

**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)

NOTICE OF ARBITRATION AND STATEMENT OF CLAIM

Ian A. Laird
Jonathan S. Kallmer
Ashley R. Riveira
Kassi D. Tallent
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(1) 202 624 2500 (tel.)
(1) 202 628 5116 (fax)

Counsel for Claimants

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	THE PARTIES.....	4
	A. Claimants	4
	B. Respondent.....	5
III.	CONSENT TO ARBITRATION.....	5
IV.	JURISDICTION	7
V.	FACTS SUPPORTING THE CLAIM.....	10
	A. The Ballantines’ Missionary and Other Charitable Work in the Dominican Republic	10
	B. Developing the Concept for Jamaca de Dios	11
	C. Interaction with the Ministry of Environment and Other Dominican Republic Authorities.....	12
	D. Development of Phase 1 and Preparation for Phase 2	15
	E. Request for Approval to Develop Phase 2	17
	1. The Imposition of Fines on Jamaca de Dios	18
	2. Rejection of Approval Request on the Basis of Excessive Slopes	20
	3. Rejection of Approval Request on the Basis of National Park Boundaries	22
	F. Requests for “No Objection” Letter to Build Apartment Complex on Lower Portion of Property.....	27
	G. Possibility of Politically Motivated Action.....	28
VI.	LEGAL ARGUMENTS SUPPORTING THE CLAIM	30
	A. National Treatment and Most-Favored-Nation Treatment	31
	B. Minimum Standard of Treatment.....	34
	C. Expropriation	37
VII.	RELIEF OR REMEDY SOUGHT	43
VIII.	APPOINTMENT OF ARBITRATOR.....	44

I. INTRODUCTION

1. Pursuant to Articles 3 and 20 of the *Arbitration Rules of the United Nations Commission on International Trade Law*, RESOLUTION 31/98 Adopted by the U.N. General Assembly on December 15, 1976, as revised in 2010 and 2013 (“UNCITRAL Arbitration Rules”), and Articles 10.16.1(a), 10.16.1(b), and 10.16.3(c) of the Dominican Republic-Central America-United States Free Trade Agreement (“CAFTA-DR”), Claimants Michael and Lisa Ballantine (collectively, the “Ballantines”) hereby submit, on their own behalf and on behalf of their enterprises (collectively, the “Enterprises”), their Notice of Arbitration and Statement of Claim against the Government of the Dominican Republic (“Dominican Republic,” “Government,” or “Respondent”) under the UNCITRAL Arbitration Rules. A summary of the key facts involved in this dispute, which are elaborated in greater detail below, is as follows.

2. The Ballantines, both U.S. citizens from Chicago, first visited the Dominican Republic in 2000 to work as Christian missionaries. They returned several times over the next six years to serve communities around the country, including by establishing three non-denominational churches and, starting in 2007, providing significant financial support to FilterPure, a non-profit organization founded by Lisa Ballantine that distributes ceramic water filters to low-income families. As a result of their affection for the country and its people, the Ballantines and their children moved to the Dominican Republic in 2006 to create Jamaca de Dios, a residential and tourism project in the mountains above Jarabacoa, in the scenic province of La Vega.

3. The Ballantines began a development process that resulted in the sale of dozens of parcels of land to (mostly Dominican) private owners, the construction of common areas and infrastructure (such as a central road, gates, water and electrical installations, and a lake), and the opening of a restaurant. Consistent with their original vision, they sought in recent years to

expand their highly successful project by selling dozens of additional parcels of land on which they would build luxury homes; constructing a boutique hotel, a spa, and two apartment complexes; and adding a second restaurant. Jamaca de Dios already supports hundreds of jobs in the local community, and its expansion would create even more.

4. For the first several years, the Ballantines had a productive relationship with government authorities, including the *Ministerio de Medio Ambiente y Recursos Naturales* (“MMA”). The government welcomed their investment, and the Ballantines worked regularly with MMA and other entities to obtain land titles, explore development incentives, and undertake required inspections, among other activities. After a few years, Jamaca de Dios was a profitable and rapidly growing enterprise and a destination of choice for Dominicans in the local community and around the country. The business was on an excellent financial trajectory when, as they had intended to do from the outset, the Ballantines requested approval in November 2010 to expand the project to the top of the mountain, where the most valuable property lay.

5. In September 2011, however, MMA rejected the Ballantines’ request to expand Jamaca de Dios on the grounds that the expansion would violate regulations governing the maximum slope of land for development. The Ballantines were perplexed by this response, both because none of the land slated for development exceeds the slope restriction of 60 percent, but also because MMA had never before mentioned slope restrictions, even though the land that MMA had already approved for the initial phase of development within Jamaca de Dios was substantially steeper. In subsequent communications, the Ballantines asked that MMA reconsider its decision.

6. Regrettably and inexplicably, MMA continued to reject the Ballantines’ requests. On January 15, 2014, it identified a new reason for its position, noting that the land identified for

expansion was located within Baiguarte National Park, a protected area on which development was restricted. The Ballantines were surprised to learn of this reason for MMA's decision, as MMA had never before mentioned this issue and, it turned out, the national parkland covered a part of the already approved and developed land as well as all of the land identified for expansion. They were also surprised to discover that the national park area ends right outside the property of at least two comparable Dominican- and Spanish-owned mountain property developments in the Jarabacoa area.

7. The Ballantines believe that the actions of MMA and other Government entities have greatly diminished the value of their investment in Jamaca de Dios, called into question the validity of their property interests in the project, and created complete uncertainty about the project's future. Pursuant to Article 10.15 of the CAFTA-DR, in an effort to resolve their dispute with the Government through consultation and negotiation, on March 3, 2014 the Ballantines contacted the Government to propose the opening of settlement discussions.¹ The Ballantines and the Government held meetings in July and August 2014 to discuss the possibility of resolving this dispute amicably. The Dominican Republic has not addressed the concerns raised by the Ballantines, compelling this formal demand for arbitration.

8. As discussed more fully in this Notice of Arbitration and Statement of Claim, the Dominican Republic, through both its actions and inaction, has breached its obligations under Section A of the CAFTA-DR, including the following provisions:

- a. Article 10.3: National Treatment;
- b. Article 10.4: Most-Favored-Nation Treatment;
- c. Article 10.5: Minimum Standard of Treatment; and

¹ See Letter from Michael J. Ballantine to Bautista Rojas Gómez (Mar. 3, 2014) (C-1).

d. Article 10.7: Expropriation and Compensation.

9. The Ballantines and the Enterprises have incurred damages of not less than US\$20 million (twenty million U.S. dollars) as a direct result of the Dominican Republic's breaches of the CAFTA-DR.

10. The Ballantines hereby reserve the right to supplement or amend this Notice of Arbitration and Statement of Claim and the submissions set forth herein.

II. THE PARTIES

A. Claimants

11. The Claimants in this arbitration are Michael and Lisa Ballantine (previously defined as the "Ballantines"). The Ballantines' contact details are as follows:

Michael and Lisa Ballantine
951 Grissom Trail
Elk Grove Village, IL 60007

12. Pursuant to CAFTA-DR Article 10.16.1(b), Claimants also submit this Notice of Arbitration and Statement of Claim on behalf of the following enterprises organized under the laws of the Dominican Republic (previously defined as the "Enterprises"), which are both solely owned and controlled by the Ballantines:

Jamaca de Dios SRL
Entre las montañas de Pinar quemado y Palo Blanco, Carretera la colonia,
Sección Palo Blanco
Jarabacoa
Provincia La Vega
República Dominicana

Aroma de la Montaña, E.I.R.L.
Entre las montañas de Pinar quemado y Palo Blanco, Carretera la colonia,
Sección Palo Blanco
Jarabacoa
Provincia La Vega
República Dominicana

13. Claimants are represented in this arbitration by:

Ian A. Laird
Jonathan S. Kallmer
Ashley R. Riveira
Kassi D. Tallent

Crowell & Moring LLP
1001 Pennsylvania Ave. NW
Washington D.C. 20004
United States of America
Telephone: (1) 202 624 2500
Telefax: (1) 202 628 5116
Email:
ILaird@crowell.com;
JKallmer@crowell.com;
ARiveira@crowell.com;
KTallent@crowell.com

14. All communications in connection with this arbitration should be directed to the above-named counsel.

B. Respondent

15. Respondent in this arbitration is the Dominican Republic. Pursuant to Article 10.27 and Annex 10-G of the CAFTA-DR, service of this Notice of Arbitration and Statement of Claim may be made on the Dominican Republic using the following contact details:

Dirección de Comercio Exterior y Administración de Tratados
Comerciales Internacionales
Secretaría de Estado de Industria y Comercio
Santo Domingo, República Dominicana

III. CONSENT TO ARBITRATION

16. Articles 10.17 and 10.18 of the CAFTA-DR include provisions to ensure effective party consent to arbitration. The Dominican Republic's consent to submit the present dispute to arbitration under the UNCITRAL Arbitration Rules is contained in Article 10.17.1 of the CAFTA-DR, which provides that "[e]ach Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement." Under Article 10.18.2(a) of

the CAFTA-DR, this Notice of Arbitration and Statement of Claim constitutes Claimants' written consent to arbitration under the UNCITRAL Arbitration Rules and in accordance with the procedures set out in the CAFTA-DR.

