

**PCA Case No. 2016-17**

**IN THE MATTER OF AN ARBITRATION UNDER THE DOMINICAN REPUBLIC-  
CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT,  
SIGNED ON AUGUST 5, 2004 (“CAFTA-DR”)**

**– and –**

**THE UNCITRAL ARBITRATION RULES (AS ADOPTED IN 2013)  
(the “UNCITRAL Rules”)**

**– between –**

**MICHAEL BALLANTINE AND LISA BALLANTINE**

**(the “Claimants”)**

**– and –**

**THE DOMINICAN REPUBLIC**

**(the “Respondent”, and together with the Claimants, the “Parties”)**

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**PROCEDURAL ORDER NO. 10**

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*Tribunal*

Prof. Ricardo Ramírez Hernández (Presiding Arbitrator)  
Ms. Marney L. Cheek  
Prof. Raúl Emilio Vinuesa

*Registry*

**Permanent Court of Arbitration  
Mr. Julian Bordaçahar**

**May 14, 2018**

## A. PROCEDURAL HISTORY

1. On March 4, 2018, the Tribunal issued Procedural Order No. 8, by which it granted the Respondent's Emergency Application,<sup>1</sup> under certain conditions. Among those, the Tribunal stated that "*inasmuch as the Tribunal allows the Respondent to have access to the Claimants' premises, it also orders the Respondent to facilitate the visits of the Claimants' experts to the various other properties and developments at issue in this case.*"<sup>2</sup>
2. Following a request from the Respondent to rescind certain parts of Procedural Order No. 8, and after having heard the Parties, on April 20, 2018, the Tribunal issued Procedural Order No. 9, by which it decided not to disturb its previous ruling, and took the opportunity to order:
  - a. the Parties to agree on a time frame for the visits and inform the Tribunal by no later than April 30, 2018.
  - b. that the visits be finalized by no later than June 15, 2018.
  - c. that any new evidence derived from these visits should be submitted in accordance with Rule 6.4 of our Procedural Order No.1 and by no later than July 15, 2018.<sup>3</sup>
3. By letter dated April 26, 2018, the Respondent requested clarification of Procedural Order No. 8 and No. 9, respectively ("**Respondent's Clarification Request**"). By e-mail of the same date, the Claimants requested an opportunity to reply.
4. By letter dated April 27, 2018, the Tribunal granted the Claimants' request for leave to answer to the Respondent's Clarification Request.
5. By e-mail received on April 28, 2018, the Respondent informed, *inter alia*, the Tribunal that "*it appears that it will not be possible for the Parties to agree by April 30, 2018 (which is this coming Monday) on a time frame for the proposed visits.*" Thus, it requested the Tribunal to set a new deadline.
6. By letter dated April 30, 2018, the Tribunal took note of the Respondent's letter and informed the Parties that a new deadline would be set in due course. Likewise, the Tribunal granted the Claimants an opportunity to comment on the Respondent's e-mail by May 2, 2018.
7. By letter dated May 2, 2018, the Claimants submitted their answer to the Respondent's Clarification Request and e-mail of April 28, 2018.
8. By e-mail received on May 3, 2018, the Respondent requested leave to file comments to the Claimants' letter dated May 2, 2018.

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<sup>1</sup> As defined in Procedural Order No. 8.

<sup>2</sup> Procedural Order No. 8, para. 25.

<sup>3</sup> Procedural Order No. 9, para. 40.

9. By letter dated May 4, 2018, the Tribunal granted the Respondent's request and also invited the Claimants to submit their comments thereof.
10. By letter dated May 7, 2018, the Respondent submitted its comments to the Claimants' letter dated May 2, 2018.
11. By letter dated May 9, 2018, the Claimants submitted their comments to the Respondent's letter dated May 7, 2018.

