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' RESPONSE TO RESPONDENT'S ARTICLE 10.18.1 ADMISSIBILITY OBJECTION

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I. INTRODUCTION

1. The Respondent's arguments about admissibility are wrong. In reality, the facts regarding the Baiguate National Park ("National Park" or "Park") demonstrate both the strength of the Ballantines'[1] claims and that they had no knowledge of a breach of CAFTA in September 2010, much less knowledge of ***loss*** relating from that breach with respect to the National Park.

2. As the Ballantines have previously explained, the creation of the National Park itself did not give rise to a claim for the Ballantines. It was the denial of their permit based on the existence of the Park that gave rise to the Ballantines' claims.[2]

3. Respondent's Objection to Admissibility ("Admissibility Objection" or "Objection") is based primarily on a September 2010 email between Michael Ballantine and his environmental advisor, Empaca Redes. But Respondent omits the key element of this email exchange. In the same email where Empaca Redes mentions that lots 67 and 90 were in the protected area, Empaca Redes states that ecotourism is allowed in the protected area.[3] In a follow up email the next week, which email Respondent also has but

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[1] One significant issues needs to be addressed with Respondent's belated objection. Respondent consistently asserts that "the Ballantines" learned of the National Park in September 2010. Yet, the September 2010 emails referred to only involve Michael Ballantine. Although Respondent forgets, Lisa Ballantine is likewise a claimant in this Arbitration. While Michael was managing the project, Lisa Ballantine was running her NGO, which was delivering clean water to people all over Hispaniola, among other charitable ventures. Although this objection should end here, if needed for additional briefing, Lisa Ballantine can testify about when she learned of the existence of the Park, which was much later. Thus, even if Respondent's arguments about Michael Ballantine were correct, which they are not, Lisa Ballantine is her own person and has her own claim.

[2] As explained below, even the claim relating to the discriminatory manner in which the Park was created did not arise until Respondent used the existence of the National Park to deny the Ballantines' permit. Had Respondent not used the National Park as a basis to deny the permit, the fact that it excluded Dominican properties would be of no moment.

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

omitted, Empaca Redes again confirms both that ecotourism is allowed in the Park and, importantly, that the the Ballantines' phase 2 project is ecotourism.[4] Thus, and omitted by Respondent, Mr. Ballantine was told by his environmental advisors in September 2010 that his planned development was an allowed use in a protected area such as this National Park.[5] Far from putting Mr. Ballantine on notice that he had suffered a loss and that Respondent had breached CAFTA, the September 2010 Empaca Redes email exchange confirms that Mr. Ballantine had every reason to believe that his project would eventually be permitted.

4. In addition to the fact that the Empaca Redes email exchange showed that Michael Ballantine did not have a claim at that time, other contemporaneous evidence confirmed this. At this same time in 2010, and for years after, the Ballantines watched as other projects in category 2 national parks, including the Baiguate National Park, continued to develop with no restrictions. As shown below, being in a national park, even a category 2 national park, is not an impediment to development. The development right next to the Ballantines, Aloma Mountain, has continued development inside the Baiguate National Park without even having a permit.[6] (Aloma Mountain is owned by the son of the former mayor of Jarabacoa and the brother-in-law of the then President of the DR.)[7] In addition to Aloma Mountain, a project not far from the Ballantines' project, Rancho Guaraguao, has built expansive structures and a significant development in a category 2 national park (this is the same category of national park that contains the

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

[5] *See id*.

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

[7] *See, e.g*., Ballantines' Reply Memorial ("Reply"), at 152.

Ballantines' phase 2 land).[8] Rancho Guaraguao is owned by the former head of the Dominican military and the current DR ambassador to Taiwan.)[9] These are just some examples of other projects, which are set our below, that are allowed to build in national parks.

5. In addition to the active developments inside national parks, the Ballantines could also see that other activities continued in the Park that otherwise would not be allowed. These included environmental harmful activities, such as farming and livestock, which have continued to grow and expand to this day.[10] How would the Ballantines have been on notice that they had suffered a loss and that Respondent had breached CAFTA when all evidence showed that developing in a national park was fully allowed.

6. There are several other undisputed facts that show that the Ballantines were **not** on notice that they had suffered a loss and that Respondent had breached CAFTA-DR. For example:

- On December 21, 2010, 16 months after the Park was created and shortly after learning of the Park, the Ballantines received provisional approval from Respondent's CONFOTUR for the Phase 2 development. This CONFOTUR approval included the signature of two high ranking MMA employees, as well as the Minister of Tourism. Both of these institutions of Respondent are responsible for approvals of developments in protected areas.[11]

[8] See section regarding Rancho Guaranguoa project, *infra*.

[9] "The crisis by evictions in Valle Nuevo does not affect the owners of Guaraguao," Hoy Digital, C-154; see also "President Tsai receives credentials from new Dominican Republic Ambassador to the ROC Jose Miguel Soto Jimenez," Office of the Republic of China (Taiwan), July 3, 2017, C-155.

[10] *See*, *e.g.*, "The crisis by evictions in Valle Nuevo does not affect the owners of Guaraguao," Hoy Digital, C-154; see generally Report of Jens Richter and Fernando Potes.

[11] *See* Respondent's CONFUTOR approval, C-52.

- As stated in his Witness Statement, and undisputed by Respondent, no MMA or other government official of Respondent mentioned anything to Michael Ballantine about development restrictions resulting from the creation of the National Park until September 2013.[12]

- On February 14, 2011, 18 months after the park was created, Mr. Ballantine and others met with the then MMA Minister Jaime David Mirabal, along with other high-ranking MMA officials, about the Phase 2 project. None of these officials mentioned the Park or any restrictions regarding the Park.[13]

- On February 17, 2011, Respondent's officials conducted an inspection of the Ballantines' Phase 2 property. None of these officials mentioned the Park or any restrictions regarding the Park.[14]

- On March 18, 2011, Respondent's officials conducted a second inspection of the Phase 2 Property. Again, none of these officials mentioned the Park or any restrictions regarding the Park.[15]

- On September 12, 2011, when Respondent denied the Ballantines' Phase 2 permit **the first time**, the Respondent did not mention the Park at all, much less as a basis to deny the permit.[16]

- On March 18, 2011, when Respondent denied the Ballantines' Phase 2 permit **the second time**, the Respondent did not mention the Park at all, much less as a basis to deny the permit.[17]

- On December 18, 2012, when Respondent denied the Ballantines' Phase 2 permit **the third time**, the Respondent did not mention the Park at all, much less as a basis to deny the permit.[18]

- Until the Ballantines received their fourth rejection, which did mention the Park, the Ballantines saw continued development in the Park such as new construction and roads, and other uses, such as agriculture and livestock.[19]

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[12] M. Ballantine Witness Statement, at ¶¶ 66–67.

[13] M. Ballantine Witness Statement, at ¶ 19.

[14] R-108 (Notes of February 17, 2011 inspection).

[15] R-004 (Notes of March 18, 2011 inspection).

[16] C-8 (denial letter of September 12, 2011).

[17] C-11 (Second denial letter of March 8, 2012).

[18] C-13 (Third rejection letter of December 18, 2012).

[19] See, e.g., Kay Reply Report; see also report of Fernando Potes.

