.g.*, **Ex. R-019**, Migratory Records for Michael and Lisa Ballantine (25 August 2016).

[166] *See, e.g.*, **Ex. R-227,** Agreement to Reserve Apartment (8 December 2013); **Ex. R-290**, Table of Nationalities Used in Jamaca de Dios Sales Contracts.

[167] *See, e.g.*, **Ex. R-272**, Restaurant Operating License for Aroma de la Montaña (19 May 2014).

[168] *See, e.g.*, **Ex. R-228**, Notarial Promissory Note (8 February 2011).

[169] *See generally* **Ex. R-290**, Table of Nationalities Used in Jamaca de Dios Sales Contracts.

[170] *See* **Ex. R-036**, Josiah and Tobi Ballantine's Naturalization File, p. 24 ("We want them to be granted Dominican citizenship also, since they meet all legal requirements, and we feel very identified with Dominican sentiments and customs. We have a close bond of coexistence and respect with this country. It will be pleasant for us to legally confirm their Dominican feeling").

[171] *See* **Reply**, ¶ 70 (asserting that they were not "connected culturally" to the Dominican Republic).

Dominican sentiment and customs given our longstanding respect for, and period living in, this country . . . ."[172]

59. That same year (2010), the Ballantines decided to remain in the Dominican Republic while Josiah and Tobi moved back to the United States[173] — even though that meant that Tobi (then a minor)[174] "had to basically live independently at . . . a young age."[175] Notably, despite the Ballantines' assertions in this arbitration that attendance at an "American school" in the Dominican Republic is indicative of a dominant U.S. nationality,[176] Tobi (who attended such American school) considered herself a "foreigner"[177] when she returned to the United States in 2010, and continued thereafter to manifest a strong connection to the Dominican Republic, which she described as "[her] country[]."[178]

60. In 2011, Michael began using his Dominican nationality in various legal documents.[179] The practice continued for years thereafter, with Michael invoking his Dominican nationality in, *inter alia*, (1) contractual arrangements relating to the so-called "Mountain

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

[173] *See* **Bifurcation Response**, ¶ 41 (explaining that Joshua Ballantine has not resided in the Dominican Republic since 2006-2007, and that Josiah and Tobi Ballantine moved back to Chicago in 2010).

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

[175] **Ex. R-243**, Email from L. Ballantine to Family (24 December 2012), p. 4.

[176] *See* **Reply**, ¶¶ 40–41.

[177] *See* **Ex. R-078**, Tobi Ballantine's Twitter Feed (last visited 23 May 2017), pp. 101–02 (21 October 2015) (posting a picture of an October 2010 Facebook post in which she had asked what popular American fast food chain "Chick-Fil-A" was, and had justified her question by stating "um. well. im a foreigner" — describing the picture as "[a] real [Facebook] status [post] 3 months after moving to the United States") In the Reply, the Ballantines take umbrage at the references to their daughter's Twitter account, calling them "trolling." However, Tobi's Twitter Feed is public, and has been since she joined the social media site in December 2010 at the age of 16. There is nothing untoward about bringing to the Tribunal's attention a post that anyone on the Internet could see.

[178] **Ex. R-078**, Tobi Ballantine's Twitter Feed (last visited 23 May 2017) (27 February 2011) (wishing a "feliz dia de independencia to my beautiful countryyy [*sic*]"); ***id.***, 20 May 2012 ("Ugh if I was ten days older I'd be voting in the DR right now").

[179] *See generally, e.g.*, **Ex. R-228**, Notarial Promissory Note (8 February 2011); **Ex. R-229**, Draft of Acknowledgement of Payment (18 March 2011).

Lodge,"[180] (2) the power of attorney that authorizes Michael to make decisions in respect of Aroma de la Montaña[181] (which is the restaurant at Jamaca de Dios, owned not by Michael or Lisa Ballantine but by their daughter Rachel),[182] and (3) approximately 40 Jamaca de Dios sales contracts.[183]

61. Lisa, for her part, began describing Jarabacoa as "home,"[184] and reporting about her "life in the Dominican Republic"[185] to family and friends — many of whom came to visit,[186] and some of whom moved to stay. Beginning in February 2010, for example, the Ballantines' daughter Rachel and her "family spent 4 months at La Jamaca de Dios,"[187] and Rachel's husband, Wesley Proch, thereafter "returned to Jarabacoa from April 2011 until August 2011 to oversee the construction of a multi-use building in the recreational space of the development, as

[180] *See, e.g.*, **Ex. R-227**, Agreement to Reserve Apartment (8 December 2013).

[181] **Ex. R-226**, Aroma de la Montaña Power of Attorney (2 April 2013).

[182] *See* **Reply**, ¶ 526 (conceding that "the restaurant is owned by Rachel Ballantine . . . .").

[183] **Ex. R-290**, Table of Nationalities Used in Jamaca de Dios Sales Contracts.

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

[185] *See, e.g.*, **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, Facebook Website, p. 373 (4 September 2012) ("On our way back to the DR. A little sad to be leaving my family, but I am reminded I have a job to do. Our lives are in the DR, and my job is bringing clean water to those who need it"), p. 245 (25 November 2013) ("[A]dapting back to Dominican life. Some of you may wonder what life is like here. Every day is something unexpected in my life. There are beautiful aspects and very difficult ones"), p. 289 (24 July 2013) ("Those of you who wonder what my life is like in the DR, i want to share with you one of my favorite bloggers").

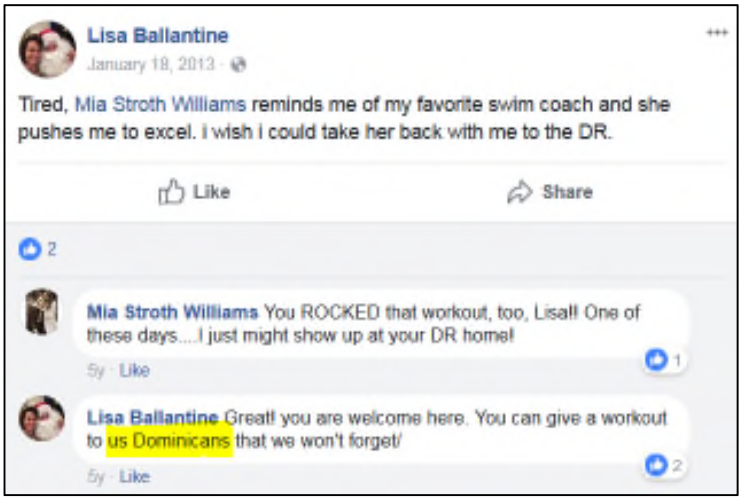
[186] *See, e.g.*, **Ex. R-231**, Email from S. Lewis, Aroma de la Montaña, to M. Sarante (14 April 2011) ("Michael[s] friend who is an engineer [*i.e.*, Eric Kay, the Ballantines' expert] will be here today for the next few months constructing a road on the mountain . . . ."); **Ex. R-012**, Greg Wittstock, A Man and His Mountain, A Woman and Her Heart (27 February 2013) (posting pictures from his trips to visit the Ballantines); **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, Facebook Website, p. 10 (13 December 2016) ("[H]ere is my friend Carla, and Blake, running in the DR with me. They were always so great about staying [c]onnected and visiting us in the DR"), p. 103 (27 May 2015) ("Our good friend Greg Wittstock . . . shares some of what he learns through both success and failure . . . . This is a great company and a great family! They have been faithful friends through the years and have supported [Filter Pure] and come for many visits as our lives took hold in the DR"), p. 106 (17 May 2015) (post from a friend: "I loved seeing all of the running energy in the DR when I visited").

[187] **W. Proch 1st Statement**, ¶ 2.

well as the administrative office of La Jamaca de Dios."[188] Eventually, "[a]fter frequent travel back and forth to the DR, in March 2013, [the] family moved to Jarabacoa."[189] As Lisa explained in an email to family and friends:

> We are . . . so excited to have [Wesley] and Rachel coming down to the Dominican Republic this coming year. ***They will be making a move to join us in our lives there***. Wesley will be continuing in construction and management with Jamaca de Dios and working side by side with Michael on this development and Rachel will be starting a new mothers education program and then eventually a birthing clinic right [here] in Jarabacoa.[190]

Several weeks later, Lisa referred to herself as "Dominican" in an exchange with a friend:[191]



The next day, Lisa announced that she was "[h]ome in the DR once more!"[192] And then, in a television interview, in June 2013 — a little more than a year before the Ballantines' submission

[188] **W. Proch 1st Statement**, ¶ 3.

[189] **W. Proch 1st Statement**, ¶ 5.

[190] **Ex. R-243**, Email from L. Ballantine to Family (24 December 2012), p. 2 (emphasis added). Although Lisa also referred to Chicago as "home" in this same email, it is clear from the quotation above that she considered her "life" to be in the Dominican Republic.

[191] **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, p. 311 (18 January 2013).

[192] **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, p. 310 (19 January 2013).

of their Notice of Arbitration (which is the critical date) — Lisa solemnly declared: "We love the Dominican Republic, ***it is our country, I am Dominican now*** . . . ."[193]

62. On 11 September 2014, in the Notice of Arbitration and Statement of Claim ***itself***, the Ballantines asserted that their "dedication . . . to the Dominican Republic [was] well understood,"[194] and that their "personal and economic commitment to the country"[195] was clear. Three weeks later, Lisa informed friends that she had "[s]pent some time visiting with Reinaldo Pared Perez[,] . . . a presidential candidate for 2016 [in the Dominican Republic]. i love that I get to meet such influential people in the DR! i want this country to have such wonderful success."[196] The Ballantines also have insisted that their "love" for the Dominican was so "deep"[197] that "sell[ing] their home and leav[ing] their friends and colleagues in the Dominican Republic"[198] supposedly caused them USD 4 million in emotional harm.[199]

63. As the foregoing illustrates, the Ballantines' connection to the Dominican Republic was strong. In fact, it was so strong that — as one would expect to happen after a person packs up his family, moves to a new country, lives there for eight years, develops a fondness for its people, comes to identify with its culture, considers it his domicile,[200] formally makes it his permanent residence, formally acquires its nationality by naturalization, pledges

[193] **Ex. C-025**, Transcript of "Nuria" (29 June 2013), p. 5 (attributing the above-quoted statement to "Speaker 8," and identifying "Speaker 8" as Lisa Ballantine) (emphasis added).

[194] **Notice of Intent**, ¶ 8.

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

[196] **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, p. 180 (28 September 2014).

[197] *See* **Ex. R-011**, Jamaca de Dios Website, "History" page (last visited 15 February 2017), p. 1 (quoting Michael Ballantine as follows: "This year in the Dominican Republic transformed our families and during that time we developed a deep love and passion for the people and culture of this beatiful [*sic*] island"); **Ex. C-025**, Transcript of "Nuria" (29 June 2013), p. 5 (quoting Lisa Ballantine as follows: "We love the Dominican Republic, it is our country, I am Dominican now. . . .").

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

[199] *See* **Amended Statement of Claim**, ¶¶ 276, 322.

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

loyalty to it, exercises nearly all of the benefits of that nation's citizenship, and commits to it personally, economically, and legally — life in the United States felt foreign to them. As Lisa Ballantine herself explained, a full nine months *after* the Notice of Arbitration and Statement of Claim was submitted: "In the process of moving back to the U.S. We have been gone for so long that I feel out of touch with american [*sic*] society. The culture is so different than when I left 10 years ago. I feel such a culture shock coming back."[201]

64. The clear conclusion from all of this is that by the time the Ballantines filed their Notice of Arbitration in 2014, their dominant and effective nationality was their Dominican nationality. That in turn means that, by application of the nationality-related jurisdictional requirements of Chapter Ten of DR-CAFTA, the Tribunal lacks jurisdiction over the Ballantines' claims. As demonstrated below, none of the factors that past tribunals (or the Ballantines) have identified support a conclusion that the Ballantines' U.S. nationality was their dominant one as of 11 September 2014. By contrast, there is considerable evidence that, by the time of submission of their claims to DR-CAFTA arbitration, the Ballantines' ties to the Dominican Republic were so strong that their Dominican nationality was unquestionably their dominant one.

65. ***State of habitual residence.*** This factor, which the U.S. State Department itself considers one of the most "important" ones for purposes of the dominant nationality assessment,[202] militates against the Ballantines' contention that their U.S. nationality was their "dominant" one as of 11 September 2014.

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

[202] **RLA-010**, United States Department of State, Office of the Legal Adviser, Digest of United States Practice in International Law 1991-1999, International Law Institute (2005), p. 4.

66. As explained above, the Ballantines spent a "transformative"[203] year in the Dominican Republic at the turn of the millennium, and subsequently returned to that country so frequently[204] — and for such long periods[205] — that it felt to them like they were there full time.[206] "[I]n the year 2006, [they] sold all of [their] properties in the United States[,] . . . moved to the Dominican Republic,"[207] and obtained "permanent resident" status there.[208] In 2008, they renewed that status,[209] and in 2009, they appeared before a notary and two witnesses and "STATED UNDER OATH that their established domicile is in . . . [the] Dominican Republic."[210] Nothing changed after the Ballantines sought and obtained Dominican nationality on the basis of that statement.[211] Their travel records confirm that, between 2010 and 2014, the Dominican Republic was their home base:

Figure 4: The Ballantines' Home Base

Year[212]	Days in the Dominican Republic	Days In the U.S.	Days In Other Countries
2010	101	145	119
2011	159	162	44
2012[213]	193	98	75

[203] *See* **Ex. R-011** History, Jamaca de Dios Website (15 February 2017), p. 1; *see also* **Notice of Intent**, ¶ 10; **M. Ballantine 1st Statement**, ¶ 4.

[204] *See* **Notice of Intent**, ¶ 11 (explaining that, before moving permanently to the Dominican Republic, the Ballantines visited the country each year); *see also* **Amended Statement of Claim**, ¶ 20.

[205] **Notice of Intent**, ¶ 11 (explaining that, before moving permanently to the Dominican Republic, the Ballantines returned there "for several months each year").

[206] *See* **Ex. R-079**, About the Artist, Lisa Ballantine, My Dove Ceramics (last visited 20 May 2017), p. 1(explaining, in a post from 2016, that the Ballantines had "spen[t] . . . 15 years in the Dominican Republic"); *see also* **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, p. 98 (10 June 2015) (posting a picture with the comment: "Here we are 15 years ago and then today. Almost one third of my life has been spent here in the Dominican Republic").

[207] **Ex. R-242**, Letter from M. Ballantine to J.A. Rodriguez (CEI-RD) (30 May 2013), p. 2.

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

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

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

[211] *See* **Ex. R-038**, M. Ballantine's Naturalization File, p. 9 (which is a copy of the sworn statement of domicile that formed part of the application).

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

2013	238	127	0
2014	213	109	43
Total	**904**[214]	**641**	281

67. The Ballantines' response to this is that "residency is not the test."[215] On some level, that is correct, as residency is not necessarily the *entirety* of the test. However, residency is unquestionably a critical part of the test (and indeed likely the most important part of it). This understanding is confirmed by the U.S. agency that is responsible for determining U.S. nationality (the U.S State Department); under the State Department's approach to the question of dominant nationality, "[t]he primary question to be asked is what nationality is indicated by the applicant's ***residence*** or other voluntary associations."[216]

68. Perhaps in recognition of the foregoing, the Ballantines also have claimed that "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[.]"[217] In support of this assertion, they list five different addresses,[218] and claim that "these were not simply empty homes with the heat turned down."[219] The problems with these contentions are threefold.

69. ***First***, the word "residence" refers to the place where one *resides*, and at any given time one cannot reside in two different places. Here, there is no evidence that the Ballantines

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

[213] 2012 was a leap year.

[214] Since Michael Ballantine "travelled just slightly less than Lisa," this number would be higher for him. **M. Ballantine 2nd Statement**, ¶ 21.

[215] **Reply**, ¶ 37.

[216] **RLA-010**, United States Department of State, Office of the Legal Adviser, Digest of United States Practice in International Law 1991-1999, International Law Institute (2005), p. 4 (emphasis added).

[217] **Reply**, ¶ 37.

[218] *See* **Reply**, ¶ 37.

[219] **Reply**, ¶ 38.

actually lived at any of the five locations they have identified during the time period between (a) their acquisition of the Dominican nationality, and (b) the submission of their claims to arbitration on 11 September 2014. ***Second***, the Ballantines do not even ***attempt*** to argue the contrary. Instead, they simply juxtapose an assertion that the Ballantines owned or rented certain premises in the U.S.[220] with a claim that those premises were occupied,[221] and hope that the reader never pauses to ask whether or not the Ballantines actually lived in those places (and if so, whether or not that fact has jurisdictional implications).[222] ***Third***, if the Ballantines ***had*** in fact contended that they lived at the addresses listed between the time they acquired Dominican nationality and the time they submitted their claims to arbitration, such a claim would not appear to be corroborated by the evidence, as illustrated in Figure 5 below.

[220] **Reply**, ¶ 37.

[221] **Reply**, ¶ 38.

[222] As the Tribunal will have seen, one of the five addresses listed is a "home" that the Ballantines only claim to have rented "[o]n July 15, 2015," which was almost a year *after* they submitted their claims to arbitration. *See* **Reply**, ¶ 37.

Figure 5: The Ballantines' Alleged "Residences" During The Time Period Between Naturalization And Submission Of The Claims To Arbitration

Address	Dates of Alleged Ownership/Rental	Problems With Any Claim That The Ballantines Lived At That Address At That Time
"33w231 Brewster Creek Circle in Wayne, Illinois"[223]	The Ballantines claim to have "owned a residence" here from 1 March 1994 to 18 August 2011[224]	• The Ballantines have asserted elsewhere that, "in the year 2006, [they] sold all of [their] properties in the United States . . . ."[225] • The Ballantines obtained "permanent residency" status in the Dominican Republic in 2006, and renewed that status in 2008.[226] • In December 2009, the Ballantines appeared before a notary and two witnesses and "STATED UNDER OATH that their established domicile is in . . . [the] Dominican Republic."[227] • The Ballantines swore, under penalty of perjury,[228] in their 2010 and 2011 U.S. tax returns that their "home address"[229] was "3170 Airmans Drive[,] Apt. no. 3032[,] Ft. Pierce, FL 34946," and that they ***did not live in the U.S. state of Illinois at any point during the year***.[230]
"1163 Westminster Avenue in Elk Grove Village, Illinois."[231]	The Ballantines claim to have "rented a home" here from 1 October 2010 to 31 December 2011[232]	• It seems unlikely that the Ballantines would have lived here when they claim to have "owned a residence at 33w231 Brewster Creek Circle in Wayne, Illinois"[233] — which appears to be less than 20 miles away[234] — during the exact same time period. • The Ballantines swore, under penalty of perjury,[235] in their 2010 and 2011 U.S. tax returns that their "home address"[236] was "3170 Airmans Drive[,] Apt. no. 3032[,] Ft. Pierce, FL 34946," and that they ***did not live in the U.S. state of Illinois at any point during the year***.[237]

[223] **Reply**, ¶ 37.

[224] **Reply**, ¶ 37.

[225] **Ex. R-242**, Letter from M. Ballantine to J.A. Rodriguez (CEI-RD) (30 May 2013), p. 2.

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

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

[228] *See* **Ex. R-244**, Ballantines' U.S. Tax Return (2010), p. 8; **Ex. R-245**, Ballantines' U.S. Tax Return (2011), p. 8.

[229] **Ex. R-244**, Ballantines' U.S. Tax Return (2010), p. 10; **Ex. R-245**, Ballantines' U.S. Tax Return (2011), p. 10.

[230] **Ex. R-244**, Ballantines' U.S. Tax Return (2010), p. 34; **Ex. R-245**, Ballantines' U.S. Tax Return (2011), p. 36.

[231] **Reply**, ¶ 37.

[232] **Reply**, ¶ 37.

[233] **Reply**, ¶ 37.

[234] *See* **Ex. R-291**, Directions between Brewster Creek Circle, Wayne, IL 60184 to 1163 Westminster Lane in Elk Grove Village, Google Maps (last visited 18 March 2018). Google Maps could not locate "Westminster Avenue in Elk Grove Village." There is, however, an 1163 Westminster ***Lane*** in Elk Grove Village, and the distance to Brewster Creek Circle was calculated from there.

[235] *See* **Ex. R-244**, Ballantines' U.S. Tax Return (2010), p. 8; **Ex. R-245**, Ballantines' U.S. Tax Return (2011), p. 8.

[236] **Ex. R-244**, Ballantines' U.S. Tax Return (2010), p. 10; **Ex. R-245**, Ballantines' U.S. Tax Return (2011), p. 10.

[237] **Ex. R-244**, Ballantines' U.S. Tax Return (2010), p. 34; **Ex. R-245**, Ballantines' U.S. Tax Return (2011), p. 36.

Address	Dates of Alleged Ownership/Rental	Problems With Any Claim That The Ballantines Lived At That Address At That Time
"850 Wellington Avenue, Unit 206, in Elk Grove Village, Illinois"[238]	The Ballantines assert that they "purchased a home" here on 2 December 2011, and sold it on November 2015[239]	• The Ballantines did not claim any moving expenses in their 2011 U.S. tax return.[240] • The Ballantines swore, under penalty of perjury,[241] in their 2011, 2012, 2013, and 2014 U.S. tax returns — which are the only ones that they were ordered to produce — that their "home address"[242] was "3170 Airmans Drive[,] Apt. no. 3032[,] Ft. Pierce, FL 34946." • In the 2011 U.S. tax return, the Ballantines also swore that they ***did not live in the U.S. state of Illinois at any point during the year***.[243] In the 2012, 2013, and 2014 tax returns, the question of whether or not the Ballantines lived in Illinois appears not to have been posed. • If the Ballantines truly lived here, it is not clear why they would need to use "the address of Michael Ballantines' parents as the 'contact' [information] for purposes of this Arbitration"[244] — which, as the Tribunal may recall, was what they did when submitting their claims to arbitration.[245]
"3831 SW 49th Street, in Hollywood, Florida"[246]	The Ballantines assert that they "purchased a home" here on 19 April 2012, and sold it on 28 March 2014[247]	• The Ballantines did not claim any moving expenses in their 2012 U.S. tax return.[248] • In their 2014 U.S. tax return, the Ballantines swore under penalty of perjury[249] that what they had purchased on 19 April 2012 and sold on 28 March 2014 was an "investment property."[250] • In addition, as noted above, the Ballantines also swore under penalty of perjury in their 2011, 2012, 2013, and 2014 U.S. tax returns that their "home address"[251] was "3170 Airmans Drive[,] Apt. no. 3032[,] Ft. Pierce, FL 34946." • As noted above, if the Ballantines truly lived here, it is not clear why they would need to use "the address of Michael Ballantines' parents as the 'contact' [information] for purposes of this Arbitration."[252]

[238] **Reply**, ¶ 37.

[239] **Reply**, ¶ 37.

[240] *See* **Ex. R-245**, Ballantines' U.S. Tax Return (2011), p. 10.

[241] *See* **Ex. R-244**, Ballantines' U.S. Tax Return (2010), p. 8; **Ex. R-245**, Ballantines' U.S. Tax Return (2011), p. 8; **Ex. R-246**, Ballantines' U.S. Tax Return (2012), p. 6; **Ex. R-247**, Ballantines' U.S. Tax Return (2013), p. 5; **Ex. R-248**, Ballantines' U.S. Tax Return (2014), p. 5.

[242] **Ex. R-244**, Ballantines' U.S. Tax Return (2010), p. 10; **Ex. R-245**, Ballantines' U.S. Tax Return (2011), p. 10; **Ex. R-246**, Ballantines' U.S. Tax Return (2012), p. 7; **Ex. R-247**, Ballantines' U.S. Tax Return (2013), p. 6; **Ex. R-248**, Ballantines' U.S. Tax Return (2014), p. 6.

[243] **Ex. R-245**, Ballantines' U.S. Tax Return (2011), p. 36.

[244] **Bifurcation Response**, fn. 30.

[245] *See* **Bifurcation Request**, ¶ 20 (explaining this point).

[246] **Reply**, ¶ 37.

[247] **Reply**, ¶ 37.

[248] *See* **Ex. R-246**, Ballantines' U.S. Tax Return (2012), pp. 2, 7.

[249] *See* **Ex. R-248**, Ballantines' U.S. Tax Return (2014), p. 5.

[250] *See* **Ex. R-248**, Ballantines' U.S. Tax Return (2014), p. 12.

[251] **Ex. R-244**, Ballantines' U.S. Tax Return (2010), p. 10; **Ex. R-245**, Ballantines' U.S. Tax Return (2011), p. 10; **Ex. R-246**, Ballantines' U.S. Tax Return (2012), p. 7; **Ex. R-247**, Ballantines' U.S. Tax Return (2013), p. 6; **Ex. R-248**, Ballantines' U.S. Tax Return (2014), p. 6.

[252] **Bifurcation Response**, fn. 30.

70. Based on the foregoing, it might seem logical to conclude that, to the extent that the Ballantines lived ***anywhere*** in the United States between naturalizing in the Dominican Republic and submitting their claims to arbitration, it would have been at the "home" address identified in their U.S. tax returns: "3170 Airmans Drive[,] Apt. no. 3032[,] Ft. Pierce, FL 34946." However, the Ballantines did not make that claim, and the reason for that is simple: that address corresponds not to a house or apartment building, but to an ***airport hangar***[253] (and moreover one that the Ballantines do not own). A company called "Missionary Flights International" operates out of that hangar,[254] and apparently offers mail delivery services to the Dominican Republic.[255]

71. Accordingly, there is no reliable evidence that the United States was the State of the Ballantines' habitual residence during the critical time period for jurisdictional purposes.

72. ***The circumstances in which the second nationality was acquired.*** As explained above, and as the Ballantines concede, they acquired the Dominican nationality intentionally and voluntarily.[256] This is important, because — as the U.S. State Department has explained — "[t]he primary question to be asked is what nationality is indicated by the applicant's residence or other ***voluntary*** associations."[257] And as the ICJ has stated, "[n]aturalization is not a matter to be taken lightly."[258]

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[253] *See generally* **Ex. R-251**, Google Maps Results, 3170 Airmans Drive, Fort Pierce, Florida 34946 (last visited 16 March 2018).

[254] *See* **Ex. R-252**, Contact MFI, Missionary Flights International Website (last visited 16 March 2018) (listing 3170 Airmans Drive, Fort Pierce, Florida 34946 as its address).

[255] *See* **Ex. R-292**, Purpose, Missionary Flights International Website (last visited 18 March 2018).

[256] *See* **Reply**, fn. 69 ("Of course the decision to attain dual nationality was voluntary").

[257] **RLA-010**, United States Department of State, Office of the Legal Adviser, Digest of United States Practice in International Law 1991-1999, International Law Institute (2005), p. 4 (emphasis added).

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

73. In their pleadings, the Ballantines contend that "[c]itizenship in the Dominican Republic is not the same privileged status found in other countries around the world,"[259] and suggest that it would be ludicrous for a person to choose Dominican citizenship given all of the "benefits and protections" that U.S. citizenship provides.[260] Aside from the inherently insulting nature of such assertions, however, if the Ballantines genuinely believe them to be true, it makes their case on jurisdiction even weaker. This is so because, if it were true that the Ballantines did not expect to gain any formal "privilege[s]," "benefits," or "protections" from naturalization, then their decision to naturalize — and to even obtain Dominican nationality for two of their children[261] — must have been based *exclusively* on their attachment to the country, [262] their identification with its culture, [263] the fact that it had become their home in law[264] and in spirit,[265] and their desire for other people to perceive them as Dominican.[266] If such is the case, it is all the more evident that their "voluntary associations" (to invoke the State Department's term) centered on the Dominican Republic.

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[259] **Bifurcation Response**, ¶ 47; *see also* **Reply**, ¶¶ 74–75.

[260] *See* **Bifurcation Response**, fn. 1.

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

[262] *See* **Ex. R-011**, History, Jamaca de Dios Website (15 February 2017), p. 1 (quoting Michael Ballantine as follows: "This year in the Dominican Republic transformed our families and during that time we developed a deep love and passion for the people and culture of this beatiful [*sic*] island"); **Ex. C-025**, Transcript of "Nuria" (29 June 2013), p. 5 (attributing the following statement to Lisa Ballantine: "We love the Dominican Republic, ***it is our country, I am Dominican now*** . . . .") (emphasis added).

[263] **Ex. R-036**, Josiah and Tobi Ballantine's Naturalization File, p. 24 (wherein the Ballantines themselves assert the following: "[W]e identify closely with Dominican sentiment and customs given our longstanding respect for, and period living in, this country . . . .").

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

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

[266] **Reply**, ¶ 26 ("As the Ballantines have stated, they became nationals of the DR .. . in the hopes that Dominicans would see that the Ballantines were making a commitment to the DR"), ¶ 28 ("[T]he Ballantines . . . viewed people from foreign countries who took U.S. citizenship as fellow countrymen or women. . . . That people would feel this way was certainly a substantial motivation and thought process [sic] for the Ballantines when they became Dominican citizens").

74. ***Personal attachment to the Dominican Republic***. There can be no doubt that, at the relevant time, the Ballantines had a powerful personal attachment to the Dominican Republic. They conceded in this arbitration that they were dedicated to the Dominican Republic,[267] had a "personal and economic commitment to the country,"[268] and had "a fondness for"[269] — and a desire to serve[270] — its people. They consciously chose to become Dominican nationals, and to obtain Dominican nationality for their children, despite (purportedly) believing that it would bring them no "benefits." They stated in a formal application to the Dominican Republic that they identified closely with "Dominican sentiment,"[271] and described themselves as "Dominican."[272] And in their naturalization oath, they pledged loyalty to the Dominican Republic.[273]

75. Notably, the Ballantines do not contest any of the foregoing. In fact, they neglect to address the "personal attachment" factor at all. Instead, they offer in their Reply a subsection about "cultural and political ties"[274] that does not actually discuss "culture" or "politics."[275]

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

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

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

[270] *See* **Reply**, ¶ 49; **Amended Statement of Claim**, ¶ 20.

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

[272] **Ex. C-025**, Transcript of "Nuria" (29 June 2013), p. 5; **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, p. 311 (18 January 2013).

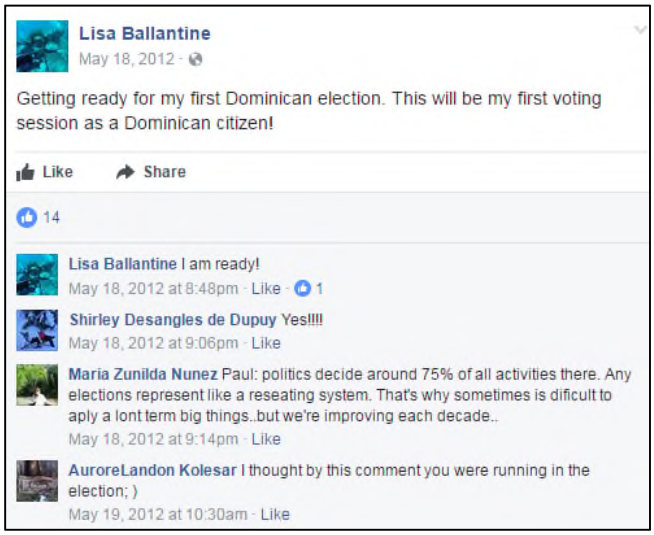
[273] **Ex. R-033**, Record of Swearing-In of M. Ballantine, *Secretaria de Estado de Interior y Policia* (18 November 2010) (pledging "***to be faithful to the [Dominican] Republic***, to respect and comply with the Constitution and the Laws of the Dominican Republic") (emphasis added) (translation from Spanish; the original Spanish version reads as follows: *"**de ser fiel a la República [Dominicana]**, de respetar y cumplir la Constitución y las Leyes de la República Dominicana*") (emphasis added); **Ex. R-034**, Record of Swearing-In of Lisa Ballantine, *Secretaria de Estado de Interior y Policia* (18 November 2010) (emphasis added).

[274] **Reply**, § II.B.2(e).

[275] *See* **Reply**, § II.B.2(e) (referring to (1) "religion and education," which the Ballantines themselves characterize as separate factors, and discuss in prior sections of the Reply; (2) "social" life, which is also a separate factor; and (3) the "hard work" that the Ballantines put into building Jamaca de Dios, which is not an element of the "dominant nationality" analysis).

Thus, they ignore the fact that they previously have stated, in a formal context, that "[they] identify closely with Dominican . . . customs,"[276] that when Lisa went back to Northern Illinois University[277] she "studied the history of the Dominican Republic focusing specially [sic] on the Taino history and art,"[278] that the Ballantines wanted to include Taino aesthetics in their business ventures,[279] and that they had met with a Dominican presidential candidate.[280]

76. The subsection on "political ties" also ignores the fact that the Ballantines exercised their right to vote in a 2012 Dominican election,[281] and that Lisa Ballantine thereafter posted about that four separate times on the social media site Facebook, enthusiastically stressing her Dominican citizenship:[282]



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

[277] **L. Ballantine 1st Statement**, ¶ 2.

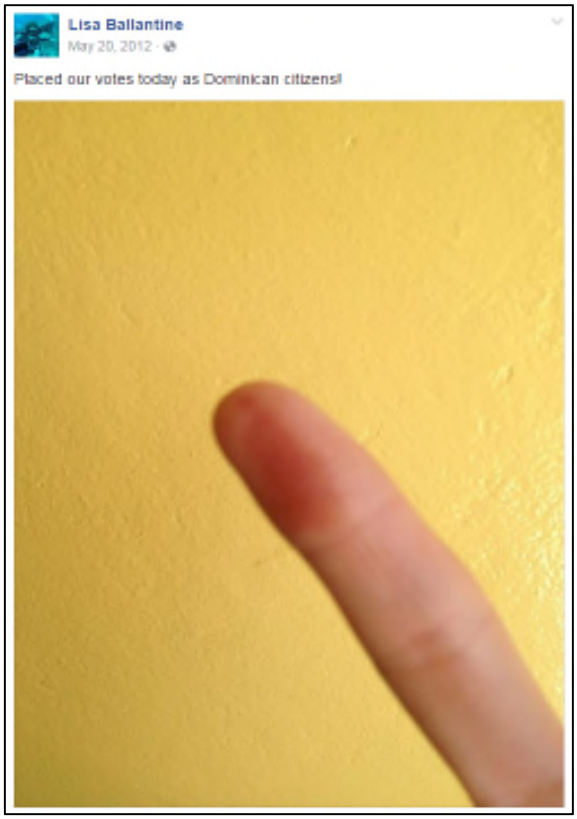
[278] **L. Ballantine 1st Statement**, ¶ 2.

[279] *See* **M. Ballantine 1st Statement**, ¶ 37 ("I also engaged Lynne Guitar, a Taino Indian anthropologist to help with the hotel design and decoration").

[280] **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, p. 180 (28 September 2014).

[281] **Ex. R-020**, Jarabacoa Voting Records (10 January 2017) (showing that Michael and Lisa Ballantine both voted in the 2012 election in the Dominican Republic, and that they and their daughter Tobi were eligible to vote in the 2016 election).

[282] *See* **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, pp. 444–447; *see also id.*, p. 379 (16 August 2012) ("Inaugurated the new president today in the DR. Let's hope for anti corruption [*sic*] and lots of growth!").



77. This point ***is*** addressed later on in the Reply, wherein the Ballantines assert that "[a]ny efforts to deem Lisa Ballantine's enthusiasm over voting in a Dominican election as proof of her dominantly Dominican nationality is silly and shows . . . desperation . . . ."[283] But a statement such as "Placed our votes today as Dominican citizens" is far from "silly," and reflects far more than mere "enthusiasm:" it reflects the Ballantines' own perception of themselves as Dominican nationals.

78. ***Center of economic life***. The Ballantines have made conflicting assertions with respect to this factor. The Notice of Intent states that "[t]he Ballantines have invested ***all of their*** efforts and ***money*** into planning and developing [a] gated community ***in the Dominican***

[283] **Reply**, ¶ 58.

Republic."[284] The Bifurcation Response, by contrast, asserts that "the center of their financial life has remained at all times in the United States."[285] The Reply does not address the point squarely. However, it seems that the Ballantines' more reliable assertion was the first one, which was made before the Dominican Republic raised its dual nationality-based jurisdictional objection.

79. It is true, as the Ballantines contend,[286] that they registered non-profit organizations, filed tax returns, and had credit cards,[287] a bank account, college savings accounts, and a retirement account in the United States. However, the ***non-profit organizations*** ("Jesus for All Nations" and "Filter Pure") mainly operated in the Dominican Republic. "Jesus for All Nations" is a religious organization that the Ballantines founded[288] when they first visited the Dominican Republic as missionaries. "Filter Pure," for its part, is an "entity that distributes innovative water filters developed by Lisa Ballantine throughout the DR and Haiti."[289] It has a factory[290] and two bank accounts in the Dominican Republic.[291]

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

[285] B**ifurcation Response**, ¶ 34.

[286] *See* **Bifurcation Response**, ¶ 34. The Ballantines also contended that "[they] have maintained US health insurance coverage through Blue Cross Blue Shield continuously since 2010." **Bifurcation Response**, ¶ 34(e). However, they have not explained either (1) what type of coverage they had, or, more importantly, (2) how exactly this relates to the Ballantines' "economic" lives.

[287] The Ballantines asserted in their **Bifurcation Request** (*see* ¶ 34(d)) that they "maintained" two credit cards with Citibank, and because some of the Ballantines' bank statements mention payments for a "Citi card" (*see* **Ex. R-241**, Account Balance Summary, Michael J Ballantine and Lisa M Ballantine (June 2012)) that would appear to be correct. However, the Ballantines failed to produce any credit card statements in document production.

[288] *See* **M. Ballantine 1st Statement**, ¶ 3 ("[I]n June of 2000, my wife Lisa and I decided to take a sabbatical and move to Jarabacoa, Dominican Republic, with our children, [another family], and another couple, in order to serve local churches and the poor. We founded a nonprofit corporation and named it Jesus for All Nations").

[289] **Amended Statement of Claim**, ¶ 19.

[290] *See* **L. Ballantine 1st Statement**, ¶¶ 5, 8.

[291] *See* **Ex. R-217**, Emails between L. Gil, Jamaca de Dios SRL, and R. Chong, Banco BHD (May 2014) (referring to Filter Pure by its Spanish name, which is "Agua Pure").

80. The Ballantines' U.S. ***tax returns***, for their part, state that neither Michael nor Lisa had a salary or earned wages during the time period following their naturalization in the Dominican Republic.[292] To the extent that they earned income at that time, 70 percent of it came from activity in the Dominican Republic,[293] mostly from "interest" payments from Jamaca de Dios.[294]

81. The U.S. ***bank account***, *i.e.*, "checking account #1110017084988 . . . at J.P. Morgan Chase Bank,"[295] reflects activity in both in the Dominican Republic and the United States, as shown in each of the four bank statements that the Ballantines have produced.[296] Moreover, "checking account #1110017084988"only tells part of the story. This is so for three reasons. *First*, the Ballantines had a separate (and much larger) Chase account for "Jamaca de Dios" "business,"[297] and despite the fact that a U.S. bank account was used, both the business

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[292] **Ex. R-244**, Ballantines' U.S. Tax Return (2010), p. 10; **Ex. R-245**, Ballantines' U.S. Tax Return (2011), p. 10; **Ex. R-246**, Ballantines' U.S. Tax Return (2012), p. 7; **Ex. R-247**, Ballantines' U.S. Tax Return (2013), p. 6; **Ex. R-248**, Ballantines' U.S. Tax Return (2014), p. 6.

[293] As indicated in the footnote immediately below, the Ballantines' U.S. tax returns reflect a total combined income of USD 370,553 between 2010 and 2014, and interest payments from Jamaca de Dios and Dominican banks account for USD 255,180 of that amount.

[294] The five U.S. tax returns that the Ballantines produced during document production reflect a total combined income of USD 370,553 between 2010 and 2014. *See* **Ex. R-244**, Ballantines' U.S. Tax Return (2010), p. 10; **Ex. R-245**, Ballantines' U.S. Tax Return (2011), p. 10; **Ex. R-246**, Ballantines' U.S. Tax Return (2012), p. 7; **Ex. R-247**, Ballantines' U.S. Tax Return (2013), p. 6; **Ex. R-248**, Ballantines' U.S. Tax Return (2014), p. 6. Of that amount, USD 255,000 is attributed to interest payments from Jamaca de Dios; USD 180 is attributed to interest payments from Dominican banks; USD 156 is attributed to interest payments from a U.S. bank; USD 39,167 is attributed to interest payments from a man by the name of Doug Koerner; and USD 76,050 is described as a "capital gain" associated with the Florida "investment property," discussed above, that the Ballantines have attempted to pass off as their "residence." *See* **Ex. R-244**, Ballantines' U.S. Tax Return (2010), p. 16; **Ex. R-245**, Ballantines' U.S. Tax Return (2011), p. 13; **Ex. R-246**, Ballantines' U.S. Tax Return (2012), p. 10; **Ex. R-247**, Ballantines' U.S. Tax Return (2013), p. 9; **Ex. R-248**, Ballantines' U.S. Tax Return (2014), pp. 8, 10.

[295] **Bifurcation Response**, ¶ 34(b). During document production, the Ballantines produced only five bank statements, each representing a different month between 2010 and 2014.

[296] *See* **Ex. R-240**, Account Balance Summary, Michael J Ballantine and Lisa M Ballantine (June 2011); **Ex. R-241**, Account Balance Summary, Michael J Ballantine and Lisa M Ballantine (June 2012); **Ex. R-237**, Account Balance Summary, Michael J Ballantine and Lisa M Ballantine (May 2013); **Ex. R-236**, Account Balance Summary, Michael J Ballantine and Lisa M Ballantine (October 2014).

[297] **Ex. R-239**, Account Balance Summary, Jamaca de Dios (December 2010), p. 1 (identifying "Michael J. Ballantine DBA [*i.e.*, Doing Business As] . . . La Jamaca de Di[os]" as the name on the account, and using the "Airmans Drive" address).

itself and its financial activity was centered in the Dominican Republic. *Second*, it appears that much of the money in "account #1110017084988" originated in the Jamaca de Dios account; the relevant bank statements reflect monthly transfers from the Jamaca de Dios account that range from USD 18,000 to USD 70,000.[298] *Third*, during that time period the Ballantines ***also*** had at least 13 different bank accounts with three different financial institutions in the Dominican Republic. Because the Ballantines only produced a handful of bank statements from those accounts, it is difficult to get a sense of how much money they contained. However, it ***is*** clear that the number is substantial, as Figure 6 below illustrates. It also is clear that the amount of money in each account changed significantly every year, which indicates activity in the Dominican Republic.

[298] *See, e.g.*, **Ex. R-241**, Account Balance Summary, Michael J Ballantine and Lisa M Ballantine (June 2012), p. 2 (reflecting deposits in the amount of USD 70,000 from "Chk 2411," which are the last four digits of the Jamaca Account); **Ex. R-237**, Account Balance Summary, Michael J Ballantine and Lisa M Ballantine (May 2013), p. 2 (reflecting deposits in the amounts of USD 18,000 from "Chk 2411"); **Ex. R-236**, Account Balance Summary, Michael J Ballantine and Lisa M Ballantine (October 2014), p. 2 (reflecting a deposit in the amount of USD 20,000 from "Chk 2411").

Figure 6: The Ballantines' Dominican Bank Accounts[299]

Bank	Account No.	Balance in 2011	Balance in 2012	Balance in 2013	Balance in 2014
Banco Popular	726792641	RD 4,254,770.36[300]	RD 5,252,034.05[301]	–	RD 723,372.34[302]
	75168602	RD 539,268.42[303]	RD 1,099,078.05[304]	–	RD 770,980.49[305]
	769264094	RD 380,700[306]	–	–	–
	719714560	–	RD 595,234[307]	–	RD 333,942.77[308]
	777305327	–	USD 2,498[309]	–	USD 9,737.82[310]
Asociación La Vega Real de Ahorros & Préstamos	D047ALVR0000000042-003-000171-3	–	–	RD 805,025.99[311]	–
Banco BHD	40851944-001-7	RD 1,050,304.19[312]	–	–	–
	1057299-002-8	RD 21,807.92[313]	–	–	–
	1057299-003-6	RD 631,448.79[314]	–	–	–

[299] The information herein is based on the handful of documents that the Ballantines submitted during document production.

[300] *See* **Ex. R-221**, Letter from Banco Popular Dominicano (4 April 2012).

[301] *See* **Ex. R-230**, Letter from Banco Popular Dominicano to Jamaca de Dios (14 January 2013).

[302] *See* **Ex. R-248**, Ballantines' U.S. Tax Return (2014).

[303] *See* **Ex. R-221**, Letter from Banco Popular Dominicano (4 April 2012).

[304] *See* **Ex. R-230**, Letter from Banco Popular Dominicano to Jamaca de Dios (14 January 2013).

[305] *See* **Ex. R-248**, Ballantines' U.S. Tax Return (2014).

[306] *See* **Ex. R-220**, Letter from Banco Popular Dominicano (9 April 2012) (explaining that this was the average amount in 2011).

[307] *See* **Ex. R-288,** Letter from Banco Popular Dominicano (14 January 2013).

[308] *See* **Ex. R-248**, Ballantines' U.S. Tax Return (2014).

