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

MICHAEL BALLANTINE and LISA BALLANTINE

Claimants

v.

THE DOMINICAN REPUBLIC,

Respondent

CLAIMANTS' REJOINDER ON JURISDICTION AND ADMISSIBILITY

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I. Introduction

1. The Dominican Republic's Rejoinder on Jurisdiction (the "DR Rejoinder") continues to ignore the deep and enduring cultural, social, familiar, residential and financial attachments of the Ballantines to the United States. It instead once again myopically focuses largely on the Ballantine's partial residency in the DR, during the time period while the Ballantines were working diligently to develop and to expand, and ultimately to attempt to salvage, the significant investment they had made in the mountain residential community Jamaca de Dios – a community that they had developed.

2. The individualized Dominican "contacts" that Respondent emphasizes in its Rejoinder are simply reflective of those commercial efforts. They are not evidence of any enduring, dominant "personal attachment" between the Ballantines and Respondent. The Ballantines attained Dominican nationality not because of any enduring cultural bond with the country, but to promote and to protect their business. Not surprisingly, and not significantly for any dominance evaluation, they used their Dominican nationality to facilitate business transactions in the DR. Indeed, the Ballantines acquired dual citizenship because they were intending a large expansion of their development and had previously experienced governmental and commercial difficulty associated being solely a US citizen investing in the Dominican Republic. Respondent's Rejoinder can point only to specific business-related activities for which the Ballantines invoked their newly-acquired dual citizenship.

3. As is well understood by the Tribunal, the dominant nationality "test" established in CAFTA-DR is intended to prevent domestic investors from belatedly attaining a dual citizenship in a forum-shopping exercise to then seek relief pursuant to an international investment treaty. That is of course not the situation here, as this Tribunal has noted in describing this factual situation as "unique"

and confirming that beyond the "attachments" of the Ballantines to both the US and the DR, it will also consider the "conduct" of the DR towards the Ballantines.

4. *What is not in dispute* is that the Ballantines have at all times in their lives been United States citizens, and that they now reside exclusively in their home country in the wake of the discriminatory behavior that has destroyed their investment in the DR and given rise to this arbitration. *What is not in dispute is* that the Ballantines obtained dual citizenship in 2010 in an effort to further promote and to protect the business that they were building in the Dominican Republic. The Ballantines used that citizenship in an effort to try to minimize the commercial disadvantage that arose from the fact that both Respondent and their clientele perceived them to be foreigners -- "gringos" to be precise.[1] *What is not in dispute* is that the Ballantines at no time severed their dominant cultural attachment to the United States, and at no time considered themselves to be more Dominican than U.S. nationals. The DR's continuing reliance on selected social media postings showing involvement in civic acts only emphasizes the lack of any substantive evidence to support its jurisdictional contentions. A smattering of kind words from the Ballantines on Facebook about their host country does not create a dominant attachment to that country.

5. A full spectrum review of relevant factors reveals the Ballantines' continuing and dominant US nationality. There is no evidence of Dominican cultural, family, educational, or societal ties beyond a few cherry-picked social media posts. The Ballantines have never considered themselves dominantly Dominican. The communications among these parties between 2010 and 2014, as the Ballantines struggled to reverse the discriminatory denial of their request to expand Jamaca de Dios,

[1] Attached as C-175 is a short video filled with Dominican citizens and politicians identifying Michael Ballantine not by name, but as the "gringo" or the "American", including the mayor of Jarabacoa who refers to him as the "American of Jamaca de Dios." This is stark and overwhelming evidence that Respondent, its representatives, and its citizens never considered the Ballantines to even be Dominican let alone dominantly Dominican, and as this video makes plain, much of the animosity toward the Ballantines was fueled by the fact that they are foreigners.

make abundantly plain that not only did the Ballantines consider themselves to be United States' investors, *but that Respondent did as well*. Respondent's own officials, as well as other Dominicans considered the Ballantines to be US nationals.

6. The DR Rejoinder chooses to ignore the Tribunal's order denying bifurcation and its plain statement that the DR's treatment of the Ballantines is an appropriate jurisdictional factor: "the conduct of the host state *vis-à-vis* the Ballantines ... will need to examined for the purposes of determining the dominant and effective nationality of the Ballantines."[2] The Tribunal further notes that "the timing of when the Ballantines acquired Dominican citizenship overlaps with the period in which the alleged unfair or discriminatory treatment occurred[.]"[3] As comprehensively documented in the merits submissions of the Ballantines, Respondent's wrongful treatment of the Ballantines was precisely because the Ballantines ***were not*** Dominican.

7. The DR continues to place great emphasis on the fact that the Ballantines lived in the DR for periods of time between 2010 -- when they became Dominican citizens -- and 2014 when they filed this arbitration. But they ignore the simple fact that the Ballantines also lived in the United States for significant periods of time during those same years -- and indeed spent more time outside the DR during those four and a half years than they spent in the DR -- and instead try to argue with a straight face that the Ballantines could not have really resided in their Illinois home during this period because they didn't deduct any moving expense on their income taxes. The evidence reflects the Ballantines' intention to decrease the amount of time they spent in the DR in 2013 and 2014, but efforts to salvage their investment from the discriminatory acts of Respondent ultimately required additional time in country. It is of course self-evident that this was not time spent basking in the glow of love for a country that they considered their newly dominant nationality. It was time spent preparing for this proceeding and

[2] Procedural Order No. 2 at ¶26.

[3] Procedural Order No. 2 at ¶28.

attempting to ensure that Jamaca de Dios would continue to operate after the Ballantines permanently returned home to the United States.

8. The facts demonstrating that the Ballantines have continuously been dominantly and effectively U.S. nationals are documented and overwhelming. The Ballantines at no point had any family, cultural, or economic ties to the Dominican Republic apart from their investment, nor did they seek to develop such ties. At the end of the day, Respondent have not presented any compelling evidence to support the counterintuitive argument that it presents -- that the Ballantines' Dominican naturalization was actually undertaken to concretize a belief that they were no longer effectively and dominantly US citizens.

II. Legal Analysis

A. The Tribunal's Order Denying Bifurcation

9. It is important to reiterate the Tribunal's bifurcation order, and to note the specific factors that it identifies as relevant to the jurisdiction question. First, the Tribunal has noted both that the situation presented here is "unique" and that most jurisdictional challenges concern "claimants [who] have adopted nationality to gain access to treaty protections."[4] ***That is not the case here of course***. Indeed, Respondent here is attempting to deny treaty protection to <u>life-long</u> US citizens by claiming that they should really be deemed Dominican citizens as the result of their acquiring dual nationality for a period of a few years -- dual nationality that was irrefutably acquired in an effort to aid and protect their business. There is simply no evidence to support any contention that the Ballantines acquired Dominican citizenship because they intended to make a "new cultural start" as primarily Dominican

[4] Procedural Order No. 2 at ¶22.

citizens.[5] Indeed, the evidence shows that the Ballantines maintained their "personal attachment" to the United States at all times when they were in the DR to grow their business.[6]

10. The Tribunal states that certain factors "among others" will be relevant to its analysis, including "the State of habitual residence, the circumstances in which the second nationality was acquired, the individual's personal attachment for a particular country, and the center of the person's economic, social and family life."[7] These are jurisdictional factors that have been discussed in previous international disputes, where Tribunals have made clear that it is important to look at a claimant's ***entire life*** in evaluating its truly dominant nationality.[8]

11. Finally the Tribunal identifies additional information it deems relevant here:

> Given the timing of the Ballantines' acquisition of Dominican nationality and their asserted reasons for acquiring that nationality, the Tribunal is of the view that the facts surrounding the investment made by the Ballantines, ***as well as the conduct of the host State vis-à-vis the Ballantines***, and vice versa, will need to be examined for purposes of determining the dominant and effective nationality of the Ballantines. There is nothing in the language of the CAFTA-DR that precludes the Tribunal from considering facts surrounding the investment when examining whether there is a qualified investor thereunder.

(emphasis added).[9] As such, the Tribunal has acknowledged that ***how Respondent's officials viewed the Ballantines and how it treated the Ballantines*** should appropriately be considered in determining the

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[5] Indeed, as Lisa Ballantine made plain in a November 2013 email -- exactly the period of time when Respondent claims that the Ballantines were becoming dominantly Dominican -- "I haven't really made friends here in the DR. It is a difficult culture to connect with and I am still an outsider. .. it looks like we will be moving back to the US in the summer [and] I am so excited about that." See C-165.

[6] This is not a situation where either Michael or Lisa Ballantines was fleeing the US to avoid debtors, or the police, or a jilted lover. They weren't taking new names, or marrying Dominican citizens, or building a new identity. They went to DR to pursue Michael's vision of creating a beautiful, luxury, mountain residential community literally from the ground up. They succeeded and that success led to the discrimination that gives rise to this claim. And that discrimination occurred because the Ballantines were U.S. nationals, and not Dominican.

