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

UNDER THE UNCITRAL ARBITRATION RULES
(AS ADOPTED IN 2013)
(the "UNCITRAL Rules")

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In the Matter of Arbitration Between:

MICHAEL BALLANTINE, LISA BALLANTINE,
Claimants,
and
THE DOMINICAN REPUBLIC,
Respondent.

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ORAL HEARING

Monday, September 3, 2018
The World Bank
1818 H Street, N.W.
MC Building
Conference Room 4-800
Washington, D.C.

The hearing in the above-entitled matter came on, pursuant to notice, at 9:14 a.m. (EDT) before:

PROFESSOR RICARDO RAMÍREZ HERNÁNDEZ, Presiding Arbitrator
MS. MARNEY L. CHEEK, Co-Arbitrator
PROFESSOR RAÚL EMILIO VINUESA, Co-Arbitrator

APPEARANCES:

Attending on behalf of the Claimants:

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United States of America

Claimant Representatives:

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MR. MICHAEL BALLANTINE

APPEARANCES (Continued)

Attending on behalf of the Respondent:

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MS. RAQUEL DE LA ROSA
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MS. PATRICIA ABREU
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MS. ROSA OTERO
MS. JOHANNA MONTERO
MS. CLAUDIA ADAMES
Ministerio de Medio Ambiente y Recursos Naturales
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Secretary to the Tribunal

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One simple fact cuts through all the noise created by the hundreds of pages of justifications now put forward by the Respondent. One simple fact brings us here today.

And this land at the top of this slide, this Jarabacoa, Dominican Republic. This is Michael, and two down, Lisa Ballantine, the Claimants. Leslie Gil and Larissa Diaz are our assistants.

We have nothing to raise from the opening statement, please do so.

Finally, before we start with the Claimant's presentation, I would want to ask whether there is any procedural issue that any party would want to raise.

I understand that Parties have agreed on the video conference protocol. But if there's anything else that any party might raise--might want to raise before we start with the Claimant presentation, please do so.

MR. BALDWIN: We have nothing to raise from the Opening Statement.
Respondent to explain its actions. One simple fact mandates an award for the Ballantines.
That simple fact is that while the Ballantines were repeatedly denied the opportunity to develop every square meter of their valuable Phase 2 land, not a single other mountain residential project in the entire country has been denied the opportunity to develop its land. Not one.
The evidence already submitted to the Tribunal is plain and overwhelming. Respondent has discriminated against the Ballantines, and it has illegally expropriated their investments, causing tens of millions of dollars in damage.
The Tribunal has seen the evidence of at least a dozen comparator projects in La Vega Province, all within just a few miles of Jamaca de Dios. These are all Dominican-owned developments that, like Jamaca, seek to take advantage of the beauty and the climate of the Dominican Central Mountain Range, and every single one of them has been allowed to proceed, either formally or informally.
After first relying on a slope law that it applied only to Jamaca as a basis for its multiple denials, Respondent now struggles to find a belated environmental justification for its dramatically disparate treatment of the Ballantines, trying to present some legitimate reason why only Jamaca was refused a permit.
But its efforts are futile and its arguments are insufficient. Ultimately, Respondent’s submission cannot refute several key facts that prove the treaty claims of the Ballantines.
First, the Respondent denied the Ballantines the right to develop all of their land because less than 15 percent of that land had slopes in excess of 60 percent. By contrast, Respondent has expressly permitted multiple Dominican mountain projects in and around Jarabacoa despite all of these projects having slopes in excess of 60 percent, every single one.
This ever-increasing list includes Paso Alto, Quintos del Bosque Phase 1 and Phase 2, Jarabacoa Mountain Garden, Mirador del Pino, and La Montaña.
Second, Respondent affirmatively communicated and collaborated with these Dominican projects to ensure their receipt of a formal environmental license, but offered no such collaboration with the Ballantines, refusing to even issue terms of reference under Dominican law.
The Tribunal, by contrast, has seen the extensive correspondence between the MMA and projects like Jarabacoa Mountain Garden, Mirador, and Quintos, which stand in stark contrast to the curt and repeated rejections that it gave to the Ballantines.
Third, Respondent has turned a blind eye and allowed multiple Dominican landowners to develop their property without a permit. This list includes Rancho Guaraguao, Sierra Fría, Los Aquelles, Monte Bonito, and, of course, Aloma Mountain, a mere stone’s throw from Jamaca de Dios.
Only now, since the initiation of this arbitration, has Respondent tried to cover some of its tracks, purporting to find most of those projects in a failed effort to lessen the manifestly disparate treatment of the Ballantines.
Fourth, Respondent denied the Ballantines the right to develop because their property was located in a national park, while it allowed Dominican-owned properties to develop in national parks and protected areas. Indeed, Rancho Guaraguao has had a massive project for more than a decade at 1900 feet above sea level--meters above sea level, in the middle of the Valle Nuevo National Park, and respondent even paved a road right to its front gate.
Moreover, Aloma Mountain, right next to Jamaca, continues its march to create a 115-lot subdivision despite being in the Baiguate National Park. The Tribunal has seen the dramatic evidence of the continued development of Aloma Mountain even since the filing of this arbitration.

This is Aloma in 2015, and this is Aloma in 2017. These pictures entirely refute any claim that a modest fine of Aloma or the punitive denial of its permit has stopped its development.
Fifth, Respondent discriminated against the Ballantines by putting them in the park at the same time it excluded Dominican-owned properties from the park, even though those properties more directly impact the Baiguate River and the Baiguate Falls, which is what the park was decreed to protect. And it expropriated their property when it relied on the park as a basis to deny the Ballantines their Phase 2 permit.
At the end of the day, it really is as straightforward as it sounds. Trying to avoid any real evaluation of whether JDD, Jamaca de Dios, is environmentally different than any of these projects, Respondent instead fills its submissions with arguments:
The Ballantines “ignore the nature and inherent complexity of environmental protection.” The Ballantines’ claim derived from a “fundamental misunderstanding of the nature of environmental assessments and of the practical limitations inherent in environmental projection.”
Of course, it remains entirely unclear what those practical limitations are and how they justify denying the Ballantines at the same time it was approving other projects.
At the end of the day, these nonspecific assertions cannot trump the reality of what's happening on the ground in La Vega Province. And despite its after-the-fact efforts, Respondent cannot identify even one environmental characteristic or sensitivity of Jamaca that does not exist in the other projects.

There is absolutely nothing unique about the location, the slopes, the soil, the water, or the biodiversity of the Ballantines' expansion property, and, thus, no legitimate reason for the Respondent's repeated and singular denial of Jamaca's expansion request. And so while the Respondent now seeks to divert the Tribunal's attention with long discussions about the difference between permitting and policing, about endemism and about the environment being a "complex system of interconnections," the expansion and the development of the mountains surrounding Jarabacoa continues unabated, and the only investors who have been affirmatively prevented from participating in that expansion are sitting before you today.

The Respondent's arbitral justifications are simply that: Environmental concerns generated for the purpose of defending this arbitration. This is especially egregious, given, one, the

To be clear, the Ballantines do not dispute that environmental protection is important and that standards are necessary to ensure that the beauty of the Dominican Republic is maintained for generations to come. But CAPTA mandates that Respondent must apply those standards fairly and equitably to all investors, foreign or domestic, and it did not do so here.