17. Article 10.18.2(b) further provides that, in submitting a claim to arbitration a claimant – and, where a claimant submits a claim on behalf of an enterprise, an enterprise – must waive its (or their) rights to initiate or continue any domestic administrative or court proceeding with respect to any measure alleged to constitute a breach, as set out in Article 10.16. A copy of the Ballantines' and the Enterprises' waiver, the original of which was delivered to Respondent on the same date as this Notice of Arbitration and Statement of Claim, is attached as Exhibit C-2 hereto. Moreover, pursuant to Annex 10-E of the CAFTA-DR, the Ballantines affirm that neither they nor the Enterprises previously have submitted any of the breaches alleged in the present Notice of Arbitration and Statement of Claim to any other binding dispute resolution procedure for adjudication or resolution.

18. Notwithstanding the foregoing, pursuant to Article 10.18.3 of the CAFTA-DR, the Ballantines and the Enterprises reserve the right to initiate or continue any proceedings for injunctive relief not involving the payment of damages before any administrative or judicial tribunal of the Respondent, for the purposes of preserving their rights and interests during the pendency of this arbitration.

19. Finally, under Article 10.18.1 of the CAFTA-DR,

[n]o claim may be submitted to arbitration under this Section 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 under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.

As the discussion below demonstrates, no more than three years have elapsed from the date on which the Ballantines first acquired, or should have first acquired, knowledge of the breaches

that they allege both on their own behalf and on behalf of the Enterprises, as well as knowledge that they or the Enterprises have suffered loss or damages as a result of those breaches.

IV. JURISDICTION

20. Beyond ensuring proper and effective party consent, the CAFTA-DR contains several jurisdictional requirements in respect of arbitration under Section B of Chapter 10. The dispute described in this Notice of Arbitration and Statement of Claim satisfies these jurisdictional requirements, which are as follows.

21. First, under Article 10.28 of the CAFTA-DR, a “claimant” must be “an investor of a Party that is a party to an investment dispute with another Party.” The same article defines “investor of a Party” as:

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;

The Ballantines are “national[s] of a Party,” the United States, who have “made an investment in the territory of another Party” to the CAFTA-DR, the Dominican Republic. While they are citizens of both the United States and the Dominican Republic, the United States is “the State of [their] dominant and effective nationality.” The center of gravity of their contacts, relationships, and commitments is the United States. They were born in the United States, have spent a significant majority of their lives in the United States, maintain their permanent residence in Chicago, and have their strongest personal and professional relationships in the United States. The entirety of the capital that the Ballantines initially invested in Jamaca de Dios originated in the United States. Indeed, the Ballantines became citizens of the Dominican Republic only in 2010 and primarily for estate planning purposes, as they understood that it is substantially less

burdensome for Dominican citizens to transfer their assets to surviving family members than for foreign nationals to do so.

22. Second, Article 10.28 provides an expansive, functional definition of “investment” that includes “every asset that an investor owns, directly or indirectly, that has the characteristics of an investment.” This includes companies and other enterprises, stock or other equity interests, debt instruments, contract rights, licenses and permits, and other types of tangible and intangible property. The economic commitment that the Ballantines made to create and develop Jamaca de Dios and Aroma de la Montaña reflects many of these forms of “investment,” including enterprises, equity interests, debt instruments, licenses and permits, and more.

23. Third, under the CAFTA-DR a claimant may submit a claim to arbitration “on its own behalf” (Article 10.16.1(a)) or “on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly” (Article 10.16.1(b)). As discussed above, the Ballantines submit this claim to arbitration on their own behalf and on behalf of two enterprises – Jamaca de Dios SRL and Aroma de la Montaña, E.I.R.L. – that are juridical persons of the Dominican Republic that the Ballantines own or control directly or indirectly.

24. Fourth, Article 10.16.1 of the CAFTA-DR further specifies that, whether or not a claimant submits a claim to arbitration on its own behalf or on behalf of an enterprise, the claim must allege “that the respondent has breached [] an obligation under Section A, [] an investment authorization, or [] an investment agreement; and... [that the claimant or enterprise, as the case may be] has incurred loss or damage by reason of, or arising out of, that breach....” As noted in paragraph 8 above and discussed in further detail below, the Ballantines allege that the

Dominican Republic has breached multiple obligations of Section A and that both the Ballantines and the Enterprises have suffered significant damages and losses as a result of those breaches.

25. Fifth, Article 10.16.2 of the CAFTA-DR provides that, “[a]t least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (‘notice of intent’).” The notice of intent must include basic information about the claimant and any enterprise, the obligations alleged to have been breached, the legal and factual basis for each claim, and the nature and amount of any relief or damages sought. On June 12, 2014, the Ballantines served their Notice of Intent to Submit a Claim to Arbitration (“Notice of Intent”) on the Dominican Republic.² The Notice of Intent contains all of the information required by the CAFTA-DR, and more than ninety (90) days have elapsed between the Ballantines’ service of their Notice of Intent and the submission of this claim.

26. Finally, under Article 10.16.3 of the CAFTA-DR, “[p]rovided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim” under one of several sets of arbitration rules, including the UNCITRAL Arbitration Rules. Article 10.16.4(c) further provides that “[a] claim shall be deemed submitted to arbitration under this Section when the claimant’s notice of or request for arbitration (‘notice of 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.”³

² See Notice of Intent to Submit a Claim to Arbitration (Jun 12, 2014) (C-3).

³ Article 18 of the UNCITRAL Arbitration Rules 1976, to which Article 10.16.4(c) of the CAFTA-DR refers, corresponds to Article 20 of the UNCITRAL Arbitration Rules 2013, under which Claimants submit this claim, pursuant to Article 10.16.5 of the CAFTA-DR.

As the below discussion shows, at least six months have passed since the events giving rise to the Claimants' claim.

V. FACTS SUPPORTING THE CLAIM

27. The Claimants' and Enterprises' claims arise out of actions by MMA, the Municipality of Jarabacoa, and other organs of the Government of the Dominican Republic that both individually and collectively deprived the Ballantines of the valuable rights and interests that they held in their "investments" in the Dominican Republic. The relevant factual background underlying these claims is summarized below.

A. The Ballantines' Missionary and Other Charitable Work in the Dominican Republic

28. The Ballantines first moved to the Dominican Republic in 2000 with their four children to work as Christian missionaries with the Jesus For All Nations Ministry. They served churches and communities around the country, including in Constanza, Dajabon, Jarabacoa, La Romana, La Vega, Moca, Puerta Plata, Santiago, San Francisco, Santo Domingo, and Tanares, as well as many small villages. They also established three non-denominational churches, all of which remain in operation today. The Ballantines returned to their home in Chicago in 2001 but continued their missionary work in the Dominican Republic, visiting the country each year to continue their support of the churches and communities they had begun to serve.

29. In addition, the Ballantines started the not-for-profit organization FilterPure Filters⁴ in 2007 to design, manufacture, and distribute low-cost, high-quality ceramic water filters to underserved communities in the Dominican Republic and Haiti. Named AguaPure in

⁴ See FilterPure, <http://www.filterpurefilters.org/> (last visited Sept. 10, 2014).

the Dominican Republic,⁵ FilterPure partnered with a local artist-entrepreneur to develop filter design, production, testing, and education protocols, and to harness a distribution network that includes not-for-profit organizations such as the Red Cross, Pan American Health Organization (PAHO), and Save the Children. To date, AguaPure has sold or distributed over 55,000 filters to Dominican families and enabled 330,000 people to drink safe water. The organization has 12 full-time Dominican employees and operates independently throughout the country in countless communities. On behalf of FilterPure, Lisa Ballantine received the 2013 Global Energy Award for the Dominican Republic.