[7] Id. at ¶25.

[8] *See, e.g.*, *Malek v. Islamic Republic of Iran,* 19 Iran–U.S. Cl. Trib. Rep. 48, 49–50 (1988), CLA-51.

[9] Procedural Order No. 2 at ¶26.

Ballantines' dominant nationality, and determining whether or not this Tribunal has power to adjudicate this dispute.

B. Legal Factors Regarding Dominant And Effective Nationality

12. Respondent's Rejoinder is mostly a rehash of the legal standards it argued for in the Amended Statement of Defense. Respondent selectively pulls out quotes from an earlier decision that it believes favors it. The most often use of this false argument is when Respondent asserts that the only real factor to consider is the time of residence in a particular country.[10] For example, Respondent cites six times to a partial document from the Office of Legal Advisor of the U.S. Department of State that is discussing dual nationality. This report is addressing a question of whether a particular dual nationality would qualify for employment by the U.S. depending on the various factors.[11] Although the report does mention some of the dominant and effective nationality, it is essentially an employment analysis focused on one particular person. It hardly represents a rigorous legal application of the issues at hand by the State Department.

13. In addition, the State Department report actually supports the Ballantines' arguments. The report refers to a person who was a dual national of the U.S. and Egypt.[12] The report notes approvingly that a U.S. court applying the dominant and effective nationality test found a person to be a U.S national even though he "had resided in Egypt rather than in the United States . . ." because of "his continued, voluntary association with the United States and his intent to remain an American."[13] Thus, in the State Department report cited repeatedly by Respondent and upon which it chiefly relies, is based on an

[10] This factor does not in any event favor Respondent. The Ballantines have spent the vast majority of their lives solely living in the U.S. And even during the time periods selected by Respondent, as explained below, the Ballantines were outside of the Dominican Republic during these times.

[11] See RLA-010. The full report, including the portion of the report explaining the issue of the report, can be found here: https://www.justice.gov/file/19926/download.

[12] RLA-010, at p. 369.

[13] RLA-010, at p. 369.

instance where a person lived in one state and was found to be a dominant and effective national of the other.

14. Other legal exhibits submitted by Respondent likewise prove the Ballantines' case. Respondent, for example, relies on an EJIL Talk to support its trite observation that an investor must be a foreign investor.[14] But this EJIL Talk is focused on discussing claims by dual nationals when those claims arise to treaty abuse, with the name of the EJIL Talk being "Claims by Dual Nationals under Investment Treaties: A New Form of Treaty Abuse?" How in the world could the Ballantines be engaging in treaty abuse being dual nationals? The Ballantines of course did not take Dominican nationality to obtain treaty protection.

15. Respondent likewise cites to the ILC's Draft Articles on Diplomatic Protection to support its argument. But those Draft Articles also show the Ballantines to be U.S. Nationals. The Draft Articles note that the "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 . . . ."[15] In this case, officials from the U.S. Embassy sought to advocate on the Ballantines behalf, including meeting with officials from the Ministry of Environment, because the Embassy officials viewed the Ballantines as U.S. nationals.

16. In any event, because this is a CAFTA case of dual nationality without a history or earlier analyses, and because the Tribunal will engage in an analysis to find the truth and reality – rather than pick and choose one factor – additional factors are appropriate to consider as well, such as (1) the ***motivations*** of the Ballantines to become dual nationals, (2) how the Ballantines viewed themselves, (3) how the DR, its representatives, and its citizens viewed the Ballantines, and (4) the laws regarding

[14] *See* RLA-110.

[15] RLA-109, Art. 7.

nationality in the two states. All of these considerations weigh into whether or not it is appropriate to permit these life-long U.S. citizens access to a claim for redress against Respondent.

17. Respondent tries to downplay these factors, and the Respondent's Rejoinder seeks to narrow the Tribunal's focus on the unremarkable fact that the Ballantines maintained a residence in the DR while they were running their business -- *while ignoring the fact that at the same time the Ballantines also maintained a residence in the United States*. The fact that the Ballantines were unable to entirely manage their investment from the United States -- as had originally been their plan[16] -- does not mean that they necessarily became dominantly Dominican simply because they were in country for less than half the time during the 2010 to 2014 time period.[17]

18. Additionally, while the jurisdictional and merits questions are indeed separate issues, the Tribunal has acknowledged "***that the same facts would necessarily have a bearing or would be relevant for both the procedural and the substantive determination.***"[18] As such, it is appropriate to consider the Respondent's treatment of the Ballantines -- "the conduct of the host State vis-à-vis the Ballantines" -- as compared to other comparable investors, in evaluating whether or not this Tribunal should deem the Ballantines to be predominantly U.S. nationals or predominantly Dominican.

19. The evidence of the disparate treatment foisted upon the Ballantine is manifest, and meticulously documented in the merits submissions previously provided to this Tribunal. Claimant's Rejoinder here is not an attempt to make additional arguments or to submit additional evidence concerning the merits of the substantive Treaty claims asserted here. But it is entirely appropriate to encapsulate for the Tribunal the "conduct" of the DR vis-a-vis the Ballantines.

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[16] M. Ballantine St. at ¶17.

[17] Indeed, the Ballantines travelled to the United States on approximately 30 different occasions during this four and a half year period. Supp. M Ballantine St. at ¶10. That exhaustive travel schedule evidences the Ballantines' maintenance of their dominantly U.S. attachments, not the opposite.

[18] Procedural Order No. 2 at ¶29.

20. It is undisputed that JDD is the only mountain residential project in La Vega that has been affirmatively prevented from developing its land. The evidence is already before this Tribunal: ***there are now at least a dozen mountain residential projects in and around Jarabacoa -- all with slopes greater than 60% and all owned by Dominicans -- that have been granted permission to develop or that have been allowed to develop without a permit,***[19] as the MMA endorses or simply turns a blind eye to similar Dominican efforts to commercialize the beauty of the region. The second phase of Jamaca de Dios is the only mountain project that has been refused any opportunity to proceed. At the end of the day, it is as simple as that.

21. Respondent's shifting justifications for those seriatim denials fail to provide a compelling excuse for why the MMA rejected the Ballantines' permitting efforts ***while at the very same time*** it affirmatively approved multiple Dominican-owned projects,[20] despite similar if not steeper slopes and similar if not more sensitive environmental conditions, and allowed many others to develop with impunity despite the absence of any environmental license.

22. The Tribunal is free to consider this evidence not only with respect to the merits of this CAFTA claim, but with respect to the Respondent's insistence that the Ballantines should be deemed "domestic" investors and not be permitted to make claim under this international treaty.

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[19] See Claimants' Reply Submission, section **III.A.1**.

[20] In incredibly stark contrast to Respondent's treatment of the Ballantines, the record reveals cooperative communication between Respondent and the Dominican owners of projects such like La Montana, Mirador del Pino, Jarabacoa Mountain Garden and Quintas Del Bosque 2, advising on how the proposals might be slightly adapted to address any environmental issues. ***Dispositively, Respondent now admits that all of these projects have slopes in excess of 60% and yet all of them have been approved for development – both before and after the Ballantines exhausted their appeals and were completely denied.*** Mirador del Pino and Jarabacoa Mountain garden were approved during the appeal process and Quintas del Bosque II and La Montaña were approved after this arbitration began. The evidence of cooperation and engagement between the MMA and these projects makes all of the shifting excuses for the Ballantines' abrupt and repeated denials ring dispositively hollow.

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

23. The DR has now reiterated several times its contentions concerning the appropriate time frame for this Tribunal's consideration of jurisdiction. It continues to present flow charts and to use the term "matroyoshka" in an effort to ignore the plain language of CAFTA.[21]

24. The Ballantines have never debated the Respondents' repeated and exhaustive (and exhausting) recitations that the jurisdiction of this Tribunal is founded upon the consent of the parties as set forth in CAFTA-DR. The Ballantines also acknowledge that they must be "claimants" as defined in CAFTA-DR in order to pursue relief under the Treaty for the discriminatory, inequitable and expropriatory treatment by Respondent. But the language of CAFTA-DR makes clear that the Ballantines are such "claimants" and that there status as claimants was fixed at the time they invested in the Dominican Republic, when they were exclusively U.S. citizens.

25. For purposes of Chapter 10 of CAFTA-DR, a "claimant" is specifically defined as an "investor of a Party that is a party to an investment dispute with another Party."[22] As such, the Ballantines must be "investor[s] of a party" other than the Dominican Republic. The term "investor of a party" is also specifically defined:

> **investor of a Party** means a Party or state enterprise thereof, or ***a national*** or an enterprise ***of a Party***, ***that*** attempts to make, is making, or ***has made an investment in the territory of another Party***; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.

