IN THE MATTER OF AN ARBITRATION UNDER THE DOMINICAN REPUBLIC CENTRAL AMERICA FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES (2013)

MICHAEL BALLANTINE
AND LISA BALLANTINE,
***Claimants*,**

v.

THE DOMINICAN REPUBLIC,
***Respondent*.**

PCA Case No. 2016-17

OBJECTION BY THE DOMINICAN REPUBLIC TO ADMISSIBILITY, PURSUANT TO DR-CAFTA ARTICLE 10.18.1

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8 November 2017

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I. INTRODUCTION

1. The Dominican Republic hereby presents a preliminary objection in the above-captioned matter, on the basis of Article 10.18.1 of the Dominican Republic Central America Free Trade Agreement ("**DR-CAFTA**"). That provision of the DR-CAFTA states in relevant part: "No claim may be submitted to arbitration . . . *if more than three years* have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged . . . and knowledge that the claimant . . . or the enterprise . . . has incurred loss or damage."[1]

2. On the basis of this clause, the Dominican Republic objects to the admissibility of the following subset of the claims asserted by Michael and Lisa Ballantine ("**the Ballantines**") in their Statement of Claim: (a) claims for the alleged expropriation (DR-CAFTA Article 10.7) of the lands associated with Project 3 (the "**Project 3 land**");[2] (b) claims for the alleged breach of

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[1] **Ex. R-010**, DR-CAFTA, Article 10.18.1 (emphasis added).

[2] As explained in the Statement of Defense, the nomenclature that the Ballantines use with respect to their different projects ("Phase 1" and "Phase 2") is oversimplified and confusing: sometimes they use the Phase 1/Phase 2 dichotomy to make a temporal distinction, other times a physical distinction. *See* **Statement of Defense**, ¶¶ 6, 71–74.

In fact, however, in Jamaca de Dios there are not two but at least five different projects, which the Dominican Republic defined in its Statement of Defense as follows:

- Project 1: The reforestation project planned by the Ballantines in October 2004, which included an access road into Jamaca de Dios.
- Project 2: The construction of a restaurant and a housing development, on part of the lower portion of the Ballantines' mountain property.

Projects 1 and 2 are comprised within what the Ballantines have referred to as "Phase 1" of Jamaca de Dios.

- Project 3: The Ballantines' plans to extend the Project 1 road further up the mountain, and to use the land there (some of which the Ballantines seem to have purchased between 2004 and 2008, and some between August 2009 and February 2011) to expand Jamaca de Dios. The Ballantines submitted a license request dated 30 November 2010 regarding this project.
- Project 4: The Ballantines' plan to construct a "mountain lodge" on land above the restaurant that was the subject of Project 2; and
- Project 5: The Ballantines' plan to build an apartment complex that would allow owners to rent their units to tourists.

Projects 3, 4 and 5 are comprised within what the Ballantines have referred to as "Phase 2" of Jamaca de Dios.

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fair and equitable treatment (DR-CAFTA Article 10.5) resulting from the creation of the Baiguate National Park ("**the Park**"); and (c) claims for the alleged breaches of national treatment (DR-CAFTA Article 10.3) and most-favored-nation treatment (DR-CAFTA Article 10.4) resulting from the creation of the Park and the supposed exclusion of competing mountain projects from the boundaries of the Park.

3. This objection is submitted in light of new facts that surfaced as a result of the Ballantines' document production mandated by the Tribunal. In Procedural Order No. 5, the Tribunal had ordered the Ballantines to provide "any document referencing when the Ballantines first became aware of the adoption of the Decree 571-09 and/or the creation of Baiguate National Park."[3] In response, on 2 August 2017, the Ballantines produced a series of emails exchanged during the 22–29 September 2010 timeframe between, on the one hand, Michael Ballantine, and, on the other hand, environmental consultants Mario Mendez and Miriam Arcia (collectively, "**the September 2010 Communications**").[4]

4. The September 2010 Communications evince that the Ballantines first learned on *29 September 2010* — at the latest — of the creation of the Park and of the restrictions that the Park imposed on the Ballantines' use of the Project 3 land. That date precedes by more than three years the Ballantines' Notice of Arbitration, which was submitted on 11 September 2014. Therefore, the Ballantines' claims of violation of Articles 10.7 (Expropriation and

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When referring to the expropriation claim, the Dominican Republic understands that the Ballantines are referring to the land on which "Project 3" was to be developed, because they tie the expropriation claim to the denial of the license (based, among other things, on the creation of the Park). Hence, for purposes of the Ballantines' expropriation claim, instead of referring to "Phase 2" and "Phase 2 land" the Dominican Republic herein refers to "Project 3" and the "Project 3 land", respectively.

[3] **Procedural Order No. 5**, Annex 2, Dominican Republic's Request No. 44, pp. 79–80.

[4] *See* **Ex. R-169**, Emails between Michael Ballantine, Mario Mendez and Miriam Ancia of Empaca Redes, and Zuleika Salazar (22–29 September 2010) (original in Spanish); *see* **Ex. R-170**, Email from Miriam Arcia to Michael Ballantine, Zuleika Zalazar, and Mario Mendez (22 September 2010) (original in Spanish).

Compensation), 10.5 (Fair and Equitable Treatment), 10.3 (National Treatment) and 10.4 (Most-Favored-Nation Treatment) of the DR-CAFTA on the basis of the restrictions imposed by the Park on the Project 3 lands, fall outside the three-year limitation period prescribed by Article 10.18.1 of the DR-CAFTA, and are accordingly inadmissible.

5. As explained in **Section II** below, the new evidence upon which the Dominican Republic bases the present objection had not been disclosed by the Ballantines before the Dominican Republic's 25 May 2017 Statement of Defense; the objection therefore could not have been included by the Dominican Republic in that submission. For that and other reasons articulated in Section II, the objection is timely and admissible.

6. In **Section III** below, the Dominican Republic discusses the facts relevant to the objection, including (a) the inaccurate representations by the Ballantines concerning the dates on which they first learned of the creation and restrictions of the Park, and (b) the new evidence recently produced by the Ballantines. This section also articulates the substantive objection asserted pursuant to Article 10.18.1 of DR-CAFTA.

7. Finally, **Section IV** sets forth the Dominican Republic's request for relief.

II. THE DOMINICAN REPUBLIC'S OBJECTION IS ADMISSIBLE

8. The Dominican Republic's present objection to the Ballantines' claims related to the creation of the Park based on Article 10.18.1 of DR-CAFTA is timely and should be adjudicated by the Tribunal.

A. This Objection Is One of Admissibility, and Is Thus Not Subject to the Constraints of Article 23(2) of the UNCITRAL Arbitration Rules

9. "Admissibility" and "jurisdiction" are two distinct legal concepts.[5] It is generally understood that "an objection to jurisdiction goes to the ability of a tribunal to hear a case while an objection to admissibility aims at the claim itself."[6] The Dominican Republic's present objection is of the latter type, as it relates to the inability of the Tribunal to hear the *claims* that lie outside of the three-year period set out in the DR-CAFTA.[7] As indicated by the *Tecmed* tribunal with respect to an analogous clause in the Spain-Mexico BIT, defenses related to failure to fulfill requirements such as those established by Article 10.18.1 "do not relate to the jurisdiction of the Arbitral Tribunal but rather to (non)compliance with certain requirements of the Agreement governing the admissibility of the foreign investor's claims."[8]

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[5] See generally, **RLA-087,** Jan Paulson, Jurisdiction and Admissibility, Global Reflections on International Law, Commerce and Dispute Resolution Liber Amicorum in honour of Robert Briner, ICC Publishing (November 2005), pp. 603–608; *see also* **RLA-019,** *Achmea B.V. v. Slovak Republic*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility (20 May 2014) (Lévy, Beechey, Dupuy), ¶ 114.

