

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 (the “DR-CAFTA”)**

**-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”)**

---

**PARTIAL DISSENT OF MS. CHEEK ON JURISDICTION**

---

*Tribunal:*

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

*Secretary to the Tribunal:*

Mr. Julian Bordaçahar

*Registry:*

**Permanent Court of Arbitration**

**3 September 2019**

## I. INTRODUCTION

1. While agreeing with many of the factual findings of the Majority, I respectfully register my dissent with regard to the test articulated for assessing the dominant and effective nationality of the Claimants and the ultimate conclusion of the Majority that the Tribunal has no jurisdiction to consider the merits of the Ballantines' claims based on a finding that their dominant and effective nationality on the relevant dates is Dominican.<sup>1</sup> I join the Award as to costs.
2. I am in agreement with my colleagues that, as a threshold matter, DR-CAFTA instructs that dual citizens such as the Ballantines may only assert a claim against the Dominican Republic if their dominant and effective nationality is, in this case, that of the United States at the time of the alleged breach and at the time of submission of the claim.<sup>2</sup> I also concur with many of the factual findings set forth in the Award. However, I respectfully dissent from the Majority's articulation of the legal test for dominant and effective nationality and the Majority's conclusion that Claimants' dominant and effective nationality on the critical dates is Dominican.
3. As explained below, through the inclusion of the phrase "dominant and effective nationality" in Article 10.28, the parties to the DR-CAFTA incorporated the customary international law standard for the treatment of dual nationality that this Tribunal is bound to apply. While my colleagues acknowledge the customary international law standard for assessing dominant and effective nationality, they ultimately depart from it. The Majority's analysis gives great weight to the Ballantines' investment-based contacts with the Dominican Republic during a narrow window of time.<sup>3</sup> While dominant and effective nationality must be assessed on certain dates, namely, the date of the alleged breach and the date of submission of the claim, it is the entire life of the individual that is relevant to the analysis. In other words, dominant and effective nationality is a distinct legal test separate and apart from the making of, maintenance of, or injury to a claimant's investment. When the customary international law standard is properly applied to the Ballantines, the conclusion reached is that the Ballantines' dominant and effective nationality on the critical dates is that of the United States.

---

<sup>1</sup> Terms defined in the Award have the same meaning in this dissenting opinion.

<sup>2</sup> Award, para. 527.

<sup>3</sup> See, e.g., Award, para 583 ("[T]his Tribunal finds relevant the fact that the main reason for the Claimants to acquire a second nationality was the *investment directly related to this proceeding*." (emphasis in original)).

## II. ASSESSING DOMINANT AND EFFECTIVE NATIONALITY

4. Article 10.28 of the DR-CAFTA states that “a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.”<sup>4</sup> Through the use of the phrase “dominant and effective nationality,” the DR-CAFTA parties adopted the customary international law standard for determining nationality of dual citizens. I disagree with my colleagues, as set out in paragraph 530 of the Award, that the Tribunal should only “take guidance from customary international law, taking into account Article 10.28 particular context, within DR-CAFTA general object and purpose.”<sup>5</sup> Rather than “giving effect to the specific context provided for in this instrument as well as its object and purpose,”<sup>6</sup> the customary international law standard referenced in DR-CAFTA should be applied, without altering that test in an investment treaty-specific context. I disagree with the Majority that it is “appropriate to give specific meaning to the terms used in DR-CAFTA rather than directly incorporating any other standard[.]”<sup>7</sup>
5. Article 10.22 of the DR-CAFTA states that the governing law for this dispute is “this Agreement and applicable rules of international law.”<sup>8</sup> Where the DR-CAFTA parties have incorporated a rule of customary international law into the treaty, as they have done with regard to the dominant and effective nationality test, the Tribunal should simply apply it.
6. The standard in DR-CAFTA is the customary international law standard to determine dominant and effective nationality, articulated by the International Court of Justice (“ICJ”) in the *Nottebohm Case*<sup>9</sup> and reflected in the *Mergé Case* of the Italian-United States Conciliation

---

<sup>4</sup> DR-CAFTA, Article 10.28 (R-10).

<sup>5</sup> Award, para. 530.

<sup>6</sup> Award, para. 530.