(emphasis added).[23] Thus, an investor of a party is "a national of a Party … that attempts to make, is making, ***or*** has made an investment in the territory of another Party[.]" (emphasis added).

[21] See DR Rejoinder at ¶34.

[22] See CAFTA-DR, Art. 10-28, appended to Respondent's Notice as Ex. R-10.

[23] *Id.*

26. This is a disjunctive definition and any of the three tenses used in the definition can be used to determine who is a claimant. As such, an "investor of a Party" is a "national … that has made an investment in the territory of another Party."[24] Therefore, this Tribunal need only look at the nationality of the Ballantines *as of the time that they made their investment* in the Dominican Republic. That definition gives ***a fixed right*** to a "national that has made an investment in the territory of another party." The Ballantines were solely U.S. citizens when they "made an investment" in the Dominican Republic and bought property at issue here. They can be claimants, and Respondents interpretive arguments to the contrary are unavailing.

27. Respondent insists that "it is an accepted principle of international law that jurisdiction "must exist on the day of the institution of proceedings."[25] The plain language of CAFTA-DR provides that because the Ballantines "made" their investment in the DR as exclusively US citizens, this Tribunal's jurisdiction existed no matter what day this proceeding was brought.

D. This Tribunal Can Consider a Broad Spectrum of Social, Cultural, Family and Economic Factors in Determining Dominant Nationality

28. However, the Ballantines' right to seek redress under CAFTA-DR is not dependent upon what point in time the Tribunal considers relevant to determine the dominant nationality of these investors. The Ballantines have at all times been dominantly U.S. citizens, and "always intended to return to the United States after the successful development of Jamaca de Dios."[26]

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[24] *Id.* The reference in the concluding clause of the definition to "dominant and effective nationality" thus becomes relevant only if the investor has dual nationality ***at the time*** that the investor "has made an investment" in the territory of a Party.

[25] Respondent's Rejoinder at footnote 44

[26] Supp. M. Ballantine St. at ¶11. Respondent asks this Tribunal to find that, despite the simple testimony, it is reasonable to make the determination that the Ballantines were dominantly U.S. citizens for more than 40 years, then became dominantly Dominican at some point during the four year period after they attained dual nationality, and now are dominantly US citizens again.

29. CAFTA-DR does not provide a defined test for measuring which of two nationalities should be considered dominant for purposes of Article 10-28. But the factors that this Tribunal should evaluate are quite straightforward -- it can undertake a broad review of all cultural, social, family and economic attachments between the Ballantines and the two countries of which they are nationals. That evaluation can and should begin with the simple acknowledgement and understanding that the Ballantines have been US citizens for their entire lives. They only became Dominican citizens in 2010 when Lisa was 42 years old and Michael was 45. Indeed, Lisa Ballantine ***did not want to become a Dominican citizen*** but Michael convinced her that it would help to protect and promote their investment.[27]

30. Respondent's Rejoinder contends that the dominance test should be an evaluation of the "daily lives" of the Ballantines. This is merely an effort to downplay the deep and continuous U.S. connections that that Ballantines maintained even while they were physically present in the DR. Indeed, the Respondent's Rejoinder is nothing more than an exercise in selecting random, non-substantive conduct and contacts to support its contention that these life-long U.S. citizens -- who, even while in the DR, spoke English in their home at all times,[28] went to an U.S. connected church,[29] and sent their children to an U.S. connected school[30] (before sending them back to the United States to continue their schooling)[31] -- had somehow magically transformed by 2014 into dominantly Dominican citizens.

31. As it frequently does in its submissions, Respondent immediately seizes the opportunity to insert a chart into its Rejoinder, insisting that the Ballantines have made "Ever-Changing Arguments"

[27] Supp. M. Ballantine St. at ¶3.

[28] Supp. M. Ballantine St. at ¶7.

[29] Supp. M. Ballantine St. at ¶18.

[30] Supp. M. Ballantine St. at ¶24.

[31] Id.

in support of its jurisdictional position.[32] This is simply inaccurate. The Ballantines' jurisdictional contentions -- which include the simple notion that this Tribunal need not merely take a snapshot in time and, on any specific date, attempt to quantitatively weigh the Ballantines' connections to the US against their connections to the DR -- have remained consistent and straightforward.[33]

32. In *Malek v. Islamic Republic of Iran,* 19 Iran–U.S. Cl. Trib. Rep. 48, 49–50 (1988), the Tribunal interpreted the *A/18 Decision* as calling for the Tribunal to look at "***the entire life of the [c]laimant, from birth***, and all the factors which, during this span of time, evidence the reality and sincerity of the choice of national allegiance." (emphasis added).[34] Respondent wants the Tribunal to look exclusively at the time period after the Ballantines acquired dual citizenship and to consider this voluntary act of acquisition to be essentially determinative that the Ballantines were dominantly Dominican between 2010 and 2014. However, this Tribunal can look beyond that brief period and

[32] According to Respondent, "the Ballantines' arguments appear to change each time that they put pen to paper." (DR Rej. at ¶28). This is, of course, silly on its face. Respondent tries to transform the Ballantines' opposition to Respondents' preposterously broad discovery requests into some sort of acquiescence to the Respondent's view of what is relevant to the Tribunal's jurisdictional analysis. For example, the Ballantines appropriately refused Respondents' request for the educational records of all member of the Ballantine family. Seizing on that refusal, Respondent now contends that the Ballantines have "changed" their view, and no longer view as jurisdictionally relevant the educational choices that reflect the Ballantines' enduring cultural attachment to the United States. The Tribunal will recall its circumscription of Respondent's expansive discovery demands -- including Respondent's insistence that every social media post from all of the Ballantine children, and the grades of every member of the Ballantine family, were somehow relevant to the DR's contentions. The Ballantines' position that document production on certain topics is not appropriate does not equate to a contention that those topics are not appropriately considered by the Tribunal in this jurisdictional analysis.

[33] This consistency stands in stark contrast to the DR's shifting and increasingly desperate efforts to justify its denial of JDD's expansion permit. From slopes to altitude to fauna to soil stability to likely something entirely new at Hearing, Respondent presents one argument to explain why the Ballantines stand alone in their inability to develop, and then moves on to another when the first argument is exposed as meritless. Indeed, Respondent first called the Baiguate Park a "red herring" only to later base its belated admissibility argument on the existence of the Park. With respect to jurisdiction, the Ballantines have repeatedly and consistently insisted that they sought dual nationality only to protect and enhance their financial investment in the DR by naturalizing in the DR. And try as Respondent might to emphasize online marketing statements and kind words about a political candidate, it cannot trump this simple fact.

[34] See CLA-51.

consider the Ballantines' *entire life* to determine whether or not they are more closely aligned with the United States or with the Dominican Republic.[35]

33. Again, it is critical to emphasize that this is not a "treaty shopping" situation -- in which a claimant is attempting to take advantage of a recently-acquired citizenship in order to have standing to sue its country of birth (or lifelong domicile) under an investment treaty. The Ballantines have been U.S. citizens their entire lives.[36] They maintained a residence in the DR to oversee and develop their significant business investment, and moved back exclusively to the United States when they were unable to reverse the Respondent's flagrant breach of its Treaty obligations. They acquired Dominican citizenship years after making their investment, because they became aware how Respondent's officials treat foreigners and wanted to try to minimize that disadvantage in running their business – not because they wanted to turn their back on the U.S. and become cultural Dominicans.[37] The Ballantines have never "abandoned" their home country and culture and they have never become dominant Dominicans.

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[35] Respondent has emphasized language from the naturalization forms and oaths and contends that the Ballantines took a "solemn" vow when they became Dominican nationals. The insinuation is that the Ballantines by definition "broke" their bond of allegiance to the United States when they naturalized in the DR. But this is plainly not the case. U.S. law does not require the Ballantines to renounce their US citizenship to nationalize with Respondent, and they were not required to pledge greater fealty to Respondent than to the United States. The problem with Respondent's argument is that it assumes too much. Nowhere in their promise of respect for the DR is there any renunciation of their life-long fidelity to the U.S. Whenever an individual elects to become a dual national, she necessarily acquires one of those citizenships at a later time. If it were merely of question of which nationality one acquired most recently, there would be no need to consider other factors that reflect their dominant family and cultural ties.

[36] The precedent cited by Respondent does not support its assertions. The *Nottebohm* opinion (RL-6) concerned the issue of diplomatic protection and whether the nationality of Liechtenstein conferred upon Nottebohm "in exceptional circumstances of speed and accommodation" and without any substantial bond could be relied upon as against Guatemala, with which Nottebohm had a long-standing and close connection, in proceedings instituted by Liechtenstein before the International Court of Justice. By contrast, here there is no doubt about the genuine and lifetime U.S. citizenship of Claimants.[36] Similarly, the *Merge* decision (RL-7) concerned a woman who for many years had no continuing financial, residential or cultural ties whatsoever to the United States.

