

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. 2**

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*Tribunal*

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

**April 21, 2017**

## I. INTRODUCTION

1. On February 17, 2017, the Respondent submitted its Notice of Intended Preliminary Objection and Request for Bifurcation (the “**Bifurcation Request**”). The Respondent also requested that, pending resolution of the Bifurcation Request, the existing pleading schedule be suspended.
2. On February 20, 2017, the Tribunal invited the Claimants (or the “**Ballantines**”) to submit any comments they may have on the Bifurcation Request by March 6, 2017.
3. On March 6, 2017, the Claimants submitted their Response to the Bifurcation Request (the “**Response on Bifurcation**”) objecting to the same.
4. On March 7, 2017, the Respondent requested leave of Tribunal to submit a brief reply (of no more than five pages) by March 8, 2017.
5. On the same day, the Tribunal informed the Parties that the Respondent may submit a brief reply of no more than five pages by March 8, 2017, and that the Claimants may, if they so wish, submit a brief sur-reply, also limited to five pages, by March 10, 2017.
6. On March 8, 2017, the Respondent submitted its reply (the “**Reply on Bifurcation**”).
7. On March 10, 2017, the Claimants submitted their sur-reply (the “**Sur-reply on Bifurcation**”).
8. On March 29, 2017, the Tribunal informed the Parties that the Respondent’s request to suspend the existing pleading schedule pending resolution of the Bifurcation Request was denied.

## II. RESPONDENT’S PRELIMINARY OBJECTIONS

9. In sum, the Respondent submits that its consent to arbitration under CAFTA-DR does not cover the Claimants’ claims given that their dominant and effective nationality was Dominican both at the time of the alleged CAFTA-DR violations (which the Respondent identifies as November 30, 2010) and at the time of submission of their claims to arbitration (September 11, 2014), the two dates the Respondent identifies as critical.<sup>1</sup> Therefore: (i) the Ballantines are not “claimants”

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<sup>1</sup> Bifurcation Request, para. 1; Reply on Bifurcation, p. 5.

under CAFTA-DR;<sup>2</sup> and (ii) their claims do not involve any obligations under Section A of CAFTA-DR (*i.e.*, Arts. 10.1 to 10.14), as required by Art. 10.16.1 thereof<sup>3</sup> (the “**Objection**”).

10. On their part, in sum, the Claimants submit that their dominant and effective nationality is and has always been American, that the Claimants acquired the Dominican nationality simply to promote their investment in the Dominican Republic and minimize market discrimination, and that they were considered Americans by the Respondent.<sup>4</sup> In addition, the Claimants disagree with the Respondent on the moments the latter has identified as critical to assess the dominant and effective nationality of an investor under CAFTA-DR, which the Claimants consider to be those when they made their investment in the Dominican Republic.<sup>5</sup>

### III. PARTIES’ POSITIONS ON BIFURCATION

11. The Respondent requests that the current procedural calendar be suspended and that its Objection be decided as a preliminary question. The Respondent bases its request for bifurcation on the following arguments:

- a) Taking into consideration the three factors identified in *Glamis Gold Ltd. v. USA*, the Respondent submits that all of them favor bifurcation<sup>6</sup>: (i) the Objection, which goes to the Respondent’s consent to this arbitration, is substantial and requires the Tribunal’s careful review; (ii) should the Respondent prevail in either aspect of its Objection, this would dispose of the entire case; and (iii) the Objection is not intertwined with the merits.<sup>7</sup>
- b) Additionally, the Respondent submits that bifurcation would not result in any material harm or prejudice to the Claimants.<sup>8</sup>
- c) Furthermore, the Respondent submits that “considerations of procedural economy and fairness dictate that the Dominican Republic should not be forced to undergo an onerous

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<sup>2</sup> Bifurcation Request, section B.

<sup>3</sup> Bifurcation Request, section C.

<sup>4</sup> Response on Bifurcation, paras. 4-8.

<sup>5</sup> Response on Bifurcation, para. 19.

<sup>6</sup> Bifurcation Request, para. 37 referring to *Glamis Gold Ltd v. United States of America*, UNCITRAL 1976, Procedural Order No. 2 (Revised) dated May 31, 2005 (“**Glamis Gold**”).

<sup>7</sup> Bifurcation Request, para. 38; Reply on Bifurcation, pp. 3-4.