<sup>7</sup> Award, para. 533.

<sup>8</sup> DR-CAFTA, Article 10.22(1) (R-10).

<sup>9</sup> *Nottebohm Case (Lichtenstein v. Guatemala) Second Phase*, ICJ, Judgment, (April 6, 1995), p. 23 (RLA-6) [hereinafter *Nottebohm Case*].

Commission<sup>10</sup> and decisions of the Iran-U.S. Claims Tribunal, notably *Case No. A/18* and *Malek v. Iran*.<sup>11</sup>

7. According to the ICJ in *Nottebohm*, “nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”<sup>12</sup> While the ICJ in *Nottebohm* was not concerned with dual nationality (the question in that case was one of diplomatic protection), the ICJ referenced the customary international law standard in cases of multiple nationalities, observing that:

International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next[.]<sup>13</sup>

8. To determine a natural person’s dominant and effective nationality is thus a fact-specific inquiry. As the Majority observes at paragraph 548, quoting *Nottebohm*, “the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.”<sup>14</sup>
9. The *Mergé Case* and *Case No. A/18* reiterate this customary international law test. The *Mergé Case* tribunal observed that *Nottebohm* “is not a case of dual nationality; but it is interesting for our purposes to note what is set forth in the reasoning of the decision in regard to the problem of

---

<sup>10</sup> *United States v. Italy*, It.–U.S. Conciliation Commission, Decision, (June 10, 1955) (RLA-7) [hereinafter *Mergé Case*].

<sup>11</sup> *Case No. A/18*, IUSCT Case. No. A/18, Decision No. DEC 32-A18-FT, (April 6, 1984) (RLA-8) [hereinafter *Case No. A/18*]; *Reza Said Malek v. Iran*, IUSCT, Interlocutory Award, (June 23, 1988) (CLA-51) [hereinafter *Malek*].

<sup>12</sup> *Nottebohm Case*, p. 23 (RLA-6).

<sup>13</sup> *Nottebohm Case*, p. 22 (RLA-6). See also *Mergé Case*, p. 244 (citing *Nottebohm Case*, p. 22) (RLA-7).

<sup>14</sup> Award para. 548 (citing *Nottebohm Case*, p. 22 (RLA-6)). The Iran-U.S. Claims Tribunal also made reference to these factors as relevant, although it stated that it would consider “all relevant factors”. See *Case No. A/18*, p. 12 (RLA-8).

dual nationality[.]” and went on to quote the *Nottebohm* passage above.<sup>15</sup> The tribunal in the *Mergé Case* then applied the test articulated in *Nottebohm*:

In order to establish the prevalence of the United States nationality in individual cases, habitual residence can be one of the criteria of evaluation, but not the only one. The conduct of the individual in his economic, social, political, civic and family life, as well as the closer and more effective bond with one of the two States must also be considered.<sup>16</sup>

10. Similarly, the Iran-U.S. Claims Tribunal in *Case No. A/18* observed that the *Nottebohm Case* “demonstrated the acceptance and approval by the International Court of Justice of the search for the real and effective nationality based on the facts of a case, instead of an approach relying on more formalistic criteria.”<sup>17</sup> The Iran-U.S. Claims Tribunal went on to conclude that it had jurisdiction over cases of dual citizens against Iran where the dominant and effective nationality of the claimant was that of the United States. It then adopted the test in *Nottebohm*: “In determining the dominant and effective nationality, the Tribunal will consider all relevant factors, including habitual residence, center of interests, family ties, participation in public life and other evidence of attachment.”<sup>18</sup>
11. While dominant and effective nationality must be assessed on the date the claim arose and the date the claim was submitted for purposes of jurisdiction, the relevant period of time for determining dominant and effective nationality on those dates is an individual’s contacts over a lifetime. As the Iran-United States Claims Tribunal explained in *Malek*, “[o]bviously, to establish what is the dominant and effective nationality at the date the claim arose, it is necessary to scrutinize the events in the Claimant’s life preceding this date. Indeed, the entire life of the Claimant, from birth, and all the factors which during this span of time, evidence the reality and the sincerity of the choice of national allegiance he claims to have made, are relevant.”<sup>19</sup>
12. *Nottebohm* and its progeny’s list of considerations is not exhaustive, but it nevertheless establishes an objective factual inquiry. I disagree with my colleagues that application of the

---

<sup>15</sup> *Mergé Case*, p. 244 (RLA-7).