- The Ballantines' Phase 1 development includes structures in the Park, as well as in the buffer zone. Respondent never notified the Ballantines of any restrictions on those properties. Nor did Respondent notify any of the other property owners in Phase 1 of any restrictions on development.

7. Among these facts above, the fact that Respondent denied the Ballantines a permit three separate times without ever mentioning the Park as a basis to deny the permit. This is significant because in the portions of the September 2010 email exchange omitted by Respondent, Empaca Redes specifically states that Mr. Ballantine should request the terms of reference (i.e., apply for the permit) to see if Respondent planned to assert any restrictions because of the Park.[20] This is precisely what Michael Ballantine did – and Respondent did not state anything about restrictions.

8. None of the above undisputed facts have anything to do with the subjective view of the Ballantines about whether they knew they had a claim in September 2010. The above are all objective facts. The Ballantines will, if needed, testify in a witness statement that they did not believe they had suffered a loss from the National Park until receiving the fourth denial of their permit where the MMA used this as a justification.

9. But the Tribunal does not need testimony from the Ballantines to determine their subjective view from September 2010 about whether they had a claim and had suffered loss. The best evidence of the Ballantines' view as to whether they had a claim and had suffered loss is that the Ballantines **continued to purchase land in Phase 2 after learning of the National Park**.[21] If the Ballantines believed they had a

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

[21] See, Statement of Defense, at ¶ 105. In its Statement of Defense, Respondent makes much of the fact that the Ballantines to continue to purchase land after the creation of the Park.

claim based on the creation of the Park, and that they had a loss resulting from this breach, they would not have continued to buy property that they knew had no commercial value. It should further be noted that when the Ballantines were rejected because of the slopes (but not the National Park), the Ballantines in fact decided not to purchase additional property that they had planned to purchase.[22]

10. Lastly, we address Respondent's assertion that Mr. Ballantine was not correct when he said that the September 2013 meeting with the MMA "was the first time that MMA had ever mentioned the existence of a Park . . . ."[23] This statement is in fact correct. The September 2010 email Respondent refers to is from Mr. Ballantine's environmental consultant, not a government official. It was only in September 2013, as Mr. Ballantines states, that one of Respondent's officials brought up the fact that the Park might be a factor with regard to the development – although without saying that the permit would be rejected on that basis. In its Objection, Respondent asserts that Mr. Ballantine stated that he "first leaned of the Park" in 2013.[24] But, as the Tribunal can see from the above, this is not what Mr. Ballantine said.

11. It is significant, however, that **Respondent** invoked the Park as a basis to deny the permit for the first time in January 2014, when it issued the fourth denial. It was

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Respondent asserts that the creation of the Park was widely reported and that the Ballantines nevertheless continued to purchase property. Yes, the Ballantines did continue to purchase property because they had no reason to believe that being in the National Park would prohibit development, **especially a blanket denial of any development**.

[22] See C-31, Ballantine Table of Land Purchases.

[23] *See* M. Ballantine Witness Statement, at ¶¶ 66-67. Citing these paragraphs in the M. Ballantine witness statement, Respondent in its Admissibility Objection asserts that Mr. Ballantine "indicate[s] that he first learned of the creation of the Park on 13 September 2013." Objection, at ¶ 19. Yet, Mr. Ballantine's statement is that this was the "first time that MMA had ever mentioned the existence of a Park."

[24] Objection, at ¶ 19.

this denial when Michael Ballantine (and Lisa Ballantine) became aware that they had suffered loss because of the Park. But this, being in January 2014, was already more than three years after the time in which Respondent asserts that the Ballantines should have been aware that they had suffered a loss. Thus, by Respondent waiting so long to assert that the National Park prohibited development of the Ballantines' property, Respondent by its own admission "ran out the clock".

12. To recap, 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.

13. As another reality check, imagine what Respondent would have argued had the Ballantines brought a claim relating to the Park before they had any loss – meaning before the Respondent had used the Park as a basis to deny the Ballantines a permit. Respondent's counsel, in somber tones and a pensive demeanor, would be

arguing to the Tribunal that the case was frivolous and the Ballantines should pay the cost of the arbitration. Respondent would ask: "How can the Ballantines bring such a claim against the DR when they cannot identify a single dollar of loss they have suffered as a result of the creation of the National Park"? "How can the Ballantines be claiming for loss when their project is ecotourism and the Park allows for ecotourism?" "The Ballantines cannot show that the DR ever denied them permission to develop because of the Park." And, in this hypothetical scenario, Respondent's counsel **would have been** correct.[25]

14. As a legal matter, as explained below, one has to suffer loss before they have a claim with regard to the time bar. Article 10.18.1 of CAFTA makes clear that loss is required, in addition to a breach of course. Yet Respondent **makes no effort** to identify any loss the Ballantines would have suffered with regard to the National Park *ipso jure* in September 2010. Because Respondent fails to identify any loss the Ballantines had suffered as a result of the National Park prior to 2014, its Admissibility Objection collapses in on its own weak foundation.

15. In addition to the fact that the Respondent's objection is without any merit factually and legally, it also comes too late and is itself time-barred. Knowing this, Respondent attempts to stretch the admissibility doctrine well beyond its breaking point. Admissibility is not a doctrine that can be used for a belated jurisdictional objection. As Respondent itself has argued (with its same counsel in this case), **Article 10.18.1 is a jurisdictional objection**, not an admissibility issue. Allowing Respondent to turn a

[25] We do not have to imagine Respondent making such arguments because these are exactly the arguments they are making here, even with the fact that the Ballantines permit was denied because of the National Park. See, e.g., SoD, at ¶¶ 242 and 266.

jurisdictional objection into an admissibility objection would be a mockery of the process.

16. Even if this were an admissibility issue, which it is not, admissibility is a tenuous doctrine that has been almost exclusively used in cases of egregious corruption or significant wrongdoing. Respondent alleges nothing that would give rise to this level of wrongdoing, or any at all for that matter.

17. The fact that Respondent did not timely make this objection as a jurisdictional objection in its Statement of Defense is fatal to this defense. Just as Respondent took advantage of the dismissal of the Corona Materials claim by relying on the time bar – a claim that the *Corona* tribunal referred to as "bona fide" – Respondent has to abide by this time bar that prevents jurisdictional defenses made after the Statement of Defense. (The irony should not be lost on the Tribunal that the Respondent is trying to assert that it should not be bound by its time bar so that it can subject the Ballantines' claim to a time bar.)

18. To be clear, Respondent **could have made this same objection in its Statement of Defense**. Respondent asserts that the creation of the Park is the event that gave rise to the Ballantines' claims, not the denial of the permit because of the Park. In the Statement of Defense, the Respondent asserts that the Decree that created the Park in September 2009 was widely known, and specifically that the decree

> "was effected pursuant to a formal decree signed by the President of the Republic and published in the Official Gazette, and the promulgation of such decree was widely publicized in the media."[26]

[26] Statement of Defense, at ¶ 238.

Thus, in the Statement of Defense, Respondent is arguing that the Ballantines should have been aware of the Park in September 2009.