<sup>8</sup> Bifurcation Request, para. 39.

and expensive proceeding on the merits unless and until the Tribunal has made a determination on the [Objection]”.<sup>9</sup>

12. The Claimants, on their part, request that the Tribunal deny the Bifurcation Request and the Respondent’s Objection, and proceed with the current arbitration schedule, or alternatively, delay any decision on bifurcation until after the Respondent has submitted its Statement of Defense on May 4, 2017.<sup>10</sup> In support of their position, the Claimants submit that (i) Article 23.3 of the UNCITRAL Rules does not contain a presumption in favor of bifurcation;<sup>11</sup> (ii) bifurcation in this case would entail delay and unnecessary costs for both Parties;<sup>12</sup> (iii) the Objection is at the heart of the merits of the case and inextricably linked to the merits;<sup>13</sup> (iv) the Objection is not substantial, as “a ‘substantial’ dual nationality objection would be one where the claimant was committing fraud with respect to the nationality or attempting to inappropriately gain some international advantage”;<sup>14</sup> and (v) the Claimants deserve a relatively speedy resolution of their claims, and investor-State proceedings are already lengthy and cumbersome.<sup>15</sup>

#### IV. RELEVANT PROVISIONS

13. Article 10.20.4 of the CAFTA-DR provides:

*4. Without prejudice to a tribunal’s authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.*

14. Article 17.1 of the UNCITRAL Rules provides:

*1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.*

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<sup>9</sup> Bifurcation Request, para. 41.

<sup>10</sup> Response on Bifurcation, para. 9 and section V.

<sup>11</sup> Sur-reply on Bifurcation, p. 1.

<sup>12</sup> Response on Bifurcation, paras. 52-53; Sur-reply on Bifurcation, p. 2.

<sup>13</sup> Response on Bifurcation, paras. 54-56; Sur-reply on Bifurcation, pp. 2-3.

<sup>14</sup> Sur-reply on Bifurcation, p. 4.

<sup>15</sup> Response on Bifurcation, para. 57.

15. Article 23.3 of the UNCITRAL Rules provides:

*3. The arbitral tribunal may rule on a plea [that the arbitral tribunal does not have jurisdiction] either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.*

## V. TRIBUNAL'S ANALYSIS

16. At the outset, the Tribunal confirms that at this stage of the proceedings, its only task is to determine whether to bifurcate, not to decide on the merits of the Objection.

17. Articles 17.1 and 23.3 of the UNCITRAL Rules give discretion to the Tribunal to decide jurisdictional objections as preliminary questions or decide them together with the merits. The Tribunal notes that neither Party disputes this authority of the Tribunal.<sup>16</sup> As to Article 10.20.4 of the CAFTA-DR, the Respondent has confirmed that its Bifurcation Request is made pursuant the initial part of this provision on the “tribunal’s authority to address other objections as a preliminary question”.<sup>17</sup>

18. For the Tribunal’s analysis, the starting point is the text of Article 17.1 of the UNCITRAL Rules, which states that in the exercise of its discretion, the Tribunal “shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute”. In addition, the Tribunal draws guidance from the standard set out in *Glamis Gold*, cited by both Parties,<sup>18</sup> according to which the following elements should be taken into consideration to decide whether or not to grant the Bifurcation Request: (i) whether the request is substantial or frivolous; (ii) whether the request, if granted, would result in a material reduction of the proceedings at the next phase; and (iii) whether the issues are too intertwined with the merits that bifurcation is impractical because it is unlikely that there will be any savings in time or cost.<sup>19</sup>

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<sup>16</sup> Reply on Bifurcation, p. 2; Sur-reply on Bifurcation, p. 1.

<sup>17</sup> Reply on Bifurcation, p. 1.

<sup>18</sup> See Bifurcation Request, para. 37; Reply on Bifurcation, p. 3; Sur-reply on Bifurcation, pp. 1-2.