<sup>16</sup> *Mergé Case*, p. 247 (RLA-7).

<sup>17</sup> *Case No. A/18*, p. 10 (RLA-8).

<sup>18</sup> *Case No. A/18*, p. 12 (RLA-8).

<sup>19</sup> *Malek*, p. 51 (CLA-51).

dominant and effective nationality test set forth in DR-CAFTA Article 10.28 should be applied to give greater weight to investment-related connections with the Dominican Republic because DR-CAFTA is an investment treaty. Specifically, I disagree with the Majority that “the inclusion of this phrase [*i.e.*, dominant and effective nationality] in an investment chapter within the broader framework of a Free Trade Agreement imbues that phrase with a specific meaning” and therefore “it [is] appropriate to give specific meaning to the terms used in DR-CAFTA rather than directly incorporating any other standard. . . [.]”<sup>20</sup> The standard articulated in DR-CAFTA is not an investment treaty-specific test for dominant and effective nationality. Rather, it is the well-established customary international law standard. My opinion in this regard is consistent with the recent decision in *Aven v. Costa Rica*, where the tribunal applied the *Nottebohm* test in examining the question of dual nationality under DR-CAFTA Article 10.28.<sup>21</sup>

13. While the Majority and I agree that the Claimants’ entire lifetime is relevant to the dominant and effective nationality inquiry, we diverge where the Majority also focuses on what it deems the specific context of DR-CAFTA for the dominant and effective nationality test.<sup>22</sup> The Majority “considers that the *investment* itself, the status of *investor* as well as other circumstances surrounding those elements may be relevant factors for assessing nationality and its dominance and effectiveness within Article 10.28 of DR-CAFTA.”<sup>23</sup> This appears to go beyond an examination of the Claimants’ economic ties to both countries over their lifetimes. The Majority concludes that “a claimant’s entire life is relevant but not dispositive”<sup>24</sup> and examines whether the Claimants’ Dominican nationality “was strong enough to take precedence over their U.S. nationality and it was producing effects or was operative *during the relevant time* in order to determine whether they were investors under DR-CAFTA.”<sup>25</sup> The result of this approach, which the Majority describes elsewhere as “temporal context in which the terms of Article 10.28

---

<sup>20</sup> Award, para. 533.

<sup>21</sup> See Award, para. 543, n. 1056. *David Aven et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award (18 September 2018), para. 205 (“Through inclusion of the expression ‘dominant and effective nationality’ in Article 10.28 definition of ‘Investor of a Party,’ the DR-CAFTA Parties intended to incorporate by reference the applicable standards of customary international law for the treatment of multiple nationalities in diplomatic protection cases, as reflected in the *Nottebohm* Case (*Liechtenstein v. Guatemala*).”).

<sup>22</sup> See Award, Section X.B.2(e).

<sup>23</sup> Award, para. 554.

<sup>24</sup> Award, para. 555.

<sup>25</sup> Award, para. 557 (emphasis added).

shall be interpreted,<sup>26</sup> is to give greater weight to the Claimants' investment-related contacts as of the date the claim arose and the date the claim was submitted,<sup>27</sup> rather than engaging in a truly holistic inquiry of the Claimants' entire lifetimes on each of those dates.

14. The proper inquiry should examine the Claimants' ties to the United States and the Dominican Republic over the course of their lifetimes to determine whether, at the time of the alleged breach (*i.e.*, 12 September 2011)<sup>28</sup> and at the time of the submission of the claim to arbitration (*i.e.*, 11 September 2014), the dominant and effective nationality of each Claimant was that of the United States or the Dominican Republic.<sup>29</sup>

### III. THE DOMINANT AND EFFECTIVE NATIONALITY OF MICHAEL BALLANTINE AND LISA BALLANTINE.

15. Dominant and effective nationality must be assessed as to each Claimant, applying the customary international law standard articulated in *Nottebohm*. The relevant dates for

---

<sup>26</sup> Award, para. 527.