[6] **RLA-088,** *Ioan Micula, et al. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008) (Lévy, Alexandrov, Ehlermann), ¶ 63; *see also* **RLA-089,** *Abaclat, et al. v. Republic of Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) (Tercier, Abi-Saab, van den Berg), ¶ 247(i) ("While a lack of jurisdiction *stricto sensu* means that the claim cannot at all be brought in front of the body called upon, a lack of admissibility means that the claim was neither fit nor mature for judicial treatment").

[7] *See* **Section III.B**.

[8] **CLA-030,** *Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) (Grigera Naón, Fernández, Bernal), ¶ 73 ("In the opinion of the Arbitral Tribunal, the defenses filed by the Respondent, relying on Title II(4) and (5) of the Appendix to the Agreement, do not relate to the jurisdiction of the Arbitral Tribunal but rather to (non)compliance with certain requirements of the Agreement governing the admissibility of the foreign investor's claims"); ***id.*,** ¶ 72 ("Title II(5) of the Appendix to the Agreement provides the following: *The investor may not submit a claim under this Agreement if more than three years have elapsed since the date on which the investor had or should have had notice of the alleged violation, as well as of the loss or damage sustained*") (emphasis added); *see also* **CLA-026**, *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award (19 December 2013) (Mourre, Park, von Wobeser) ("***Teco***"), ¶¶ 627–628 ("Article 10.18.1 of the CAFTA-DR . . . is not a matter of jurisdiction but of admissibility").

10. Since the objection is not one of jurisdiction, it is not governed by Article 23(2) of the UNCITRAL Arbitration Rules (which contemplates that, in principle, jurisdictional objections should be raised no later than the statement of defense).[9]

11. A separate DR-CAFTA tribunal has addressed an Article 10.18.1 objection, and concluded that the objection was one of admissibility rather than jurisdiction. Specifically, the tribunal in *Teco v. Guatemala* unequivocally determined that "contrary to Claimant's submission, [an objection based on Article 10.18.1] is not a matter of jurisdiction but of admissibility."[10] On that basis, the tribunal concluded that "it is thus irrelevant that the Respondent failed to raise, in its Memorial of Jurisdiction and Admissibility, a jurisdictional objection in this respect."[11]

12. In light of the foregoing, the Dominican Republic's present objection is timely, since (i) it was raised as soon as practicable after the evidence and facts underlying the objection came to light, and (ii) it is in any event an objection of admissibility rather than jurisdiction, and therefore not subject to Article 23(2) of the UNCITRAL Rules.[12]

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[9] **RLA-044,** UNCITRAL Arbitration Rules, Article 23(2) ("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. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified").

[10] **CLA-026,** *Teco*, ¶ 628.

[11] **CLA-026,** *Teco*, ¶ 628; note that even though *Teco* was heard under the **ICSID Arbitration Rules**, rather than the **UNCITRAL Arbitration Rules**, both sets of rules contain similar language as to the time at which objections to jurisdiction are to be made. *See* **RLA-090,** ICSID Arbitration Rules, Rule 29 ("… A party shall file the objection with the Secretary-General no later than in its first written statement or at the first hearing if that occurs earlier, unless the facts on which the objection is based are unknown to the party at that time").

[12] Although the Dominican Republic could have waited to submit its objection in its Rejoinder, it is doing so before that in order to allow the Ballantines a more fulsome opportunity to address it.

B. Even If the Objection Were Construed As a Jurisdictional One, the Tribunal Should Admit It

13. Even if the Tribunal were to conclude that the Dominican Republic's objection relates to jurisdiction rather than to admissibility — or, alternatively, that the time limits of Article 23(2) of the UNCITRAL Arbitration Rules are equally applicable to *admissibility* objections (*quod non*) — it should still admit and decide the objection.

14. The reason it should do so is that, as noted above, the Dominican Republic submitted the objection as soon as practicable after becoming aware of the evidence and facts underlying the objection. It was not until 2 August 2017, as part of their Second Document Production pursuant to Procedural Order No. 5,[13] and *after* the Dominican Republic's submission of the 25 May 2017 Statement of Defense, that the Ballantines produced the evidence on which the Dominican Republic is basing the present objection. As explained below, such evidence shows that the Ballantines already had knowledge in September 2010 — *i.e.*, *prior to* the three-year time limit under Article 10.18.1 of DR-CAFTA — of the creation and restrictions of the Park.[14] The Dominican Republic could not have asserted the objection without this new evidence.

15. Under these circumstances, the explicit exception articulated in Article 23(2) of the UNCITRAL Rules applies: "The arbitral tribunal may, in either case, admit a later plea if it

[13] **Ballantines' Index of Production** (2 August 2017); *see* **Procedural Order No. 5**, Annex 2, Dominican Republic's Request No. 44, pp. 79–80. It bears noting that the Ballantines initially resisted producing the evidence that forms the basis for the present motion, by objecting to the materiality and relevance of the Dominican Republic's request for "documents referencing when the Ballantines first became aware of the adoption of the Decree 571-09 and/or the creation of Baiguate National Park".

[14] *See* **Ex. R-169**, Emails between Michael Ballantine, Mario Mendez and Miriam Ancia of Empaca Redes, and Zuleika Salazar (22–29 September 2010) (original in Spanish); **Ex. R-170**, Email from Miriam Arcia to Michael Ballantine, Mario Mendez, and Zuleika Zalazar (22 September 2010) (original in Spanish).

considers the delay justified."[15] Leading commentary on the UNCITRAL Arbitration Rules has explained that "late" pleas due to the discovery of new evidence are precisely the kind of "justifiably late pleas" that should be admitted pursuant to the above-quoted provision of Article 23(2).[16] This interpretation also finds support in the jurisprudence:

> 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.[17]

16. Admission of the objection is further justified because doing so will cause no prejudice at all to the Ballantines, as they will have ample opportunity to respond. At a minimum, the Ballantines will have an opportunity to address the objection in their Rejoinder on Jurisdiction,[18] and then again during the Oral Hearing.[19] In principle, they could even do so in their upcoming Reply;[20] however, given the imminence of the latter filing (which is due 9 November 2017), the Dominican Republic would not object if the Tribunal were to grant the Ballantines a prudential additional amount of time to make a separate submission in response to this objection. Such submission would then be followed by a second round of briefing by the Ballantines in their Rejoinder on Jurisdiction, and by further discussion at the Oral Hearing, thereby giving the Ballantines a full opportunity to be heard.

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[15] **RLA-044,** UNCITRAL Arbitration Rules, Article 23(2).

[16] **RLA-091,** David D. Caron and Lee M. Caplan, The UNCITRAL Arbitration Rules: A Commentary (Second Edition), Oxford University Press (2013), p. 456 ("The last sentence of Article 23(2) thus expressly states … that the arbitral tribunal has discretion in limited circumstances to admit justifiably late pleas, such as due to the discovery of new evidence").

[17] **RLA-092,** *European American Investment Bank AG v. Slovak Republic*, PCA Case No. 2010-17, Second Award on Jurisdiction (4 June 2014) (Greenwood, Stern, Petsche), ¶ 115.

[18] To be filed by 21 May 2018 pursuant to Annex 1 of **Procedural Order No. 6**.