[37] Respondent's discrimination against the Ballantines continues to this day. Attempting the simple administrative act to renounce their citizenship -- which the DR's own consular website indicates should take no more than two hours -- Respondent has refused this request, insisting that the Ballantines must undertake some undefined, separate, individual process to renounce their dual nationality.

III. Respondent's Jurisdictional Contentions Fail to Demonstrate that the Ballantines Were Dominantly Dominican

34. The Ballantines have already provided the Tribunal with detailed submissions that confirm their irrefutable and deep social, cultural, familial and economic ties to the United States. It need not repeat that overwhelming evidence here. Instead, the Ballantines will respond to the certain egregious assertions made by Respondent in its Rejoinder.

A. Personal Attachment

35. As the Tribunal has explicitly noted, an "individual's personal attachment for a particular country" is one of the factors it will consider in its jurisdictional analysis.[38] This both subjective and objective consideration overwhelmingly supports the simple notion that the Ballantines have always been dominantly U.S. nationals. The Ballantines have testified as to their deep connection to U.S. culture and society, while their connection to the Dominican Republic was one of commercial expediency.[39] The DR Rejoinder seeks to minimize the Ballantines' testimony concerning which country was at all time their "home", but this Tribunal can and should consider these unrebutted statements.

36. Indeed, their testimony is not simply an "after the fact" effort to recast their emotional connections to the United States. Contemporaneous statements made by the Ballantines to friends and family during the 2012 - 2014 fully support their personal attachment to their lifelong home and deny Respondent's effort to select out-of-context social media postings and claim they support a finding that the Ballantines were dominantly Dominican.

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[38] Procedural Order No. 2 at ¶25.

[39] "Although we always tried to be respectful of Dominican culture and its people, we did very little to assimilate[.] We never felt like we were Dominicans, never acted like Dominicans, and nobody perceived us as Dominicans. … We were never part of any Dominican clubs or associations. Socially, we had very few Dominican friends , but chose to associate almost exclusively with American missionary friends and other American expats" Supp. M. Ballantine St. at ¶4.

37. As only a few examples, in 2012, Michael Ballantine still considered the DR to be a "foreign country."[40] In late 2013, Lisa Ballantine revealed to a friend that she was "dreading" her return to the DR.[41] Also in 2013, Lisa confessed that "I haven't really made friends here in the DR … and I am still an outsider."[42] And in 2014 -- when Respondent claims that the Ballantines were dominantly Dominican -- Michael made plain that "I cannot wait to get out of this place."[43]

38. These contemporaneous communications reveal the Ballantines' emotions and confirm the simple fact that despite their acquisition of Dominican nationality, the Ballantines at all times continued to view themselves as U.S. citizens, who were working in a "foreign country" trying to realize their commercial vision. Respondent's Rejoinder continues to place great emphasis on social media statements from Lisa about her "life in the Dominican Republic"[44] and her quip that she is a "Dominican"[45], but it ultimately asks the Tribunal to read too much into those posts. The Ballantines have of course never denied that they became Dominican nationals; but these infrequent statements simply cannot be the foundation upon which one can build any solid argument that the Ballantines were ***dominantly*** Dominican.[46]

B. Circumstances Surrounding Acquisition of Dual Nationality

39. As the Tribunal also notes, the "circumstances in which the second nationality was acquired" is another primary factor it will review in evaluating dominance. And those circumstances are

[40] See C-163, January 29, 2012 email from M. Ballantine.

[41] See C-164, November 19, 2013 email from L. Ballantine.

[42] See C-165, November 29, 2013 email from L. Ballantine.

[43] See C-166, August 11, 2014 email from M. Ballantine.

[44] Respondent's Rejoinder at ¶61.

[45] Respondent's Rejoinder at ¶61.

[46] Indeed, the Respondent's rejoinder entirely ignores the multiple Facebook postings from Lisa referring to the United States as her true "home." See Reply L Ballantine St at ¶8.

of record and are unrefuted by any of the Respondent's Rejoinder's charts or handpicked social media posts.

40. The Ballantines acquired Dominican citizenship simply to *promote their business*. As Michael Ballantine has testified, he and Lisa Ballantine became citizens of the Dominican Republic at a time when their project faced unfair resistance from Respondent's officials.[47] The Ballantines, rightly, viewed this resistance as emanating from the fact that they were U.S. nationals and not Dominicans. The Ballantines, wrongly, believed that taking Dominican citizenship would cause those officials to treat them in the same manner that the officials treated Dominican-born persons.

41. Business and investment promotion, expedition, simplification, and protection does not equate to dominant nationality. Respondent argues -- as it must to push its Orwellian nationality defense -- that the Ballantines' choice to attain dual citizenship was driven by cultural attachment as opposed to economic expediency, but its insistence in this regard is both factually unsupported, and on its face silly.

42. The Respondent's Rejoinder points only to the Ballantines using their newly acquired dual citizenship to do exactly the things that one would expect -- to make their commercial endeavors in the DR easier.[48] Respondent insists that "invoking their Dominican nationality when entering into contracts; signing a loan agreement; selling more than 40 different lots at Jamaca de Dios[49]; [and]

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[47] Supp. M. Ballantine S**t** at ¶1.

[48] To be clear, the Ballantines did not become Dominican nationals *until six years after* their initial purchase of land in Jarabacoa in July of 2004. The Ballantines initially intended and expected that their investment in Jarabacoa would be managed from their home in Chicago. But it became apparent that they needed to be in country to ensure its success, and they began to reside in the DR in August of 2006. See M. Ballantine St. at ¶17: "I had been overseeing the project during visits from my home in Chicago and we decided to move to Jarabacoa in August 2006 to finish the road, install utilities, and finish the construction of our house."

[49] A more compelling fact concerning the lot sales is that every lot sale was conducted in US dollars. Attached here as C-162 are all of the contracts for the lot sales in Phase 1 of JDD. Payment for every single lot sale is denominated in US dollars. These sale contracts were produced to the DR during document discovery. They evidence the Ballantines' continuing connection to the stability of the US currency system. Again, ***each of these Phase 1 lot sale contracts calls for payment in United States dollars.*** Indeed, as confirmed in the DR Rejoinder at ¶81, the Ballantines used the US banking systems for a significant amount of their property sales.

obtaining a restaurant operating license" equates to dominant Dominican nationality "on the critical dates". This "evidence" does nothing more than confirm the testimony of Michael and Lisa Ballantine that they attained dual citizenship to facilitate doing business in the DR.

C. Cultural and Economic Center

43. The Tribunal further notes that it will consider "the center of the person's economic. social and family life."

44. Respondent's Rejoinder presents a checklist of things that the Ballantines did when they first began to split time between the DR and the U.S. This is an effort to create the impression that the Ballantines were building a foundation ("putting down roots") on their path to become dominantly Dominican: "They built a house, opened bank accounts, made friends, connected with their neighbors, joined a church, initiated a charitable venture, and sent their children … to a local school."[50] Respondent of course conveniently ignores that all of these things were done as exclusively U.S. citizens, because the Ballantines did not become dual nationals until 2010.

45. But more importantly, the generic insinuations of these contentions deserve closer scrutiny:

- The Ballantines did build a house to help promote their development and they did live in that house when they were in the DR. That house was where they lived while they were physically present in the DR, it was not a "Dominican home." Most significantly, English was the language spoken at all times in the home. The Ballantines entertained their U.S. friends there. ***And critically, the Ballantines decided to sell their home in September of 2012, as part of their plan to significantly reduce the amount of time they would be spending in the DR.*** Indeed, the attached sales brochure for the Ballantines' house in Jamaca proves that the

[50] DR Rejoinder at ¶54.

Dominican "home" upon which Respondent places such emphasis was intended to be sold two years before the dispositive jurisdictional date argued by the Respondent.[51] So there is no confusion, the Ballantines were trying to sell the house they had built in their own development because they intended to spend dramatically less time in the DR moving forward.[52] The evidence reveals that the Ballantines were attempting to minimize their residential connection -- indeed all of its connections -- to the DR at the time Respondent insists is jurisdictionally critical.

- Respondent cites paragraph 7 of Lisa Ballantine's second witness statement for its contention that the Ballantines "made friends" in the DR. What her statement -- which is uncontradicted by any evidence provided by Respondent -- actually says is:

> [M]y cultural connection to the DR was limited. I had American friend with whom I was part of a Bible study group, and Michael and I had American friends with whom we socialized frequently. We attended an American church in Jarabacoa when we were in town. ***I had few Dominican friends*** … I was an American woman doing a job in the DR."[53]

This is a typical tactic Respondent employs in its Rejoinder. Respondent's contortionist effort to claim a jurisdictional contact out of Lisa's statement that she had "few Dominican friends" is emblematic of the lack of any significant evidence to support the notion that the Ballantines were dominantly Dominican.[54]

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[51] See C-180, September 11, 2011 listing for the Ballantine house in Jamaca de Dios.