<sup>27</sup> *See, e.g.*, Award, para. 597 (“[W]hile this Tribunal cannot deny the fact that *during the relevant period*, the Claimants maintained connections to the United States and this also seems natural from the fact that they were born and lived in that country for the majority of their lives, in this Tribunal’s opinion, *during the relevant period* the Dominican nationality was effective and took precedence over the American nationality. Although the Claimants maintained residential connections to the United States, their permanent residence was in the Dominican Republic, overall, most of their days from 2010 to 2014 were spent in the Dominican Republic, they changed their status to permanent residents and later to Dominican citizens.”) (emphasis added); *see also* Award, para. 598 (“While their personal and professional relations to the Dominican Republic may have been limited, it is difficult to deny that *during that period of time* their investment kept them economically centered in the Dominican Republic.”) (emphasis added).

<sup>28</sup> 12 September 2011 is presumed to be the date the claim arose, as that is the date the Ballantines’ expansion request was denied by the Ministry of the Environment and Natural Resources of the Dominican Republic on the basis that the slopes on the upper portion of the property exceeded the 60 percent slope permitted under Article 122 of the Environmental Law and because it was considered an environmentally fragile area, creating a natural risk. *See* Award, para. 126 (citing Letter from Zoila González de Gutierrez to Michael Ballantine (September 12, 2011) (C-8)).

<sup>29</sup> To the extent “effective” nationality also reflects a concept that citizenship is valid as a legal matter and there is a *bona fide* connection between the natural person and the State, the Parties agree that concept has been satisfied here. *See* Rejoinder on Jurisdiction and Merits, para. 44 (“Typically, the first step in the ‘dominant and effective nationality’ analysis is to identify a person’s ‘effective’ nationalities (*i.e.*, any nationalities for which there exists a *bona fide* connection between the person and the State of nationality). In the present case, however, this first step is unnecessary, as it is uncontested that the Ballantines — who are nationals of both the Dominican Republic and the United States — have genuine connections to both States.” (internal citations omitted)).

determining dominant and effective nationality are 12 September 2011 (the date of the alleged breach) and 11 September 2014 (the date of submission of the claim). For the reasons explained below, both Ms. Ballantine and Mr. Ballantine had dominant and effective U.S. nationality on both critical dates.

16. Lisa Ballantine's connections to both the United States and the Dominican Republic can be summarized as follows:
- Ms. Ballantine was born and lived in the United States until 2000,<sup>30</sup> that is, for approximately the first forty years of her life. The center of her interests during this period, including her family ties and participation in public life through civic and religious groups, was the United States. The center of her professional life was also in the United States. At all relevant times, Ms. Ballantine was a U.S. citizen.
  - Ms. Ballantine worked as a missionary in the Dominican Republic for a year in 2000, and returned to the United States in 2001.<sup>31</sup>
  - She then moved to the Dominican Republic in August 2006, along with her husband and children.<sup>32</sup> The Ballantines enrolled their children in the American School in the Dominican Republic, attended an American church,<sup>33</sup> and spoke English at both church and at home.<sup>34</sup> Ms. Ballantine lived in the Dominican Republic from 2006 until this claim was submitted.<sup>35</sup>
  - Ms. Ballantine sold much of her property in the United States when she moved to the Dominican Republic,<sup>36</sup> but maintained property in the United States throughout her time living in the Dominican Republic<sup>37</sup> and also filed income tax returns in the United States.<sup>38</sup>

---

<sup>30</sup> Award, para. 179.

<sup>31</sup> Award, para. 179 (citing Amended Statement of Claim, para. 18; Jamaca de Dios Website, "History" Page (last accessed January 24, 2017) (R-11)).

<sup>32</sup> Award, para. 179 (citing Greg Wittstock, *A Man and His Mountain, A Woman and Her Heart* (February 27, 2013) (R-12); Notice of Intent, paras. 7, 12). .

<sup>33</sup> Award, para. 182 (citing First Witness Statement of Michael Ballantine, paras. 89-90.).

<sup>34</sup> Award., para. 568.

<sup>35</sup> Award, para. 562.

<sup>36</sup> Award, para. 563 (citing First Witness Statement of Lisa Ballantine, paras. 1-3).