19. Importantly, the September 2010 email to which Respondent refers – even accepting Respondent's characterization of it – changes nothing. Respondent already maintained that the Ballantines should have been aware of the creation of the Park. The creation of the Park, according to Respondent, gave rise to the Ballantines' claim. Respondent could have made a jurisdictional objection based on the fact that the Park was announced by a Decree in September 2009 and that the Ballantines waited more than three years to file their claim. But Respondent did not.

20. For these reasons, as further elaborated below, the Tribunal should reject the Respondent's objection.

II. RELEVANT FACTS

a. Dominicans Are Able To Develop Projects In National Parks, Build Roads In National Parks, And Use Their Land In National Parks For Commercial Uses. Only The Ballantines Are Not

21. Michael Ballantine did not know in September 2010 that Respondent had breached CAFTA-DR, much less that they had suffered loss. In order to know that the Respondent had breached CAFTA and that they had suffered a loss, the Ballantines would have to have known that they could not develop their property in the National Park. But the Ballantines would not have known this because they saw many other projects building in national parks, including in category 2 national parks, without any restrictions at all.[27]

[27] Notably, and although unknown at the time to the Ballantines, some of these projects were able to develop their properties in these parks in the absence of a permit.

i. The Former Head Of The Dominican Military Developed a Huge Luxury Housing Project, Called Rancho Guaraguao, In A Category 2 National Park

"*Well, if they give me [property in the Valle Nuevo National Park], I would take it.*"

> -- Gonzalo Castillo, Respondent's Minister of Public Works, in February 2017, when asked about whether he had obtained a property in the protected Valle Nuevo National Park.[28]

22. Respondent asserts in its Admissibility Submission that the fact that "the Ballantines" learned of the creation of the Baiguate National Park in September 2010 started the three-year time bar. One of the many reasons why this assertion is incorrect is the fact that the Rancho Guaraguao owner was allowed to develop an expansive project in the Valle Nuevo National Park, a category 2 national park, about 20 miles away from the Baiguate National Park.

23. Rancho Guaraguao is owned by a powerful Dominican, General José Miguel Soto Jiménez.[29] General Soto Jiménez was the former head of the Dominican military and currently serves as the DR's ambassador to Taiwan.[30]

24. General Soto Jiménez built Rancho Guaraguao in a category 2 national park named Valle Nuevo National Park (Baiguate National Park is also a category 2 national park).[31] Importantly, it should be noted that General Jimenez Soto built this large development **after** the land was placed in the Valle Nueva National Park, not

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[28] "Public Works Minister says he does not know if lands he bought in Constanza are in a protected area," ElCaribe, Feb. 13 2017, C-156.

[29] "The crisis by evictions in Valle Nuevo does not affect the owners of Guaraguao," Hoy Digital, C-154.

[30] "The crisis by evictions in Valle Nuevo does not affect the owners of Guaraguao," Hoy Digital, C-154; see also "President Tsai receives credentials from new Dominican Republic Ambassador to the ROC Jose Miguel Soto Jimenez," Office of the Republic of China (Taiwan), July 3, 2017, C-155.

[31] "The crisis by evictions in Valle Nuevo does not affect the owners of Guaraguao," Hoy Digital, C-154.

before. All of the developments discussed below relate to work on a property that was already in a category 2 national park.

25. General Soto Jiménez built quite an expansive project.[32] Rancho Guaraguao, the areas within the boundaries of the Valle Nuevo park, occupy about 80 hectares.[33] Rancho Guaraguao includes luxury villas and mansions, some of which have heliports and heated pools.[34] The complex also includes a disco, gym, swimming pool, jacuzzi with thermal water, playground, camping, picnic, gazebos, barbecues, and a Catholic chapel.[35] This is not a small and incidental project.

26. Rancho Guaraguao is considered ecotourism, just as the Phase 2 project was to be.[36] The Tribunal will recall that the Ballantines were told by their environmental consultant that the Ballantines' planned Phase 2 was an ecotourism project.

27. Keeping in mind that this project is considered ecotourism, the Tribunal should take note of a few of the pictures below of Rancho Guaraguao to see what constitutes ecotourism in the DR. Additional pictures of this expansive project can be found at Exhibit C-161.

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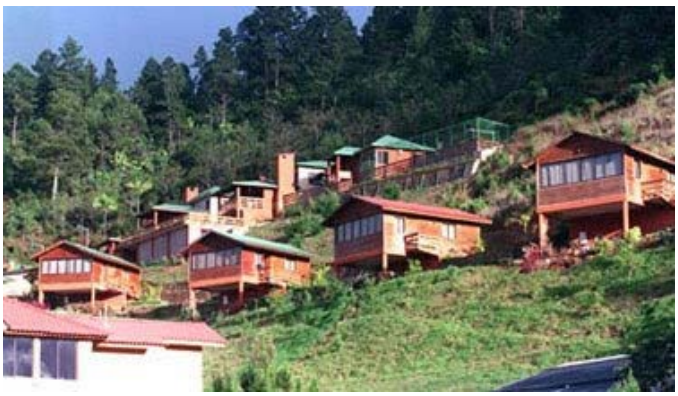
[32] "The crisis by evictions in Valle Nuevo does not affect the owners of Guaraguao," Hoy Digital, C-154.

[33] "The crisis by evictions in Valle Nuevo does not affect the owners of Guaraguao," Hoy Digital, C-154.

[34] "The crisis by evictions in Valle Nuevo does not affect the owners of Guaraguao," Hoy Digital, C-154.

[35] "The crisis by evictions in Valle Nuevo does not affect the owners of Guaraguao," Hoy Digital, C-154.

[36] See http://www.hotel-republica-dominicana.com/rancho-323-rancho-guaraguao-constanza.html, C-157.



28. Even more astounding, is that this expansive Rancho Guaraguao project was built and continues to operate without a permit.[37] Photos taken this week, like the ones below, show that construction is still occurring in Rancho Guaraguao.

29. The Ballantines would not have had access to the MMA's files and would not have necessarily known that Rancho Guaraguao did not have a permit. But the fact that Rancho Guaraguao did not have a permit shows that having your land in a national park does not necessarily mean that you have suffered a loss.

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

30. Even more astounding than the fact that Rancho Guaraguao was built without a permit after the creation of the Valle Nuevo National Park, Respondent's Ministry of Tourism paved the access road to Rancho Guarangao and Respondent's Distribuidora de Electricidad del Norte electrified the new lots.[38] Given this, one can understand why the Minister of Public Works thinks he deserves to be given a house in Rancho Guaraguao.[39] These substantial benefits, at the Dominican taxpayer's expense, were not given to the Ballantines for Phase 1 or Phase 2. Such free benefits at the expense of the people in the Dominican Republic is available, however, for powerful Dominicans.

31. The Tribunal should likewise take note that even when Respondent eventually restricted some activity in Valle Nuevo National Park, such as agriculture and cattle ranching, the Rancho Guaraguao project continues to enjoy expansive villas and mansions within the Valle Nuevo National Park – and continues new construction to this day in the absence of a permit. As explained by the Dominican periodical *Hoy*:

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[38] "The crisis by evictions in Valle Nuevo does not affect the owners of Guaraguao," Hoy Digital, C-154.

[39] "Public Works Minister says he does not know if lands he bought in Constanza are in a protected area," ElCaribe, Feb. 13 2017, C-156.