Ultimately Respondent's defense is built on the almost unfathomable contention that's documented nowhere in Respondent's contemporary files, that Jamaca was somehow so environmentally special that only its project needed to be brought to a complete stop when every single other mountain development project was allowed to proceed.

One does not need a degree in environmental science to realize this doesn't pass the smell test. The evidence doesn't support it and common sense doesn't support it.

A very brief chronology is appropriate to supplement the evidence already before the Tribunal.

In the mid-2000s, the Ballantines began to acquire tracts of mountain property in Jarabacoa, which is about two hours north of Santo Domingo, with the vision of developing an upscale mountain residential and ecotourism project needed to be brought to a complete stop when every single other mountain development project was allowed to proceed.

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The most popular mountain development in the Dominican Republic is Jamaca de Dios. In less than five years, Jamaca had become a popular dining destination not only for residents of Jarabacoa, but for the wider community of Jarabacoa and for visiting tourists. The approval of Phase 1 gave the Ballantines a legitimate and reasonable expectation that their efforts to develop Phase 1 the Ballantines’ road. The quality of that road is a critical factor to this story.

Without planning, mountain roads can be difficult to build and to maintain, and many mountain projects in Jarabacoa have struggled to build a quality road. The Tribunal has seen the evidence confirming that the Ballantines invested the time and money necessary to create this important part of their Phase 1 project.

Unfortunately for the Ballantines, the neighboring development, Aloma Mountain, which you can see directly to the east of Phase 2, was owned by a politically connected Dominican who wanted the Ballantines’ road for access to his property. As the development for the luxury homes in Phase 2, was owned by a politically connected Dominican who wanted the Ballantines’ road for access to his property. And thus began the Ballantines’ troubles.

That owner, Juan José Domínguez, is the former brother-in-law of the then-Dominican president, Leonel Fernández, and the son of the then-mayor of Jarabacoa, and Domínguez wanted to remove competition for his complex. Now, that proved difficult because Jamaca de Dios proved to be a resounding success. The first phase of the development sold out largely to a Dominican clientele. There were more than 100 names on a waiting list for lots further up the mountain. In less than five years, Jamaca had become the most popular mountain development in the Dominican Republic. No Respondent witness disputes this.

Having built a successful ecotourism complex and created a brand associated with that excellence, the Ballantines began work on their plans to expand Jamaca. They intended to divide their land higher up the mountain, this land, into 70 more luxury home sites. The效果图 of Jamaca de Dios: Phase 1 at the top, Phase 2 at the bottom. You can see in the development of Phase 1 of Jamaca required that the Ballantines engage extensively and frequently with the MMA. After its approval of Phase 1 of Jamaca, the MMA conducted frequent inspections of Jamaca to ensure its ongoing environmental compliance, showing a remarkable capacity for policing despite its claims now about the difficulty of such efforts.

The MMA reviewed the semi-annual environmental reports, the ICA reports, submitted by Jamaca under Dominican Law. Indeed, those are the reports that the evidence now show only Jamaca was required to provide. And the Parties exchanged communications regarding various topics. These communications are in the record and none specify any concerns about environmental issues that the Respondent now trumpets. The approval of Phase 1 gave the Ballantines a legitimate and reasonable expectation that their efforts to build and maintain, and many mountain projects in Jarabacoa have struggled to build a quality road. The quality of that road is a critical factor to this story.

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Having built a successful ecotourism complex and created a brand associated with that excellence, the Ballantines began work on their plans to expand Jamaca. They intended to divide their land higher up the mountain, this land, into 70 more luxury home sites. The Tribunal has seen the unrebutted testimony of Wesley Proch which details Jamaca’s creation of a construction arm in order to undertake the home construction activity that would have been associated with the expansion to Phase 2. But Phase 2 was to be more than just valuable additional lots and the homes that would be built on them. The Ballantines also intended to construct a boutique hotel and spa in Phase 2. There were no mountain hotels in the region and the commercial opportunity was manifest.

The Ballantines also intended to construct a boutique hotel and spa in Phase 2. There were no mountain hotels in the region and the commercial opportunity was manifest.
1. The Ballantines invested significant time and effort into the development of this concept. They engaged an architect to design the property. They engaged a Taino Indian expert to help ensure the hotel's cultural appropriateness.

2. The Ballantines also developed plans to construct a Mountain Lodge at the top of Phase 1 just above the restaurant. The market opportunity here was also manifest.

3. They contracted with respected Dominican architect Rafael Selman to design the Mountain Lodge, and the Tribunal has the unrebutted witness testimony of David Almansar, confirming the significant effort undertaken with respect to the Mountain Lodge. Detailed studies were done and engineering drawings were created.

4. And as the Tribunal has seen, the Mountain Lodge was a fully realized addition to the existing complex, with luxury finishes, beautiful views. Indeed, the Ballantines received commitments to buy several units before even breaking ground. The Mountain Lodge was ready to be constructed as soon as the MNA granted permission for a simple modification to the Phase 1 permit.

5. Now, given that the lots the Mountain Lodge would be built on had already been approved for development as part of Phase 1, the Ballantines foresaw no regulatory obstacle to their luxury condominium project.

Omar Rodriguez, and his desire to partner with Michael and Lisa and the Jamaca brand.

1. The Ballantines were simply waiting for their Phase 2 permit to move forward with this deal. Having completed a significant environmental impact study for Phase 1 and having been promptly approved, and having demonstrated their environmental sensitivity in the development of Phase 1, the Ballantines had a legitimate expectation that they would be appropriately approved for their expansion request.

2. So as the Ballantines prepared to seek permission to expand Jamaca, they first applied for tax-free status for their entire project pursuant to CONFOTUR Law 158, intended to promote tourism throughout the DR. This status would exempt the revenue generated by Jamaca from income tax obligations to the Dominican government.

3. The Ballantines' Phase 2 plan for 50 additional lots for the hotel and spa and for a lower development project were all described in the Phase 2 submission by the Ballantines for CONFOTUR approval. Approval was sought in August of 2010 and Respondent promptly granted the Ballantines' provisional tax-exempt status in December of 2010.

4. This approval was signed by the Dominican Ministries of Tourism, Culture, Tax, and Environment. All

But Respondent refused to even consider their request for a permit to build the Mountain Lodge. The City of Jarabacoa ignored the Ballantines' request to issue a no objection letter, and then a year later wrongly stated that the Ballantines first needed approval from the MNA first--first needed approval from the MNA, and the MNA failed to ever act on the Ballantines' application. The Mountain Lodge remains stuck in some administrative purgatory.

1. The Ballantines also planned to build another apartment building near the base of the complex with larger units to allow access to the development for larger families. They commissioned architectural drawings for this as well.

2. Respondent now disparagingly calls this plan a pipe dream, but its failure to materialize is the direct result of the Respondent's denial of the Phase 2 permit.

3. Jamaca also established a management program to oversee rental programs for both of these properties. This would have increased international investor interest and created additional profit for Jamaca.