[52] Ultimately, the logistical requirements associated with preparing to initiate this arbitration, transferring management of Jamaca de Dios to the homeowners' association, leasing the restaurant to a third party, ensuring continued operation of the Ballantines' water charity, and permanently leaving the Dominican Republic required that the Ballantines be physically in the country more than they otherwise planned to be, but to contend that their physical location equates to a dominantly Dominican nationality is of course to ignore the reality of what was happening to the Ballantines' investment in light of the discriminatory acts of Respondent.

[53] Reply L. Ballantine St at ¶7

[54] Indeed, C-165 contemporaneously establishes that as of November of 2013, more than seven years after the Ballantines purportedly "put down roots" in the DR, Lisa Ballantine "ha[dn't] really made friends here in the DR."

- Respondent claims that the Ballantines "connected with their neighbors" but cites only Michael Ballantine's statement about allowing adjoining landowner access to their project's road.[55] The Tribunal is aware of the merits issue with respect to that road, and the fact that these "neighbors" ultimately joined other citizens of Jarabacoa in tearing down the gates to the Jamaca, an incident captured on video, in which Michael Ballantine is referred to by locals as the "Foreigner", "the American" and "the Gringo".[56]
- Respondent correctly states that the Ballantines "joined a church" but omits the undisputed fact that the Ballantines at all times worshipped at a U.S.-connected church in Jarabacoa.[57] It correctly states that Lisa Ballantine started "a charitable venture" but omits the undisputed fact that it was a U.S. nonprofit.[58] It correctly states that the Ballantines sent their children to "local school" in Jarabacoa but omits the fact that it was an U.S.-connected school.[59]

46. None of this is evidence of "deepened ties" to the DR. While the Respondent's Rejoinder endeavors to spin a story of U.S. nationals who became Dominicans, Respondent realizes that none of these contentions moves the jurisdictional needle in its direction. So it returns to its social

[55] DR Rejoinder at ¶54

[56] See Exhibit C-68. The video attached as C-175 provides even more stark evidence of how the Ballantines were viewed by Respondent and its representatives and citizens, and confirms the irrefutable fact that the Ballantines never integrated into Dominican culture. There is simply no evidence to the contrary.

[57] Supp M. Ballantine St at ¶18

[58] Reply L. Ballantine St at ¶4

[59] Respondent cites a newspaper article that makes reference to Lisa's brief homeschool efforts, and insinuates that this is evidence that the Ballantines had no real affinity to the U.S. educational system. This is what happens when one spends too much time trolling the internet. The two children who attended the U.S. school in Jarabacoa -- Josiah and Tobi -- were homeschooled *for one year by Lisa*, in the United States. They both returned to the United States in 2010, at ages 17 and 16, only four months after the Ballantines obtained dual nationality -- to continue their education in the United States, and never to reside again in the DR.

media arguments[60] to claim that postings by Lisa Ballantine[61] and marketing statements on Jamaca de Dios's website[62] show an overwhelming connection that the Ballantines felt for the DR.

47. It is of course not surprising that the Ballantines touted the beauty of the DR on the Jamaca website. They were trying to sell lots and to communicate their commitment to building the finest residential mountain community in the country. And Lisa Ballantine's continuing wish for DR "to have such wonderful success,"[63] is only a measure of her kind and generous spirit, despite the fact their her dog was killed, her house in JDD was set on fire, and that while in the DR, she was frequently scared for her and her family's safety.[64] Absolutely nothing that the DR cites tips the scales to make the Ballantines a dominantly Dominican couple or family.

48. The Ballantines considered themselves to be foreign investors in the Dominican Republic, and to be dominantly U.S. nationals. Their testimony to that end is of record. So is the testimony of their U.S. friends and colleagues in the DR, who confirm the Ballantines' strong and continuing

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[60] The DR even goes so far as to reiterate its invocation of Tobi Ballantine's Chick-fil-A joke on Twitter. DR Rejoinder at ¶59.

[61] These contentions are simply a retread, and they reveal how much of a stretch the Respondents' jurisdictional assertions really are. Respondents entirely ignore Lisa's posts confirming her real affinity to the Unites States between 2010 and 2014 that show her talking about the U.S. as home:

- August 3, 2010 -- "Goin' home!" (*made while she was flying to the U.S.*)
- August 4, 2010 -- "Sweet Home Chicago!"
- January 30, 2011 -- "Home sweet home, with my babies, but sick again …" (*posted in Chicago*)
- December 17, 2011 -- "Snow today, Bears game tomorrow, yep, I am truly home."
- July 4, 2012 (Independence Day) -- "Missing the celebration of the freedom of my home."
- September 14, 2014 -- Met the American Ambassador today. Wonderful guy. Good to have the USA with you in a foreign country."

Reply L. Ballantine at ¶9.

[62] DR Rejoinder at ¶62.

[63] DR Rejoinder at ¶62.

[64] Reply L. Ballantine at ¶10-11.

connection to the U.S. community in and around Jarabacoa, and their continued alliance to key U.S. cultural markers, such as religion and education.[65]

49. The evidence to this end is overwhelming, and Respondent understands that, so its Rejoinder attempts to convert this factor into a rehash of its "physical location equals dominance" argument. Respondent argues that "the question here is … where -- in a physical/geographic sense -- the majority of their social/family life actually occurred." Therefore, according to Respondent because the Ballantines spent more days in the DR than they did in the US between 2010-2014, the Ballantines must be Dominican. Case closed!

50. But as the Tribunal understands, this issue is not simply an exercise in counting days. Even if the Ballantines had been in the DR a few more days than they were in the U.S. for some artificial time period, this does not equate to cultural, family and social dominance – or there would be no need to explore those factors. The Tribunal itself has confirmed that it must consider, in part, the Ballantines' "***personal attachment for a particular country***" and this test looks at the evidence surrounding that attachment not quantitatively, but rather qualitatively.

51. The Ballantines' social, family and cultural life was so much more connected to the United States than to the Dominican Republic that any comparison borders on the absurd. Respondent does not debate the simple fact that all of the Ballantines' relatives are U.S. nationals and reside in the U.S. and have always resided in the U.S. While Respondent wishes to downplay the importance of this undisputed fact, it is a significant factor and it reveals that this dominance analysis is really intended to be used when someone attempts to acquire a second citizenship to avail themselves of treaty protection, not when a state is arguing that the mid-investment attainment of a second citizenship should deny a lifelong foreign citizen of treaty protection.

[65] See e.g., Witness Statements of Scott Taylor and Jeffrey Schumacher.

52. The Ballantines continuously referred to Chicago as their "home" and socialized with U.S. nationals at their restaurant and home. There is simply no evidence to support Respondent's assertion that the Ballantines had voluntarily made a decision to discard their strong U.S. cultural heritage in order to become dominantly Dominican; to the contrary, the evidence before this Tribunal rejects that any such contention.

53. The Ballantines moved with their four children to the Dominican Republic in the summer of 2006. However, the educational paths taken by each of the children[66] (including their two older children returning to the United States for college in 2007) show a family centered in the United States, and college tuitions were paid from US-based college savings plans pursuant to IRS Section 529. Every Ballantine child returned to the U.S. for further education while Michael and Lisa worked to promote and expand their Dominican investment, while splitting time between the two countries. The Ballantines' lives were and are centered in the United States, and not in the Dominican Republic.

54. The Ballantines have strong faith and their religious affiliations further evidence the dominance of their U.S. nationality. They attended a U.S.-connected church while in Jarabacoa.[67] The Ballantines also attended church in the United States during their extensive visits between 2010-2014.[68]

55. Respondent's Rejoinder attempts to gloss over all of the strong and enduring cultural, religious and social ties that the Ballantines maintained with their home country. Instead, it emphasizes individual events such as the fact that Lisa Ballantine voted in the 2012 Dominican election and posted about it on Facebook. Respondent insists that casting that vote "reflects the Ballantines' own perception of themselves as Dominican nationals." It is true that the Ballantines were Dominican nationals in 2012;

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[66] *Id*.

[67] See Supplemental M. Ballantine St at ¶18. The Witness Statements of Scott Taylor and Jeffrey Schumacher confirm the Ballantines' strong connection to the church and their strong connection to the U.S. missionary community in Jarabacoa.

[68] See Supplemental M. Ballantine St at ¶19

that is an empirical fact. But the Ballantines did not perceive themselves to be ***dominantly*** Dominican nationals. They did not perceive themselves to be ***more Dominican*** than U.S. – just the opposite. Voting in 2012 in the DR provides no support for any such contention, especially given that the Ballantines also voted in the United States in 2014.