[309] *See* **Ex. R-230**, Letter from Banco Popular Dominicano to Jamaca de Dios (14 January 2013).

[310] *See* **Ex. R-248**, Ballantines' U.S. Tax Return (2014).

[311] *See* **Ex. R-215**, Certification, Asociación La Vega Real de Ahorros y Préstamos (15 January 2013).

[312] *See* **Ex. R-219**, Letter from Banco BHD to Jamaca de Dios SRL (9 April 2012).

[313] *See* **Ex. R-219**, Letter from Banco BHD to Jamaca de Dios SRL (9 April 2012).

[314] *See* **Ex. R-219**, Letter from Banco BHD to Jamaca de Dios SRL (9 April 2012).

Bank	Account No.	Balance in 2011	Balance in 2012	Balance in 2013	Balance in 2014
	1133166-00015	RD 1,272,281.69[315]	–	RD 46,232.23[316]	–
	0751973-001-9	USD 167,407.76[317]	–	USD 24,609.45[318]	USD 914.87[319]
	1179360-0018	–	–	RD 1,013,030[320]	–
	0851944-0017[321]	–	–	–	–
Totals	**13 Accounts**	RD 8,150,581[322] + USD 167,407.76	RD 6,948,844[323] + USD 2,498	RD 1,864,288[324] + USD 24,609.45	RD 1,828,296[325] + USD 10,652.69

82. As for the U.S. retirement account and U.S. college savings accounts, these are red herrings. The ***retirement account*** was opened "[m]any years ago,"[326] and seems to have been dormant for quite some time. As best the Dominican Republic can discern, the Ballantines neither contributed to, nor withdrew from, the retirement account at any point after they became Dominican nationals.[327] The story with the ***college savings accounts*** is similar. Such accounts

[315] *See* **Ex. R-216**, Letter from Banco BHD to Jamaca de Dios SRL (5 April 2012).

[316] *See* **Ex. R-222**, Letter from Banco BHD to M. Ballantine (16 January 2013) (explaining that this was the average amount for 2013).

[317] *See* **Ex. R-216**, Letter from Banco BHD to Jamaca de Dios SRL (5 April 2012).

[318] *See* **Ex. R-223**, Letter from Banco BHD to M. Ballantine (16 January 2013) (explaining that this was the average amount for 2013).

[319] *See* **Ex. R-217**, Emails between L. Gil, Jamaca de Dios SRL, and R. Chong, Banco BHD (May 2014).

[320] *See* **Ex. R-217**, Emails between L. Gil, Jamaca de Dios SRL, and R. Chong, Banco BHD (May 2014).

[321] *See* **Ex. R-217**, Emails between L. Gil, Jamaca de Dios SRL, and R. Chong, Banco BHD (May 2014).

[322] On 1 January 2011, USD 1 was equivalent to RD 37.2. Accordingly, the amount above would have corresponded to approximately USD 219,102.

[323] On 1 January 2012, USD 1 was equivalent to RD 38.5. Accordingly, the amount above would have corresponded to approximately USD 180,490.

[324] On 1 January 2013, USD 1 was equivalent to RD 39.9. Accordingly, the amount above would have corresponded to approximately USD 46,724.

[325] On 1 January 2014, USD 1 was equivalent to RD 42.3. Accordingly, the amount above would have corresponded to approximately USD 43,222.

[326] **M. Ballantine 2nd Statement**, ¶ 13.

[327] *See* **Ex. R-233**, Ameritrade Statement (2010), p. 3; **Ex. R-234**, Ameritrade Statement (2011), p. 3; **Ex. R-235**, Ameritrade Statement (2012), p. 3; **Ex. R-283**, Ameritrade Statement (2013), p. 3; **Ex. R-232**, Ameritrade Statement (2014), p. 3.

were opened in 2004, for the benefit of the Ballantines' children. However, it appears that the Ballantines have not deposited money into them since early 2005.[328]

83. ***Center of social and family life***. The Ballantines do not squarely address this factor in their Reply. However, based on their argument that they "socialized almost exclusively with Americans at their restaurant and home"[329] it appears that they have misunderstood the nature of the inquiry. The question here is not about the national origins of the people with whom the Ballantines socialized, but rather *where* — in a physical/geographic sense — the majority of their social and family life actually occurred.

84. The answer to that question cannot be "the United States." As noted above, the Ballantines spent the majority of their time between 2010 and 2014 in the Dominican Republic,[330] in a "community"[331] that they intentionally had designed to promote their vision of "social life."[332] Friends from the United States visited often,[333] and their daughter and grandchild moved there to stay.[334] However, they also "socialized frequently"[335] with people

[328] *See generally* **Ex. R-238**, College Savings Account Records for the Ballantine Children.

[329] **Reply**, ¶ 47.

[330] *See* Figure 4, above.

[331] *See* **M. Ballantine 1st Statement**, ¶ 6 ("Lisa and I discussed at length the concept of a luxurious gated community unlike the single family houses that were slowly appearing throughout the mountains of Jarabacoa"), ¶ 22 ("I was trying to achieve something much more comprehensive than simply selling a lot of land").

[332] **Amended Statement of Claim**, ¶ 42.

[333] *See, e.g.*, **Ex. R-231**, Email from S. Lewis, Aroma de la Montaña, to M. Sarante (14 April 2011) ("Michael's friend who is an engineer [*i.e.*, Eric Kay, the Ballantines' expert] will be here today for the next few months constructing a road on the mountain . . . ."); **Ex. R-012**, Greg Wittstock, A Man and His Mountain, A Woman and Her Heart (27 February 2013) (posting pictures from his trips to visit the Ballantines); **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, Facebook Website, p. 10 (13 December 2016) ("[H]ere is my friend Carla, and Blake, running in the DR with me. They were always so great about staying [c]onnected and visiting us in the DR"), p. 103 (27 May 2015) ("Our good friend Greg Wittstock . . . shares some of what he learns through both success and failure . . . . This is a great company and a great family! They have been faithful friends through the years and have supported [Filter Pure] and come for many visits as our lives took hold in the DR"), p. 106 (17 May 2015) (post from a friend: "I loved seeing all of the running energy in the DR when I visited").

[334] **W. Proch 1st Statement**, ¶ 5.

[335] **L. Ballantine 2nd Statement**, ¶ 7.

who were local to Jarabacoa, and developed such close bonds that the latter even agreed to submit witness statements in this arbitration on their behalf.[336] The Ballantines also developed close ties with their colleagues at Jamaca de Dios, who became "some of [their] favorite people . . . ."[337]

85. In light of the foregoing, the Ballantines cannot credibly claim that this factor militates in favor of a conclusion that the Ballantines' dominant nationality at the relevant time was their U.S. nationality.

86. ***Other factors raised in the Bifurcation Response***. In the Reply, the Ballantines insist that the Tribunal should also consider the additional factors that they had mentioned in their Bifurcation Response — namely, "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 . . . ."[338] However, of these factors, the only two that they actually discuss are "education" and "religion."[339] It seems, therefore, that the Ballantines do not contest the Dominican Republic's discussion of the other factors. Moreover, many of the factors are irrelevant because they focus on time periods prior to the Ballantines' acquisition of their second nationality.

87. In terms of ***education***, the Ballantines (1) recognize that Lisa Ballantine "went back to Northern Illinois University"[340] to "stud[y] ceramic filter manufacturing"[341] and "the

[336] *See generally* J. Schumacher 1st Statement; S. Taylor 1st Statement.

[337] **Ex. R-037**, Lisa Ballantine's Facebook Profile Page, p. 99 (9 June 2015) ("Spending one of our last days here with some of our favorite people, the staff at Jamaca de Dios").

[338] **Reply**, ¶ 35.

[339] *See* **Reply**, §§ II.B.2(c), II.B.2(d).

[340] **L. Ballantine 1st Statement**, ¶ 2.

[341] **L. Ballantine 1st Statement**, ¶ 2.

history of the Dominican Republic"[342] in order to "create a social entrepeneurial [*sic*] startup that would focus on clean water"[343] in Jarabacoa,[344] and (2) do not contest that the foregoing is indicative of a connection to the Dominican Republic. They make any other arguments in respect of their own educational paths. Instead, they encourage the Tribunal to consider "the educational path taken by the Ballantine children,"[345] and the fact that Josiah and Tobi were sent to a so-called "American school"[346] in Jarabacoa. The Reply characterizes this as evidence of such a strong commitment to "U.S. educational ideologies"[347] that it indicates a "dominant American nationality."[348] Yet if such a strong commitment had existed, the Ballantines presumably would have sent their children to U.S. schools from start to finish. As noted above, however, the Ballantines chose to keep their children ***out of*** U.S. schools when they were living in the U.S.[349]

88. With respect to ***religion***, the Ballantines assert yet again that, "[a]t all times while in Jarabacoa, [they] regularly attended an American church . . . ."[350] However, it is not clear what that term means ("American church"), or why it would even matter, given that the issue here is not what faith the Ballantines may practice (or whether the headquarters of the church

[342] **L. Ballantine 1st Statement**, ¶ 2.

[343] **L. Ballantine 1st Statement**, ¶ 2.

[344] **L. Ballantine 1st Statement**, ¶ 2 ("After visiting Jarabacoa, I realized that in addition to being a perfect location for our vision of a luxury residential community, it was also a perfect location for my desire to create a social entrepeneurial [*sic*] startup that would focus on clean water").

[345] **Reply**, ¶ 40.

[346] **Reply**, ¶ 41.

[347] **Reply**, ¶ 41.

[348] **Reply**, ¶ 40.

[349] **Ex. R-250**, From art to intervention, Chicago Tribune (23 March 2011), p. 1 (explaining that "[Lisa] Ballantine . . . home-schooled her four children"); *see also* **Ex. R-079**, About the Artist, Lisa Ballantine, My Dove Ceramics (last visited 20 May 2017) ("The first 50 years of my life have been dedicated to pouring into and adventuring with my four children and husband. We have ***homeschooled***, performed, raced, and traveled the world together, spending the last 15 years in the Dominican Republic") (emphasis added).

[350] **Reply**, ¶ 44.

they attended is in the United States), but rather *where* — in a physical/geographic sense — they went to church and practiced their faith. The fact itself that "the Ballantines had a "strong connection to [a] church . . . ***in Jarabacoa***"[351] confirms their integration into the community, and signifies that the religion factor, too, supports the conclusion that the Ballantines' dominant ties and activities at the critical time were in the Dominican Republic.

89. ***Other factors raised in the Reply***. In addition to the foregoing, the Ballantines contend that the Tribunal also should consider "[t]he laws regarding dual nationality in the U.S. and the D.R.,"[352] "[h]ow the Ballantines viewed themselves,"[353] and "[h]ow the U.S. and the D.R. viewed the Ballantines."[354] However, the Ballantines' arguments based on these factors do not support their position.

90. For example, the Ballantines' main argument with respect to "***[t]he laws regarding dual nationality in the U.S. and the D.R.***"[355] is that Dominican law does not matter, because Dominican authorities supposedly did not "respect Dominican citizenship"[356] in a separate instance that has nothing whatsoever to do with this case.[357] As discussed below, the Ballantines raise similar arguments on the merits, and they all suffer from the same flaw — namely, that laws exist and continue to apply irrespective of whether a private citizen is convinced that they are perfectly applied and policed in every instance.

[351] **Reply**, ¶ 45.
[352] **Reply**, § II.B.5.
[353] **Reply**, § II.B.3.
[354] **Reply**, § II.B.4.
[355] **Reply**, § II.B.5 (emphasis added).
[356] **Reply**, ¶ 74.
[357] For that reason, although the Dominican Republic disputes the Ballantines' characterization, it will not discuss the issue further herein.

91. The Ballantines also assert here that, because "naturalized Dominicans can have their citizenship taken away,"[358] their naturalization in the Dominican Republic only represented a "tenuous" connection, "not a bond of strength that would show that the Ballantines were Dominican."[359] As discussed above, however, the Ballantines' connection to the Dominican Republic was anything but tenuous, and the circumstances in which naturalization can be lost or voided are irrelevant to the strength of the person's ties to that country.

92. The Ballantines' two arguments with respect to "***[h]ow the[y] viewed themselves***"[360] are also flawed. The ***first*** such argument is that "the Ballantines have testified that they viewed themselves as U.S. citizens,"[361] and that "[t]heir testimony to that is end of record."[362] The latter phrase appears to be a variation on the phrase "end of story." However, the Ballantines' own self-serving assertion simply cannot be the "end" of the inquiry. It is for the Tribunal, not the Ballantines, to determine which nationality was dominant as of 11 September 2014,[363] based on objective and contemporaneous evidence.

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[358] **Reply**, ¶ 73 (citing **CLA-050-Response**, Law No. 1683 of 16 April 1948 Relating to Naturalisation, Ministry of Interior (16 April 1948), Art. 12 (which authorizes the Executive Branch to "revoke any naturalization when the beneficiary" does something like "[t]ake[] up arms against the Republic" or "[c]ommits acts of disloyalty, unfaithfulness, ingratitude or indignity against the Republic, its leaders, dignitaries or institutions," "[m]oves his domicile abroad, within one year of obtaining his naturalization," or "[p]articipates as author or accomplice in actions or businesses aimed at overthrowing the legally constituted Government or attempts the assassination of the Head of State . . . .")).

[359] **Reply**, ¶ 73.

[360] **Reply**, § II.B.3 (emphasis added).

[361] **Reply**, ¶ 50. The Ballantines attempt to build on this argument in a different section of the Reply, by emphasizing that "[t]hey exclusively used their US passports for travel everywhere other than to the DR . . . ." **Reply**, ¶ 39. Be that as it may, it seems unlikely — given the variety of ways in which the Ballantines used their Dominican nationalities — that they were attempting to make a statement "to the world" about their dominant nationality (as the Reply contends; *see* ¶ 39). The more likely explanation is that the Ballantines did not want to spend time or money on travel visas, which would have been required for Dominican citizens but not for U.S. citizens.

[362] **Reply**, ¶ 46.

[363] *See* **Ex. R-010**, DR-CAFTA, Art. 10.28 (stating 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," and thereby confirming that the dominant nationality inquiry is not a self-judging one) (emphasis added).

93. The ***second*** argument under this heading is that any "enthusiasm" for the Dominican Republic expressed by Lisa Ballantine on her Facebook page should be ignored.[364] The problem with this is that even if one were to ignore Lisa's contemporaneous account on Facebook of her life in the Dominican Republic, as explained above, the Ballantines' actions (and many of their past statements) confirm that they repeatedly and enthusiastically declared and exercised their Dominican nationality.

94. The Ballantines' five arguments on the question of "***[h]ow the U.S. and the D.R. viewed the Ballantines***"[365] are equally problematic. The ***first*** is that the United States must have viewed the Ballantines as having dominant U.S. nationalities,[366] because "U.S. diplomatic officials advocated on behalf of the Ballantines to Respondent's officials,"[367] and supposedly would not have done so if they had "viewed the Ballantines as dominantly and effectively Dominicans . . . ."[368] This argument might have been plausible if the U.S. officials in question had known at the time that the Ballantines were dual nationals. However, there is no evidence that they did. As far as the Dominican Republic is aware, the United States does not keep a database of dual nationals. Thus, unless the Ballantines had informed the U.S. embassy officials with whom they spoke that they were also Dominican nationals (and there is no evidence in the record to indicate that they did), there is no reason why the U.S. officials should have *known* about the dual nationality issue — let alone commented upon it.

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[364] *See* **Reply**, ¶ 56.
[365] **Reply**, § II.B.4 (emphasis added).
[366] *See* **Reply**, ¶¶ 63–64.
[367] **Reply**, ¶ 63.
[368] **Reply**, ¶ 64.

95. The Ballantines' ***second*** argument is that "Respondent also considered the Ballantines to be foreign investors, and to be dominantly American."[369] Here, they emphasize that, in May 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,"[370] and that, following the meeting, Mr. Rodríguez referred to the Ballantines as "foreign investors" in certain correspondence.[371] From this the Ballantines infer that Mr. Rodríguez must have "understood that the Ballantines were dominantly US investor . . . ."[372] However, the problem — once again — is that there is no evidence that Mr. Rodríguez was aware that the Ballantines were dual citizens (*i.e.*, that they were anything other than U.S. nationals). The Dominican Republic does not maintain a database of dual nationals and in any event there is no reason why Mr. Rodríguez would have known that the Ballantines had become naturalized Dominican nationals, unless the Ballantines had told him so affirmatively. Importantly, however, Michael Ballantine omitted that fact when he informed Mr. Rodríguez of the "situation [with] Jamaca de Dios . . . ."[373]

96. The Ballantines' ***third*** argument is that there supposedly is "a mountain of circumstantial evidence that Respondent's officials viewed the Ballantines as U.S. citizens and not Dominicans."[374] However, such "evidence" consists merely of a recap of the Ballantines' "discrimination" claims in this case, and to use those arguments as a basis for determining

[369] **Reply**, ¶ 65 (emphasis omitted).
[370] **Reply**, ¶ 65 (emphasis omitted).
[371] **Reply**, ¶ 65 (citing **Ex. C-026**, Letter from Jean Alain Rodríguez to Bautista Rojas Gómez (1 July 2013)) (emphasis omitted).
[372] **Reply**, ¶ 65.
[373] **Ex. R-242**, Letter from M. Ballantine to J.A. Rodriguez (CEI-RD) (30 May 2013), p. 1.
[374] **Reply**, ¶ 68.

jurisdiction would be to put the cart before the horse, since the proper order is for the Tribunal to determine first whether or not it has jurisdiction, and only then, if it does, to consider the merits.

97. The Ballantines' ***fourth*** argument is that, "[i]n 2010, shortly after the Ballantines became naturalized Dominican citizens, they applied to have Jamaca de Dios registered as a foreign investment under the Dominican Foreign Investment Law 16-95."[375] However, the Ballantines fail to explain how this relates to "[h]ow the U.S. and the D.R. viewed the Ballantines,"[376] and (in any event) as they themselves concede, they ultimately "did not complete the registration process . . . ."[377] In their Reply, they claim that this was because "they were awaiting approval of their Phase 2 permitting request . . . ."[378] However, the Ballantines told a different story when withdrawing their application; at that time, they claimed to be unable to locate basic documents about their own investment.[379]

98. The Ballantines' ***fifth***, and final, argument is that, "[i]n July of 2013, Michael Ballantine became an associate member of the American Chamber of Commerce in the Dominican Republic."[380] In the Reply, the Ballantines attempt to characterize this as evidence that "Respondent . . . considered the Ballantines to be foreign investors, and to be dominantly American."[381] However, they fail to explain how or why that is so. Moreover, as the Reply itself states (and the underlying exhibit confirms), Michael Ballantine became an "***associate*** member" of the American Chamber of Commerce in the Dominican Republic

[375] **Reply**, ¶ 65 (emphasis omitted).
[376] **Reply**, § II.B.4 (emphasis added).
[377] **Reply**, ¶ 65.
[378] **Reply**, ¶ 65.
[379] *See generally* **Ex. R-224**, Ballantines' Exchanges with CEI-RD (2 September 2013 to 28 November 2013).
[380] **Reply**, ¶ 65.
[381] **Reply**, ¶ 65 (emphasis omitted).

("**AmChamDR**").[382] This is important, because AmChamDR has ***multiple*** categories of membership. "Associate" members, like Michael Ballantine, are "[l]egal persons, or entities, established in the Dominican Republic, ***of any nationality***, who have commercial ties with the United States of America or who, in the opinion of the Chamber, share the same mission and objectives for the incentive of commercial relations and investments in a sustainable environment."[383] Thus, Dominican persons can be associate members. In contrast, legal entities that are owned or controlled by U.S. nationals are given a different designation: "US-Linked members."[384]

* * *

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

B. The Claims In This Case Also Violate DR-CAFTA's Rule That The Claims Must Involve "Obligations" Under Articles 10.1 to 10.14 Of DR-CAFTA

100. One of the rules set forth in Chapter Ten of DR-CAFTA (and, more specifically, in Article 10.16.1) is that the only type of "claim" that a "claimant" may submit to arbitration is "a claim that the respondent has breached an obligation under [Articles 10.1 to 10.14]."[385] In practical terms, this means (1) that claims based on alleged violations of obligations ***other*** than those set forth in Articles 10.1 to 10.14 of DR-CAFTA are not permitted, and (2) that the

[382] **Reply**, ¶ 65 (emphasis added); *see also* **Ex. C-085**, Letter from William Malamud to M. Ballantine (24 July 2013), p. 1.
[383] **Ex. R-249**, AmChamDR bylaws, Art. 9(b) (emphasis added).
[384] *See* **Ex. R-249**, AmChamDR bylaws, Art. 9(a).
[385] **Ex. R-010**, DR-CAFTA, Art. 10.16.1(a).

Ballantines must demonstrate that one or more of the obligations set forth in Articles 10.1 to 10.14 of DR-CAFTA apply in this case.

101. In their pleadings, the Ballantines do not contest the foregoing. In fact, they barely address this rule at all. However, because it provides an independent basis for declining jurisdiction over the claims herein, it seems useful to summarize the key points yet again.

1. The Ballantines' Claims Based on Chapter 18 Of DR-CAFTA Are Barred

102. As the Tribunal will recall, in the Amended Statement of Claim, the Ballantines purported to assert claims not only under Articles 10.3, 10.4, 10.5, and 10.7 of DR-CAFTA,[386] but also under what they called "Article 10.18: Transparency"[387] or "Article 18"[388] — which, as best the Dominican Republic could discern, were references to Chapter 18 of DR-CAFTA.[389] Because "Chapter 18" is not one of the DR-CAFTA provisions listed in Article 10.16.1, this claim clearly contravenes the rule that the only type of "claim" that a "claimant" may submit to arbitration is "a claim that the respondent has breached an obligation under [Articles 10.1 to 10.14]."[390]

103. In their Reply, the Ballantines attempted to backpedal on this point, arguing that their assertion that "[t]he Respondent's actions constitute a violation of transparency under Article 18 of CAFTA-DR"[391] should not be construed as a claim for a violation of Chapter 18

[386] *See* **Amended Statement of Claim**, ¶ 15.

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

[388] *See* **Amended Statement of Claim**, § V.F.

[389] There is no such thing as "Article 10.18: Transparency." Article 10.18 of DR-CAFTA is titled "Conditions and Limitations on Consent of Each Party." **Ex. R-010**, DR-CAFTA, Art. 10.18. Moreover, the numbering in Chapter 18 begins with "Article 18.1." There is no such Article as "Article 18."

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

[391] **Amended Statement of Claim**, § V.F.

itself.[392] Rather (they contend), it is a claim under ***Article 10.5***[393] that uses the contents of Chapter 18 "as a guide."[394] This is a distinction without a difference — especially in light of the Ballantines' assertion that "the Tribunal should consider the obligations under Chapter 18 as the types of transparency obligations that CAFTA (and NAFTA) states [sic] view as necessary in the investment context."[395] If it were true that the Chapter 18 obligations were "necessary in the investment context," then they would have been included in the "investment" chapter of DR-CAFTA (*i.e.*, Chapter Ten). The fact that they were ***not*** so included must be deemed intentional, and the Tribunal cannot simply allow the contents of Chapter 18 to be imported into Chapter Ten through the back door. To do so would be to ignore the interpretative principle *expressio unius est exclusio alterius*, and the fact that (1) Article 10.16.1 is clear that only claims based obligations set forth in Articles 10.1 to 10.4 can be submitted to arbitration, and (2) Chapter 18 does not contain an investor-State dispute resolution provision.

2. The Ballantines' Chapter Ten Claims Are Likewise Impermissible, Due to Lack of Consent

104. The remainder of the Ballantines' claims are based on Articles 10.3, 10.4, 10.5, and 10.7 of DR-CAFTA.[396] However, these, too, exceed the scope of the Dominican Republic's consent to arbitration. This is so because the Dominican Republic's consent to arbitration applies only to "claim[s] that the respondent has ***breached an obligation*** under [Articles 10.1 to

[392] *See* **Reply**, ¶ 417 ("Respondent asserts that the Ballantines are seeking a claim under Chapter 18 of CAFTA-DR. The Ballantines are not").

[393] *See* **Reply**, ¶ 417.

[394] **Reply**, fn. 471 ("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").

[395] **Reply**, ¶ 421.

[396] *See* **Amended Statement of Claim**, ¶ 15. The Ballantines have since abandoned their claim under Article 10.4 (*i.e.*, their MFN claim).

10.14],"[397] and State action can only be deemed a breach of an international obligation ***if*** "***the State is bound by the obligation in question at the time the act occurs***."[398] At the time of the various acts that the Ballantines have alleged, however, the Dominican Republic was not bound by any of the "obligations" that the Ballantines attempt to invoke.

105. As the Dominican Republic has explained, and the Ballantines have not contested, the obligations described in Articles 10.3, 10.4, 10.5, and 10.7 of DR-CAFTA only apply to "covered investments" and "investors of another Party."[399] The term "covered investment" is defined in DR-CAFTA Article 2.1 as an investment in the territory of one DR-CAFTA Party "of an investor of another Party."[400] And, as noted above, for purposes of the present case, the term "investor of another Party" refers to a person who attempts to make, is making, or has made an investment in the Dominican Republic, and whose dominant and effective nationality is his or her U.S. nationality.

106. Accordingly, to establish that consent to arbitration exists, the Ballantines must prove that their U.S nationality was their dominant and effective nationality at the time of the alleged State conduct underlying their claims. The foregoing is consistent with the explicit conclusions of the *Pac Rim v. El Salvador* tribunal regarding the meaning of the relevant DR-

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

[398] **RLA-011**, Articles on the Responsibility of States for Internationally Wrongful Acts, International Law Commission (2001), Art. 13 (emphasis added).

[399] **Ex. R-010**, DR-CAFTA, Art. 10.3 ("Article 10.3: National Treatment[.] 1. ***Each Party shall accord to investors of another Party*** . . . . 2. ***Each Party shall accord to covered investments*** . . . .") (emphasis added), Art. 10.4 ("Article 10.4: Most-Favored-Nation Treatment[.] 1. ***Each Party shall accord to investors of another Party*** . . . . 2. ***Each Party shall accord to covered investments*** . . . .") (emphasis added), Art. 10.5 ("Article 10.5: Minimum Standard of Treatment[.] 1. ***Each Party shall accord to covered investments*** . . . .") (emphasis added), Art. 10.7 ("Article 10.7: Expropriation and Compensation[.] 1. ***No Party may expropriate or nationalize a covered investment*** either directly or indirectly . . . .") (emphasis added).

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

CAFTA provisions,[401] and other investment arbitration tribunals have held the same outside of the DR-CAFTA context.[402] In fact, even the Ballantines themselves appear to concede this, at least in part, when they observe that it would be "more intuitive to evaluate a dual citizen's dominant nationality at the time of the alleged Treaty violations."[403] The rule is also confirmed by Article 44 of the Articles on State Responsibility, which states that "[t]he responsibility of a State may not be invoked if: (a) the claim is not brought in accordance with any applicable rule relating to the nationality of claims . . . ."[404]

107. As the Dominican Republic explained in its Bifurcation Request, and again in its Statement of Defense, the Ballantines have been vague — and perhaps deliberately so — about the timing of the alleged DR-CAFTA violations. As best the Dominican Republic can discern, the Ballantines' claims are based on alleged State actions that supposedly occurred between **January 2011** (when the Ministry of Environment received the Ballantines' request for permission to expand their development project), and **11 March 2014** (which is the latest possible date on which any event giving rise to a claim could have occurred, since the

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

[402] *See*, *e.g.*, **RLA-023**, *Serafín García Armas y Karina García Gruber v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-3, Decision on Jurisdiction (Grebler, Oreamuno Blanco, Tawil) (15 December 2014), ¶ 214; **RLA-021**, *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award (Kaufmann-Kohler, Brower, Landau) (24 March 2016), ¶ 327; **RLA-002**, *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction (Stern, Klein, Thomas) (18 July 2013), ¶¶ 299–300.

[403] **Reply**, fn. 34.

[404] **RLA-011**, Articles on the Responsibility of States for Internationally Wrongful Acts, International Law Commission (2001), Art. 44(a).

Ballantines submitted their claims to arbitration on 11 September 2014, but were required before doing so to wait until "six months ha[d] elapsed since the events giving rise to the claim").[405]

108. As explained above, however, the Ballantines' dominant nationality during that entire time period was their Dominican nationality. This means: (1) that, at the time of the alleged breach(es), the Ballantines were not "investor[s] of [the United States]," for purposes of Article 10.28; (2) that their supposed investments accordingly do not constitute "covered investments"; (3) that the "obligations" that the Ballantines purport to invoke therefore do not apply; and (4) that, since the Dominican Republic has only consented to the submission of a claim that the respondent has breached "an obligation" under the Treaty,[406] the Tribunal lacks jurisdiction.

C. Some Of The Claims In This Case Also Violate The Statute of Limitations Rule in Article 10.18.1 of DR-CAFTA

109. As the Dominican Republic has explained, in addition to the rules discussed in Parts A and B above, DR-CAFTA also provides in Article 10.18.1 that "no claim may be submitted to arbitration . . . if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged . . . and knowledge that the claimant . . . or the enterprise . . . has incurred loss or damage."[407] Because the Ballantines submitted their claims to arbitration on 11 September 2014 (by means of a Notice of Arbitration on that date), this means that the Ballantines cannot assert claims if, on or before

[405] **Ex. R-010**, DR-CAFTA, Art. 10.16.3.
[406] **Ex. R-010**, DR-CAFTA, Art. 10.16.1(a).
[407] **Ex. R-010**, DR-CAFTA, Art. 10.18.1.

11 September ***2011***, they knew or should have known about the conduct underlying such claims[408] and the alleged loss or damages that supposedly stemmed therefrom.[409]

110. As the Dominican Republic explained in its submission on admissibility,[410] this rule operates to bar all of the claims that the Ballantines had initially asserted based on the creation of the Baiguate National Park, given that documents that the Ballantines produced during document production[411] confirm that, as of 11 September 2011, the Ballantines had known for approximately one year about the creation of the Park and the restrictions that it imposed. As a practical matter, this in turn meant that any expropriation claim based on State conduct post-dating the Park's creation ***also*** was barred. This was so because (1) the Ballantines had alleged in their Amended Statement of Claim that "the Dominican Republic has expropriated the Ballantines' investment ***by the creation*** of the National Park,"[412] and (2) it is legally impossible to expropriate the same investment twice.[413]

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[408] *See* **CLA-015**, *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits (Keith, Cass, Fortier) (24 May 2007), ¶ 28 (addressing the substantively identical provision that appears in NAFTA, and explaining that the relevant question was "when [claimant] first had or should have had notice of the existence of ***conduct*** alleged to breach NAFTA obligations and of the losses flowing from it") (emphasis added).

[409] **RLA-098**, *Spence International Investments, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) (Bethlehem, Kantor, Vinuesa) (30 May 2017), ¶ 213 (explaining that the requirement of "actual or constructive knowledge of the loss or damage incurred in consequence of the breach implies that such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred. It neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result").

[410] *See generally* **Objections to Admissibility**.

[411] *See generally* **Ex. R-169**, Emails between M. Ballantine, Mario Mendez and Miriam Arcia of EMPACA, and Zuleika Ivette Salazar Mejia (22-29 September 2010); **Ex. R-170**, Email from Miriam Arcia to M. Ballantine, Mario Mendez, and Zuleica Zalazar (22 September 2010). In their Admissibility Response, the Ballantines argued repeatedly that, when quoting and discussing these documents in the Objection to Admissibility, the Dominican Republic had omitted certain language therefrom. *See, e.g.*, **Admissibility Response**, ¶¶ 3, 7, 110. They even went so far as to assert that costs should be awarded to them on that basis. **Admissibility Response**, ¶ 110. However, a simple review of the Objection to Admissibility confirms that the Dominican Republic not only *quoted* the language that the Ballantines claim was omitted, but even emphasized it in bold and italics, and discussed it in a subsequent paragraph. *See* **Objection to Admissibility**, ¶¶ 30, 32.

[412] **Amended Statement of Claim**, ¶ 14 (emphasis added).

[413] *See* **RLA-043**, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (Lalive, Chemloul, Gaillard) (8 May 2008), ¶ 622 (translation from Spanish; the original Spanish version states as follows: " . . . *es imposible expropriar dos veces seguidas los mismos bienes*").

111. In response to the foregoing, in their Admissibility Response of 17 November 2017, the Ballantines surprisingly took the position (A) that they have ***not*** in fact asserted any claims based on the creation of the Baiguate National Park,[414] and (B) that any such claim would suffer from conceptual flaws.[415] Of these points, only the second one is true. The first one is false because the Ballantines *did* in fact assert claims based on the creation of the Park — in not just one of their prior pleadings, but two.[416] For the Ballantines to contend otherwise is an

[414] **Admissibility Response**, ¶ 2 ("As the Ballantines have previously explained, the creation of the National Park itself did not give rise to a claim for the Ballantines"), ¶ 73 ("To be clear, the manner in which Respondent created the Park in 2009 was discriminatory, in that Respondent purposefully excluded Dominican properties from the Park. . . . But, even so, the drawing of lines of a Park is not by itself a breach. Had Respondent never used the existence of the Park as a basis to deny the Ballantines' development, or even as a basis to impose significant restrictions, Respondent would not have breached CAFTA"), ¶ 72 ("Put simply, there was no breach by Respondent in September 2010 with regard to the Park . . . .").

[415] *See* **Admissibility Response**, ¶ 14 ("Respondent makes no effort to identify any loss the Ballantines would have suffered with regard to the National Park *ipso jure* in September 2010"), ¶ 73 ("[T]he drawing of lines of a Park is not by itself a breach"), ¶ 76 ("The reason Respondent cannot point to any loss that Michael Ballantine knew he suffered in September 2010 is because there was not any as of that time with respect to the National Park"), ¶ 79 ("Lastly, we note that being in a national park, so long as you are able to build, is not a de facto detriment. For example, a U.K. report found that properties in national parks produced a premium of 22% over market price").

[416] *See* **Amended Statement of Claim**, ¶ 13 ("While the Ballantines acknowledge the Dominican Republic's right to appropriately create a national park, for a genuine public purpose, it cannot discriminate against the Ballantines in ***creating*** this Park, which it did here") (emphasis added), ¶ 14 ("At a minimum, the Dominican Republic has expropriated the Ballantines' investment ***by the creation of the National Park*** and thus must compensate the Ballantines for its significant commercial value") (emphasis added), ¶ 116 ("The belated invocation of the Baiguate National Park was inequitable to the Ballantines, as was the opaque process that apparently led to ***creation of the Park*** more than four years earlier") (emphasis added), ¶ 117 ("A simple review of the circumstances surrounding the ***creation of the Park*** exposes that the inclusion of the Ballantines' property was opaque, pretextual, unjustified, arbitrary, and discriminatory, and that the invocation of the Park as a barrier against expansion in January 2014 constituted an illegal expropriation of the Ballantines' investment in the Dominican Republic") (emphasis added), ¶ 120 ("The Ballantines, like all landowners within the Baiguate National Park, were given no advance notice of the expropriation of their land. Neither the Ballantines, nor other landowners, were notified by Respondent that ***a National Park had been created*** on their land") (emphasis added); **Reply**, ¶ 200 ("***The creation of the National Park*** was part of a corrupt scheme . . . in order to destroy the Ballantines' investment to the advantage of local interests") (emphasis added), ¶ 205 ("[***T]he establishment of the Baiguate Park***, and its use to deny development permission to the Ballantines, was not only expropriatory but also discriminatory") (emphasis added), ¶ 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") (emphasis added), ¶ 252 ("[T]he circumstances surrounding ***the creation of the National Park*** . . . are all inconsistent with Chapter 10 of CAFTA-DR . . . .") (emphasis added), ¶ 332 ("First, ***the creation of the National Park itself*** was discriminatory") (emphasis added), ¶ 357 ("[W]ith respect to the national park, the purported measure of ***creating the park*** is itself a violation of arbitrary conduct with respect to CAFTA-DR") (emphasis added).

improper (though characteristic) attempt to revise history. The Ballantines can, of course, abandon those claims, and the Dominican Republic assumes that this is what the Ballantines have now done. Accordingly, a lengthy discussion on the DR-CAFTA time bar has been rendered unnecessary.

112. Nevertheless, given the possibility that the Ballantines could attempt to re-assert the claims that they have already expressly disclaimed,[417] it seems useful to state expressly that the Dominican Republic does not accept the Ballantines' legal, procedural, or factual arguments on the admissibility issue (or the merits of the underlying claims), and that unless otherwise stated, nothing in this Rejoinder should be construed as acceptance thereof. Should the Ballantines indeed attempt to reinstate the claims that they already have abandoned, the Dominican Republic reserves its right to address their inadmissibility and (lack of) merit at the hearing.

III. MERITS

113. Throughout the Reply, the Ballantines insist that their merits case is "simple."[418] However, the reality is that, rather than "simple," it is over-simplified or simplistic — in large part because it ignores the nature and inherent complexity of environmental protection.[419]

114. The central theme of the Ballantines' merits case[420] is the allegation that, because other developers were permitted to build projects in parks, and on land with steep slopes, the

[417] *See* Letter from the Ballantines to the Tribunal (1 March 2018), p. 3 (asserting, despite the clear statements to the contrary that are quoted in the footnotes above, that "[t]he issue is the appropriateness of Respondent's conduct when it created the National Park and excluded similarly situated Dominican-owned lands from the Park, as the Ballantines have argued all along").

[418] *See, e.g.*, **Reply**, ¶¶ 1, 2, 9, 77, 91, 93, 107, 109, 119, 134, 197.

[419] *See generally* **RLA-107**, B.H. Thompson, Jr., Tragically Difficult: The Obstacles to Governing the Commons, Environmental Law, Volume 30 (2000) ["Thompson, Tragically Difficult"].

Ministry of Environment and Natural Resources ("**Ministry**") should have granted the Ballantines' request for a permit that would have allowed them to do the same.[421] On the surface, this argument may have some intuitive appeal. One problem, however, is that when the Ballantines claim that particular third-party projects were "permitted" or "allowed" — or that the Ministry "let" other developers proceed with construction — they typically are referring ***not*** to the grant of a Ministry permit, but rather to the fact that some people have developed projects without authorization,[422] in violation of Dominican law. The Ballantines claim that such instances mean "[t]hat Respondent's commitment to the environment is in name only,"[423] that the "[Ministry] does not take [environmental] resolutions seriously,"[424] and that "Respondent should be estopped from relying on its alleged laws . . . ."[425] However, such conclusions do not follow from the fact that some third parties may be operating without a permit.

115. There are always people who flout the law, or who try to "game the system." This unfortunately occurs often in the environmental arena (and as discussed below, even the

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

[420] In the merits section of the Reply, the Ballantines advance numerous factual arguments that ultimately do not give rise to any claim. In the interest of procedural economy, the Dominican Republic does not respond herein to each such assertion. Unless otherwise noted, this silence should not be construed as acceptance of the Ballantines' arguments.

[421] *See, e.g.*, **Reply**, ¶¶ 1, 3, 5, 6, 9, 79, 83, 104–70, 174, 183, 206–10, 247, 314–15, 334–35, 359, 456.

[422] *See, e.g.*, **Reply**, ¶ 3 (asserting that "Respondent has allowed many Dominican landowners to develop their property ***in the total absence of a permit***") (emphasis added), ¶ 5 (referring to "the multiple Dominican projects that have been permitted ***or simply allowed*** to develop") (emphasis added), ¶ 6 (describing projects that were "allowed to build ***without a permit***") (emphasis added), ¶ 9 (asserting that "there are now more at least [sic] 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*** . . . .") (emphasis added), ¶ 83 (referring to allegedly "competing projects that were approved ***or are building without a permit***") (emphasis added), ¶¶ 104–70 (conceding that, of the 18 projects that they mention, the following 12 were never granted an environmental permit (and some never even sought one): Aloma Mountain (*see* ¶ 106), La Montaña (*see* ¶ 156), Sierra Fria (*see* ¶ 157), Rancho Guaraguao (*see* ¶ 164), Los Auquellos (*see* ¶ 167); Monte Bonito (*see* ¶ 169), Jarabacoa Mountain Village (*see* ¶ 170), Cabaña Los Calabazos (*see* ¶ 170), Monte Sierra (*see* ¶ 170), Proyecto El Naranjo (*see* ¶ 170), Proyecto Santa Ana (*see* ¶ 170), Vista del Campo (*see* ¶ 170).

[423] **Reply**, ¶ 221.

[424] **Reply**, fn. 412.

[425] **Amended Statement of Claim**, § V.E.

Ballantines themselves have done it). In large part, this is a product of basic human nature; while many people agree that protecting the environment is important, most of them are unwilling to modify their own behavior[426] — especially when economic interests are at stake.[427] They tell themselves (often incorrectly) that they are already doing their part,[428] that their own actions are unlikely to have an impact,[429] and that the problem probably is not all that bad[430] — or if it is, that someone else is to blame,[431] and that it can be addressed later in any event.[432] Because of this, there will always be gaps in compliance,[433] and States cannot always fix that through policing (due to limitations in resources, among other reasons).[434] But that is just a reality of life — and indeed, one that DR-CAFTA explicitly recognizes and accepts.[435] The

[426] **RLA-107**, Thompson, Tragically Difficult, p. 246 (explaining that it is "difficult to get people to actively support solutions . . . ").

[427] **RLA-107**, Thompson, Tragically Difficult, p. 268 ("Many people have an amazing ability to shove their environmental values into a remote corner of their conscience when their economic interests are at stake").

[428] **RLA-107**, Thompson, Tragically Difficult, p. 261 (citing an experimental simulation of a fishery in which "[s]eventy-seven percent of the participants thought they had been 'cooperative,' even though they had not left sufficient fish for an optimal fishery," and "thirty-two percent reported that they had been 'cooperative' even though they took more than their proportionate share of *all* the fish in the fishery") (emphasis in original).

[429] **RLA-107**, Thompson, Tragically Difficult, p. 242.

[430] **RLA-107**, Thompson, Tragically Difficult, p. 259.

[431] *See* **RLA-107**, Thompson, Tragically Difficult, pp. 261–62 (explaining, citing a research simulation, that when "participants [are led to] believe that [a resource] shortage is man-made, they assume that someone else is the true culprit and that the culprit should cure the problem").

[432] **RLA-107**, Thompson, Tragically Difficult, p. 264 ("[M]ost people assume that they will be able to avoid, reduce, or ameliorate future risks. We tend to be optimists about the future, at least when taking precautionary steps today is costly").

[433] *See* **RLA-107**, Thompson, Tragically Difficult, p. 267 (explaining that solutions to environmental problems require cooperation from constituents).

[434] **RLA-106**, Aagaard, Owen, Pidot, Practicing Environmental Law, University Casebook Series (2017), p. 11 ("Laws . . . are not always effective tools. Enforcing a prohibition against pill-flushing, for example, might be so difficult that there is no sense trying"); **RLA-111**, P. Sands, Principles of International Environmental Law (Third Edition), Cambridge University Press (2012), p. 15 ("[E]ven where international environmental rules exist, there are difficulties of enforcement . . . .") ["P. Sands, Principles of International Environmental Law"].

[435] *See* **Ex. R-010**, DR-CAFTA, Art. 17.2.1(b) ("Enforcement of Environmental Laws. . . . 1. . . . (b) The Parties recognize that ***each Party retains the right to exercise discretion*** with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities") (emphasis added). As the *Al Tamimi v. Oman* tribunal explained in respect of the identically-

[FOOTNOTE CONTINUED ON NEXT PAGE]

Ballantines' position herein is functionally equivalent to that of a person who claims that, because there are other people who drive vehicles without wearing their seatbelts, a police officer must grant him express permission to do the same. That cannot be right. As the *Merrill & Ring* tribunal explained, "regulations addressed to social well-being are evidently within the normal functions of government and it is not legitimate for an investor to expect to be exempt from them."[436]

116. Another important reality that the Ballantines ignore, in their effort to characterize this case as "simple," is the inherent complexity of environmental regulation. As Professor Philippe Sands has explained in his treatise on international environmental law,[437] "the environment represents a complex system of interconnections,"[438] and this means that, "to understand the evolution and character of a particular environment it is necessary to consider a broad range of apparently unrelated factors," which not only "interact[] with each other in a number of ways that do not permit them to be treated as discrete,"[439] but also change over time as the Earth evolves. Because of this, any question about "environmental impact" is inherently difficult to answer at all[440] — especially considering (1) that various combinations of "law[] . . .

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worded provision in the U.S.-Oman FTA, "Article 17.2.1(b) acknowledges" that "[t]he enforcement of environmental laws and regulations . . . involves the exercise of prosecutorial discretion and allocation of limited governmental resources . . . ." **RLA-112**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman,* ICSID Case No. ARB/11/33, Award (Williams, Brower, Thomas) (3 November 2015), ¶ 458.

[436] **CLA-016**, *Merrill & Ring Forestry LP v. Canada*, ICSID Case No. UNCT/07/1, Award (Orrego Vicuña, Kenneth, Rowley) (31 March 2010), ¶ 233.

[437] Although Philippe Sands is well-known in the investment arbitration world as a public international law scholar, he also has considerable experience in international environmental law issues, and has spent more than 30 years writing, researching, teaching, and negotiating international agreements on the subject.