## **B. POSITION OF THE PARTIES**

### **1. The Respondent's Position**

12. The Respondent requests the Tribunal to clarify Procedural Orders No. 8 and 9.<sup>4</sup> In particular, in Procedural Orders No. 8 and 9, the Tribunal ordered, respectively, "*the Respondent to facilitate the visits of the Claimants' experts to the various other properties and developments at issue in this case*"<sup>5</sup>, and "*the Parties to agree on a time frame for the visits and inform the Tribunal by no later than April 30, 2018.*"<sup>6</sup>
13. After expressing that it stands fully ready and willing to assist,<sup>7</sup> the Respondent requests clarifications on two aspects.<sup>8</sup> First, it maintains that "*it is not clear specifically which "other properties or developments" are covered by the Tribunal's orders*". And second, "*and independently of the locations to which the POs apply, it is not clear what actions specifically the Tribunal wishes that the Dominican Republic take in respect of each site.*"<sup>9</sup>
14. Regarding the first clarification, the Respondent explains that "*in their pleadings, the Ballantines made reference to a wide variety of real estate development projects in the Dominican Republic.*"<sup>10</sup> However, only 12 of them are the subject of claims in this arbitration<sup>11</sup> and the Claimants have already visited 8 of those.<sup>12</sup> Therefore, the Respondent contends that it would seem that Aloma

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<sup>4</sup> Respondent's Letter to the Tribunal, dated April 26, 2018, p. 1.

<sup>5</sup> Procedural Order No. 8, para. 25.

<sup>6</sup> Procedural Order No. 9, para. 40a).

<sup>7</sup> In the same vein, the Respondent asserts that "it reconfirms its willingness to make the required efforts to implement the POs", Respondent's Letter to the Tribunal, dated May 7, 2018, p. 1.

<sup>8</sup> Respondent's Letter to the Tribunal, dated April 26, 2018, pp. 1 and 2.

<sup>9</sup> Respondent's Letter to the Tribunal, dated April 26, 2018, pp. 1 and 2.

<sup>10</sup> Respondent's Letter to the Tribunal, dated April 26, 2018, p. 1.

<sup>11</sup> See Reply, dated November 9, 2017, para. 104 – 169, 456. It mentions that the proper comparators include the following projects: Quintas del Bosque I, Quintas del Bosque II, Jarabacoa Mountain Garden, Aloma Mountain, Paso Alto, Mirador del Pino, Sierra Fria, La Montaña, Rancho Guaraguao, Alta Vista, Monte Bonito, and Los Auquelles.

<sup>12</sup> Respondent's Letter to the Tribunal, dated April 26, 2018, p. 1; Respondent's Letter to the Tribunal, dated May 7, 2018, p. 4. According to the Ballantines' experts, relied on in their Reply, they have already visited Jarabacoa

Mountain is the only other property or development for which it would be required to facilitate a visit.<sup>13</sup> However, because the use of the plural in Procedural Order No. 8 suggests there are “*multiple sites for which access must be facilitated*”, the Respondent requests the Tribunal to identify “*the specific sites to which the Dominican Republic should facilitate a visit.*”<sup>14</sup>

15. The Respondent emphasizes that it is the Ballantines’ responsibility to identify the properties and propose a timetable. It explains that, by the time the Respondent had sent its April 26 letter to the Tribunal, the Ballantines had not yet contacted the Dominican Republic neither to identify the properties to be visited, nor to propose a specific timetable.<sup>15</sup>
16. Per the Respondent, the identification of the properties is essential because they are owned by “*private sector third parties.*”<sup>16</sup> Without it, it is unclear how the Respondent can agree on a timetable.<sup>17</sup> The Respondent considers it unreasonable to expect the Dominican Republic to “guess” which properties and projects the Ballantines wish to visit, when they mentioned more than 20 in their written submissions.<sup>18</sup>
17. Additionally, the Respondent contends that the Claimants are distorting the facts concerning the properties and projects they refer to in their letter, dated May 2, 2018. Neither Aloma Mountain – which is located inside Baiguata National Park –, nor Jarabacoa Mountain Garden, Mirador del Pino, and Paso Alto – located outside of it – are selling properties and/or building homes as it was planned in Jamaca de Dios’ Phase 2.<sup>19</sup> Furthermore, the permits granted to Quintas del Bosque I and II, and La Montaña – which are outside of the Baiguata National Park – were subject to conditions, for environmental reasons.<sup>20</sup>
18. Regarding the second clarification, the Respondent would like to know which specific actions the Tribunal would like the Respondent to take in respect of each site. While the Respondent would be willing to “*agree with the Ballantines on a general timeframe for site visits, to coordinate with the owners of the relevant property (or properties), and to ask for the cooperation of such owners*”,<sup>21</sup>

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Mountain Garden, Quintas del Bosque I, Quintas del Bosque II, Paso Alto, Rancho Guaraguao, La Montana, Mirador del Pino, and Los Aquelles.