<sup>37</sup> Award, paras. 564, 207 (citing Second Witness Statement of Michael Ballantine, para. 8).

<sup>38</sup> Award, para. 210 (citing Second Witness Statement of Michael Ballantine, para. 11; Letter from Catalano, Caboor & Co, C-80).



- Ms. Ballantine purchased significant property in the Dominican Republic from 2003 to 2011,<sup>39</sup> and much of the property was purchased while she was solely a U.S. national.
- Ms. Ballantine became a legal permanent resident of the Dominican Republic in 2006, which status was renewed in 2008.<sup>40</sup>
- Ms. Ballantine became a naturalized Dominican citizen in 2010, her application for citizenship having been approved on 30 December 2009.<sup>41</sup> She maintained her U.S. citizenship as well.
- Ms. Ballantine also naturalized two of her four children in 2010.<sup>42</sup> Those two children would later return to the United States for college.<sup>43</sup>
- Ms. Ballantine voted in the 2008 U.S. presidential election, the 2012 Dominican election, and the 2014 midterm U.S. elections, while residing in the Dominican Republic.<sup>44</sup>
- Ms. Ballantine became a Dominican citizen because she had a significant investment there and she thought her Dominican citizenship might result in better treatment for her investment, and also for estate planning purposes.<sup>45</sup>
- In 2010 and 2011, Ms. Ballantine spent more days on an annual basis in the United States than in the Dominican Republic.<sup>46</sup>
- In 2012, 2013, and 2014, Ms. Ballantine spend more days on an annual basis in the Dominican Republic than in the United States, although still traveled frequently (approximately 110 days/year) to the United States.<sup>47</sup>

---

<sup>39</sup> Award, para. 58.

<sup>40</sup> Award, para. 563, n. 1079; Certificates of Permanent Residency of Michael and Lisa Ballantine (R-25).

<sup>41</sup> Award, para. 566, n. 1082 (noting that “[t]he Claimants have indicated that they obtained the Dominican nationality in 2010. According to Exhibit R-018, such nationality was approved by Presidential Decree No. 931-09 issued on December 30, 2009”).

<sup>42</sup> Award, para. 578 (citing Josiah and Tobi Ballantine’s Naturalization File (R-036)).

<sup>43</sup> Award, para. 182.

<sup>44</sup> Award, para. 216 (citing to Second Witness Statement of Michael Ballantine, para. 26; Hearing Transcript, Day 1, 63:6-8).

<sup>45</sup> Award, para. 581 (citing First Witness Statement of Michael Ballantine, para. 88.).

<sup>46</sup> Award, para. 565 (citing Supplemental Witness Statement of Michael Ballantine, para. 21).

<sup>47</sup> Award, para. 565, n. 1081 (citing Supplemental Witness Statement of Michael Ballantine, para. 21.)

- Ms. Ballantine traveled to the United States approximately 30 times between 2010 and 2014.<sup>48</sup>
  - During the 2010 to 2014 period, Ms. Ballantine continued to work with her U.S. nonprofit organization, Filter Pure, Inc.,<sup>49</sup> which partners with local NGOs around the world, including in the Dominican Republic, to develop water programs. Filter Pure, Inc. had significant operations in the Dominican Republic.<sup>50</sup> Since 99 percent of its donations came from U.S. donors, Ms. Ballantine, who was responsible for fundraising, spent much of her time in the United States.<sup>51</sup>
  - Ms. Ballantine described her cultural connection to the Dominican Republic as “limited,”<sup>52</sup> although she also spoke of the Dominican Republic on social media as “our country.”<sup>53</sup> I agree with the Majority view that she had personal attachments both to the United States and the Dominican Republic.<sup>54</sup> Connections to the United States were not displaced with connections to the Dominican Republic.
17. There is no question that the focal point of Ms. Ballantine’s daily life shifted from the United States to the Dominican Republic when she moved with her husband and young children to the Dominican Republic in 2006. That said, this shift in focus, even coupled with Ms. Ballantine’s naturalization in 2010, is not enough to support a finding that Ms. Ballantine’s dominant and effective nationality on the critical dates (*i.e.*, 12 September 2011 and 11 September 2014) was Dominican.
18. Looking holistically at Ms. Ballantine’s habitual residence during her lifetime, the centre of her personal and professional interests, her family life, and her maintenance of significant ties to the United States, the facts support a finding that under customary international law Ms. Ballantine’s dominant and effective nationality is that of the United States. Ms. Ballantine chose to nationalize in the Dominican Republic because she and her husband owned a significant investment and thought it might bolster the success of their business. Less than two years later, the alleged breach in this case arose. That Ms. Ballantine chose Dominican nationality not necessarily for love of country and allegiance, but out of economic self-interest,

---

<sup>48</sup> See Suppl. Witness Statement of Michael Ballantine, para. 10.