> "As a result of the application of the resolution of the Ministry of the Environment that prohibits agriculture and cattle ranching in the Valle Nuevo National Park , the producers have criticized that sumptuous villas like **those of Rancho Guaraguao are allowed in the protected area, villas whose owners are powerful businessmen, officials, politicians, and military persons**."[40]

32. If the Ballantines watch as other projects are allowed to build within the National Park, like the substantial Rancho Guaraguao project, they are not on notice that they will be singled out and told they cannot develop their property at all.

ii. The Ballantines' Neighbor Developed His Property In The National Park <u>After</u> The Ballantines Learned Of The Park In September 2010

33. In addition to Rancho Guaraguao, other projects were and are being built in national parks. Most notably, the Ballantines' neighbor, Juan Jose Dominguez, has developed his property, Aloma Mountain, in a national park. As the Tribunal may recall, Mr. Dominguez was the son of the then Mayor of Jarabacoa and the brother-in-law of the then President of the DR.[41]

34. After learning of the existence of the National Park in September 2010, Mr. Ballantine could see that his next-door neighbor was developing his property, which was in the exact same National Park. The Aloma Mountain development inside the Park continued throughout the period in which the Ballantines were denied a permit three times because of slopes. The Aloma Mountain development inside the Park continued after the Respondent denied the Ballantines for a fourth time, this time raising the Park as a basis to deny the Ballantines' permit.

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[40] "The crisis by evictions in Valle Nuevo does not affect the owners of Guaraguao," Hoy Digital, C-154. (emphasis added).

[41] *See, e.g.*, Ballantines' Reply Memorial ("Reply"), at ¶ 152.

35. In fact, as laid out in the Ballantines' Reply, Mr. Dominguez continues to develop his property in the Park **to this day**.[42] The video in the Ballantines' Reply shows the significant road development that Mr. Dominguez has undertaken in the last two years, apparently preparing for further development after this instant case is over.[43] The Ballantines experts in this case, who were there in August of this year preparing their reports for the Reply, note with pictures and testimony that Mr. Dominguez was continuing to this day to develop his property within the National Park.[44] It is good to be politically connected in the DR.

36. Immediately below are some additional pictures that show the development of Aloma Mountain that has taken place in the same National Park that the Ballantines are in. Note the large house, green grass, landscaped yard, and other structures, which were all done after Aloma Mountain was put into the Baiguate National Park.

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

[43] See C-93.

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

37. Respondent claimed in the Statement of Defense that they fined Aloma Mountain. But there is no evidence that this fine was paid.[45] It appears – given the date that this fine was issued – that the fine was done to affect the arbitration and not punish Mr. Dominguez. He certainly thinks so as he continues to develop his property in the National Park to this day.

iii. Other Persons And Developments Continued To Perform Allegedly Prohibited Activities In National Parks

38. Rancho Guaraguao and Aloma Mountain are not outliers. Respondent seems to let Dominicans build within national parks all the time. The following are some additional examples of developments and activities in national parks.

39. **Ocoa Bay** is a massive two-phase project located within the boundaries and buffer zones of the Francisco Alberto Camaaño Deño Category 2 National Park, which was created the same day as Baiguate National Park.[46] The inauguration for Ocoa Bay **was attended both by President Danilo Medina and the Minister of Environment Bautista Gomez Rojas**.[47] Phase 1 was fully approved on December 28, 2011 despite the absence of a Park Management Plan.[48]

40. The approval permit for the Ocoa Bay project describes it in terms remarkably similar to what was planned for the Ballantines' Phase 2 (although Jamaca was on a smaller, less invasive scale), including a boutique hotel and spa, villas, apartments, townhomes, commercial outlets, a club house, a racquet club, parking, and

[45] Ballantines' Reply, at ¶ 148.

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

[47] https://presidencia.gob.do/noticias/mas-inversiones-turisticas-al-sur-presidente-medina-inicia-proyecto-ocoa-bay (C-158).

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

other common areas.[49] Ocoa Bay's planned expansion will be entirely within a national park.

41. It is apparent that the Management Plan for the Francisco Alberto Camaaño Deño Park, which was ratified four years after the project, in January of 2016, was crafted specifically to accommodate Ocoa Bay.[50] Tellingly, this Management Plan specifically defines permissible ecotourism standards,[51] whereas the Management Plan for Baiguate Park indicates those standards won't be defined until 2018 -- after the conclusion of this arbitration.

42. **Villa Pajon** is an unpermitted, Dominican-owned "ecotourism" project entirely within the limits within the Valle Nuevo National Park, as it proudly trumpets on the front page of its website.[52] These developments proceeding unabated in national parks would lead anyone to believe that they would be allowed to develop their property even if it was located in a national park.

iv. The Respondent Even Approved An Environmentally Noxious Cement Factory In The Buffer Zone Of A National Park

43. Although ultimately rejected because Respondent's corrupt politicians were caught, the tale of the cement factory is a prototypical case study in Dominican political influence at work.

44. On June 18, 2008, a large Dominican mining company applied for permission to construct a massive $300,000,000 cement factory within the buffer zone of

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

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

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

[52] See http://www.villapajon.do, C-159.

the category 2 Los Haitises National Park.[53] An initial inspection report by the MMA confirmed and documented the significant environmental impact this project would have and recommended that the project be denied.

45. On March 17, 2009, witness Eleuterio Martinez initially sent a letter to witness Jaime David Mirabal appending this report and recommending the project be denied. The letter cited numerous environmental reasons, including the project's location in the buffer zone of the Park, its effect upon the Park's underground aquifers, its "incalculable" impact on the soil and subsoil, and its negative impact on surrounding flora and fauna.[54]

46. Astonishingly, only one week later, Martinez apparently had a change of heart. On March 26, 2009, Martinez, and seven other MMA employees, confirmed their approval of the project,[55] and on April 14, 2009, a permit was issued, signed by Respondent's witness Jaime David.[56]

47. Not surprisingly, this unleashed a firestorm of protest across the nation, with support from different Dominican environmental and community organizations, including the Academy of Sciences (of which Eleuterio Martínez has been a Member since 1996). This outcry ultimately forced Jaime David, on June 22, 2009, to request

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

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

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

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

that the United Nations Development Programme ("UNDP") independently evaluate how the permit was issued.[57]

48. In November 2009, the UNDP issued its final report, skewering the process by which the MMA issued the license, because it "was not rigorous and exhaustive ... and did not observe the principles and spirit of the environmental legal framework."[58] The report found that "taking into account the various factors considered, [the project] is not viable, and that it is only viable technically and economically from the point of view of the company."[59] The project was cancelled.[60]

49. Again, what Respondent allows in national parks is significant and substantial. The Ballantines would have no reason to believe they had suffered a loss when learning that their Phase 2 property was in the Park, especially in light of the fact that they were told (and is in fact the case) that their type of ecotourism project is allowed in the Park.

b. The Ballantines Received Provisional Approval For The Development Of Phase 2 From Respondent <u>After</u> The National Park Was Created

50. The Ballantines' plans for the hotel, spa, a lower development project, and fifty additional lots were all contained in the Phase 2 submission by the Ballantines to Respondent's CONFUTOR that sought tax-free status for the entire Jamaca project.[61] This request was conditionally approved by four relevant ministries of Respondent,

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

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

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

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

[61] See C-101.

including MMA and Tourism, in December of 2010, without any restrictions at all.[62] This approval appropriately caused the Ballantine to expect timely MMA approval of their formal permit application to begin the expansion of their property.