[438] **RLA-111**, P. Sands, Principles of International Environmental Law, p. 5.

[439] **RLA-111**, P. Sands, Principles of International Environmental Law, p. 5.

[440] *See* **RLA-106**, Aagaard, Owen, Pidot, Practicing Environmental Law, University Casebook Series (2017), p. 11.

science, economics, [and] ethics" have to be considered,[441] and (2) that every project and project site is unique and must be evaluated according to its own characteristics.

117. When these complexities are borne in mind, it becomes clear that the Ballantines' many complaints about the Dominican Republic's actions are based on a fundamental misunderstanding of the nature of environmental assessments, and of the practical limitations inherent in environmental protection.

118. In **Part A** below, the Dominican Republic recalls the events that gave rise to this case, pausing frequently to correct the Ballantines' multiple misstatements. Following that discussion, **Part B** demonstrates that the Ballantines' DR-CAFTA claims are unfounded and unwarranted, and that the Dominican Republic at all times observed its obligations under Chapter Ten of DR-CAFTA.

A. Events Giving Rise To The Ballantines' Claims

119. In their pleadings, the Ballantines jump back and forth between discussion of their own projects, on the one hand, and of the various other projects that they claim are "comparators," on the other. This makes it difficult to develop a clear sense of the Ballantines' project chronology (which perhaps was the Ballantines' intention, given that a chronological review of the evidence reveals deficiencies in their claims). The Dominican Republic focuses on such chronology below.

1. Project 1 (The "Access" Road)

120. In the early 2000s, the Ballantines decided to buy a tropical mountain[442] in the Dominican Republic. Michael Ballantine "was determined to develop it,"[443] and he and Lisa

[441] **RLA-106**, Aagaard, Owen, Pidot, Practicing Environmental Law, University Casebook Series (2017), p. 4.

"discussed at length the concept of a luxurious gated community"[444] that they would name "**Jamaca de Dios**."

121. The Ballantines decided that "such a development could be very successful if [they] could build a quality road up the mountain."[445] As Michael explained in his first witness statement, he was "very conscious that the key to success for La Jamaca de Dios was the road."[446] In fact, the road was so critical that the Ballantines concluded that they could not create a housing development without it.[447] As the Amended Statement of Claim explains, the "road . . . was the backbone of the complete development,"[448] and its "importance . . . cannot be overstated."[449]

122. The problem, however, was that "[m]ountain roads are difficult to build and to maintain."[450] Moreover, the Ballantines aspired to build a "type of mountain road [that] had never been attempted by a private enterprise in the Dominican Republic."[451] Michael Ballantine admits in his first witness statement that "[their] lawyer advised that the road would have the biggest environmental impact . . . ."[452]

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

[442] **Ex. R-012**, Greg Wittstock, A Man and His Mountain, A Woman and Her Heart (27 February 2013), p. 3.

[443] **M. Ballantine 1st Statement**, ¶ 7.

[444] **M. Ballantine 1st Statement**, ¶ 6.

[445] **M. Ballantine 1st Statement**, ¶ 6.

[446] **M. Ballantine 1st Statement**, ¶ 12.

[447] *See* **M. Ballantine 1st Statement**, ¶ 14 ("My lawyer advised that the road would have the biggest environmental impact, and ***after*** the road was built and after the trees are planted, we could ***then*** seek approval from the Ministry of the Environment to subdivide the property [to] build houses") (emphasis added).

[448] **Amended Statement of Claim**, ¶ 46.

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

[450] **Amended Statement of Claim,** ¶ 45; *see* **M. Ballantine 1st Statement**, ¶ 15 ("The key to a mountain road in the tropics is storm water management. The velocity and force storm water creates coming off a mountain is a beauty of nature to behold and it will take out anything in its path if not directed and managed properly").

[451] **M. Ballantine 1st Statement**, ¶ 15.

[452] **M. Ballantine 1st Statement**, ¶ 14.

123. In late 2004, the Ballantines approached the Ministry with a plan to "plant more than 50,000 trees across their new property."[453] At the time, reforestation throughout the Dominican Republic was one of the Ministry's top priorities.[454] Thus, when the Ballantines asked to "construct[] ***an access road***"[455] in order "to facilitate the reforestation plan,"[456] the Ministry allowed them to do it,[457] but — to ensure that the scope of the road project would be limited in scope and environmentally safe — instructed that the road should be built without "extract[ing] or "transport[ing]" any "sand or gravel."[458]

124. The Ballantines, however, proceeded blithely to ignore the limitation imposed by the Ministry. As Michael himself concedes, "[d]uring the course of the [road] construction, [the Ballantines] spent significant sums on ***heavy equipment***, fuel, [and] ***earth moving***."[459] The "earth moving" aspect involved "find[ing] large deposits of rock and road grade material in varying place[s] throughout the mountain" and then using "[t]his material . . . for backfill, engineered support structures, road base, and drainage channels."[460] Thus, without the Ministry's knowledge, the Ballantines went far beyond what the Ministry had authorized them to do for purposes of building an "access road."

[453] **Amended Statement of Claim**, ¶ 28.
[454] **Ex. R-318**, World Bank Report on Environmental Priorities and Strategic Options for the Dominican Republic (2004), ¶ 229.
[455] **Ex. C-033**, Request to Build Reforestation Access Road (28 December 2004) (emphasis added).
[456] **Amended Statement of Claim**, ¶ 29.
[457] **Ex. C-034**, Ministry's Response to the Request to Build Reforestation Access Road (18 January 2005).
[458] **Ex. C-034**, Ministry's Response to the Request to Build Reforestation Access Road (18 January 2005).
[459] **M. Ballantine 1st Statement**, ¶ 15 (emphasis added).
[460] **M. Ballantine 1st Statement**, ¶ 16 (emphasis added).

2. Project 2 (Restaurant And Housing Development)

125. With the road thus a *fait accompli*, the Ballantines began to focus on the next stage of their plans for Jamaca de Dios, which involved the construction of a restaurant and a housing development on part of the lower portion of their property ("**Project 2**").[461] As required by Article 40 of the Dominican Republic's environmental law ("**Environmental Law**"), the Ballantines needed to obtain authorization from the Ministry before breaking ground on their Project 2.[462]

126. The Ministry's process for granting environmental authorization is a complex one that involves different factors and stages. However, the Ballantines' Reply purports to reduce the scope of such process to a single element, by zooming in on a single phrase in a single provision of the Environmental Law: "slope incline . . . greater than sixty percent."[463] However, as environmental engineer and current Director of Environmental Regulations and Investigations

[461] Once again, as in the Statement of Defense, the Dominican Republic has declined herein to adhere to the Ballantines' nomenclature concerning the different projects at Jamaca de Dios (*e.g.*, "Phase 2"), because such nomenclature misleadingly conflates different stages of the Ballantines' activities at Jamaca de Dios, in ways that have substantive implications. *See* **Statement of Defense**, ¶ 71. Moreover, and independently of the foregoing, the Phase 1/Phase 2 nomenclature lends itself to confusion, given that: (1) on some occasions, the Ballantines use the Phase 1/Phase 2 dichotomy to make a *temporal* distinction; (2) on other occasions the Ballantines use the Phase 1/Phase 2 nomenclature to make a *physical* distinction; and (3) some of the alleged events that, temporally, would be part of "Phase 2" relate to land that, physically, would be part of "Phase 1." Nevertheless, where strictly necessary to avoid confusion (*e.g.*, when quoting from the Ballantines' pleadings or describing their arguments), this Rejoinder occasionally follows the Ballantines' nomenclature.

[462] See **Ex. R-003**, Environmental Law (18 August 2000), Art. 40 ("Any project, infrastructure work, industry, or other activity which may, by its nature, affect, one way or another, the environment and natural resources, must obtain from the Secretary of State for the Environment and Natural Resources, prior to its execution, an environmental permit or license, depending on the magnitude of the effects the project may cause").

[463] In relevant part, Article 122 of the Environmental Law (which incidentally, the Ballantines do not quote in their Reply), states as follows: "***Intensive tillage, like plowing, removal, or any other work which increases soil erosion and sterilization, is prohibited on mountainous soil where slope incline is greater than sixty percent (60%)***. Only the establishment of permanent plantations of fruit shrubs and timber trees is permitted. . . . From the enactment of the present Act, ***said land shall not be subject to*** human settlement, or agricultural activity, or ***any*** other ***activity that may endanger soil stability*** or national infrastructure works." **Ex. R-003**, Environmental Law (18 August 2000), Art. 122 (emphasis added).

Mr. Zacarías Navarro explains,[464] and as the Environmental Law itself makes clear, the scope of the Ministry's review is far broader, and encompasses multiple other factors.

127. Article 40 of the Environmental Law states that "***[a]ny project***, infrastructure work, industry, or other activity ***which may***, by its nature, ***affect, one way or another, the environment and natural resources, must obtain*** from the Secretary of State for the Environment and Natural Resources, prior to its execution, ***an environmental permit or license,*** depending on the magnitude of the effects the project may cause."[465] To obtain such a license, the proponent of the project must undergo what is known as an "environmental evaluation process."[466] As Article 38 of the Environmental Law explains, the objective of such process is to "control and mitigate the possible impacts upon the environment and natural resources caused by works, projects, and activities."[467] As the Ballantines concede, the evaluation of such impact is "a complex and multifaceted exercise . . . ."[468]

128. Part of the reason for this is that the concept of "environment" is far-reaching, and "has evolved significantly over time under the influence of a diverse range of inputs, including philosophy, religion, science and economics."[469] Dictionaries define the term "environment" in such broad terms as "'the objects or the region surrounding anything,'"[470] and the Dominican

[464] *See generally*, **Z. Navarro 2nd Statement**, § III.A.

[465] **Ex. R-003**, Environmental Law (18 August 2000), Art. 40 (emphasis added).

[466] **Ex. R-003**, Environmental Law (18 August 2000), Art. 40 (emphasis added).

[467] **Ex. R-003**, Environmental Law (18 August 2000), Art. 38.

[468] **Reply**, ¶ 446 ("[D]etermining whether one specific project results in a positive or negative 'environmental impact' is in itself a complex and multifaceted exercise").

[469] **RLA-111**, P. Sands, Principles of International Environmental Law, p. 13.

[470] **RLA-111**, P. Sands, Principles of International Environmental Law, p. 13 (quoting the Oxford English Dictionary).

Environmental Law has defined it as "the system of biotic,[471] abiotic,[472] socioeconomic, cultural and aesthetic elements that interact with each other, with individuals and with the community in which they live, and that determine their relationship and survival."[473] Given the breadth and multifarious nature of such definition, evaluating the potential "impact" of a project on each of the elements of the definition is complicated — especially since the different elements interact variously, and are constantly changing.

129. Moreover, questions about environmental impact "are often extremely difficult to answer definitively,"[474] and "[e]stablishing causation is difficult at best, and sometimes impossible, especially where (as is often the case) a particular adverse outcome . . . has numerous potential causes."[475] Many States simply adopt the presumption that environmental risk exists unless proven otherwise. This is known as the "precautionary principle,"[476] and the Dominican Republic's Environmental Law has adopted it expressly: "The prevention criterion will prevail over any other criteria in the public and private management of the environment and natural resources. The absence of absolute scientific certainty shall not be invoked as a reason for not adopting preventive and effective measures in any activity that adversely impacts the environment, in accordance with the precautionary principle."[477]

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[471] "Biotic" means "of or relating to living organisms; caused by living organisms." **Ex. R-274**, Oxford English Dictionary, "Biotic" (last visited 17 March 2018).

[472] "Abiotic" refers to something that is physical, or "inorganic, rather than biological. *See* **Ex. R-279**, Oxford English Dictionary, "Abiotic" (last visited 17 March 2018).

[473] **Ex. R-003**, Environmental Law (18 August 2000), Art. 16.35.

[474] **RLA-106**, Aagaard, Owen, Pidot, Practicing Environmental Law, University Casebook Series (2017), p. 10.

[475] **RLA-106**, Aagaard, Owen, Pidot, Practicing Environmental Law, University Casebook Series (2017) , p. 10.

[476] *See* **RLA-106**, Aagaard, Owen, Pidot, Practicing Environmental Law, University Casebook Series (2017), p. 11 (explaining that, "[i]n its strongest form, [the precautionary principle] asserts that people should not carry out activities that might pose environmental risks until they demonstrate that those activities are in fact safe").

[477] **Ex. R-003**, Environmental Law (18 August 2000), Art. 8.

130. In addition to the above-mentioned definition of "environment," Article 117 of the Environmental Law states that, "[t]o achieve the conservation, and sustainable use of natural resources, both land and sea resources, the following criteria should be taken into account, among others:

1. The ecological function of the resource;

2. The resource's peculiarity;

3. Its fragility;

4. The sustainability of the management proposed;

5. The plans and priorities of the country, region and province where the resources are located."[478]

However, the Environmental Law does not set forth a comprehensive list of every factor that should be considered in every environmental impact assessment. Such a list would be inherently impractical, given that (1) different sites have different features; (2) those different features interact in different ways; (3) different projects have different impacts upon those different features; (4) the environment itself is constantly changing; (5) science is always evolving; (6) technology is always improving; and (7) environmental protection efforts are becoming more stringent over time. As Professor Sands observes, "the development of principles and rules of international environmental law . . . has tended to ***react*** to events or incidents or the availability of scientific evidence, rather than anticipate general or particular environmental threats and put in place an anticipatory legal framework."[479] This is true also in the Dominican Republic.

[478] **Ex. R-003**, Environmental Law (18 August 2000), Art. 117.

[479] **RLA-111**, P. Sands, Principles of International Environmental Law, p.23; see also **CLA-061**, William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability (Simma, McRae, Schwartz) (17

[FOOTNOTE CONTINUED ON NEXT PAGE]

131. Notwithstanding the multiplicity of factors, there are manuals and guides that serve as a reference point in environmental assessments,[480] and in 2014, the Ministry combined many of the items discussed in those sources to create a non-exhaustive list of criteria that should be considered during the "preliminary stage" of the analysis. As Mr. Navarro explains, the goal of that stage is to determine, after documentary review and a field visit, whether or not terms of reference should be issued for the preparation of an environmental impact assessment for the proposed project.[481] "This analysis is done, necessarily, in attention to the characteristics of the area where the project is intended to be developed."[482]

132. In July 2005, the Ballantines initiated this process in respect of Project 2, by writing to the Ministry to request that the latter issue "terms of reference" for an environmental impact assessment.[483] The Ministry thereafter conducted an initial assessment of the proposed Project 2 site.[484] During this assessment, the relevant Ministry technicians observed, *inter alia*, that "[l]and topography is irregular, with fairly steep slopes that promote land erosion,"[485] that "[t]he vegetation is typical of a of humid subtropical forest,"[486] that "[w]e could hear there was a stream,"[487] and that "[t]he project access road is under construction. . . ."[488] They investigated this last issue (the access road), and flagged it for further review, recommending that an

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
March 2015), ¶ 437 ("Modern regulatory and social welfare States tackle complex problems. Not all situations can be addressed in advance by the laws that are enacted").

[480] *See* **Z. Navarro 2nd Statement**, ¶¶ 17–18.

[481] **Z. Navarro 2nd Statement**, ¶ 15.

[482] **Z. Navarro 2nd Statement**, ¶ 15.

[483] *See generally* **Ex. C-035**, Letter from M. Ballantine to Ministry (7 February 2005).

[484] *See* **Ex. R-258**, Prior Analysis Report (4 April 2006).

[485] **Ex. R-258**, Prior Analysis Report (4 April 2006).

[486] **Ex. R-258**, Prior Analysis Report (4 April 2006).

[487] **Ex. R-258**, Prior Analysis Report (4 April 2006).

[488] **Ex. R-258**, Prior Analysis Report (4 April 2006).

environmental impact assessment focus, *inter alia*, on the "[t]opographical survey of the access road."[489]

133. On 18 August 2006, the Ministry incorporated this recommendation (and several others) into a set of "terms of reference" for an environmental impact assessment,[490] and invited the Ballantines to submit such an assessment within a period of one year.[491] The Ballantines then retained a Dominican company named Antilia Environmental Consultants ("**Antilia**") to conduct an environmental impact assessment and to assist with the broader permit application process.[492] The relevant retainer agreement reflects the parties' express "understanding"[493] that "[i]n accordance with the legal order established in the Dominican Republic, the procedure for issuing an Environmental License ***does not guarantee that said environmental license*** will be granted just because a specific environmental study was submitted. . . ."[494]

134. On 15 February 2007, the Ballantines submitted a document titled "declaration of environmental impact" to the Ministry.[495] However, a review of such study revealed that it was so "deficient,"[496] and had omitted so many important details,[497] that it had to be redone.[498] The

[489] **Ex. R-258**, Prior Analysis Report (4 April 2006).

[490] *See* **Ex. C-036**, Letter from Ministry to M. Ballantine (18 August 2006).

[491] **Ex. C-036**, Letter from Ministry to M. Ballantine (18 August 2006), p. 2.

[492] *See generally* **Ex. R-264**, Environmental Services Contract between Jamaca de Dios and Antilia Consulting (28 November 2006).

[493] **Ex. R-264**, Environmental Services Contract between Jamaca de Dios and Antilia Consulting (28 November 2006), p. 1.

[494] **Ex. R-264**, Environmental Services Contract between Jamaca de Dios and Antilia Consulting (28 November 2006), p. 2 (emphasis added).

[495] *See generally* **Ex. C-037**, Letter from M. Ballantine to Ministry (14 February 2007).

[496] **Ex. R-064**, Letter from Ministry to M. Ballantine (15 June 2007), p. 1.

[497] **Ex. R-064**, Letter from Ministry to M. Ballantine (15 June 2007), p. 1.

[498] *See generally* **Ex. R-064**, Letter from Ministry to M. Ballantine (15 June 2007), p. 1.

Ministry explained this to the Ballantines in a June 2007 letter,[499] and Antilia thereafter undertook to develop a more fulsome impact study.[500]

135. The Ballantines submitted the revised study to the Ministry in August 2007, and the Ministry's Technical Evaluation Committee thereafter reviewed it.[501] On 7 December 2007, at the recommendation of such Committee,[502] the Ministry granted a permit ("**Project 2 Permit**") to the Ballantines for "the creation of a residential area, including parceling out, sale of plots, and construction of two-level mountain cabin style buildings."[503]

136. This permit stated expressly that Michael Ballantine was required to submit an environmental compliance report every six months,[504] and that he would be responsible for any penalties resulting from any injury that the project caused to the environment.[505] The permit also cautioned that "[a]ny modification or substantive incorporation of new works, or expansion, shall be submitted to an Environmental Impact Assessment process administered by the Undersecretariat of Environmental Management in accordance with Law 64-00 [i.e., the Environmental Law]."[506] Michael Ballantine signed the permit as an acknowledgment that he had reviewed it.[507]

137. As envisioned in the Project 2 Permit and the regulatory framework, the Ministry thereafter inspected Project 2 several times for environmental compliance. During the course of

[499] **Ex. R-064**, Letter from Ministry to M. Ballantine (15 June 2007), p. 1.
[500] *See generally* **Ex. R-103**, Environmental Impact Assessment, *Jamaca de Dios* (August 2007).
[501] *See* **Ex. C-004**, Project 2 Permit (7 December 2007), p. 1.
[502] *See* **Ex. C-004**, Project 2 Permit (7 December 2007), p. 1.
[503] **Ex. C-004**, Project 2 Permit (7 December 2007), p. 1.
[504] **Ex. C-004**, Project 2 Permit (7 December 2007), p. 6.
[505] **Ex. C-004**, Project 2 Permit (7 December 2007), p. 6.
[506] **Ex. C-004**, Project 2 Permit (7 December 2007), p. 7.
[507] *See* **Ex. C-004**, Project 2 Permit (7 December 2007), p. 3.

one such inspection, in May 2009 (and a subsequent review of the Ballantines' file), the Ministry discovered that Jamaca de Dios (1) had cut down trees at the project site, without authorization,[508] (2) had engaged in construction in a manner that interfered with waterways,[509] (3) had distributed housing lots in a manner that did not conform with the development plans that had been authorized by the Ministry,[510] and (4) had not filed the environmental compliance reports required by the Project 2 Permit.[511] As a sanction for the foregoing infractions, the Ministry ordered Jamaca de Dios on 19 November 2009 to pay a fine of approximately USD 27,500;[512] to suspend work on Project 2 until the fine was paid;[513] to undo the environmental damage that it had caused;[514] and to begin submitting the environmental compliance reports contemplated in the Project 2 Permit.[515]

138. In their Reply in the present arbitration, the Ballantines contend that the "size [of the $27,500 fine] . . . [i]s evidence of discriminatory treatment,"[516] claiming (incorrectly) that it was "the largest fine the [Ministry] had ever assessed on a property owner in the region."[517] The Reply also complains that "[n]ot a single [other] mountain project was similarly fined for its failure to submit these environmental reports."[518] However, as noted above, the Ballantines' failure to submit environmental compliance reports was only ***part*** of the reason why they were

[508] **Ex. C-007**, Resolution SGA No. 973-2009 (19 November 2009), p. 1.
[509] **Ex. C-007**, Resolution SGA No. 973-2009 (19 November 2009), p. 1.
[510] **Ex. C-007**, Resolution SGA No. 973-2009 (19 November 2009), p. 1.
[511] **Ex. C-007**, Resolution SGA No. 973-2009 (19 November 2009), p. 1.
[512] *See* **Amended Statement of Claim**, ¶ 84.
[513] **Ex. C-007**, Resolution SGA No. 973-2009 (19 November 2009), p. 5.
[514] **Ex. C-007**, Resolution SGA No. 973-2009 (19 November 2009), p. 6.
[515] **Ex. C-007**, Resolution SGA No. 973-2009 (19 November 2009), p. 6.
[516] **Reply**, ¶ 181.
[517] **Amended Statement of Claim**, ¶ 84.
[518] **Reply**, ¶ 182.

sanctioned.[519] Further, the amount of the fine was calculated using a pre-existing statutory formula that takes into account the amount that was invested in the project (as one of the Ballantines' own exhibits explains).[520] Given that the Ballantines have claimed that they "invested millions of dollars in infrastructure,"[521] and that no other developer had built anything like Jamaca de Dios before,[522] it would not be surprising if the fine ***had*** in fact been the largest one ever. In the event, the fine — which was later reduced by 50 percent[523] — was not by any means the "largest fine" ever assessed by the Ministry in the region (even at the original, higher amount).[524] In any event, some projects have suffered much harsher penalties than a simple fine.

3. Creation Of The Baiguate National Park

139. As noted above, the Ballantines appear to have abandoned those of their arbitral claims which were based on the creation itself of the Baiguate National Park ("**the Park**"). Nevertheless, in order to provide context for some issues discussed later in this section, it seems useful to recall certain points from the Statement of Defense concerning the creation of the Park.

140. The Park was formally created, and its boundaries formally established, by a presidential decree known as "**Decree No. 571-09**," published on 7 August 2009.[525] In their pleadings, the Ballantines have contended that "[t]he Park's boundaries were drawn to prevent

[519] *See generally* **Ex. C-007**, Resolution SGA No. 973-2009 (19 November 2009), pp. 1, 6.

[520] *See* **Ex. C-007**, Resolution SGA No. 973-2009 (19 November 2009), p. 3 (quoting **Ex. R-003**, Environmental Law (18 August 2000), Art. 167).

[521] **M. Ballantine 1st Statement**, ¶ 10.

[522] *See* **Notice of Arbitration and Statement of Claim**, ¶ 31.

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

[524] *See* **Ex. R-056**, Minutes of Environmental Inspection of Aloma Mountain (14 August 2013), (imposing on Aloma Mountain a fine that was almost double the amount of that initially imposed on Jamaca de Dios). The Aloma Mountain fine also was eventually reduced, to RD 352,137.36. *See* **Ex. R-055**, Resolution on Reconsideration of Aloma Mountain Fine (20 January 2014).

[525] **Amended Statement of Claim**, ¶ 113 and fn. 142.

any expansion of Jamaca De Dios."[526] Importantly, however, as of 7 August 2009 (the formal date of establishment of the Park), *no expansion of Jamaca de Dios had yet been requested by the Ballantines.* In fact, at that time the Ballantines did not even own all of the land that was to become their proposed site for Project 2. Rather, at that time, the only land in Jarabacoa that the Ballantines assertedly owned was 500,017.87 square feet (approximately 11.5 acres) of mountain land that they had purchased (through 14 different transactions) between 18 July 2004 and 28 February 2008.[527] It was not until *after* Decree No. 571-09 was published (on 7 August 2009) that the Ballantines began to purchase new land for the so-called "2nd Phase,"[528] as indicated by the following excerpt from the Ballantine's own "Table of Jamaca de Dios Land Purchases."[529]

III. Land purchased for 2nd Phase

Bought from	Land extension Mts2	Date of purchase	Demarcation	Parcel no.
Federico Abreu's BARTER	22,255.04	17-ago.-09	Yes	1542
Wilson Duran	31,450.00	15-sep.-09	No	1541
María Consuelo Rodríguez	9,905.78	14-ene.-11	No	1541
Ana Lidia Rodríguez Serrata	18,582.99	29-mar.-11	No	1541
Ramón Amable Rodríguez	45,036.40	7-ene.-11	No	1542
Miguel Serrata Rodríguez	15,130.00	9-feb.-11	No	1541
Jamaca de Dios **	140,834.50		Yes	1541
Total	283,194.71			

**This land came from the mother title. The purchases made from Bolivar and Viriato Serrata, and Carlos Ml.Duran.

141. As the Dominican Republic explained in greater detail in its Statement of Defense, Decree No. 571-09 represented the culmination of a nationwide environmental protection initiative that had begun in October 2004, and that was conducted pursuant to the United Nations Convention on Biological Diversity ("**Convention on Biological Diversity**") — a multilateral treaty dedicated to the promotion of sustainable development, to which the

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

[527] This figure is based on the information the Ballantines provided in **Ex. C-031**.

[528] **Ex. C-031**, Ballantines' Table of Jamaca de Dios Land Purchases (undated), § III.

[529] **Ex. C-031**, Ballantines' Table of Jamaca de Dios Land Purchases (undated), § III.

Dominican Republic has been a Party since 1997. In 2004, the Parties to the Convention agreed to an action plan aimed at "significantly reducing the rate of biodiversity loss by 2010."[530]

142. As Professor Sands explains, "biodiversity" is important because, in addition to its "ethical, intrinsic and aesthetic value,"[531] it provides what are known as "'ecosystem services'"[532] *i.e.*, contributions to "the maintenance of the biosphere in a condition that supports human and other life."[533] Factors like "habitat change (loss, degradation and fragmentation), climate change, invasive species, over-exploitation and unsustainable use, and pollution"[534] all threaten biodiversity,[535] and loss of biodiversity, in turn, can have catastrophic consequences for the environment. This is so because "what is ultimately threatened is the ability of ecosystems to purify water, regenerate soil, protect watersheds, regulate temperature, recycle nutrients and waste, and maintain the atmosphere."[536] As Professor Sands explains, "[t]he costs are not purely ecological, [but] extend to economic, medical and agricultural losses, and have profound moral and aesthetic implications."[537]

143. To accomplish their objective of "significantly reducing the rate of biodiversity loss by 2010,"[538] the Parties to the Convention on Biological Diversity engaged in what is known as "gap analysis" — a specific method for "identifying biodiversity (*i.e.*, species, ecosystems and ecological processes) not adequately conserved within a protected area network or through other

[530] **Ex. R-146**, Conference of the Parties to the United Nations Convention on Biological Diversity, Decision VII/28 (13 April 2004), Annex, p. 6 ¶ 2.
[531] **RLA-111,** P. Sands, Principles of International Environmental Law, p. 450.
[532] **RLA-111,** P. Sands, Principles of International Environmental Law, p.450 .
[533] **RLA-111,** P. Sands, Principles of International Environmental Law, p. 450.
[534] **RLA-111,** P. Sands, Principles of International Environmental Law, p. 450.
[535] **RLA-111,** P. Sands, Principles of International Environmental Law, p. 450 .
[536] **RLA-111,** P. Sands, Principles of International Environmental Law, p. 450
[537] **RLA-111,** P. Sands, Principles of International Environmental Law, p. 450.
[538] **Ex. R-146**, Conference of the Parties to the United Nations Convention on Biological Diversity, Decision VII/28 (13 April 2004), Annex, p. 6, ¶ 2.

effective and long-term conservation measures."[539] They then worked toward "the establishment and maintenance by 2010 for terrestrial [areas] and by 2012 for marine areas[,] of comprehensive, effectively managed, and ecologically representative national and regional systems of protected areas . . . ."[540] In practical terms — and as the name "gap analysis" suggests — the purpose of this exercise was to identify, and then fill, existing "gaps" in conservation in each State Party to the Convention.

144. In the Dominican Republic, these efforts were led by Professor Eleuterio Martínez, a forest engineer specialized in ecology and environmental issues, who is serving as a witness in this arbitration. Professor Martínez represented the Dominican Republic during the negotiation of the Convention on Biodiversity, and is currently the Vice-President of the Dominican Academy of Science.[541]

145. From August 2008 until August 2009, Professor Martínez led a team of government officials, scientists, and cartographers which identified new areas for environmental protection in the Dominican Republic.[542] Using a procedure that the Dominican Republic had developed in cooperation with a German State agency, the team gathered existing information, verified it in the field, analyzed the environmental and biodiversity value of each site to determine whether protection was needed, and, where appropriate, mapped out an area to be recommended for protection to a high-level advisory panel.[543] At the end of the process, 32 new

[539] **Ex. R-156**, Jeffrey Parrish and Nigel Dudley, What Does Gap Analysis Mean? A Simple Framework for Assessment, p. 1 (original emphasis omitted).

[540] **Ex. R-146**, Conference of the Parties to the United Nations Convention on Biological Diversity, Decision VII/28 (13 April 2004), ¶ 18; **E. Martínez 1st Statement**, ¶ 26.

[541] **E. Martínez 1st Statement**, ¶¶ 2, 27.

[542] *See* **E. Martínez 1st Statement**, ¶¶ 33–36.

[543] **E. Martínez 1st Statement**, ¶¶ 33–36.

protected areas — and corresponding "buffer zones"[544] — were created, by means of the above-mentioned Decree No. 571-09.[545] Consistent with the objective of the 2004 Convention on Biological Diversity action plan, the 32 different areas identified in Decree No. 571-09 contain a variety of natural resources, species, ecosystems, and ecological processes[546] — each of which was to be "preserved" according to its own specific characteristics.[547]

146. The Baiguate National Park, for its part, was intended primarily "to preserve the immense canopy of pine trees and beautiful (mixed and broadleaf) riparian forests that converge along the central stretch of [the Baiguate] river, where the Nogal [tree] still remains as a sample or indicator species of the original forest, which is under severe threat and must be saved given its great significance, both cultural[] and . . . forest[al]."[548] The fact that this was the Park's primary purpose is clear from the text of Decree No. 571-09 (which lists this point at the very outset of its explanation of why the Park was created),[549] and explains why, for example, the Dominican Republic produced "a ten-page survey of trees on the Mogote Mountain" in response

[544] **Ex. R-077**, Decree No. 571-09, (7 August 2009) (as published in the Official Gazette No. 10535 dated 7 September 2009), p. 3 ["*Decree No. 571-09*"] ("Decree No. 571-09 . . . establishes a 300-meter buffer or sustainable use zone around all conservation units covered under the general categories of the International Union for Conservation of Nature, provides for the creation of a national inventory of various wetlands, and creates a 250-meter protective area around the reservoirs of all dams in the country").

[545] **E. Martínez 1st Statement**, ¶ 4; **Ex. R-077**, Decree No. 571-09, p. 3.

[546] **Ex. R-077**, Decree No. 571-09, p. 3 ("Decree No. 571-09 creates various national parks, natural monuments, biological reserves, scientific reserves, marine sanctuaries, wildlife refuges, the Boca de Nigua National Recreation Area and the Salto de Jimenoa National Monument").

[547] See generally **Ex. R-003**, Environmental Law (18 August 2000), Art. 117 (explaining that, "[t]o achieve the conservation, and sustainable use of natural resources, both land and sea resources, the following criteria should be taken into account, among others: 1. The ecological function of the resource; 2. The **Resource's peculiarity**. . .") (emphasis added).

[548] **Ex. R-077**, Decree No. 571-09, Art. 14.

[549] *See* **Ex. R-077**, Decree No. 571-09, Art. 14.

to the Ballantines' request for "documents relating to the scientific studies and bases for the creation and demarcation of the Baiguate Park."[550]

147. In addition to the foregoing, "protection [wa]s similarly given to the legendary Salto Baiguate [*i.e.*, Baiguate waterfall], a bathing site and place for holding special rituals known to the Taino culture settled on this part of the island."[551] However, such "protection" was to be accomplished by including the Baiguate "river source" and "tributaries" within the bounds of the Park[552] (which were the elements that were relevant for the structural protection of the waterfall, and rendered unnecessary inclusion of the waterfall itself within the Park limits). As Professor Martínez has explained, protecting the river source and tributaries not only would protect "the Falls,"[553] which "[are] fed by the waters of the Baiguate River,"[554] but also would help to safeguard the biodiversity of the neighboring Mogote mountain system[555] — an acknowledged "botanical jewel"[556] with "a sensitive and highly fragile flora and fauna biodiversity."[557] And protecting the Mogote system, in turn, would help to preserve another neighboring river (the Yaque del Norte River) and ***its*** biodiversity.[558]

148. In the Reply, the Ballantines once again complain about the exclusion from the Park limits of the Salto Baiguate, claiming that such exclusion is "stunning[],"[559] and constitutes evidence that "[t]he creation of the National Park was part of a corrupt scheme . . . to destroy the

[550] **Reply**, ¶ 198.
[551] **Ex. R-077**, Decree No. 571-09, Art. 14.
[552] **E. Martínez 1st Statement**, ¶ 50.
[553] **E. Martínez 1st Statement**, ¶ 50.
[554] **E. Martínez 1st Statement**, ¶ 50.
[555] *See* **E. Martínez 1st Statement**, ¶ 51.
[556] **E. Martínez 1st Statement,** ¶ 39 (citing a 2000 study by German and Dominican researchers).
[557] **E. Martínez 1st Statement**, ¶ 38.
[558] *See* **E. Martínez 1st Statement**, ¶ 51.
[559] **Reply**, ¶ 195.

Ballantines' investment to the advantage of local interests."[560] However, that cannot be true, for at least two reasons. ***First***, if the Ministry had wanted to "destroy the Ballantines' investment," it defies logic (1) that it would have chosen a path as elaborate, expensive, and bureaucratically cumbersome as taking a year to identify, evaluate, and recommend 32 different areas for protection, ***then*** holding high level technical advisory sessions, and ***then*** preparing, promulgating, and publishing a formal decree by the President; (2) that it would have waited ***four years*** before mentioning the Park to the Ballantines;[561] and (3) that it would have not only allowed the Ballantines to keep the housing lots that they had not yet sold, but also would have stood by without objection as the lots were sold — all of which the Ministry did.[562] ***Second***, the Ballantines' own witness complains that, even five years after the Park was created, the "technicians from the Ministry did not know the quantity of inhabitants, communities and projects involved inside the Park."[563]

* * *

149. As noted above, the Ballantines made it clear in their Admissibility Response that "the creation of the National Park itself did not give rise to a claim for the Ballantines,"[564] and that "the drawing of lines of a Park is not by itself a breach."[565] Because of this, it seems unnecessary to discuss at length herein the Ballantines' arguments about the creation of the Baiguate National Park. Nevertheless, for the sake of good order — and because it is important

[560] **Reply**, ¶ 200.

[561] **Amended Statement of Claim**, ¶ 110 (asserting that "September 13, 2013 . . . was the first time that the Park had ever mentioned [sic] by the [Ministry] in any written or oral communication").

[562] *See* **Ex. R-262**, Email Exchange between M. Ballantine and B. Webb (December 2011), p. 6 (confirming that, more than two years after the Baiguate National Park was created, the Ballantines still had "15 lots in [their] inventory"); **Amended Statement of Claim**, ¶ 51 (asserting that, "[a]s of the date of this Memorial, ***all*** of the lots have been sold and the small remaining inventory consists of reacquisitions by Jamaca") (emphasis added).

[563] **L. Gil 1st Statement**, ¶ 45.

[564] **Admissibility Response**, ¶ 2.

[565] **Admissibility Response**, ¶ 73.

to the Dominican Republic to set the record straight — the attached witness statement of Professor Martínez and attached expert report of Mr. Sixto Inchaustegui (a biologist specializing in ecology and the environment, with more than 40 years of experience in environmental sciences and conservation)[566] set forth a thorough rebuttal of the Ballantines' various arguments concerning the Park. As they explain, there is simply no merit to the Ballantines' assertion that "there are no environmental justifications for the borders of the Baiguate Park as they were drawn."[567]

150. In addition to this, it bears noting that, out of the five project sites that the Ballantines claim were intentionally excluded from the Park's boundaries,[568] four were not yet project sites at the time that the boundaries were drawn. The remaining site was that of the first "Quintas del Bosque" project, which the Ministry had authorized ***before*** the Baiguate National Park was created. As Professor Martínez explains:

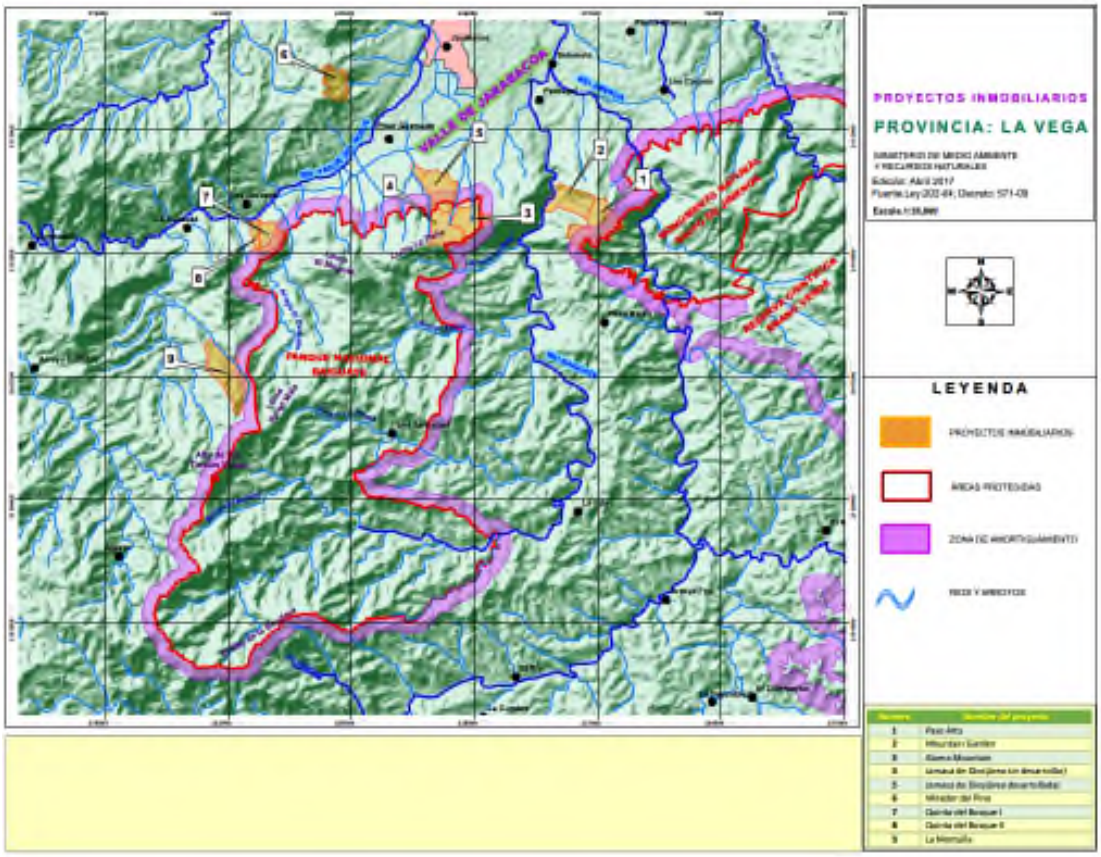
> When I was in charge of the creation of the Park and the additional 31 protected areas, I was not aware of who would be planning future real estate projects on their properties, and who owned what. Concerning the Park, taking into account the environmental values that deserved environmental protection, due to their elevation, presence of cloud forest, endangered species or species at risk, and water resources, the cartographers proceeded to make the layout in the chosen place: the system of mountains called El Mogote - Loma la Peña – Alto de Bandera. The result, known today, but not anticipated at that time, was that the lands corresponding to Aloma Mountain (in its entirety) and to Jamaca de Dios (only partially) were covered by the Park. Other projects such as Quintas del Bosque, Paso Alto, Mountain Garden, Mirador del Pino and Montaña, were not covered by the Park because they were not in such mountain system (see the map included below). **For example, with regard to Quintas del Bosque, such lands have an elevation**

[566] *See* **S. Inchaustegui 1st Report**, ¶¶ 48–55.

[567] **Reply**, ¶ 205.

[568] Such five sites are the following: (1) the Paso Alto site, (2) the Jarabacoa Mountain Garden site, (3) the Aloma Mountain site, (4) the site of the second Quintas del Bosque project, and (5) the La Montaña site.

between 640-930 masl, the evidence no presence of cloud forest, and are outside of El Mogote - Loma la Peña – Alto de Bandera.[569]



4. Initiation Of So-Called "Phase 2"

151. The Ballantines contend that, "[i]n 2009, the[y] . . . initiated the second phase of their investment — intending to market and ultimately sell at least 70 lots on the upper portion of their property and to construct luxury private homes on those lots."[570] However, as best the Dominican Republic can discern, "initiat[ing] the second phase" did not consist of very much. The Ballantines' internal records state expressly that "[t]here were no investment dollars necessary to begin phase two,"[571] and the Ballantines apparently did not commission "any

[569] **E. Martinez 2nd Statement**, ¶ 11.

[570] **Amended Statement of Claim**, ¶ 64.

[571] **Ex. R-273**, Ballantines' Annotated Google Earth Map (16 September 2016).

studies, assessments or due diligence reports related to the commercial, financial, legal and/or environmental feasibility of the Ballantines' real estate development projects regarding the so called 'Phase 2.'"[572]

152. What the Ballantines ***did*** do was to undertake an expansion of the Aroma de la Montaña Restaurant. However, that was in 2012, not 2009.[573] Moreover, such restaurant expansion was unauthorized, and violated the terms of the Project 2 Permit (which, as noted above, required the Ballantines to seek and obtain the Ministry's permission for any expansion or modification).[574] Although the Ballantines have claimed that the restaurant expansion was indeed authorized,[575] the only license that they ever received was a restaurant *operating* license that the Ministry of Tourism eventually granted in May 2014.[576] Importantly, however, that license stated expressly that "[g]ranting the present authorization ***does not exempt its holders from the obligation to obtain other authorizations, permits and licenses*** that may be required in accordance with the regulated activity and the legislation in force."[577]

153. In any event, at some point the Ballantines decided to hire new environmental consultants — from the firm Empaca Redes — to assist with expansion of Jamaca de Dios. In September 2010, those consultants explicitly informed the Ballantines that the sites that they

[572] **Redfern Schedule,** DR Request No. 39 (ordering production of the above-quoted category of documents, which the Ballantines failed to produce).

[573] **Ex. R-243**, Email from L. Ballantine to Family (24 December 2012), p. 5 (reporting on the events of the preceding year and stating "[w]e have gone through a restaurant rehab").

[574] **Ex. C-004**, Project 2 Permit (7 December 2007), p. 7.

[575] *See* **Reply**, fn. 554.

[576] *See generally* **Ex. R-272**, Restaurant Operating License for Aroma de la Montaña (19 May 2014). Notably, this license was granted to Michael Ballantine in his Dominican capacity. *See* ***id.***, p. 3.

[577] **Ex. R-272**, Restaurant Operating License for Aroma de la Montaña (19 May 2014), p. 2 (emphasis added).

hoped to develop for the so-called Phase 2 "[we]re located within [a] protected area . . . called Baiguate National Park. This is a Category II protected area."[578]

154. The wording of that September 2010 email makes it clear that Michael Ballantine had already discussed this issue with the Empaca Redes consultants on some occasion *prior* to September 2010: "As agreed, I attach the map of the location of the protected areas in the area surrounding the Jamaca de Dios project."[579] The email states expressly that, *"[a]ccording to the Law of Protected Areas, the following uses are allowed: scientific research, education, recreation, nature tourism, ecotourism."* [580]

155. One week later, on 29 September 2010, Empaca Redes stated in another email to Michael Ballantine that "the National Park's category permits low impact ecotourism projects such as yours, ***although the issue of roads***, and management of sewage and other waste ***is for discussion*** . . . . I remind you that ***what is most important is that the Ministry of Environment visit the area for the project and that it provide its technical, legal and viability/non-viability opinion for the project*** . . . . [N]otwithstanding the category of the protected area, ***the Ministry is in charge of defining the use and which types of projects yes, and which no***."[581]

156. The Ballantines have contended (erroneously) that this email exchange "confirms both that ecotourism is allowed in the Park and . . . that the the [sic] Ballantines' phase 2 project

[578] **Ex. R-170**, Email from Miriam Arcia to M. Ballantine, Mario Mendez, and Zuleika Salazar (22 September 2010), p. 1.