<sup>13</sup> Respondent’s Letter to the Tribunal, dated April 26, 2018, p. 2.

<sup>14</sup> Respondent’s Letter to the Tribunal, dated April 26, 2018, p. 2.

<sup>15</sup> Respondent’s Letter to the Tribunal, dated May 7, 2018, p. 1.

<sup>16</sup> Respondent’s E-mail to the Tribunal, received on April 28, 2018.

<sup>17</sup> Respondent’s Letter to the Tribunal, dated May 7, 2018, p. 2.

<sup>18</sup> Respondent’s Letter to the Tribunal, dated May 7, 2018, p. 2.

<sup>19</sup> Respondent’s Letter to the Tribunal, dated May 7, 2018, p. 4.

<sup>20</sup> Respondent’s Letter to the Tribunal, dated May 7, 2018, p. 4.

<sup>21</sup> Respondent’s Letter to the Tribunal, dated April 26, 2018, p. 2.

under Dominican law, it cannot compel the property owners to grant access to private parties, such as the Ballantines and their experts, to their properties and developments.<sup>22</sup>

19. The Respondent's highlights its request for a site visit to Jamaca de Dios for Messrs. Booth and Deming as an example. Since the experts are not governmental officials inspecting Jamaca de Dios pursuant to governmental duties, but private parties, they could not have entered the property without the Ballantines' consent.<sup>23</sup>

20. In any case, the Dominican Republic can only:

demand that certain residential communities permit third parties to gain access to their roads if such roads have become public property by operation of law (and therefore no longer belong to any particular private landowner).<sup>24</sup>

21. Apart from this exception, the Respondent recognizes that it cannot "*guarantee a site visit to any particular privately owned property, or the timing of any such visit*" which shall not be interpreted as a declaration by the Dominican Republic claiming that it is powerless to facilitate the visits, but only limited to inform "*the owners of the properties of the POs, and to seek such owners' consent to the visits by the Experts.*"<sup>25</sup> Therefore, if the Tribunal expects otherwise, it requests further clarification of the basis and scope of those expectations.<sup>26</sup>

22. In relation to the issue of the admissibility of expert evidence submitted with the Rejoinder, the Respondent states that the Claimants' understanding of the relevant standard is misplaced. Indeed, the Respondent believes that the right standard is "*whether the Booth and Deming reports were submitted to rebut factual or legal arguments, or evidence, advanced by the Ballantines (and their experts) in the Reply*", instead of whether the Respondent knew at the time of the Statement of

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<sup>22</sup> Respondent's Letter to the Tribunal, dated April 26, 2018, p. 2. As the Respondent contends, the Ballantines are confusing the powers of the Ministry of Environment. The Ministry has the legal power to visit and inspect property to ensure compliance with environmental regulations. However, it does not have the power to compel property owners to grant access to private parties such as the Experts; see Environmental Law (18 August 2000), Art. 53, **Exhibit R – 003** (Respondent's Letter to the Tribunal, dated May 7, 2018, p. 2.).

<sup>23</sup> Respondent's Letter to the Tribunal, dated May 7, 2018, p. 2.

<sup>24</sup> Respondent's Letter to the Tribunal, dated April 26, 2018, p. 2. As the Respondent explains in its footnote 8, the "urbanization parceling" is a legal process "*by which, pursuant to the Dominican Real Estate Law and corresponding regulations, a landowner obtains permission from governmental authorities to formally subdivide an existing tract of land into smaller lots. When a private landowner successfully completes such process, any area destined to serve as a road, or otherwise as a right of way, is automatically ceded to the public domain, and should be accessible in principle by private third parties.*" See Law 108-05, Art. 106, **Exhibit R-303**; Regulation No. 628-2009, Art. 161, **Exhibit R-304**. According to the Respondent, the files of the Ministry of Environment show that two of the residential communities referenced in the Ballantines' pleadings have gone through the urbanization parceling process: Jamaca de Dios and Jarabacoa Mountain Garden. Both have already been visited by the Ballantines' experts.