4. The Ballantines were also planning to acquire the neighboring development, Paso Alto, seen here. Paso Alto is another beautiful mountain property. The Tribunal has the unrebutted testimony of its Dominican owner,

1. Four of these agencies reviewed the Ballantines' plan to expand their development and approved it as furthering the policy behind the CONFOTUR law.

2. Indeed, the MNA expressly approved tax-free status for both Phase 1 and Phase 2 without any mention of slope restrictions or the recent establishment of a national park. This approval was also consistent with the Ballantines' experience for approvals for Phase 1 and increased their legitimate expectation of a nondiscriminatory review of their license request.

3. At the same time, on December 13th -- December 10, the Ballantines obtained a no-objection letter from the City Council of Jarabacoa with respect to their expansion plans, both for the hotel and for the subdivision of 50 lots. This also increased their expectations Phase 2 would be fairly evaluated.

4. Indeed, after these events, the Ballantines purchased a small additional amount of land that allowed them to plan for 70 lots in Phase 2.

5. None of the Respondent's many officials involved in granting the CONFOTUR approval and the no-objection letter mentioned any concerns with regard to 60 percent slopes, any environmental issues, or the existence of a national park. And so in November 2010, the Ballantines formally requested an expansion permit to begin work on
Phase 2 of Jamaca.

But we know the story. In September of 2011, the MMA denied the Ballantines' request to expand Jamaca, beginning our seven-year journey to this hearing. The MMA asserted that any development into Phase 2 would run afoul of Article 122 and its slope limitations of 60 percent, which is roughly 31 degrees.

That denial was arbitrary and discriminatory, because among other reasons, less than 15 percent of the land in Phase 2 exceeds the slope restriction, and the Ballantines had expressed no intention to build on any portion that did.

Here is a map on the left that shows the proposed Phase 2 expansion area and shows those portions where the slope exceeds 60 percent. Here is that slope map combined with Phase 1. And this slope map on the right is superimposed over the Google Earth image of the Jamaca property we saw earlier.

The Ballantines had not built on 60 percent slopes in Phase 1, and they weren't going to build on them in Phase 2. And despite all this "usable land," to quote Mr. Navarro, that ran afoul of no slope law, the Respondent flatly rejected the entirety of the expansion request. None of this land that did not exceed any slope requirement could be developed.

The MMA did not invite a discussion with the Ballantines or issue terms of reference to help find a development plan that might address any demonstrable environmental concerns. It did not say, "15 percent of your land is too steep and you can't develop that land. Please resubmit your plan with a reduced development scope."

It did not deny the permit, only as to the small Phase 2 areas that have a slope exceeding 60 percent. It did not condition the permit on any agreement--on an agreement not to build in certain areas or make any suggestions or recommendations to the Ballantines.

It simply rejected the entire expansion and said none of the Ballantines' land could be developed except if they wanted to grow fruit trees. None of the softly, gently rising land above Phase 1 could be developed and sold.

As the Tribunal has already seen, this is markedly different from how the MMA treated permit requests from comparator Dominican-owned projects. And that's why we're here today.

The Ballantines immediately sought reconsideration of this denial, seeking a dialogue and reiterating that their Phase 1 project had complied with all environmental laws. But MMA refused to engage and continued to refuse any expansion of JDD.

The Ballantines then explicitly confirmed that they did not intend to build on 60 percent slopes. They submitted the comprehensive—they submitted comprehensive environmental evidence from respected Dominican engineering firm Empaca Redes to show the minimal impact that the Phase 2 development would have. They got their embassy involved. They got Respondents foreign investment office involved. They got the media involved, including one of the island's most respected journalists, desperately trying to get an equitable evaluation of their permit request.

Unlike similarly situated competing projects that were allowed to work with the MMA to address any concerns, including slope concerns, and then were formally granted permission to develop, Respondent ignored the Ballantines and their submissions.

So the Tribunal knows, the DR issued several more denials. Three additional rejection letters came in March 2012, December 2012, and finally in January of 2014, all invoking slopes as the primary basis for their denial.

However, contemporaneous with these denials, the MMA was permitting the development of competing mountain projects that were owned by Dominicans despite similar or greater slopes at those projects, and it has continued to permit Dominican-owned projects: Mirador del Pino, Alta Vista, Jarabacoa Mountain Garden, Quintas del Bosque Phase 2, La Montaña.

The MMA was also allowing other mountain projects to build on similar or greater slopes in the absence of permits. The Ballantines were singled out for discriminatory treatment by Respondent. So while the Ballantines need not prove intent to prevail on their treaty claims, the evidence is plain.

As confirmed in writing by prominent local businessman Victor Pacheco, whose grandfather, Victor Capellan, owned a huge tract of land behind the Ballantines, next to the Baiguate River, it was Michael's neighbor, Juan José Domínguez, who was neck-deep in the discriminatory, arbitrary, and unfair treatment by Respondent of the Ballantines.

As Pacheco writes, "It looks to be a political bout now, as laws can always justify an argument, depending on the agenda."

And that may be true in the Dominican Republic. Indeed, the Tribunal has seen their dismal international ranking with respect to ethics and corruption. The World Economic Forum ranked it 135th out of 137 countries in that regard. But the law applicable here today, the Central American Free Trade Agreement, cannot justify Respondent's arguments.
As the MMA began to realize that its reliance upon slope restrictions would be exposed, its official search for a new pretext to deny the Ballantines’ permit request. And so in their last denial letter, in January 2014, two and a half years after its initial denial, the MMA invoked a purported new justification for its permit rejection. For the very first time, MMA asserted that the Ballantines’ Phase 2 property, more than 283,000 square meters, was located within the Baiguate National Park, a protected area in which development was purportedly restricted.

That designation was made by Presidential decree in August 2009, and this January 2014 letter was the very first time the MMA had relied on the existence of the park as a basis for denying the additional development of Jamaca de Dios, four and a half years later. And while the Ballantines acknowledge the Dominican Republic’s right to appropriately create national parks for genuine public purposes, it cannot discriminate against investors in creating this park, which it did here. The park’s boundaries were drawn to prevent expansion of Jamaca de Dios. By contrast, comparator Dominican-owned projects were expressly drawn out of any protected areas, allowing those landowners continuing freedom to develop their own mountain resort properties.

These new concerns set forth in the Respondent’s submissions are not unique to Jamaca de Dios. They’re shared by all other mountain developments that are now permitted and moving forward in the La Vega Province.

Briefly, Respondent now claims that the altitude of Phase 2 was a significant concern and was a critical factor in the evaluation of the project. This doesn’t ring true. First, during the course of all its inspections and technical committee meetings about Phase 2 and throughout its repeated denial letters, not once did the MMA or its engineers specifically cite altitude as a concern. Second, there’s absolutely nothing in Dominican law at the time that identified altitude as a consideration in the evaluation of a project’s environmental viability. And the altitude restriction that Respondent has now rushed to enact after this arbitration was filed would not be triggered by the highest point of Phase 2.

But, third, and ultimately fatal to any claims about altitude, Paso Alto, Jarabacoa Mountain Garden, Aloma Mountain, La Montaña, and Rancho Guaraguao all have altitudes similar to or greater than the highest point of Phase 2.

Respondent has expropriated the Ballantines’ investment and must compensate the Ballantines for its significant commercial value. As the Tribunal has seen, Respondent has now moved away from slopes as the justification for its disparate treatment of Jamaca. Because the evidence is plain. All mountain projects have some steep slopes.