<sup>49</sup> See Reply Witness Statement of Lisa Ballantine, paras. 4-5.

<sup>50</sup> Award, para 183.

<sup>51</sup> Reply Witness Statement of Lisa Ballantine, para. 5.

<sup>52</sup> Award, para. 571 (citing Second Witness Statement of Lisa Ballantine, para 7).

<sup>53</sup> Award, para. 571 (citing Transcript of “Nuria” Report (June 29, 2013) (C-25)).

<sup>54</sup> Award, para. 573.

does not lead to a conclusion that her dominant and effective nationality was Dominican on the critical dates. Ms. Ballantine's economic ties to the Dominican Republic and her narrow reasons for seeking Dominican citizenship are but two of many relevant factors to be considered in this analysis.

19. Michael Ballantine's connections to both the United States and the Dominican Republic can be summarized as follows:

- Mr. Ballantine was born and lived in the United States until 2000,<sup>55</sup> that is, for approximately the first forty years of his life. The center of his interests during this period, including his family ties, participation in public life through civic and religious groups, was in the United States. At all relevant times, Mr. Ballantine was a U.S. citizen.
- Mr. Ballantine worked as a missionary in the Dominican Republic for a year in 2000, and returned to the United States in 2001.<sup>56</sup>
- He then moved to the Dominican Republic five years later, in 2006, along with his wife and children.<sup>57</sup> The Ballantines enrolled their children in the American School in the Dominican Republic.<sup>58</sup> They attended an American church,<sup>59</sup> and spoke English both at church and at home.<sup>60</sup> Mr. Ballantine lived in the Dominican Republic from 2006 until this claim was submitted.<sup>61</sup>
- Mr. Ballantine sold much of his property in the United States when he moved to the Dominican Republic,<sup>62</sup> but maintained property in the United States throughout his time living in the Dominican Republic<sup>63</sup> and also filed income tax returns in the United States.<sup>64</sup>

---

<sup>55</sup> Award, para. 179.

<sup>56</sup> Award, para. 179.

<sup>57</sup> Award, para. 179.

<sup>58</sup> Award, para. 568 (citing Supplemental Witness Statement of Michael Ballantine, para. 24; Second Witness Statement of Lisa Ballantine, para. 3).

<sup>59</sup> Award, para. 568.

<sup>60</sup> Award, para. 568.

<sup>61</sup> Award, para. 562.

<sup>62</sup> Award, para. 563 (citing Witness Statement of Lisa Ballantine, para. 3).

<sup>63</sup> Award, paras. 564, 207 (citing Suppl. Witness Statement of Michael Ballantine, para. 8).

<sup>64</sup> Award, para. 210 (citing Second Witness Statement of Michael Ballantine, para. 11; Letter from Catalano, Caboor & Co, C-80).

- Mr. Ballantine also purchased significant property in the Dominican Republic from 2003 to 2011,<sup>65</sup> and much of the property was purchased while he was solely a U.S. national.
- Mr. Ballantine became a legal permanent resident of the Dominican Republic in 2006, which status was renewed in 2008.<sup>66</sup>
- He became a naturalized Dominican citizen in 2010, his application for citizenship having been approved on 30 December 2009.<sup>67</sup> Mr. Ballantine maintained his U.S. citizenship as well.
- Mr. Ballantine also naturalized two of his four children in 2010.<sup>68</sup> Those two children would later return to the United States for college.<sup>69</sup>
- Mr. Ballantine voted in the 2008 U.S. presidential election, the 2012 Dominican election, and the 2014 midterm U.S. elections, while residing in the Dominican Republic.<sup>70</sup>
- Mr. Ballantine became a Dominican citizen because he had a significant investment there and he thought his Dominican citizenship might result in better treatment for his investment, and also for estate planning purposes.<sup>71</sup>
- From 2010 to 2014, Mr. Ballantine spent more days on an annual basis in the Dominican Republic than in the United States, although he still traveled frequently to the United States.<sup>72</sup> Mr. Ballantine traveled to the United States approximately 30 times between 2010 and 2014.<sup>73</sup>
- Mr. Ballantine's business, Jamaca de Dios, was based in the Dominican Republic, and that was the focus of his professional life.<sup>74</sup>