[579] **Ex. R-170**, Email from Miriam Arcia to M. Ballantine, Mario Mendez, and Zuleika Salazar (22 September 2010) (emphasis added), p. 1.

[580] **Ex. R-170**, Email from Miriam Arcia to M. Ballantine, Mario Mendez, and Zuleika Salazar (22 September 2010), p. 1 (red text in original).

[581] **Ex. R-169**, Emails between M. Ballantine, Mario Mendez and Miriam Arcia of EMPACA, and Zuleika Ivette Salazar Mejia (22-29 September 2010), p. 1 (emphasis added).

is ecotourism,"[582] and therefore "confirms that Mr. Ballantine had every reason to believe that his project would eventually be permitted."[583] However, and to the contrary, the emails themselves explicitly recommended to the Ballantines that they "register the project with the available documentation and information with the Ministry of Environment, to obtain the Terms of reference or a letter of refusal."[584] The email also expressly reminded Michael Ballantine that "what is ***most*** important is that the ***Ministry*** . . . ***provide <u>its</u>*** technical, legal and viability/non-viability ***opinion***," and that "notwithstanding the category of the protected area, ***the Ministry*** is in charge of defining the use and which types of projects yes, and which no."[585] As discussed further below, the Ballantines sent a permit application to the Ministry two months later.

157. Around the same time as the above-mentioned Empaca Redes exchanges, the Ballantines submitted an application to an inter-agency tourism development council named Consejo de Fomento Turístico ("**CONFOTUR**"). The Ballantines emphasize such application repeatedly throughout their pleadings herein. However, CONFOTUR has nothing to do with the environmental permitting process. The application submitted by the Ballantines was for a special type of tax exemption status that CONFOTUR had the authority to confer, which, if granted, "would allow the Ballantines to sell all of their properties without having to pay tax to the Dominican government."[586] Thus, when CONFOTUR granted "provisional" exemption status to Jamaca de Dios on 10 November 2010,[587] its resolution warned the Ballantines

[582] **Admissibility Response**, ¶ 3.

[583] **Admissibility Response**, ¶ 3.

[584] **Ex. R-169**, Emails between (1) M. Ballantine and Zuleika Salazar, and (2) Mario Mendez and Miriam Arcia of Empaca, and Zuleika Ivette Salazar Mejia (22-29 September 2010), p. 1 (emphasis added).

[585] **Ex. R-169**, Emails between (1) M. Ballantine and Zuleika Salazar, and (2) Mario Mendez and Miriam Arcia of Empaca, and Zuleika Ivette Salazar Mejia (22-29 September 2010), p. 1 (emphasis added).

[586] **Amended Statement of Claim**, ¶ 73.

[587] *See generally* **Ex. C-052**, Resolution Confotur No. 44/2010, Provisional Approval (10 November 2010).

explicitly that "*la presente Resolución de Clasificación Provisional de Proyecto Turístico otorgada por este CONFOTUR,* ***no autoriza el inicio de la construcción del proyecto JAMACA DE DIOS*** . . . ."[588]

158. Despite this, the Ballantines have asserted in their pleadings and witness statements that the 10 November 2010 CONFOTUR resolution "appropriately caused the Ballantine [sic] to expect timely MMA approval of their formal permit application to begin the expansion of their property,"[589] and justified the purchase of new land on which to pursue that project.[590] These assertions are mistaken, for two reasons.

159. ***First***, the Ballantines were well aware that the mere fact that a permit application had been ***submitted*** did not mean that the granting of such permit was "guaranteed."[591] It follows *a fortiori* from this that they also knew that even less could there be a guarantee of approval *before* the filing of an application. At the time of the 10 November 2010 CONFOTUR resolution, the Ballantines had not submitted any application to the Ministry to expand Jamaca de Dios.[592] In fact, they had not even purchased all of the land onto which they hoped to expand.[593] ***Second***, Resolution 107-2004, which sets out the requirements for an application for provisional CONFOTUR classification, required inclusion in the application of copies of the

[588] **Ex. C-052**, Resolution Confotur No. 44/2010, Provisional Approval (10 November 2010), p. 3 (emphasis added).

[589] **Reply**, ¶ 96; *see also* ***id.***, ¶ 99 ("[O]n December 21, 2010, the Ballantine [sic] received conditional CONFUTOR approval for their expansion . . . . The Ballantines had no reason to believe there would be any issue with the expansion of their existing project").

[590] *See* **M. Ballantine 3rd Statement**, ¶ 54.

[591] **Ex. R-264**, Environmental Services Contract between Jamaca de Dios and Antilia Consulting (28 November 2006), p. 2 ("In accordance with the legal order established in the Dominican Republic, the procedure for issuing an Environmental License does not guarantee that said environmental license will be granted just because a specific environmental study was submitted . . .").

[592] As discussed below, such application was dated ***30*** November 2010. *See generally* **Ex. C-005**, Letter from Zuleika Ivette Salazar Mejia to Ernesto Reyna (30 November 2010).

[593] *See generally* **Ex. C-031**, Ballantines' Table of Jamaca de Dios Land Purchases (undated), § III.

titles of the relevant land.[594] Any CONFOTUR classification is therefore limited to the land for which a title has been provided. And because, as noted above, the Ballantines had not purchased all of the land on which they hoped to expand at the time of the CONFOTUR resolution, it follows that the resolution could not have engendered any expectations in respect of the expansion.

5. Project 3 (Road Extension And Housing Development Expansion)

160. By means of a letter dated 30 November 2010, the Ballantines requested permission for a project that they captioned "Ampliación Jamaca de Dios."[595] The application that was appended to such letter described the proposed expansion project as follows: "2.2 km mountain road. Design in process of being parceled out [.] 1 cabin building."[596] For heuristic purposes, the Dominican Republic herein refers to this project as "**Project 3.**"[597]

161. As noted above, the Ballantines (1) had been told by their first set of environmental consultants (Antilia) that the mere submission of a permit application was not a guarantee of success;[598] (2) had been cautioned by their second set of environmental consultants (Empaca Redes) that the Ministry could reject their application; and (3) had been expressly

[594] **Ex. R-266**, Resolution 107-2004 on CONFOTUR classification (22 December 2004), p. 3.

[595] **Ex. C-005**, Letter from Zuleika Salazar to Ernesto Reyna (30 November 2010), p. 1. At the time, the Ballantines had not yet received a "no objection" letter from the Municipality. *See generally* **Ex. C-091**, Letter from Roberto E. Cruz, Planificación y Gestión Ambiental, to M. Ballantine, re City of Jarabacoa No Objection Letter (13 December 2010); *see also* **M. Ballantine 1st Statement**, ¶ 36. This is relevant because, as discussed below, the Ballantines and their witnesses claim to be "astound[ed]" by the notion that a permit request could be submitted to the Ministry in advance of receipt of a "no objection" letter. *See, e.g.*, **L. Gil 1st Statement**, ¶ 33.

[596] **Ex. C-005**, Letter from Zuleika Salazar to Ernesto Reyna (30 November 2010), p. 4.

[597] This term ("Project 3") is not used by the Ballantines themselves, but rather only by the Dominican Republic for purposes of this arbitration, to facilitate an understanding by the Tribunal of the different components of the Ballantines' undertaking at Jamaca de Dios.

[598] **Ex. R-264**, Environmental Services Contract between Jamaca de Dios and Antilia Consulting (28 November 2006), p. 2.

advised by CONFOTUR that no construction had been authorized.[599] Despite all of this, the Ballantines proceeded in early January 2011 to purchase additional land on the mountain,[600] and made plans to buy excavators to use on such land.[601]

162. The Ballantines' November 2010 letter was stamped "received" by the Ministry on 26 January 2011, and the Ministry dispatched technicians for a site visit three weeks later.[602] During the site visit, which took place on 17 February 2011, "Michael Ballantine received the team with Eric Kay, the Canadian engineer who had helped to design and construct the Phase 1 road."[603] The latter explained that they "would be using excavators more in building the Phase 2 road . . . ."[604]

163. The Ministry inspectors rightly understood this to mean that the "[e]arth movements to be carried out in the construction phase [would be] . . . major."[605] They also observed, *inter alia*, that, "[i]n the Project construction phase . . . the primary or secondary forest need[ed] to be cleared,"[606] that "[t]he Project [would] contaminate[] soil and subsoil . . . in a significant way,"[607] and that "diverse vegetation and a slope greater than 60% were observed in

[599] *See* **Ex. C-052**, Resolution Confotur No. 44/2010, Provisional Approval (10 November 2010), p. 3.

[600] *See* **Ex. C-031**, Ballantines' Table of Jamaca de Dios Land Purchases (undated); **M. Ballantine 3rd Statement**, ¶ 54.

[601] *See* **Ex. R-268**, Email from E. Kay to M. Ballantine (17 January 2011); *see also* **W. Proch 1st Statement**, ¶ 6 ("We had purchased large earth-moving equipment, multiple trucks for earthmoving and material transportation, and numerous power tools").

[602] *See generally* **Ex. R-108**, Notes from 17 February 2011 Site Visit; **Reply**, ¶ 366.

[603] **Amended Statement of Claim**, ¶ 89.

[604] **M. Ballantine 1st Statement**, ¶ 54.

[605] **Ex. R-108**, Notes from 17 February 2011 Site Visit, § 5; *see also* ***id.***, § 9.

[606] **Ex. R-108**, Notes from 17 February 2011 Site Visit, § 22.

[607] **Ex. R-108**, Notes from 17 February 2011 Site Visit, § 10.

the proposed Project area."[608] This was problematic for several reasons, including that, pursuant to Article 122 of the Environmental Law,

> [i]ntensive tillage, like plowing, removal, **or any** other **work which increases soil erosion** and sterilization, is **prohibited on mountainous soil where slope incline is greater than sixty percent (60%)**. Only the establishment of permanent plantations of fruit shrubs and timber trees is permitted. . . . From the enactment of the present Act, **said land shall not be subject to** human settlement, or agricultural activity, or **any** other **activity that may endanger soil stability** or national infrastructure works.[609]

Even though this law (which was enacted in 2000) predated the Ballantines' investment in the Dominican Republic — and despite the fact that the Ballantines themselves refer to it in their pleadings — the Reply inexplicably contends that "[w]hen 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."[610]

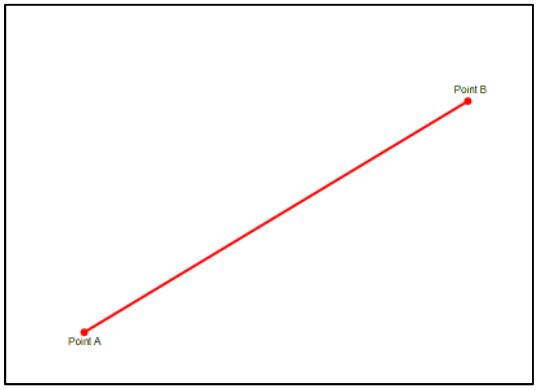
164. The term "slope incline" referenced in Article 122 of the Law (quoted above) is a technical terms that refers to the distance between two points of different heights along the same horizontal plane. In Figure 7 below, the "slope incline" is the line between Points A and B:

[608] **Ex. R-108**, Notes from 17 February 2011 Site Visit, Final Evaluation.

[609] **Ex. R-003**, Environmental Law (18 August 2000), Art. 122 (emphasis added).

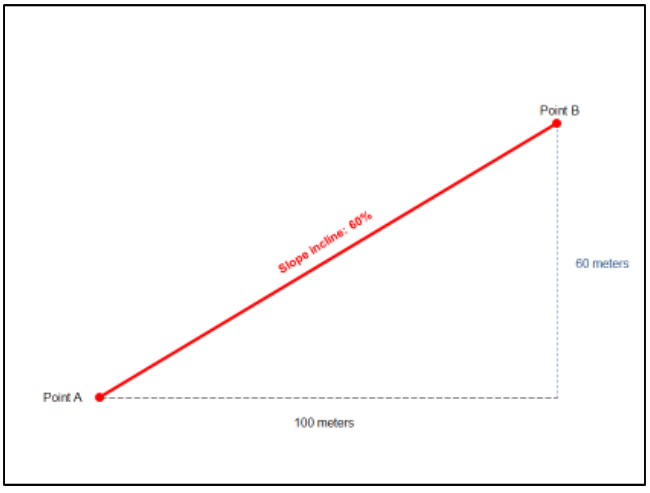
[610] **Reply**, ¶ 374.

Figure 7: Slope Incline



165. As Mr. Navarro explains, slope incline can be expressed in either of two ways: in degrees, or as a percentage.[611] However, he notes that there is a tendency "to use results in percentage terms because it is much more practical."[612] A slope's ***percentage*** corresponds to the vertical distance climbed over the span of 100 horizontal units (meters, feet, etc.).[613] In Figure 8 below, for example, if the horizontal distance between Points A and B were 100 meters, and the vertical distance were 60 meters, the slope incline would be 60 percent.[614]

Figure 8: Slope Incline (Percentage)



[611] **Z. Navarro 1st Statement**, ¶ 39.
[612] **Z. Navarro 1st Statement**, ¶ 40.
[613] *See* **Z. Navarro 1st Statement**, ¶ 40.
[614] *See* **Z. Navarro 1st Statement** (using a 7 percent slope as an example).

In contrast, the ***degree*** of a slope is an entirely different form of measurement — one that measures the slope's *angle*, and is calculated by "applying an inverse tangent [tan-1 (a/d)] trigonometric function."[615] An example of this is Angle 1 in Figure 9 below, which measures in degrees the same slope incline that Figure 8 above measures in percentage. In the example provided, the *percentage* of the slope incline is 60% (Figure 8 above), but in *degrees* the slope incline is 31% (Figure 9 below).

Figure 9 Slope Incline (Degrees)

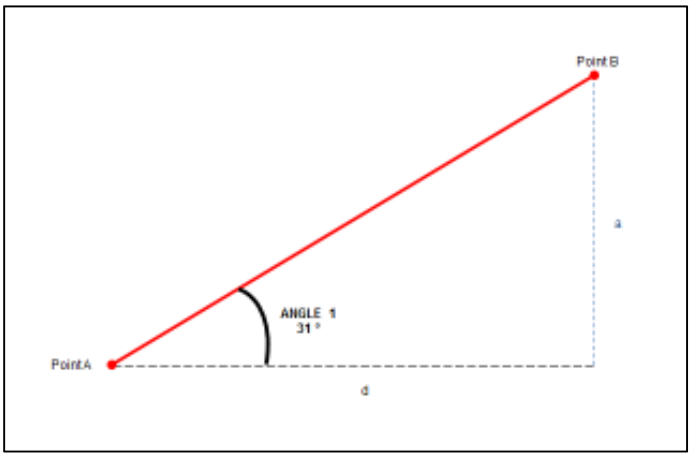


Figure 10 below shows both forms of measurement, and shows that a slope incline of 60 percent (in the column captioned "m%") is equivalent to a slope of 31 degrees (in the column captioned "m°") (see line highlighted in orange below):

[615] **Z. Navarro 1st Statement**, ¶ 39 (brackets in original).

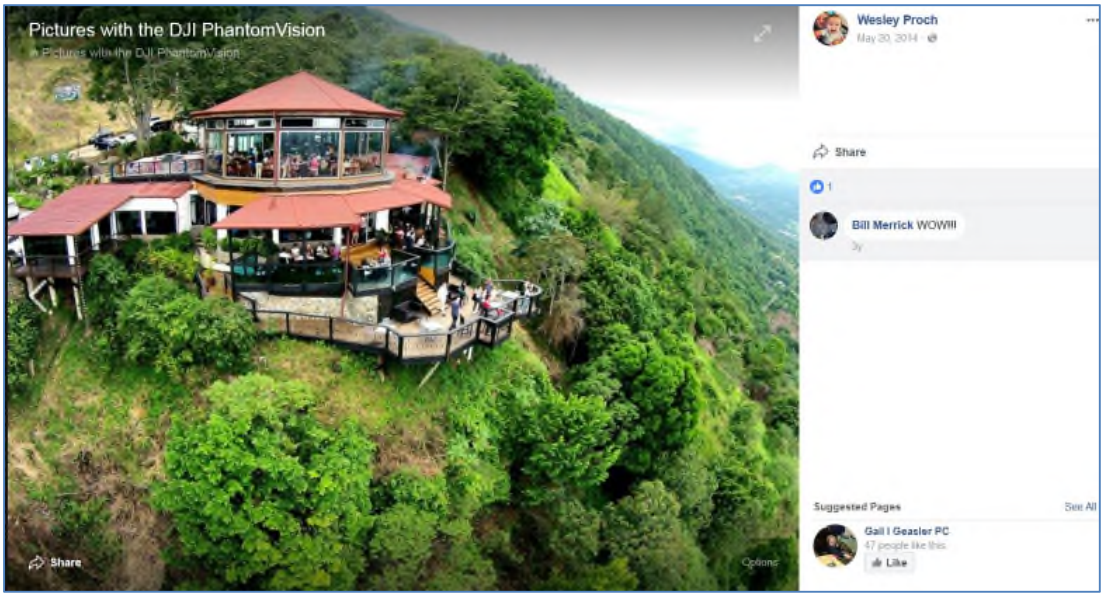
Figure 10: Slope Incline (Percentage and Degrees)[616]

Horizontal Travel		Vertical Travel				
x1	x2	y1	y2	m%	m°	
0	100	0	1	1	1	7m 100m
0	100	0	5	5	3	
0	100	0	7	7	4	Road Slope Limit
0	100	0	10	10	6	
0	100	0	15	15	9	
0	100	0	20	20	11	
0	100	0	25	25	14	
0	100	0	30	30	17	
0	100	0	35	35	19	
0	100	0	40	40	22	45m 100m
0	100	0	45	45	24	
0	100	0	46.65	46.65	25.01	Slope Limit under Law No. 5856-1962
0	100	0	50	50	27	
0	100	0	55	55	29	
0	100	0	60	60	31	Slope Limit under Law No. 5856-1962
0	100	0	65	65	33	
0	100	0	70	70	35	60m
0	100	0	75	75	37	
0	100	0	80	80	39	
0	100	0	85	85	40	100m
0	100	0	90	90	42	
0	100	0	95	95	44	100m
0	100	0	100	100	45	

166. Some of the pictures that the Ballantines have submitted into the record appear to suggest that the relevant land is not particularly steep. However, much of that has to do with the angle of the photograph. In reality, the slope is precipitously steep, as shown in the following photograph of the Aroma de la Montaña restaurant, taken by drone (and then posted on the Facebook page of Wesley Proch, who is the Ballantines' son-in-law, and a witness in this arbitration):[617]

[616] Figure 10 above was included as "Table 1" in Mr. Navarro's first witness statement. *See* **Z. Navarro 1st Statement**, ¶ 41.

[617] **Ex. R-280**, Photograph of Aroma de la Montaña (20 May 2014).



167. During the 17 February 2011 site visit by the Ministry, the inspectors and the Ballantines agreed that, because the Ballantines were proposing to "develop[] to the top of the mountain[,] and it is virtually impossible to make the subdivision map without first cutting the road,"[618] the Ballantines should first request permission for construction of the road.[619] On 24 February 2011, Michael Ballantine sent a letter to the Ministry requesting such permission.[620]

168. The Ministry then conducted another site visit on 18 March 2011. The report on this site visit (Ex. R-4) included the following observations and conclusions (which due to their importance for present purposes, are quoted *in extenso*):

[618] **M. Ballantine 1st Statement**, ¶ 55.

[619] **M. Ballantine 1st Statement**, ¶ 55; **Reply**, ¶ 366 ("The Tribunal should recall that the Ballantines [sic] submission to the MMA that solicited [sic] 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 with the inspectors on the February 17, 2011 preliminary visit").

[620] **Ex. C-053**, Letter from M. Ballantine to Ministry (24 February 2011), pp. 1–2 ("A visit was made to the project on 16 February 2011, by the technicians of the Ministry of the Environment . . . . Based on their recommendation, we are writing to you for the purpose of requesting an authorization for the construction of the access road of the Jamaca de Dios Expansion project. The road will be three kilometers long and six meters wide. . . .[O]ur request . . . is vitally important for the purpose of continuing to develop the project").

- "[Soil] texture is variable, being more gravelly and sandy in the upper part of river courses, and consisting of fine sand and silt in the lower parts."[621]

- "[O]n the land selected by the owners of the project in question, the slope is is greater than 60%."[622]

- "The total land is made up of mountains that are 1100 meters above sea level. On the surface there are volcanic tuffs in a matrix of limestone rock. The stratum formed by limestone rock is altered by weathering, which also affects the volcanic tuff. Due to the morphology of the area, the whole terrain is affected by a natural phenomenon known as mass movement, whose origin lies in the force of gravity."[623]

- "It is a zone of great natural water runoffs. The run-offs have already been impacted and on the hillside, a 2 meter high by 10 meter wide cistern has been built, with a 4 inch by 2 inch output access pipe." [624]

- "It is one of the areas in the country with the highest rainfall..."[625]

- "All these waterways gather currents from steep slopes to create a dendritic-looking network."[626]

- "Potential environmental impacts that can result from the Jamaca de Dios project. . . . Impact on the geomorphology of the land, impacts on the soils, impact on the region's flora and fauna, impact on runoff waters and groundwater."[627]

- "Project access roads are narrow, with inadequate incline. The project is being constructed at a height exceeding 900 meters above sea level. Ascent and descent is very dangerous. Also, inadequate building material is being used. Some buildings are up to three floors high, built in blocks and concrete, where scientific principles

[621] **Ex. R-004**, Site Visit Report (21 March 2011), p. 2.
[622] **Ex. R-004**, Site Visit Report (21 March 2011), p. 5.
[623] **Ex. R-004**, Site Visit Report (21 March 2011), p. 5.
[624] **Ex. R-004**, Site Visit Report (21 March 2011), p. 7.
[625] **Ex. R-004**, Site Visit Report (21 March 2011), p. 5.
[626] **Ex. R-004**, Site Visit Report (21 March 2011), p. 5.
[627] **Ex. R-004**, Site Visit Report (21 March 2011), p. 6.

> are being ignored given the inadequate excavations we were able to notice for this type of building. In the field, no protection works were observed - neither on access roads nor for the villas - in an area of high natural risk. Sedimentary rock strata and volcanic rock lying on the surface are not properly cemented. The rocks resistance to breakage has been reduced by natural phenomena. This has altered the region's safety factor, increasing the power of driving forces and weakening resistance forces. Alteration of these natural parameters results in landslides and resulting damages, loss of life and of material goods. Driving forces and resistance forces are also interrelated with variables such as slope and topography, climate, vegetation, water, and time."[628]

- "CONCLUSION: Institutional weaknesses and voracious economic interests combined to deal Nature a severe blow in the Municipality of Jarabacoa. Currently, another project is being proposed, similar to the project that is already being built, which is still in process and for which[a permit] was irresponsibly granted in an environmentally fragile area. It does not require a genius in Environmental Sciences to see it. This zone of high environmental fragility and high natural risk, should not be inhabited by human beings because it is unstable and extremely dangerous."[629]

169. The Ballantines' own expert, Mr. Kay, made similar findings, acknowledging in a 9 June 2011 email to Michael Ballantine that there were "soft soil conditions"[630] and "problem steep slope areas" on the property.[631] The next day, in an email about the road, Mr. Kay explained that they would need to find a way to "manage the water,"[632] by which he meant "prevent water [from] going over the edge — as water will do big damage anywhere it goes over the edge. As a note, water running at the outside edge of a road increases soil water saturation,

[628] **Ex. R-004**, Site Visit Report (21 March 2011), p. 6–7.
[629] **Ex. R-004**, Site Visit Report (21 March 2011), p. 7.
[630] **Ex. R-267**, Email from E. Kay to M. Ballantine (9 June 2011).
[631] **Ex. R-267**, Email from E. Kay to M. Ballantine (9 June 2011).
[632] **Ex. R-270**, Email from E. Kay to M. Ballantine (10 June 2011), p. 1.

[and] saturated soils are more unstable."[633] This damage was already happening, as indicated in the following excerpt from a June 2011 report from Mr. Kay entitled "Slope Repairs":[634]

Slope Repairs June 2011

LOT 47 - Bio-Engineering – Wattle Fencing

Analysis – Water in excess came over the slope edge and started a failure further downslope, this failure worked upward and undermined a portion of the recent work by Jorge.

A contemporaneous report on "Bioengineering," also from Mr. Kay's firm, "strongly recommended" to the Ballantines that they "urgently undertake a program of Bio-Engineering for Slope Stability for all slope areas that are showing signs of soil movement."[635] The report warned that "miss-directed [sic] water has the potential to cause erosion damage and to over-saturate sensitive slopes. These seemingly innocuous and minor events have the capacity to miss-direct [sic] water to areas of high concern (danger areas)."[636]

[633] **Ex. R-270**, Email from E. Kay to M. Ballantine (10 June 2011), p. 1 (emphasis in original).
[634] **Ex. R-271**, Slope Repairs Report, Kay Associates (June 2011), p. 1.
[635] **Ex. R-269**, BioEngineering Report, Kay and Associates (June 2011), p. 1.
[636] **Ex. R-269**, BioEngineering Report, Kay and Associates (June 2011), p. 1.

170. On 12 September 2011, following reports and recommendations by Ministry technicians, and a meeting of the Ministry's Technical Evaluation Committee,[637] the Ministry formally rejected the Ballantines' permit application.[638] The reasons for the rejection were multiple: "[T]he project [was] [n]ot viable environmentally for being in a mountain area ***with a slope higher than 60%*** where the use allowed is just the establishment of permanent planting of fruit bushes and harvestable trees, pursuant to Article 122 of Law 64-00, ***likewise it is considered an environmentally [fragile area] and implies a natural risk***."[639]

171. As the Ballantines explain, technically speaking, "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."[640] However, because (as noted above) the Ballantines were proposing to "develop[] to the top of the mountain[,] and it is virtually impossible to make the subdivision map without first cutting the road,"[641] the September 2011 notice effectively precluded expansion of the housing development to the top of the mountain.

172. In its 12 September 2011 letter rejecting the permit, the Ministry made it clear to the Ballantines that, notwithstanding the rejection, the Ministry would be willing "to carry out any activity relevant to an evaluation, should [the Ballantines] decide to submit another place(s)

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[637] In their Amended Statement of Claim, the Ballantines had asserted that this meeting "was highly irregular in that local MMA director Graviel Pena [sic] was not invited to attend, in contravention of standard MMA policy." **Amended Statement of Claim**, ¶ 95. However, they have not responded to the explanation that Zacarías Navarro provided in his witness statement, which was (1) that local technicians had participated in the site visits, (2) that the relevant norms speak of attendance at the CTE meeting by *provincial* MMA directors, (3) that Mr. Peña was the head of MMA operations in the city of Jarabacoa, which is part of the province of La Vega, and (4) that the MMA director for the province of La Vega attended the relevant meeting. *See* **Z. Navarro 1st Statement**, ¶ 30.

[638] **Ex. C-008**, Letter from Ministry to M. Ballantine (12 September 2011).

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

[640] **Reply**, ¶ 366.

[641] **M. Ballantine 1st Statement**, ¶ 55.

that is potentially viable."[642] However, for whatever reason, the Ballantines failed to propose an alternative site. They now deny that they were given the option (arguing that, had they been offered that possibility, it would have been "silly" and "defie[d] credulity" for them not to do it).[643] Whatever the case may be, it is incontrovertible (a) that the Ministry did in fact invite the Ballantines to propose an alternative (not just in its 12 September 2011 letter, but also in a January 2014 letter discussed further below);[644] and (b) they did not do it (as illustrated by the fact that there is no evidence thereof).

173. The Ballantines also refused to accept that the Ministry really meant it when it rejected their permit application, as they began a 51-month campaign to try to convince the Ministry to vacate its conclusion that Project 3 was not environmentally viable. This resulted in years of additional site visits and studies by Ministry officials, and years of additional Technical Evaluation Committee meetings, all at the taxpayers' expense. Throughout all of that, the Ministry analyzed the Ballantines' arguments in good faith, but continued consistently to reject the Ballantines' proposal, and never gave the Ballantines any objective basis on which to believe that the Ministry's conclusion might change. Yet, even now, the Ballantines inexplicably contend that "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."[645]

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[642] **Ex. C-008**, Letter from Zoila González de Gutiérrez, *Ministerio de Medio Ambiente y Recursos Naturales*, to M. Ballantine (12 September 2011) (translation from Spanish; the original Spanish version reads as follows: *"[L]es informamos que este Ministerio está en la mejor disposición de realizar las actividades pertinentes para la evaluación, en caso que usted decida presentar otro(s) lugar(es) con potencialidades viables"*).

[643] **Reply**, ¶ 365 ("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 [Ministry] to make sure there were no issues with slopes, they certainly would have done so").

[644] **Ex. C-015**, Letter from Ministry to M. Ballantine (15 January 2014).

[645] **Reply**, ¶ 543.

174. In their campaign to the Ministry, as discussed below, the Ballantines focused primarily on the "slope" element, which they (somehow) claim was "surpris[ing],"[646] "perplex[ing],"[647] and incorrect. They premised their argument on the asserted fact that "none of the slopes on the upper portion land that the Ballantines were proposing to develop in Phase 2 exceeds a grade of 60 ***degrees***." [648] However, they must have known that the Ministry's conclusion on the slope was possible or even likely, given that an Empaca Redes report on the expansion project (produced by the Ballantines during the document production phase) identifies the slope incline limit and then explicitly acknowledges that "slopes with higher inclines have been identified . . . ."[649]

175. Moreover, the "environmental fragility" and "natural risk" elements mentioned in the 12 September 2011 communication — which the Ballantines have ignored to such an extent that they asserted as recently as two weeks ago that the issue must be new[650] — were important factors in the Ministry's analysis; after all, this was *an environmental viability* assessment. And given the vitriol with which the Ballantines and their witnesses have criticized alleged[651] construction by a neighboring landowner,[652] they must have known that leveling the mountain to

[646] **Notice of Arbitration and Statement of Claim**, ¶ 51.

[647] **Notice of Arbitration and Statement of Claim**,¶ 5.

[648] **Notice of Arbitration and Statement of Claim**,¶ 51 (emphasis added).

[649] **Ex. R-265**, Empaca Redes Report on Project 3 (undated), p. 6.

[650] *See* Letter from the Ballantines to the Tribunal (1 March 2018), p. 8 (arguing that the Tribunal should deny access to Jamaca de Dios to the Dominican Republic's environmental engineering experts, on the asserted basis that "[t]he question in this case is not whether Respondent's experts can now develop from whole cloth some 'geo-environmental engineering' reason to deny the Ballantines a permit. *The relevant question is whether the actual denial of the expansion* ***based on Jamaca's slopes*** *was appropriate*, or was a violation of CAFTA, when the MMA repeatedly denied the permit") (emphasis added).

[651] As discussed further below, the Ballantines' assertions about continued construction at Aloma Mountain are unfounded.

[652] *See, e.g.*, **Z. Salazar 1st Statement**, ¶ 10 ("During my time at Jamaca de Dios, Juan José Dominguez tore apart an entire mountainside without any type of permission, leaving horrible scars and mudslides that were in plain view throughout the entire city of Jarabacoa. His invasion of the mountain was very aggressive and literally destroyed the

[FOOTNOTE CONTINUED ON NEXT PAGE]

create a road — which is what they intended to do[653] — would have had a significant adverse environmental impact.

176. As Mr. Navarro has explained, in order to ensure that the Project 3 road complied with national road construction regulations, it would have had to have been "built as a zig-zag (S-shape), and a great volume of earth [would have had to have been] moved."[654] However, "[s]uch earth movements [would have] create[d] a geological instability, and alter[ed] the geomorphology and drainage . . . ."[655] The change in geomorphology, in turn would have "increased the risk of disasters, the most violent risk being a land-slide,"[656] and "the changes to the natural drainage system that the project would cause, in such pronounced gradients, would mean an increase in surface runoff and water erosion, loss of rocky structural stability and, therefore, a risks of landslide, water pollution, and less water catchment to feed aquifers and springs."[657] After accounting for the composition of the land (*i.e.*, a "geological structure . . . based on loose, metamorphic, and unconsolidated rocks"),[658] "the work needed to develop the JDD Expansion Project [*i.e.*, Project 3] would put the entire area at risk, including the lower part of the mountain due to landslides, mass flow or water erosion."[659]

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
mountain's beauty for years"); **M. Ballantine 1st Statement**, ¶ 62 ("While we were diligently and appropriately seeking our expansion permit, Juan Jose Dominguez was destroying the mountain with his illegal construction").

[653] *See* **M. Ballantine 1st Statement**, ¶ 11 ("I knew the primary thing I needed to do was build a great road that would allow people to access their properties safely. I believed that it needed to not be more than an 8-degree slope, with as few switchbacks as possible. It needed to [be] wide enough for two large trucks to pass each other in both directions at all points").

[654] **Z. Navarro 1st Statement**, ¶ 23.

[655] **Z. Navarro 1st Statement**, ¶ 24.

[656] **Z. Navarro 1st Statement**, ¶ 25.

[657] **Z. Navarro 1st Statement**, ¶ 25.

[658] **Z. Navarro 1st Statement**, ¶ 64.

[659] **Z. Navarro 1st Statement**, ¶ 64.

6. The First Reconsideration Request

177. In November 2011, the Ballantines requested reconsideration of the Ministry's September 2011 decision to reject the Ballantines' permit application for Project 3, on the asserted basis that the Ministry had made a calculation error. In his letter to the Ministry, Michael Ballantine acknowledged that "according to Law 64-00, Article 122, does not allow development in areas where the slope is greater than 60 degrees[sic]," and stated "and that's fine. . ." but asserted that it was not applicable because "the slope where we are trying to locate a simple access is only ***34 degrees***. Thus, it is within the permitted range. . ."[660] This prompted yet another site visit by Ministry officials (on 23 January 2012),[661] and yet another meeting of the Ministry's Technical Evaluation Committee.[662] The notes from the latter indicate "the access road is the greatest problem for this project. There will be landslides when opening the road."[663]

178. On 8 March 2012, the Ministry sent a letter to the Ballantines in which it reminded the Ballantines that the Environmental Law prescribed a maximum slope of 60 ***percent*** — not 60 ***degrees*** (which had been the term used by Michael in his reconsideration request).[664] As discussed above, percentage and degrees are two entirely different measurements, and the Ministry explained in its letter that the site proposed by the Ballantines was located on land that had slopes between 20 and 37 *degrees*, which "[i]n percentage terms . . . means 36% and 74%, respectively."[665] Further, the Ministry stressed that the problem with the Ballantines' proposal was the prospect of removal of soil and increased risk of erosion on land with a slope of 60

[660] **Ex. C-010**, Letter from M. Ballantine to Ministry (2 November 2011) (emphasis added).
[661] **Ex. R-105**, Informe de Supervisión Proyecto Ampliación Jamaca de Dios, Codigo 6219 (23 January 2012).
[662] **Ex. C-094**, Notes of *Comité Técnico de Evaluación* evaluation of Phase 2 (22 February 2012).
[663] **Ex. C-094**, Notes of *Comité Técnico de Evaluación* evaluation of Phase 2 (22 February 2012), p. 5.
[664] **Ex. C-011**, Letter from Ministry to M. Ballantine (8 March 2012), p. 2.
[665] **Ex. C-011**, Letter from Ministry to M. Ballantine (8 March 2012), p. 1.

percent or higher, referring to Article 122 of the Environmental Law (*i.e.*, the slope-related provision), and emphasizing the relevant portions thereof in bold type:[666]

> For such reasons the execution of said project comes into conflict with the following articles:
>
> a) **Article 122 of Law 64-00** which forbids giving the mountain grounds with a slope equal or greater than sixty percent (60%) the use of intensive labor: plowing, **removal or any other labor increasing their erosion** and sterilization, allowing only the establishment of permanent planting of fruit bushes and harvestable trees.

179. The Ministry also explained (1) that, by law, the type of soil found on the site could only be used for certain purposes;[667] (2) that the project would affect runoff, water, and microbasin and water conditions; (3) that while the Ballantines' initial proposal had been deemed improper, at the site visit, the Ministry officials had learned that the project that the Ballantines were planning would be even larger and more ambitious than that initially proposed (and therefore even *more* improper); and (4) that the cuts and terrain-leveling required to create the road would exert too much pressure on the mountain ecosystem.[668] The Ministry then concluded by stating that the Ballantines' file was definitively closed.[669]

180. In their Reply, the Ballantines take issue with two of the Dominican Republic's comments in the Statement of Defense regarding the "slope" issue. The ***first*** was that the Ballantines' assertion that the Ministry had miscalculated the slope seemed to be based on a simple but fundamental misunderstanding by the Ballantines concerning the measurement of the slope incline: they had mistakenly conflated two different types of slope calculation (*viz.*, the

[666] **Ex. C-011**, Letter from Ministry to M. Ballantine (8 March 2012), p. 2.

[667] Although the Ballantines largely ignore the soil issue in their pleadings, they must have known that it would be a concern; Michael Ballantine himself has testified that they "checked for soil studies for every construction . . . ." **M. Ballantine 1st Statement**, ¶ 28.

[668] **Ex. C-011**, Letter from Ministry to M. Ballantine (8 March 2012), p. 2.

[669] **Ex. C-011**, Letter from Ministry to M. Ballantine (8 March 2012), p. 3.

calculation expressed in degrees and the calculation expressed as a percentage). In his most recent witness statement, Michael Ballantine insisted that it would be "silly" to interpret his use of the term "degrees" in place of "percent" as evidence that he had misunderstood the nature of the requirement, and asserted that "[i]t was of course apparent to all parties at the time that I was simply communicating the fact that the average slope of Phase 2 was well within the . . . limit of Article 122."[670] This seems implausible; if it were true, there would have been no need for the Ministry to explain (as it did) the difference between measurements calculated in degrees and measurements calculated as a percentage.

181. The ***second*** comment by the Dominican Republic to which the Ballantines object is the observation in the Statement of Defense that "it is not just the existence of land steeper than 60% that is important, but also the concentration and altitude of such land, and the level of intervention that would be necessary to develop it."[671] In response, the Ballantines contend that such factors were "absen[t] [from] . . . any Dominican regulations concerning the implementation of the law concerning slopes,"[672] and that the notion that "altitude," "concentration and environmental impact should be considered" therefore must have been "a creation for this arbitration."[673] However, the Ballantines jump to the wrong conclusion, after choosing the wrong point of departure.

182. As a threshold matter, the mere fact that "the law concerning slopes" — *i.e.*, Article 122 of the Environmental Law — does not explicitly mention a particular factor does not mean that it is irrelevant to the broader analysis. For example, as the Ballantines' own builder

[670] **M. Ballantine 3rd Statement**, ¶ 22.
[671] **Statement of Defense**, ¶ 120 (emphasis omitted).
[672] **Reply**, ¶ 5.
[673] **Reply**, ¶ 319; *see also* ***id.***, ¶¶ 317, 318.

(and witness) David Almanzar explains, "[f]or the structural plans [for the Mountain Lodge] we . . . measured the permeability of the ground, cohesion, plasticity limits and of course its compressive efforts."[674] They performed all of those measures ***even though none of those factors is mentioned in Article 122***.

183. Moreover, as noted above, the "slope" requirement is only one of ***many*** factors in the broader "environmental viability" analysis. The notion that "environmental impact" must be considered when assessing environmental viability is so basic a concept that it should not need to be stated expressly — especially when the Environmental Law expressly states that environmental impact studies are among the main tools for environmental management.[675]

184. As for the "***altitude***" factor, as noted above, Article 122 of the Environmental Law states:

> Intensive tillage, like plowing, removal, or any other work which increases soil erosion and sterilization, is **prohibited on <u>mountainous</u> soil** where slope incline is greater than sixty percent (60%). Only the establishment of permanent plantations of fruit shrubs and timber trees is permitted. . . . From the enactment of the present Act, said land shall not be subject to human settlement, or agricultural activity, or any other activity that may endanger soil stability or national infrastructure works.[676]

The word "mountainous" clearly indicates that altitude is relevant;[677] as the Ballantines themselves observe, "[m]ountains are not flat."[678] This provision of the law was designed to

[674] **D. Almanzar 1st Statement**, ¶ 4.

[675] See **Ex. R-003**, Environmental Law (18 August 2000), Art. 9 ("Los estudios de evaluación de impacto ambiental y los informes ambientales serán los instrumentos básicos para la gestión ambiental"); see also **id.**, Arts. 38, 40.

[676] **Ex. R-003**, Environmental Law (18 August 2000), Art. 122 (emphasis added)

[677] As Mr. Navarro explains in his second witness statement, "altitude" is also important outside of the "slope" context, as "[a]ltitude defines different ecosystems, involves change of pressure, change of humidity, change of vegetation, temperature and precipitation. It is an important factor to evaluate the climate and geomorphology; characteristics that affect, in turn, the flora and fauna of the area." **Z. Navarro 2nd Statement**, ¶ 23. Although the Ballantines' witness Mr. Peña questions the relevance of

[FOOTNOTE CONTINUED ON NEXT PAGE]

preclude "any . . . work which increases erosion" or "endangers soil stability," and in the context of "mountainous soil," erosion naturally is more dangerous when it occurs at the top of the mountain.[679] Accordingly, it is self-evident that altitude would be considered as a relevant factor. Even if the Ballantines themselves did not understand this, their consultants clearly did. For example, a 2010 "Proposal for Terrain and Road Engineering" prepared by "ECON consulting" states that "in order to properly plan the phases of the Jamaca de Dios project, an accurate topographical map of the project area is required,"[680] and that such map was to "***includ[e] elevation*** . . . ."[681]

185. Slope ***concentration***, for its part, helps to determine whether or not the relevant project will require "intensive tillage, like plowing, removal, or any other work which increases soil erosion and sterilization . . . ."[682] As Mr. Navarro explains, an analysis of "the concentration of the slopes . . . is important, among other things, to determine the magnitude of the interventions required to execute the project as proposed."[683] If a developer can work around the high slopes, then "intensive tillage" might not be necessary, and erosion would not be a risk.

186. In addition to the foregoing, the Ballantines also assert that "there is not a single document in Respondent's Jamaca Phase 2 file that mentions the safety of the road as a concern

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this particular factor in his second statement (*see* ¶ 6), "altitude" was expressly listed on the application review form that was used by the Ministry's Jarabacoa branch at the time that Mr. Peña served as its director. *See, e.g.*, **Ex. R-326**, Notes from Site Visits by Jarabacoa Environmental Officials, March and April 2011(*Formulario de Inspección).*

[678] **Reply**, ¶ 4.

[679] *See* **Z. Navarro 2nd Statement**, ¶ 24.

[680] **Ex. R-275**, Proposal for Terrain and Road Engineering, ECON Consulting (2010), p. 11.

[681] **Ex. R-275**, Proposal for Terrain and Road Engineering, ECON Consulting (2010), p. 5 (emphasis added).

[682] **Ex. R-275,** Proposal for Terrain and Road Engineering, ECON Consulting (2010), p. 5.

[683] **Z. Navarro 2nd Statement**, ¶ 25.

of the MMA."[684] Further, they contend that "[h]ad the MMA identified any specific path of the road as an issue, that issue could have been easily remedies [sic]."[685] As explained above, however, the only issue on the table was the "safety" of the road ***from an environmental perspective***, and that aspect was discussed in many documents. Further, the problems associated with the road would have existed no matter how it were designed, as ***any*** attempt to level the mountain to the extent necessary to create a road would have posed a very serious risk to mountain stability.[686]

7. The Second Reconsideration Request

187. The Ballantines now concede that, because the above-mentioned September 2011 and March 2012 letters from the Ministry "state in unambiguous terms that the Ministry 'formally rejected' the project and that their 'application file had been closed[,]' [i]t is hard to imagine a more vivid example of the Respondent establishing a 'complete bar to the project.'"[687] And yet, in August 2012, somehow the Ballantines still appeared "optimistic that, with . . . [a] change of government, things would be different."[688]

188. Accordingly, that month, they appealed yet again to the Ministry, but, incredibly, once again they confused the degree vs. percentage issue: "We understand there are parameters established and we are not questioning them in any way, we are just saying that the extension of our current project is located in a zone ***with a pitch of 32 degrees, and not 60.***"[689] Importantly,

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[684] **Reply**, ¶ 113.
[685] **Reply**, ¶ 113.
[686] *See* **Z. Navarro 2nd Statement**, § III.C.
[687] **Reply**, ¶ 364.
[688] **R. Webb 1st Statement**, ¶ 7.
[689] **Ex. C-012**, Letter from M. Ballantine to Ministry (3 August 2012) (emphasis added).

at this time the Ballantines also simply proceeded to start building the road, without permission.[690]

189. On 18 December 2012, the Ministry responded to the Ballantines' August 2012 letter, reiterating that the project was not environmentally viable.[691] It explained that Michael Ballantine was misreading the relevant Environmental Law provision (by once again focusing on degrees instead of percent),[692] and recalled once more the many reasons why the application had been rejected several times before (*e.g.*, not just the slope issue, but also soil issues, impact on water basin, the need to raze the mountain to complete the project, and resulting risks and potential impact).[693] The Ministry's letter also explained yet again that the slopes were a problem because removing soil and increasing the risk of erosion on mountainous land steeper than 60 percent is illegal.[694] It concluded by expressly stating that the file was closed.[695]

8. The Third Reconsideration Request

190. Despite all of the foregoing, the Ballantines refused to accept the Ministry's determination. In July 2013, they sent a letter to the Ministry in which they acknowledged the many reasons why the Project 3 permit request had been rejected,[696] but argued that the Ministry should nevertheless reconsider its prior decisions. The following four sets of events then occurred in parallel.