[19] To be held from 3 September 2018 to 7 September 2018 according to Annex 1 of **Procedural Order No. 6**.

[20] To be filed by 9 November 2017 pursuant to Annex 1 of **Procedural Order No. 6**.

17. Finally, it bears recalling that the Tribunal has an *ex officio* obligation to ascertain that the claims are admissible and within its jurisdiction. For example, Article 23(1) of the UNCITRAL Arbitration Rules provides, in relevant part, that "[t]he arbitral tribunal shall have the power to rule on its own jurisdiction . . . ."[21] It is understood that "the power to pronounce upon one's own jurisdiction encompasses the duty not only to affirm it when jurisdiction is extant but also *to reject it when it is not*."[22] As one leading observer on the UNCITRAL Arbitration Rules has noted, "[i]f the tribunal does identify a jurisdictional or admissibility issue of its own initiative, it goes without saying that it will have to ask the parties to address it, giving them a fair and sufficient opportunity to do so."[23]

18. The foregoing means that, having been apprised of the serious threshold defects in the subset of the Ballantines' claims that are based on the creation of the Park, the Tribunal would have an affirmative duty to determine whether or not Article 10.18.1 bars those claims.[24]

[21] **RLA-044,** UNCITRAL Arbitration Rules, Article 23(1).

[22] **RLA-095,** Jan Paulsson and Georgios Petrochilos, UNCITRAL Arbitration, Kluwer Law International (2017), UNCITRAL Arbitration Rules, Section III, Article 23 [Pleas as to the jurisdiction of the arbitral tribunal], ¶ 4 (emphasis added); *see also* ***id.***, ¶¶ 2, 11 ("[T]he tribunal has the power – indeed, the duty – to pronounce on objections to its jurisdiction . . . Further, the *travaux* make clear that the tribunal's power to 'rule on its own jurisdiction' encompasses the power to rule on whether in the circumstances it should exercise a jurisdiction that it has – in other words, the power to pronounce on the admissibility of the claim before it").

[23] **RLA-095,** Jan Paulsson and Georgios Petrochilos, UNCITRAL Arbitration, Kluwer Law International (2017), UNCITRAL Arbitration Rules, Section III, Article 23 [Pleas as to the jurisdiction of the arbitral tribunal], ¶ 19.

[24] Note that the Working Group II (Arbitration and Conciliation) of the United Nations Commission on International Trade Law made clear, in its fiftieth session held in New York, 9–13 February 2009, that for purposes of Article 23(1) of the UNCITRAL Arbitration Rules, "***the general power of the arbitral tribunal, referred to in paragraph (1), to decide upon its jurisdiction should be interpreted as including the power of the arbitral tribunal to decide upon the admissibility of the parties' claims*** or, more generally to exercise its own jurisdiction." *See* **RLA-096,** Report of Working Group II (Arbitration and Conciliation), UNCITRAL Report of 50th Session, UN Doc A/CN.9/669 (9 March 2009), ¶ 39 (emphasis added).

III. THE DOMINICAN REPUBLIC'S OBJECTION TO ADMISSIBILITY

A. Factual Background

19. In his witness statement dated 4 January 2017, Michael Ballantine indicated that he first learned of the creation of the Park on 13 September 2013.[25] The same position was taken by the Ballantines' fact witness Ms. Leslie Gil.[26]

20. In their pleadings, the Ballantines consistently represented that they first learned on 15 January 2014 of the restrictions imposed on their lands by Decree 571, which was dated 7 August 2009 and is the decree that created the Park. [27]

21. According to the Ballantines, throughout the period between August 2009 and January 2014, during which they interacted extensively with the MMA,[28] they lacked any knowledge that the existence of the Park had created any restrictions on the development of Project 3. Thus, in their Notice of Arbitration and Statement of Claim, they stated:

> 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. […] ***Without such notification, the Ballantines could not reasonably have known that the existence of the***

[25] **Michael Ballantine First Witness Statement**, ¶¶ 66–67 ("**M. Ballantine 1st Statement**") ("On September 13, 2013, my lawyer Mario Pujols, Miriam Arcia from Empacaredes, my administrator Leslie Gil and I met with Zacarias Navarro, MMA Director of Environmental Evaluation. ***Mr. Navarro informed me that the planned expansion was within the protected area of the Baiguate National Park***. ***This was the first time that MMA had ever mentioned the existence of a Park. . . . . After we learned of the creation of the National Park***, we requested documentation from the Ministry of Environment") (emphasis added).

[26] *See* **Leslie Gil First Witness Statement**, ("**L. Gil 1st Statement**"), ¶ 39 (asserting that at the end of September 2013 during a visit to Jamaca de Dios, two officials of the Ministry showed representatives of Jamaca de Dios a plan that indicated "that the area of expansion was inside the Baiguate park", and told them "of the decree and the date of its creation"); ¶¶ 39–40 (claiming that Ms. Gil asked the Ministry representatives "how it was possible that after so much time and 3 denials now they are telling us that the land was in a protected area"); ¶ 46 (claiming that at a meeting held on 19 December 2014 by the Ministry with other owners of land inside the Baiguate National Park, which Ms. Gil attended, "*[e]veryone had the same questions: How is it possible that this park existed and no-one knew about it*?") (emphasis added).

[27] **Notice of Arbitration and Statement of Claim**, ¶¶ 59–61 ; *see also* **Amended Statement of Claim**, ¶ 11.

[28] **Notice of Arbitration and Statement of Claim**, ¶ 60 (explaining that between August 2009 and January 2014 the MMA had interacted extensively with the Ballantines but had "never mentioned the national park").

national park could create restrictions on the development of Jamaca de Dios.[29]

22. The Ballantines even purported to offer an explanation for why they lacked any earlier knowledge that Decree 571 had imposed restrictions on the development of Project 3 of Jamaca de Dios: "[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."[30]

23. However, the newly revealed evidence shows that the Ballantines in fact knew about the restrictions imposed by the Park much earlier than they represented in their witness statements and in their Statement of Claim. In the document production mandated by the Tribunal,[31] the Ballantines produced two sets of critical documents: (1) an email dated 22 September 2010 to Michael Ballantine from Miriam Arcia (who is one of the consultants from the Ballantines' environmental consultancy firm Empaca);[32] and (2) a series of emails exchanged during the 22–29 September 2010 time period between Michael Ballantine, Miriam Arcia, and Mario Mendez (another environmental consultant from the Empaca firm).[33]

24. These documents, referred to jointly above and hereinafter as "the September 2010 Communications," form the basis of the Dominican Republic's present objection to

[29] **Notice of Arbitration and Statement of Claim**, ¶ 61 (emphasis added).

[30] **Notice of Arbitration and Statement of Claim**, ¶ 61.

[31] **Procedural Order No. 5**, Annex 2, Dominican Republic's Request No. 44, pp. 79–80 (ordering the Ballantines to produce "any document referencing when the Ballantines first became aware of the adoption of the Decree 571-09 and/or the creation of Baiguate National Park").

[32] *See* **Ex. R-170**, Email from Miriam Arcia to Michael Ballantine, Mario Mendez, and Zuleika Zalazar (22 September 2010), pp. 1–2 (original in Spanish).

[33] *See* **Ex. R-169**, Emails between Michael Ballantine, Mario Mendez and Miriam Arcia of Empaca Redes, and Zuleika Salazar (22–29 September 2010), pp. 1–2 (original in Spanish).