<sup>19</sup> *Glamis Gold*, para. 12:

“12. This Tribunal in examining the various sources finds that Article 21(4) contains a three fold test:

- a. First, in considering a request for the preliminary consideration of an objection to jurisdiction, the tribunals should take the claim as it is alleged by Claimant.
- b. Second, the “plea” must be one that goes to the “jurisdiction” of the tribunal over the claim [...].
- c. Third, if an objection is raised to the jurisdiction of the tribunal and a request is made by either party that the objection be considered as a preliminary matter, the tribunal should do so. The tribunal may

19. With respect to the first element, without addressing the merits of the Objection, the Tribunal observes that it is undisputed between the Parties that the Claimants were citizens both of the United States of America and of the Dominican Republic since 2010, including when they filed their claim for arbitration as well as when at least some of the alleged violations of the CAFTA-DR occurred.<sup>20</sup> The Claimants allege that they started investing in the Dominican Republic before they acquired their Dominican citizenship, with purchase of lands made as early as July 2004<sup>21</sup>.
20. As to the second element of the *Glamis Gold* standard, the Tribunal notes that the Respondent alleges that, if successful, its Objection would dispose of the entire case, and that the Claimants do not take issue with this statement. The Tribunal agrees that should it find that the Claimants' "dominant and effective nationality" at relevant times was Dominican, the Objection would dispose of the entire case.
21. Therefore, in the Tribunal's view, a valid question arises under Article 10.28 of the CAFTA-DR concerning the definition of "investor" protected under the CAFTA-DR, as to which was the Claimants' "dominant and effective nationality" at relevant times. The Tribunal is thus unpersuaded by the Claimants' argument that the Respondent's Objection is not substantial.
22. The Tribunal would like to note that the factual circumstances that this case presents are unique. The Tribunal is mindful that nationality-based challenges to the question of whether the claimants are qualified investors are most often brought in situations where the claimants have adopted

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decline to do so when doing so is unlikely to bring about increased efficiency in the proceedings. Considerations relevant to this analysis include, inter alia, (1) whether the objection is substantial inasmuch as the preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding; (2) whether the objection to jurisdiction if granted results in a material reduction of the proceedings at the next phase (in other words, the tribunal should consider whether the costs and time required of a preliminary proceedings, even if the objecting party is successful, will be justified in terms of the reduction in costs at the subsequent phase of proceedings); and (3) whether bifurcation is impractical in that the jurisdictional issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost."

<sup>20</sup> Claimants' Notice of Intent to Submit a Claim to Arbitration dated June 12, 2014, para. 17: "...in 2010, Michael and Lisa Ballantine became dual citizens of the United States and the Dominican Republic..."; Claimants' Notice of Arbitration and Statement of Claim dated September 11, 2014, para. 21: "...the Ballantines became citizens of the Dominican Republic only in 2010..."; Claimants' Amended Statement of Claim dated January 4, 2017, paras. 155-156: "[the Ballantines] became citizens of the Dominican Republic in 2010... [i]n September 2016, The [sic] Ballantines began taking steps to renounce their Dominican citizenship..."; Bifurcation Request, paras. 1, 11 and 18-19: "[t]he naturalization process began in September 2009... [t]he applications were approved by presidential decree on 30 December 2009..."; Response on Bifurcation, paras. 4 and 26.

<sup>21</sup> Response on Bifurcation, para. 31.

nationality to gain access to treaty protections.<sup>22</sup> Other cases have involved investors who obtain residence of the host country<sup>23</sup> or investors who have assigned their claims to an entity owned and controlled by an entity of the host State.<sup>24</sup> As to the specific question before this Tribunal, of determining the “dominant and effective nationality”, the Parties agree that the CAFTA-DR does not articulate any standard for its determination and agree that reference to international law is appropriate.<sup>25</sup> The Respondent further states that it “is not aware of any investor-State tribunal that has addressed this issue”.<sup>26</sup> The Tribunal notes that this appears thus to be a question of first impression where a provision which addresses this standard would have to be interpreted in the investor-State -investment treaty- context.

23. Lastly, it is with respect to the third element of the *Glamis Gold* standard (*i.e.*, whether the issues are too intertwined with the merits that bifurcation is impractical because it is unlikely that there will be any savings in time or cost) that the Tribunal faces more difficulty.
24. In order to resolve the Objection, the Tribunal will be called upon to interpret the definition of “investor of a Party” in accordance with the customary international rules of interpretation in their context and in light of the object and purpose of the CAFTA-DR. Article 10.28 of the CAFTA-DR states:

***investor of a Party** means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality; [emphasis added]*

25. The Tribunal notes that it is clear from the text of this provision that the CAFTA-DR allows an “investor of a Party” to have dual nationality. Thus, the Tribunal opines that the key question before it is to ascertain the meaning of the words “dominant and effective” in determining the nationality of the Claimants in the context of the CAFTA-DR. The Tribunal considers that the

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<sup>22</sup> See, e.g. *Renée Rose Levy and Grencitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award dated January 9, 2015, para. 191; *Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia*, PCA Case No. 2012-02, Award on Jurisdiction and Admissibility dated December 17, 2015, paras. 554 and 584; *Lao Holdings N.V. v. Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction dated February 21, 2014, para. 70.