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[690] *See* **Ex. R-048**, Letter from Graviel Pena to José Alarcón Mella, Suelos y Agua, Medio Ambiente y RR. NN., *Oficio No 067-012*, with *Informe Técnico* (8 October 2012).
[691] **Ex. C-013**, Letter from Ministry to M. Ballantine (18 December 2012).
[692] **Ex. C-013**, Letter from Ministry to M. Ballantine (18 December 2012).
[693] **Ex. C-013**, Letter from Ministry to M. Ballantine (18 December 2012).
[694] **Ex. C-013**, Letter from Ministry to M. Ballantine (18 December 2012), p. 3.
[695] **Ex. C-013**, Letter from Ministry to M. Ballantine (18 December 2012), p. 4.
[696] **Ex. C-014**, Letter from L. Gil to M. Ballantine (4 July 2013).

191. ***First***, the Ballantines — who had been advised that it would not make sense to put time, effort, or money into marketing housing lots if there was not much inventory,[697] have argued in this proceeding that it is unlikely that someone would market a project to customers "if [he] did not have a permit or an assurance that it [*i.e.*, the permit] was coming,"[698] did not have any such permit or assurances, and apparently did not think it prudent to buy any more land themselves precisely because of this[699] — chose to launch a marketing campaign for their so-called "Phase 2." The relevant promotional materials stated misleadingly: "Our project has been approved as environmentally friendly . . . ."[700] This apparently drove in customers; according to the Ballantines' witness Zuleika Salazar, such promotional materials "work[ed]."[701] And although the Ministry had not given any indication that the third reconsideration request would prosper, the Ballantines apparently took steps to "prepare lots,"[702] and even held an open house in September 2014.[703]

192. ***Second***, following an inspection conducted in January 2013, the Ministry renewed the Project 2 permit for five years.[704] As discussed below, this renewal confirms that the problem with Project 3 had to do simply with the particular characteristics of the land on which the Ballantines proposed to build it, and ***not*** with any animus or hostility by the Ministry with respect to the Ballantines.

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[697] *See* **Ex. R-263**, Email Exchange between M. Ballantine and B. Webb (December 2011), p. 1.

[698] **M. Ballantine 3rd Statement**, ¶ 38.

[699] *See* **Ex. C-104**, E-mail from Leslie Aimeé Gil Peña to M. Ballantine (9 December 2013) (stating that Ms. Gil had communicated to a third party that Michael Ballantine had decided not to buy more land at the moment).

[700] **Ex. R-261,** Jamaca de Dios Brochure (undated), p. 4.

[701] **Ex. R-255**, Email from Z. Salazar to M. Ballantine (28 November 2013).

[702] *See* **Ex. R-204**, Jamaca de Dios Jarabacoa, S.A. Financial Statements for FYE 2014, (containing a line item for "costos preparación de lotes").

[703] **Ex. R-256**, Email from D. Cabrera to M. Ballantine (4 September 2014).

[704] **Ex. C-017**, Project 2 Permit Renewal (20 June 2013) , p 3. This renewed version of the permit likewise stated that "[c]ualquier cambio de tecnologia, incorporación sustantiva de nuevas obras o ampliación deberá ser sometida al proceso de Evaluación de Impacto Ambiental conforme a la Ley 64-00." *See* ***id.***, p. 6.

193. ***Third***, the Ballantines wrote to the CEI-RD to seek the latter's assistance. (As noted above, however, in their letter the Ballantines failed to mention their Dominican nationality.) In describing the slope requirement, they mischaracterized the issue, claiming that they had complied with the relevant provision of the Environmental Law (which outlawed extensive tillage on mountainous land that was steeper than 60 percent) on the basis that the road itself (which is what the Ballantines were hoping to accomplish through extensive tillage of such land) would "not have any appreciable slope."[705] This was misleading, as what is relevant under Article 122 of the Environmental Law is not the (eventual) slope of the road, but rather the (original) slope of the land on which the road is built.

194. ***Fourth***, the Ministry duly evaluated the Ballantines' third reconsideration request. Yet another Ministry site visit was conducted on 28 August 2013,[706] and still *another* took place in late September 2013. At the latter, Zacarías Navarro (who was part of the Ministry's site visit team, and is a witness in this arbitration) mentioned to the Ballantines that some of the land appeared to be within the Baiguate National Park.[707] (Of course, as explained above, at that point the Ballantines had already known about the Park for almost three years.)

195. On 15 January 2014, the Ministry wrote to the Ballantines, once again confirming its prior conclusion that the project was not environmentally viable. In support of this conclusion, the Ministry once again cited the slopes and the soil, but this time it also mentioned

[705] *See* **Ex. R-242**, Letter from M. Ballantine to J.A. Rodriguez (CEI-RD) (30 May 2013), p. 4 ("In consideration of the concern of the Ministry [regarding slopes], we have planned a road which does not have any appreciable slope. The road has been opened and it can be confirmed that the slopes are considerably less than indicated by the Ministry and can be managed in accordance with the Law. Article 122 of the Law 64-00 clearly establishes that the legal limit of a slope is 60%. The projects to be developed have slopes less than that which is established by the Law. Therefore the point made by the Environment has no technical base sufficient to support it").

[706] The site visit report states, inter alia, that "[w]e toured the place, where we were able to see the various slopes, which go from steep to very steep. . . ." **Ex. R-114,** Informe de Visita de Análisis Previo (28 August 2013), p. 4.

[707] *See* **Statement of Claim**, ¶ 110.

the fact that the land was located within the borders of the Baiguate National Park.[708] The letter further stated that the Ballantines' file would be closed, but that nevertheless the Ballantines were invited to choose an alternative site (this, too, confirms that the problem for the Ministry with Project 3 was the proposed land and not the Ballantines themselves).[709]

196. That letter also reminded the Ballantines that, "pursuant to Law 64-00 article 40 and the Regulation[s] of the System of Environmental Authorizations, the activities of construction, extension and/or renovation of the projects shall not be executed if they do not have the corresponding environmental authorization."[710] Despite this explicit warning, six months later the Ministry was informed by the Jamaca de Dios homeowners' association that the Ballantines had been moving land to such an extent that the association thought the Ministry should conduct an inspection, and make sure that the stability of the mountain was not being put at risk.[711]

197. In their Admissibility Response, the Ballantines somehow claim that it was not until they received the Ministry's 15 January 2014 letter that they realized that Project 3 would not be approved.[712] In support of this assertion, they emphasize that "the Respondent noted in that complete denial [letter] that the Ballantines could make use of the land by planting fruit trees."[713] However, that same language had appeared ***in the Ministry's very first response*** to the Ballantines' application (*i.e.*, the Ministry's September 2011 letter). And, as noted above, at the

[708] **Ex. C-015**, Letter from Ministry to M. Ballantine (15 January 2014), p. 1.

[709] **Ex. C-015**, Letter from Ministry to M. Ballantine (15 January 2014), p. 2.

[710] **Ex. C-015**, Letter from Ministry to M. Ballantine (15 January 2014), p. 2.

[711] **Ex. R-154**, Letter from Jamaca de Dios Homeowners' Association to Ministry (16 June 2014), ("Greetings. We are writing to inform you that within our project, the project developer has been carrying out a series of earth movements requiring inspection by the Ministry, so that the project does not create a risk for mountain stability").

[712] *See* **Admissibility Response**, ¶ 78.

[713] **Admissibility Response**, ¶ 78.

same time, the Ballantines argued in the Reply that because the Ministry's September 2011 and March 2012 letters "state in unambiguous terms that the Ministry 'formally rejected' the project and that their 'application file had been closed[,]' [i]t is hard to imagine a more vivid example of the Respondent establishing a 'complete bar to the project.'"[714] The Ballantines also asserted in their Reply that "[they] intended to purchase even more of the land surrounding [their] 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' [sic] treaty violations."[715] In light of the foregoing, it cannot be true that it was only when the Ballantines received the Ministry's January 2014 letter that they realized that Project 3 would not be approved.[716]

198. With respect to the Park, the Ballantines have argued that "[t]he Ministry's reference to the Baiguate National Park was surprising";[717] that the Ministry did "[n]ot once . . . inform the Ballantines of the implications of the national park for their development activities";[718] and that, "[w]ithout such notification, the Ballantines could not reasonably have known that the existence of the national park could create restrictions on the development of Jamaca de Dios."[719]

199. However, the Ballantines ***did*** in fact know that the existence of the national park could create restrictions on the development of Jamaca de Dios. As noted above, their own environmental consultants had told them as much as early as September 2010. (And the fact that

[714] **Reply**, ¶ 364; *see also* ***id.***, ¶ 108 (referring to "the flat and irreversible rejection that Respondent gave the Ballantines, first in 2011 and continuing until 2014").

[715] **Reply**, fn. 231.

[716] *See* **Admissibility Response**, ¶ 78.

[717] **Notice of Intent**, ¶ 25.

[718] **Notice of Arbitration and Statement of Claim**, ¶ 61.

[719] **Notice of Arbitration and Statement of Claim**, ¶ 61.

the Ministry itself did not confirm that in the interim is immaterial, given that (1) the Ballantines not only failed to raise the issue affirmatively with the Ministry, but apparently intentionally opted not to do so, in the hope that the Ministry would not say anything,[720] and (2) the permit application already had been denied — according to the Ballantines, definitively — for a variety of other reasons.)

200. The Ballantines also contend that "[i]t remains puzzling even now why [they] could not continue their successful ecotourism project within the Baiguate Park . . . ."[721] However, as repeatedly stated above, the existence of the Park was only one of many reasons why Project 3 was deemed "not environmentally viable," and the Ballantines' letters to various Dominican authorities show that the Ballantines had no problem understanding why their permit application was denied.

201. Moreover, as far as the Dominican Republic can discern, the Ballantines' assertion that Project 3 qualifies as "ecotourism"[722] is based exclusively upon emails from their own environmental consultants, which they misleadingly describe as "inspection notes." To be clear, the Dominican Republic has not recognized that Project 3 or any part of Jamaca de Dios is ecotourism because it is not, and the Ballantines have known this all along.

202. As explained by Professor Martinez, according to the definition of United Nations World Tourism Organization (UNWTO), the term "ecotourism" refers to "forms of tourism in which the main motivation of the tourists is the observation and appreciation of nature as well as

[720] *See* **Ex. R-169**, Email from Empaca to M. Ballantine (29 September 2010), p. 1 ("I have followed attentively and closely . . . the conversations and queries that you have concerning the declaration of the protected area Baiguate Park which affects the project. For such purposes I propose: 1. To register the project with the available documentation and information with the Ministry of Environment, to obtain the Terms of reference or a letter of refusal . . . ").

[721] **Reply**, ¶ 191.

[722] *See* **A. Escarraman 1st Statement**, ¶ 1; **Reply**, ¶ 194.

the traditional cultures prevailing in natural areas . . .[, which] *minimises negative impacts upon the natural and socio-cultural environment*."[723] Building 70 luxury houses in the middle of a cloud forest and calling a real estate development of *minimal impact* defies common sense. Professor Martinez explained as much to Michael Ballantine when he tried to recruit him as an expert for this arbitration:

> [I] insisted with him that the works would generate an impact on nature of such magnitude that his project within the Baiguate National Park could never be understood as an ecotourism project. In fact, in that conversation I explained to him that the construction of roads could cause soil erosion, making it impossible for the project to be considered an ecotourism project.[724]

203. Scientist Pieter Booth (an expert in this arbitration) reached a similar conclusion after after visiting and assessing the land slated for the proposed Project 3:

> ***[D]evelopment of Project 3, should it be allowed to proceed, would result in a significant loss in biodiversity and water capture as well as significant losses to other ecosystem services***. I quantify the losses to biodiversity and water capture in terms of Discounted Service-Hectare Years (DSHYs) and estimate the total loss in these service between a development state and a preservation state to be 360.8 DSHYs. A total of 48.6 ha. of agricultural land would have to be actively restored to primary cloud forest in order to fully compensate society as a mitigation for the loss in ecosystem services from developing the Project 3 area.

The significant negative impact on biodiversity alone would prevent Project 3 from qualifying as "ecotourism" — assuming, of course, that "ecotourism" was even part of the Ballantines' plans. Given how infrequently the Ballantines used that term in their past pleadings (zero in the Notice of Arbitration and Statement of Claim, and four times in the Amended Statement of Claim), it seems as though "ecotourism" (to borrow the Ballantines' own phrase) was a recent invention.

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[723] *See* **R-315**, United Nations World Organization of Tourism, (http://sdt.unwto.org/content/ecotourism-and-protected-areas) (visited on 19 March 2018) (defining ecotourism).

[724] **Martinez 2nd Statement**, ¶ 51.

To recall, the Ballantines' intention was to build luxury homes, with spa, restaurant, and a boutique hotel. That is why Michael Ballantine hired luxury hotel consultant Bob Webb. [725]

9. Project 4 (Mountain Lodge)

204. In parallel with their attempts to overturn the Ministry's conclusion regarding Project 3, the Ballantines also conceived of a new project — a "Mountain Lodge" — which is referred to herein as "**Project 4**."

205. In 2012, the Ballantines began to discuss the Mountain Lodge idea with consultants. At the time, as Michael has observed, "[t]here were no mountain hotels in the region . . . ."[726]

206. One of the consultants, a company called "ProHotel," undertook what is known as a "SWOT Analysis" — an analysis of "Strengths," "Weaknesses," "Opportunities," and "Threats." Among the "threats" that it identified were "[d]isruption of flora and fauna," and "[t]hreatening of the environment."[727]

207. ProHotel recommended as next steps ***first*** "[o]btain[ing] financing for projects" and "[o]btain[ing] permits for projects,"[728] and only ***then*** developing "a marketing and sales plan," "[hiring] a construction company," and "[preparing] PR efforts."[729] However, the

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[725] **Ex. R-171**, Emails between Michael Ballantine and Bob Webb (5–12 August 2012), p. 2, regarding the construction of a luxury development inside the Baiguate National Park (Michael Ballantine informing marketing and luxury hotel consultant Bob Webb: "We are going full sped [*sic*] ahead with the suite/junior suite concept above the restaurant and *have expanded the vision to include a luxury hotel and spa in the other area up top*")[725] (emphasis added); *see also* **Amended Statement of Claim**, ¶ 64 (explaining that the "Ballantines initiated the second phase of their investment — intending to market and ultimately sell at least 70 lots on *the upper portion of their property and to construct luxury private homes on those lots*), ¶ 69 (explaining that "the Ballantines also intended to construct *a boutique hotel in Phase 2*").

[726] **M. Ballantine 1st Statement**, ¶ 37.

[727] **Ex. R-257**, Jamaca de Dios Development Plan, Prohotel International Inc., p. 8.

[728] **Ex. R-257**, Jamaca de Dios Development Plan, Prohotel International Inc., p. 10.

[729] **Ex. R-257**, Jamaca de Dios Development Plan, Prohotel International Inc., p. 10.

Ballantines decided not to follow this advice. Instead, they promptly commissioned marketing materials and advertisements, and quickly began distributing them; they even took client deposits for units at the Mountain Lodge.[730] Eventually, in October 2013, they wrote to the Jarabacoa Municipality to request a "no objection" letter for construction of the Mountain Lodge. While awaiting the Municipality's response, they entered into agreements with additional clients,[731] and took deposits from them.[732]

208. The Ballantines' witness Zuleika Salazar has attempted to justify the "deci[sion] to begin marketing the Mountain Lodge" on the basis that "there was no reason for the government to not approve it," because "[t]he Mountain Lodge was on land that the Ministry had already approved for development."[733] However, both the original (2007) Project 2 Permit and the 2013 renewal notice for Project 2 had made it clear that the Ministry's approval covered Project 2 only, and that any expansion or new construction would require separate approval — even if it was on the same parcel(s) of land.[734]

209. Initially, the Ballantines contended that "the Municipality . . . ***failed to act***" on their request that the Municipality confirm that it had "no objection" to the Mountain Lodge.[735] In its Statement of Defense, the Dominican Republic demonstrated that this was not true. In December 2014, the City Council held a meeting that was attended by the Ballantines'

[730] *See* **Ex. R-260**, Mountain Lodge Transactions, (showing that the first client deposit for the Mountain Lodge was in September 2013).

[731] *See* **Ex. R-227**, Agreement to Reserve Apartment (8 December 2013).

[732] *See* **Ex. R-259**, Payment Receipt (18 January 2014).

[733] **Z. Salazar 1st Statement**, ¶ 21.

[734] *See* **Ex. C-004**, Project 2 Permit (7 December 2007), p. 7; **Ex. C-017**, Project 2 Permit Renewal (20 June 2013), p. 6.

[735] **Notice of Intent**, ¶ 30 (emphasis added).

representative Leslie Gil.[736] At that meeting, City Council officials explained that they had heard that the Ministry had concerns about any expansion of Jamaca de Dios, and that they had therefore asked the Ministry for more information.[737] They then informed Ms. Gil as follows: "[A]s you can see, we are willing to continue working in this direction. Immediately after we receive a reply from the Ministry of the Environment, we will call them through architect Sánchez to establish our position in this regard."[738] Ms. Gil's witness statement confirms that she understood this message.[739]

210. In their Reply, the Ballantines amended their argument slightly, complaining that it was the Municipality's refusal to provide a "no objection" letter that was improper[740] — not because the Ballantines were *entitled* to such a letter, but simply because the absence of a response supposedly (1) prevented the Ballantines from moving forward with the permit application process, and (2) left the Ballantines "in a legal limbo, . . . with nothing to challenge . . . ."[741]

211. However, the Ballantines know full well that they could have approached the Ministry in parallel (while still waiting for the Municipality's decision) to discuss the proposed project. That is precisely what they say they had done in connection with Project 3.[742] Further, Dominican law contains certain safeguards (like the concept of "administrative silence") which

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

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

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

[739] *See* **L. Gil 1st Statement**, ¶ 33 ("The board declared that they would not issue a no objection letter until the Environmental Ministry had given a response as to whether the land was or was not in a protected area").

[740] *See* **Reply**, ¶ 392.

[741] **Reply**, ¶ 393.

[742] **M. Ballantine 1st Statement**, ¶ 36 ("On November 30, 2010, we submitted our request to the MMA for the 'terms of reference' for the expansion. Less than two weeks ***later***, we received our letter of no objection from the City of Jarabacoa") (emphasis added).

protect against the "legal limbo" scenario that the Ballantines allege. Such safeguards enable an individual to initiate a judicial appeal in circumstances where an administrative authority does not respond to within a particular amount of time to a request by that individual.[743] However, the Ballantines did not avail themselves of these safeguards.

10. Project 5 (Apartment Complex)

212. The Ballantines have asserted that at some point they "developed plans for . . . [an] apartment complex that would allow owners to rent their units to tourists."[744] However, this project ("**Project 5**") was more of a pipe dream than an actual project as such. The Ballantines never sought permission from the Dominican Republic to build such a complex (which supposedly would have been located "near[] to the base of the property"[745]), and they never began construction on it. And yet, in this arbitration the Ballantines are brazenly seeking approximately USD 1 million in damages for such "project."[746]

B. The Ballantines' Merits Claims Are Unfounded

213. Throughout the Reply, the Ballantines assert repeatedly that "[t]he second phase of Jamaca de Dios is the only mountain project that has been refused any opportunity to proceed,"[747] and that this "simple fact . . . mandates an award for the Ballantines."[748] However, their assertion is incorrect, and even if it were true, it would not necessarily "mandate an award" in the Ballantines' favor. To render an award in the Ballantines' favor, the Tribunal would need to find that the Ballantines have proven that the Dominican Republic violated one of the

[743] *See generally* **Ex. R-339**, Law 1494 of 1947 on Contentious-Administrative Jurisdiction, Art. 2.
[744] **Amended Statement of Claim**, ¶ 6.
[745] **Amended Statement of Claim**, ¶ 25.
[746] *See* **J. Farrell 2nd Report**, p. 17.
[747] **Reply**, ¶ 9; *see also* ***id.***, ¶¶ 1, 78, 93, 313.
[748] **Reply**, ¶ 1.

obligations in Section A of DR-CAFTA Chapter Ten. However, the Ballantines plainly have not done so. They appear to have abandoned their MFN and full protection and security claims, and have confirmed expressly that they are not asserting claims based on the creation of the Baiguate National Park.[749] As discussed below, the claims that remain — *viz.*, the national treatment, fair and equitable treatment, and expropriation claims — are unfounded.

1. The Ballantines' National Treatment Claim Is Unfounded

214. As the Tribunal will recall, the Ballantines' national treatment claim under Article 10.3 of DR-CAFTA initially was the star of their case; the very first argument in their Amended Statement of Claim was that "the Dominican government has discriminated against the Ballantines ***because of their nationality*** . . . ."[750] In the Reply, however, the national treatment claim plays a much smaller role, and the reason for that is simple. The Ballantines now understand, as they themselves have recognized, that "[t]he national treatment . . . obligation[] of the CAFTA-DR require[s] that governments not treat an investor of the other Party or its investments any worse than it treats its own investors . . . ***simply because of nationality***,"[751] and are unable to demonstrate that they were treated worse than other Dominican investors simply on the basis of their dual U.S. nationality.

215. As the Ballantines explain, the "focus here is on ***the treatment*** . . . ."[752] This is clear from the text of Article 10.3:

> 1. ***Each Party shall accord*** to investors of another Party ***<u>treatment</u>*** no less favorable than that it accords, in like circumstances, to its own

[749] *See, e.g.*, **Admissibility Response**, ¶ 2 ("[T]he creation of the National Park itself did not give rise to a claim for the Ballantines"), ¶ 73 ("[T]he drawing of lines of a Park is not by itself a breach").

[750] **Amended Statement of Claim**, ¶ 2.

[751] **Notice of Arbitration and Statement of Claim**, ¶ 77(emphasis added).

[752] **Reply**, ¶ 428 (emphasis added) (making this assertion in the "national treatment" section of the Reply).

> investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> 2. ***Each Party shall accord*** to covered investments ***treatment*** no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 3. ***The treatment to be accorded*** by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.[753]

216. However, the Ballantines do not clearly identify in their Reply the specific "treatment" accorded to them or to their investment that supposedly was less favorable than that accorded to other Dominican investors or investments in like circumstances. They do expatiate at some length about the alleged actions of other developers, and the supposed characteristics of their respective projects. However, the "national treatment" section of the Reply[754] simply skips the threshold question of what "treatment" the Ballantines themselves were accorded.

217. Thus, the 12-paragraph subsection supposedly devoted to that issue[755] starts out by declaring that "the Ballantines received a less favorable treatment,"[756] but then is extremely vague about what such treatment entailed. Whereas the Amended Statement of Claim had identified nine specific measures (which the Dominican Republic then addressed in its Statement of Defense),[757] the Reply offers only cryptic clues about the nature of the treatment given to the

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[753] **Ex. R-010**, DR-CAFTA, Art. 10.3 (emphasis added).

[754] *See* **Reply**, § II.B.6 ("National Treatment").

[755] *See* **Reply**, § II.B.7 ("Less Favorable Treatment").

[756] **Reply**, ¶ 492; *see also* ***id.***, ¶ 484.

[757] *See* **Statement of Defense**, ¶ 150 (identifying the measures); *see also* ***id.***, ¶¶ 151–202 (demonstrating that no violation had occurred).

Ballantines and their investment.[758] As best the Dominican Republic can discern, the Ballantines are claiming that such treatment consisted of the Ministry's rejection of their application for a permit for the Project 3 road.[759] If that is indeed the case, the national treatment claim must fail, as the Ballantines cannot demonstrate that the decision had anything to do with the Ballantines themselves ***at all*** — let alone with their U.S. nationality.

218. Rather, the decision had everything to do with the particular site that the Ballantines had identified for the project that they were proposing. This is clear from the fact that the Ministry invited the Ballantines ***on two separate occasions*** to propose an alternative site (first in September 2011,[760] and then again in January 2014),[761] so that the Ministry could evaluate such site (and, if appropriate, approve it). "The intent of government is a complex and multifaceted matter,"[762] but it defies logic that the Ministry would have offered to dedicate its scarce resources, and more time, to an evaluation of the environmental viability of a project that it had no intention of approving, simply because of who the developers were. The Ministry's annual budget is not as extensive as those of other Dominican agencies, which have billions of

[758] *See* **Reply**, ¶¶ 487, 492, 493.

[759] *See* **Reply**, ¶ 501 (asserting that "[t]here is no possible justification for Respondent to allow any . . . development in the Park or on slopes that exceed 60% while at the same time ***denying the Ballantines a similar permit***") (emphasis added).

[760] **Ex. C-008**, Letter from Ministry to M. Ballantine (12 September 2011) ("[W]e inform you that this Ministry is more than willing to carry out any activity relevant to an evaluation, should you decide to submit another place(s) that is potentially viable") (translation from Spanish; the original Spanish version reads as follows: "[L]es informamos que este Ministerio está en la mejor disposición de realizar las actividades pertinentes para la evaluación, en caso que usted decida presentar otro(s) lugar(es) con potencialidades viables").

[761] **Ex. C-015**, Letter from Letter from Ministry to M. Ballantine (15 January 2014) , p. 2("In this sense, a new site alternative is hereby requested, otherwise **your dossier is closed**) (translation from Spanish; the Spanish original reads as follows: "*En este orden, se solicita una nueva alternativa de sitio, de lo contrario* ***su expediente queda cerrado***") (emphasis in original).

[762] **CLA-017**, S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award (Hunter, Schwartz, Chiasson) (13 November 2000), ¶ 161.

U.S. dollars at their disposal.[763] Its budget is so tight that, as the Ballantines concede, there is only "a single MMA representative [who] oversees all projects in the area" of La Vega (of which Jarabacoa is only part).[764] If the Ministry had had any animus at all toward the Ballantines, it likely would not have offered to work with them to find a way to make their project work. Nor, if that had been the case, would the Ministry have renewed the Ballantines' Project 2 permit;[765] carefully considered three separate reconsideration requests; or conducted four different site visits over the span of several years — all of which it did. In light of all of the foregoing, it becomes evident that the Ballantines' argument on national treatment suffers from one principal (and fatal) problem: it squares neither with the facts nor with common sense.

219. In the Reply, the Ballantines attempt to distract from the foregoing by (1) changing their position on the applicable legal standard,[766] (2) repackaging their national treatment claim as a fair and equitable treatment claim (more on this below), (3) identifying every other company that they can think of that is "operating in the . . . resort/restaurant/hotel business sector,"[767] and (4) then describing how the projects of those companies seem to be faring. Incidentally, this last prong (though inherent to the national treatment inquiry) is one of the contributing factors to a phenomenon known as "the tragedy of the commons," which is one of the core obstacles to environmental protection efforts. As Stanford Law School professor Barton H. Thompson, Jr. explains:

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[763] *See, e.g.*, **Ex. R-281**, 2018 Agency Budgets, (revealing that the Ministry's 2018 budget (approximately USD 90 million) is a fraction of the budget that other agencies have).

[764] **Reply**, fn. 119.

[765] *See generally* **Ex. C-017**, Project 2 Permit Renewal (20 June 2013).

[766] *See* **Reply**, ¶ 491 (asserting that "the Ballantines are not required to show that the less favorable treatment they received is as a result of their nationality"); *but see* **Notice of Arbitration and Statement of Claim**, ¶ 77 (conceding that "[t]he national treatment . . . obligation[] of the CAFTA-DR require[s] that governments not treat an investor of the other Party or its investments any worse than it treats its own investors . . . ***simply because of nationality***") (emphasis added).

[767] **Reply**, ¶ 481.

> Anyone who has studied the environment for very long understands ***the tragedy of the commons***. When a resource is freely available to everyone in common, everyone has an incentive to take as much of that resource as they want, even though the collective result may be the destruction of the resource itself. ***Society as a whole would be better off restraining consumption and preserving the resource. But the rational action for each individual is to consume to her heart's content***. Because no one can bind anyone else's actions, not consuming simply makes one a patsy. To each individual, moreover, her own actions seem insignificant. Holding back will lead to a marginal improvement, if any, in the condition of the resource. Even those who recognize and bemoan the oncoming tragedy of overuse will often conclude that it makes no sense not to join others in depleting the resource. The high road leads nowhere. ***The cumulative result of reasonable individual choices is collective disaster***.[768]

He goes on to explain that "one of the factors that contribute[s] to the tragedy [is the fact that] each [resource] user feeds on the fear that ***others*** are maximizing their consumption and, therefore, increases his or her ***own*** consumption,"[769] thereby perpetuating the cycle.

220. It is also worth mentioning that, as noted above, the text of DR-CAFTA "acknowledges that environmental law enforcement is not inherently consistent in its application."[770] The relevant provision (*viz.*, Article 17.2.1) states as follows:

> Article 17.2: Enforcement of Environmental Laws
>
> (1) [. . .]
>
> (b) The Parties recognize that ***each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities***. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a

[768] **RLA-107**, Thompson, Tragically Difficult, p. 242 (emphasis added).

[769] **RLA-107**, Thompson, Tragically Difficult, p. 245 (emphasis added).

[770] **RLA-112**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (Williams, Brower, Thomas) (3 November 2015), ¶ 389 (describing the text of Article 17.2.1(b) of the Oman-U.S. FTA, which is identical to the text of Article 17.2.1(b) of DR-CAFTA).

> course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources.[771]

As the *Al-Tamimi v. Oman* tribunal explained with respect to identical language in the Oman-U.S. FTA, "[t]he enforcement of environment laws and regulations, as Article 17.2.1(b) acknowledges, may not always be precisely uniform, involves the exercise of prosecutorial discretion and allocation of limited governmental resources, and ultimately may not reveal differential treatment based on anything other than the particular circumstances of the alleged offender and the infraction alleged."[772] Such is the case here (even though the claim is about permitting, and not policing): the differential treatment alleged is based on the particular circumstances of each project.

221. As noted above, in their Reply, the Ballantines provide a laundry list[773] of other entities that are supposedly "operating in the . . . resort/restaurant/hotel business sector,"[774] and contend that all of them are relevant to the national treatment analysis. However, it cannot be that the Ballantines are "in like circumstances" with ***all*** of those other entities.[775] As the Ballantines themselves previously have accepted, "the 'proper comparison is between investors ***which are subject to the same regulatory measures under the same jurisdictional***

[771] **Ex. R-010**, DR-CAFTA, Art. 17.2.1(b) (emphasis added).

[772] **RLA-112**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman,* ICSID Case No. ARB/11/33, Award (Williams, Brower, Thomas) (3 November 2015), ¶ 458.

[773] *See* **Reply**, ¶ 456.

[774] **Reply**, ¶ 481.

[775] *See* **RLA-112**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman,* ICSID Case No. ARB/11/33, Award (Williams, Brower, Thomas) (3 November 2015), ¶ 463 ("The Tribunal does not accept the Claimant's submission that '[its] Quarry should be understood as being with all limestone quarries in Oman'").

authority.'"[776] This disqualifies 12 of the 13 alleged "comparators" that the Ballantines identify in their list.[777]

222. Such alleged comparators are disqualified because the alleged treatment of such entities and their projects did not involve the same type of regulatory measures about which the Ballantines appear to complain. This may not have been immediately apparent, because the Ballantines often use the same words and phrases ("allow a project to move forward," "permit a project to move forward") to refer to different concepts. However, a close review of the Ballantines' pleadings reveals that:

a. when the Ballantines use the phrase "allow a project to move forward" in connection with their own project, they mean "affirmatively granting an environmental permit," and

b. when the Ballantines use the phrase "allow a project to move forward" in connection with the ten ***other*** projects, they mean "not prosecuting a developer who built without a permit."[778]

The latter point is necessarily so because those ten other projects — namely, Aloma Mountain (permit denied), Sierra Fría and Monte Sierra (permits denied, request resubmitted, and decision

[776] **Amended Statement of Claim**, ¶ 181 (quoting **CLA-016**, Merrill & Ring Forestry L.P. v. Government of Canada, UNCITRAL, Award (Orrego Vicuña, Dam, Rowley) (31 March 2010) , ¶ 89) (emphasis added); see also **RLA-112**, Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33, Award (Williams, Brower, Thomas) (3 November 2015), ¶ 463 ("The Claimant must point to evidence that a domestic comparator which possessed the same or substantially similar approvals as the Claimant, and carried out the same or substantially similar material conduct . . . was treated . . . according to a different standard").

[777] *See* **Reply**, ¶ 456.

[778] Among the projects that the Ballantines claim the Dominican Republic "allowed to move forward" are (1) projects for which the Ministry expressly denied a permit (in particular, Aloma Mountain), (2) projects for which a permit decision is pending (in particular, Sierra Fría and Monte Sierra), and (3) projects for which, according to the Ballantines, no environmental permit has been sought (in particular, Rancho Guaraguao, Monte Bonito, Villa Pajón, Cabaña los Calabazos, Santa Ana, Arroyo Naranjo and Mountain Village).

pending), Rancho Guaraguao, Monte Bonito, Villa Pajón, Cabaña los Calabazos, Santa Ana, Arroyo Naranjo and Mountain Village (no request for pemit submitted) — did not ***have*** environmental permits. In fact, some of them had never even submitted a permit application. Accordingly, the only way that the Ministry could be said to have "allowed these projects to move forward" would have been through non-prosecution.

223. The problem with this for the Ballantines' argument is that licensing, on the one hand, and prosecution (*i.e.*, policing), on the other, are two entirely different procedures, and are treated as such by both the Environmental Law and the Ministry. The environmental permitting process is addressed in Article 38 of the Environmental Law, and is handled by the Environmental Evaluation Department.[779] Policing, on the other hand, is addressed in Article 41 of the Environmental Law, and is enforced by Environmental Quality Department.[780] If the Ballantines were alleging that the Ministry prosecuted them but not other developers, then a comparison might be apt. However, the only sanction that the Ballantines' pleadings describe was the 19 November 2009 fine/temporary work suspension/order to begin submitting environmental compliance reports,[781] and any claim based on that sanction plainly would be time-barred under the DR-CAFTA three-year statute of limitations. Moreover, such a claim would also be unfounded. The most that the Ballantines could claim (and, in fact, all that they *have* claimed) is that the fine was at the time "the largest fine the [Ministry] had ever assessed on

[779] *See* **Ex. R-332**, Compendium of Regulations and Procedures for Environmental Authorizations of the Dominican Republic (22 September 2014), Art. 4 (defining the functions of the Environmental Evaluation Department to coordinate the environmental evaluation process of projects).

[780] *See* **Ex. R-332**, Compendium of Regulations and Procedures for Environmental Authorizations of the Dominican Republic (22 September 2014), Art. 41 (assigning the task of follow-up, policing fiscalization, and enforcement to the MMA's Environmental Quality Department).

[781] **Ex. C-007**, Resolution SGA No. 973-2009 (19 November 2009), p. 6.

a property owner in the region."[782] But that alone does not demonstrate ***any*** discrimination — let alone discrimination that is nationality-based. As noted above, environmental regulation tends "to ***react*** to events or incidents,"[783] and policing is inherently the same. If, as the Ballantines assert, Jamaca de Dios was the first project of its kind, then it should have come as no surprise if it *had* in fact been the first project to be fined — especially since environmental protection tends to increase over time. Notably, the Ministry has imposed fines on eight of the projects that the Ballantines have mentioned, namely: Mountain Garden,[784] Mirador del Pino,[785] Paso Alto,[786] Aloma Mountain,[787] Los Auquelles,[788] Rancho Guaraguao,[789] Ocoa Bay,[790] and Vista del

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

[783] **RLA-111**, P. Sands, Principles of International Environmental Law (Third Edition), Cambridge University Press (2012), p. 23; *see also* **CLA-061**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability (Simma, McRae, Schwartz) (17 March 2015), ¶ 437 ("Modern regulatory and social welfare States tackle complex problems. Not all situations can be addressed in advanced by the laws that are enacted").

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

[785] *See* **Ex. R-333**, Resolution DJ-RAS-4-2017-0235 (25 May 2017) (imposing a fine upon Mirador del Pino in the amount of RD$245,640.00 (approximately US$5,000.00) for failing to submit environmental compliance reports as mandated by the environmental permit, for failing to renew a compliance, bond, and requiring compliance with Art. 122 of Law 64-00 proscribing constructions on slopes in excess of 60%).

[786] *See* **Ex. R-334**, Resolution DJ-RAS-4-2017-0227 (1 August 2017) (imposing a fine upon Paso Alto in the amount of RD 368,460.00 (approximately US$7,498.16) for failing to submit environmental compliance reports as mandated by the environmental permit, and for failing to renew a compliance bond, and a renewed master plan).

[787] A fine in the amount of RD 1.7 million was imposed, and then reduced to RD 352,137.36. *See* **Ex. R-120,** Inspection Report Recommending Fine to Aloma Mountain (20 August 2013), p. 9; **Ex. R-055**, Resolution on Reconsideration of Aloma Mountain Fine (20 January 2014) . Aloma Mountain administratively appealed the fine, and the Ministry confirmed the former resolution of a DR$ 352,137.36 fine to Aloma Mountain and reserved the right of the Ministry to execute the fine. *See* **Ex. R-335** Resolution Decision Confirming Fine to Aloma Mountain after Administrative Appeal (28 February 2018).

[788] *See* **Ex. C-137,** Resolution Fine to Los Auquellos (31 July 2017) (fining Los Auquelles in the amount of RD 245,640.00, for building 15 villas on slopes over 30%, and some structures on slopes over 60%, without a permit; and requesting that Los Auquelles apply for an environmental permit and comply with all applicable environmental regulations).

[789] Ex. **R-278,** Fines imposed on Rancho Guaraguao (16 March 2018).

[790] *See* **R-073,** Fine to Ocoa Bay (8 December 2016). The Ministry imposed on 8 December 2016 an administrative fine in the amount of RD$ 2,742,980.00 (US$ 134, 406.00) to Ocoa Bay for building a lookout point, vineyards and wine cellar inside the Francisco Alberto Caamana Deno.

Campo.[791] However, the Ministry's policing efforts extend far beyond Jarabacoa, and other projects (unrelated to this case) have also been fined for breaches of environmental regulations.

224. As for the remainder of the alleged comparators, the parties agree that the Tribunal should choose the one that is most like the Ballantines,[792] and that it would be "'perverse to ignore identical comparators if they were available . . . .'"[793] In this case, such a comparator exists: Aloma Mountain. It is on the same mountain as Project 3, falls within the Baiguate National Park, and stands at almost the same elevation[794] (meaning that it, too, has the conditions necessary to host a "cloud forest" and the associated fauna and flora), presents a very similar slope distribution,[795] has the same type of soil, and is also inside the Park.

225. The Ballantines appear to accept — at least tacitly — that Aloma Mountain is the most apt comparator, as it is the only project that they mention expressly in the section of the Reply devoted to "less favorable treatment."[796] However, the Ballantines' so-called "evidence"

[791] *See* **Ex. R-120**, DJ-RAS-4-2017-0234 (28 August 2017). Fine imposed to Vista del Campo in the amount of RD $ 122,820.00 (approximately USD2,493.25) for violation of the environmental authorization, having built a restaurant, a parking and a cold storage without these infrastructures being authorized in the initial permit. The fine was paid on 28 September 2017 by check no. 100487 of the bank Santa Cruz, by Raul Octavio Ruiz and received by the Ministry.

[792] *See* **Reply**, ¶ 474 (conceding that, "in an ideal world, a foreign investor should be compared to an identical comparator").

[793] **Reply**, ¶ 474 (quoting **CLA-011**, *Methanex Corp. v. United States of America*, UNCITRAL, Final Award (Veeder, Rowley, Reisman) (3 August 2005), Part IV, Ch. B, ¶ 17 (wherein the tribunal went on to say that it would also be "perverse to refuse to find and to apply less 'like' comparators when no identical comparators existed")).

[794] The altitude of the Aloma Mountain project site ranges from 990 to 1200 masl, and the altitude of the Project 3 site ranges from 820 to 1260 masl.

[795] The slope distribution for the two project sites is as follows:

Land %	0-20%	20%-40%	40%-50%	50%-60%	60%
Slope %s Project 3 JDD	4.87%	32.81%	21.61%	22.02%	18.70%
Slope %s Aloma Mountain	11.59%	48.65%	21.24%	13.64%	4.89%.

[796] *See* **Reply**, § III.B.7.

with respect to Aloma Mountain is largely anecdotal, and as the *Al Tamimi* tribunal explained, "purely anecdotal evidence [about one's neighbors[797]] proves very little on its own."[798]

226. As the Tribunal will recall, the permit application for the Aloma Mountain project was denied by the Ministry, and its developer was fined for environmental violations. However, the Ballantines claim that this developer received more favorable treatment than they did, because (according to them) his project is still moving forward to this day. In support of this argument, the Ballantines cite exclusively to aerial footage taken by a drone. There is no evidence that Aloma Mountain is marketing, advertising, or selling any lots or houses.

227. The problem with the Ballantines' aerial footage is that it does not show anything new — as the photographs below (from 2002, 2006, 2011, and 2017) demonstrate. There was road construction between 2002 and 2006, and the road was then developed further between 2006 and 2011 (as shown in the upper left side of the 2011 photograph below). However, Aloma Mountain was fined in 2013 for building without a permit, and the Ministry denied its permit application later that same year.[799] Importantly, as indicated by a comparison of the photographs from 2011 and 2017, there was ***no additional construction*** following the Ministry's rejection of the Aloma Mountain permit application. In practical terms, this means that, even assuming *arguendo* that it were appropriate to compare the non-prosecution of Aloma Mountain for an alleged environmental law violation to the rejection of the Ballantines' permit application (*quod non*), the Ballantines have not even established that Jamaca de Dios was treated ***differently***, let alone less favorably.

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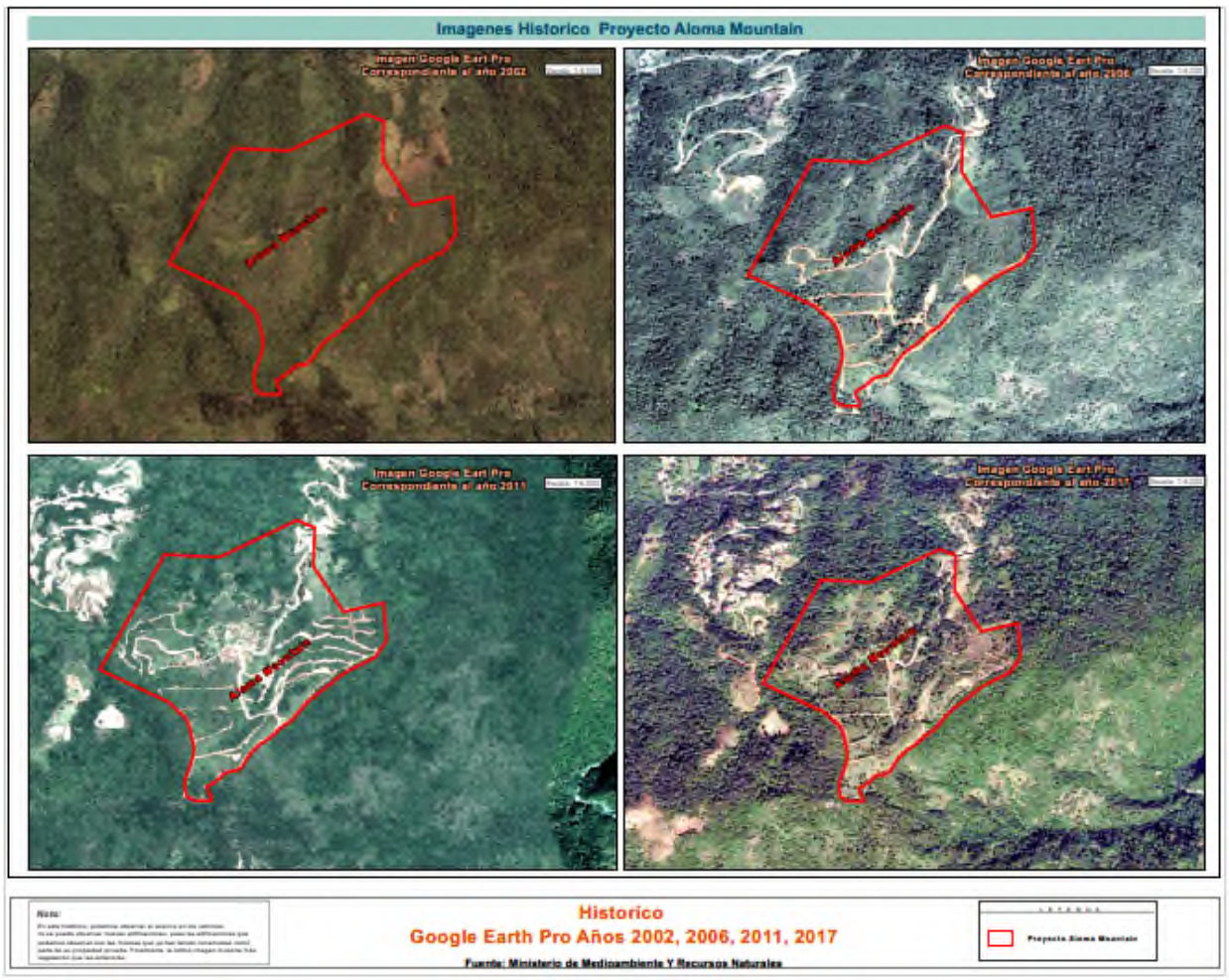
[797] *See* **RLA-112**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman,* ICSID Case No. ARB/11/33, Award (Williams, Brower, Thomas) (3 November 2015), ¶ 462.