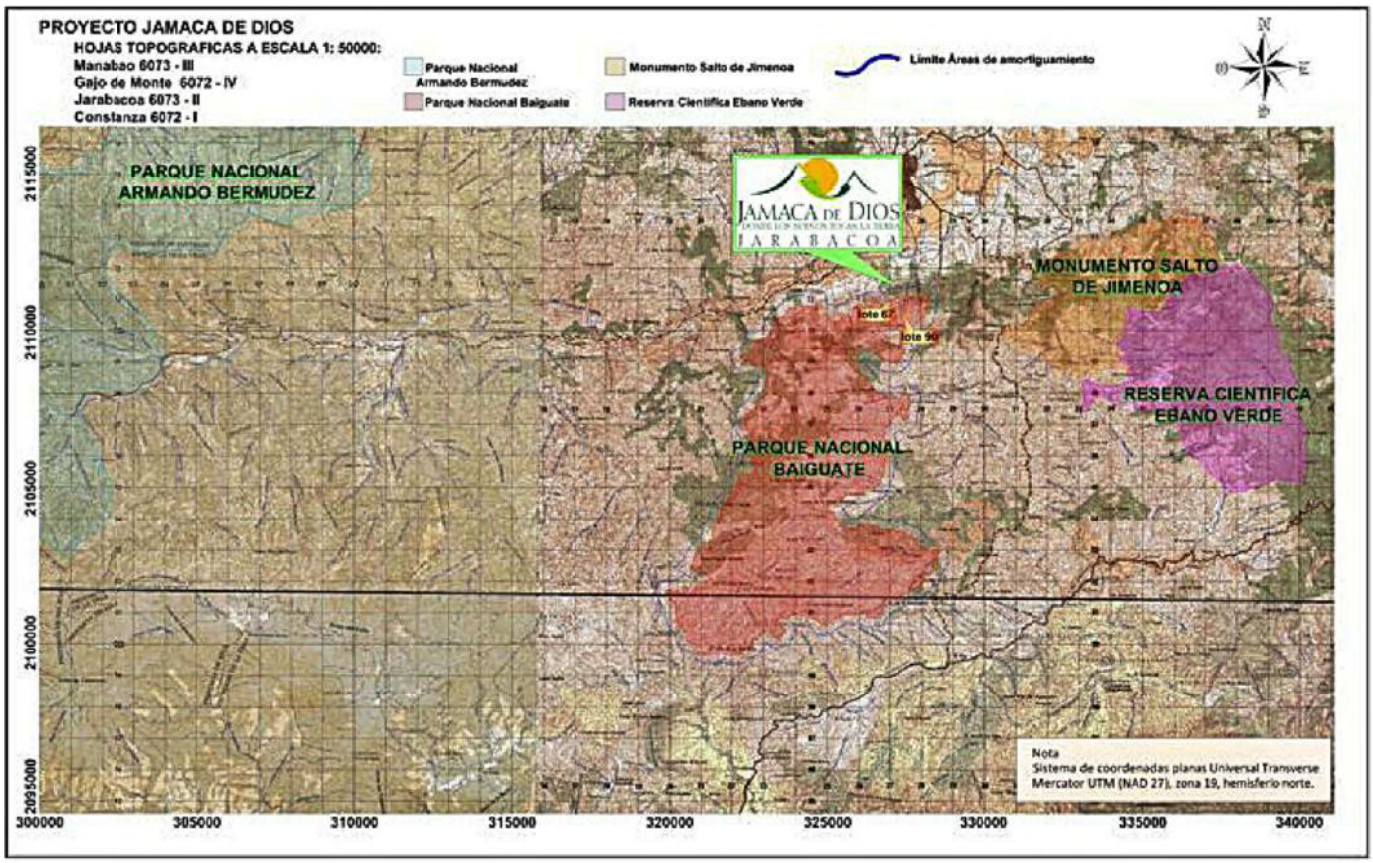
admissibility. As explained below, the documents show that the Ballantines were aware as of 29 September 2010, at the latest, of the following: (a) the creation of the Park; (b) the fact that the Ballantines' Project 3 land was located within the boundaries of the Park; (c) the restrictions imposed by the Park on the lands comprised within it, including the Ballantines' land; and (d) the effects of the foregoing on the Ballantines' planned Project 3.

25. On 22 September 2010, Ms. Arcia informed Mr. Ballantine by email of the following:

> I attach the map of the location of the protected areas in the area surrounding the Jamaca de Dios project. ***Note that the points we took in Lots 67 and 90, as you may observe, <u>are located within the protected area</u>***. This protected area is called Baiguate National Park. This is a Category II protected area.[34]

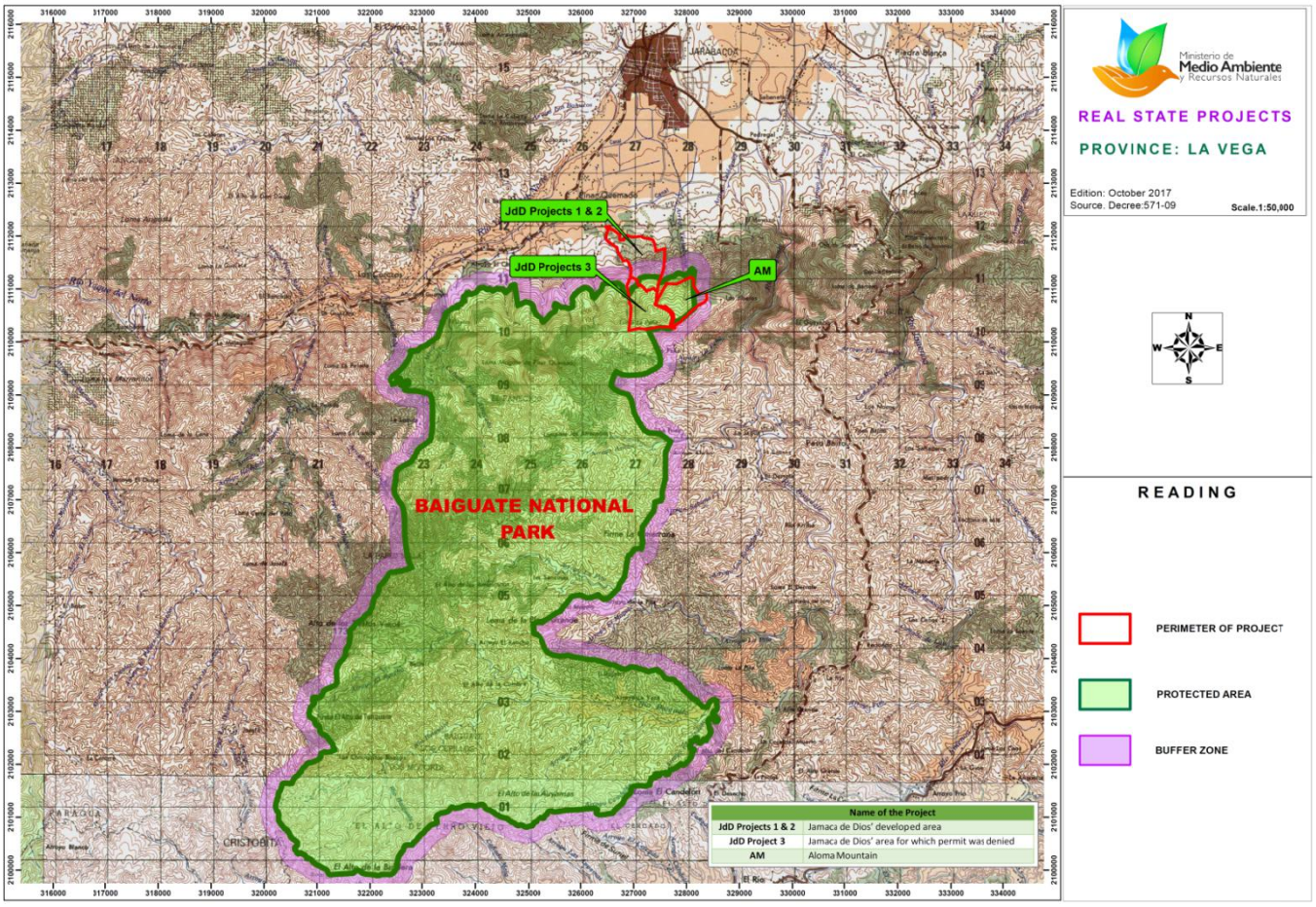
26. In addition to informing Mr. Ballantine that the Jamaca de Dios project was located within the Park, Ms. Arcia provided the following map, which confirms that on 22 September 2010 Mr. Ballantine had already been informed that Project 3 was inside the Park.