<sup>23</sup> See e.g. *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues dated December 6, 2000, paras. 28, 30, 36-37.

<sup>24</sup> See e.g. *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on hearing of Respondent’s objection to competence and jurisdiction dated January 5, 2001, para. 32(v). See also *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award dated June 26, 2003, Orders, numeral 1.

<sup>25</sup> Bifurcation Request, para. 12; Response on Bifurcation, para. 22.

<sup>26</sup> Bifurcation Request, para. 12.

elements analyzed by other tribunals (even if not involved in interpreting investment treaty provisions) will certainly be relevant to the Tribunal's analysis, including, among others, the State of habitual residence, the circumstances in which the second nationality was acquired, the individual's personal attachment for a particular country, and the center of the person's economic, social and family life.<sup>27</sup>

26. However, the interpretation of the terms "dominant and effective nationality" in this instance will primarily have to involve the immediate context. Given the timing of the Ballantines' acquisition of Dominican nationality and their asserted reasons for acquiring that nationality, the Tribunal is of the view that the facts surrounding the investment made by the Ballantines, as well as the conduct of the host State *vis-à-vis* the Ballantines, and vice versa, will need to be examined for purposes of determining the dominant and effective nationality of the Ballantines. There is nothing in the language of the CAFTA-DR that precludes the Tribunal from considering facts surrounding the investment when examining whether there is a qualified investor thereunder. The definition of "investor of a Party", which refers to a national of a Party that "has made an investment in the territory of another Party", provides further contextual support for such an approach.
27. Moreover, the evidence concerning the facts previous to the date of filing for arbitration (*i.e.*, September 11, 2014) would certainly have some bearing in the Tribunal's assessment of both whether the Ballantines *had a dominant and effective Dominican nationality* and whether there was discrimination between the Claimants -as *investor of a Party*- and Dominican nationals -as nationals of the host State.
28. Due to the particular circumstances of the dispute at hand, where the timing of when the Ballantines acquired Dominican citizenship overlaps with the period in which the alleged unfair or discriminatory treatment occurred, as well as the various factors that the Tribunal may have to take into consideration in order to determine the dominant and effective nationality, the majority of the Tribunal is persuaded that, in the circumstances of the present case, the facts concerning the Objection appear to be intertwined with those concerning the merits, which would justify hearing them together.

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<sup>27</sup> Bifurcation Request, para. 12 and Reply on Bifurcation, p. 4 *referring to Lichtenstein v. Guatemala (Nottebohm Case – second phase)*, International Court of Justice, Judgment dated April 6, 1955, p. 22 (**RL-6**); *United States v. Italy (Mergé Case)*, It.-U.S. Conciliation Commission, Decision dated June 10, 1955, p. 247 (**RL-7**); Iran-U.S. Claims Tribunal, Case No. A/18, Decision dated April 6, 1984, p. 12 (**RL-8**).

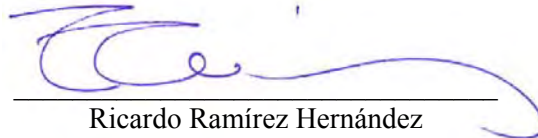


29. With the foregoing, the Tribunal is not suggesting that an alleged violation of the CAFTA-DR could in any way inform the Objection related to the “dominant and effective nationality” analysis. The jurisdictional question presents a discrete issue different from the merits. The issue here is rather that the same facts would necessarily have a bearing or would be relevant for both the procedural and the substantive determination.
30. Based on the foregoing, the majority of the Tribunal considers that in light of the factual link between the merits and the Objection, a separate process would create unnecessary delays in these proceedings. Thus, with a view of conducting an efficient process, the Tribunal, by majority, denies the Respondent’s Bifurcation Request. The Tribunal finally notes that the ultimate outcome of the Objection will be a factor that the Tribunal may take into account when awarding costs in this dispute.

#### **VI. TRIBUNAL’S DECISION**

31. The Tribunal, therefore, hereby rejects, by majority, the Respondent’s Bifurcation Request and confirms that the proceedings shall continue in accordance with the procedural calendar set forth in Annex 1 of Procedural Order No. 1.

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



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Ricardo Ramírez Hernández  
(Presiding Arbitrator)

On behalf of the Tribunal