[798] **RLA-112**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman,* ICSID Case No. ARB/11/33, Award (Williams, Brower, Thomas) (3 November 2015), ¶ 463.

[799] *See* Appendix A.



228. The nine other projects that the Ballantines cite are less appropriate comparators. In general, they fall into two categories: (1) projects that received permits for sites that fall within protected areas (Ocoa Bay); and (2) projects that received permits for sites that include land with high slopes (Mountain Garden, Quintas del Bosque 1, Quintas del Bosque 2, Mirador del Pino, Paso Alto, Los Aquelles, La Montaña, and Alta Vista). Ocoa Bay, however, is not a mountain project, and the other eight projects are not part of the Mogote Mountain system ***or*** the Baiguate National Park. They therefore should not be compared to Jamaca de Dios. In any event, as demonstrated in **Appendix A**, appended hereto, in each of those cases the Ministry's grant of a permit is explained by the particular features of the site, the steps needed to protect it, and (as applicable) the nature of the protected area in which it was located.

* * *

229. In their Reply, the Ballantines contend that "[the] tribunal should not rely on what Respondent perceives to be the 'environmental impact' of the different projects" discussed above,[800] because "Respondent is obviously not a 'neutral' observer regarding this question in the context of the present on-going arbitration proceedings."[801] However, the Ministry's assessments of the various projects are well-documented, and long pre-date this arbitration. Moreover, the notion that an agency sworn to protect the environment in one of the most at-risk areas of the planet[802] would abandon its principles simply to win an arbitration is offensive — and belied by the fact that this case is headed to a hearing. If it were true that no genuine environmental concern existed, it would have been easy for the Dominican Republic simply to settle the case by letting the Ballantines have their way.

230. But as the engineer Peter Deming and scientist Pieter Booth (both experts in this arbitration) have confirmed, the concern here was justified. As Mr. Deming explains, the level of intervention and land excavation necessary to make Project 3 stable and safe would require more invasive controls, and affect a larger area of land, than in Project 2 (which itself was quite invasive).[803] Mr. Deming explains:

> Building Project 3 in line with international building codes would also require disturbing greater areas of land for road construction and development of lots than those areas disturbed by Project 2. As

[800] **Reply**, ¶ 447.

[801] **Reply**, ¶ 447.

[802] *See* **S. Inchaustegui 1st Report**, ¶ 3 ("The Insular Caribbean, of which the Dominican Republic is part, is considered to be one of the five major biodiversity hotspots on the planet, both due to high endemic diversity and the high level threat to which it is submitted").

[803] *See, e.g.*, **Ex. R-103**, Ballantines' Environmental Impact Assessment, Jamaca de Dios (August 2007), p. 68 ("Another negative impact to the soil, associated with project construction, is an increase in the risk of erosion . . . [i]t is classed as a ***highly significant impact*** . . . Increased surface water and groundwater pollution, caused by sediments resulting from erosion, spilled liquid and solids, and construction waste . . . has been rated as a medium importance impact") (original emphasis omitted, emphasis added); *see also id.*, pp. 67–69, 72.

> previously indicated, final design details would include the disturbance of more land than the final road width or development structure lots, enlarging the development footprint of Project 3.[804]

Mr. Booth, for his part, concluded that Project 3 would have had a significant adverse impact upon biodiversity both in Jamaca de Dios, and in the rest of the Park:

> [I]t is an undeniable fact that development would result in the irreversible loss or degradation of habitat, likely including areas of largely undisturbed forest and degraded original forest that are in advanced stages of natural recovery . . . Based on my analysis I find that development of Project 3, should it be allowed to proceed would result in a significant loss in biodiversity and water capture as well as significant losses to other ecosystem services.[805]

231. And although the Ballantines have tried their best, through an array of unrelated and unfounded *ad hominem* attacks, to plant seeds of doubt as to the character of the many hardworking civil servants who have dedicated their lives to protecting the environment, the Tribunal should bear in mind — as the *Bilcon* tribunal observed — that "domestic authorities [like the Ministry] enjoy distinctive kinds of legitimacy, such as being elected or accountable to elected authorities."[806] They should not be approached with inherent mistrust, but rather with deference, given the "highly specialized [and] scientific"[807] nature of their work, and the fact that they likely "have more familiarity with the factual and domestic legal complexities of a situation."[808]

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[804] **P. Deming 1st Report**, ¶48.

[805] **P. Booth 1st Report**, ¶¶ 99-100.

[806] **CLA-061**, William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability (Simma, McRae, Schwartz) (17 March 2015), ¶ 439.

[807] **CLA-059**, *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award (Kaufmann-Kohler, Brower, Crawford) (2 August 2010), ¶ 123.

[808] **CLA-061**, William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability (Simma, McRae, Schwartz) (17 March 2015), ¶ 439.

2. The Ballantines' Fair And Equitable Treatment Claim Is Unfounded

232. The fair and equitable treatment standard under Article 10.5 of DR-CAFTA[809] "do[es] not require treatment in addition to or beyond that which is required by [the customary international law minimum standard of treatment of aliens."[810] As the Dominican Republic explained in its Statement of Defense, with references to case law and commentary, this standard is a stringent one that is not easily satisfied, which confers on States a significant degree of latitude. The Ballantines responded to this in their Reply with 17.5 pages of snippets from past decisions that confirm that point.[811] It appears, therefore, that the Ballantines agree that (as these snippets state), "'the standard for finding a breach of the customary international law minimum standard of treatment . . . remains as stringent as it was under *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.'"[812] This means that, as the *SD Myers* tribunal explained, "[a] breach . . . occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is ***unacceptable*** from the international

[809] In relevant part, Article 10.5 states as follows:

"1. Each Party shall accord to covered investments treatment in accordance with customary international law, including **fair and equitable treatment** and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world . . . ."

Ex. R-010, DR-CAFTA, Art. 10.5 (emphasis added).

[810] **Ex. R-010**, DR-CAFTA, Art. 10.5.2.

[811] *See generally*, **Reply**, pp. 94–111.

[812] **Reply**, ¶ 271 (quoting **CLA-025**, *Glamis Gold, Ltd. v. United States of America, U*NICITRAL, Award (Young, Caron, Hubbard) (8 June 2009), ¶ 616 (and emphasizing the above-quoted passage in bold text)); *see also id.*, ¶ 266 (quoting the following passage from **CLA-020**, *International Thunderbird Gaming Corp. v. United Mexican States,* UNCITRAL, Award (van den Berg, Ariosa, Wälde) (26 January 2006), ¶ 194: "'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 . . . .'") (emphasis omitted).

perspective."[813] As discussed below, however, the Ballantines have not made that showing. Each of the four strands to their fair and equitable treatment claim — *i.e.*, the "discrimination"[814] strand, the "arbitrariness"[815] strand, the "due process"[816] strand, and the "transparency"[817] strand — suffers from crippling conceptual and evidentiary flaws.

a. The "Discrimination" Strand Of The Ballantines' Fair And Equitable Treatment Claim

233. As noted above, the bulk of the Ballantines' merits case now rests on the assertion that they were subjected to discriminatory treatment, in violation of Article 10.5 of DR-CAFTA.[818] In support of this assertion, the Ballantines contend (1) that "[d]iscrimination is prohibited under CAFTA-DR Article 10.5,"[819] and (2) that the Dominican Republic "specifically targeted"[820] the Ballantines for adverse treatment. However, neither contention is true.

234. The ***first*** is belied by an interpretation of the Treaty itself. As the Dominican Republic explained in its Statement of Defense, Article 10.5 of DR-CAFTA (which contains the fair and equitable treatment clause) does not mention the word "discrimination," or any other related term or synonym. This is important, because (1) Articles 10.3 and 10.4 of DR-CAFTA address two specific types of discriminatory treatment (*viz.*, national treatment and MFN treatment),[821] and (2) it follows from the interpretative principle *expressio unius est exclusio*

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[813] **CLA-017**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (Hunter, Schwartz, Chiasson) (13 November 2000), ¶ 263 (emphasis added).

[814] *See* **Reply**, pp. 111–32.

[815] *See* **Reply**, pp. 132–49.

[816] *See* **Reply**, pp. 149–59.

[817] *See* **Reply**, pp. 159–62.

[818] *See generally* **Reply**, pp. 111–32.

[819] **Reply**, ¶ 290.

[820] **Reply**, ¶ 311.

[821] *See generally* **Ex. R-010**, DR-CAFTA, Art. 10.3 (National Treatment), Art. 10.4 (Most-Favored-Nation Treatment).

alterius that these are the only two types of discriminatory treatment covered in DR-CAFTA Chapter Ten. Although the Dominican Republic understands that past tribunals have reached different conclusions, such conclusions cannot be squared with the plain text of the Treaty.

235. The ***second*** contention — that the Dominican Republic "specifically targeted"[822] the Ballantines — is based on the premise that "the Ballantines do not have to show discriminatory intent in order to succeed on its [sic] discriminatory FET claim."[823] That is not true. The word "target" itself refers to something intentional; it means "[t]o plan or schedule (something) to attain an objective."[824] It is impossible to "target" someone or something without intending to do so. In any event, the Ballantines' allegations of discrimination are unfounded. Since the Ballantines have confirmed that "the creation of the National Park itself did not give rise to a claim for the Ballantines,"[825] such accusations relate exclusively to the Ministry's invocation of the following as bases for rejecting the Ballantines' permit application for the Project 3 road: (1) Article 122 of the Environmental Law (*i.e.*, the provision that prohibits intensive tillage on mountainous land with a slope that exceeds 60 percent), and (2) the Baiguate National Park. Each of these points is addressed below.

(i) The Claim Based On Article 122 of the Environmental Law

236. As far as the Dominican Republic can discern, the Ballantines' "targeted discrimination"[826] claim based on the Ministry's use of Article 122 of the Environmental Law as one of the bases for rejecting the Project 3 permit application is substantively identical to their

[822] **Reply**, ¶ 311.
[823] **Reply**, ¶ 308.
[824] **Ex. R-313**, Target, Oxford English Dictionary (last visited 19 March 2018).
[825] **Admissibility Response**, ¶ 2; *see also* ***id.***, ¶ 73 ("[T]he drawing of lines of a Park is not by itself a breach").
[826] **Reply**, ¶ 312.

national treatment claim. It therefore should be rejected for the same reasons set out in Section III.B.1 above. However, because the "targeted discrimination" segment of the fair and equitable treatment section of the Reply is more detailed than the section on national treatment, it seems useful to pause here and briefly address the Ballantines' argument.

237. Such argument parts from the premise that "[t]he MMA rejected in total the Ballantines' request for the Phase 2 expansion on the grounds that the land contained slopes in excess of 60% . . . ."[827] Then the Ballantines assert that "other entities that had slopes over 60% on their property were nevertheless granted licenses to develop their projects by the government,"[828] that "[they] know of three projects that have never been permitted and have been able to develop on land that included slopes greater than 60%,"[829] and that the Dominican Republic's explanation as to how the various entities and projects differed are mere "excuse[s] . . . created for this arbitration."[830] They also assert that their "Phase 2 is less pristine and environmentally significant than all of the other projects that were granted permits despite having slopes,"[831] and that it is "very telling, in terms of discrimination, [that] the MMA did not deny the Ballantines a permit only for those Phase 2 areas that have a slope exceeding 60%."[832] These arguments are flawed.

238. ***First***, the Ministry did not reject the Ballantines' Project 3 permit application solely because "the land contained slopes in excess of 60% . . . ."[833] Rather, it did so for several

[827] **Reply**, ¶ 312.
[828] **Reply**, ¶ 313.
[829] **Reply**, ¶ 314.
[830] **Reply**, ¶ 317; *see also* ***id.***, ¶¶ 318–19.
[831] **Reply**, ¶ 320.
[832] **Reply**, ¶ 321. Because the Ballantines were given permits in connection with Projects 1 and 2, and did not seek a permit from the Ministry in respect of Projects 4 or 5, this argument can only relate to Project 3.
[833] **Reply**, ¶ 312.

reasons — only one of which was that "***the project [was] [n]ot viable environmentally*** for being in a mountain area with a slope higher than 60% where ***the use*** allowed is just the establishment of permanent planting of fruit bushes and harvestable trees, ***pursuant to Article 122 of Law 64-00*** . . . ."[834] As the words in bold text explain, it was not "the land,"[835] considered in isolation, that was problematic. Rather, the problem was that "the project" that the Ballantines wanted to pursue on that land was "not viable environmentally" because "the use" of the land was restricted by Article 122 of Law 64-00, *i.e.*, the Environmental Law. The Ministry also emphasized this point in its subsequent communications:

Excerpt from 8 March 2012 Letter from the Ministry to the Ballantines:[836]

> For such reasons the execution of said project comes into conflict with the following articles:
>
> a) **Article 122 of Law 64-00** which forbids giving the mountain grounds with a slope equal or greater than sixty percent (60%) the use of intensive labor: plowing, **removal or any other labor increasing their erosion** and sterilization, allowing only the establishment of permanent planting of fruit bushes and harvestable trees.

239. The reason why the Project 3 road conflicted with Article 122 of the Environmental Law is that such Article provides that "[i]ntensive tillage, like plowing, removal, or any other work which increases soil erosion and sterilization, is prohibited on mountainous soil where slope incline is greater than sixty percent (60%)."[837] There was no way for the Ballantines to cut a road on the mountain without undertaking "work which increases soil erosion . . . on mountainous soil where slope incline is greater than sixty percent."

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[834] **Ex. C-008**, Letter from Ministry to M. Ballantine (12 September 2011), (emphasis added). The letter further explained that, "***likewise***, it is considered an environmentally [fragile area] ***and*** implies a natural risk." ***Id.*** (emphasis added). The Ballantines generally ignore these points in their pleadings.

[835] **Reply**, ¶ 312.

[836] **Ex. C-011**, Letter from Ministry to M. Ballantine (8 March 2012), p. 2 (emphasis in original).

[837] **Ex. R-003**, Environmental Law (18 August 2000), Art. 122. Even though, this law (which was enacted in 2000) long predated the Ballantines' investment in the Dominican Republic, the Reply inexplicably contends that "[w]hen 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." **Reply**, ¶ 374.

240. ***Second***, it is true that "other entities that had slopes over 60% on their property were nevertheless granted licenses to develop their projects by the government."[838] As explained above, however, the particular land and projects at issue were different from those of the Ballantines, and therefore are not valid comparators. For a start, none of those entities was attempting to develop a project on a site that was within a national park. As indicated in Appendix A, the relevant project sites — those associated with Mountain Garden, Quintas del Bosque 1, Quintas del Bosque 2, Mirador del Pino, Paso Alto, Los Auquelles, and Alta Vista — were not sufficiently high for a cloud forest to exist and the fauna and flora associated with it.[839] The only project site with an elevation that was comparable to Project 3 was that of La Montaña (which was not part of the mountain system *El Mogote – Loma La Peña – Alto de La Bandera*, and where 95.37% of the land has slopes below 60 percent). Nevertheless, and contrary to the Ballantines' assertion,[840] the site's high altitude limited the scope of the project. Thus, La Montaña's permit limits construction beyond 1300 masl.[841]

241. ***Third***, the fact that there may be unauthorized "projects . . . on land that included slopes greater than 60%,"[842] is a red herring, for the same reasons discussed above in Part 1 of this Section. Not penalizing unauthorized activity is not the same as denying a permit, and cannot be invoked as a basis for a claim of discrimination since the relevant subjects are not similarly situated.

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[838] **Reply**, ¶ 313.

[839] *See* Appendix A of Other Projects.

[840] *See* **Reply**, ¶ 156 (speculating that the Dominican Republic would issue a permit to La Montaña allowing construction despite Resolution 0009 of 2007 which limits construction beyond 1300 masl).

[841] *See* **Ex. R-276**, Environmental Permit La Montana (19 January 2018) (providing that only lots 4 through 22 of Phase 1, and lots 3 through 8 of Phase 3 have authorization to build.); *see* also R-277, Letter from La Montana to MMA on altitude of lots (4 December 2017) (the developer of La Montaña providing a list of the lots in that property, which reflects that all the lots covered by the permit have an altitude below 1300 masl).

[842] **Reply**, ¶ 314.

242. ***Fourth***, as discussed above, the Ballantines' assertion that factors like "altitude," "concentration and environmental impact" must have been "a creation for this arbitration"[843] is simply incorrect. In the context of an "environmental impact assessment," how can "environmental impact" possibly be characterized as an *ex post* invention? And factors like altitude and concentration clearly help to determine whether the work needed for the project will "increase soil erosion"[844] or "endanger soil stability,"[845] both of which are expressly mentioned in Article 122.

243. ***Fifth***, there is nothing "telling, in terms of discrimination,"[846] about the fact that the Ministry rejected the application in its entirety rather than "deny the Ballantines a permit only for those Phase 2 areas that have a slope exceeding 60%."[847] As noted above, the Ballantines agreed that, because they were proposing to "develop[] to the top of the mountain[,] and it is virtually impossible to make the subdivision map without first cutting the road,"[848] the Ballantines should first request permission for the road.[849] Implicit in such agreement was the notion that, if the road was not "environmentally viable," the Ballantines would not be allowed to proceed with an expansion of the housing development. The Ballantines acknowledge this in

[843] **Reply**, ¶ 319; *see also* ***id.***, ¶¶ 317–318.

[844] **Ex. R-003**, Environmental Law (18 August 2000), Art. 122.

[845] **Ex. R-003**, Environmental Law (18 August 2000), Art. 122

[846] **Reply**, ¶ 321.

[847] **Reply**, ¶ 321.

[848] **M. Ballantine 1st Statement**, ¶ 55.

[849] **M. Ballantine 1st Statement**, ¶ 55; **Reply**, ¶ 366 ("The Tribunal should recall that the Ballantines [sic] submission to the MMA that solicited [*sic*] 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 with the inspectors on the February 17, 2011 preliminary visit").

their Reply.[850] In sum, since the road could not be constructed without intensive tillage of mountainous land that exceeded the 60 percent threshold, and the housing development in turn could not be constructed without the road, it is entirely logical that Project 3 foundered on the basis that part of the proposed site had slopes that exceeded 60 percent.

244. ***Finally***, the assertion that the Ballantines' so-called "Phase 2 is less pristine and environmentally significant than all of the other projects that were granted permits despite having slopes"[851] is precisely why the Environmental Law exists. As explained above, while many people agree that protecting the environment is important, most of them wish to shift the burden of environmental protection to someone else.[852] It is human nature to "assume that the rule that benefits [oneself] is the fairest."[853] However, if everyone makes that assertion, it leads to the tragedy of the commons. In any event, the Ballantines have in no way presented any persuasive evidence that Jamaca de Dios areas were less sensitive environmentally. To the contrary, the expert Mr. Deming in his attached report shows that the Ballantines' land was indeed quite sensitive.

(ii) The Claim Based On The Park

245. The Ballantines' "targeted discrimination"[854] claim based on the use of Baiguate National Park as a basis for rejecting the Project 3 permit application fails for similar reasons. Here, the Ballantines' principal argument is "that Aloma Mountain . . . continues to develop its

[850] **Reply**, ¶ 366 ("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 2, which was agreed to with the inspectors on the February 17, 2011 preliminary visit").

[851] **Reply**, ¶ 320.

[852] **RLA-107**, Thompson, Tragically Difficult, p. 261.

[853] **RLA-107**, Thompson, Tragically Difficult, p. 260.

[854] **Reply**, ¶ 312.

property even though it is in the same national park as the Ballantines."[855] As explained above, however, that is simply not true. And, apart from Aloma Mountain, the only three other projects that the Ballantines mention are (A) two that they ***concede*** were never given an environmental permit (*viz.*, Villas Pajon and Rancho Guaraguao),[856] and (B) one that ***was*** granted a permit, but which is not a mountain project (*viz.*, Ocoa Bay). None of these projects can be considered "similarly situated" to the Ballantines' proposed Project 3.

b. The "Arbitrariness" Strand Of The Ballantines' Fair And Equitable Treatment Claim

246. In addition to claiming that they were subjected to discriminatory treatment, the Ballantines also claim that they were treated in an arbitrary fashion, supposedly in violation of Article 10.5. Here, the Ballantines appear to take issue with both the existence itself of Article 122 of the Environmental Law, and its application to the Ballantines' Project 3 permit request. (Although the Reply also asserts that the boundaries of the Baiguate National Park were drawn in an arbitrary fashion,[857] as noted above, the Ballantines have since conceded that "the drawing of lines of a Park is not by itself a breach.")[858]

247. Certain aspects of the Ballantines' "arbitrariness" claim are simply a rehash of their discrimination argument.[859] Because that argument has been addressed above, it is not herein repeated. However, it does seem useful to address what appear to be the five main arbitrariness arguments that the Ballantines are advancing.

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[855] **Reply**, ¶ 334.
[856] *See* **Reply**, ¶ 335.
[857] *See* **Reply**, ¶¶ 378–85.
[858] **Admissibility Response**, ¶ 73.
[859] *See, e.g.*, **Reply**, ¶¶ 359, 365, 371.

248. The ***first*** is that it was supposedly arbitrary to "den[y] the Ballantines the right to develop *any* part of the land"[860] when only part of the property "included slopes that exceeded the maximum grade of 60% permitted under Article 122 of the environmental law."[861] That is incorrect because it was not possible for the Ministry to grant the type of "partial authorization" that the Ballantines are positing, given the specific reasons for the Ministry's denial of the permit in the first place. As the Ballantines themselves acknowledge, they were proposing to "develop[] to the top of the mountain[,] and it is virtually impossible to make the subdivision map without first cutting the road."[862] Because of this, the Ballantines agreed that, before seeking permission from the Ministry to move forward with the housing subdivision, they would first request permission for the road.[863] As noted above, implicit in the foregoing is the notion that, if the road was deemed not "environmentally viable" — which is what ultimately happened — then the Ballantines would not be allowed to proceed with ***any*** expansion of the housing development (since the road would be needed for any expansion, regardless of area).

249. The ***second*** arbitrariness argument is somewhat of a *non sequitur*. As the Tribunal may recall, the Ballantines had asserted in their Amended Statement of Claim that they had been denied the "right to develop,"[864] and the Dominican Republic in its Statement of Defense had explained that this was not true, because the Ministry had affirmatively invited the Ballantines to propose an alternative site for their project, after the initial site was rejected. In

[860] **Reply**, ¶ 359 (emphasis in original).

[861] **Reply**, ¶ 359.

[862] **M. Ballantine 1st Statement**, ¶ 55.

[863] **M. Ballantine 1st Statement**, ¶ 55; **Reply**, ¶ 366 ("The Tribunal should recall that the Ballantines [sic] submission to the MMA that solicited [*sic*] 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 with the inspectors on the February 17, 2011 preliminary visit").

[864] **Amended Statement of Claim**, ¶ 41.

response, the Ballantines have attempted to contest this factually, and for some reason have chosen to do so in the "arbitrariness" section of the Reply. Within that section, they assert at least twice that "Respondent never asked the Ballantines to change their project or to provide alternative plans for Phase 2,"[865] and call it a "lie . . . that MMA officials were trying to work with the Ballantines . . . ."[866] They are so confident in these assertions that they claim that it would have been "silly"[867] and would have "defie[d] credulity"[868] for them ***not*** to have "consider[ed] a revised plan . . . ."[869] if they had in fact been invited to do so by the Ministry.

250. And yet, that is precisely what happened. As explained above, the Ministry invited the Ballantines at least twice — explicitly and in writing — to propose alternate sites for the project that they wished to build,[870] but the Ballantines inexplicably declined to do so. Instead, and for whatever reason, they opted to insist on obtaining approval for the same site that they initially had proposed. Accordingly, instead of simply accepting the Ministry's reasons for rejecting the initial site, and proposing an alternative site, they wasted the Ministry's time and money by pursuing three separate reconsideration requests — all of which the Ministry reviewed and considered in good faith. The Ministry went to great lengths to work with the Ballantines. The Reply's assertion to the contrary is therefore entirely unsupported.

251. The ***third*** arbitrariness argument is that "the policy, as written in Article 122 of the Environmental Law, . . . purports to restrict any development on land where slopes exceed

[865] **Reply**, ¶ 364; *see also* ***id.***, ¶ 362.
[866] **Reply**, ¶ 363.
[867] **Reply**, ¶ 365.
[868] **Reply**, ¶ 365.
[869] **Reply**, ¶ 365.
[870] *See* **Ex. C-008**, Letter from Ministry to M. Ballantine (12 September 2011); **Ex. C-015**, Letter from Ministry to M. Ballantine (15 January 2014).

60%."[871] Here, the Ballantines contend that "[t]his, as written in the law, ***is not a rational policy***," [872] because "[d]isallowing all development in land which contain slopes in excess of 60% is too broad a policy to protect certain areas."[873] It is not clear what the Ballantines are attempting to argue. However, it ***is*** clear that Article 10.5 of DR-CAFTA does not allow for claims based on abstract criticism of the ***rationality*** of a law, let alone when such law predates the relevant investment. As the text of Article 10.5 makes plain, the standard at issue is "fair and equitable ***treatment***," [874] and the word "treatment" connotes some form of measure taken vis-à-vis the investor. Investment treaties would be unmanageable if they could be used willy-nilly to challenge any law that an investor deems "irrational." This is one reason why "[t]he starting point is always that a foreign investor enters a host State voluntarily and must take its law as he finds it."[875]

252. The ***fourth*** is arbitrariness argument, already refuted above, is that "Respondent's assertion that its officials used altitude, concentration, and environmental impact when determining the slope issues was arbitrary," [876] because it supposedly "finds no place in the law or anything else for that matter."[877] As explained above, the slope issue was only ***part*** of the "environmental impact" assessment, and "altitude" and "concentration." for their part, were relevant to the core question set forth in Article 122 of the Environmental Law — *viz.*, whether

[871] **Reply**, ¶ 368.

[872] **Reply**, ¶ 368 (emphasis added).

[873] **Reply**, ¶ 368.

[874] **Ex. R-010**, DR-CAFTA, Art. 10.5 (emphasis added).

[875] **RLA-124**, C. McLachlan, L. Shore, M. Weiniger, International Investment Arbitration, Oxford University Press (2007), ¶ 7.180; *see also* **CLA-016**, *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL, Award (Orrego Vicuña, Dam, Rowley) (31 March 2010), ¶ 233 ("[R]egulations addressed to social well-being are evidently within the normal functions of a government and it is not legitimate for an investor to expect to be exempt from them").

[876] **Reply**, ¶ 374.

[877] **Reply**, ¶ 375.

there would be "any . . . work which increases soil erosion and sterilization . . . on mountainous soil where slope incline is greater than sixty percent (60%)."[878] This was relevant because the Environmental Law mandated that, "[f]rom the enactment of the present Act, said land shall not be subject to human settlement, or agricultural activity, or any other activity that may endanger soil stability or national infrastructure works.[879]

253. The ***fifth***, and final, arbitrariness argument is that "the application of the law was further arbitrary in that the purported mechanism by which Respondent's officials [sic] appears to have vested complete discretion in the MMA official in determining whether to grant the permit."[880] Because of the garble in this assertion, it is not clear what the Ballantines are arguing. However, it simply cannot be the case that the mere "vesting of discretion" regarding a particular task in a particular person or agency can amount to arbitrary conduct that violates international law. As the *Bilcon* tribunal explained, "Modern regulatory and social welfare states tackle complex problems. Not all situations can be addressed in advance by the laws that are enacted. Room must be left for judgment to be used to interpret legal standards and apply them to the facts."[881]

[878] **Ex. R-003**, Environmental Law (18 August 2000), Art. 122.

[879] **Ex. R-003**, Environmental Law (18 August 2000), Art. 122 (emphasis added).

[880] **Reply**, ¶ 377.

[881] **CLA-061**, William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability (Simma, McRae, Schwartz) (17 March 2015, ¶ 437; see also **id.**, ¶ 738 ("[L]awmakers . . . can set environmental standards as demanding and broad as they wish and can vest in various administrative bodies whatever mandates they wish"); **CLA-017**, S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award (Hunter, Schwartz, Chiasson) (13 November 2000), ¶ 263 (explaining that "a breach of Article 1105 [of NAFTA, which contains the fair and equitable treatment obligation] occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the **high measure of deference** that international law generally extends to the right of domestic authorities to regulate matters within their own borders") (emphasis added).

c. The "Due Process" Strand Of The Ballantines' Fair And Equitable Treatment Claim

254. In addition to the arguments addressed above, the Ballantines also allege in their Reply that the Dominican Republic committed three separate due process violations.[882] As the Ballantines observe,[883] "due process" is indeed mentioned explicitly in Article 10.5(2)(a) of DR-CAFTA:

> "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 . . . .[884]

255. However, each of the three due process claims asserted is unfounded. The ***first*** is related to the non-issuance by the Municipality of Jarabacoa of a "no-objection" letter in connection with Project 4 (*i.e.*, the Mountain Lodge project). The Ballantines contend that such non-issuance left them "in a legal limbo . . . with nothing to challenge because there was no denial of the letter (nor, of course, was there a granting of the letter)."[885] However, it is not true that the Ballantines were in any "legal limbo," as under Dominican law, there is a doctrine known as "administrative silence" which protects an individual's right to appeal any failure by governmental authorities to provide a timely response to requests that the individual has filed.[886] In situations where the relevant authority does not respond to a request within a particular amount of time, the doctrine of administrative silence creates a presumption of a negative act against the individual (*i.e.*, a presumption that the request has been rejected), so that the

[882] *See* **Reply**, ¶ 391.
[883] *See* **Reply**, ¶ 388.
[884] **Ex. R-010**, DR-CAFTA, Art. 10.5.2(a).
[885] **Reply**, ¶ 393.
[886] **Ex. R-339**, Law 1494 of 1947 on Contentious-Administrative Jurisdiction, Art. 2.

individual can initiate appeals before the appropriate judicial authorities.[887] The Ballantines, who had Dominican attorneys,[888] could have discovered this easily had they been genuinely concerned at the time about "be[ing] left with nothing to challenge . . . ."[889]

256. The ***second due process*** claim is related to the Ministry's invocation of Article 122 of the Environmental Law as a basis for rejecting the Ballantines' application for a permit to build the Project 3 road.[890] Here, the Ballantines' contention is that the Ministry "has the obligation to explain to an investor the reasons why specific measures affecting its interests were adopted."[891] However, the Ministry in fact did that, many times.[892] Its letters detailed at length the relevant legal norms,[893] and specifically responded to the Ballantines' comments.[894] The Ballantines stated in contemporaneous correspondence that they understood the Ministry's reasoning,[895] and even provided a point-by-point explanation of the Ministry's position to

[887] **Ex. R-339**, Law 1494 of 1947 on Contentious-Administrative Jurisdiction, Art. 2.

[888] *See, e.g.*, **M. Ballantine 1st Statement**, ¶ 13 (referring to a Dominican environmental lawyer); **Ex. R-225**, Email from M. Ballantine to B. Guzman (22 July 2008) (indicating that the Ballantines also retained a Dominican lawyer to assist with their naturalization applications).

[889] **Reply**, ¶ 393.

[890] **Reply**, ¶ 396.

[891] **Reply**, ¶ 397.

[892] *See, e.g.*, **Ex. C-008**, Letter from Ministry to M. Ballantine (12 September 2011); **Ex. C-011**, Letter from Ministry to M. Ballantine (8 March 2012); **Ex. C-013**, Letter from Ministry to M. Ballantine (18 December 2012); **Ex. C-015**, Letter from Ministry to M. Ballantine (15 January 2014).

[893] **Ex. C-011**, Letter from Ministry to M. Ballantine (8 March 2012); **Ex. C-013**, Letter from Ministry to M. Ballantine (18 December 2012); **Ex. C-015**, Letter from Ministry to M. Ballantine (15 January 2014).

[894] *See generally* **Ex. C-011**, Letter from Ministry to M. Ballantine (8 March 2012); **Ex. C-013**, Letter from Ministry to M. Ballantine (8 March 2012), **Ex. C-015**, Letter from Ministry to M. Ballantine (15 January 2014).

[895] See, e.g., **Ex. C-010**, Letter from M. Ballantine to Ministry (2 November 2011), ("La razón que nos han dado . . . es que según la ley 64-00 articulo 122, no permite el desarrollo en áreas donde la pendiente es mayor de 60 grados y eso está bien . . . ."); **Ex. C-097**, Letter from M. Ballantine to Ministry (3 August 2012), p. 3 ("Between the documentation outlined by the Vice-Minister (i) the project is located in a land with a 20-37 pitch corresponding to 36-75% respectively; (ii) the project is located in a zone with stream channels; (iii) the work of the project would put much pressure to the environment and mountain; and (iv) the soil of where the project is located is fit for forests, crops and grass"); **Ex. C-012**, Letter from M. Ballantine to Ministry (3 August 2012), p. 1 ("We understand there are parameters established and we are not [questioning you] in any way, we are just saying that the extension of our current project is located in a zone with a pitch of 32 [degrees] and not 60"). The language that appears in brackets in the foregoing quotation from Exhibit C-012 better reflects the original Spanish version of the letter, which had stated as follows: "*Entendemos que existen parametros establecidos y no lo estamos poniendo en tela de juicio de*

[FOOTNOTE CONTINUED ON NEXT PAGE]

another government agency.[896] Accordingly, there should be no question that the Ministry adequately explained to the Ballantines why their permit request had been rejected.

257. The ***third***, and final, due process claim about the creation of the Baiguate National Park, which the Ballantines contend was a "secretive process."[897] As noted above, however, the Ballantines have since abandoned their claims based on the creation of the Park.[898] That said, it seems useful to note that the Ballantines' argument here was based, *inter alia*, upon the assertion that the publication in the Official Gazette of the decree that created the Park "has nothing to do with the transparency — or lack thereof — with respect to the creation of the Park."[899] This is nonsensical. The Official Gazette is the principal official publication mechanism for decrees, executive orders, and laws in the Dominican Republic. The Ballantines' own expert refers to the "gazettement" of a protected area — stating that "[g]azettement indicates that a protected area has been designated for protection by the state or other public authorities according to relevant legislation in force,"[900] and that this "process . . . provides an opportunity for stakeholders to participate in the definition of protected area boundaries and [zoning] system."[901]

258. The Ballantines also asserted that "the publication of [the decree in] a gazette . . . does nothing to allow the Ballantines to understand the effect of the Park's creation,"[902] and "did not provide precise boundaries that would allow the Ballantines to know the scope and extent of

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
ninguna manera, simplemente estamos diciendo que la extensióon de nuestro projecto proyecto actual se encuentra en una zona que está a sóolo 32 grados de inclinación, no 60."

[896] *See generally* **Ex. R-242,** Letter from M. Ballantine to J.A. Rodriguez, Centro de Exportación e Inversión (30 May 2013).

[897] **Reply**, ¶ 404.

[898] *See* **Admissibility Response**, ¶¶ 2, 73.

[899] **Reply**, ¶ 405.

[900] **L. Potes 1st Report**, fn. 21.

[901] **L. Potes 1st Report,** ¶ 21(d).

[902] **Reply**, ¶ 410.

the Park."[903] However, their own environmental consultants from Empaca Redes plainly thought otherwise, since as early as September 2010 — almost three years to the day before the Ballantines say that the Ministry first specifically mentioned the Park to them[904] — they were able to explain to the Ballantines both where the Park was, and what its existence meant.[905]

d. The "Transparency" Strand Of The Ballantines' Fair And Equitable Treatment Claim

259. The final strand of the Ballantines' fair and equitable treatment claim is the "transparency" strand. Nearly every aspect of the argument here is unfounded.

260. The argument begins with the assertion that "[t]ransparency is one of the bases under which a claimant can seek relief pursuant to an FET clause."[906] Ironically, in support of this proposition, the Ballantines point to *Metalclad*[907] — an award that was subsequently set aside precisely for concluding erroneously that "transparency" was part of the minimum standard of treatment under customary international law.[908] They also cite Chapter 18 of DR-CAFTA, which contains certain transparency requirements, and encourage the Tribunal to use them "as a guide."[909] The problem, however, is that — as explained above — the Ballantines cannot simply import into Chapter Ten the requirements of Chapter 18. Doing so would violate the interpretative principle of *expressio unius est exclusio alterius*. In any event, apart from the

[903] **Reply**, ¶ 411.

[904] **Amended Statement of Claim**, ¶ 110.

[905] *See generally* **Ex. R-169**, Emails between (1) M. Ballantine and Zuleika Salazar, and (2) Mario Mendez and Miriam Arcia of Empaca (22-29 September 2010); **Ex. R-170**, Email from Miriam Arcia to M. Ballantine, Mario Méndez, and Zuleika Salazar (22 September 2010).

[906] **Reply**, ¶ 418.

[907] **Reply**, ¶ 420.

[908] *See* **CLA-029**, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 Award (Lauterpacht, Civiletti, Siqueiros) (30 August 2000), ¶¶ 70-74 (*cited in* **CLA-005**, *Marvin Roy Feldman Kapa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (Keramaeus, Covarrubias Bravo, Gantz) (16 December 2002), ¶ 133.

[909] **Reply**, fn. 471.

mere act of citing Chapter 18, the Ballantines do not even attempt to explain what any transparency "obligation" might entail. Their claim should be dismissed on this basis alone.

261. Even setting these threshold issues aside, the claim also falters on its merits. The Ballantines asserted claims in the Reply based on (1) Article 122 of the Environmental Law,[910] and (2) the creation of the Park.[911] The claims based on the creation of the Park have since been withdrawn,[912] leaving only the claim based on Article 122 of the Environmental Law.

262. With respect to Article 122, the Ballantines complain that while "Respondent asserts that there exists a whole manner of considerations regarding whether to approve the project,"[913] they are not mentioned expressly in the law. As explained above, however, questions of environmental impact are inherently difficult to answer, and it would be impractical to require States to develop and publish a comprehensive list of all of the potentially relevant factors, given that (1) different sites have different features; (2) those different features interact in different ways; (3) different projects have different impacts upon those different features; (4) the environment itself is constantly changing; (5) science is always evolving; (6) technology is always improving; and (7) environmental protection efforts are becoming more stringent over time. Again in the words of the *Bilcon* tribunal: "Modern regulatory and social welfare States tackle complex problems. Not all situations can be addressed in advance by the laws that are enacted."[914]

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[910] **Reply**, ¶ 423.

[911] **Reply**, ¶ 424.

[912] *See* **Admissibility Response**, ¶¶ 2, 73.

[913] **Reply**, ¶ 423.

[914] **CLA-061**, William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability (Simma, McRae, Schwartz) (17 March 2015), ¶ 437 ("Modern regulatory and social welfare States tackle complex problems. Not all situations can be addressed in advanced by the laws that are enacted").

263. However, that does not mean that the factors were unknowable. The reports and testimony of the Ballantines' own consultants and builder demonstrate the contrary. For example, their builder has explained in his witness statement that, "[f]or the structural plans [for the Mountain Lodge] we . . . measured the permeability of the ground, cohesion, plasticity limits and of course its compressive efforts"[915] — even though none of those factors are mentioned in Article 122. And although the Ballantines insisted in the Reply that "altitude" is a factor that had been invented for this arbitration, they were expressly informed, in a 2010 "Proposal for Terrain and Road Engineering" prepared by "ECON consulting" that (1) "in order to properly plan the phases of the Jamaca de Dios project, an accurate topographical map of the project area [would be] required,"[916] and (2) such map was to "includ[e] ***elevation***."[917]

264. In sum, the Ballantines' transparency claims — and indeed, all of their fair and equitable treatment claims — are unfounded.

3. The Ballantines' Expropriation Claim Is Unfounded

265. The Ballantines' expropriation claim pursuant to Article 10.7 of DR-CAFTA[918] has changed significantly over the course of this proceeding. As it currently stands, the claim is articulated as follows:

[915] **D. Almanzar 1st Statement,** ¶ 4.

[916] **Ex. R-275**, Proposal for Terrain and Road Engineering, ECON Consulting (2010), p. 11.

[917] **Ex. R-275**, Proposal for Terrain and Road Engineering, ECON Consulting (2010), p. 5.

[918] Article 10.7.1 states as follows: "No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and (d) in accordance with due process of law and Article 10.5." **Ex. R-010**, DR-CAFTA, Art. 10.7.1.

a. "Respondent's final denial of the Ballantines' permit request for Phase 2 ended any opportunity to develop this property, expropriating the Ballantines' project."[919]

b. "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."[920]

c. "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."[921]

The problem with this claim is threefold. ***First***, it is inadmissible. As explained above, this is so because (1) it is legally impossible to expropriate the same property twice,[922] (2) the Ballantines previously had asserted that "the Dominican Republic has expropriated the Ballantines' investment ***by the creation*** of the National Park,"[923] (3) such claim is time-barred by Article 10.18.1 of DR-CAFTA, and (4) the Ballantines cannot circumvent the time bar simply by claiming that an expropriation took place on a later date.

266. ***Second***, in any event, it follows from the fact that it is legally impossible to expropriate the same property twice[924] that the first two allegations above cannot both be true.

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[919] **Reply**, ¶ 508.

[920] **Reply**, ¶ 505.

[921] **Reply**, ¶ 505.

[922] **RLA-043**, *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (Lalive, Chemloul, Gaillard) (8 May 2008), ¶ 622 ("[I]t is impossible to expropriate the same assets two consecutive times") (translation from Spanish; the original Spanish version reads as follows: *"[E]s imposible expropiar dos veces seguidas los mismos bienes"*).

[923] **Amended Statement of Claim**, ¶ 14 (emphasis added).

[924] **RLA-043**, *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (Lalive, Chemloul, Gaillard) (8 May 2008), ¶ 622 ("[I]t is impossible to expropriate the same

[FOOTNOTE CONTINUED ON NEXT PAGE]

The reality, moreover, is that neither is true. As the Ballantines themselves acknowledged in their Amended Statement of Claim, "***[d]irect*** expropriation has been described as the compulsory transfer of title to property to the State or a third party, or the outright seizure of property by the State."[925] Accordingly, the second assertion above — *i.e.*, that "[t]he denial 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***"[926] — could only be true if the Ballantines had lost title to their property. However, the Ballantines have conceded expressly on multiple occasions that they still have title to the property.[927] They also confirmed as recently as two weeks ago, that they still exercise dominion and control over such property.[928]

267. By contrast, ***indirect*** expropriation consists of interference so substantial that it "deprives the investor of the possibility to utilize the investment in a meaningful way."[929] In the Reply, the Ballantines contend, citing *Metalclad*, that indirect "'expropriation . . . includes . . . interference with the use of property which has the effect of depriving the owner, in whole or significant part, o[f] the use or reasonably-to-be-expected economic benefit of property.'"[930] However, the Ballantines' own pleadings show that "the final denial of the Respondent of the Ballantines' permit to develop Phase 2 due to the slopes"[931] — which appears

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
assets two consecutive times") (translation from Spanish; the original Spanish version reads as follows: *"[E]s imposible expropiar dos veces seguidas los mismos bienes"*).

[925] **Amended Statement of Claim**, ¶ 229.

[926] **Reply**, ¶ 505.

[927] **Reply**, ¶ 504 ("Yes, the Ballantines hold title to the property"); **Amended Statement of Claim**, ¶ 237 ("[T]he Ballantines maintained legal ownership of the land, the concessions, and other investments . . . .").

[928] *See* Letter from the Ballantines to the Tribunal (1 March 2018), p. 7 ("The Ballantines are not obligated to grant the Respondent any examinations of ***their*** property for the purposes of the arbitration . . . ") (emphasis added).

[929] **Amended Statement of Claim**, ¶ 229.

[930] **Reply**, ¶ 506 (ellipses in original).

[931] **Reply**, ¶ 505.

to be a reference to the Ministry's 15 January 2014 letter, rejecting the Ballantines' third reconsideration request — did not have that effect.

268. As explained above, there was nothing magical about the "final" denial; the discussion of slopes was virtually the same in every single letter leading up to such "final denial." In fact, the Ballantines themselves have stated in respect of the September 2011 and March 2012 letters that "[i]t is hard to imagine a more vivid example of the Respondent establishing a 'complete bar to the project.'"[932] Consistent with the foregoing, the Ballantines have asserted that "when they received the first denial from Respondent in September of 2011, they chose to halt additional purchases [of land] to mitigate any additional losses that may result from Respondents' [sic] treaty violations."[933] It follows from this that if an expropriation occurred, it would have occurred in September 2011 or March 2012. However, the Ballantines themselves contend elsewhere in their Reply that, as of 2013, when the Ministry "first invoked the Park [as a ground for denying the permit] . . . the Ballantines had owned all of their Phase 2 property for three years, and ***its value was dramatic***."[934]

269. ***Third***, the allegation that the "[t]he 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"[935] ignores the fact that the Ballantines did not have any legal entitlement to a "no objection" letter. As the Dominican Republic explained in its Statement of Defense — and the

[932] **Reply**, ¶ 364.