[34] **Ex. R-170**, Email from Miriam Arcia to Michael Ballantine, Mario Mendez, and Zuleika Zalazar (22 September 2010), pp. 1–2, on Jamaca de Dios inside Baiguate National Park (original in Spanish) (emphasis added).



27. The map sent by Ms. Arcia to Mr. Ballantine clearly shows that lots 67 and 90 of Jamaca de Dios are located inside the Park. The map above matches the map of the Baiguate National Park provided below, which was produced by the Ministry of the Environment, and which clearly shows its boundaries, the area of Jamaca de Dios that has been developed, and the area of Jamaca de Dios that the Ballantines were hoping to develop but for which they were denied a permit (Project 3). The latter map also shows that the lands where the Ballantines were

hoping to build Project 3 are inside the boundaries of the Park.



28. In addition to showing Mr. Ballantine that the lands where the Ballantines were hoping to build Project 3 were located inside the Park, Ms. Arcia shared crucial information with Mr. Ballantine concerning legal restrictions affecting those lands. For example, she brought to Mr. Ballantine's attention that, pursuant to the law on protected areas, the use of those lands was restricted to "scientific research, education, recreation, nature tourism, ecotourism."[35] Ms. Arcia even used red font to highlight the references to "nature tourism" and "ecotourism," thereby

[35] **Ex. R-170**, Email from Miriam Arcia to Michael Ballantine, Mario Mendez, and Zuleika Zalazar (22 September 2010), p. 1, on Jamaca de Dios inside Baiguate National Park (original in Spanish, no emphasis added, red font color in the original).

signaling clearly to the Ballantines the existence of limitations on the authorized uses for lands inside a Category II protected area, such as the Park.[36]

29. On the evening of 22 September 2010 — *i.e.*, the same day that Ms. Arcia informed Mr. Ballantine that the lands for Project 3 were inside the Park, and that their use was restricted to specific types of tourism — Mr. Ballantine himself wrote the following, in an email addressed to Ms. Arcia:

> *Ok this is the Baiguate National Park* but one additional question, is this to conform with the law on the environment signed by Leonel Fernandez? This law had coordinates? Is this the same or something new?[37]

30. By means of the foregoing, Mr. Ballantine acknowledged that he knew that the Park had been created. As evinced in the same string of emails, the next day, 23 September 2010, Ms. Arcia replied to Mr. Ballantine that "[t]he boundaries of the park are provided by Decree No. 571-09 signed by Leonel Fernandez dated 7 August 2009."[38] Further, a few days later, on 29 September 2010, Mario Mendez confirmed in an email to Mr. Ballantine that use of the Ballantines' lands located inside the Park was restricted:

> I have attentively and closely followed the conversations and queries that you have concerning *the declaration of protected area Baiguate Park which affects the project* . . . ***I remind you that the National Park's category permits low impact ecotourism projects such as yours, although the issue of roads, and management of sewage and other waste is for discussion*** . . . I remind you that what is most important is that the Ministry of Environment visit the area for the project and that it provide its technical, legal, and viability/non-viability opinion for the project . . .

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[36] *See* **Ex. R-170**, Email from Miriam Arcia to Michael Ballantine, Mario Mendez, and Zuleika Zalazar (22 September 2010), p. 1, on Jamaca de Dios inside Baiguate National Park (original in Spanish).

[37] *See* **Ex. R-169**, Emails between Michael Ballantine, Mario Mendez and Miriam Arcia of Empaca Redes, and Zuleika Salazar (22–29 September 2010), p. 2 (original in Spanish).

[38] **Ex. R-169**, Emails between Michael Ballantine, Mario Mendez and Miriam Arcia of Empaca Redes, and Zuleika Salazar (22–29 September 2010), p. 2 (original in Spanish).

> [N]otwithstanding the category of the protected area, the Ministry is in charge of defining the use and which types of projects yes, and which no.[39]

31. Given the foregoing, it is clear that by September 2010 at the latest, Mr. Ballantine already knew that the lands on which the Ballantines were hoping to develop Project 3 were located inside the Park, and that any such development would be restricted to certain limited permissible uses (namely, ecotourism and/or nature tourism). He was informed of this not once, but several times, by his own environmental consultants in the September 2010 Communications.[40] Moreover, Mr. Ballantine was even warned by Mr. Mendez that it was uncertain whether he would be permitted to build roads and waste management facilities in a Category II protected area such as the Park.[41]

32. Notwithstanding the advice of their own environmental consultants that only "low impact ecotourism projects" would be permitted inside the Park,[42] the Ballantines moved forward with the development of a high-impact luxury complex.[43] According to the Ballantines' own Notice of Intent and Amended Statement of Claim, Project 3 of Jamaca de Dios was to include: extending the road further up the mountain; subdividing the upper lands into 70 lots for

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[39] **Ex. R-169**, Emails between Michael Ballantine, Mario Mendez and Miriam Arcia of Empaca Redes, and Zuleika Salazar (22–29 September 2010), p. 1 (original in Spanish) (emphasis added).

[40] *See* **Ex. R-170**, Email from Miriam Arcia to Michael Ballantine, Mario Mendez, and Zuleika Zalazar (22 September 2010), p. 1 (original in Spanish); *see* **Ex. R-169**, Emails between Michael Ballantine, Mario Mendez and Miriam Arcia of Empaca Redes, and Zuleika Salazar (22–29 September 2010), p. 1 (original in Spanish).

[41] **Ex. R-169**, Emails between Michael Ballantine, Mario Mendez and Miriam Arcia of Empaca Redes, and Zuleika Salazar (22–29 September 2010), p. 1 (original in Spanish).

[42] *See* **Ex. R-169**, Emails between Michael Ballantine, Mario Mendez, Miriam Arcia of Empaca Redes, and Zuleika Salazar (22–29 September 2010), p. 1 (original in Spanish).