B. Developing the Concept for Jamaca de Dios

30. After 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. They had a vision for a residential and tourism project in the mountainous center of the country, and in 2003 began purchasing land in the Municipality of Jarabacoa, in the Province of La Vega.

31. The Ballantines' vision was to develop a mountain residential and tourism property like no other in the country, if not the entire Caribbean region. Jamaca de Dios ("Hammock of God"), as they named it, was to be a place where private individuals could purchase land and build luxury mountain homes; where homeowners and local citizens could enjoy first-class dining with striking views of the valley; and, eventually, where Dominicans and tourists alike could stay in a high-end boutique hotel and spa, purchase or rent apartments in a "mountain lodge" (as well as a second, yet-to-be-built apartment complex), and enjoy a number of recreational and other activities, such as hiking trails, organic gardens, parks and common

⁵ See AguaPure, <http://www.aguapure.com.do/> (last visited Sept. 10, 2014).

areas, a recreational lake, basketball and tennis courts, a fitness center, and a children's play area, among others.

32. The Ballantines intended from the beginning that Jamaca de Dios would be a long-term, integrated project that would proceed on the basis of two phases of development. During Phase 1, the Ballantines would focus on developing the lower portion of the property, selling parcels of land to private buyers for the construction of homes, constructing a restaurant, and outfitting the property with the infrastructure necessary to support the entire project. The development of Phase 1 would allow the Ballantines to test the market for their idea, build a reputation in the community and around the country and, critically, generate the revenue that could be reinvested into a second phase of development.

33. After hopefully having established a successful business, the Ballantines would in Phase 2 develop the even more desirable and valuable upper portion of the property, selling dozens of additional lots for private homebuilding, constructing a luxury hotel and spa, adding a second restaurant, and, back on the lower portion of the property, building a "mountain lodge" of apartments for sale or rental.

C. Interaction with the Ministry of Environment and Other Dominican Republic Authorities

34. Before undertaking significant development activities with respect to Jamaca de Dios, the Ballantines first needed to seek and obtain environmental permits from the *Ministerio de Medio Ambiente y Recursos Naturales* (previously defined as "MMA"), the ministry responsible for the implementation and enforcement of environmental laws and regulations, including those concerning real estate development. MMA exercises its regulatory authority pursuant to the *Ley General sobre Medio Ambiente y Recursos Naturales (Ley No. 64-00)* ("Environmental Law") and subsidiary laws and regulations to ensure, among other objectives,

that the development of real property is consistent with the Dominican Republic's legal and policy objectives concerning environmental protection.⁶

35. MMA requires that applications for environmental permits to undertake real estate development proceed through six specific steps. First, the applicant must obtain a letter of "no objection" from the municipal government of the area where the proposed project is to be located. Second, the applicant must provide the "no objection" letter to MMA and request that MMA provide "terms of reference" for the submission of a "*Declaración de Impacto Ambiental*" ("Environmental Impact Statement"). Third, MMA must conduct a technical visit to the location of the proposed project in order to prepare and provide the applicant with the "terms of reference" for the Environmental Impact Statement. Fourth, the applicant must prepare and submit the Environment Impact Statement. Fifth, MMA must review the Environmental Impact Statement and related application documents, including by having its *Comité Técnico de Evaluación* ("CTE") prepare a technical report on the proposed project. Finally, on the basis of its review, the CTE technical report, and any stakeholder or public comments, MMA must issue a decision to grant or deny an environment project for the proposed project.

36. The Ballantines immediately set out to satisfy these requirements.

- a. After having obtained a "no objection" letter from the City Council of the Municipality of Jarabacoa, on February 7, 2005, through one of the leading environmental companies in the Dominican Republic, Antilia Environmental Consultants (which the Ballantines had hired to assist them with the

⁶ See *Ley General sobre Medio Ambiente y Recursos Naturales (Ley No. 64-00)*, art. 40 ("Every project, work of infrastructure, industry, or any other activity which by its nature can affect, in one way or another, the environment and natural resources, shall obtain from the Secretary of State of Environment and Natural Resources, prior to its execution, the environmental permit or license, according to the magnitude of the effects it may cause.") (Unofficial translation) (CLA-1).

permitting process), the Ballantines sent a letter to MMA indicating their desire to develop a residential mountain project involving some 82 home sites, and requesting terms of reference for an Environmental Impact Statement.

- b. On August 18, 2006, MMA issued terms of reference to the Ballantines.
- c. In February 2007, the Ballantines submitted the Environmental Impact Statement to MMA.
- d. Subsequently in 2007, the CTE completed its technical report of the proposed project.
- e. In December 2007, MMA issued permit No. 0649-07 for the development of the lower portion of the property.⁷

37. In sum, the establishment and initial development of Jamaca de Dios required that the Ballantines engage extensively and frequently with MMA. The Ballantines took these obligations seriously and worked diligently to complete all of the required steps. By all accounts, during both the process of applying for permissions and the initial development of Phase 1, the Ballantines and MMA had a constructive relationship, communicating often regarding the permitting for the lower portion of the property. Per its regulatory framework, MMA conducted annual inspections of Jamaca de Dios to ensure ongoing environmental compliance, reviewed the semi-annual reports submitted by Jamaca de Dios regarding its tax payments and related matters, exchanged communications regarding various topics and, in general, served as a productive partner for the Ballantines.

⁷ See Permiso Ambiental No. 0649-07 (Dec. 7, 2007) (C-4).

D. Development of Phase 1 and Preparation for Phase 2

38. In December 2007, having secured the necessary permissions, the Ballantines set out to develop Phase 1 of Jamaca de Dios along the lines of their vision for the project. They first worked to develop the infrastructure necessary to support the various uses for which Jamaca de Dios was intended. Their approach to infrastructure construction was consistent with the long-term, integrated nature of the project; it anticipated not just the immediate needs of Phase 1, but the likely needs of Phase 2 years down the road. The Ballantines hired engineering and construction services companies to build high-quality, environmentally sound roads. They created networks to supply electricity, high-speed Internet, and potable water to sites throughout the property. They hired 24-hour security and maintenance to provide for the safety and comfort of residents and guests. And they created recreational and other common areas to enhance the social life of the property, such as a spring-fed lake, sports areas, a fitness center, and a playground area.⁸

39. Having established the necessary infrastructure, the Ballantines then undertook to develop the various components of Phase 1. They first subdivided the property into 82 individual lots and began marketing them to private purchasers. Under a standard contractual relationship, these individuals would be permitted to construct the homes of their choice, subject to broad parameters agreed with Jamaca de Dios.

40. The Ballantines also worked to develop the restaurant, Aroma de la Montaña, into a fine dining establishment that would serve as an anchor for much of the social and residential life of the community. Since its establishment in May 2007, Aroma de la Montaña, which sits near the top of the lower portion of the property, has become an increasingly popular dining

⁸ See Jamaca de Dios, <http://www.jamacadedios.com/index.php/en/> (last visited Sept. 10, 2014).

destination for residents of both Jamaca de Dios and the wider community of Jarabacoa, as well as for visitors from Santo Domingo.⁹ Indeed, beginning in 2011, the Ballantines undertook a \$1.2 million expansion of Aroma de la Montaña, expanding the available seating from 90 to 225 and installing a rotating floor in the main dining room, the only one of its kind in the Caribbean.

41. After the initial work to acquire and sell land, develop infrastructure and properties, and build a reputation for the project, Jamaca de Dios became an unambiguous and accelerating economic success. Between 2007 and 2011, the Ballantines sold 75 lots, including 68 to Dominican citizens. Due to the strong growth of the project, it came to support the employment (directly or indirectly) of more than 300 people, an important social contribution in an area of the country where economic growth and employment lag behind national levels and investment is badly needed. Less tangibly, but still importantly, in the space of six years Jamaca de Dios went from being 100 acres of empty, undeveloped mountain land to a thriving tourism and residential property, and one with even greater upside potential. As the Ballantines had hoped, by the end of Phase 1 Jamaca de Dios had become arguably the most popular and successful mountain tourism and residential project in the Caribbean region.

42. A key benefit of the economic success of Jamaca de Dios in Phase 1, as mentioned above, was that it helped generate the resources needed to undertake Phase 2 of the development into the upper portion of the property. Building on the property and infrastructure investments that they had already made in Phase 1, in 2009 the Ballantines identified more concretely the specific elements of Phase 2. The Ballantines decided to seek to sell an additional 70 lots on the upper portion of the property for the construction of more private homes. They

⁹ See http://www.tripadvisor.com/Restaurant_Review-g675009-d2235452-Reviews-Aroma_de_la_Montana-Jarabacoa_La_Vega_Province_Dominican_Republic.html (last visited Sept. 10, 2014).

undertook architectural and business planning for the construction of a boutique 20-room hotel/spa and restaurant at the top of the upper portion of the property. They developed plans to construct two apartment complexes on the lower portion of the property and established a management company to oversee rental programs for these properties. (With respect to one of these apartment complexes, the Ballantines received commitments to buy six of the 12 units before even breaking ground.) And they created alliances with a hotel consultancy and tour operating companies to maximize tourism opportunities throughout Jamaca de Dios.