<sup>25</sup> Respondent's Letter to the Tribunal, dated May 7, 2018, p. 3.

<sup>26</sup> Respondent's Letter to the Tribunal, dated April 26, 2018, p. 3.

Defense that the Ballantines were going to build a luxury project, which would affect the environment.<sup>27</sup> According to the Respondent, it has complied with this standard, since both expert reports address several issues raised in the Reply and in Jens Richter's and Erick Kay's expert reports.<sup>28</sup>

23. Lastly, the Respondent points out the Tribunal's order that "*any new evidence derived from these visits should be submitted in accordance with Rule 6.4 of our Procedural Order No.1 and by no later than July 15, 2018.*"<sup>29</sup> Pursuant to this order and Section 6.4 of the Procedural Order No. 1, the Respondent understands that if the Ballantines were to submit additional evidence, as a result of their site visits, it would have an opportunity to submit counter-evidence. Thus, it reserves its right to do so.<sup>30</sup>

24. The Respondent states its readiness to "*facilitate additional visits to those properties as necessary, in accordance with Dominican Law, due process, and the property rights of the owners of such properties.*"<sup>31</sup> For good order, it requests the Tribunal to determine which properties it shall facilitate access and to clarify the scope of such obligation, taking into account "*the limitations imposed by due process, property rights of third parties, and Dominican law.*"<sup>32</sup>

## **2. The Claimants' Position**

25. The Claimants point out that the Respondent's is desperately trying to prevent the Claimants from visiting the relevant properties. The Claimants underscore that this is the fourth time that the Respondent argues that the Ballantines have no right to visit the comparators and, in their most recent correspondence, they argue that only one property is called for under Procedural Order No. 9 and yet, the property is inaccessible. Nevertheless, the Claimants argue that the Respondent is wrong on both counts.<sup>33</sup>

26. The Claimants note that the Respondent takes exception with the fact that it took them a week after the issuance of Procedural Order No. 9 to suggest a time frame for the visits. As the Claimants explain, while they were coordinating availability with their experts and counsels, the Respondent submitted its letter dated April 26, 2018, claiming that only one property should be visited. As a result, the Ballantines did not provide a list of relevant and called-for properties, since the Tribunal

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<sup>27</sup> Respondent's Letter to the Tribunal, dated May 7, 2018, p. 3.

<sup>28</sup> Respondent's Letter to the Tribunal, dated May 7, 2018, p. 3.

<sup>29</sup> Procedural Order No. 9, para. 40c).

<sup>30</sup> Respondent's Letter to the Tribunal, dated April 26, 2018, p. 3.

<sup>31</sup> Respondent's Letter to the Tribunal, dated May 7, 2018, p. 4.

<sup>32</sup> Respondent's Letter to the Tribunal, dated May 7, 2018, p. 5.

<sup>33</sup> Claimants' Letter to the Tribunal, dated May 2, 2018, p. 1.

would have to decide on the issue and they were busy securing a time frame, pursuant to Procedural Order No. 9. In any case, the Claimants find the Respondent's assertion curious, as it "*waited almost two months from the issuance of PO8 before it made its newly found assertion that it cannot facilitate the visits.*"<sup>34</sup>

27. The Claimants complain that the Respondent expressed its "*willingness to work*" with the Claimants and "*surprise that they have not yet identified the properties that they wish to be the subject of the experts' visit*"<sup>35</sup> to the Ballantines' counsel, only six minutes before the e-mail was sent to the Tribunal. It did not make any effort to implement Procedural Order No. 9 or to agree on a time frame to set the site visits when requested to do so.<sup>36</sup>
28. The Claimants argue that the Respondent's assertion that only one property should be visited is wrong for two reasons. The first one, because it misstates the purpose of Procedural Order No. 9 and the second one, because it misstates the extent of the previous visits by the experts.<sup>37</sup>
29. Regarding the first reason, the Claimants recall that in the Respondent's Emergency Application, it argued that it needed access to perform engineering and environmental impact assessments to address issues that the Claimants' had brought in their Reply. However, as the Claimants explained previously, the issues were already brought before the Tribunal and the Parties. The Respondent did not provide any explanation to why it sought access at that time and not while drafting the Statement of Defense. Therefore, "[h]ad Respondent submitted those expert reports in the Statement of Defense, the Ballantines could have sought access to the other properties to make similar assessments in the Reply."<sup>38</sup>
30. As a result of the Respondent's Emergency Application, the Claimants' previous information collected on the comparable properties before their Reply is "*irrelevant to the Tribunal's analysis here.*"<sup>39</sup> The reason for this is that the "*Ballantines' experts were responding to the expert reports that Respondent submitted in the Statement of Defense.*"<sup>40</sup> The Respondent submitted in its