51. So the Tribunal is clear: when the Ballantines sought approval from CONFUTOR for tax-free status for both the first and the second phase of their integrated ecotourism project, four ministries of Respondent quickly signed off on the expansion.[63] One of the ministries whose approval was required was the MMA, and Ernesto Reyna signed on its behalf.[64]

52. This CONFUTOR approval came 3 months after Michael Ballantine learned of the existence of the Park. This CONFUTOR approval involved Respondent's MMA.[65] Michael Ballantine would have not been aware he had suffered a loss as a result of the creation of the Park when Respondent was moving forward with CONFUTOR approvals.

c. Respondent's First Three Denials Of The Ballantines' Permit Mentioned Nothing About The National Park

"Before the rooster crows today, you will deny me three times."

-- Luke, 22:61

53. Perhaps a centrally important fact here is that Respondent **did not mention the National Park** as a basis to deny the Ballantines a permit for the first three denials. When Respondent finally did raise the National Park issue on its fourth denial of the Ballantines request, this denial came ***more than three years*** after the Ballantines

[62] Respondent's CONFUTOR Approval, C-52.

[63] Respondent's CONFUTOR Approval, C-52.

[64] Respondent's CONFUTOR Approval, C-52.

[65] Respondent's CONFUTOR Approval, C-52.

made their first request for the permit. It lies ill in the mouth of Respondent to assert in a special pleading that certain of the Ballantines' claims are time barred when Respondent waited more than three years to raise the National Park as a basis to deny the Ballantines' request for Phase 2. If Respondent believed the creation of the National Park gave rise to a claim, as they now assert, than it was certainly bad faith for Respondent to trick the Ballantines into missing the deadline by not mentioning the Park.

54. On November 30, 2010, the Ballantines requested that Respondent's MMA provide the Ballantines with "terms of reference for the Phase 2 project. Almost one year later, on September 12, 2011, Responded denied the Ballantines the right to develop the project, citing only the issue of slopes in excess of 60%.[66] Respondent mentioned nothing about the Ballantines not being able to develop the property because of the National Park.[67]

55. The Ballantines requested a reconsideration of this denial. On March 8, 2012, Respondent again denied the Ballantines' request.[68] Just as with the first denial, Respondent again mentioned the slopes and added in something about waterways (which was incorrect).[69] But Respondent did not mention the National Park as a basis to deny the permit.[70]

56. The Ballantines requested another reconsideration of the denial. On December 18, 2012, more than two years after the Ballantines made their initial request,

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[66] See C-8.

[67] See C-8.

[68] Letter from Zoila González de Gutiérrez to M. Ballantine (Mar. 8, 2012) (C-11).

[69] Letter from Zoila González de Gutiérrez to M. Ballantine (Mar. 8, 2012) (C-11).

[70] Letter from Zoila González de Gutiérrez to M. Ballantine (Mar. 8, 2012) (C-11).

the Respondent again denied the Ballantines' request.[71] And, again, the Respondent did not mention the National Park as a basis to deny the expansion.[72]

57. Realizing the absurdity of the denial based on slopes, when the Ballantines could see that all their Dominican neighbors were granted permits for properties that included similar or steeper slopes, the Ballantines yet again requested a reconsideration of this decision. It was only on this fourth denial, given on **January 15, 2014**, that Respondent mentioned the National Park as a basis to deny the project.[73]

58. The fact that Respondent waited so long to mention the denial based on the National Park is significant. This eventual denial, made in January 2014, came after Respondent asserts that the 3-year time limit had expired. (Respondent says that the Ballantines learned of the National Park in September 2010 and therefore that the time bar expired in September 2013.) Yet, despite the Ballantines' repeated requests for the permit, Respondent never mentioned the National Park, preventing the Ballantines from being able to make a claim with regard to the Park even if they wanted to.

59. It should be further noted that – in the very same email the Respondent refers to in its objection – the Ballantines were specifically told by their environmental consultant that they should submit their request for terms of reference to the MMA so they could find out if there were any restrictions from the Park.[74] When Respondent said nothing about restrictions from the Park, the Ballantines were justified in believing that there were no restrictions – certainly not substantial ones – and that there was no loss.

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[71] Letter from Zoila González de Gutiérrez to M. Ballantine (Dec. 18, 2012) (C-13).

[72] Letter from Zoila González de Gutiérrez to M. Ballantine (Dec. 18, 2012) (C-13).

[73] Letter from Zoila González de Gutiérrez to M. Ballantine (Jan. 15, 2014) (C-15).

[74] C-103.

d. Respondent Mischaracterizes The September Email In Question

60. Respondent presents the September 2010 email to the Ballantines from Empaca Redes as putting the Ballantines notice that they had a claim and had suffered a loss. To make this assertion, Respondent selectively cites portion of the email. But the Tribunal should review the entire email as it makes clear that the Ballantines were told that the Park allowed ecotourism projects like their project.

61. Empaca Redes tells Michael Ballantine in that email that "the National Park category allows low density ecotourism projects, such as yours."[75] Thus, Michael Ballantine was told that his project was ecotourism and that these types of projects are allowed in the Park.[76]

62. This information by Empaca Redes needs to be considered in light of the fact that other projects were being developed in national parks, as described above.

63. Respondent cannot deny that ecotourism activities should be allowed in the Park. In fact, in its Statement of Defense, Respondent touts the fact that the ecotourism is allowed in the Park. And, importantly, Respondent's MMA has always recognized Jamaca de Dios as ecotourism, as its own inspection notes confirm.[77]

64. So it is not that projects *like* Jamaca's Phase 2 cannot be in a national park, as Rancho Guarangoa and Aloma Mountain make clear, it is just that the Ballantines' U.S. owned project cannot be developed in the Park.

e. Mr. Ballantine's Statement About First Being Told Of The Park By Respondent Is Entirely Accurate And Legally Significant

[75] C-103.

[76] C-103.

[77] See C-102 and C-103.

"It depends upon what your definition of '*is*' is".

-- Bill Clinton, 1998

65. The statement above from then President Clinton has been derided as slippery lawyer speak. An overly lawyered statement meant to obscure the truth can appropriately be criticized.

66. The statement from Mr. Ballantine, however, where he states that the MMA did not raise the National Park with him as an obstacle until September 2013, is not one of those statements. It is the truth and relevant to the matters in question.

67. Respondent tries to alter the plain meaning of this statement to assert that Mr. Ballantine is asserting that this is the first time he learned of the existence of the Park. But that is not at all what he says. He stated that the September 2013 meeting with the MMA "was the first time that MMA had ever mentioned the existence of a Park . . . ."[78] Mr. Ballantines is talking about when Respondent's MMA raised the issue of the Park as an potential obstacle to development.[79]

68. This is a distinction with a critical difference. The fact that matters in this case is when Respondent raised the existence of the National Park to the Ballantines in connection with substantial restrictions on development. It was this mention where the Ballantines would have had some reason to be concerned that Respondent would use the existence of the National Park as a basis to deny their permit. This is why Mr. Ballantine mentions this. It is what matters.