[933] **Reply**, fn. 231; *see also* **J. Farrell 2nd Report**, p. 7 ("The Ballantines did not purchase any land after their first MMA rejection").

[934] **Reply**, ¶ 192 (emphasis added).

[935] **Reply**, ¶ 505.

Ballantines have not contested — such entitlement is a prerequisite to any expropriation claim.[936] Moreover, it simply cannot be the case that the mere non-issuance of a discretionary permit somehow automatically equates to an expropriation. If it were, the issuance of a permit effectively would cease to be discretionary, as a State would have no real choice but to issue the permit.

270. In sum, the Ballantines' expropriation claim fails even on the face of their own pleadings.

IV. QUANTUM

271. As discussed more fully in Section II, above, the Tribunal lacks jurisdiction to hear the claims in this arbitration. Even if the Tribunal were to decide that it has jurisdiction and can hear the claims, as discussed in Section III, above, the Dominican Republic did not commit any breach of its DR-CAFTA obligations, and therefore is not liable for any alleged harm suffered by the Ballantines.

272. If the Tribunal were nevertheless to conclude that the Ballantines have in fact established jurisdiction, that all of their claims are admissible, and that the Dominican Republic breached DR-CAFTA, no award of damages would be appropriate.

273. As further articulated below, in regard to each head of damages, the Ballantines claims are speculative, entirely unsupported, and fail to take into account fundamental principles

[936] *See* **RLA-080**, *Emmis International Holding, B.V.* et al. *v. Hungary*, ICSID Case No. ARB/12/2, Award (McLachlan, Lalonde, Thomas) (16 April 2014), ¶ 159 (explaining that when the "cause of action . . . is that of expropriation, Claimants must have held a property right of which they have been deprived"); *see also* **RLA-080**, *Emmis International Holding, B.V.* et al. *v. Hungary*, ICSID Case No. ARB/12/2, Award (McLachlan, Lalonde, Thomas) (16 April 2014), ¶ 168 (citing and describing the facts of seven other investor-State decisions that support this proposition).

of causation, contributory fault and mitigation. Moreover, the pre-judgment interest that the Ballantines seek cannot be awarded, and the Ballantines are not entitled to moral damages.

274. Furthermore, as will be seen in Section IV.I., below, new evidence surfaced in document production which suggests that the Ballantines *either* kept two sets of accounting books (and thus for years committed tax fraud in both the Dominican Republic and the United States); *or* produced fraudulent documentation in the context of this arbitration, with the intent to deceive the Dominican Republic and the Tribunal. Whatever the case may be, given such circumstances, an award of damages in favor of the Ballantines would be unconscionable.

A. Summary Of The Ballantines' Damages Allegations As Revised In The Reply

275. As of their Reply, the Ballantines seek damages in the amount of US$30.1 million for alleged violations of DR-CAFTA under three heads of damages: (i) "Lost Profits" (for Project 3 Lot sales, Project 3 Builders EBT, Mountain Lodge, the Lower Apartment Complex, and the Boutique Hotel)937; (ii) "Lost Opportunity" (for Paso Alto and what the Ballantines term "Brand Diminution and Future Investment"); and (iii) "Investment Expenditure" (expansion of Aroma Restaurant, and construction of Project 1 and Project 3 roads).

276. The Ballantines also seek prejudgment interest at a rate of 5.5% compounded monthly, which they calculate at US$5.4 million.[938] Further, they request that the Tribunal award them "Moral Damages."[939] All of these issues are addressed below.

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[937] The Ballantines excluded from their Reply damages claims that they had previously alleged for lost sales of Project 2 lots, in an amount of US$218,920. The Ballantines explain that, since the time of filing of the Statement of Defense, they have sold those lots, and are therefore no longer claiming damages related to them. *See* **Reply,** fn. 545; *see also* **J. Farrell 2nd Report**, Exhibit 1, fn. 1.

[938] *See* **Reply,** ¶ 548**;** *see also* **J. Farrell 2nd Report**, p. 13 and Exhibit 1.

B. The Ballantines Have Not Established That, *But For* The Dominican Republic's Actions, They Would Have Been Able To Successfully Develop Any Of Their Prospective Projects

277. The Ballantines allege that, *but for* the Dominican Republic's acts, they would not have suffered the damages they are claiming in this proceeding.[940] However, the Ballantines have failed to show that the losses they claim are causally linked to the specific breaches alleged, and have refused to even answer the basic question, "What injury resulted from what measure?"[941] In response to this criticism, the Ballantines argued that the whole discussion was "nonsensical,"[942] because "the damages that flow from the various [alleged] treaty violations do not depend on the specific violation but rather from what is necessary to wipe out the consequences of these wrongful acts."[943]

278. The Ballantines' response is misguided. They are confusing, on the one hand, the obligation to prove a causal link between each breach alleged and the damages claimed, and on the other, the separate and distinct issue of the *reparations* to which a party may or may not be entitled once causation has been proven. Here, the Dominican Republic is not referring to the issue of reparations.[944] Before the reparations aspect is even addressed, the Tribunal first needs

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

[939] *See* **Reply,** ¶ 553; *see also* **Amended Statement of Claim**, ¶ 276.

[940] *See* **Reply**, ¶ 514; *See* also **Amended Statement of Claim**, ¶ 281.

[941] *See* **Statement of Defense,** ¶ 279 ("The Ballantines here have not even attempted to individualize the specific injury allegedly associated (or resulting from) each of the alleged measures").

[942] *See* **Reply**, ¶¶ 520, 522.

[943] *See* **Reply**, ¶ 520.

[944] In contrast, that clearly appears to be what the Ballantines are referring to, as the materials cited in their Reply plainly reveal. *See, e.g.*, **Reply** ¶ 517 quoting **CLA-039**, *Case Concerning The Factory at Chorzów (Case for Indeminity)(Merits)*, PCIJ Series A No. 17, Judgment No. 13 (13 September 1928), p. 47 ("'***[R]eparation*** 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'") (emphasis added); **Reply** ¶ 518 quoting **CLA-029**, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 Award (Lauterpacht, Civiletti, Siqueiros) (30 August 2000), ¶ 122 ("'[W]here 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

[FOOTNOTE CONTINUED ON NEXT PAGE]

to determine if the loss alleged — regardless of its value — is actually the result of the specific breach alleged.[945] This makes sense because if the relevant State conduct did not cause the harm that the claimant alleges, the State should not have to bear responsibility for such harm.

279. For that reason, it is a settled principle that "compensation will only be awarded if there is a sufficient causal link between the breach of the BIT and the loss sustained by the Claimants."[946] The starting point of that analysis is "to recall what the unlawful acts were" and second, to identify "the loss suffered by [Claimants] as a result of [those] measures."[947] Further, the "*but for*" test requires that the loss be caused specifically by the breach alleged, and not by other causes.[948]

280. In the Reply, the Ballantines first double down on the abstract proposition, originally made in their Amended Statement of Claim, that their damages "flow equally from the

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
which would in all probability have existed if that act had not been committed (the status quo ante)'") (emphasis added).

[945] **CLA-017,** *S.D. Myers, Inc. v. Government of Canada,* UNCITRAL, Partial Award (Hunter, Schwartz, Chiasson) (13 November 2000), ¶ 316 ("[C]ompensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific [treaty] provision that has been breached"); *and also* **CLA-041,** *Responsibility of States for Internationally Wrongful Acts*, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10) (12 December 2001), Art. 31.1 ("The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act").

[946] **RLA-113**, *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador,* ICSID Case No. ARB/04/19, Award (Kaufmann-Kohler, Gómez-Pinzón, van den Berg) (18 August 2008), ¶ 468; *See* also **RLA-084**, *Responsibility of States for Internationally Wrongful Acts*, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10) (12 December 2001), Art. 31, Comment 11; Art. 39, Comment 2.

[947] **RLA-041**, *LG&E Energy Corp, et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award (Maekelt, Rezek, van den Berg) (25 July 2007), ¶¶ 46, 47.

[948] *See* **RLA-029**, *Ronald S. Lauder v. Czech Republic,* UNCITRAL, Final Award (Briner, Cutler, Klein) (3 September 2001), ¶234 ("Even if the breach therefore constitutes one of several "*sine qua non*" acts, this alone is not sufficient. In order to come to a finding of a compensable damage it is also necessary that there existed no intervening cause for the damage"). *See* also **CLA-017,** *S.D. Myers, Inc. v. Government of Canada,* UNCITRAL, Partial Award (Hunter, Schwartz, Chiasson) (13 November 2000), ¶ 316 ("[T]he economic losses claimed by [the claimant] must be proved to be those that have arisen from a breach of the treaty, and not from other causes").

inequitable and discriminatory treatment [], and from the illegal expropriation."[949] However, their Reply reveals what appears to be the genuine gravamen of their claims:[950]

> 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."

281. This quote from the Reply clearly shows that the Ballantines consider the measures in breach of DR-CAFTA to be the Dominican Republic's assertion of the following two grounds as a basis for the denial of the permit for the Project 3 expansion request: (i) the slope restrictions; and (ii) the National Park restrictions.[951]

282. Consequently, the Ballantines' damages claims are predicated on the (implausible)[952] assumption that, *but for* the invocation of the slope or National Park restrictions,

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[949] *See* **Reply**, ¶ 520; *see also* **Amended Statement of Claim**, ¶ 288.

[950] *See* **Reply**, ¶ 521 (emphasis added).

[951] Ballantines no longer seem to be claiming that the creation of the Park is a DR-CAFTA breach.

[952] Even if the Ballantines case was meritorious - *quod non* - they cannot realistically expect to be awarded damages in the form of lost profits for 10 distinct prospective projects (none of which is a going concern, none of which was executed, and some of which had not even yet been planned) for 25 years or more (their damages claim consider residual values). Evidently then, the Ballantines' entire damages case is little more than an exercise in "anchoring" — an attempt to skew the Tribunal's frame of reference so that it will view this case as a multi-million dollar dispute and thereby feel more comfortable awarding a "lesser" amount which, absent the anchoring, would be unwarranted and excessive. *See* **RLA-114**, E. Sussman, Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them, The American Review of International Arbitration, Vol. 24, No. 3 (2013), p. 497 ("Numbers are suggestive, and high or low numbers, even those that are presented at the start of the arbitration, can impact an arbitrator's thinking despite the careful damages analysis conducted based on the concrete evidence presented by the parties"); *see also* **RLA-115**, Felipe Sperandio, 'Arbitrating Fast and Slow: Strategy Behind Damages Valuations?', Kluwer Arbitration Blog, February 28 2018, http://arbitrationblog.kluwerarbitration.com/2018/02/28/booked-2/ (referring to the "'anchoring effect' as a cognitive bias phenomenon [that] occurs when a person is asked to consider a particular initial value, relating to an

[FOOTNOTE CONTINUED ON NEXT PAGE]

the expansion **permit for Project 3 would have been granted,** and that, without anything more than marginal upfront capital expenditures,[953] the Ballantines would have secured **future profits from 10 distinct ventures for over 25 years**.

Figure 11: Description of ventures for which the Ballantines claim lost profits

Venture	Description	Start	End
1	Acquisition of the Paso Alto project; subdivision, infrastructure and sale of 36 lots[954]	2011	2016
2	Subdivision, infrastructure and sale of 70 lots in Project 3[955]	2012	2017
3	Construction of 70 homes in Project 3[956]	2012	2018
4	Construction and operation of Taino Hotel (until at least 2023)[957]	2012	N/A
5	Construction of Mountain Lodge and sale of all 12 units[958]	2012	2014
6	Management of Mountain Lodge rental pools (until at least 2023)[959]	2014	N/A
7	Construction of Lower Apartment Complex and sale of all 6 units[960]	2014	2016
8	Management of Lower Apartment Complex rental pools (until at least 2023)[961]	2014	N/A
9	Investment in/acquisition of unnamed mountain project; subdivision, infrastructure and sale of 88 lots[962]	2017	2026
10	Investment in/acquisition of second unnamed mountain project, subdivision, infrastructure and sale of 88 lots[963]	2027	2036

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
unknown quantity, before estimating that quantity. What follows is that the person's estimate tends to remain close to that value initially considered; even in situations where the latter bears no correlation with the former").

[953] A review of the invested expenditures and revenues assumed by the Ballantines' damages expert, Mr. Farrell, in his calculations reveals that he only assumed an initial investment of US$0.99 million for all the lost profits heads of damages included in his report. *See* **J. Farrell 1st Report**, Schedules 1, 2, 4, 5, 6, 7, 8, 10, 11.B. The rest of the assumed capital expenditure was to be funded by cash flows from each of the ventures. *See also* **T. Hart 2nd Expert Report**, Appendix F.

[954] *See* **J. Farrell 1st Report**, Schedule 10; *see also* **J. Farrell 2nd Report**, Exhibit 1.

[955] *See* **J. Farrell 1st Report**, Schedule 1; *see also* **J. Farrell 2nd Repor**t, Exhibit 1.

[956] *See* **J. Farrell 1st Report**, Schedule 2; *see also* **J. Farrell 2nd Report**, Exhibit 1.

[957] *See* **J. Farrell 1st Report**, Schedules 4, 11.A; *see also* **J. Farrell 2nd Report**, Exhibit 1.

[958] *See* **J. Farrell 1st Report**, Schedule 5; *see also* **J. Farrell 2nd Report**, Exhibit 1.

[959] *See* **J. Farrell 1st Report**, Schedules 6, 11.A; *see also* **J. Farrell 2nd Report**, Exhibit 1.

[960] *See* **J. Farrell 1st Report**, Schedule 7; *see also* **J. Farrell 2nd Report**, Exhibit 1.

[961] *See* **J. Farrell 1st Report**, Schedules 8, 11.A; *see also* **J. Farrell 2nd Report**, Exhibit 1.

[962] *See* **J. Farrell 1st Report**, Schedule 11.B; *see also* **J. Farrell 2nd Report**, Exhibit 1.

[963] *See* **J. Farrell 1st Report**, Schedule 11.B; *see also* **J. Farrell 2nd Report**, Exhibit 1.

283. Separately, the Ballantines claim that *but for* the invocation of the slope and National Park restrictions as a basis for the Project 3 permit denial, their investments in Aroma Restaurant, and in the Project 1 and Project 3 roads, would not have been impaired.[964]

284. These assumptions suffer from several fatal flaws. *Principally*, as stated in Section III above, the slope and National Park restrictions were not the only bases on which the permit was denied. Other environmental concerns were raised — on repeated occasions — by the Ministry of Environment, and the Ballantines have not claimed that the invocation of any of those other concerns configured breaches of the DR-CAFTA.[965] Accordingly, it does not follow that the permit would have been issued absent the invocation the slope or National Park restrictions. *Additionally*, (i) the Ballantines fail to present any evidence whatsoever to substantiate the proposition that, *but for* the alleged breach, they would have been capable of actually carrying out those ventures successfully (no prior record of success, no evidence of

[964] For avoidance of doubt, the Dominican Republic does not admit that these "investments" have been impaired at all — much less as a result of acts or omissions of the Dominican Republic.

[965] *See* **Ex. C-008,** Letter from Zoila González de Gutiérrez, *Ministerio de Medio Ambiente y Recursos Naturales*, to M. Ballantine (12 September 2011), ("[T]he project [was] [n]ot viable environmentally for being in a mountain area ***with a slope higher than 60%*** where the use allowed is just the establishment of permanent planting of fruit bushes and harvestable trees, pursuant to Article 122 of Law 64-00, ***likewise it is considered an environmentally [fragile area] and implies a natural risk***"); *see also* **Ex. C-011,** Letter from Zoila González de Gutiérrez, *Ministerio de Medio Ambiente y Recursos Naturales*, to M. Ballantine (8 March 2012); and **Ex. C-013,** Letter from Zoila González de Gutiérrez, *Ministerio de Medio Ambiente y Recursos Naturales*, to M. Ballantine (18 December 2012), ("[T]he Ministry informs you that the Technical Evaluation Committee (TEC) in a meeting on February 22, 2012, and under Resolution No. 012-12; after having evaluated your proposal to carry out the construction and operation of 10 cabins and the sale of 19 lots for the construction of villas; the extension of a 2.8 km stretch for lot distribution; concludes and reiterates that the project is not viable in the chosen site due to the following: The project is located on lands with slopes between 20 and 37 degrees which, in percentage terms, are equivalent to 36% and 75%, respectively. The soils are a Class V, VI and VII productive capacity, suitable for forests, perennial crops and pastures. In the area where the expansion is proposed, expansion activities would modify the natural water runoff, local hydrological status and the micro-basin because the area contains stream sources. The application was submitted for the construction and operation of 10 cabins, and the sale of 19 lots to build villas. Given the conditions of the land, the aforementioned construction is not, in itself, viable. At the time of the inspection, the construction and operation of 50 lots to build 50 villas was reported; and we observed that in the authorized area buildings have been built in violation of the authorization issued. Land cut and leveling work required to build the requested road and constructions, where proposed, would exert excessive pressure on the mountain ecosystem . . . Therefore, the Ministry informs you that after evaluating the present case, your file is considered closed").

access to the requisite funds[966]);[967] (ii) the Ballantines present claims for damages that are not sufficiently causally connected to the alleged breach to form the basis of an award of damages;[968] (iii) there is no evidence of loss or impairment;[969] and (iv) the Ballantines have themselves contributed to whatever losses they claim to have suffered.[970]

285. The flaws described in numerals (ii) to (iv) above will be addressed in the context of the discussion of the heads of damages in Sections IV.D. and E. below.

C. The Ballantines Have Failed To Prove Any Aspect Of Their Damages Claims

286. The Ballantines have the burden of proving every strand of their theory of damages.[971] This means that the Ballantines must prove: (i) that the loss claimed arose from a breach of the treaty, and not from other causes[972]; (ii) that the causal relationship between the

[966] *See* **T. Hart 2nd Report**, ¶ V.C.1. for a detailed discussion.

[967] Issues of lack of evidence will be addressed more fully in the next section.

[968] *See* **RLA-038**, *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (Fernández-Armesto, Paulsson, Voss) (28 March 2011), ¶155 ("It is a general principle of international law that injured claimants bear the burden of demonstrating that the claimed quantum of compensation flows from the host State's conduct, and that the causal relationship is sufficiently close (i.e. not 'too remote')").

[969] **RLA-041**, *LG&E Energy Corp, et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award (Maekelt, Rezek, van den Berg) (25 July 2007), ¶ 45 ("the issue that the Tribunal has to address is that of the identification of the "actual loss" suffered by the investor "as a result" of Argentina's conduct. The question is one of "causation": what did the investor lose by reason of the unlawful acts?).

[970] **CLA-017,** *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (Hunter, Schwartz, Chiasson) (13 November 2000), ¶ 316 ("[T]he economic losses claimed by [the claimant] must be proved to be those that have arisen from a breach of the treaty, and not from other causes").

[971] **RLA-044**, UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013) (February 2014), Art. 27.1 ("Each party shall have the burden of proving the facts relied on to support its claim or defense"); **CLA-012**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (Nariman, Anaya, Crook) (12 January 2011), ¶ 237 ("Under [UNCITRAL Rules] a claimant has the burden of proving both the breach and the claimed loss or damage"); **RLA-046,** Meg Kinnear, Damages in Investment Treaty Arbitration, Arbitration Under International Investment Agreements: A Guide To The Key Issues, Oxford University Press (7 April 2010), 551, 556 ("The investor bears the burden of proving causation, quantum and the recoverability of the loss claimed").

[972] **RLA-017,** *S.D. Myers, Inc. v. Government of Canada*, Partial Award (Hunter, Schwartz, Chiasson) (13 November 2000) , ¶ 316 ("[T]he economic losses claimed by [the claimant] must be proved to be those that have arisen from a breach of the treaty, and not from other causes").

breach and the alleged loss caused is sufficiently close, *i.e.*, "not too remote"[973]; and (iii) the quantum of the loss alleged.[974] To be recoverable, the alleged damages have to be proven with a reasonable degree of certainty; damages that are speculative, contingent or merely possible cannot form the basis of an award.[975]

287. The Ballantines have not disputed that they must prove their case; nor have they disputed any of the rules described above. Rather, they simply have chosen in their Reply not to address such factors, or the evidentiary problems in their damages case. A close look at the record reveals the likely reason why the Ballantines elected not to engage on the evidentiary issues.

288. Throughout this arbitration, the Ballantines reference a grand total of ***two*** exhibits to support the totality of the claims and assertions included in the quantum section of their Amended Statement of Claims and Reply, respectively. Those two documents — neither of which is directly relevant to proving their damages claims — are the following: (i) **Ex. C-072,** which is a translation of a press release issued by the Central Bank of the Dominican Republic

[973] *See* **RLA-038,** *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (Fernández-Armesto, Paulsson, Voss) (28 March 2011), ¶155 (["i]t is a general principle of international law that injured claimants bear the burden of demonstrating that the claimed quantum of compensation flows from the host State's conduct, and that the causal relationship is sufficiently close (i.e. not 'too remote')); *see also* **RLA-017,** *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (Hunter, Schwartz, Chiasson) (13 November 2000), ¶ 316 ("[C]ompensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific [treaty] provision that has been breached"); *and also* **CLA-41,** Responsibility of States for Internationally Wrongful Acts, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10) (12 December 2001), Art. 31.1 ("The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act").

[974] **RLA-017,** *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (Hunter, Schwartz, Chiasson) (13 November 2000), ¶ 316 ("[T]he burden is on [the claimant] to prove the quantum of the losses in respect of which it puts forward its claims").

[975] *See* **RLA-039,** *Rudloff Case*, Mixed Claims Commission United State-Venezuela (1903-5), Decision of Claim On Its Merits (undated), 255, 258-59 ("Damages to be recoverable must be shown with a reasonable degree of certainty, and cannot be recovered for an uncertain loss . . . [D]amages claimed in this item are speculative and contingent, and cannot form the basis of an award"); *see also* **RLA-040,** *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (Dupuy, Williams, Bernardini) (22 September 2014), ¶ 685 ([T]he appropriate standard of proof [for damages] is the balance of probabilities. This, of course, means that damages cannot be speculative or merely 'possible'").

regarding the Monetary Policy Rate as of 30 November 2016; and (ii) **Ex. C-101**, which is an undated drawing of the Jamaca Project purporting to show a planned timeshare development titled "Valy's at the Jamaca" — a project that, per the Ballantines' own admission, was ultimately not pursued, and with respect to which damages are not being sought herein.[976]

289. In the Statement of Defense, the Dominican Republic called out the Ballantines' failure to substantiate their claims:

> The Ballantines have not produced any evidence to demonstrate that Jamaca de Dios was indeed a profitable venture— at any time. Hence, there is no basis to conclude that any new projects would have been profitable. On the contrary, financial statements filed by the Ballantines with the Mercantile Registry show that at least as of 30 June 2010, the company operated at a loss.[977]

290. Notwithstanding this pointed criticism in the Statement of Defense that their damages claims and calculations were unsupported,[978] the Ballantines still failed in their Reply to present any evidence of the damages they seek. Instead of substantiating their damages claims with objective evidence, the Reply simply relies once again on bald and self-serving assertions of past profitability.[979]

291. Further, by way of direct "response" to this criticism, the Reply adopts a tactic that is consistent with the Ballantines' general strategy in their pleadings of sarcastically dismissing as "silly" any objections to deficiencies in their case. Thus, on the damages points, the Ballantines content themselves simply with disparaging the Dominican Republic for

[976] *See* **Reply**, ¶ 531 ("[A]s 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").

[977] *See* **Statement of Defense**, ¶ 306.

[978] *See* **Statement of Defense**, ¶¶ 306, 326, 327.

[979] *See* **Reply,** ¶ 515.

presenting what they claim are "primarily generalized legal defenses" regarding absence of "causation," "[failure] to mitigate" and "speculation", as opposed to "any substantive economic critique of the projected value of the Phase 2 land and the homes that would be built there [prepared by Mr. Farrell, the Ballantines' damages expert]."[980] Further, the Ballantines contend that the Dominican Republic was unable to specifically attack the Ballantines' projections "because the numbers used by the Ballantines are largely **based upon the historical performance of the existing investment**."[981] This last phrase is bolded for emphasis and appearance of truthfulness.

292. The Ballantines gloss over the fact that its damages expert completely failed to support nearly all of the inputs that yielded his damages calculations. No relevant documentary support whatsoever was provided for the claimed historical results and the limited market data that was supplied was not directly relevant.[982] In fact, the Ballantines' damages report was so severely deficient that the Dominican Republic's damages expert felt compelled to include the following (unusual) statements in his report:

> 51. [] ***In my experience, I have seen very few damages reports with this complete lack of financial evidence and basic supporting documentation***.
>
> 52. BRG states it relied upon historical financial results to make revenue assumptions, but ***failed to produce even the most basic documents*** to support a claim of this type which show: (1) the cost to acquire the land parcels; and (2) the sales prices received and dates of sale for each of the Phase 1 lots that were sold. In BRG's Schedule 1, which is its calculation of alleged damages related to the Phase 2 lots and is the largest damages category claim in Exhibit 2, BRG purports to rely on actual sales prices per square meter for lots sold in Phase 1 from 2012 through 2015, with adjustments for sale prices through 2017. BRG even

[980] *See* **Reply,** ¶ 515.

[981] *See* **Reply,** ¶ 515. (emphasis in original)

[982] *See* **T. Hart 1st Report**, ¶ 50.

> claims to exclude sales from its sample which were deemed "sporadic" and overall "not a good indicator of the average sales price." Even if this calculation methodology was considered appropriate, BRG purportedly relied on actual historical sale prices, without providing any supporting financial documentation (including but not limited to financial statements, bank accounts, tax returns (U.S., DR, local property)), and land purchase and sales agreements. ***Failure to provide this most basic support shows a lack of diligence and care in preparing the damages claim on the part of BRG and calls into question the independence of these calculations***.[983]

293. In sum, the stark reality is that the Ballantines have simply not produced any evidence substantiating their alleged damages. They instead bootstrap, attempting to rely solely on their own naked assertions (including those by Michael Ballantine — a party to the arbitration — about past profitability and future plans), and on the unsupported calculations of their damages expert Mr. James Farrell.

294. Although Mr. Farrell states that his opinion is based on "the documents and information gathered and provided to [him] at the time of [his] report,"[984] he did not submit any documents with either of his reports, except for exhibits and schedules containing his own calculations.

295. Remarkably, Mr. Farrell did not provide any underlying information or documents that purportedly formed the basis of his calculations, and when such information and documents were requested from him by the Dominican Republic's counsel, what was provided revealed that his report was based mainly on: (i) notes devoid of supporting data (most likely provided by Michael Ballantine himself); (ii) e-mail explanations from Michael Ballantine; and (iii) conversations of which no notes were kept (primarily with Michael Ballantine). Since his report thus appears to be founded mainly on information and mere assertions provided by the

[983] *See* **T. Hart 1st Repor**t, ¶ 51–52 (emphasis added, internal citations omitted).

[984] *See* **J. Farrell 1st Report**, p. 8; *see also* **J. Farrell 2nd Report**, p. 4.

party that retained him, rather than on any external or objective sources, Mr. Farrell cannot be considered an independent expert. As stated by Mr. Hart in his Second Report, Mr. Farrell failed to meet industry standards in the performance of his duties as an expert, including by failing to provide data to support his calculations.[985] He has no reasonable basis for his conclusions, and his damages analysis is therefore unreliable.[986] Moreover, his conclusions are directly contradicted by contemporaneous documents.[987]

296. In light of all the above, the Tribunal should disregard the report by Mr. Farrell, and the Ballantines have failed to meet their burden of proof on damages. Unsubstantiated assumptions simply cannot form the basis of a damages award.[988] All of the Ballantines' damages claims therefore fail.

D. The Ballantines Are Not Entitled To Any Of Their Lost Profits Claims

297. As noted above, to be recoverable damages must be proven with a reasonable degree of certainty.[989] The PCIJ in *Chorzow* referred to it as the "situation which would, *in all probability*, have existed if that act had not been committed."[990] Article 36 of the Draft Articles

[985] *See* **T. Hart 2nd Report**, ¶ 41.

[986] *See* **T. Hart 2nd Report**, ¶¶ 40–48.

[987] *See* **T. Hart 2nd Report,** ¶¶ 48, 63–69, 73–75, 79, 70.

[988] *See* **RLA-116**, *Mohammad Ammar Al-Bahloul v. Tajikistan*, SCC Case No. V (064/2008), Final Award (8 June 2010), ¶ 96.

[989] *See* **RLA-039,** *Rudloff Case*, Mixed Claims Commission United State-Venezuela (1903-5), Decision of Claim On Its Merits (undated), 255, 258–59 ("Damages to be recoverable must be shown with a reasonable degree of certainty, and cannot be recovered for an uncertain loss . . . [D]amages claimed in this item are speculative and contingent, and cannot form the basis of an award"); *see also* **RLA-040,** *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (Dupuy, Williams, Bernardini) (22 September 2014), ¶ 685 ([T]he appropriate standard of proof [for damages] is the balance of probabilities. This, of course, means that damages cannot be speculative or merely 'possible'").

[990] **CLA-039**, *Case Concerning The Factory at Chorzów (Case for Indeminity)(Merits)*, PCIJ Series A No. 17, Judgment No. 13 (13 September 1928), p. 47.

of State Responsibility, which is cited by Claimants, for its part speaks of financially assessable damage including lost profit *insofar as it is established*.[991]

298. The Ballantines alleged damages for lost profits, including lost profits from alleged lost opportunities, are speculative, and as such cannot form the basis of an award.

299. In Section IV.C. above, the Dominican Republic addressed the absolute lack of evidence, including evidence of past profitability, for the Ballantines' damages claims. To be clear, it is not that the evidence the Ballantines presented lacking; it is that they presented *no evidence at all*.

300. Nevertheless, the Ballantines continue blithely to assert in their pleadings that "[they] had a thriving, expanding development and brand," that the "success in developing the first phase of Jamaca de Dios gave them reasonable and appropriate expectations and confidence with respect to the economic prospects concerning their [] plans," and that "[they] had done it before – and done it well."[992]

301. It is as if the Ballantines would like the Tribunal simply to take them at their word. However, facts that are not proven cannot be taken into account by the Tribunal.[993] "[T]the cornerstone principle that determines the recoverability of lost profits is whether they can be established with reasonable certainty."[994] Here, not only is there no evidence of a past track record of profitability, but (as will be seen below), the documentary evidence in fact

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[991] **CLA-041,** *Responsibility of States for Internationally Wrongful Acts*, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10) (12 December 2001), Art. 36.

[992] *See* **Reply**, ¶¶ 514, 516.

[993] *See* **RLA-047**, Sergey Ripinsky and Kevin Williams, Damages in International Investment Law, British Institute of International and Comparative Law (November 2008), p. 162.

[994] **RLA-047**, Sergey Ripinsky and Kevin Williams, Damages in International Investment Law, British Institute of International and Comparative Law (November 2008), p. 280.

affirmatively demonstrates the contrary: that the Ballantines' operation ***was <u>not</u> profitable at all***.[995] For this reason, no damages should be awarded for lost profits.

302. In their pleadings, the Ballantines make the same unsupported assertions over and over again. The Ballantines' pleadings repeatedly describe their investment in the Dominican Republic with tendentious words such as *success, thriving, expanding, etc*.[996] In fact, terms of that nature are used in more than ***sixty*** instances, throughout their Amended Statement of Claim and Reply. What the Ballantines cannot prove with documentary evidence they seek to achieve through mere repetition — an almost textbook appeal to the cognitive phenomenon known as "repetition fallacy."[997] This phenomenon refers to the reality that "[a] reliable way to make people believe in falsehoods is frequent repetition, because familiarity is not easily distinguished from truth."[998]

1. Project 3 Lot Sales

303. The Ballantines are not entitled to the loss profits claims from the sale of Project 3 lots. As explained below, these claims are speculative and unsupported, and directly contradicted by contemporaneous evidence. Also, the Ballantines are not entitled to loss profits for the simple reasons that Project 3 was not a going concern, and the Ballantines did not make any significant investments or perform works in such project that would warrant an award of lost

[995] *See* **Ex. R-208,** Jamaca de Dios Jarabacoa Tax Returns (2006 to 2016); *See* **T. Hart 2nd Report, ¶¶** 64–66 **(**"In fact, Jamaca's income (land sales) and net profits/losses clearly shows that Claimants' business was not successful. Over this six year period, Jamaca only made sales totaling $1.5 million, which cumulatively generated nearly a quarter million dollar loss"**);** and Appendix G.3. (showing total retained losses of US$168,920 as of 31 December 2016).

[996] *See* **Amended Statement of Claim**, **¶¶** 281, 283; *see* **Reply**, ¶ 514.

[997] **RLA-117**, Daniel Kahneman, THINKING, FAST AND SLOW (Farrar, Straus and Girous, 2011), p. 62.

[998] **RLA-117**, Daniel Kahneman, THINKING, FAST AND SLOW (Farrar, Straus and Girous, 2011), p. 62.

profits. Hence, lost profits based on the Discounted Cash Flow (DCF) methodology would not be appropriate in this case.

a. The claims are speculative.

304. As stated in Sections IV.C. and D above, the Ballantines have not produced any evidence to show that Jamaca de Dios was a profitable a venture, as they claim. To the contrary, Jamaca de Dios' financial statements and tax returns, as well as the Ballantines' personal U.S. tax returns, show that in reality Jamaca de Dios only had negligible profits, in the years when it yielded a profit at all.[999]

305. Thus, "historical" profits cannot form the basis for an award of the damages claimed by the Ballantines for lost profits (which they say amount to US$12,752,668).

b. The claims are directly contradicted by contemporaneous evidence.

306. By way of background on this issue, it is useful to review how the documents that will be referred to below were obtained.

307. First, the Ballantines did not present to the Tribunal — in either of their main pleadings — any documentary evidence to substantiate their alleged historical sales. Similarly, their quantum expert, too, declined to present evidence on that issue. However, certain relevant documents were made available by the Ballantines to the Dominican Republic in the process of

[999] *See* **Ex. R-199,** Jamaca de Dios Financial Statement Year 2009; **Ex. R-200,** Jamaca de Dios Financial Statement Year 2010; **Ex. R-201,** Jamaca de Dios Financial Statement Year 2011; **Ex. R-202,** Jamaca de Dios Financial Statement Year 2012; **Ex. R-203,** Jamaca de Dios Financial Statement Year 2013; **Ex. R-204,** Jamaca de Dios Financial Statement Year 2014; **Ex. R-205,** Jamaca de Dios Financial Statement Year 2015; **Ex. R-206,** Jamaca de Dios Financial Statement Year 2016; *see also* **Ex. R-208,** Jamaca de Dios Jarabacoa Tax Returns (2006 to 2016); **Ex. R-244,** Ballantines' U.S. Tax Return (2010); **Ex. R-245,** Ballantines' U.S. Tax Return (2011); **Ex. R-246,** Ballantines' U.S. Tax Return (2012); **Ex. R-247,** Ballantines' U.S. Tax Return (2013); **Ex. R-248,** Ballantines' U.S. Tax Return (2014); and *See* **T. Hart 2nd Report,** Appendices G.1– G.3. Note that even though Jamaca de Dios was minimally profitable for certain of the years it operated, in the aggregate the company operated at a loss.

document production. Specifically, they produced Jamaca de Dios's financial statements for years 2009-2016;[1000] Michael and Lisa Ballantine's personal tax returns submitted to the United States for the years 2010-2014;[1001] and documents related to the sales of Project 2 lots.[1002]

308. Separately, the Dominican Republic was able to obtain from the Dominican Tax Authorities copies of Jamaca de Dios's Dominican tax returns for the years 2005-2016, and copies of 73 agreements entitled "*Contrato de Venta Definitivo*" ("Definitive Sales Contract") (the "**Tax Authority Contracts**"), all of which related to sales of Project 2 lots.

309. Jamaca de Dios's financial statements for years 2009-2016,[1003] its Dominican Republic tax returns for years 2006-2016,[1004] Michael and Lisa Ballantine's personal tax returns submitted to the United States for years 2010-2014,[1005] and the Tax Authority Contracts[1006] paint one financial picture.

[1000] *See* **Ex. R-199,** Jamaca de Dios Financial Statement Year 2009; **Ex. R-200,** Jamaca de Dios Financial Statement Year 2010; **Ex. R-201,** Jamaca de Dios Financial Statement Year 2011; **Ex. R-202,** Jamaca de Dios Financial Statement Year 2012; **Ex. R-203,** Jamaca de Dios Financial Statement Year 2013; **Ex. R-204,** Jamaca de Dios Financial Statement Year 2014; **Ex. R-205,** Jamaca de Dios Financial Statement Year 2015; **Ex. R-206,** Jamaca de Dios Financial Statement Year 2016.

[1001] *See* **Ex. R-244,** Michael and Lisa Ballantines' U.S. Tax Returns Year 2010; **Ex. R-245,** Michael and Lisa Ballantines' U.S. Tax Returns Year 2011; **Ex. R-246,** Michael and Lisa Ballantines' U.S. Tax Returns Year 2012; **Ex. R-247,** Michael and Lisa Ballantines' U.S. Tax Returns Year 2013; **Ex. R-248,** Michael and Lisa Ballantines' U.S. Tax Returns Year 2014.

[1002] *See* **Ex. R-282**, Jamaca [Project 2] Sales Contracts, Claimant's Production (April 2009 to September 2017).

[1003] *See* **Ex. R-199,** Jamaca de Dios Financial Statement Year 2009; **Ex. R-200,** Jamaca de Dios Financial Statement Year 2010; **Ex. R-201,** Jamaca de Dios Financial Statement Year 2011; **Ex. R-202,** Jamaca de Dios Financial Statement Year 2012; **Ex. R-203,** Jamaca de Dios Financial Statement Year 2013; **Ex. R-204,** Jamaca de Dios Financial Statement Year 2014; **Ex. R-205,** Jamaca de Dios Financial Statement Year 2015; **Ex. R-206,** Jamaca de Dios Financial Statement Year 2016.

[1004] *See* **Ex. R-208**, Jamaca de Dios Jarabacoa Tax Returns (2006 to 2016).

[1005] *See* **Ex. R-244,** Michael and Lisa Ballantines' U.S. Tax Returns Year 2010; **Ex. R-245,** Michael and Lisa Ballantines' U.S. Tax Returns Year 2011; **Ex. R-246,** Michael and Lisa Ballantines' U.S. Tax Returns Year 2012; **Ex. R-247,** Michael and Lisa Ballantines' U.S. Tax Returns Year 2013; **Ex. R-248,** Michael and Lisa Ballantines' U.S. Tax Returns Year 2014.

[1006] *See* **Ex. R-209**, Jamaca [Project 2] Sales Contracts to Dominican Tax Authorities (April 2009 to September 2017).

310. However, the sales documents produced by the Ballantines during document production, paint a rather different one.[1007]

311. It is important to understand the document production process that yielded the these contract in the first place, to place the meaning of such contracts into context. The Dominican Republic's document requests application had asked for the following at Request No. 53: "Any documentation related to sales made by Jamaca de Dios of lots in the original Jamaca de Dios Project ('Phase 1'), including but not limited to the relevant sales agreements."[1008] In the comments column of the Redfern schedule, the Dominican Republic had explained that such sales documents were "relevant and material to the fact of sales, their timing, the size of the lots and the price at which the [Project 2] lots were sold. The Ballantines use such historical [Project 2] sales as a basis for their projections."[1009]

312. Although the Ballantines initially objected to the request, they agreed to "undertake a reasonable search for sales agreement[s] for lots sold in [Project 2]."[1010] With its first and second document productions, the Ballantines produced several documents related to this request.[1011]

313. On 27 October 2017, the Dominican Republic sent a letter to the Ballantines requesting that they supplement the production pursuant to Procedural Order No. 5. In connection with the Request 53 in particular, the Dominican Republic explained:

[1007] *See* **Ex. R-282**, Jamaca [Project 2] Sales Contracts, Claimant's Production (April 2009 to September 2017) containing a subset of those contracts.
[1008] *See* **Procedural Order No. 5** (17 July 2017), Annex 2, p. 92.
[1009] *See* **Procedural Order No. 5** (17 July 2017), Annex 2, p. 92.
[1010] S*ee* **Procedural Order No. 5** (17 July 2017), Annex 2, p. 92.
[1011] *See* **Ex. R-305**, Ballantines First Production Index; **Ex. R-306**, Ballantines Second Production Index.

> The documents related to the "Phase 1" lot sales seem to be incomplete. For example: Documents C0000367 and C0000410 appear to refer to the same lot but involve different parties, as do documents C0000376 and C0000436; and documents C0000510 and C0000614. This suggests that there are additional agreements that were not provided.
>
> Documents C0000294 and C0000045 refer to sales of lots in Jamaca de Dios made by third parties. This suggests that there are additional documents covering the original sales of those lots from Jamaca de Dios to the sellers named in those documents.
>
> The Dominican Republic requests that the Ballantines provide all agreements related to the sales of the Phase 1 lots.[1012]

314. The Ballantines responded on 1 December 2018 stating the following: "The Ballantines believe that the documents disclosed sufficiently show the sales of the lots. Nevertheless, the Ballantines will disclose additional documents related to the earlier sales to third parties and resellers."[1013] The Ballantines produced additional documents on 12 December 2017.[1014]

315. On 9 January 2018, the Dominican Republic sent another request that the Ballantines supplement their document production in accordance with Procedural Order No. 5:

> The Ballantines agreed to provide the sales agreements related to the original Jamaca de Dios Project. Upon review of the documents produced by the Ballantines in response to this request, the Dominican Republic identified certain deficiencies in the production that revealed that there must have been documents additional to those disclosed by the Ballantines.
>
> On 27 October 2017, the Dominican Republic gave examples to illustrate that there was an incomplete production and reiterated its request that the Ballantines provide all agreements related to the sales of the Phase1 Lots as agreed.

[1012] *See* **Ex. R-296**, Letter from Arnold & Porter to Baker Mackenzie (27 October 2017) p. 8.

[1013] *See* **Ex. R-309**, Letter from Baker Mackenzie to Arnold & Porter (1 December 2017) p. 3.

[1014] *See* **Ex. R-307**, Ballantines Third Production Index.

> The Ballantines' response on 1 December 2017 indicates that "[they] believe that the documents disclosed sufficiently show the sales of the lots. Nevertheless, the Ballantines will disclose additional documents related to the earlier sales to third parties and resellers." The Ballantines seek now to impermissibly limit the scope of the obligations assumed by them in connection to this request. The Ballantines must produce all agreements related to the sales of the Phase1 lots, not choose among the documents and produce whatever they believe is convenient or sufficient.
>
> On 12 December 2017 the Ballantines provided 22 additional documents responsive to this request. These documents reveal that in fact all of the agreements were not originally provided. Even with these additional documents, because some of the "gaps" identified in our letter of 27 October 2017 have not been clarified, in fact these new documents too seem contradictory as there are contracts related to the same lot being sold by Jamaca de Dios to different people. Moreover, a significant number of the sales agreements produced by the Ballantines are titled "Conditional Sales Agreements" or "Sale Promise" agreements, whereas others are titled "Final Sales Agreements," this suggests that there may be additional agreements related to such transactions that have yet to be provided.
>
> The Dominican Republic reiterates its request that the Ballantines provide all agreements related to the sales of the [Project 2] lots or confirm that no other documents exist[1015].

316. On 29 January 2018, the Ballantines responded to the second request by stating: "The Ballantines have produced the agreements reflecting their sale of [Project 2 lots]. Certain lots were sold more than once because the original purchaser failed to commence construction within required time allotments and thus the lot was reacquired by Jamaca."[1016] Moreover, the document states: "The Ballantines have made an appropriate search and do not presently possess any additional documents responsive to the following requests: [], 53."[1017] It is clear that the Ballantines were suggesting that the agreements they produced reflected the conditions of the

[1015] *See* **Ex. R-310**, Letter from Arnold & Porter to Baker Mackenzie (9 January 2018) p. 9.

[1016] *See* **Ex. R-311**, Letter from Baker Mackenzie to Arnold & Porter (29 January 2018) p. 2.

[1017] *See* **Ex. R-311**, Letter from Baker Mackenzie to Arnold & Porter (29 January 2018) p. 1.

sales i.e., the "fact of sales, their timing, the size of the lots and the price at which the [Project 2] lots were sold."

317. However, the terms — and of particular relevance, the sales prices — of the contracts provided by the Ballantines in document production, reflecting sales made from 2007 to 2017,[1018] do not match the historical sales information reflected in Jamaca de Dios' financial statements (2009 - 2016)[1019] or the information contained in Form 5471 of the Ballantines' personal U.S. tax returns for years 2010 to 2014.[1020]

318. Nor do they match Tax Authority Contracts. Notably, Sixty-two (62) of the contracts produced by the Ballantines during document production relate to the same lots and ostensibly the same parties as Tax Authority Contracts, but reflect different sales prices (the "**Parallel Contracts"**).[1021]

(i) The Tax Authority Contracts

319. The Ballantines' claim that their inputs for the DCF model came from actual performance in Project 2. According to Mr. Farrell, the average starting sale price for each lot in Project 3 (which was set at US$64) was established taking into account "the average sales prices per square meter for lots sold in [Project 2] from 2012 through 2015, which ranged from

[1018] *See* **Ex. R-282**, Jamaca [Project 2] Sales Contracts, Claimant's Production (April 2009 to September 2017).