E. Request for Approval to Develop Phase 2

43. As noted above, the Ballantines from the beginning envisioned Jamaca de Dios as a single, integrated project. While they initially targeted their development efforts on the lower portion of the property, they always intended for their Phase 1 development to lead, as seamlessly as possible, to a Phase 2 of development further up the mountain. Indeed, it is the upper portion of the property that is the most valuable, with its even more striking views, cool temperatures, and enhanced privacy. In any event, the two portions of the property were to be mutually reinforcing and value-enhancing. For example, the sale of lots and the restaurant business on the lower portion would generate demand for the upper portion, just as a growing number of landowners and hotel guests on the upper portion would increase the value of the lower portion houses and the business of the restaurant.

44. On November 30, 2010, consistent with this vision, the Ballantines requested that MMA provide it with “terms of reference” for an expanded project.¹⁰ As part of the set of requirements for the extension of the environmental permit for Phase 2, on December 13, 2010, the Ballantines obtained another letter of no objection from the Municipal City Council of

¹⁰ See Letter from Zuleika Salazar to Ernesto Reyna (Nov. 30, 2010) (C-5).

Jarabacoa.¹¹ As the following discussion details, somewhat before but largely after the Ballantines' expansion request, both MMA and other organs of the Government had begun to treat the Ballantines and Jamaca de Dios in an increasingly troubling way.

1. The Imposition of Fines on Jamaca de Dios

45. The Ballantines' request for approval to undertake Phase 2 occurred in an environment of newly emerged tension with MMA. In particular, on May 22, 2009, MMA officials appeared unannounced at Jamaca de Dios to conduct an environmental inspection. The officials were accompanied by men brandishing automatic weapons and assuming a military bearing, and they treated the Ballantines in a hostile and aggressive manner, including by threatening criminal action against Michael Ballantine for violating environmental laws by creating access to and flattening home sites in three lots, all of which had previously been approved for development, and for removing a small number of trees without authorization.

46. On November 19, 2009, on the basis of this inspection but without convincing reasoning, MMA imposed a fine of almost one million DR pesos (more than \$US27,500 at the exchange rate at the time) on Jamaca de Dios for alleged violations of environmental laws and regulations.¹² The Ballantines immediately requested a meeting with then Minister of Environment Jaime David Miraval to explain that the activities that arguably constituted violations had been allowed by their environmental permit and to understand the basis for MMA's actions. MMA did not respond to the Ballantines' request. The Ballantines were informally given to understand, however, that it was the largest fine that MMA had ever assessed

¹¹ See Letter from Miguel Abreu and Roberto E. Cruz to Michael J. Ballantine (Dec. 13, 2010) (C-6).

¹² See Resolución SGA No. 973-2009 (Nov. 19, 2009) (C-7).

on a property owner in the region. (Indeed, local MMA officials indicated privately that the fine was excessive and arbitrary.) They continued to express concerns with paying the fine.

47. On October 7, 2010, then Minister David informed the Ballantines that MMA would reduce the fine by 50 percent. He nevertheless continued to reject all requests from the Ballantines for an in-person meeting.

48. On receiving the Ballantines' request for expansion into Phase 2 on November 30, 2010, MMA responded that it would not act on the Ballantines' request unless and until the fine was paid. The Ballantines again requested a meeting with then Minister David, which the minister agreed to on the condition that the Ballantines first paid the fine. On February 1, 2011, in an effort to improve relations with MMA and with hopes of receiving permission to begin development of Phase 2, the Ballantines paid the fine.

49. The following week, the Ballantines were granted a meeting with then Minister David and several senior MMA officials. Mr. Ballantine conveyed his views that the fine was unjustified, that it was inappropriate to deprive the Ballantines of a hearing on the matter, and that they had paid it against their will. Omar Rodriguez, president of the competitor Paso Alto development, attended the meeting and spoke in support of the Ballantines, indicating that Jamaca de Dios was an excellent project and that the fine was excessive. Then Minister David apologized to Mr. Ballantine on behalf of MMA and promised to send another inspection team to Jamaca de Dios to investigate the matter, including the Ballantines' request to extend the existing permit that they had already obtained. After sending a follow-up letter to MMA on April 21, 2011, an inspection team appeared at Jamaca de Dios on May 18, 2011, but the Ballantines never received any report of the results of that inspection.

2. Rejection of Approval Request on the Basis of Excessive Slopes

50. On September 12, 2011, MMA rejected the Ballantines' request to expand Jamaca de Dios on the grounds that the slopes of the land on the upper portion of the property exceeded the maximum grade of 60 degrees permitted under Article 122 of the Environmental Law.¹³ It added that, while the Ballantines were not permitted to undertake real estate development with respect to the Phase 2 land because of the environmental fragility of the area, they were free to grow fruit trees.

51. The Ballantines were surprised to receive this decision from MMA, for three reasons. First, 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.¹⁴ On the contrary, the slopes of the land slated for development (*e.g.*, for home sites, the hotel/spa, and a second restaurant) average 30 to 34 degrees, and the Ballantines had not intended to develop any of the land with steeper slopes, such as in canyon areas.

52. Second, MMA had never before mentioned slope restrictions, even though the land that MMA had already approved for development in Phase 1 (and that the Ballantines had developed successfully) was substantially steeper than the land in Phase 2. MMA had not once raised the issue of slopes with respect to the permitting or other consideration of development in Phase 1.

53. Third, MMA had previously approved the environmental permits of other, similarly situated investors, namely Quintas del Bosque and Paso Alto. Quintas del Bosque is owned by a Dominican entity, while Paso Alto is owned by Dominican and Spanish nationals.

¹³ See Letter from Zoila González de Gutiérrez to Michael Joseph Ballantine (Sept. 12, 2011) (C-8).

¹⁴ See Maps of Phase 2 Slopes (Aug. 6, 2014) (C-9).

In addition, MMA recently approved a third project, Dominican-owned Mountain Garden Jarabacoa. Even to a lay observer, it is clear that the slopes of these three developments are at least as steep as, if not steeper than, those of Jamaca de Dios. It does not appear, moreover, that MMA has ever raised issues relating to slope levels with the owners of these three properties.

54. The Ballantines requested that MMA reconsider its decision, indicating that the slopes of the land designated for development in Phase 2 did not exceed the threshold permitted by applicable law, and that they did not have any intention of building in any area where the grade of the slope was excessively steep.¹⁵ Indeed, as the Ballantines communicated to MMA, the sites on which the new homes and hotel/spa would have been built are essentially flat. The Ballantines also requested that MMA provide the reports, findings, and other technical data underlying its conclusion that the Phase 2 expansion would violate the slope restrictions. MMA did not provide any such reports, findings, or other technical data, and there is no evidence that it considered the information and documents provided by the Ballantines. As of the date of this Notice of Arbitration and Statement of Claim, the Ballantines have received none of the underlying documents requested to support MMA's decision rejecting their application.

55. On March 8, 2012, despite the Ballantines' continued requests that MMA provide the technical justification for its decision, MMA rejected the Ballantines' first request for reconsideration in a summary fashion.¹⁶ The Ballantines continued to seek MMA's reconsideration of the matter.¹⁷ MMA did not respond meaningfully to the Ballantines' repeated requests for in-person meetings; even where they would agree to meetings, those meetings would be exceedingly brief, and the Ballantines would not be permitted to be accompanied by their

¹⁵ See Letter from Michael Ballantine to Ernesto Reyna (Nov. 2, 2011) (C-10).

¹⁶ See Letter from Zoila González de Gutiérrez to Michael Joseph Ballantine (Mar. 8, 2012) (C-11).

¹⁷ See Letter from Michael Ballantine to Ernesto Reyna (Aug. 3, 2012) (C-12).

counsel or environmental advisors. On December 18, 2012, MMA rejected the Ballantines' second reconsideration request in a letter that repeated the letter of March 8, 2012 almost verbatim.¹⁸

56. On July 4, 2013, through Empacaredes, an environmental firm that they had retained, the Ballantines submitted an extensive report demonstrating that the slopes of the proposed Phase 2 land complied with all applicable slope restrictions and other environmental requirements.¹⁹ MMA did not respond to the submission of this report.