D. Residency

56. Ultimately, Respondent reiterates the thrust of its jurisdictional argument -- which is that this Tribunal should simply count the number of days that the Ballantines were in the DR versus the number of the days they were in the United States and the bigger number wins. This of course does not carry the day.

57. Respondent first reprints the chart showing Lisa Ballantine's physical location over the five years between 2010 and 2014. Respondent believes that this chart supports its contention that the DR was the "primary" residence of the Ballantines during that period. It insists that because the Ballantines had a residence in the DR, by default the Ballantines were "dominantly" Dominican in September of 2014, when this claim was filed. But the chart does not support such a contention.

58. ***First***, the chart shows that Lisa was physically out of the Dominican Republic more often that she was in the DR during those years. Most of the time she was not in the DR she was at her home in the United States, but she also traveled a fair amount -- always as an U.S. national (as shown by her passport records) and frequently for her US-organized charity. In other words, **she was not in the DR for the majority of that time period**.

59. ***Second*****,** the chart reveals that in the two years immediately surrounding her purportedly "solemn" vow to become a Dominican, Lisa was in the United States more than she was in the Dominican Republic.

60. ***Third***, the chart at most demonstrates that the Ballantines split their residency between the United States and the DR, and that the DR's conclusion that the Ballantines maintained "habitual" residency in the DR is simply inaccurate.

61. Respondent in its Rejoinder tries to downplay the simple fact that the Ballantines also had a residence in the U.S. throughout this time period. Indeed, it does more than that. ***It actually tries to convince this Tribunal that the Ballantines didn't really have a residence in the United States during this period***. But its effort to manipulate the facts falls woefully short. Since becoming dual citizens, the Ballantines have at all times continuously maintained at least one residence, and sometimes two residences, in the United States:

- From March 1, 1994 through August 18, 2011, the Ballantines owned a residence at 33w231 Brewster Creek Circle in Wayne, Illinois;
- From October 1, 2010 through December 31, 2011, the Ballantines rented a home at 1163 Westminster Avenue in Elk Grove Village, Illinois;
- On December 2, 2011, the Ballantines purchased a home at 850 Wellington Avenue, Unit 206, in Elk Grove Village, Illinois, and sold this home in November of 2015; and
- On April 19, 2012, the Ballantines purchased a home at 3831 SW 49th Street, in Hollywood, Florida, and sold that home on March 28, 2014. [69]

62. But the evidentiary proof of ownership of these residences should not get in the way of a good chart, so Respondent claims there is no evidence that the Ballantines ***actually lived*** in any of these residences during this period, despite the Ballantines' unambiguous testimony. Respondent insinuates that although the Ballantines continuously rented or owned residences in the United States, and although Lisa Ballantine was in the United States for 641 days between 2010 and 2014, she did not actually live in any of these homes. Of course, Respondent does not explain where the Ballantines would have actually lived when they were home in the U.S. for nearly two years during this five-year period without

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

a residence. Respondent also leaves unexplained the simple question of why the Ballantines would have bought a home in December of 2011 if not to reside in it.

63. Respondent argues that "if the Ballantines truly lived" at any of their residences:

- *why do the US tax returns filed by the Ballantines during this period listed their "home address" as a mail-forwarding facility in Florida?*

  The Ballantines used a mail-forwarding facility for convenience to ensure that important mail -- such as communications with US taxing authorities -- all came to a single location. The IRS explicitly permits the use of a PO Box for tax filings, and the clerical error of referring to their unit number as an apartment number has confused no one except the Respondent. The Ballantines have never claimed that they ever resided at a mail-forwarding facility.

- *why do those US tax returns "swear" that the Ballantines did not live in Illinois in they years 2010 and 2011?*

  Respondent points to a form buried deep in the Ballantines tax return for 2010 and 2011 through which the Ballantines simply elected not to take any deduction for Illinois sales taxes that they may have paid. Transforming this choice into a "sworn" declaration that the Ballantines did not live in Illinois is laughable, and it highlights the ridiculousness of Respondent's jurisdictional claims.

- *why did they not claim any moving expenses on their tax returns in 2011 when they purchase their condominium in Elk Grove Village?*

  Although the Ballantines certainly appreciate the reminder about the deductibility of moving expenses, their decision not to seek such a deduction for costs associated with moving from their rental home in Elk Grove Village to their purchased condominium in

Elk Grove Village less than two miles away is not evidence that the Ballantines did not move to, and live in, that condominium from 2011 to 2014.

- *why did they use Michael Ballantines' parents' address as a contact address for the arbitration?*

  the Ballantines were uncertain where in the United States they would be residing for the duration of this extended arbitration proceeding -- which is now in its fifth calendar year -- and elected to use Michael's parents address to ensure they would be notified of procedural events in this proceeding.

64. So there is no lingering confusion, the Ballantines attach to this Rejoinder monthly statements from the television, internet and phone provider for their purchased Elk Grove condominium. These invoices date from February 2012 through October 2014, and evidence the continuous service to the condominium during this period.[70] Respondent would apparently have this Tribunal believe that the Ballantines bought a condominium, established utility services, and then chose not to reside in the house.

65. The Ballantines also established cellular service with a United States cellular provided in December of 2011, and that service has remained active through the present.[71] Indeed, the August 2014 invoice shows that the billing address was the condominium they owned in Elk Grove Village.[72]

66. Additional evidence reveals the overreach of Respondents' residency claims and further establishes the dominance of the Ballantines' US connections. As the Ballantines have previously testified, they maintained U.S. health insurance at all times since their acquisition of dual citizenship. The Ballantines sought significant medical treatment between 2011 and 2014 exclusively at times when

[70] C-167, Comcast invoices for the Ballantine residence at 850 Wellington Ave, Unit 206, Elk Grove Village, IL, for February 2012, February 2013, February, September and October 2014.

[71] C-168, AT&T wireless invoice for August 2014 to 850 Wellington Ave, Unit 206, Elk Grove Village, IL, and AT&T confirmation of continuous cellular service from December 2011.

[72] Id.

they were residing in the United States, which demonstrates their strong personal attachment to the United States.[73]

67. Additionally, the health insurance records reveal both that the Ballantines were residing at the rented Elk Grove Village apartment in 2011[74] (which is of course entirely consistent with their previous testimony) and were residing at their owned Elk Grove Village condominium from 2012 - 2014[75] (also entirely consistent with their previous testimony). Indeed in the months surrounding September 2014, the time at which Respondent contends that the Ballantines were dominantly Dominican, both Lisa and Michael Ballantine received medical care here in the United States, not in the Dominican Republic.[76]

68. This is not surprising because by this time, the Ballantines had long since decided to spend even less time in the Dominican Republic. Perhaps the most compelling evidence of this is decision to sell the house that they had built for themselves in Jamaca de Dios. The Ballantines decided to put that house up for sale in September of 2012,[77] almost two years before the date of filing of this arbitration in September of 2014 -- the date and year when Respondent insists that the Ballantines were dominantly Dominican largely based upon the fact that the Ballantines were physically in the DR more frequently than they were in the United States in 2013 and 2014.

69. But physical location is of course not the test. Ultimately, the Ballantines were forced to be in the DR more than they wished to be because of the actions of the DR. Despite all of the noise

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[73] See C-169, C-170, C-171, and C-172, Blue Cross Blue Shield Explanation of Benefits Statements for 2011, 2012, 2013, and 2014, respectively

[74] C-169, Blue Cross Blue Shield Explanation of Benefits Statements for 2011, addressed to 1163 Westminster Lane, Elk Grove Village, IL.

[75] C-170, 171, and 172, Blue Cross Blue Shield Explanation of Benefits Statements for 2012-14, addressed to 850 Wellington Ave, Unit 206, Elk Grove Village, IL

[76] C-172

[77] C-173

generated by the DR, the evidence presented by the Ballantines confirms that they were in the United States at least 30 separate times between 2010 to 2014.[78] The Ballantines were not "severing" their forty-plus years of U.S. cultural heritage, but were splitting time between their home country -- the United States -- and the country where they had made a significant economic investment that needed attention.