Respondent now says it’s not “only” the specific measure of steepness that impacts the application of its slope law. It now asserts that one must also consider concentration, altitude, environmental impact, fundamentally boiling its defense down to this statement, which can be fairly characterized as: Ignore what we repeatedly and contemporaneously wrote and told to you. We really meant to deny your project for these reasons.

And it has continued to search for new reasons as every justification it presents is shown to be unsupported by the evidence.

And despite Respondent’s insistence that this is a complex issue, it’s really quite simple. And one does not need a Ph.D. in ecology or forestry to understand all of these projects share similar environmental characteristics. Of course they do. They’re all within a few miles of each other. They’re all in the Dominican central mountain range, a forested group of mountains in the same Dominican province.

Respondent says it’s concerned about the soils of Phase 2, but the soil class of all the projects are the same. Not surprising since they’re all in the same mountain range.

Respondent cites concerns about Phase 2 impact on water sources, but can’t avoid the simple fact there is no active water within the Jamaca project, unlike the active streams and rivers that exist in Quintas, Mirador, Jarabacoa Mountain Garden, Paso Alto, Sierra Fria, and now La Montaña.

Indeed, these projects were allowed to develop despite these active streams and rivers, and some were even expressly allowed to take water from those waterways for use at their development.

The Respondent talks about biodiversity and endemic species at Jamaca, but doesn’t even attempt to argue that other projects don’t share these same ecologies. Evaluation files produced by Respondents for these projects prove any such contention untenable. And the expert witness statement of Jens Richter and Fernando Potes fully catalog the environmental attributes of Jamaca, evaluating them next to these comparator projects. And their testimony confirms there is nothing unique about the Jamaca ecology that justifies the discriminatory treatment the Ballantines faced.
Indeed, these reports show that the
environment surrounding the proposed expansion area of
Jamaca had been fragmented due to years of prior
agricultural use as compared to the more pristine mountain
forests of other approved development projects.

Realizing the futility of environmental arguments,
Respondent has switched gears, and it now argues that the
denial is really the Ballantines’ own fault because
Respondent supposedly didn’t know the Ballantines were
going to build—weren’t going to build on the steep slopes,
and that unlike other development projects, the Ballantines
never expressed a willingness to work with the MMA or to
provide any revisions to their Phase 2 proposal. This is
preposterous.

First, unlike its efforts to engage in---cooperate
with Dominican projects, the MMA’s rejections to the
Ballantines were brief and absolute.

Indeed, the first denial letter plainly told the
Ballantines that the MMA would consider any additional
property that the Ballantines might propose, but that all
283,000 square meters of Phase 2 land was good only for
growing fruit trees.

By contrast, the evidentiary record reveals
extensive communication between Respondent and the
Dominican owners of projects such as Mirador, Jarabacoa

Second highlighted. “In the area planned to
develop, there are no rivers, streams or sewers, which
means the construction of the vacation villas will not
affect or modify under any circumstance the local
hydrological condition. They are taking all appropriate
measures to not build on slopes higher than the legal
percentage. We politely request you to forward to your
good offices reconsideration of the decision to reject the
approval.”

It didn’t work. At no time during the three-year
effort to obtain a permit did the MMA ever say to the
Ballantines, “We’re concerned a small portion of your
expansion area has slopes in excess of 60 percent. What’s
your plan to avoid development of these areas?”

They never said, “We’re concerned about the road
layout and want you to consider a different route.” They
never said, “We’re concerned about your altitudes and want
a new site plan.” And yet this is manifestly how
Respondent interacted with every Dominican project issuing
terms of reference and using the corresponding
environmental study as a framework for collaboration and
dialogue. The Ballantines have submitted and identified at
least a dozen comparator projects that are appropriate for
this Tribunal’s consideration.

Detailed evidence about these projects is before
you, but it’s appropriate to briefly discuss these projects
to emphasize the disparate treatment of the Ballantines.

Paso Alto, located on the same mountain ridge as
Jamaca only two miles away on Loma Barrero just across the
Brazilian River. Permit received in 2006 to subdivide more
than 50 lots. Paso Alto spans the ridge line of Loma
Barrero and Respondent Witness Navarro now confirms that
17 percent of this project has slopes in excess of
60 percent.

And indeed in 2007, the MMA allowed Paso Alto to
build a shortcut road to its project beginning at
850 meters above sea level through this pristine forest.
That road contains some 20 narrow switchbacks and proceeds
to an altitude of 1160 meters above sea level.
The Tribunal has also seen the unrefuted testimony of Omar Rodriguez and his desire to joint venture with Jamaca given the strength of the brand.

Quintas, Phase 1. This project is also located on the same mountain ridge as Jamaca two miles to the west. Construction here began before its owners sought and obtained a permit from the MMA in 2009, one year before the Ballantines sought their permit to expand their project. The permit granted the right to develop 60 lots, although the first phase of the project now apparently has 83 lots despite no modification to its permit.

And Respondent now confirms that 15 percent of the project has slopes in excess of 60 percent. And if we superimpose those slopes over the approved site map for Phase 1, we see several lots approved for development despite slopes in excess of 60 percent. Quintas wanted to expand just as Jamaca did. Quintas’ expansion began in February of 2014, one month after the Respondent’s final rejection of the Phase 2 request. The owner saw terms of reference to expand his project, and the terms of reference were promptly issued by the MMA despite their refusal to issue terms to Jamaca. That then began a long period of collaboration that ultimately resulted in the issuance of an expansion permit for at least 26 additional lots.

At the very same time, Respondent was denying Jamaca the right to develop, this property was fully licensed without any restrictions whatsoever on the development of 115 lots.

You can see the slopes here on the left. The area in black are slopes in excess of 60 percent. And you can see the site plan next to it. And if you superimpose the site plan against the slope map, the image is stunning. All throughout the project, approved lots consisting almost completely of land with 60-degree slopes. Respondent’s Witness Navarro now testifies that JMG’s owner promised not to build on steep slopes, but this map shows that any alleged promise not to develop in areas with steep slopes was false, and it’s unclear whether the MMA even considered this site plan when it approved JMG without any restrictions whatsoever. This picture alone proves the discrimination that the Ballantines faced.

Internal MMA documents concerning the approval of JMG show the stark difference between how this project, despite its greater environmental impact, was treated versus how the Ballantines’ expansion request was treated. The Tribunal will hear from Mr. Navarro, who was in charge of the MMA evaluation process at the time. He is now forced to try and argue there are differences between the two projects that support the denial of Jamaca at the very same time JMG was approved. One argument he tries is that the roads of JMG would be less impactful because they wouldn’t have to cross contour lines. This map shows that’s not true.

An inspector visited the project in February 2013. His list of proposed conditions or requests for approval is confusing, at best. It says, “The lot area should be reduced by almost 80 percent. An inventory of the possible number of trees to be moved should be submitted. And down at the bottom they should adapt the slopes in such a way that none exceed 30 percent.”