57. On July 23, 2013, after months of seeking but being denied discussions with MMA, the Ballantines met with officials from the U.S. Embassy in Santo Domingo. The embassy officials agreed to assist the Ballantines, contacting MMA in the following weeks to request that the ministry reconsider the Ballantines' application. Without further communication to the Ballantines, MMA sent an inspection team to Jamaca de Dios on August 28, 2013.

3. Rejection of Approval Request on the Basis of National Park Boundaries

58. Finally, on January 15, 2014, MMA provided its fourth rejection of the Ballantines' reconsideration request for permission to expand Jamaca de Dios.²⁰ In this letter, MMA continued to allege that the slopes in the proposed expansion were too steep, still without providing a technical basis or documentary support for its conclusion. MMA also indicated, for the first time, that the Ballantines' extension application was not viable because the Phase 2 land was located within the boundaries of Baiguate National Park, which had been designated as a

¹⁸ See Letter from Zoila González de Gutiérrez to Michael Joseph Ballantine (Dec. 18, 2012) (C-13).

¹⁹ See Letter from Leslie Gil to Ministerio de Medio Ambiente y Recursos Naturales (Jul. 4, 2013) (C-14).

²⁰ See Letter from Zoila González de Gutiérrez to Michael Joseph Ballantine (Jan. 15, 2014) (C-15).

protected area on which development was restricted. The letter concluded by noting that “a new site location is requested, otherwise **your file is closed**” (emphasis in original).

59. MMA’s reference to Baiguat National Park was surprising to the Ballantines, for several reasons. First, even though the decree establishing that the national park was a protected area had been issued years earlier, on August 7, 2009,²¹ the very first time that MMA had indicated in writing that the existence of Baiguat National Park could be a basis for precluding or otherwise restricting the development of Jamaca de Dios was January 15, 2014. (MMA official Zacarias Navarro had first raised the issue orally in a meeting in August 2013.) If MMA had actually believed that a portion of the development of Jamaca de Dios could be restricted on the basis that it was located within park boundaries, one would have expected that this concern would have been raised repeatedly in the previous years, and most certainly in relation to the earlier reconsideration rejections by MMA.

60. On the contrary, between August 2009 and January 2014 MMA interacted extensively with the Ballantines regarding a number of matters, reviewing 10 semi-annual reports submitted by Jamaca de Dios on its Phase 1 environmental compliance, negotiating a reduction of the fine imposed in November 2009, exchanging eight letters regarding various matters, and making five in-person visits to Jamaca de Dios for purposes of reviewing environmental compliance, among other activities. MMA even extended the duration of the existing permit for the lower portion of the property for an additional five years, despite the fact, as discussed below, that the boundaries of Baiguat National Park include a significant portion of the approved Phase 1.²² More broadly, during this 53-month period the Government engaged

²¹ See *Decreto Número 571-09* (Aug. 7, 2009) (hereinafter “Decree No. 571-09”) (C-16).

²² See *Permiso Ambiental No. 0649-07* (Jun. 20, 2013) (C-17).

repeatedly with the Ballantines with respect to Jamaca de Dios, with the Registro de Títulos issuing titles to newly acquired lots in the Phase 2 area (the deeds to which do not mention protected parkland), multiple ministries (Tourism, Culture, Hacienda and MMA) preliminarily approving Phase 1 for tax incentives under CONFOTUR 158, and the Ministry of Tourism considering the Ballantines’ request for approval of Jamaca de Dios as a “tourism complex.” (Indeed, the Ministry of Tourism recently provided this approval, which would relate to the Phase 1 land as well as much of Phase 2.) Most puzzling, on three separate occasions during this period – September 12, 2011, March 8, 2012, and December 18, 2012 – MMA rejected the Ballantines’ Phase 2 expansion for an enumerated reason – the slope restrictions – but never mentioned the national park.

61. Not once did MMA inform the Ballantines of the implications of the national park for their development activities, open discussions with the Ballantines regarding these issues, or offer to pay compensation. Indeed, the decree establishing Baiguate National Park (and other protected areas) runs 47 pages and identifies protected land only by reference to geospatial coordinates; it does not include any references to municipalities, provinces, or other common geographic categories. Without 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.

62. Second, while the boundaries of Baiguate National Park were drawn to include all of the upper portion of the Ballantines’ property (as well as a significant portion of the already approved and developed lower portion in Phase 1), they did not include the land of two then-approved and comparable mountain property developments in the region, Dominican-owned Quintas del Bosque and Dominican- and Spanish-owned Paso Alto. On the contrary, as maps

showing the park boundaries suggest, it appears that the lines of the park were drawn painstakingly to just barely exclude these competing properties.²³

63. Third, while the national park boundaries do include the property of Dominican-owned Aloma Mountain (“Aloma”) (which lies adjacent to Jamaca de Dios), there do not appear to have been any restrictions on its development. While MMA has refused to meaningfully respond to the Ballantines’ requests for information regarding the permitting and development of Aloma – as it is required to do under domestic law²⁴ – it appears that development of that project has continued robustly, with the construction of more than six kilometers of roads, houses, a clubhouse, water and electrical infrastructure, parks and recreational facilities, a lake, and other amenities.

64. Fourth, the national park property, of which Jamaca de Dios constitutes approximately one half of one percent of the total park area, appears not to include at least some of the very things that Decree No. 571-09 indicated was its purpose to protect. For example, one of the objectives of Decree No. 571-09 is to protect the Salto Baiguate (Baiguate waterfall), yet the Salto Baiguate falls some three kilometers outside the boundaries of the national park. Moreover, given that Jamaca de Dios is on a side of a mountain that faces away from Rio Baiguate (Baiguate river), 100 percent of the rainwater that falls on Jamaca de Dios is conveyed to the North Yaque River. In other words, none of the rainwater that falls on Jamaca de Dios property has any bearing on the water levels or quality of either the Río Baiguate or the Salto Baiguate. (In contrast, virtually all of the rainwater that falls on the competitor Mountain Garden Jarabacoa and Paso Alto projects, which both lie just outside the national park, runs into the Río

²³ See Map of Baiguate National Park Boundaries (Aug. 6, 2014) (C-18).

²⁴ See *Ley General de Libre Acceso a la Información Pública (Ley No. 200-04)*, art. 2 (CLA-2).

Baiguate.) Furthermore, while Decree No. 571-09 indicates that another of its objectives is to protect local walnut trees, the Ballantines have undertaken an extensive survey that concludes there are no walnut trees on Jamaca de Dios, in either Phase 1 or Phase 2.

65. Finally, in addition to including the entirety of the land slated for development in Phase 2, the boundaries of Baiguate National Park also capture some 36 of the initial 84 lots that the Ballantines had sold to private purchasers in the course of developing Phase 1. Of these 36 lots, most of which were purchased by Dominican citizens, the buyers have already constructed homes on 18 of them. The Ballantines are not aware that any of the owners of the homes built on these lots has received a similar communication from MMA regarding the restrictions created by Baiguate National Park or has been otherwise notified by MMA or any other government authority that Baiguate National Park could serve to restrict the use and enjoyment of their property. On the contrary, the Ballantines understand that MMA has continued to transfer titles to the owners of these lots and undertake other related activities consistent with those owners having clean, unrestricted title to their property and without any mention of the national park.

66. On receiving the January 15, 2014 letter from MMA, the Ballantines immediately asked MMA to identify the bases on which it had drawn the boundaries of Baiguate National Park, as there did not appear to be any coherent environmental, geological, geographic, or altitude-related reason for it to have located the park lines through the middle of their development. The Ballantines also asked MMA to explain why, after being in force for 53 months, it was the first time that the Ministry had decided to rely on Decree No. 571-09 as a basis for rejecting the Ballantines' request to expand Jamaca de Dios.²⁵ The letter from the Ballantines that posed these questions also indicated that MMA's action to reject its expansion

²⁵ See *supra* note 1.

request appeared to constitute an expropriation of their investment requiring compensation under both domestic law and the CAFTA-DR. To date, neither MMA nor any other organ of the Government has explained the bases for the location of the national park boundaries or why MMA only for the first time in January 2014 raised the national park as an impediment to the development of Phase 2.