[43] **Ex. R-171**, Emails between Michael Ballantine and Bob Webb (5–12 August 2012), p. 2, regarding the construction of a luxury development inside the Park (Michael Ballantine informing marketing and luxury hotel consultant Bob Webb: "We are going full sped [*sic*] ahead with the suite/junior suite concept above the restaurant and *have expanded the vision to include a luxury hotel and spa in the other area up top*") (emphasis added); *see also* **Amended Statement of Claim**, ¶ 64 (explaining that the "Ballantines initiated the second phase of their investment — intending to market and ultimately sell at least 70 lots on *the upper portion of their property and to construct luxury private homes on those lots*) (emphasis added); ***id.***, ¶ 69 (explaining that "the Ballantines also intended to construct *a boutique hotel in Phase 2*") (emphasis added).

the construction of luxury homes; constructing a luxury hotel; constructing a spa; constructing a second restaurant in the upper part of the mountain; constructing a "mountain lodge" of apartments across from the existing restaurant; and constructing a slightly larger apartment complex nearer to the base of the property.[44] This expansion was far more ambitious than their original Project 2,[45] which the Ballantines themselves describe as involving the construction of a restaurant and delineating 80 to 90 individual lots for the future development of luxury homes.[46] The Ballantines knew that their Project 2, and the infrastructure that was put in place for it, was not a *low impact project*.[47] Thus, for example, in their own Environmental Impact Assessment related to Project 2 (which was of a far lesser scale than Project 3), the Ballantines admitted that the Project 2 development would entail "*highly significant"* and *"medium"* environmental impacts affecting, among other things, the land, water and flora.[48] This assessment explained that the change in the use of the land caused by the Project 2 would entail the "disappearance of some of the natural ecosystems . . . temporary or permanent migration of other species . . . [and]

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[44] *See* **Notice of Intent to Submit a Claim to Arbitration**, ¶ 16; *see also* **Amended Statement of Claim**, ¶ 25.

[45] As explained above, the Dominican Republic defines herein as "Project 2" as the Ballantines' construction of a restaurant and a housing development, on part of the lower portion of the Ballantines' mountain property, which are comprised within what the Ballantines referred to as "Phase 1" of Jamaca de Dios.

[46] *See* **Notice of Intent to Submit a Claim to Arbitration**, ¶ 14 ("[T]he Investors subdivided the lower portion of their mountain property in to over 90 lots for private buyers to build luxury homes . . . built a popular line dining restaurant, Aroma de la Montaña (famous for its rotating floor); and developed common areas for the community, including tennis and basketball courts, an aerobics center, a playground, a recreational lake stocked with fish, and an organic garden"); *see also* **Notice of Arbitration and Statement of Claim**, ¶ 36 (a); **Ex. R-168**, Emails between Michael Ballantine and Jens Richter, environmental and tree plantation consultant (28 September 2010), p. 2 (in which Mr. Ballantine wrote to his consultant Jens Richter on 29 September 2010, just a few days after Mr. Ballantine had been warned that building roads in the Park might not be permitted: "*When we open more roads* I want to reforest ….") (emphasis added).

[47] *See* **Amended Statement of Claim**, ¶ 24 ("[T]he Ballantines would develop the lower portion of the property … . This initial phase would also include the creation of the robust infrastructure necessary for development of the entire mountain").

[48] **Ex. R-103**, Environmental Impact Assessment, Jamaca de Dios (August 2007), pp. 67–69, 72. *See e.g., **id.***, p. 68 ("Another negative impact to the soil, associated with project construction, is an increase in the risk of erosion . . . [i]t is classed as a *highly significant* impact . . . Increased surface water and groundwater pollution, caused by sediments resulting from erosion, spilled liquid and solids, and construction waste . . . has been rated as a *medium* importance impact") (original emphasis omitted, emphasis added).

a complete transformation of the natural landscape," and described such impacts as "permanent . . . irreversible . . . [and] very significant."[49] The Ballantines' assessment also admitted that the construction of the Project 2 roads would entail "an increase in the risk of erosion due to land clearing and cleaning" and the "[m]odification of rainwater surface flow pattern, which implies a decrease in the infiltration rate."[50] The impact caused by the construction of the roads was described by the Ballantines to be "one of the most significant," and its effects on waterways was considered an "irreversible and permanent" negative impact.[51]

33. In light of the foregoing, and taking into account that Project 3 was far more ambitious than Project 2, it is inconceivable that the Ballantines would not have known, as of September 2010, that the restrictions imposed by the Park would present an unsurmountable obstacle to their proposed expansion project (*i.e.*, Project 3). Yet, they decided to move ahead with it anyway.

B. Objection to Admissibility

1. Article 10.18.1 of DR-CAFTA

34. To recall, Article 10.18.1 of DR-CAFTA states:

> ***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*** (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***.[52]

[49] **Ex. R-103**, Environmental Impact Assessment, Jamaca de Dios (August 2007), p. 67.
[50] **Ex. R-103**, Environmental Impact Assessment, Jamaca de Dios (August 2007), p. 68 (emphasis in original).
[51] **Ex. R-103**, Environmental Impact Assessment, Jamaca de Dios (August 2007), pp. 68–69.
[52] **Ex. R-010**, DR-CAFTA, Article 10.18.1 (emphasis added).

35. To determine whether claims submitted to arbitration lie within the relevant limitation period (*i.e.*, within the three years prior to the date of submission of the claims to arbitration), a tribunal must determine (a) the date on which the claimant first acquired actual or constructive knowledge of the alleged breach; and (b) the date on which the claimant first acquired actual or constructive knowledge of the damages resulting from such breach.[53] If either of these two dates is more than three years before the date on which the relevant claims were submitted to arbitration,[54] the claims are time-barred.

36. Here, the relevant claims were submitted on 11 September 2014, by virtue of the Notice of Arbitration of that date. Accordingly, if by 10 September 2011 the Ballantines already had, or should have had, knowledge of the alleged breach(es), and of the loss or damages caused thereby, the relevant claims are barred and should be dismissed. As shown below, the relevant knowledge was acquired far earlier —September **20*10*** — and accordingly the claims are indeed barred.

2. The Date of the Ballantines' Actual or Constructive Knowledge

37. The Ballantines allege that their investments have been subject to several expropriatory acts,[55] the first of which was "Respondent's creation of the [Baiguate] National Park," which they claim "deprived [the Project 3 land] of any use."[56]

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[53] **Ex. R-010**, DR-CAFTA, Article 10.18.1.

[54] According to the DR-CAFTA, a claim is deemed submitted to arbitration when the notice of arbitration and the statement of claim are received by the respondent. *See* **Ex. R-010**, DR-CAFTA, Article 10.16.4(c) ("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").

[55] *See* **Amended Statement of Claim**, ¶¶ 237–239 (alleging that the expropriatory acts of the Dominican Republic included (a) the creation of the Baiguate National Park, (b) the denial of a permit to develop Project 3 because "some of the land had slopes exceeding 60 percent", and (c) the "refusal to issue a no objection letter for the Mountain lodge [project]").

[56] *See* **Amended Statement of Claim**, ¶ 238.

38. The Ballantines further assert that the Dominican Republic breached its obligation of fair and equitable treatment because, according to them, the Dominican Republic (a) created the Park in secret, (b) did not provide compensation for the portions of land that were "expropriated" by means of their inclusion within the boundaries of the Park, and (c) drew the boundaries of the Park to encompass the Ballantines' property while excluding other, Dominican-owned property.[57]

39. Additionally, the Ballantines allege that the Dominican Republic breached its obligations of national treatment and most-favored-nation treatment by creating the Park, thereby rendering completely useless their property.[58] They argue that "[w]hile the boundaries of Baiguate National Park were drawn to include all of the upper portion of the Ballantines' property . . . the boundaries of the Park were drawn to exclude these competing properties [*viz,* Dominican-owed Jarabacoa Mountain Garden, Dominican-owned Quintas del Bosque, and majority Dominican-owned Paso Alto]."[59]

40. All of the aforementioned alleged breaches stem from the creation of the Park, which was effected pursuant to Decree 571-09 dated 7 August 2009.[60]

41. As explained by the tribunal in *Corona,* "DR-CAFTA Article 10.18.1 contemplates two forms of knowledge of breach and loss or damage: *actual knowledge* — what the Claimant did in fact know at a given time — and *constructive knowledge* — what the

[57] *See* **Amended Statement of Claim**, ¶ 211.
[58] *See* **Amended Statement of Claim**, ¶ 192.
[59] *See* **Amended Statement of Claim**, ¶ 137.
[60] *See* **Statement of Defense**, ¶ 238.