It’s unclear how Jarabacoa Mountain Garden would adapt or adjust its slopes to bring them down from 60 percent to 30 percent, but they didn’t do that. They didn’t reduce the number of lots they wanted to develop by 80 percent. Instead, they were approved. The Tribunal has seen the documents from MMA’s own files and will see them later this week concerning the evaluation and approval of this project. The MMA didn’t care about 115 lots directly above the Baiguate River despite acknowledgment that project runoff would impact the river. It didn’t care about a site plan that called for these lots to be on slopes exceeding 60 percent.

It didn’t care that the proposed roads would cut directly across contour lines and have to be dangerously steep. It didn’t care about active water on the property.
"all year long" and that there were unexplained pipes already built into those waterways. It didn't care about the potential habitat destruction, specifically noted by inspectors. It didn't care about the existing evidence of erosion and the potential for landslides specifically noted by inspectors. It fully approved the project without modification or condition. The differential treatment here is unavoidable and dispositive. JNG has steeper slopes than JDD, and this was not a barrier to approval. The very same environmental contentions that Respondent now puts forth in this proceeding as justification for denial of Jamaca were not a barrier to the approval of Jarabacoa Mountain Garden. Within two months of each other, Navarro and the MMA accepted the Dominican project's appeal of its original denial and issued a permit and rejected the Ballantines' appeal of their original denial and refused a permit. Mirador del Pino, located on a mountain ridge to the north of Jamaca. It was granted permission to subdivide its property into 77 buildable lots in December of 2012 despite the fact that at least 7 percent of the project has slopes in excess of 60 percent. Mirador requested and received terms of reference, and in March of 2011 the Respondent did not deny the permit request but instead advised Mirador that several of its lots were too close to a ravine that was a source for a tributary of the Yaque River. The MMA identified a small portion of the property, about 10 percent of the 84 lots that Mirador sought to develop that needed to be removed, eliminated, seven eliminated lots from the submission. The MMA later identified concerns about the slopes at Mirador del Pino, but this also did not prompt a refusal of the request to develop. Instead, it simply said, "In addition, the lots with slopes equal to or more than 60 percent will be excluded," according to Article 122. Of course, one year earlier in 2011, Respondent did not identify any specific portion of the Jamaca expansion that needed to be removed from its application. It simply rejected the entire application without comment. In April 2012, a field inspection team visited Mirador and made these observations. "We recommend that all the lots which are on the banks of sources of water and have a very steep slope which is over the limits allowed by 64-00 are not used for construction."

The inspectors did not recommend that the entire project be rejected. Unlike the inspectors at Jamaca, they did not say, "Your project has some slopes over 60." Permission to expand denied. "Rather, they simply recommended that the steep lots not be used for construction and the permit was granted.

La Montana, this project is a few miles southwest of Jamaca and, like so many others, directly abuts the Baiguate Park but conveniently is not included in it. According to the MMA website, it's intended to be the largest mountain project in the country and intended ultimately to be more than three times as large as the proposed expansion of Jamaca. As Respondent's own maps show, the project is entirely forested and has slopes that exceed 60 percent. La Montana received an MMA permit earlier this year despite inspection reports that note serious concerns about its environmental impact. Let's look at that report.

It discusses the construction of ecotourism cottages on a total of 60 plots. It notes mass erosion due to the high local precipitation. It notes slopes between 36 and 60 percent. It observes a series of streams having clear and constant flow of high and good quality. It notes the impact the project would have. The loss of forested area, changes in the natural condition, loss of biodiversity, loss of species habitat, the possible disappearance of the El Rancho stream and an unidentified stream.

And it says, "We are of the opinion that should the project be implemented, it would considerably and negatively affect the dynamic of the ecosystems that interact for the conservation of the forest, especially the area's flora and fauna."

Permission approved. Indeed, the project has now been approved up to at least 1300 meters above sea level showing that Respondent's putative concern about altitude apparently applies only to the Ballantines. Rancho Guaraguao. This project was developed only entirely within the Valle Nuevo Category 2 National Park in Constanza after the park was created in 1998. Constanza, like Jarabacoa, is a mountain tourism pole and the towns are only 12 miles apart. This is owned by Dominican Miguel Jiménez Soto, a major general of the Dominican Armed Forces. It's a development remarkably similar to Jamaca with 52 luxury villas, a restaurant, and common areas. It can be seen from anywhere within the Town of Constanza and by anyone driving past on the main road. However, this project was built entirely without an environmental permit. It was expanded in 2010 without a permit. And it still doesn't have a permit. Indeed, it's continuing to actively develop. It was also developed at an altitude between 1470 and 1890 meters above sea level,
And tellingly, in 2015 Respondent paved a road from Constanza to the entrance of Rancho Guaraguao. Not surprisingly, the Respondent’s Minister of Public Works, Gonzalo Castillo, is a property owner at this unpermitted luxury mountain development.

Now, in response to the Ballantines’ identification of this comparator, the DK quickly rushed in to try to cover its tracks issuing a fine in March of this year, more than a decade after development of the project began and after it had paved a road to its front door.

Sierra Fria. It appears this project was initially denied by the MMA in November of 2016 after this proceeding was brought. This project continued to market its property and now has been or is about to be permitted. Indeed, the Respondent’s Ministry of Tourism website publicly confirms the project received its CONFOCOTUR approval in July of 2017. That approval was signed by Soila González, the same MMA manager that signed the original denial of the Sierra Fria permit only eight months earlier.

Sierra Fria has confirmed potential buyers and brokers that the development will receive its permit in 2018. The testimony to that is in the record and unrebutted. And it is marketing the sale of 133 condominiums. These are its brochures.

The Tribunal has seen the unrebuted testimony that Dominican Developer Daniel Espinal was allowed to work directly with the Ministry of the Environment to secure MMA approval for Sierra Fria.

Alta Vista, also located in La Vega and owned by Dominican Franklin Liriano, a mountain residential community approved by MMA in August 2012. Indeed, in what appears to be a trend, the Ministry of Tourism paved the previous gravel road several kilometers to the front gate of this project as well. Inspired by Jamaca de Dios, the Tribunal has seen the testimony confirming Liriano’s desire to co-venture with the Ballantines to leverage the Jamaca brand before Respondent’s treaty violations drove the Ballantines from the DR.

Los Auquelles. This 35-lot project is located in the Central Mountain Range on the north side of Jarabacoa. 14 homes have been built here since the mid-2000s without an environmental permit. 15 homes. The Tribunal has seen the evidence of the MMA’s policing of this project.

After this claim was brought, the MMA inspected the project in April 2016 and noted the existence of homes built on slopes well in excess of 60 percent, but no fine was issued and the development was not halted. Then after the submission of the Amended Statement of Claim, a second inspection visit was made in May 2017.

And then, finally, a third inspection made in July of 2017 resulting in a small fine of 6,000 U.S. dollars for failing to obtain a proper permit and for building homes on slopes in excess of 60 percent.

Yet another effort by Respondent to now appear as though it’s applying its laws equally without regard to nationality. But instead, this shows Dominicans get a mere slap on the wrist for their illegal development, and the MMA continues to look the other way hoping this arbitration will soon be over.

Monte Bonito. Another gated mountain project located on the other side of the Yaque River in Jarabacoa. It’s owned by the Ramirez family, the owners of the largest coffee plantation in Jarabacoa. It has built both roads and dozens of vacation homes over the last 12 years. It has 55 lots and has slopes in excess of 60 percent. It’s never been permitted.