III. LEGAL ARGUMENT

[78] M. Ballantine Witness Statement, at ¶¶ 66–67.

[79] M. Ballantine Witness Statement, at ¶¶ 66–67.

a. CAFTA's Three-Year Time Bar Requires Both Knowledge Of A Breach Of A Substantive Provision And Knowledge That The Investor Has Suffered Loss Or Damage

"*The Arbitral Tribunal finds that the facts surrounding the dispute and the allegations made demonstrate that the Claimant . . . had a* bona fide *claim . . . .*"

> -- The *Corona Materials* Tribunal, dismissing the claim under CAFTA-DR Article 10.18.1 but noting that Corona Materials had a *bona fide* claim.

69. Article 10.18.1 of CAFTA is clear that both knowledge of a breach and knowledge of a loss are required to start the time bar. Accordingly:

> "No 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 […] has incurred loss or damage**."[80]

Thus, it is not enough for Respondent to show that Michael Ballantine had knowledge that Respondent had breached CAFTA in September 2010, Respondent must also show that Mr. Ballantine had knowledge that he had suffered loss as well. Here, however, Respondent can show neither.

70. The fact that both knowledge of the breach **and** knowledge of loss is required to trigger the 3-year period was confirmed by the *Corona Materials* tribunal, as Respondent knows well:

> It warrants emphasizing **that knowledge of the breach in and of itself is insufficient to trigger the limitation period's running; subparagraph 1 requires knowledge of breach and knowledge of loss or damage**."[81]

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[80] CAFTA Art. 10.18.1 (emphasis added).

[81] ¶ 194.

So the critical date is not when the Ballantines first learned about the existence of the National Park but, instead, when the Ballantines (both of them) had both knowledge that a **breach** of CAFTA was committed by the DR and knowledge **of loss or damage**.

i. The Ballantines Did Not Have Knowledge In September 1010 That Respondent Had Breached CAFTA-DR.

71. As laid out above, the September 2010 email to Michael Ballantine from his environmental advisor did not create the requisite knowledge for him to believe that Respondent had breached CAFTA, much less for Lisa Ballantine who was not even copied on the email. This is because, among other reasons:

- The email stated that the Park allowed ecotourism and that his Phase 2 project was ecotourism;
- Other projects, including projects in the Baiguate National Park, were freely developing in category 2 national parks;
- Respondent did not raise the possibility that the National Park would be an impediment to development until September 2013;
- Respondent's three denials of the Ballantines' permit said nothing about the National Park or noted any restrictions emanating from the Park; and
- The Ballantines had received an approval from Respondent's CONFUTOR regarding its Phase 2 Project after Michael Ballantine learned of the Park.

72. Put simply, there was no breach by Respondent in September 2010 with regard to the Park, as Respondent had not used the Park as a basis to deny the Ballantines' permit not taken any measures that established significant restrictions to their development as a result of the National Park, until September 2013.

73. To be clear, the manner in which Respondent created the Park in 2009 was discriminatory, in that Respondent purposefully excluded Dominican properties from the Park. As noted in the expert reports of Mr. Potes and Mr. Richter, the Dominican properties excluded from the Park were more pristine and environmentally significant

than the Ballantines' property and these properties were right next to the Baiguate river, the protection of which was the purpose of the Park.[82] But, even so, the drawing of lines of a Park is not by itself a breach. Had Respondent never used the existence of the Park as a basis to deny the Ballantines' development, or even as a basis to impose significant restrictions, Respondent would not have breached CAFTA.

ii. The Ballantines Did Not Have Knowledge In September 1010 That They Had Suffered Loss As A Result Of A Breach By Respondent Of CAFTA-DR

"To see what is in front of one's nose needs a constant struggle."

-- George Orwell, *In Front Of Your Nose*, 1946

74. The September 2010 email to Michael Ballantine did not make him aware that he had suffered loss or damage at that point in time.

75. Even had Respondent breached CAFTA by the creation of the Park itself, the Respondent has identified no loss that the Ballantines suffered in September 2010, much less a showing that Michael Ballantine should have been aware of any such loss.

76. The reason Respondent cannot point to any loss that Michael Ballantine knew he suffered in September 2010 is because there was not any as of that time with respect to the National Park. This is because, among other reasons:

- The Ballantines' environmental advisor stated that the Park would allow ecotourism and that the Phase 2 expansion would be ecotourism;
- The Ballantines saw other land owners developing in national parks; and
- Respondent had not used the existence of the Park until 2014 to deny the Phase 2 permit or to impose restrictions on the Phase 1 or Phase 2 properties.

[82] See, generally, expert reports of Jens Richter and Fernando Potes.

77. Respondent does not deny that ecotourism projects are allowed in the Park. To the contrary, this is a cornerstone of Respondent's defense. As noted by Respondent, the Baiguate Park Management made just this year, and right before the Statement of Defense, allows for ecotourism in the Park.[83] And, as stated above, similar projects in the DR to the planned Phase 2 are likewise considered ecotourism.[84]

78. To make clear that the Ballantines' knowledge of loss occurred in 2014 when Respondent rejected the permit for the fourth time, the Respondent noted in that complete denial that the Ballantines could make use of the land by planting fruit trees.[85] This treatment was in stark contrast to the Dominican-owned projects that can not only develop in national parks but can also do so without a permit! It was at this point in 2014 when the Ballantines would have known that they had a loss because of the National Park.

79. Lastly, we note that being in a national park, so long as you are able to build, is not a de facto detriment. For example, a U.K. report found that properties in national parks produced a premium of 22% over market price.[86] And properties in national parks in the DR, such as Rancho Guaraguao, seem to be flourishing with Respondent's support.

iii. Knowledge Of An Offending Measure It Not The Same As Knowledge Of A Breach Or Knowledge Of Loss

[83] See, e.g., Statement of Defense, at ¶ 242.

[84] See *supra*.

[85] Letter from Zoila González de Gutiérrez to M. Ballantine (Jan. 15, 2014) (C-15).

[86] "National Parks produce 22% price premium," Nationwide House Price Index, July 2017, C-160.

80. Here, as stated above, the Ballantines would have had no indication that Respondent had breached CAFTA and that they had suffered loss as a result of the 2010 email to Michael Ballantine from his environmental advisor.

81. Tribunals have held that even where an investor is aware of an offending measure, and even aware that because of that measure they could be subject to expropriation, is not sufficient to be considered a breach of CAFTA at that time.

82. In fact, it was Respondent's counsel that made this successful argument in the *Spence v. Costa Rica* case. As noted by the *Spence* tribunal:[87]

> The Claimants also stress that Article 10.18.1 addresses the issue of a **claimant's knowledge of an alleged breach, not knowledge of the existence of a measure**. While the Claimants may have had knowledge of the **existence** of a measure before the limitation period, this is **not the same** as saying that they had, or should have had, **knowledge of the occurrence of a breach.**

83. The *Spence* tribunal agreed with the position of Respondent's counsel in that case, although made for the claimants. The tribunal held that "While the Claimants' knowledge at the time of purchase may be material for purposes of any assessment of the value of the properties in question, it is **not ultimately determinative either of issues of jurisdiction** or of liability."[88]

84. On the question of jurisdiction and its interpretation of CAFTA Articles 10.18.1, the *Spence* tribunal focused on the claimant's knowledge of an alleged breach and loss, not when the claimants became aware of the existence of the boundaries of the park:

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[87] *Spence International Investments, LLC, et al. v. Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (25 October 2016).