F. Requests for “No Objection” Letter to Build Apartment Complex on Lower Portion of Property

67. Over the period of time that the Ballantines were seeking MMA approval to expand Jamaca de Dios into Phase 2, they were also seeking to construct a compact, 12-unit apartment complex (the “mountain lodge”) on the already permitted and developed Phase 1 lower portion of Jamaca de Dios. The architectural plans for the mountain lodge, however, required an amendment to the existing environmental permit covering Phase 1, and therefore the Ballantines had again begun taking the six steps identified above in paragraph 35 to obtain environmental approval. As an initial matter, this included obtaining a “no objection” letter from the relevant municipal authority.

68. On October 1, 2013, the Ballantines requested a “no objection” letter for the proposed mountain lodge from the Municipality of Jarabacoa.²⁶ Despite the passage of almost a year, and repeated attempts by the Ballantines to elicit a response from local authorities,²⁷ the Municipality of Jarabacoa has still failed to act on their request or to explain the reason(s) for the delay or possible rejection. As noted above, the Ballantines had received commitments to buy six of the 12 planned units in the mountain lodge before even breaking ground on construction;

²⁶ See Letter from Rafelina Díaz to Department of Urban Planning of the City Council of Jarabacoa (Oct. 1, 2013) (C-19); see also Letter from Rafelina Díaz to Lucía Sánchez (Oct. 1, 2013) (C-20).

²⁷ See Letter from Oriana Cruz to Lucía Sánchez (Jan. 22, 2014) (C-21).

as a result of the Municipality of Jarabacoa’s failure to issue a “no objection” letter, they have been forced to return the would-be buyers’ deposits.

69. To be sure, the Municipality of Jarabacoa has not ignored the Ballantines. It has instead undertaken a number of harmful actions in relation to Jamaca de Dios. Specifically, on April 22, 2013 (and despite having been advised by its own legal counsel five days previously that such action would be unlawful, as the federal *Tribunal de Tierras de La Vega* (“Land Tribunal”) has authority over real property disputes),²⁸ the municipal government passed a resolution to tear down two of the gates protecting Jamaca de Dios and granting public access to the project’s private road.²⁹ On June 17, 2013, in actions that were partially recorded on video,³⁰ a group made up largely of citizens (rather than municipal officials) proceeded to forcibly remove the two gates. On July 31, 2013, the Ballantines succeeded in obtaining a preliminary injunction from the Land Tribunal to prohibit the Municipality of Jarabacoa from entering the Ballantines’ property and ordering it to rebuild the gates.³¹ Notwithstanding the result, the Ballantines experienced substantial emotional distress (including by receiving death threats during the ordeal), and Jamaca de Dios suffered significant economic damages, as a result of the Municipality of Jarabacoa’s actions.

G. Possibility of Politically Motivated Action

70. While Chapter 10 of the CAFTA-DR “applies to *measures* adopted or maintained by a Party relating to” investors of another Party or their investments, not to the motive or intent

²⁸ See Resolución de Interes Judicial (Sept. 13, 2011) (C-22).

²⁹ See Resolución No. 005-2013 (Apr. 22, 2013) (C-23). Indeed, a local court had ruled almost two years previously, on September 13, 2011, that the gates were the legitimate property of Jamaca de Dios.

³⁰ See <https://www.youtube.com/watch?v=TN6zhFgq9aM> (last visited Sept. 9, 2014).

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

behind those measures, an understanding of a government's possible motives or intent can help contextualize facts and allow a tribunal to discern the true nature of the measures it is examining. In this case, there is evidence that the Government's mistreatment of the Ballantines is the product of politically motivated action.

71. As set out in the Dominican Republic's popular investigative news program, "Nuria,"³² one key figure who is alleged to be connected to the mistreatment of the Ballantines and Jamaca de Dios is former government official Juan José Domínguez. As Nuria Picra, the creator and narrator of the program, describes:

Rumors in town have begun to spread, the version is that behind that opposition there may be interests from powerful people, one of the most heard ones is Juan José Domínguez Quesada's, who is the ex-brother-in-law of ex-president Leonel Fernández and the son of the mayor of Jarabacoa Piedad Quesada, and it is said public health clerk who managed the National Department of Mouth Health, which we reported was totally abandoned while its manager increased his fortune. Two weeks after the report he was dismissed from his charge. But what would be the intention for Domínguez finding obstacles for the project in Jamaca de Dios? There are recent situations that could jeopardize him.³³

It is reported that Mr. Domínguez is the ex-brother-in-law of former Dominican Republic President Leonel Fernández. He is also apparently the son of the current mayor of Jarabacoa, Piedad Quezada Domínguez, and was from 2004 to 2012 a senior official in the Ministry of Public Health under the leadership of Minister Bautista Rojas Gómez (whose term as Public Health Minister ran from 2008 to 2012). It is notable that Minister Rojas Gómez has been the Minister of Environment, the most senior official in MMA, since August 2012.

72. Mr. Domínguez is the owner of the Aloma Mountain project, mentioned above in paragraph 63. To the best of the Ballantines' knowledge, Aloma, which is currently undergoing rapid and extensive development, has never received an environmental permission from MMA

³² See "Nuria," <http://www.youtube.com/watch?v=wYLsUM8Zax4> (Jun. 29, 2013) (last visited Sept. 9, 2014); see also Transcript of "Nuria" (Jun. 29, 2013) (C-25).

³³ See *id.*

and, like much of Jamaca de Dios, sits largely within Baiguate National Park. The Ballantines understand that Mr. Dominguez had plans for Aloma that resembled theirs for Jamaca de Dios, *i.e.*, he wished to develop a multi-purpose tourism and residential community where people could purchase lands to build homes, stay in a luxury hotel, and enjoy fine dining.

VI. LEGAL ARGUMENTS SUPPORTING THE CLAIM

73. The actions and inaction of MMA, the Municipality of Jarabacoa, and potentially other central and sub-central government bodies of the Dominican Republic have greatly diminished the value of the Ballantines' investment in Jamaca de Dios, called into question the validity of their property interests in the project, and created complete uncertainty about the project's future. The Ballantines believe that the Dominican Republic's conduct is inconsistent with its obligations under the CAFTA-DR and, more generally, with the broad commitments it made in that agreement to the rule of law and high standards of openness, transparency, and non-discrimination.

74. As discussed in detail below, the Dominican Republic's actions and inaction breached several obligations of the CAFTA-DR, including the obligations: (1) not to discriminate against investors of the other Party or their investments on the basis of nationality (National Treatment (Article 10.3) and Most-Favored-Nation Treatment (Article 10.4)); (2) to provide the investments of investors of the other Party with "fair and equitable treatment" (Minimum Standard of Treatment (Article 10.5)); (3) to provide the investments of investors of the other Party with "full protection and security" (Minimum Standard of Treatment (Article 10.5)); and (4) to provide "prompt, adequate, and effective compensation" in the event of an expropriation (Expropriation and Compensation (Article 10.7)).

75. Importantly, a key government ministry, the Centro de Exportación e Inversión (“CEI-DR”), shares these concerns, as its director urged MMA in a July 1, 2013 letter³⁴ to reconsider the Ballantines’ expansion request, not just for its own sake but because of the possible consequences of a rejection on perceptions of the country’s investment climate. Even President Danilo Medina has focused in recent days on concerns regarding the attractiveness of the Dominican Republic to foreign direct investment and its broader commitment to the rule of law and fundamental fairness. In a September 2, 2014 letter to the President of the Senate in respect of the Congress’ deliberations over whether to create a national park on the land of the foreign-owned Falcondo mining project,³⁵ President Medina made several important points in relation to the international legal obligations at issue here, namely the protections against nationality-based discrimination, arbitrary and capricious treatment, and uncompensated expropriations. This points are elaborated below, as applicable.

A. National Treatment and Most-Favored-Nation Treatment

76. The CAFTA-DR contains strong protections against nationality-based discrimination against investors or their investments. In particular, Articles 10.3 and 10.4 of the CAFTA-DR provide as follows:

Article 10.3: National Treatment

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

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to

³⁴ See Letter from Jean Alain Rodríguez to Bautista Rojas Gómez (Jul. 1, 2013) (C-26).

³⁵ See Letter from Danilo Medina to Cristina Lizardo Mezquita (Sept. 2, 2014) (C-27).

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.