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<sup>34</sup> Claimants' Letter to the Tribunal, dated May 2, 2018, p. 1; Claimants' Letter to the Tribunal, dated May 8, 2018, p. 1 (emphasis added by Claimants). As the Claimants explain, Procedural Order No. 8 was issued on March 24, 2018. However, the Respondent did not assert that it could not facilitate the visits of the Ballantines' experts to the other properties and projects until its letter dated April 26, 2018. The Claimants contend that the Respondent purposefully waited almost two months before asserting that it was essentially powerless to facilitate the visits.

<sup>35</sup> Claimants' Letter to the Tribunal, dated May 2, 2018, p. 1. *See* Respondent's E-mail to the Tribunal, received on April 28, 2018.

<sup>36</sup> Claimants' Letter to the Tribunal, dated May 2, 2018, p. 1.

<sup>37</sup> Claimants' Letter to the Tribunal, dated May 2, 2018, p. 2.

<sup>38</sup> Claimants' Letter to the Tribunal, dated May 2, 2018, p. 2.

<sup>39</sup> Claimants' Letter to the Tribunal, dated May 2, 2018, p. 2.

<sup>40</sup> Claimants' Letter to the Tribunal, dated May 2, 2018, p. 2.

Rejoinder reports from new experts with different areas of knowledge, compared to the experts of its Statement of Defense.<sup>41</sup> Therefore,

the purpose of the immediate visits by the Ballantines’ experts as ordered in Procedural Order No. 8 is to respond to the Respondent’s new experts and their arguments that could have and should have been made with the Statement of Defense.<sup>42</sup>

31. Additionally, the Claimants argue that their experts had “*very limited access to only some of the the comparable properties*”,<sup>43</sup> as they had to stay mostly in the “public” roads. As a result, only in limited circumstances, could they take slope measurements of other properties. In contrast, the Respondent acquired unfettered access to Jamaca de Dios and its experts could go anywhere on the property.<sup>44</sup> Consequently, for reasons of fundamental fairness, the Claimants request the same access to the comparable properties in order to rebut the Respondent’s assertions made by relying on its new experts and to show that the following comparable properties “*are similarly situated to the Ballantines’ properties and, in some cases, environmentally sensitive with significant impacts on the environment.*”<sup>45</sup>

32. Accordingly, the Claimants request access to the following properties:<sup>46</sup>

Project Name	Notes
Aloma Mountain	<ul style="list-style-type: none"> <li>• Developed without permit</li> <li>• In Baiguete National Park</li> <li>• Slopes in excess of 60%</li> <li>• Owned by brother-in-law of then Dominican President</li> </ul>
Jarabacoa Mountain Garden	<ul style="list-style-type: none"> <li>• Granted permit</li> <li>• Excluded from Baiguete National Park even though it borders Baiguete Falls and river</li> <li>• Slopes in excess of 60%</li> </ul>

<sup>41</sup> Claimants’ Letter to the Tribunal, dated May 2, 2018, p. 2. *See*, email from Herrera to Tribunal, February 28, 2018 in which Mr. Herrera stated that “*the current request for permission to access is in preparation for the Rejoinder and it would be for its independent experts, Messrs. Booth (environmental scientist specialized in environmental due diligence), Sananes (engineer with experience in geo-environmental engineering) and Klaetsch (geo-technical engineer), who are new experts of the Dominican Republic and have never been to the Jamaca de Dios site.*”

<sup>42</sup> Claimants’ Letter to the Tribunal, dated May 2, 2018, p. 2. According to the Claimants in their footnote 7, these visits would “*include two new experts who have the same area of expertise as the Respondent’s new experts, as well as an expert to conduct the slope measurements.*”

<sup>43</sup> Claimants’ Letter to the Tribunal, dated May 2, 2018, p. 3.