[88] *Spence International Investments, LLC, et al. v. Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (25 October 2016), ¶ 205.

> On the issue of **first knowledge of the *breach***, if a claim is to be justiciable for purposes of CAFTA Article 10.18.1, the Tribunal considers that it must rest on a **breach that gives rise to a self-standing cause of action** in respect of which the claimant first acquired knowledge within the limitation period. The Tribunal notes that this was the approach adopted by the *Mondev* tribunal, with which it is happy to agree. . . . It does mean, though, that for a "component" of a dispute to be justiciable in the face of a time-bar limitation clause, that component must be separately actionable, i.e., it must constitute a cause of action, a claim, in its own right.
>
> For purposes of Article 10.18.1, the relevant date is when the claimant first acquired knowledge **not simply of the breach but also that they incurred *loss or damage* as a result thereof**. The Tribunal agrees with the observation of the tribunal in *Corona Materials* that "**knowledge of the breach in and of itself is insufficient to trigger the limitation period's running; subparagraph 1 requires knowledge of breach *and* knowledge of loss or damage**."

85. The case here is different from Spence in that the Ballantines would not even have had a basis to know in September 2010 that they might be subject to expropriation or significant restrictions. But even had they known that, as Respondent's counsel argued in *Spence*, this is not enough to raise the time bar.

86. In addition to the *Spence* tribunal, other tribunals have noted that measures that take place before the time bar clock starts can be relevant for purposes of the merits, even if not sufficient to start the time bar clock. As was noted by the *Eli Lilly* tribunal in a NAFTA proceeding:

> In this context, many previous NAFTA tribunals that have found it appropriate to consider earlier events that provide the factual background to a timely claim. As stated by the tribunal in *Glamis Gold v. United States*, a claimant is permitted to cite "factual predicates" occurring outside the

> limitation period, even though they are not necessarily the legal basis for its claim.[89]

87. The same rationale used by these other tribunals is correct and applicable here. Although the discriminatory circumstances surrounding the creation of the Park are certainly relevant to the Ballantines' claim, the Ballantines' claims regarding the National Park only arose when the existence of the Park was used to deny the permit.

b. As Respondent Knows, The Three-Year Rule Is A Jurisdictional Defense, Not An Admissibility Objection

88. In the *Corona* case, the DR argued that the claim should be rejected under Art. 10.18.1 precisely on the ground that the tribunal **lacked jurisdiction** over the claim (it did not argue merely that the claim was "inadmissible"). The position of the DR on the matter is very clear from the following passages taken from the award:

- "Through its Preliminary Objections the Respondent requests the Tribunal, among other things, to declare that **it lacks jurisdiction** to hear this dispute given that the Claimant's claims allegedly **fall outside the three-year period** stipulated by Article 10.18.1 of the DR-CAFTA".[90]

- "In its PO Memorial, the Respondent claims that the Tribunal **lacks jurisdiction** to hear the Claimant's claims because the alleged acts and omissions on which the Claimant's claims are allegedly based took place outside the three-year period required under DR-CAFTA Article 10.18.1 for a Tribunal to have **jurisdiction** over the claims."[91]

89. The *Corona* tribunal agreed with the position adopted by the DR and rejected the claims for **lack of jurisdiction**.

> "The Tribunal decides that the Claimant not having satisfied the conditions required under DR-CAFTA Article

[89] *Eli Lilly and Company v Canada*, Final Award, 16 March 2017, UNCITRAL Case No. UNCT/14/2.

[90] *Corona Materials, LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3) Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶ 4.

[91] *Corona*, ¶ 54.

> 18.10.1, its request for arbitration was time-barred and the **present Tribunal has no jurisdiction** over the claims."[92]

90. In the *Spence* case, Costa Rica also argued that the Tribunal lacked **jurisdiction** over the case under Article 10.18.1.

> "Costa Rica **objects to the jurisdiction** of the Tribunal on the grounds that the Claimants failed to initiate proceedings within the CAFTA's three-year limitation period under CAFTA **Article 10.18.1** . . . ." [93]

> "The Respondent raises objections to **jurisdiction** under Article 10.1.3 and Article 10.18.1" [94]

91. The *Spence* tribunal likewise agreed that CAFTA Article 10.18.1 is a jurisdictional objection:

> The Claimants face **formidable jurisdictional hurdles**. (…) The limitation period of **Article 10.18.1**, which would exclude any claim in respect of which a claimant first acquired, or is deemed to have first acquired, knowledge of the alleged breach and loss before 10 June 2010, presents an equally daunting challenge. [95]

92. NAFTA awards examining the equivalent of Art. 10.18.1 (i.e. NAFTA Art. 1116(2), 1117(2)) have also always considered the question as one of jurisdiction, not admissibility. A good example is the reasoning of the *Apotex* Tribunal:

> *The Nature of this Objection:* As with the previous issue, there is an initial question as to the precise nature of this objection, and whether it is properly characterised as one of "jurisdiction" or merits / substance. **The [time-bar] objection was treated by both Parties as a "jurisdictional" issue**.

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[92] *Corona*, ¶ 280.

[93] *Spence International Investments, LLC, et al. v. Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (25 October 2016) ¶ 7.

[94] *Spence*, ¶ 27.

[95] *Spence*, ¶ 162.

93. There should be no doubt that the time bar issue is a jurisdictional issue, and not a question of admissibility. Had Respondent timely made this objection, as they could have, Respondent would certainly be admitting that this is a jurisdictional objection.

c. Respondent's Jurisdictional Defense Is What Is Time Barred, Not The Ballantines Claims

94. UNCITRAL Arbitration Rules, Article 23(2) reads follows:

> "A plea that the arbitral tribunal does not have jurisdiction shall be raised **no later than in the statement of defence** or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off."

95. In their recent book on the UNCITRAL Arbitration Rules (the 2010 version), Paulsson and Petrochilos explain the basic reasons for the rule contained at Article 23(2):

> There is thus a **general duty** in article 23(2) to formulate jurisdictional objections **early,** which extends not only to comprehensive objections that the arbitral tribunal totally lacks jurisdiction but also to objections that some claims fall astride a jurisdiction that is otherwise admitted.[96]

96. Paulsson and Petrochilos further explain that in accordance with the history of the drafting the Rules, an untimely jurisdictional objection can only be admitted in **very rare circumstances**:

> Indeed, the **drafting history of the 1976 Rules shows** that untimely jurisdictional objections could be admitted only in **very rare circumstances**, under the general powers

[96] Jan Paulsson and Georgios Petrochilos, UNCITRAL Arbitration, Kluwer Law International (2017), p. 197 -8.