Once the Ballantines identified this project as a comparator, the MMA rushed to hurry and cover its tracks, sending an inspector in March of this year who wrote a report asking that the law be applied and that the appropriate administrative penalty be imposed. Whether any fine was imposed is uncertain.

It’s appropriate to save Aloma Mountain for last.
The Tribunal has seen the Núria report from the respected journalist broadcast across the Dominican Republic, which highlighted the disparate treatment between Jamaca and Aloma Mountain and highlighted the political connections between Gómez—between Domínguez and the MGA which allowed Juan José Domínguez to use MGA personnel to help build his project.

Now, Respondent emphasizes that Aloma has been denied its permit and it trumpets the fine that Respondent has imposed on Domínguez for developing without a permit. But that fine was merely for show. It was promptly reduced by more than 80 percent. And to this day, more than five years later, there's no evidence Domínguez has paid it.

The evidence is plain before this Tribunal. Neither the permit denial nor his unpaid fine has prevented Aloma from developing its land directly adjacent to the dormant Phase 2 of Jamaca de Dios in Baignaut Park. There are 12 comparators that prove the Respondent's treaty violations, several are on this chart.

As much as it will try to divert the Tribunal's attention from these simple facts, Respondent cannot avoid that each of these competing Dominican projects were allowed to develop—were allowed to develop, and the Ballantines were forced to bring this claim and be here before you this week. At the end of the day, it's as simple as that.

Thank you.

MR. BALDWIN: Thank you, Members of the Tribunal.

It's good to see Respondent here, and I thank everyone for their time and attention to this case because this is an important case. I'm going to talk about a few issues today, and the first is dominant and effective nationality.

Now, I don't want anyone to get the wrong impression from seeing this slide because this is not an indication of how important the U.S. is versus the Dominican Republic. Instead, this is a visual representation of the amount of time that Michael Ballantine has spent in the United States versus the time he spent in the Dominican Republic. And it's an approximate visualization and will give some of these details, but this shows you what we're talking about here.

Now, I'd like to first start off with a reality check. Because this is a situation different than we typically see. This is not an instance where the Ballantines decided to move to some place to obtain treaty protection to set up a Dutch corporation or to do something like that to do it. There's little doubt here that the Ballantines invested as U.S. nationals. They hadn't even become Dominican citizens when they started making their investments.

Their investments were made as U.S. nationals. They were there as U.S. nationals. Or Michael Ballantine was there particularly as a U.S. national working on this project. And so that should be kept in mind as you think about this because there's no allegation or insinuation here that there's any type of abuse in this case, which separates it from a lot of cases. And not only abuse of rights cases, but also dominant and effective nationality cases that you'll see in some of the—especially the earlier cases.

One of the reality checks. Speaking of those cases, if you look at the situation that the Ballantines have with regard to their dominant and effective nationality and you compare and contrast, these are the cases that are cited by both Parties with regard to dominant and effective nationality.

And Hotttehohn, born in Germany, always lived in Germany, moved to Guatemala for 34 years, got a very fast fast-track citizenship in Liechtenstein, came back to Guatemala, and then Liechtenstein sued on his behalf. That is an example of abuse of the system. That is nothing like the Ballantines.

With Merge. Merge moved to Italy in 1933 with an Italian husband, resided—never resided in the United States at the point that the claim was brought. So she never resided in the U.S. after 1933, didn't pay U.S. taxes, only Italian. The Tribunal found her to be an Italian.

Ladjevardi, born in the U.S. to Iranian parents, spent the majority of her childhood in Iran. When in the U.S., she lived with Iranians. Her friends were Iranians, and she always had a permanent residence in Iran. That's that.

Malek vs. Iran. Now the last two are cases where the people were found to be U.S. If you look at Malek, left Iran in 1958 when he was 17. Relevant claim period was '80-'81. Married an Iranian woman, made frequent trips to Iran, but nevertheless was still deemed to be—and, of course, born in Iran. Nevertheless still deemed to be U.S. And then Saghil was a U.S. national who happened to be born in Iran and lived on and off there and sought citizenship but found to be, in this case, U.S.

Another thing that has to be kept in mind as you think about this is there's two investors here. There's Michael Ballantine and Lisa Ballantine. One very cute married couple but two investors. And the Tribunal has to look at both of them and has to determine the dominant and effective nationally of both, not as one group.

And Respondent throughout its papers lumps them together. You can see this is typical of a lot of these
 paragraphs where they say "Oh, they did for travel purposes and financial purposes, business license, signing loan agreements." And then you start to look at the evidence. And the evidence doesn't hold up. And I'm confident the Tribunal will look at that evidence. The evidence doesn't hold up in many places. But also when it talks about some of these issues that are listed, particularly in this paragraph, you go to the citation and all you see is something Michael Ballantine did.

I mean, Michael Ballantine signed an agreement, but not Lisa Ballantine. So it’s not the Ballantines. It's Michael or Lisa Ballantine.

And, of course, it shouldn't be surprising to the Tribunal that if they're making a--if Michael Ballantine is making a loan agreement in the Dominican Republic, that he would--might use his Dominican nationality or Dominican passport in connection with that. That just makes sense.

That doesn't show any connection or attachment to the Dominican Republic.

So before we get to the specific evidence, I want to talk about how Respondent views people. And I want to make it clear I'm not talking about the people in this room who are here from Respondent. I'm talking about Respondent’s officials who are not here but who have done a lot, and so have lots of other international agreements. Everything else. Have done a lot of work on talking about what’s going on in Haiti where tens of thousands of people--I'm sorry, in the Dominican Republic where tens of thousands of people, Dominican citizens, were stripped of their citizenship and made stateless by Respondent. Again, not by the people in this room but by Respondent.

Now, this human rights travesty shows that it is a precarious thing to be Dominican. So let's look at what happens here. Pregnant women and young children stripped of their Dominican citizenship. That's important. These

created lots of issues. And I just want to make that clear so nobody feels like I'm saying that the people in this room are responsible.

But I want to talk about who is Dominican according to Respondent. Because as we’ll see, Dominican nationality and citizenship is a very precarious and fleeting thing. There's very little certainty to it. So I'd like to introduce you to two people. On the left side of your screen we have C.P., 37 years old. We don't have a picture of her because of the situation you’ll see in a moment. On the right side we have Lisa Ballantine here, age 51. And I apologize for mentioning your age, Lisa, but I have to for this slide.

So let's look at this. C.P. And this is all from Exhibit C. The C.P. is all from Exhibit C-179. C.P. was born in the Dominican Republic. Lisa Ballantine, born in the United States. C.P. lived her whole life in the Dominican Republic. 37 years. Lisa lived her whole life in the United States except for portions of the years in 2001 when she was on a mission's trip and then from 2006 to 2014, portions of those years.

C.P. apparently has Haitian ancestry. Could be her parents, could be her grandparents. But C.P. has Haitian ancestry. Lisa has U.S. ancestry. Her entire family—or her family is in the U.S., the residences are in

the U.S. You've seen this evidence. You'll see some today. She is U.S.