[1019] *See* **Ex. R-199,** Jamaca de Dios Financial Statement Year 2009; **Ex. R-200,** Jamaca de Dios Financial Statement Year 2010; **Ex. R-201,** Jamaca de Dios Financial Statement Year 2011; **Ex. R-202,** Jamaca de Dios Financial Statement Year 2012; **Ex. R-203,** Jamaca de Dios Financial Statement Year 2013; **Ex. R-204,** Jamaca de Dios Financial Statement Year 2014; **Ex. R-205,** Jamaca de Dios Financial Statement Year 2015; **Ex. R-206,** Jamaca de Dios Financial Statement Year 2016.

[1020] *See* **Ex. R-244,** Michael and Lisa Ballantines' U.S. Tax Returns Year 2010; **Ex. R-245,** Michael and Lisa Ballantines' U.S. Tax Returns Year 2011; **Ex. R-246,** Michael and Lisa Ballantines' U.S. Tax Returns Year 2012; **Ex. R-247,** Michael and Lisa Ballantines' U.S. Tax Returns Year 2013; **Ex. R-248,** Michael and Lisa Ballantines' U.S. Tax Returns Year 2014.

[1021] Note that the vast majority of both the Parallel Contracts and the Tax Authority Contracts were signed by Michael Ballantine on behalf of Jamaca de Dios.

approximately $31 to $74 per square meter," and the average sale price of lots in what he calls "Zone C" of Project 2 in 2012 was US$59 per square meter.[1022]

320. However, these numbers are directly contradicted by the Tax Authority Contracts.[1023] Critically for present purposes, those contracts — which were not submitted into evidence by the Ballantines, nor appended by Mr. Farrell to his expert report on damages — *reflect different sales prices for the same Project 2 lots*.[1024]

321. The Dominican Republic's expert on damages, Mr. Hart, reviewed the Tax Authority Contracts to assess the accuracy of the per square meter prices presented by Mr. Farrell, described above. However, contrary to Mr. Farrell's assertions, Mr. Hart found that the Tax Authority Contracts reflect an overall average sales price of only US$8.72 per square meter for Project 2[1025] (compared to the figure of US$64 cited by the Ballantines in this arbitration as the average price per square meter for Project 3, based on "historical results"); a sales prices per square meter in Project 2 between 2012 and 2015 ranging from US$7.35 to US$16.15[1026] (compared to the range of US$31 to US$74 cited by the Ballantines in this arbitration); and an

[1022] *See* **J. Farrell 1st Report**, p. 10.

[1023] The Dominican Republic was able to obtain 73 sales agreements related to Project 2 lots. The relevant contracts were submitted to the "*Dirección General de Impuestos Internos*," which is the Dominican Republic's tax collection agency, referred to herein as the "**Dominican Tax Authorities**." Dominican law requires payment of transfer taxes related to real estate land sales as a condition to the registration of the transfer in the Land Registry. Those taxes are assessed on the basis of the sales price shown in the contract. Therefore, all real estate transfer contracts have to be presented to the Dominican Tax Authorities prior to the transfer being officially recorded. Nothing can be deduced from the fact that the Dominican Tax Authorities were only able to provide 73 agreements (according to the Ballantine's they have sold all 93 lots). There may be other agreements that have not been presented to the Tax Authorities for purposes of recording the transfer.

[1024] Note that while the Ballantines agreed to produce all of the documents related to the sale of "Phase 1" lots in response to the Dominican Republic's Document Production Request No. 53, and did in fact produce thousands of pages of documents, they neglected to produce **ANY** of the contracts submitted to the Dominican tax authorities.

[1025] *See* **T. Hart 2nd Report**, ¶ 75, Table 10; *See also* **Ex. R-209,** Jamaca [Project 2] Sales Contracts to Dominican Tax Authorities (April 2009 to September 2017)*;* **Ex. R-308,** Table summarizing Tax Authority Contracts, pp. 1–2.

[1026] *See* **T. Hart 2nd Report**, ¶ 75, Table 10; *See also* **Ex. R-209,** Jamaca [Project 2] Sales Contracts to Dominican Tax Authorities (April 2009 to September 2017)*;* **Ex. R-308,** Table summarizing Tax Authority Contracts, pp. 1–2.

average price per square meter in 2012 for Project 2 of US$9.98[1027] (compared to the figure of US$59 cited by the Ballantines in this arbitration).

322. The sales prices shown in the Tax Authority Contracts seem to align with the historical sales revenues reported in Jamaca de Dios' financial statements,[1028] and also with the documentation presented by Jamaca de Dios to the Dominican tax authorities in their income tax returns.[1029] Further, they also seem consistent with the figures presented by the Ballantines in their personal income tax returns to the United States tax authorities.[1030]

323. Given the contradictory documentation submitted to the Dominican Republic tax authorities (and apparently also the U.S. tax authorities), even if the Ballantines were somehow able to substantiate the numbers proposed by Mr. Farrell as the damages claims in this arbitration (which they have not), the Ballantines are now estopped from relying on Mr. Farrell's figures.

[1027] *See* **T. Hart 2nd Report**, ¶ 75, Table 10; *See also* **Ex. R-209,** Jamaca [Project 2] Sales Contracts to Dominican Tax Authorities (April 2009 to September 2017)*;* **Ex. R-308,** Table summarizing Tax Authority Contracts, pp. 1–2.

[1028] *See* **Ex. R-199,** Jamaca de Dios Financial Statement Year 2009; **Ex. R-200,** Jamaca de Dios Financial Statement Year 2010; **Ex. R-201,** Jamaca de Dios Financial Statement Year 2011; **Ex. R-202,** Jamaca de Dios Financial Statement Year 2012; **Ex. R-203,** Jamaca de Dios Financial Statement Year 2013; **Ex. R-204,** Jamaca de Dios Financial Statement Year 2014; **Ex. R-205,** Jamaca de Dios Financial Statement Year 2015; **Ex. R-206,** Jamaca de Dios Financial Statement Year 2016.

[1029] *See* **Ex. R-208,** Jamaca de Dios Jarabacoa Tax Returns (2006 to 2016).

[1030] *See* **Ex. R-244,** Michael and Lisa Ballantines' U.S. Tax Returns Year 2010; **Ex. R-245,** Michael and Lisa Ballantines' U.S. Tax Returns Year 2011; **Ex. R-246,** Michael and Lisa Ballantines' U.S. Tax Returns Year 2012; **Ex. R-247,** Michael and Lisa Ballantines' U.S. Tax Returns Year 2013; **Ex. R-248,** Michael and Lisa Ballantines' U.S. Tax Returns Year 2014. Form 5471 of the U.S. tax returns, titled Information Return of U.S. Persons With Respect To Certain Foreign Corporations, is used to satisfy the United States' reporting requirements for U.S. citizens and residents who are officers, directors or shareholders in certain foreign corporations. (*See* **Ex. R-297**, Instructions for Form 5471, Internal Revenue Service) Schedule C of Form 5471 requires information on the foreign company's income statement. In this schedule, for years 2010-2014, the Ballantines reported the financial results of Jamaca de Dios. When comparing Jamaca de Dios' Dominican tax returns and financial statements to the information in Form 5471 of the Ballantine's personal income tax returns, minor discrepancies between the figures used can be found. However, the only relevant discrepancies found relate to the gross profit (aggregate underreporting of approximately US$260,000 in the U.S. for years 2010-2014) and retained earnings (aggregate overestimate of approximately US$210,000 in the U.S. for years 2010-2014). Earnings before taxes and gross sales for the period reflect minor discrepancies (aggregate overestimate of EBT by approximately US$15,000 in the U.S. and underreporting of sales by approximately US$50,000 for the 2010-2014 period) but generally the sales and net profit numbers for Jamaca de Dios in the Dominican tax returns, the financial statements and contained in the Ballantines' U.S. tax returns are aligned. Those discrepancies may or may not be explained by differences in tax accounting standards between the Dominican Republic and the United States.

324. The conditions of estoppel are (1) a statement of fact which is clear and unambiguous; (2) this statement must be voluntary, unconditional, and authorized; and (3) there must be reliance in good faith upon the statement, either to the detriment of the party relying on the statement, or to the advantage of the party making the statement.[1031]

325. Since at least 2009,[1032] Jamaca de Dios — predominantly through Michael Ballantine — executed 73 "*Contrato[s] de Compraventa Definitivo[s]*" that have been submitted to the Dominican tax authorities, affirmatively declaring to the Dominican Republic that they had an average sales price per square meter of approximately US$8.74 for Project 2 lots. Moreover, since at least 2006, the Ballantines have reported Jamaca de Dios's sales (income from operations) on the income tax returns submitted to the Dominican Tax Authorities in amounts that are consistent with the sales prices reflected in the Tax Authority Contracts.[1033] These are clear, unambiguous, voluntary, unconditional, authorized and authoritative statements of fact.

326. The Dominican Republic has relied on these statements to its detriment, by assessing taxes that were calculated on the basis of the revenue from sales reported by the Ballantines in their tax returns and in the contracts that they submitted to the tax authorities (*i.e.*, the Tax Authority Contracts). As such, the Ballantines are estopped from proposing in this

[1031] *See* **Ex. CLA-010,** *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award (Dervaird, Greenberg, Belman) (26 June 2000), ¶ 110;

[1032] And possibly since 2006, which is when Jamaca de Dios first began reporting sales on its Dominican tax returns.

[1033] **Ex. R-208,** Jamaca de Dios Jarabacoa Tax Returns (2006 to 2016). The total sales price reflected in the 73 Tax Authority Contracts is US$1,741,502. (*See* **Ex. R-308**, Table summarizing Tax Authority Contracts) The 73 Tax Authority Contracts correspond to approximately 78% of the total lots sold. If the historical sales prices identified in the Tax Authority Contracts is consistent with the prices for the universe of contracts for sale of the lots, that would mean that all sales would have yielded an aggregate amount of approximately US$2,200,000. This figure is largely consistent with the total sales reported by Jamaca de Dios to the Dominican Tax Authorities from 2005-2016 at US$2,345,154.

arbitration any sales prices that are not consistent with what they have been declaring to the Dominican Tax Authorities for the last 9 years.

(ii) The Parallel Contracts

327. As explained above, in the context of document production, the Ballantines provided the Dominican Republic with copies of certain agreements that the Ballantines stated (somewhat ambiguously) "reflect[] their sale of Phase 1 lots." These contracts were different from the Tax Authority Contracts — and yet they related to the same lots. Critically for present purposes, the sales prices for the Project 2 lots which were identified in the Parallel Contracts were different **—** significantly *higher* —than the sales prices identified in the Tax Authority Contracts *for those same lots*. So: same lots, but different contracts, and different prices.

328. As it happens, and like those in the Tax Authority Contracts, the sales price figures in the Parallel Contracts do not support Mr. Farrell's damages calculations. In any event, ***if in fact*** the Parallel Contracts reflect the "true" sales terms of the Project 2 lots ***that would indisputably mean that the figures contained in the Tax Authority Contracts were incorrect***. Since the Tax Authority contracts were provided by the Ballantines to the Dominican tax authorities, and since the figures contained therein are reflected in the Ballantines' Dominican income tax returns, the foregoing has potentially serious implications. Unless the Ballantines can articulate a plausible explanation for the discrepancy between, ***on the one hand***, the sales price figures that appear in the documents and income tax returns that they provided to the Dominican tax authorities (and possibly also the U.S. tax authorities), and, ***on the other hand***, the figures that they (and their quantum expert) have advanced in this arbitration, and on which they would have this Tribunal rely upon to award damages, it would appear that the Ballantines would face a major quandary. They would have to accept one — but only one — of the

following three propositions: (i) that the sales prices they submitted to the tax authorities are correct (in which they case they are spectacularly over-inflating their damages claims in this arbitration); (ii) that the sales prices contained in the Parallel Contracts are correct (in which case they significantly under-reported the relevant sales prices in their submissions to the tax authorities, thereby paying less in taxes than they would have otherwise, to the detriment of the Dominican people);[1034] or (iii) that the sales prices in *both* the Parallel Contracts *and* the Tax Authority Contracts are incorrect (in which case even further explanations would be required). Any of the three options would have crippling implications for the Ballantines in this arbitration.

c. Additional reasons why the Ballantines' Project 3 Lot Sales Damages Claims Fail.

329. In the unlikely event that the Tribunal considers that any damages are to be awarded to the Ballantines in regard to Project 3 lot sales, the appropriate method of evaluating any damage for this claim would be investment amount.[1035] In his second report, Mr. Hart provides two alternative assessments for measuring such amount.[1036]

[1034] An analysis of the Tax Authority Contracts and the Parallel Contracts revealed that there were at least 62 instances of corresponding agreements (*i.e.*, agreements that relate to the same lots and ostensibly the same parties, but that reflect different sales prices. A comparison of the two sets of contracts reveals a significant discrepancy in the aggregate sales price of those 62 lots. The 62 Tax Authority Contracts (which were reported to the tax authorities) reflect an aggregate sales price of US$1,491,000, whereas the total aggregate sales price reflected in the corresponding 62 Parallel Contracts was spectacularly higher: approximately US$4,801,000. Because the Parallel Contracts correspond to only two thirds (2/3) (approximately) of the total number of lots, it seems logical to assume that the aggregate sales price reflected in the Parallel Contracts for the totality of the lots would be significantly higher. If true, that would mean in turn that the delta between the aggregate sales price reported to the tax authorities and the aggregate sales price reflected in the Parallel Contracts would also be significantly higher.

[1035] *See* **Statement of Defense**, ¶¶ 318–323.

[1036] *See* **T. Hart 2nd Report**, ¶¶ 81–85.

2. Project 3 Builder's Net EBT

330. The Ballantines are not entitled to allege lost profits on Project 3 Construction. These damages claims are wholly speculative, since the Ballantines have submitted no evidence that they had any prior experience in building homes.

331. The Ballantines claim in their Reply that they "had already built a half dozen homes, administrative buildings and the best private mountain road in the country."[1037] However, the Ballantines offer no evidence (beyond Michael Ballantines' own self-serving assertions), of prior comparable and successful experience building homes for sale.

332. There is no reason to believe that the Ballantines would have been successful in the construction business. Hence, there is no reasonable certainty as to the alleged loss claimed.

3. The Mountain Lodge, The Lower Apartment Complex And The Boutique Hotel

333. The Ballantines have not submitted any evidence that they had any prior experience in (a) *building* apartment complexes, hotels or spas; (b) managing rental properties; or (c) *operating* hotels or spas.

334. The Ballantines argue that their past experience selling "90 lots in [Project 2], " "managing and expanding the restaurant," and creating "a brand that was associated with quality" — assertions that remain unsupported and which are directly contradicted by contemporaneous evidence— is sufficient to prove that their claims are not speculative.[1038] However, the experience on which the Ballantines rely simply does not relate to the building, management or operation of apartment complexes or hotels/spas.

[1037] **Reply** ¶ 516.
[1038] **Reply,** ¶ 516.

335. Moreover, no significant work on these prospective projects (to the extent they even existed) was undertaken to warrant an award of lost profits.

336. In that which concerns the Mountain Lodge, damages cannot be awarded because it was the Ballantines themselves who affirmatively chose to abandon their Mountain Lodge idea, instead of pursuing legal avenues available to them, or engaging with the Ministry of Environment and obtaining the assurances required by the Municipality to proceed with the project.[1039]

337. With respect to the Lower Apartment Complex, the Ballantines never sought any type of authorization from the Dominican Republic for such project; it is therefore unclear how the Dominican Republic could have caused any harm in connection with such project.

338. Moreover, no evidence has been submitted to the tribunal to confirm that such project in fact existed. The Ballantines claim in their Reply that their CONFOTUR application included "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."[1040] They add that that after the conditional CONFOTUR approval was granted, they "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 [they] already presented to this Tribunal."[1041] There are several flaws in this reasoning. *First*, a timeshare villa project and an apartment project are separate and distinct ventures. *Second*, the fact that a

[1039] *See* **Ex. R-093,** Letter from Jarabacoa Municipality Council to M. Ballantine (16 February 2015).
[1040] **Reply,** ¶ 516.
[1041] **Reply,** ¶ 516.

different project was at one point presented to the Dominican Republic does not solve the causation problem.

E. The Ballantines Are Not Entitled To Any Damages For Their Lost Opportunity Claims

1. Paso Alto

339. The proposition that the Dominican Republic somehow caused the Ballantines to abandon the Paso Alto Project is untenable. The Ballantines' decision to discontinue the Paso Alto venture was made prior to any measure taken by the Dominican Republic.

340. The Ballantines argue in their Reply that "that consummation of the [Paso Alto] transaction was contingent upon the receipt of the [Project 3] permit, which was expected in 2011."[1042] They then contend that "had Respondent not discriminated against the Ballantines [,] negotiations between Paso Alto and the Ballantines would have resumed — whether that was in May of 2011, September of 2011, or May of 2012."[1043] However, even after document production, pursuant to which the Ballantines had agreed to produce all responsive documentation regarding the Paso Alto venture, they presented no document suggesting that any further negotiations took place after March 2011. [1044]

[1042] **Reply**, ¶ 527.

[1043] **Reply,** ¶ 528.

[1044] In contrast to Michael Ballantines' assertion, **Ex. R-300**, Draft Letter from Michael Ballantine regarding Paso Alto (16 December 2010), which was produced in the context of Document Production and is dated December 2010 (prior to the execution of the Letter of Intent) shows that since the outset there was hesitation to undertake the Paso Alto project. In the letter, Michael Ballantines explains: "I feel that it is very premature for me to enter into another project and to have to divide my attention and energy between both of them [referring to Jamaca and Paso Alto]. For 2011, we had planned an enormous capital investment in our common areas, as well as the construction of a Boutique Hotel, and the opening of another phase of Jamaca. All of this will need a great deal of attention and of capital which at the moment does not allow me the luxury of dedicating myself to another type of investment." The letter shows that Michael Ballantine hesitated about acquiring the project because of the expansion plans that were already under way for Jamaca, and not because he had conditioned his acquisition of Palo Alto on the ability to also develop Jamaca."

2. Brand Diminution And Future Investment

341. The 'future investment' claim relates to the residual earnings of rental management EBT of Mountain Lodge (Project 4), Hotel Taino (part of Project 3) and the Apartment Complex (Project 5). Damages for lost profits stemming from those prospective developments are untenable due to lack of certainty; residual earnings based on those prospective projects are even more uncertain.

342. For "brand diminution" damages, the Ballantines are asking the Tribunal to assume that the Ballantines would have acquired property in as yet unidentified lands, that they would have had the means to develop such property in a way comparable to Project 2, that there would have been a market for such individualized lots, that they would have successfully sold the lots at a profit, and that they would have been able to do all of that all over again in 10 years; and that they were prevented from doing all of the foregoing by acts of the Dominican Republic.

343. In their Reply, the Ballantines list several prospective partners that, according to them, wanted to partner with the "Jamaca" brand.[1045] During document production the Ballantines suggested that they had sufficient receivables from the sales of the original lots to begin their expansion project.[1046] Given that the Ballantines did not have to make any expenditures on the expansion project (because they never obtained the required permits),[1047] it is unclear how the Dominican Republic could have impaired Jamaca's ability to invest in other prospective ventures, if they in fact existed, leading to any diminution of the Jamaca brand. The Ballantines allege they had the resources and the opportunity; hence, it was their decision not to pursue any other project.

[1045] **Reply, ¶¶** 534–536.

[1046] *See* **Ex. R-207**, Jamaca de Dios List of Accounts Receivables (12 July 2011).

[1047] *See* **Ex. R-273**, Ballantines' Annotated Google Earth Map (16 September 2016).

F. The Ballantines Are Not Entitled To Any Of Their Investment Expenditure Claims

1. Aroma Restaurant

344. Aroma de la Montaña and the lots where the restaurant is developed belong to Rachel Proch (née Ballantine) not to Michael and/or Lisa Ballantine. A claimant is only entitled to compensation for losses it has actually suffered itself – not for losses suffered by third parties over which the tribunal has no jurisdiction. Even if Michael Ballantine was granted a valid power of attorney to represent Rachel Proch, such power would not confer upon him any *ownership* rights over Aroma. The Tribunal therefore cannot award damages relating to Aroma Restaurant, since whatever harm was incurred was suffered not by Michael or Lisa Ballantine, but by a third party.[1048]

345. In any event the Ballantines have not proven that Aroma de la Montaña has actually suffered any loss. The infrastructure built continues to exist and, according to Aroma de la Montaña's tax returns and financial statements,[1049] after completion of the expansion in 2013,[1050] Aroma had exponential growth, almost doubling its sales between 2012 and 2013,

[1048] *See* **RLA-100**, *Occidental Petroleum Corporation v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award (Fernández-Armesto, Feliciano, Oreamuno) (2 November 2015), ¶ 262 ("claimants are only permitted to submit their own claims, held for their own benefit, not those held (be it as nominees, agents or otherwise) on behalf of third parties not protected by the relevant treaty").

[1049] *See* **Ex. R-189,** Aroma de la Montaña Financial Statements Year 2007; **Ex. R-190,** Aroma de la Montaña Financial Statements Year 2008; **Ex. R-191,** Aroma de la Montaña Financial Statements Year 2009; **Ex. R-192,** Aroma de la Montaña Financial Statements Year 2010; **Ex. R-193,** Aroma de la Montaña Financial Statements Year 2011; **Ex. R-194,** Aroma de la Montaña Financial Statements Year 2012; **Ex. R-195,** Aroma de la Montaña Financial Statements Year 2013; **Ex. R-196,** Aroma de la Montaña Financial Statements Year 2014; **Ex. R-197,** Aroma de la Montaña Financial Statements Year 2015. Note that Aroma de la Montaña's fiscal year runs from July 1st to June 30th.

[1050] *See* **Ex. R-187**, Prohotel International Introduces New Food and Beverage Manager at Newly Renovated Jarabacoa Restaurant, Yahoo Finance (27 March 2013).

achieving 30% and 34% increases in net income in years 2013 and 2014, and an astonishing 217% increase in net income in 2015 as compared to 2014.[1051]

346. Furthermore, since 11 June 2015, the restaurant has been leased to a third-party operator.[1052] The lease comprises the expanded restaurant,[1053] and the lessee/operator of the restaurant agreed to pay a monthly fee equivalent to 15% of the net sales of the restaurant,[1054] subject to a presumed floor of US$800,000.00 yearly net sales, which would be subject to yearly increases.[1055] Therefore, the lease agreement guarantees Aroma US$120,000 a year starting from June 30, 2015, which, according to Aroma's tax returns, is more than **20** times what Aroma was making in 2012 prior to the expansion.[1056] There is no evidence of any loss incurred.

[1051] *See* **T. Hart 2nd Report**, Table 3 p. 20.

[1052] *See* **Ex. R-211**, Operating and Leasing Contract for Aroma (11 June 2015).

[1053] See **Ex. R-211**, Operating and Leasing Contract for Aroma (11 June 2015), Art. 1 ("Purpose of the Lease. Under the conditions and terms set forth below and in accordance with legal provisions in force, THE LESSOR grants THE LESSEE a lease on the Aroma de la Montaña Restaurant, located in lots number 48 and 50 within the Jamaca de Dios Tourist Project: located in the Palo Blanco section of the municipality of Jarabacoa, province of La Vega, Dominican Republic. The Restaurant consists of: "(i) a first level with 12 tables, bathrooms, bar, industrial kitchen, area for waiters, balcony/terrace with 11 tables and outdoor oven; (ii) a second level with revolving floor and 14 tables, bathrooms, bar area for waiters; (iii) gardens and artificial fountain: (iv) children playground; (v) parking area for approximately 40 vehicles; (vi) underground cellar with seating area and capacity for 1,944 bottles: as well as (vii) offices and administrative areas. PARAGRAPH I: The building and facilities of the Aroma de la Montaña Restaurant also include a Propane gas pipeline with a vertical 2,000 pound tank (located near the parking area, close to security area), which are the subject of this contract and have been seen and examined by THE LESSEE. THE LESSEE acknowledges receipt of the Restaurant to THE LESSEE's entire satisfaction and in perfect condition. PARAGRAPH II. In addition, the business object of this document is leased with all movable property, furniture, utensils, equipment and accessories that are listed in an inventory attached to this document ")

[1054] See **Ex. R-211**, Operating and Leasing Contract for Aroma (11 June 2015), Art. 4 **(**"ARTICLE FOUR. - Lease Price.) THE LESSEE undertakes to pay a monthly rent, without delay or deductions of any kind, equivalent to Fifteen Percent (15%) of the net sales of the Aroma de la Montaña restaurant, on the seven (7) of each month starting on August seventh (7) Two Thousand Fifteen (2015)").

[1055] See **Ex. R-211**, Operating and Leasing Contract for Aroma (11 June 2015), Art. 4, ¶ 1 ("ARTICLE FOURTH. PARAGRAPH 1. Given his experience in the Hospitality area, THE LESSEE guarantees the LESSOR minimum annual net sales income of Eight Hundred Thousand US Dollars (US$ 800,000.00) or its equivalent in Dominican Pesos at the current exchange rate in the main Dominican commercial banks, as well as a Ten Percent (10%) yearly increase on said amount to become effective annually (from July 1 to June 30 each year.").

[1056] In 2012 Aroma de la Montaña's net income was RD$223,133 which was approximately US$5,800.00 at the exchange rate then in force. *See* **Ex. R-189,** Aroma de la Montaña Financial Statements Year 2007; **Ex. R-190,** Aroma de la Montaña Financial Statements Year 2008; **Ex. R-191,** Aroma de la Montaña Financial Statements Year 2009; **Ex. R-192,** Aroma de la Montaña Financial Statements Year 2010; **Ex. R-193,** Aroma de la Montaña Financial Statements Year 2011; **Ex. R-194,** Aroma de la Montaña Financial Statements Year 2012; **Ex. R-195,**

[FOOTNOTE CONTINUED ON NEXT PAGE]

347. Assuming that despite the foregoing there was any loss to compensate, and that somehow the Ballantines were entitled to compensation stemming from that loss — *quod non* — the Ballantines themselves contributed to any such loss by failing to stop expansion works in Aroma Restaurant once they became aware of the denial of the permits for Project 3, and by continuing to undertake such works until 2016. The Ballantines argue in their Reply that at the time that the Ballantines received the initial rejection letter, in September of 2011, works had already started and contracts had been signed for the Aroma Restaurant expansion project, "so the expansion could not simply have been abandoned at this time."[1057] However, the only contract actually executed at that time was the contract with Carousel for construction of the rotating floor.[1058] The fear of breaching a US$69,600 contract would not justify pledging an additional US$1.1 million to a supposedly doomed venture.

348. Lastly, as stated in the Statement of Defense, the principle *ex turpi causa non oritur actio* bars recovery of damages related to the expansion works. The Ballantines have argued in their Reply that their expansion was appropriately licensed, and to support this assertion they provide document **Ex. C-151**. However, such document evidences only that, per the Ballantines' own admission,[1059] months after the expansion works had already started, the Ballantines had managed to obtain *some* of the permits required for the expansion works being

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
Aroma de la Montaña Financial Statements Year 2013; **Ex. R-196,** Aroma de la Montaña Financial Statements Year 2014; **Ex. R-197,** Aroma de la Montaña Financial Statements Year 2015.

[1057] *See* **Reply, ¶**525.

[1058] *See* **Ex. R-301**, Turntable Manufacturing Contract (4 August 2011).

[1059] The Ballantines state that the works started sometime prior to the first rejection letter in September 2011.

carried out at Aroma.[1060] However, the critical authorization from the Ministry of Environment was never even sought, much less obtained.

2. Project 1 and Project 3 Roads

349. The Dominican court judgment that dismissed the Ballantines' lawsuit in 2015 requesting the closure of the easement did not refer to the entirety of the Project 1 Road,[1061] so it is unclear why the Ballantines are claiming that the entire Project 1 road was "expropriated." The following map (Figure 12) highlights (in red) the entirety of the Project 1 road as it runs through Project 2 and (in blue) the portion of the road related to the easement contested with the Municipality of Jarabacoa and the townspeople.[1062]

[1060] *See* **Ex. C-151**, Aroma Restaurant Expansion approvals (May 2012).

[1061] *See* **Ex. C-069,** Final Judgment on Recognition of Easement and Removal of Gates, *Sala Tribunal de Tierras Jurisdicción Original-La Vega* (5 October 2015).

[1062] The Ballantines don't seem to disagree that the easement referred to a portion of the Project 1 road not the road in its entirety. *See* **Ex. C-148**, Google Earth Image of 2005 Road and Historic Pathway (2016), where the contested portion of the road (Gates 1 to Gate 3) is highlighted in Red.

Figure 12

350. In any event, the Ballantines do not have standing to claim for the Project 1 road: they have sold off all of the lots in the project,[1063] and realized the value invested in the road when they sold the original project's lots. The road continues to exist, and is being used both by the owners of the lots and by the patrons and employees of Aroma Restaurant.

351. As a threshold matter, it bears noting that when the Ballantines created their Jamaca project, they submitted their property to a process called "*urbanización parcelaria*" in accordance with Law 108-05.[1064] Such process resulted in the creation of 96 lots of land.[1065] By

[1063] *See* **Reply**, ¶ 516.

[1064] *See* **Ex. R-302**, Approval of the Parcel Urbanization of Project 2 (27 November 2009).

operation of that law, the areas destined for roads are automatically ceded to the public domain in the event of an *urbanización parcelaria*.[1066] Since that is what happened here, the Ballantines have no "residual" rights to the Project 1 road.

352. The Ballantines' claim for Project 3 road is even more outrageous, because they never even constructed that road. Accordingly, they are asking for reimbursement of expenses that were never incurred.

353. To the extent this claim refers to the small portion of the Project 3 road that the Ballantines illegally constructed (900m dirt road above Project 2). This was an unpermitted construction for which the Ballantines were fined by the MMA.[1067] The Ballantines cannot claim reparations for the expenditures related to that road; the principle *ex turpi causa non oritur actio* bars recovery of any damages related thereto, given that the construction of the road was unauthorized. Also, there is no causation, the Ballantines contributed to their own injury by undertaking works on the Project 3 road despite not having a permit, and after the denial of the permit related to that Project.

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

[1065] *See* **Ex. R-302**, Approval of the Parcel Urbanization of Project 2 (27 November 2009).

[1066] **Ex. R-303,** Law 108-05 on Land Registry**,** Art. 106 ("In urbanizations and plot subdivisions, streets, green areas and other spaces destined to public use are established as public domain upon registration of the drawings" original text in Spanish: "*En las urbanizaciones y lotificaciones, las calles, zonas verdes y demás espacios destinados al uso público quedan consagrados al dominio público con el registro de 1os planos*"); **Ex. R-304,** Regulation No. 628-2009, Art. 161 ("A parcel urbanization is the act of creating new plots by a sub-division of one or more registered plots, and the opening of public streets or roads. [...] Paragraph III. Surface areas destined to be streets cannot be considered as plots. Partial filings where existing original certificates of title are maintained are not allowed. Paragraph IV. The registration of the resulting plot certificates of title automatically implies a transfer of streets, passageways, avenues, pedestrian areas, spaces destined to be green areas, etc., to the public domain" Original text in Spanish: "*Se denomina urbanización parcelaria al acto de levantamiento parcelario que tiene por fin la creación de nuevas parcelas por división de una o más parcelas registradas, con apertura de calles o caminos públicos. […] Párrafo III. No se consideran como parcelas las superficies destinadas a calles. No se admiten presentaciones parciales que dejen subsistentes el o los títulos originarios. Párrafo IV. El registro de los títulos de las parcelas resultantes implica automáticamente el traspaso de las calles, pasajes, avenidas, peatonales, espacios destinados a zonas verdes, etc., al dominio público*").

[1067] *See* **Ex R-143**, Administrative Resolution No. 566-2012 (15 October 2012).

354. Also, the Dominican court ruling that dismissed the Ballantines' suit requesting the closure of the easement in 2015 did not refer to the Project 3 road at all, so it is unclear how the Project 3 road was "expropriated."

355. In sum, the Ballantines have provided no evidence to support the amount of damages that they claim for the Project 1 and Project 3 roads.

G. The Ballantines Are Not Entitled To The Pre-Judgment Interest They Claim

356. The Ballantines seek an award of pre-judgment interest in the amount of 5.5% compounded monthly. As explained by the Dominican Republic's damages expert, the use of benchmark interest rate of the Central Bank of the Dominican Republic, which is denominated in Dominican Pesos, is not appropriate for an award requested in U.S. Dollars.[1068] Additionally, there is simply no basis at all for awarding interest compounded monthly.[1069]

H. The Ballantines Are Not Entitled To Moral Damages

357. The Ballantines make no attempt to respond to the arguments in the Statement of Defense on the issue of moral damages. The relevant section of the Reply is merely a verbatim repetition of ¶¶ 316 to 323 of the Amended Statement of Claim. Awards of moral damages are extremely rare in investment treaty cases,[1070] and the facts in this case do not warrant such an award.

358. The Ballantines seek to present themselves as the victims of an allegedly corrupt government that deliberately sought to obliterate their investment. Paradoxically, however, it is the Ballantines who have systematically attacked the Dominican Republic and its officials: (i) by

[1068] *See* **T. Hart 2nd Report**, ¶¶ 57–61.
[1069] *See* **T. Hart 2nd Report,** ¶¶ 56, 62.
[1070] *See* **Statement of Defense**, ¶¶ 337–344.

filing personal damages lawsuits against municipality officials;[1071] (ii) by mounting negative publicity campaigns in the local media falsely suggesting involvement by Ministry of Environment and Municipality officials in corrupt acts;[1072] and (iii) by defaming several officials of the Dominican Republic by suggesting they were involved in corrupt acts in the context of this very proceeding.[1073] All of this was done without a shred of evidence. Further, as discussed in Section IV.I., below, the Ballantines have sought to take advantage of institutional weaknesses in the Dominican Republic, and have misrepresented facts to the government in a way that, barring a plausible explanation, would amount to fraud.

I. Any Award Of Damages In Favor Of The Ballantines Would Be Unconscionable

359. The Ballantines are not entitled to an award of damages for multiple reasons: because the tribunal has no jurisdiction to hear their claims; because some or all of their claims are inadmissible; because there has been no breach of DR-CAFTA; and because the Ballantines have failed to carry their burden of proof on damages. However, there appears to be an additional, potentially much more serious reason why the Ballantines are not entitled to any compensation: as succinctly described in Section IV.D.1, documents that surfaced during document production have revealed alarming discrepancies in the Ballantines' representation of the sales prices of the lots that they sold in Project 2. It appears that for several years, the Ballantines have been submitting tax returns to the Dominican and U.S. tax authorities that reflect income from Project 2 lot sales that is inconsistent with the sales price figures reflected in the relevant contracts. Such contracts, identified above as the "Parallel Contracts," were not

[1071] *See* **RLA-118**, Bailiff Act 766/2013, Service of Process of civil suit for moral damages against Municipality Council Members and Municipality of Jarabacoa and the Mayor.
[1072] *See* **Ex. C-025**, Transcript of Nuria report (Jun. 29, 2013).
[1073] *See* **Amended Statement of Claim**, fn. 158, ¶ 147.

presented by the Ballantines as evidence, although they were disclosed to the Dominican Republic during document production, and the Dominican Republic is now introducing them into the record.

360. The findings discussed herein are based squarely on: (i) documents that the Ballantines provided in the context of document production; (ii) documents provided to the Dominican Republic in the context of ordinary tax filings; and (iii) the written representations made to the Dominican Republic by the Ballantines in this arbitration. As will be seen, the Ballantines' have put forward **two sets of facts that on their face do not appear to be logically reconcilable**. One negates the other, such that there would not appear to be any plausible justification or explanation; however, if exists, the burden is on the Ballantines to identify it.

361. **Exhibit R-308** contains relevant information for each of the 62 Tax Authority Contracts and their corresponding Parallel Contracts.[1074] The table below contains a subset of **Exhibit R-308**, showing the typical findings. For each lot, the row in white shows the information from the Parallel Contract, and the row in blue shows the corresponding terms of the analogous Tax Authority Contract. Thus, for example, the first row in the table below (Figure 13) reflects the information for Lot 7 contained in the Parallel Contract, and the second row shows the information for that same lot (Lot 7) contained in the Tax Authority Contract. The sequence then continues, in pairs, for other lots.

[1074] *See* **Ex. R-308**, p. 3; Full copies of the Tax Authority Contracts and the Parallel Contracts can be found at **Ex. R-209** and **Ex. R-282**, respectively.

Figure 13: Terms of Parallel Contracts v. Tax Authority Contracts

	Source	ID Purchaser/s	Lot #	Name of Contract	Date	m2	Price in US$	$/m2
A	Doc. Prod. C0006037 (Parallel Contract)	[redacted]43-6	7	Contrato de Venta	14-Jan-11	2,811.95	$75,000.00	26.67
	Tax Authority Contract	[redacted]43-6	7	Contrato de Venta Definitivo	29-Mar-11	2,811.95	$22,338.93	7.94
B	Doc. Prod. C0000052, C0002731	[redacted]63-0, [redacted]39-8	8	Promesa de Venta	5-Sep-11	3,405.43	$103,500.00	30.39
	Tax Authority Contract	[redacted]63-0 [redacted]39-8	8	Contrato de Venta Definitivo	22-Aug-12	3,405.43	$26,121.34	7.67
C	Doc. Prod. C0000078, C0003232 (Parallel Contract)	[redacted]94-6	11	Contrato de Venta	27-Mar-11	2,120.38	$98,100.00	46.27
	Tax Authority Contract	[redacted]94-6	11	Contrato de Venta Definitivo	5-Nov-11	2,120.38	$16,560.47	7.81

362. As can be seen in the table, the Parallel Contract is generally dated earlier than the corresponding Tax Authority Contract, and the price stated in the Tax Authority Contract is only a fraction of the price in the corresponding Parallel Contract. Overall, the aggregate sales price for the 62 Tax Authority Contracts is US$1,491,465[1075] whereas the aggregate sales price of the 62 Parallel Contracts is significant higher: US$4,800,769 — a difference of approximately US$3,309,304.

[1075] Original sales prices in Dominican Pesos; the table contained in Ex. R-308 p. 3, reflects the exchange rates used for the conversion. The exchange rates used are based on the average US Dollar to DR Peso conversion rate on the day of each of the contracts according to the published conversion rates of the Dominican Central Bank. (available https://www.bancentral.gov.do/estadisticas_economicas/mercado_cambiario/)

363. ***If*** the Parallel Contracts indeed reflect the true sales prices of Project 2 lots (as the Ballantines suggested during document production[1076]), that would mean that in at least 62 separate instances (and possibly more), since at least 2009 (the date of the earliest Tax Authority Contract) and until as recently as 2017 (the date of the last Tax Authority Contract), the Ballantines have generated separate and disparate sales agreements: one set (the Parallel Contracts) which they are now saying reflect the actual sales prices, and a different set (the Tax Authority Contracts) that was presented to the tax authorities (thereby resulting in taxes assessed based on a lower price).

364. Moreover, the lower figures contained in the Tax Authority Contracts were also reflected in the income tax returns that were submitted by the Ballantines — under penalty of perjury — to both the Dominican and U.S. authorities.

365. As observed in Section IV.D.1., above, the tax returns filed by Jamaca de Dios with the Dominican Tax Authorities (on the one hand), and the information provided by the Ballantines' to the U.S. tax authorities on Form 5471[1077] of their tax returns (on the other hand) are largely consistent. The Ballantines produced U.S. tax returns for the years 2010-2014, and when those particular tax returns are compared to Jamaca de Dios' Dominican tax returns and financial statements for the same years, the two sets are largely consistent.[1078] For the years 2005-2008 and 2015-2016 (tax returns for which were not provided by the Ballantines), presumably the Ballantines reported their holdings in Jamaca de Dios and Jamaca's results to the United States consistently with what they reported to the Dominican Republic.

[1076] *See* **Ex. R-311**, Letter from Baker Mackenzie to Arnold & Porter (29 January 2018), p. 2.

[1077] Form 5471 is the form through which U.S. citizens and residents who are officers, directors or shareholders in certain foreign corporations fulfill their reporting requirements.

[1078] There is not a direct correspondence, as there appears to be a discrepancy in total sales for the period 2010-2014 of about US$50,000.

366. The total aggregate sales reported by Jamaca de Dios to the Dominican Tax Authorities for the period from 2005 to 2016 amounts to US$2,367,418. However, the Parallel Contracts (which as noted reflect only 2/3 of the total lots available for sale), reflect an aggregate figure that is more two times higher (US$4,800,769). This suggests that the aggregate sales of the universe of available lots (93) reflected in the Parallel Contracts, including the analogous ones that were not produced by the Ballantines, likely are approximately three times higher than the corresponding aggregate sales reported to the Dominican Tax Authorities.

367. This is potentially highly relevant because Jamaca de Dios paid taxes on the basis of its reported sales. Accordingly, if the Parallel Contracts really do reflect the true sales of Jamaca, that would mean that the Ballantines have kept **two sets of books** throughout the life of their real estate venture in the Dominican Republic. The under-reporting of the sales prices would inevitably lead in turn to an under-reporting of earnings and a corresponding under-assessment of Jamaca's income tax. The Dominican Republic's Tax Code defines tax fraud as engaging in "simulation, concealment, maneuver or any other form of deception, to attempt to mislead [the tax authorities] in the assessment of taxes, with the purpose of evading or facilitating the total or partial evasion of taxes."[1079] Moreover, the Dominican Tax Code specifically states that "declaring, stating or recording false figures, facts or data or omitting any circumstance from the accounting books, balance sheets, returns, manifests or other documents that gravely influences the assessment of the tax obligation" is considered tax fraud.[1080]

[1079] *See* **Ex. R-312**, Dominican Tax Code, Law 11-92, Art. 236 (Translation from Spanish; original text in Spanish: "Incurre en defraudación el que, mediante simulación, ocultación, maniobra o cualquier otra forma de engaño, intente inducir a error al sujeto activo en la determinación de los tributos, con el objeto de producir o facilitar la evasión total o parcial de los mismos.")

[1080] *See* **Ex. R-312**, Dominican Tax Code, Law 11-92, Art. 237 (Translation from Spanish; original text in Spanish: "Son casos de defraudación tributaria, los siguientes: 1. Declarar, manifestar o asentar en libros de contabilidad,

[FOOTNOTE CONTINUED ON NEXT PAGE]

368. Alternatively, if the true sales prices of the Jamaca lots are those reflected in the Tax Authority Contracts rather than in the Parallel Contract, that mean that the Ballantines have grossly and unjustifiably inflated their damages claims in this arbitration.

369. Either way, it would appear that the Ballantines face a fatal dilemma, unless they are able to articulate a reasonable explanation for the existence of separate sets of contracts, and for the lower price reported to the tax authorities of the Dominican Republic and of the U.S.

370. Especially in light of the facts presented above, and what they suggest, it would be unconscionable for the Tribunal to award moral damage to the Ballantines. The Tribunal simply cannot award damages to the Ballantines based on past results when the Ballantines' own documentation contains varying accounts of such results, and particularly if it turns out to be the case that such results were misrepresented to relevant tax authorities, to this Tribunal, or both.

V. COSTS

371. Much of the foregoing discussion also informs the issue of the allocation of costs in this proceeding. Other relevant factors also militate in favor of an award of costs and legal fees to the Dominican Republic, including: the fact that the Ballantines do not qualify as "claimants"; the fact that their claims are substantively meritless; and the Ballantines' litigation style, which has caused unnecessary expenditures for the Dominican Republic (as for instance due to the Ballantines' constantly changing argumentation; their reformulation of the facts in each round of pleadings; and their willful omissions during document production. For all these reasons, the Tribunal should grant the Dominican Republic the full costs of the proceeding, as well as the full amount of the Dominican Republic's legal fees and expenses.

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
balances, planillas, manifiestos u otro documento: cifras, hechos o datos falsos u omitir circunstancias que influyan gravemente en la determinación de la obligación tributaria.")

VI. REQUEST FOR RELIEF

372. For the foregoing reasons, as well as those articulated in its Statement of Defense dated 25 May 2017, the Dominican Republic respectfully requests:

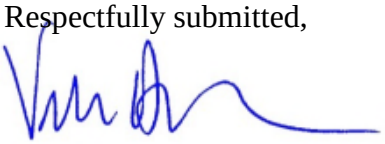
a. that the Tribunal dismiss all of the Ballantines' claims, on the basis of lack of jurisdiction, inadmissibility, and/or lack of merit;

b. that, in the event that it were to decide that one or more claims are meritorious, the Tribunal decline to grant any damages to the Ballantines, on the basis that their damages calculations are unreliable, erroneous, and/or speculative;

c. that the Tribunal grant to the Dominican Republic all of the costs of the proceeding, as well as the full amount of the Dominican Republic's legal fees and expenses; and

d. that the Tribunal award to the Dominican Republic such other relief as it may deem just and proper.

Respectfully submitted,



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