<sup>44</sup> Claimants’ Letter to the Tribunal, dated May 2, 2018, p. 3.

<sup>45</sup> Claimants’ Letter to the Tribunal, dated May 2, 2018, p. 4.

<sup>46</sup> Claimants’ Letter to the Tribunal, dated May 2, 2018, pp. 3 and 4. *See* Ballantines’ Reply, pp. 172-173.

La Montana	<ul style="list-style-type: none"> <li>• Granted permit</li> <li>• Located partially within Baiguate National Park</li> <li>• Development is above 1,300 meters</li> <li>• Slopes in excess of 60%</li> </ul>
Mirador del Pino	<ul style="list-style-type: none"> <li>• Granted permit</li> <li>• Slopes in excess of 60%</li> </ul>
Paso Alto	<ul style="list-style-type: none"> <li>• Granted permit</li> <li>• Same mountain range as JDD</li> <li>• Slopes in excess of 60%</li> </ul>
Rancho Guaraguao	<ul style="list-style-type: none"> <li>• Developed without permit</li> <li>• In its entirety at a higher altitude than any portion of the JDD expansion planned area.</li> <li>• In category 2 national park</li> <li>• Slopes in excess of 60%</li> <li>• Owned by former head of Dominican Military</li> </ul>
Quintas del Bosque I and II	<ul style="list-style-type: none"> <li>• Granted Permits</li> <li>• Excluded from Baiguate National Park</li> <li>• Environmentally sensitive area</li> <li>• Slopes in excess of 60%</li> </ul>

33. As the Claimants explain, these properties are “*gated mountain residential/resort projects*”<sup>47</sup> within the area of Jamaca de Dios. Similarly to Jamaca de Dios’ Phase 1 and plan for Phase 2, they sell properties or build homes. All these properties either received a permit to develop or did so “*openly and notoriously (on a mountain side)*”<sup>48</sup> without a permit. All the properties share several characteristics, *inter alia*, that their slopes are greater than 60%, are heavily forested and in similar altitudes. Furthermore, except for Rancho Guaraguao, all of them can be seen from the city of Jarabacoa.<sup>49</sup>

34. Therefore, the Claimants request the Tribunal not to explain to the Respondent which course of action it should take. As the Claimants state, “[t]o the extent that Respondent does not faithfully facilitate these visits or otherwise seeks to obstruct them, the Ballantines will surely bring this to the attention of the Tribunal.”<sup>50</sup> The Tribunal can later decide whether the Respondent has acted in

<sup>47</sup> Claimants’ Letter to the Tribunal, dated May 2, 2018, p. 4.

<sup>48</sup> Claimants’ Letter to the Tribunal, dated May 2, 2018, p. 4.

<sup>49</sup> Claimants’ Letter to the Tribunal, dated May 2, 2018, p. 4.

<sup>50</sup> Claimants’ Letter to the Tribunal, dated May 2, 2018, p. 4.

good faith or not, and in any case, take it into consideration. The Claimants reserve their right to argue that the Respondent's conduct should be considered by the Tribunal in their factual findings.<sup>51</sup>

35. The Claimants argue that the Respondent intends with its request for clarification to create the false notion that it is powerless to facilitate the visits. However, as the Claimants explain, when a permit is granted, "*the property owners are subject to visits and inspections on their property.*"<sup>52</sup> Additionally, several of the properties are inside national parks, which is considered dominion of the state. Thus, the Respondent can facilitate those visits.<sup>53</sup>
36. Moreover, the Claimants complain that the Respondent has visited Jamaca de Dios Phase 2 without permission in order to gather evidence – for example, Exhibit R-293 – for these arbitration proceedings. The Claimants contend that in January 2018, the Respondent's officials arrived unannounced to Jamaca de Dios "*and spent six hours in Phase 2 taking extensive drone footage of the area.*"<sup>54</sup> The Respondent has not disputed the fact that its government officials entered the Ballantines' property several times to collect evidence for these arbitration proceedings.<sup>55</sup> Thus, Respondent cannot claim it is powerless to grant access to the other properties and wants the Tribunal to "*amend its order to excuse it of any responsibilities.*"<sup>56</sup>
37. The Claimants contend that, because several of these properties have been allowed to notoriously develop without a permit, Respondent ironically asserts that it does not have any rights to these properties since a road becomes "public" when "*a landowner obtains permission from governmental authorities to formally subdivide an existing tract of land into smaller lots.*"<sup>57</sup> However, certain properties have been allowed to develop without a permit and so, it
- would be a perversion of justice, however, to allow Respondent to deny the Ballantines access to these properties because it has **allowed** these properties to develop without a permit.<sup>58</sup> (Emphasis added by Claimants)
38. The Claimants note that, it appears that the Respondent has not approached any of the landowners yet. The Ballantines ask for a transparent process, as they do not trust that the Respondent's officials will "*faithfully execute the Tribunal's orders.*"<sup>59</sup>