E. Economic Activity

70. The Ballantines do not dispute that they had significant economic ties to the DR as a result of their investment. But the fruits of those investments were intended to ultimately be enjoyed in the US. The Ballantines' continuous financial connection to the United States confirms that they have at all times been dominantly U.S. citizens. The Ballantines made a significant investment in the Dominican Republic beginning in 2004, and established a series of bank accounts in the DR in connection with the operation of that investment. But they at no time severed the strong economic connection they had established with the United States:

- most significantly, the Ballantines have filed individual federal income tax returns in the United States each year from 2004 to the present, and have not filed individual income tax returns in the Dominican Republic;[79]
- the Ballantines have continuously maintained US checking account #1110017084988 continuously at J.P. Morgan Chase Bank from May 21, 1996 through the present;[80]
- Michael Ballantine has continuously maintained an Individual Retirement Account at Ameritrade in the United States from at least 2009 to the present;[81]
- Michael Ballantine has continuously maintained a Citibank credit card issued in the United States since 1992 and Lisa Ballantine has had a separate Citibank credit card issued in the United States continuously since 2012;[82]

[78] Supp. M. Ballantine St at ¶21.

[79] See Exhibit C-80, 3/2/17 Letter from Catalano, Caboor & Co. See Supplemental M. Ballantine St at ¶11

[80] See Exhibit C-81, 2/28/17, Chase account confirmation for account #1110017084988. See Supplemental M. Ballantine St at ¶12

[81] See Exhibit C-82, Ameritrade account statements; See Supplemental M. Ballantine St at ¶13

- The Ballantines have maintained U.S. health insurance coverage through Blue Cross Blue Shield continuously since 2010;[83]
- The Ballantines established IRS Section 529 college savings accounts with College Counts in the United States to pay for college with U.S. funds while partially residing in the DR.[84]
- Lisa Ballantine formed her U.S. nonprofit, Filter Pure Inc., pursuant to IRS Section 501(c)(3) in February of 2008. [85] She directed the entity until its assets were transferred to another nonprofit in 2015. Lisa raised more than $1,000,000 from U.S. donors between the years 2010-2014.
- The Ballantines have had a charitable gift account at Fidelity in the United States at all times since 2001.[86]

71. Respondent submits yet another chart to demonstrate that there was significant activity in the Jamaca de Dios accounts during the 2010 - 2014 time period. The Ballantines do not dispute this. Indeed, they have repeatedly confirmed to the Tribunal the extent of their financial activity in the DR. They sold nearly 90 lots in the first phase of their development (with contracts denominated in U.S. dollars);[87] they built and operated the nicest restaurant in Jarabacoa; they built and maintained the highest quality private mountain road in the country. Their development and operation of JDD required a lot of financial activity. And that financial activity had a geographic connection to the DR.[88] But the physical location of financial transactions is of course not what this Tribunal needs to decide. All bilateral investment treaties -- CAFTA-DR included -- contemplate the fact that foreign investors will make significant economic investments in a different state, and exist in large part to provide a series of protections for those foreign investors.

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[82] See Supplemental M. Ballantine St at ¶14

[83] See Supplemental M. Ballantine St at ¶15

[84] See Supplemental M. Ballantine St at ¶16

[85] See Exhibit C-83.

[86] See Exhibit C-174, April 10, 2018 letter from Fidelity Charitable, confirming active account for the Ballantines.

[87] See Exhibit C-162.

[88] Of course, a significant portion of the proceeds of the lot sales were received by the Ballantines in the United States.

72. ***What this Tribunal needs to determine is whether or not the Ballantines were foreign investors.*** Looking at the physical location of economic activity related to the investment does not answer the question. What answers the question -- as the Tribunal has itself confirmed -- is, in large part, considerations of personal attachment, why the second nationality was acquired, the center of cultural and family and economic life, and how the host state treated and viewed the Ballantines. And on these points the DR again and again can only point to the partial presence of the Ballantines in the Dominican Republic.

73. Indeed, the DR quickly glosses over the fact that in 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***. [89] The DR argues this has nothing to do with "how the US or the DR viewed the Ballantines," but ignores the fact that it has everything to do with how the Ballantines viewed themselves.

74. So do the facts that a) in July of 2013, Michael Ballantine became an associate member of the American Chamber of Commerce in the Dominican Republic;[90] b) beginning in July of 2013, the Ballantines met with the officials from the US Embassy in Santo Domingo at least nine times for assistance in their appeal with respect to the denied expansion permit[91]; and c) in May of 2013, Michael Ballantine met with Jean-Alain Rodriguez, the Executive Director of the CEI-RD, the official Dominican agency responsible for the promotion of international trade and *foreign direct investment*, who then wrote to the MMA on behalf of the Ballantines referring to them as "Foreign Investor[s]."[92]

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[89] This would have permitted the Ballantines to repatriate profits from JDD to the US without Central Bank approval.

[90] See C-85.

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

[92] C-26

75. All of these actions were undertaken by Michael Ballantine because he considered himself to be dominantly U.S., and a foreign investor in the Dominican Republic. And in turn, Respondent also considered him to be a foreign investor.

F. Respondent Viewed the Ballantines As U.S. Nationals And Acted Against Them On That Basis

76. In Procedural Order No. 2, the Tribunal stated that "***the conduct of the host State vis-à-vis the Ballantines***, and vice versa" would need to be examined in determining dominant and effective nationality.[93]

77. The evidence demonstrates that Respondent treated the Ballantines as foreigners and discriminated against them on this basis.

78. As an initial matter, it is clear that Respondent's officials and citizens did not view the Ballantines as Dominican nationals. For example, in one video from 2013, Dominicans citizens and politicians can be seen referring to Michael Ballantine as the "gringo" or the "American [*sic*]", including the mayor of Jarabacoa who refers to him as the "American [*sic*] of Jamaca de Dios." The Tribunal will recall that the City of Jarabacoa had refused to issue a no-objection letter for a part of the project. It is clear that Respondent's officials and citizens viewed the Ballantines as U.S. nationals. The Ballantines were not Dominican. They were "others" – *i.e.*, persons without Dominican heritage and therefore not Dominican.[94]

79. The DR has a track record of treating people it views as non-Dominicans in a shameful and wrongful manner – even where those people were born and raised in the Dominican Republic. The

[93] Procedural Order No. 2 (emphasis added).

[94] It is worth noting here that racism and discrimination against the "other" is not unique to the DR. Every nation suffers from this pernicious issue. And nations sometimes enact laws that institutionalize this racism and bias. But that does not excuse the DR from this conduct. And it certainly does not excuse them from treating foreigners in a significantly worse manner than it does people with Dominican heritage.

starkest example of this is the treatment of people of Haitian ancestry who have been made stateless by Respondent's actions. As stated in a "Minority Rights" report:

> Dominicans of Haitian descent constitute a significant minority in the Dominican Republic. This community is **comprised of children, grand-children and great-grand-children born in the country** to Haitian migrants who arrived in the DR from the early 1900s onwards.
>
> While members of this minority have historically faced profound exclusion and racism, **both from state institutions and from other Dominicans**, their situation became markedly worse in 2013 when Constitutional Court Judgement 168/13 retroactively (from 1929) stripped thousands of people of their Dominican nationality. As a result, the 2013 ruling **rendered this population stateless**, as set out in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, **leaving them unable to access higher education, health care, formal employment or justice**.
>
> The judgment retroactively reviewed the nationality status of individuals born in the country to two migrant parents, disproportionately affecting Dominicans of Haitian descent. At the time it was estimated that as many as 210,000 people had been left stateless, though this figure was revised to some 133,770 Dominican-born individuals. However, **this estimate only included first generation of Dominican-born individuals**: that is, persons born in the country to two parents born abroad. It did not include subsequent generations of individuals of foreign descent, as there is no reliable population data available. As such it did not include all persons without nationality.[95]

As laid out above, Respondent rendered tens of thousands of people stateless – depriving them of "access higher education, health care, formal employment or justice."[96] Remember, these are people who were born in the Dominican Republic and lived their whole lives there.[97] The exclusion that these persons faced from state institutions was based on the fact that they were of Haitian descent (even if remotely so), not that they themselves were Haitian.

80. Human Rights Watch described the way in which the Dominican nationals were stripped of statehood and deported to a place in which they never even lived:

[95] Minority Rights Report, Exh. C-176.

[96] See id.

[97] See id.

> "At least 200,000 Dominicans of Haitian descent and Haitian migrants working in the Dominican Republic re-entered Haiti between June 2015 and May 2017 . . . in accordance with a controversial 2015 regularization plan for foreigners in the Dominican Republic. **Many others left under pressure or threat. Many deportations did not meet international standards and many people have been swept up in arbitrary, summary deportations without any sort of hearing**."

The Ballantines also left under pressure and threats – after having been denied the rights that Dominicans (without Haitian ancestors) are allowed. Respondent does not consider these persons with Haitian ancestors to be Dominicans. It also (outside of the context of this arbitration) does not consider the Ballantines to be Dominican.