Now, let's look at—who do you think Respondent thinks is Dominican? Well, Respondent thinks that Lisa Ballantine is Dominican. She's dominantly and effectively Dominican despite all the things up here. Now, what about C.P.? C.P. is stateless. C.P. is nothing. Her citizenship was taken away.

The key to maintaining Dominican nationality is to be someone that people consider Dominican. It has nothing to do with a piece of paper that makes you Dominican or doesn't make you Dominican. And Human Rights Watch has done a lot, and so have lots of other international organizations. Everything else. Have done a lot of work on talking about what’s going on in Haiti where tens of thousands of people--I'm sorry, in the Dominican Republic where tens of thousands of people, Dominican citizens, were stripped of their citizenship and made stateless by Respondent. Again, not by the people in this room but by Respondent.

Now, this human rights travesty shows that it is a precarious thing to be Dominican. So let's look at what happens here. Pregnant women and young children stripped of their Dominican citizenship. That's important. These aren't people that weren't. They were stripped of their Dominican citizenship before being pushed across the border into Haiti, forced to leave the country of their birth through abusive, in summary, practices.

And this was not a court decision. I've had—I debate this issue a lot among a lot of other immigration issues a lot. And I talk sometimes to my friends in the Dominican Republic. And they go, "Oh, this is a court decision."

It's not a court decision. There's laws. There's other implementing regulations. This is the executive branch doing this, and you can see this. Immigration officers did not even make a cursory attempt to determine whether they should be deported aside, you know, from checking whether they had work documents. They had been separated from their children for days or weeks after they crossed the border and had no legal recourse or opportunity to challenge that before a judge.

Now, I want to make a point. And if you'll indulge me, this point is a little bit personal. But you see, the last part talks about children being separated from their parents. I'd be remiss here if I did not mention that the U.S. officials have done some pretty disgusting things too, in my view, in terms of immigration; separating children, other things that have happened in the
which is--which originated and is a very popular dance in the Dominican Republic? Were they there to learn the Merengue, a dance? Was it part of the project? Or was it part of the Dominican Republic versus being out of the Dominican Republic. And as we discussed, Lisa--and as the testimony shows, Lisa Ballantine was there--while she was there working on this non-profit that she did. Now, why did Lisa Ballantine take Dominican nationality? They've decided not to call her in this case. They decided not to cross-examine her. Her testimony is unrebutted. And she states in her Witness Statement that she became a citizen of the United States in 2005. "I was concerned that our children could lose the entire investment if we were to die."

Now, this is the most basic reason to do something, to take the Dominican nationality to protect your children, not to gain some advantage or anything like that. To protect what you're going to be passing on to your children. Although the Respondent took it away anyway. But that's why she was there, to protect her kids. She certainly would have never thought that she'd be sitting here and Respondent would be arguing that because she did this to protect her children that, the vast majority of that time in the U.S. Here is a chart which shows the amount of time Lisa Ballantine has spent out of the DR in green and in the DR in red. This chart which was exhibited—or information originally came from Michael Ballantine. The Respondent exhibits this in their information as well. This is a chart for the years 2010 to 2014. And you can see the amount of time that Lisa--this is, again, Lisa Ballantine--the amount of time she spends in the Dominican Republic versus being out of the Dominican Republic. Now, of course, the time out of the Dominican Republic doesn't mean she was in the United States the whole time. Lisa Ballantine, as the Tribunal is aware from the pleadings, ran a non-profit that brought clean water. She was spending a lot of time in other countries at that time too. She was spending time in other countries working on this nonprofit, bringing clean water to people in these countries, bringing these filters to people. So it wasn't all in the U.S. But you can look at what was in the Dominican Republic and out of the Dominican Republic.

So what were the Ballantines doing in the Dominican Republic? Were they there to learn the Merengue, which is--which originated and is a very popular dance in the Dominican Republic? Is that what attracted them to the Dominican Republic? No.
therefore, she doesn't have a right to seek legal redress.

Habitus. The Ballantines owned or rented residential property in the U.S. This is from Michael Ballantine's Witness Statement. The Ballantines owned a New York condominium and a New York home. They owned and/or rented property in Brazil, Spain, Dominican Republic, United States, and elsewhere. They had automobiles registered in different countries. The Ballantines did not have Permanent Resident Cards or green cards. However, their children had green cards. The Ballantines had health insurance with United Healthcare.

Now, the Ballantines' evidence of attachment is their children's evidence. Their children were born in the U.S. and have lived in the U.S. for most of their lives. They have friends and family in the U.S.

In addition, the Ballantines' children are American citizens. They have voted in U.S. elections and have been involved in U.S. political activities.

The Ballantines' children are also involved in U.S. organizations and communities. They are members of the Rotary Club, have volunteered at various organizations, and have been involved in various community activities.

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work and their life investment? What did they do? Did they go to Punta Cana? That's what I would have done, to be honest with you. I would have probably spent a couple of years in the very beautiful place of Punta Cana. But they didn't do that. Instead, they got out of there and went back to the United States.

Now, as this—Michael Ballantine explains in his Reply Statement, there were things they had to do to get out of there. They had to make sure the homeowners association was in place. They had to take care of the restaurant. They had to take care of those things that they felt they had a duty to the people of the complex to take care of, but they got out. They didn't go to Santiago or Santo Domingo.

Now, the U.S. Embassy has a view here too. The U.S. Embassy in the D.R. advocated for Michael Ballantine on many occasions as a U.S. national. They advocated on his behalf all the time. Let's talk about how Respondent viewed them. The then Mayor of Jarabacoa. This is from Professor Riphagen's concurrence in Case Number A/18.

And he says, "If one state treats a dual national as an alien, that is by arbitrarily discriminating against that person as compared with its own citizens, a claim may be validly brought before an international tribunal on that basis of the person's nationality."

So let's look at how Respondent viewed them. First, let's look at the CEI-RD. This is Respondent's agency that's in charge for foreign investment. They deal with foreign investors in the country. And they interceded several times. This is an example. They interceded with this letter, for example, with the Ministry of the Environment to try to get them to reconsider their denial of the Ballantines' property. They did that talking about him being a foreign investor.

Now, Respondent, in its pleadings, makes the argument—they go, "Oh, well, look. You know, they didn't know that they—that Michael Ballantine was a Dominican national too. You know, they only thought he was a U.S. national."

Well, that's interesting. First off, there's nothing in the record to suggest that. There's nothing in the record showing that they didn't know that he was a Dominican national as well. And Respondent can ask Mr. Ballantine that on cross-examination if they wish. So that's one issue. That's an evidentiary issue.

But the other issue is just because he was a Dominican national does not answer the question. That starts the question. It's the dual nationality that begins the inquiry. What matters are the attachments and other things. And certainly, the people in the CEI-RD and others—this is just one example—viewed Michael Ballantine as a U.S. national. He looks like it, he talks like it, he's hanging out with U.S. nationals. He's a U.S. national. That's how they viewed him.

Now, it's not just them. As I mentioned, it's how everyone in the place viewed the Ballantines. This is the Mayor—the former Mayor—the then Mayor of Jarabacoa. This is from Exhibit C-175. It's a video. This is her saying, "I am a close friend. I love very much the American of Jamaca de Dios."