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<sup>51</sup> Claimants' Letter to the Tribunal, dated May 2, 2018, p. 5.

<sup>52</sup> Claimants' Letter to the Tribunal, dated May 2, 2018, p. 4.

<sup>53</sup> Claimants' Letter to the Tribunal, dated May 2, 2018, p. 4.

<sup>54</sup> Claimants' Letter to the Tribunal, dated May 2, 2018, p. 5.

<sup>55</sup> Claimants' Letter to the Tribunal, dated May 9, 2018, p. 1.

<sup>56</sup> Claimants' Letter to the Tribunal, dated May 9, 2018, p. 1.

<sup>57</sup> Claimants' Letter to the Tribunal, dated May 2, 2018, p. 5.

<sup>58</sup> Claimants' Letter to the Tribunal, dated May 2, 2018, p. 5.

<sup>59</sup> Claimants' Letter to the Tribunal, dated May 2, 2018, p. 5.

39. Lastly, the Claimants refer to the Respondent reserving its right to submit counter-evidence. The Claimants find it a curious request, because the Respondent has asserted before that it was powerless to facilitate the access to the comparable properties. Therefore, *“if Respondent truly cannot access the comparable properties, then it will not be able to submit any counter-evidence as to the facts developed by the Ballantines with respect to the properties”*.<sup>60</sup>
40. The Claimants request the Tribunal to *“keep PO9 as is and not put restrictions or specifics as to what the Respondent is supposed to do”*<sup>61</sup>, to reject *“Respondent’s efforts to create a number of conditions and specifics with regard to PO8”* and to order the visit to the properties mentioned by the Claimants in its letter dated May 2, 2018, since the Respondent does not seem to be challenging this.<sup>62</sup> If the Respondent does not act in good faith in regards to Procedural Order No. 8, it is the Claimants’ intention to address its bad faith in due course.<sup>63</sup>

### **C. THE TRIBUNAL’S ANALYSIS AND DECISION**

41. The Tribunal has considered the Parties’ arguments, and has deliberated upon the issues addressed therein. As a result, the Tribunal hereby clarifies its previous Procedural Orders.
- a. Respondent shall facilitate, that is, seek the authorization, coordinate with private owners or take any appropriate action based on the circumstances, as well as grant immediate access to any public areas located in the sites listed by Claimants in their May 2 letter.
  - b. In case a visit to a site could not take place, Respondent is instructed to provide to the Tribunal a detailed explanation as the specific circumstances for which such access was not granted. Claimants will have an opportunity to make comments if they so wish.
  - c. The visits shall be finalized by no later than June 30, 2018.
  - d. Any new evidence derived from these visits should be submitted in accordance with Rule 6.4 of our Procedural Order No.1 and by no later than July 31, 2018.

**Place of Arbitration: Washington, D.C., United States of America**

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<sup>60</sup> Claimants’ Letter to the Tribunal, dated May 2, 2018, p. 5.

<sup>61</sup> Claimants’ Letter to the Tribunal, dated May 2, 2018, p. 5.

<sup>62</sup> Claimants’ Letter to the Tribunal, dated May 9, 2018, p. 1 and footnote 4.

<sup>63</sup> Claimants’ Letter to the Tribunal, dated May 9, 2018, p. 1.

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke that ends in a small hook.

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Ricardo Ramírez Hernández  
(Presiding Arbitrator)

On behalf of the Tribunal