Claimant should have known at a given time . . . *[I]t is sufficient that the Claimant acquired either actual or constructive knowledge*."[61]

42. Here, as discussed below, the September 2010 Communications show that the Ballantines had ***actual*** knowledge on 29 September 2010 of the relevant alleged breaches and related losses or damage.

a. Knowledge of the Alleged Breaches

43. Very few tribunals have addressed expressly the exact meaning of the term "knowledge of the *breach*." However, two NAFTA decisions (in which the respective tribunals were presented with NAFTA provisions equivalent in all material aspects to Article 10.18.1 of DR-CAFTA) offer particular insight. In addressing the time-bar established by Article 1116(2) of NAFTA, the *UPS v. Canada* tribunal explained that the relevant question was "when [claimant] first had or should have had notice of the existence of ***conduct*** alleged to breach NAFTA obligations and of the losses flowing from it."[62] In *Grand River v. United States of America*, the tribunal indicated that its task was to determine if the record showed knowledge by the claimant "***of the measures complained of*** as breaches of relevant Articles of NAFTA."[63]

44. It is clear from *UPS* and *Grand River* that the relevant inquiry is not if and at what point the claimant became aware that a particular measure constitutes a treaty breach, but rather simply if and at what point the claimant became aware of the measure itself. This was patent in *Grand River*, in which the tribunal held that the relevant claims were barred because "the

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[61] **RLA-052**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award (31 May 2016) (Dupuy, Mantilla-Serrano, Thomas) ("***Corona***"), ¶ 217 (emphasis added).

[62] **CLA-015**, *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits (24 May 2007) (Keith, Fortier, Cass) ("***UPS***"), ¶ 28 (emphasis added).

[63] **RLA-099,** *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) (Nariman, Anaya, Crook) ("***Grand River***"), ¶ 60 (emphasis added).

Claimants should have known prior to [the critical date] of the [statutes], any related measures and enforcement actions taken prior to that date . . . ."[64]

45. Here, as explained above, the evidence shows that as of 29 September 2010 — at the latest — the Ballantines already knew of the measure that they allege breached the DR-CAFTA (*viz.*, the creation and restrictions of the Park). Specifically, the evidentiary record now shows that the Ballantines were put on notice on 29 September 2010 of (a) the creation of the Park, (b) the restrictions it imposed, and (3) the fact that Project 3 was incompatible with such restrictions.

46. A recent award in another DR-CAFTA case —*Spence v. Costa Rica* — notes that "the 'should have first acquired knowledge' test in Article 10.18.1 is an objective standard; what a prudent claimant should have known or must reasonably be deemed to have known."[65] Prior tribunals have repeatedly confirmed that constructive knowledge "entails notice that is imputed to a person, either from knowing something that ought to have put the person to further enquiry, or from willfully abstaining from inquiry in order to avoid actual knowledge."[66]

47. Accordingly, to the extent that the creation of the Park imposed limitations on the use of the Project 3 land that amount to an expropriation, as the Ballantines have alleged in their pleadings,[67] the Ballantines, acting as prudent investors, should have known by 29 September 2010 at the latest, that the expropriation had supposedly occurred.

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[64] **RLA-099,** *Grand River*, ¶ 83

[65] **RLA-098,** *Spence International Investments, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) (30 May 2017) (Bethlehem, Kantor, Vinuesa) ("***Spence***"), ¶ 209. This concept ("should have known or must reasonably be deemed to have known") is often referred to as "constructive knowledge." *See e.g.* **RLA-052,** *Corona*, fn. 180.

[66] **RLA-099,** *Grand River*, ¶ 59; *see also* **RLA-098,** *Spence*, ¶ 209.

[67] *See* **Amended Statement of Claim**, ¶ 14 ("At a minimum, the Dominican Republic has expropriated the Ballantines' investment by the creation of the National Park and thus must compensate the Ballantines for its

Footnote continued on next page

48. As to the Ballantines' claim of breach of fair and equitable treatment — which relates to the supposed secrecy in the creation of the Park, its boundaries, and the lack of compensation for the portions of land that were allegedly "expropriated" by means of their inclusion inside the Park [68] — the underlying facts were also known to the Ballantines by 29 September 2010 at the latest. By that date, the Ballantines knew that the Park had supposedly been created "in secret," that it had affected their lands, and that they had not received compensation.

49. Concerning the Ballantines' claims of breach of national treatment and most-favored-nation treatment — which relate to the creation of the Park and the supposed exclusion from the Park of Jarabacoa Moutain Garden, Quintas del Bosque, and Paso Alto — the underlying facts were also known by the Ballantines by 29 September 2010 at the latest. By such date, the Ballantines knew that their Project 3 land was inside the Park, they had a map with the coordinates of the Park, and Mr. Ballantine was familiar with the location of other mountain projects in Jarabacoa, including Jarabacoa Moutain Garden, Quintas del Bosque, and Paso Alto.[69]

50. Particular knowledge of treaty rights has not been deemed relevant for purposes of assessing the existence of actual or constructive knowledge of the breach as required by

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significant commercial value"); ***id.***, ¶ 119 ("Despite depriving the Ballantines of the reasonable commercial use of their Phase 2 property, the Dominican Republic has never offered or discussed any 'fair value' compensation for the Ballantines, or any compensation at all for the significant value of the Ballantines' land in the Baiguate National Park").

[68] *See* **Amended Statement of Claim**, ¶ 211.

[69] *See* **M. Ballantine 1st Statement**, ¶ 30 (describing how Jarabacoa Mountain Garden "has steeper terrain than Jamaca de Dios, and is located directly above the Baiguate River"); ***id.,*** ¶ 32 (explaining that Paso Alto was located on a "spectacular piece of mountain property that was only two miles from [Jamaca de Dios]"); *see also* **Jose Roberto Hernández First Witness Statement**, ¶ 10 (describing how Mr. Ballantine and Mr. Hernández would meet two or three times a year in Jamaca de Dios or in Quintas del Bosque to discuss matters concerning afforestation and sales).

Article 10.18.1 of DR-CAFTA.[70] But even if such knowledge were required, as of September 2010, the Dominican Republic had for several years been conducting a robust media campaign in civil society and the business community about DR-CAFTA and its investment chapter (including the publication of newspaper articles, books, seminars, brochures, and capacity-building).[71] In addition, there is also proof that by September 2010, the Ballantines had legal counsel advising them on their investment for the planned Project 3 in Jamaca de Dios.[72] Accordingly, to the extent that knowledge of treaty rights were considered a relevant element — *quod non* — on the basis of the Dominican Republic's publicity campaign concerning the DR-CAFTA and of their own counsel's advice, the Ballantines should have had knowledge of the relevant treaty rights, and of the alleged breach thereof, by 29 September 2010 at the latest.

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[70] See **CLA-015**, *UPS*, ¶ 28 ("We agree with UPS that its claims are not time-barred. We put aside for the moment *the question of when it first had or should have had notice of the existence of conduct alleged to breach NAFTA obligations* and of the losses flowing from it") (emphasis added); *see also* **RLA-099,** *Grand River*, ¶ 60 ("The Tribunal must then proceed to assess the documentary evidence brought on record intended to show such *'constructive knowledge' of the measures complained of as breaches* of relevant Articles of NAFTA") (emphasis added).