---

<sup>65</sup> Award, para. 58.

<sup>66</sup> Award, para. 563, n. 1079; Certificates of Permanent Residency of Michael and Lisa Ballantine (R-25).

<sup>67</sup> Award, para. 566, n. 1082 (noting that “[t]he Claimants have indicated that they obtained the Dominican nationality in 2010. According to Exhibit R-018, such nationality was approved by Presidential Decree No. 931-09 issued on December 30, 2009”).

<sup>68</sup> Award, para. 578 (citing Josiah and Tobi Ballantine's Naturalization File (R-036)).

<sup>69</sup> Award, para. 182; Amended Statement of Claim, para. 41.

<sup>70</sup> Award, para. 216 (citing Second Witness Statement of Michael Ballantine, para. 26; Hearing Transcript, Day 1, 63:6-8).

<sup>71</sup> Award, para. 581.

<sup>72</sup> Award, para. 565.

<sup>73</sup> Suppl. Witness Statement of Michael Ballantine, para. 10.

<sup>74</sup> Award, para. 576.

- Mr. Ballantine testified that he did little to assimilate with Dominican culture.<sup>75</sup> He also attested to his close bond with the Dominican Republic when he sought citizenship.<sup>76</sup> I agree with the Majority view that he had personal attachments both to the United States and the Dominican Republic.<sup>77</sup> Connections to the United States were not displaced with connections to the Dominican Republic.
20. There is no question that the focal point of Mr. Ballantine's daily life shifted from the United States to the Dominican Republic when he moved with his wife and young children to the Dominican Republic in 2006. Further, even before acquiring Dominican citizenship, but certainly from 2010 to 2014, Mr. Ballantine's economic ties to the Dominican Republic were stronger than his economic ties to the United States, as he spent more time in the Dominican Republic because his business was there.
21. Nevertheless, looking holistically at Mr. Ballantine's life, and considering his habitual residence during his lifetime, his family life, the center of his personal and professional interests, and his maintenance of significant ties to the United States through both family and property, the facts support a finding that under the customary international law standard of dominant and effective nationality, Mr. Ballantine was a U.S. national on the critical dates. Mr. Ballantine chose to nationalize in the Dominican Republic because he and his wife owned a significant investment there and thought it might bolster the success of their business. Less than two years after their naturalization, the alleged breach in this case arose. That Mr. Ballantine chose Dominican nationality not necessarily for love of country and allegiance, but out of economic self-interest, does not lead to a conclusion that his dominant and effective nationality was Dominican on the critical dates. Mr. Ballantine's economic ties to the Dominican Republic and his narrow reasons for seeking Dominican citizenship are but two of many relevant factors to be considered in this analysis.
22. It is worth noting that the consequence of the Majority's determination that the Ballantines are dominantly and effectively Dominican is that the Ballantines could bring a DR-CAFTA claim against the United States, assuming that alleged harm to an investment in the United States occurred during the same relevant time frame as in the instant case. It is difficult to imagine that if the Ballantines launched this hypothetical case against the United States under DR-

---

<sup>75</sup> Award, para. 571 (citing First Witness Statement of Michael Ballantine, para. 89).

<sup>76</sup> Award, para. 578 (citing Letter from G. Rodríguez to the President of the Dominican Republic (R-17)).

<sup>77</sup> Award, para. 573.

CAFTA, such a case could move forward based on a dominant Dominican nationality of the Claimants. The factual record simply does not support such a conclusion.