Article 10.4: Most-Favored Nation Treatment

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

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

The principle of non-discrimination is reflected in the domestic law of the Dominican Republic, in particular Article 25 of the Constitution (2010), which provides, *inter alia*, that foreigners “have in the Dominican Republic the same rights and duties as nationals, with the exceptions and limitations established by this Constitution and the laws.”³⁶

77. The national treatment and most-favored-nation treatment (MFN) obligations of the CAFTA-DR require that governments not treat an investor of the other Party or its investments any worse than it treats its own investors or those of a third country, respectively, simply because of nationality. Both obligations relate to the entire “life cycle” of an investment, from entering a market and establishing an investment, to its management and operation, and on to any acquisition, expansion, or other disposition of an investment that an investor might choose to undertake. Both obligations, moreover, focus on how governments treat investors that are “in like circumstances,” meaning that they are substantially comparable in their make-up, business

³⁶ See *Constitución Política de la República Dominicana* (Jan. 26, 2010), art. 25. (Unofficial translation) (CLA-3).

functions, and the markets in which they compete. The Government has breached its obligations to accord the Ballantines and the Enterprises national treatment and MFN treatment in several respects.

78. For example, MMA's repeated rejections of the Ballantines' Phase 2 permit requests on the basis of excessive slopes appear to be the result of nationality-based discrimination. Dominican-owned Mountain Garden Jarabacoa and Quintas del Bosque and Dominican- and Spanish-owned Paso Alto are "in like circumstances" with Jamaca de Dios; they operate in the same geographic region, provide comparable residential and recreational offerings, and compete for the business of similar consumers. Indeed, the slopes of these companies' properties, which by all accounts obtained their development permits without the issue of slopes being raised (let alone examined), are at least as steep – if not steeper – than those of Jamaca de Dios. There is no identifiable reason, other than nationality, for MMA to have rejected the Ballantines' Phase 2 permit request on the basis of excessive slopes, and not also to have rejected the requests of Mountain Garden Jarabacoa, Quintas del Bosque, and Paso Alto for the same reason.

79. In addition, the manner in which MMA demarcated the boundaries of Baiguate National Park is difficult to understand in the absence of an intent to treat U.S.-owned Jamaca de Dios less favorably than properties owned by Dominican or third country nationals. The terrain and topography of Jamaca de Dios is in all relevant respects – geographic, geological, ecological, and otherwise – comparable to that of Mountain Garden Jarabacoa, Quintas del Bosque, and Paso Alto. Yet MMA drew the lines of the park to include a substantial portion of Jamaca de Dios and to exclude, by a relative hair's breadth, the other three properties. MMA has not identified a single characteristic of Jamaca de Dios that validly distinguishes it from Mountain

Garden Jarabacoa, Quintas del Bosque, or Paso Alto in a manner that supports this decision. (It did, of course, recognize that a key objective underlying the establishment of the national park was to protect the Salto Baiguate, despite not including the waterfall within park boundaries.)

80. Furthermore, MMA's inaction with respect to the largely Dominican owners of the 36 Phase 1 lots contained within Baiguate National Park is further evidence of a failure to provide national treatment. In particular, there is no evidence that any of the private owners of those lots, both those who have already built houses and those who have not yet done so, have been informed by MMA or otherwise that development of those parcels is impermissible or subject to restrictions as a result of the National Park Decree.

B. Minimum Standard of Treatment

81. The CAFTA-DR also provides protections against government treatment that is arbitrary, capricious, inconsistent with basic notions of due process, or harmful to investments' physical or legal security. Article 10.5 provides as follows:

Article 10.5: Minimum Standard of Treatment¹

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; and
- (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

¹ Article 10.5 shall be interpreted in accordance with Annex 10-B.

82. President Medina's letter to the President of the Senate concerning the Falcondo matter references elements of the minimum standard of treatment obligation, including the importance of the rule of law, predictability, and "legal security." For example, drawing on Article 110 of the Constitution (2010), President Medina notes that:

Legal security is an essential element of the Rule of Law, its purpose is that individuals can know the extent and effects of their rights and obligations in order to be able to predict the impact of the legal system in their work reasonably. As the Constitutional Court [] said: "legal security, it is designed as a consubstantial legal principle to every Rule of Law, which stands as security for the objective application of the law, to ensure predictability in the acts of public authorities, defining its powers and duties. This is the certainty that individuals have, individuals who make a society about what their rights and obligations are, without having the authorities, their caprice or arbitrariness clumsiness harm them."³⁷

83. The minimum standard of treatment obligation under the CAFTA-DR contains two core protections, each of which ensures a baseline of appropriate treatment for the investments of investors. The "fair and equitable treatment" obligation protects investments from denials of justice, arbitrary or capricious government treatment, and other deprivations of fairness and due process that governments may commit. The "full protection and security" obligation requires governments to afford investments a reasonable level of physical security, including "the level of police protection required under customary international law," as well as the legal security associated with having clear, unobstructed, and unimpeded certainty regarding the integrity of one's property rights and property interests. Through various instances of government action and inaction, the Dominican Republic has failed to afford the Ballantines either "fair and equitable treatment" or "full protection and security."

³⁷ See *supra* note 35.

84. First, MMA has failed to provide the Ballantines with “fair and equitable treatment” through its repeated and unsupported rejections of their Phase 2 permit requests on the basis of slope restrictions. As discussed above, MMA provided no scientific or other technical support for its slope findings, and it failed to respond adequately or on a timely basis to the Ballantines’ requests for a justification of the determination and an opportunity to present contrary evidence. Indeed, the Ballantines have reliable, contrary technical evidence demonstrating that the land slated for development is fully in compliance with all applicable slope restrictions. MMA’s refusal to meaningfully consider this evidence, and on that basis to reconsider its own conclusion, is a denial of justice.

85. Second, MMA has also deprived the Ballantines of “fair and equitable treatment” in the manner in which it relied on the existence of Baiguarte National Park as a basis for restricting the development of Phase 2. The minimum expectation of an administrative agency on the enactment of a decree establishing protected parkland would be to effectively inform affected property owners of the restrictions created thereby. For MMA to have enacted the decree in a manner that prevented the Ballantines from reasonably understanding its impacts on their property interests in Jamaca de Dios, to have then interacted with the Ballantines over a period of more than four years in a manner that was entirely consistent with the validity of those property interests, and to have finally raised the matter in a summary fashion that essentially destroyed the Ballantines’ valuable rights, is almost a textbook example of a “fair and equitable treatment” violation.

86. Third, the Municipality of Jarabacoa’s April 22, 2013 decision to order the destruction of the Jamaca de Dios gates, and the resulting June 17, 2013 incident – akin to mob action – to actually dismantle the gates (and to foster an environment that could result in death

threats) constituted a breach of the “full protection and security” obligation. The duty of a State to provide police protection is, at bottom, the responsibility to preserve and protect the personal safety of citizens and the physical integrity of their property. The Municipality of Jarabacoa did not simply fail “to provide the level of police protection required under customary international law;” it actually took concrete, deliberate steps to deprive the Ballantines of that minimum level of protection. That the city’s conduct was ultimately enjoined by a court does not in any way diminish the outrageousness of, and harm caused by, its breach of this obligation.

C. Expropriation

87. Like virtually all international investment agreements, the CAFTA-DR provides investments with guarantees against expropriations or nationalizations that are uncompensated or otherwise inconsistent with customary international law. Article 10.7 provides as follows:

Article 10.7: Expropriation and Compensation³

1. 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.

2. Compensation shall:

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

3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation paid – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

- (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus
- (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with Chapter Fifteen (Intellectual Property Rights).⁴

³ Article 10.7 shall be interpreted in accordance with Annexes 10-B and 10-C.

⁴ For greater certainty, the reference to “the TRIPS Agreement” in paragraph 5 includes any waiver in force between the Parties of any provision of that Agreement granted by WTO Members in accordance with the WTO Agreement.

88. The expropriation obligation in the CAFTA-DR, as in other international investment agreements, does not prohibit governments from expropriating private property for public use. It requires, rather, that when governments exercise their sovereign right to expropriate, they do so on the basis of several conditions widely recognized and enforced in both international law and the domestic laws of virtually all national legal systems, including that of the Dominican Republic. In particular, as Article 10.7.1 makes plain, when governments expropriate private property they must do so for a “public purpose;” in a “non-discriminatory manner;” on payment of “prompt, adequate, and effective compensation;” and consistent with due process (as well as the minimum standard of treatment obligation). The Government’s conduct with respect to Jamaca de Dios, particularly as it relates to Baiguate National Park,

constituted an indirect expropriation for which it was obliged, under both the CAFTA-DR and its own law, to provide compensation.