[71] *See* **Ex. -174**, *Rep. Dominicana firma el CAFTA*, BBC Mundo (6 August 2004); *see* **Ex. R-175**, Q&A: The CAFTA Debate, The New York Times (18 July 2005); *see* **Ex. R-176***,* Debating the Central American Free Trade Act, PBS (3 November 2005); *see* **Ex. R-177***, Los ejes de la política comercial dominicana*, Listín Diario (2 July 2007); *see* **Ex. R-178**, *Plan de Difusión/Comunicación del DR CAFTA, Dirección de Comercio Exterior de la República Dominicana* (December 2007–November 2009); *see* **Ex. R-179**, *Comercio Internacional DR CAFTA: Compromisos y Oportunidades, Secretaria de Estado de Industria y Comercio, Dirección de Comercio Exterior y Administración de Tratados Comerciales, Consejo Nacional de Competitividad* (27 August 2009); *see* **Ex. R-180**, *DR-CAFTA Tres Años de Compromisos y Logros, Ministerio de Industria y de Comercio de la República Dominicana* (2010), p. 83–84; *see* **Ex. R-181**, *Estrategia De Comunicación Para El DR-CAFTA, Dirección de Comercio Exterior de la República Dominicana* (2006); *see* **Ex. R-182**, *Inversión Bajo el DR-CAFTA, Secretaria de Estado de Industria y Comercio* (17–18 July 2007); *see* **Ex. R-183***, El Arbitraje de Inversión y la Defensa del Estado en R.D., Secretaria de Estado de Industria y Comercio* (11–12 September 2008); *see* **Ex. R-184**, *La Solución de Controversias en el DR-CAFTA, Instituto de Comercio Exterior e Innovación Empresarial (I-CEi)* (8 October 2009); *see* **Ex. R-185***, Seminario Avanzado de Capacitación Sobre Administración de Tratados de Libre Comercio: Las Controversias en Materia de Inversión*, Organization of American States, United Nations Commission on Trade and Development, *Secretaria de Estado de Industria y Comercio, Centro de Exportación e Inversión de la República Dominicana, Agencia Canadiense de Desarrollo Internacional* (18–19 May 2007).

[72] *See* **M. Ballantine Second Statement** (explaining that after naturalizing, Mr. Ballantine "hired Dominican counsel" as he began the process to register Jamaca as a foreign investment),¶ 28; *see* **Response to Bifurcation**, ¶ 45a; *see* **Ex. R-173**, Email from Salcedo & Astacio, Ballantine legal counsel, to the Dominican Investment Center (CEI-RD) (10 August 2010) (referring to the process of registration of investment of Jamaca and to Michael Ballantine as her "client"), p. 1; *see also* **Ex. R-172,** Supplemental Request for Registration of Investment by Salcedo & Astacio, Ballantine legal counsel (6 October 2010), pp. 1–2 (supplementing, on behalf of the Ballantines, their original request for registration of their investment) (original in Spanish).

b. Knowledge of the Alleged Loss

51. The Ballantines have alleged that the immediate effect of the restrictions imposed by the creation of the Park was to deprive them of the reasonable commercial use of the Project 3 land comprised therein.[73] This means that they knew that the restrictions imposed by the Park had had an adverse impact on their Project 3, and thus had caused them loss or damage. Accordingly, by September 2010, along with *actual* knowledge of the restrictions imposed by the Park, the Ballantines had *actual* knowledge of the purported damage or loss incurred as a result thereof.

52. The requisite knowledge of breach and loss incurred was acquired as soon as the Ballantines knew or should have known of the limitations imposed by the creation of the Park.[74] For the "knowledge of loss or damage" requirement under Article 10.18.1 to be met, it is not necessary for the Ballantines to have known the exact amount of damages allegedly suffered.[75] Rather, it is sufficient for them to have known that *some* injury or loss was incurred.[76] Furthermore, as confirmed recently by another DR-CAFTA tribunal, "[i]t is the first appreciation of loss or damage in consequence of a breach that starts the limitation clock ticking."[77]

53. To the extent that the Ballantines' consider that the restrictions imposed on their lands by the creation of the Park deprive them of "significant commercial value" and of

[73] *See* **Amended Statement of Claim**, ¶¶ 14, 119.

[74] *See* **Section III.B** above, ¶¶ 27, 29.

[75] *See* **RLA-052,** *Corona*, ¶ 194 ("in order for the limitation period to begin to run, it is not necessary that . . . the amount of loss or damage suffered be precisely determined"); *see also* **RLA-098**, *Spence*, ¶ 213 ("[A]ctual or constructive knowledge of the loss or damage incurred in consequence of the breach implies that such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred. It neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result").

[76] **CLA-023,** *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002) (Stephen, Crawford, Schwebel), ¶ 87.

[77] **RLA-098**, *Spence*, ¶ 213.

"reasonable commercial use," as they repeatedly assert in their pleadings,[78] the Ballantines' first appreciation of the damages incurred should have been, at the latest, on 29 September 2010.

54. Since the Ballantines knew or had reason to know by 29 September 2010 of the alleged breaches related to the Park as well as of the alleged loss or damage incurred as a result thereof, and since that date precedes 11 September 2011, the elements of Article 10.18.1 are satisfied. The Ballantines' expropriation, fair and equitable treatment, national treatment, and most-favored-treatment claims based on the creation and restrictions of the Park therefore fall outside the scope of the Dominican Republic's consent to arbitration under the DR-CAFTA, and are therefore inadmissible.

[78] *See* **Amended Statement of Claim**, ¶¶ 14, 119.

IV. REQUEST FOR RELIEF

For the reasons articulated above, the Dominican Republic respectfully requests:

1. That the Tribunal dismiss all of the Ballantines' claims related to the alleged expropriation of the lands comprised within the Park resulting from the creation and restrictions of the Park, on the basis that such claims are inadmissible — or, alternatively, on the basis of lack of jurisdiction — by virtue of Article 10.18.1 of DR-CAFTA;

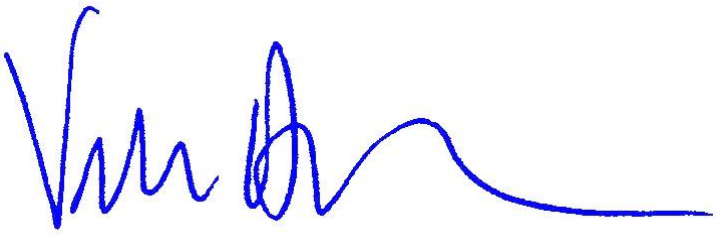
2. That the Tribunal dismiss all of the Ballantines' claims related to an alleged failure by the Dominican Republic to provide fair and equitable treatment in connection with the creation of the Park, on the basis that such claims are inadmissible — or, alternatively, on the basis of lack of jurisdiction — also by virtue of Article 10.18.1 of DR-CAFTA;

3. That the Tribunal dismiss all of the Ballantines' claims related to alleged violations of national treatment and most-favored-nation treatment by the Dominican Republic in connection with the creation of the Park, on the basis that such claims are inadmissible — or, alternatively, on the basis of lack of jurisdiction — also by virtue of Article 10.18.1 of DR-CAFTA;

4. That the Tribunal grant to the Dominican Republic all of the costs of the proceeding, as well as the full amount of the Dominican Republic's legal fees and expenses; and

5. That the Tribunal award to the Dominican Republic such other relief as the Tribunal may deem just and proper.

Respectfully submitted,



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