> granted to arbitrators to conduct the arbitration by article 15(1) (now article 17(1)). [97]

The fact that Respondent chose to not raise this in the Statement of Defense, even though it could have, as explained below, is not a "very rare circumstance."

d. The September 2010 Email Is Not New Evidence And, In Any Event, Does Not Involve A "Grave Injustice"

97. Respondent seeks to excuse its tardiness by asserting that the September 2010 email was new evidence. Although it is true that Respondent did not have this exact email when it filed its Statement of Defense, this email added nothing new to Respondent's knowledge with respect to this time bar objection.

98. Article 10.18.1 talks about when the investor did acquire or "should have first acquired" knowledge of the breach and knowledge of the loss. Thus, the Respondent never had to show that the Ballantines in fact ***knew*** of the Park but only that they should have known. But, the assertion that the Ballantines should have known about the Park, is exactly what Respondent argues repeatedly in its Statement of Defense.

99. As stated above, Respondent talks about the Decree creating the Park being public and "widely publicized".[98] Respondent criticizes the Ballantines for purchasing additional property in the Park after 2009.[99] Respondent makes clear that it believes the Ballantines should have known the Park was created in 2009.

100. Given this position, Respondent cannot now claim that the September 2010 email provided information to them that they did not have for the purposes of an objection under Article 10.18.1. Respondent had enough information already – according

[97] Id., p. 197

[98] Statement of Defense, at ¶ 238.

[99] Statement of Defense, at ¶ 238.

to itself – to make such an objection about a time bar going back to 2009 as it claimed that the existence of the park was publicly known. But, for whatever reason, it chose not to make this objection in its Statement of Defense.

101. In addition, simply having any new evidence is not sufficient to excuse a late jurisdictional objection. In support of its assertion that that "late" pleas due to the discovery of new evidence are precisely the kind of "justifiably late pleas" that should be admitted" (para. 15), the Respondent refers to the following passage from *European American Investment Bank* award:

> To preclude a respondent from making a jurisdictional objection after it submitted its statement of defense when that objection concerned facts which arose only after the date on which that statement was filed would involve a **grave injustice. That injustice would be particularly grave where, as here, the new facts involve conduct on the part of the Claimant which the Claimant chose not to notify to the Respondent or the Tribunal.**

102. This last passage shows that the *European American Investment Bank* Tribunal was dealing with facts completely different from the instant case, facts in that case where the investor had engaged in wrongdoing. Here, the fact that Respondent chose not to make this jurisdictional objection in the Statement of Defense does not give rise to a grave injustice.

103. The statement by Michael Ballantines in his Witness Statement is plainly that September 2013 was the first time that Respondent's MMA had raised concerns about the Park.[100] Mr. Ballantine did not state he had never been told by his environmental advisors about the existence of the Park.

[100] M. Ballantine Witness Statement, at ¶¶ 66-67.

104. Other reasons demonstrate that not admitting the late objection would not be a grave injustice, such as the facts laid out above. It is not a grave injustice because the September 2013 email did not give Mr. Ballantine knowledge of a breach and corresponding loss. And, as also stated above, Respondent already asserted that the Ballantines should have known about the Park in 2009. The Ballantines are not responsible for the late pleas by the Respondent. The situation of "grave injustice" referred to by the tribunal is therefore not applicable to the present case.

105. In any event, the Respondent also failed to refer to the rest of the *European American Investment Bank* award where the tribunal makes some very important statements relevant to this case:

> Nevertheless, the Tribunal **does not consider that a respondent has an unlimited power to add new jurisdictional objections after the statement of defence has been filed**. The Caron commentary quoted above makes plain that the Tribunal has discretion to admit **"justifiably late pleas"**. . . . In deciding whether a plea is "justifiably late", the Tribunal must therefore have regard to **whether there has been undue delay by the Respondent once it became aware of the facts and to whether there will be undue prejudice to the Claimant if the plea is admitted**. (….)[101]

106. Again, it is important to note that the *European American Investment Bank* case dealt with 'late' pleas which had been **caused by the conduct** of the claimant:

> Finally, the Tribunal considers that there is no basis for refusing to admit the first new jurisdictional objection on the basis of prejudice to the Claimant. If the Claimant has been prejudiced by the fact that this objection was not raised ahead of the 2011 jurisdictional hearing, that is **largely its own fault. Had it acted with greater candour** in November 2010 and informed the Tribunal of the action it had taken in the Slovak courts, the significance of that

[101] Id., ¶ 118.

> action for the jurisdiction of the Tribunal could have been considered at the 2011 hearing.[102]

107. Other tribunals have upheld the requirement that the objection be made in the Statement of Defense.[103] Not allowing Respondent to make a time barred jurisdictional objection is the right result here for the reasons stated above.

IV. RELIEF REQUESTED

a. The Tribunal Should Dismiss This Objection

108. Given the facts above, and the relevant legal doctrines, the Tribunal has more than enough cause to dismiss this objection right now. The Ballantines thus request that the Tribunal dismiss this claim.

109. To be clear, the Ballantines would object to this issue being further litigated and considered in the continuing proceedings as an admissibility objection is not timely and not applicable, and the jurisdictional objection is made too late. The Ballantines do point out, however, that if the Tribunal decides to allow this admissibility or jurisdictional objection to continue, that the issues could be further elaborated (over the Ballantine's objections) in the Ballantines' Rejoinder on Jurisdiction.

b. Respondent Should Pay The Costs And Fees Associated With The Ballantines Defense Of This Admissibility Submission

110. The Respondent's Admissibility Submission, which came as the Ballantines' were busy preparing their Reply Submission, has raised unnecessary costs and proceedings in this Arbitration. Consider the following, as set out above:

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[102] Id., ¶ 126-7.

[103] *CME Czech Republic BV v. The Czech Republic* (UNCITRAL) Partial Award, 13 September 2001, ¶ 378ff. See also *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, ¶ 87.

- Respondent omits the crucial part of the Empaca Redes email where the Ballantines are told that the Park allows ecotourism and they are an ecotourism project. The Respondent did not have to highlight this fact but they were obligated to address it somehow.

- Respondent did not mention the National Park in the first three denials to the Ballantines. Had Respondent mentioned the National Park as a basis to deny the permit, the Ballantines could have brought a claim within the three-year window that Respondent seeks to impose.

- The Respondent knows full well that Dominican owned projects have been allowed to develop and conduct other activities in category 2 national parks, including the very same Park at issue here.

- Respondent has argued that the creation of the National Park did not give rise to a claim, despite its objection here. Respondent further argues that the Ballantines can conduct ecotourism activities in the Park and that there has not been any deprivation. This is inconsistent with Respondent's position that the National Park gave rise at that time to the Ballantines' claims.

- Respondent stretches the admissibility doctrine well beyond the standard of a credible argument. The three-year window is a jurisdictional issue, not an admissibility issue. Respondent is aware that the admissibility doctrine is tenuous and used almost exclusive in circumstances of corruption or significant wrongdoing.

111. The Tribunal should order Respondent to reimburse the Ballantines for the costs of defending against this Admissibility Submission.

112. For the reasons stated above, the Tribunal should dismiss the Respondent's admissibility and jurisdictional objection. The Tribunal should also order Respondent to pay the Ballantines' costs of defending against this Submission.

Respectfully submitted,

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Teddy Baldwin
One of the attorneys for the Claimants

November 17, 2017