81. Human Rights Watch noted the manner in which persons born and raised in the DR were subject to arbitrary deportations and horrific conditions, including the following women who were born and had lived in the DR for 29 and 37 years, respectively:

> C.P., 29, was born in the Dominican Republic. She did not register under the 2014 process, she said, because: "All I saw were people like me being maltreated, so I didn't try to register." Dominican officers wearing a uniform she did not recognize deported her in mid-2015. She said that she was not given any opportunity to appeal and was deported the same day. No one took her name or gave her any paperwork during the deportation. "I didn't have any clothes except what I was wearing, or anything for the baby," she said.
>
> N.B., 37, was also born in the Dominican Republic. She said that her half-sister tried to help her register. "It was hopeless," she said. "The officers asked a lot of questions, said we had to find the midwife who cut my umbilical cord, or get someone well-known in the village to come and vouch that I was born there." She was deported in mid-2015 by men she described as being "from immigration." She said that she was not provided with any paperwork, and was deported the same day, without any opportunity to appeal. "They just asked: 'Do you have papers?' and when I said 'No', they said, 'Get in the truck.'"[98]

82. The treatment of people of Haitian descent is shameful and likely violative of Respondent's other treaty obligations, including its human rights treaties. But it is also highly relevant to the Tribunal's analysis on the dominant and effective nationality issue. That is because the treatment

[98] HRW Report, 29 Nov. 2016, Exh. 179.

of Dominican-born people of Haitian descent shows another aspect of the shamelessness of Respondent. In this arbitration, Respondent is arguing that the Ballantines are dominantly Dominican because they spent time some time in the DR, had Dominican friends, a house, and the like. Yet Respondent has stripped the nationality of tens of thousands who were born and lived their whole lives in the DR. These persons had Dominican friends, attended a church in the DR, owned property, had connections – AND knew no other country. Respondent does not view these persons as Dominican at all, despite their having been in the DR their whole life. It lies ill in the mouth of Respondent to assert that the Ballantines are Dominicans because of a limited residence while stripping citizenship from adult persons who have lived their whole lives in the DR are not nationals at all. Asserting that the Ballantines are dominantly Dominican **in order to try to win an arbitration** just furthers the shamelessness of Respondent's behavior.

83. Another shameless part of Respondent's behavior is its treatment of the Ballantines because they are U.S. nationals in light of how they treat Dominican nationals (who do not have Haitian ancestry). One stark example is the DR's attempt to avoid having to deal with the Odebrecht issue in order to protect Dominicans. The former head of Odebrecht, Marcelo Odebrecht, revealed that his company **paid US$92 million in bribes to Dominican officials**.[99] As the Miami Herald noted, the "Dominican Republic ha[s] done very little" to address this situation.[100] As the Seattle Times noted in May 2017:

> One of the most sprawling corruption scandals in modern history **has deep roots in the Dominican Republic**: The Brazilian company behind the operation placed its international "bribery bureau" in this Caribbean country and shoveled out nearly $100 million in bribes to local officials.
>
> **Yet five months after the scheme was exposed, nobody has been charged here and no corrupt officials have been named** — infuriating both political

[99] Exh. C-177.

[100] *See id*.

> reformers and opposition parties. **By contrast, investigations in Brazil, Colombia, Panama and Peru have produced hundreds of charges, including cases against former presidents**.[101]

The recipients of those bribes were Dominicans.

84. Respondent takes every step to avoid taking actions against Dominicans (unless their great grandparents were Haitian). But Respondent is quick to assert wrongdoing by the Ballantines. One such assertion that Respondent makes in its Rejoinder regards the taxes paid by the Ballantines in the DR. Respondent acts as if the Ballantines are Jimmy Hoffa for paying taxes at an appraised rate versus the sale price.[102] But Respondent appears to say nothing when Dominicans do this very common practice and, likewise, do not appear to take actions against Dominicans for doing so.[103] Respondent plainly views the Ballantines on foreigners and, consequently, creates harsher standards for them than Dominicans.

85. Protecting Dominicans who take bribes is not the only way that Respondent's views about Dominicans versus the "other" creates pernicious results. Respondent allows and has allowed Dominicans (without Haitian heritage) to build developments in the absence of a permit. This includes, as only two examples, Aloma Mountain and Rancho Guaraguao. In both cases, Respondent has allegedly "fined" the properties years later and only after the Ballantines raised this issue in the arbitration. In both cases, however, there is no evidence that the fines were ever paid. And the Tribunal should expect that the fines will be dropped after the conclusion of this arbitration.

86. In the Dominican Republic, it is good to be a Dominican. You can obtain permits for developments where the slopes exceed 60%. You can build a house or road on slopes in excess of 60%.

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[101] Exh. C-178.

[102] *See, e.g.*, Respondent's Rejoinder, at 274.

[103] *See* Report of Lic .Jose La Paz Lantigua Balbuena, dated 17 May 2018. It is difficult to prove a negative that no Dominican was ever prosecuted for doing this prior to 2017. But it appears that this was not an issue with respect to prosecutions until Respondent needed to assert purported wrongdoing in the arbitration.

You can develop in a national park with or without a permit. You can pay taxes based on the appraised value of the property. You can even accept $92 million in bribes.

IV. Admissibility

87. With respect to the Ballantines' claims, Respondent literally asserts in the Rejoinder that "all of their claims are inadmissible".[104] It is difficult to address with precision Respondent's assertions with regard to admissibility as it has not explained how "all of [the Ballantines'] claims are inadmissible.

88. Nevertheless, Respondent mischaracterizes the Ballantines' arguments with regard to the admissibility defense put on by Respondent for the first time after its Statement of Defense. Respondent asserts that the Ballantines have "abandoned" their claims with regard to the park.[105] This is false. What the Ballantines stated was that the creation of the national park did not by itself give rise to a claim because there was no indication that such a park would prohibit development. As we stated in the Admissibility Response:

> "imagine this: you are an investor in a foreign country. You find out that your property is in a national park. You are told by your environmental consultants that this is no problem because ecotourism is allowed in the park and you planned project is ecotourism. You look across to your neighbor's property, which is also in the park. Your neighbor, the mayor's son and brother-in-law to the President of the Dominican Republic, is developing his property with no concerns. You know that other projects similar to your project are also developing in national parks. After you know of the creation of a park, you receive an authorization from that country (here, CONFUTUR), which includes a review by the country's environmental regulators and tourism officials. You request a permit and receive three denials but, notably, these denials say absolutely nothing about the permit being denied because the property is in a national park. No reasonable person would conclude that she had suffered a loss because of a breach of CAFTA-DR given the above."

If no reasonable person would conclude that a loss has been suffered, then the claim had not yet arisen. Far from being an abandonment of a claim for the national park, it demonstrates that the Ballantines did not have a claim until the permit was denied on the basis of the park.

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[104] Rejoinder, at 359.

[105] See, e.g., Rejoinder at 111.

89. The Tribunal should recall that building in a National Park is not an impediment – if you are a Dominican. Respondent admits that Rancho Guaraguao and Aloma Mountain, among others, developed without environmental permits.[106] Regarding Rancho Guaraguao, that project was expanded in 2010.[107] Yet Respondent just fined Rancho Guaraguao on 16 March 2018 – 2 months ago and just days before the Rejoinder.[108] Rancho Guaraguao is on a mountain and is a notorious project that advertises all over social media and on travel sites.[109] Respondent cannot claim that it did not know about Rancho Guaraguao for 13 years. How would the Ballantines have known that building in a national park was forbidden when Rancho Guaraguao was notoriously doing so.

V. Conclusion

90. As it does on the merits, Respondent asks the Tribunal to ignore the forest and look at a very limited number of trees, such as the Ballantines voted here, and their commercial websites say nice thing about the DR, and their social media sites do not disparage our country (while ignoring the vast majority of the trees that show a connection to the U.S.). The forest of the Ballantines' U.S. connections is dense and deep. Despite all the charts, footnotes, and accusations, the Respondent is left with the mere contention that the Ballantines' mid-investment decision to attain DR citizenship for business purposes necessarily equates to dominance. Respondent is wrong.

91. The hearing will emphasize the discriminatory conduct that the evidentiary record already makes plain. The success of JDD was untenable for connected Dominicans who wanted their own projects to flourish. The DR's continually shifting justification for its treatment of JDD -- the project was denied due to slopes, wait… the project was denied due to Park, wait… the project was denied due

[106] *See, e.g.*, Respondent's Rejoinder at 222.

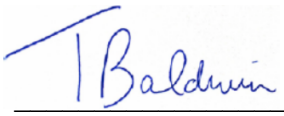
[107] See, e.g., the Ballantines Reply at 164.

[108] Exh. R-278.

[109] *See, e.g.*, Exh. C-152.

to flora and fauna, wait… the project was denied due to altitude, wait… the project was denied to protect pristine forest environment, wait… the project was denied due to soil stability -- reveals a *post hoc* rationalization that was contained in any of Respondent's contemporaneous internal or external communications about Jamaca and that the Tribunal need not accept.

Dated: 21 May 2018



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