89. Similar to the CAFTA-DR, Dominican Republic law provides a well-developed framework under which the government may expropriate private property for public use, including provisions for determining the fair market value of that expropriated property and ensuring that property owners receive appropriate compensation. (This is notwithstanding the fact that, as the U.S. Department of State reports, “[t]he procedures for resolution of expropriation cases are opaque and byzantine to the outsider, and Dominican government agencies frequently disagree on where the responsibility lies for the next action.”³⁸) For example, Article 36 of the Environmental Law provides that the government may declare that land falling into a protected area is to be used for the public interest and acquire it, with the price to be paid determined either by agreement of the parties or by applicable law:

Protected areas are State property, and must be managed according to their categories, zoning and regulation, based on management plans approved by the Secretary of State of Environment and Natural Resources, with the participation of the community and its organizations in the management and handling of them.

Paragraph I -. The Dominican State may enter into agreements for co-management and /or management of protected areas with interested entities, provided that the prime interest, among any other, is conservation.

Paragraph II -. When the national interest or the management category so requires it, it is declared under the national system of protected areas an area belonging to a private person or entity, the Dominican State may declare of public utility and acquire it through purchase or exchange, being the price and conditions established by the laws governing this field or by mutual agreement.³⁹

In addition, Article 31 of the *Ley Sectorial de Areas Protegidas (Ley No. 202-04)* (“Law on Protected Areas”) permits MMA to acquire land for a public purpose, but it also provides that the

³⁸ U.S. Department of State, 2014 Investment Climate Statement – Dominican Republic (<http://www.state.gov/documents/organization/227161.pdf>, at 3 (June 2014).

³⁹ See *supra* note 6. (Unofficial translation).

government shall negotiate a sales price with the landowner, or that the government shall carry out a legal process for expropriation:

The Secretary of State of Environment and Natural Resources is authorized to make, on behalf of the State and prior approval of the Executive Branch direct purchase or exchange of land to individuals to fulfill the purposes of this law. In the case of exchange for other land or property of the State, Legislature's approval is required.⁴⁰

Perhaps most significant, Article 51.1 of the Constitution of the Dominican Republic (2010) provides that no person shall be deprived of his property, except for a public purpose, and on the payment of fair value compensation as determined by the parties or a court.

1. No person can be deprived of their property, but for justified cause of public utility or of social interest, with prior the payment of its just value, determined by agreement between the parties or issued by a competent tribunal, in accordance with what is established in the law. In case of the declaration of a State of Emergency or of Defense, the indemnification might not be prior;

[. . .]

4. There will be no politically motivated confiscation of the assets of physical or juridical persons.⁴¹

90. In his letter to the President of the Senate, President Medina built on these ideas, indicating that:

when establishing a National Park in a private property that entails in terms of the Constitution (Article 16) and the Sectorial Law on Protected Areas, the removal of the essential attributes of property rights, the prohibition imposed overflows on the legislator by the Constitution. The only way according to the Constitution that one can deprive an individual of his property rights, is by compelling reasons of public utility or social interest, and "payment of their fair value" (Article 51.1), it is through the eminent expropriation, proceedings the Legislative Branch is alien to, as whom interact in the same, in the Dominican legal system in force, are the Executive and Judicial Branches.⁴²

⁴⁰ See *Ley Sectorial de Areas Protegidas (Ley No. 202-04)*. (Unofficial translation) (CLA-4).

⁴¹ See *Constitución Política de la República Dominicana* (Jan. 26, 2010), art. 51. (Unofficial translation) (CLA-3).

⁴² See *supra* note 35.

In addition, referencing in the Falcondo context the expropriation obligation in the bilateral investment treaty between the Dominican Republic and Switzerland, President Medina adds that:

[a]s noted in this binding text for the Dominican State under the provisions of Article 26.2 of the Constitution of the State, and precedent of the Constitutional Court [], the only way for an investment of this nature to be affected is constituted exclusively the mandatory expropriation, upon declaration of public interest and the payment of an effective and appropriate compensation.

91. The Government's words and actions, above all MMA's letter of January 15, 2014, strongly suggest that it is exercising its sovereign right to expropriate property – including property owned by the Ballantines – in order to preserve national parkland. It is irrelevant that the Government has not physically seized or sought to transfer title to the Ballantines' property to itself. By depriving the Ballantines of the ability to develop the Phase 2 land as they had always intended and openly represented to the Government, the Government has indirectly expropriated the Ballantines' investments through, as laid out in Annex 10-C of the CAFTA-DR, “an action or series of actions by a Party [that] has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.”

92. Paragraph 4 of Annex 10-C is instructive regarding the analysis of an indirect expropriation. It provides, in relevant part, as follows:

- (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
 - (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
 - (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
 - (iii) the character of the government action.
- (b) Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such

as public health, safety, and the environment, do not constitute indirect expropriations.

93. The Government's conduct with respect to Baiguate National Park satisfies the Annex 10-C test with respect to indirect expropriation. First, the economic impact of the government action on the Ballantines has been substantial. As a result of the Government's prohibition on their efforts to develop the Phase 2 land, the value of that property has fallen precipitously. Second, the Government's action has significantly interfered with the Ballantines' reasonable investment-backed expectations regarding their property. The Dominican Republic had never before suggested that the existence of the national park could be an impediment to the development of their property up the mountain. Indeed, that the Government raised only the issue of slope restrictions between September 2011 and January 2014 – a position that the Ballantines can show by technical data was baseless – further supports the idea that the Ballantines had reasonable expectations, backed by their continued commitment of capital, that they would be able to develop their property interests in Phase 2 as envisioned. Finally, the character of the Government's action – to draw the boundaries of the park to contain all of Phase 2 of Jamaca de Dios but to just exclude Quintas del Bosque and Paso Alto, to wait 53 months to even raise the issue with the Ballantines, and to decline to enforce the decree with respect to another Dominican-owned property – was arbitrary, discriminatory, and disproportionately directed at the Ballantines. In this way, the observation in paragraph 4(b) of Annex 10-C does not apply to this situation.

VII. RELIEF OR REMEDY SOUGHT

94. Without prejudice to its rights to amend, supplement, or restate the relief to be requested in the arbitration, Claimants request the Tribunal to:

- (1) declare that Respondent has breached its obligations under the CAFTA-DR and international law;
- (2) award Claimants monetary damages of not less than **US\$20 million (twenty million U.S. dollars)** in compensation for losses sustained as a result of Respondent's breaches of its obligations under the CAFTA-DR and international law, including, *inter alia*, reasonable lost profits, direct and indirect losses (including, without limitation, loss of reputation and goodwill), losses of all tangible and intangible property, and moral damages;
- (3) award all costs (including, without limitation, attorneys' fees and all other professional fees) associated with any and all proceedings undertaken in connection with this arbitration, including all such costs undertaken to investigate this matter and prepare this Notice of Arbitration and Statement of Claim, and all such costs expended by Claimants in attempting to resolve this matter amicably with Respondent before serving this Notice of Arbitration and Statement of Claim;
- (4) award pre- and post-judgment interest at a rate to be fixed by the Tribunal;
and
- (5) grant such other relief as counsel may advise or the Tribunal may deem appropriate.

VIII. APPOINTMENT OF ARBITRATOR


95. In accordance with 10.19.1 of the CAFTA-DR, Claimants recognize that “[u]nless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.”⁴³ Furthermore, under Article 10.19.2 and 10.19.3, the Secretary-General of ICSID shall serve as appointing authority and, if a tribunal has not been constituted within 75 days from the date a claim is submitted to arbitration, shall, at the requesting of a disputing party, appoint the arbitrator(s) not yet appointed.

96. Pursuant to Article 10.16.6(a) of the CAFTA-DR, Claimants hereby appoint Mr. Henry G. Burnett, a national of the United States, to serve as arbitrator in this arbitration. Mr. Burnett has confirmed to counsel that he is and shall remain impartial and independent of the parties during the pendency of this arbitration.

⁴³ Article 9.1 of the UNCITRAL Arbitration Rules provides that “[i]f three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.” In light, however, of Article 10.16.5 of the CAFTA-DR, which provides that “[t]he arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement,” the CAFTA-DR provisions regarding selection of arbitrators shall control in this case.

DATE OF ISSUE: **September 11, 2014**

CROWELL & MORING LLP



Ian A. Laird
Jonathan S. Kallmer
Ashley R. Riveira
Kassi D. Tallent

1001 Pennsylvania Ave. NW
Washington D.C. 20004
United States of America
Telephone: (1) 202 624 2500
Telefax: (1) 202 628 5116
Email:
ILaird@crowell.com;
JKallmer@crowell.com;
ARiveira@crowell.com;
KTallent@crowell.com

SERVED ON:

The Dominican Republic

Dirección de Comercio Exterior y Administración de Tratados Comerciales Internacionales
Secretaría de Estado de Industria y Comercio
Santo Domingo, República Dominicana