**IV. THE SIGNIFICANCE OF THE BALLANTINES' DECISION TO OBTAIN DOMINICAN CITIZENSHIP.**

23. The Majority is troubled by the Ballantines' motivation for seeking Dominican citizenship, which Mr. Ballantine described at the Hearing as "it was only — had to do with economics and it had to do with estate protection. I did not integrate with the culture. I was an investor."<sup>78</sup> I agree with the Majority, quoting *Nottebohm*, that "[n]aturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being."<sup>79</sup> Naturalization is a commitment and a responsibility on the part of an individual to the country he swears allegiance to.
24. But in this particular case, what should the legal consequences be of the Ballantines' motivation for seeking Dominican citizenship? If the Ballantines were motivated by a desire to protect their investment, should that prevent them from filing a claim as U.S. nationals under the DR-CAFTA? Such a question standing alone is not one of dominant and effective nationality, but one of bad faith or abuse of rights. When determining the dominant and effective nationality of Mr. and Mrs. Ballantine, the circumstances surrounding the Ballantines' naturalization in the Dominican Republic is simply a factor to be considered as part of a holistic examination of the facts.
25. With regard to bad faith or abuse of rights, both Parties agree that the Ballantines did not acquire a second nationality as a form of treaty shopping to gain access to a dispute settlement mechanism.<sup>80</sup> In fact, their Dominican nationality had the potential to defeat their ability to bring a claim. Claimants did not take steps to avail themselves of a second nationality so they could gain protections under DR-CAFTA or bring a claim they would not otherwise have been entitled to bring. They made their investments as U.S. nationals, and the steps they took to

---

<sup>78</sup> Award, para. 581 (citing Hearing Transcript, Day 2, pp. 479-80).

<sup>79</sup> Award, para. 582 (citing *Nottebohm Case*, p. 24 (RLA-6)).

<sup>80</sup> See Reply Memorial, para. 33 ("There can be no question that the Ballantines did not take citizenship in the DR to obtain treaty protection."); Rejoinder on Jurisdiction and Merits, para. 44 ("it uncontested that the Ballantines — who are nationals of both the Dominican Republic and the United States — have genuine connections to both states." (internal citations omitted)).

become Dominican nationals involved a risk that they would jeopardize their ability to bring a potential future investment claim against the Dominican Republic.

26. On these facts, the Dominican Republic chose not to allege bad faith or abuse of rights in this case, and rightly so.
27. It is commonplace for a U.S. corporation to incorporate a wholly-owned subsidiary abroad in order to do business. In the typical case, the U.S. corporation would have created a Dominican corporation for the ease of doing business – for buying property, paying employees, etc. – and the U.S. company would maintain ownership over its subsidiary and manage it from afar. There is no question that the U.S. company could bring a claim on behalf of that U.S.-owned Dominican enterprise under DR-CAFTA.<sup>81</sup>
28. The difference between the Ballantines and this hypothetical U.S. corporation is that the Ballantines were small business owners, and while they created a Dominican corporation for the ease of doing business, they decided not to manage it from afar. Instead, they moved to the Dominican Republic and chose to directly manage and run their investments with personal devotion and commitment.
29. In this case, these two U.S. nationals acquired a second nationality in 2010 in an effort to help their investments thrive. Under those circumstances, the second nationality does not become the dominant one by virtue of the investment-related motivations of the Claimants. Instead, the test for dominant and effective nationality remains a holistic one that focuses on the totality of one's personal, familial, economic, and civic ties over a lifetime. Under that test, both Lisa and Michael Ballantine are U.S. nationals who qualified as U.S. investors under the DR-CAFTA at the time of the alleged breach and at the time they submitted their claims against the Dominican Republic.

---

<sup>81</sup> DR-CAFTA, Article 10.16.1(b) (R-10).

**V. CONCLUSION**

30. For these reasons, I am unable to join the Award with regard to the Majority's decision on jurisdiction and must with all due respect issue this dissenting opinion with regard to the Majority's determination that this tribunal lacks jurisdiction to hear the Ballantines' claims. I join the Award as to costs. For the reasons set forth in the Award, it is appropriate in the circumstances of this case for each party to bear its own legal fees and expenses and for each party to bear half of the costs of the arbitration.



*Marney L. Cheek*

---

Marney L. Cheek  
Co-arbitrator