And if you listen to the video—I'm not going to play it, but if you listen to the video, which I suggest you do, you'll see she actually starts to say "gringo" and then catches herself and says, "The American of Jamaca de Dios."

And Michael Ballantine was never bothered by being called a gringo. But if you look at this Exhibit C-175, which I would recommend you do, you'll see a string of people in 2013 all saying "the American," "the gringo," "the American, the gringo." They're talking about Michael Ballantine, it's clear from the context of these comments, and that's how he was viewed. Certainly, the people of Jarabacoa didn't view him as a Dominican.

This is just a slide on—we talked about the time period. It's in our papers. I'm not going to—"I'm going to skip over that now given time constraints."

Now, analysis should be based on truth. Okay. A Winston Churchill quote, "Occasionally he stumbled over the truth but hastily picked himself up and hurried on as if nothing had happened."

So let's look at—the truth is the inquiry here. The truth is what—we should find out what actually happened. That should be the truth instead of trying to find clever ways to make arguments that are not supported or twisting evidence to do that.

So let's do this. I put this in the "no good deed goes unpunished" category. We talked about this CEI-RD and the agency that's responsible—the agency that's responsible for dealing with foreign investors. And we talked about Michael at one point sent the head of that agency a letter.

The head of that agency now is the Attorney General of the Dominican Republic. Michael Ballantine had sent him a letter in 2013. And he had—one of the many things he had written in that letter was "The nature and kindness of the people"—meaning the Dominican people—"made them feel at home for the first day."

That's a nice, kind, decent comment made by a nice, kind, decent human being to someone to talk about the
A Dominican citizen and she did place a vote. That has nothing to do with connections to the Dominican Republic. This is a factual statement, by the way. She was a Dominican citizen.

Now, let's look at another one. This is from a Statement of Leslie Gil who is here in the room. She was a witness, worked with the Ballantines for a long time. She also wasn't cross-examined. But she stated in her statement—she was talking about being an employee of the Ballantines, and she said that they made the employees feel like family. They were made to feel like family.

This is used by Respondent as evidence that they have family connections or some cultural or connection in the Dominican Republic. This is absurd. This is taking—talk about no good deed goes unpunished.

These are people who treated their employees well. And somebody says, “Hey, they treated me really nice, like family,” and that’s touted by Respondent as a cultural connection and attachment.

This one is especially interesting. So Lisa Ballantine went to the school in the U.S. This was after she was talked about going to the Dominican Republic back in 2010 to the United States. This was before she started Jamaca de Dios and before she—especially before she started her non-profit. She went to Northern Illinois University. Now, that’s part of the attachment analysis. Where do the people go to school? She went to school in the United States.

Now, what did she do in that school? Well, she studied. She took at least one class, I assume, on ceramic filter manufacturing, and she took a class on Dominican history.

Now, Respondent—she was doing this, by the way, so that she could create this nonprofit and bring clean water. But, again, no good deed goes unpunished with Respondent.

So here they say—they highlight that she went back to Northern Illinois University and said, “This indicates mainly a connection to the Dominican Republic.” Now, I assume that the connection is not studying ceramic filter manufacturing. But the connection they think is that—it says here “the history of the Dominican Republic.” Yeah, she took a class on the history of the Dominican Republic as part of college.

I very much doubt that Northern Illinois University has a major on Dominican history. Okay? So it wasn’t like she was there taking a major on Dominican history. She took one class. I deal with a lot of students all the time as part of the Jessup Competition and other things, and I have never heard anyone tell me, “Hey, I’m from Northern Illinois University and I have a Ph.D. in Dominican history.” Okay. It’s one class.

Now, this is something—other things that Respondent has done in connection with this. Okay. They—Lisa Ballantine’s Facebook page—I’ve been on it myself. It’s public. Looked through it. Hundreds of pictures. Lots of pictures. She likes to take pictures, and she posts these pictures up on Facebook.

Respondent submitted four of these pictures and put them in the text of its Statement of Defense and showed this and said, “Look, here she is.”

She says, “We placed our votes today as Dominican citizens.”

“Ah, look. This shows she’s Dominican.”

That’s a factual statement, by the way. She was a Dominican citizen and she did place a vote. That has nothing to do with connections to the Dominican Republic. It just shows that she was a citizen of there and placed a vote.

But this—this is evidence of nothing. But that’s not the issue. Because the issue is, if you look through, and as Lisa Ballantine put in her statement, these facts—if you look through the entire thing, you see her making all kinds of comments that Respondent didn’t include. They just selectively picked out a couple.

This is how they do their dominant effective nationality analysis. They select a few nuggets that they think help them, like they treated the people like family, and omit everything else. Here is her saying “I’m goin’ home” or “Sweet home Chicago” or “I’m truly home.”

I’ll point out that Lisa Ballantine even talks about Baden-Baden being her home in Germany. Now, when I saw this and I saw Respondent’s argument, I looked on UNCTAD to see if there was a Bilateral Investment Treaty between Germany and the Dominican Republic because I thought about amending the claim to add this based on German citizenship because this seems to be enough for Respondent to show that somebody thinks they’re German.

Now, this is another thing that they did. Again, this picture here doesn’t come from an exhibit. This is in the text of the Statement of Defense which is on the--which is on the website. And they took a comment from a then-16-year-old girl in 2010. I said that Tobi had moved back in 2010 to the United States.

They took a funny comment—this is a funny comment. “What the heck is Chick-fil-A?” Like she couldn’t have Googled Chick-fil-A to see what it was, like
In the Corona Materials case—this is from the Award—the Tribunal notes, "The Dominican Republic hereby respectfully requests that this Tribunal declare they lack jurisdiction to hear the dispute based on the three-year time period." 

Same Respondent, same lawyers, different case, a couple of years ago it was definitely jurisdiction. Now, there's no doubt that it's admissibility, and so now they want to argue that it's admissibility even though they argued before that it was—that it was jurisdiction.

And, of course, it is jurisdiction, and we all know it's jurisdiction. And jurisdictional objections have to be brought in the Statement of Defense. And it's here in UNCITRAL Rule 23(2). And you can see in that last sentence there, "Unless a later plea—the Tribunal considers a later plea to be justified."

So let's quickly look at whether or not it was justified. First off, what did the Ballantines know or should have known in—when the park was created? Well, Respondent argues that the part—that the promulgation of this decree was widely publicized. They talk a lot about this was well known in the Dominican Republic, everybody

disregarded. But since Respondent is here, and I want to make sure everything is clear, I just want to confirm that I'm not the Prime Minister of Nepal. So I want that to be clear on the record. Okay.

Let's talk about jurisdiction. Respondent in this case says that their issue about the national park, the emails in 2010 that talk about the national park that they belatedly made after the Statement of Defense, they say this is an admissibility, not a jurisdictional. They spend lots of time talking about, "Hey, this is admissibility. How could anyone think this is a jurisdictional claim? This is definitely admissibility."

Well, as CAFTA and NAFTA Tribunals have laid out many examples of, when people look at this time bar, it's looked at as a jurisdictional example. Now, we talk about this in our papers, but you can look at the U.S. submission at Footnote 6 and you can see all the cases that talk about that.

Now, when the U.S. has been asked, the U.S. has been consistent. Respondent has not been consistent. The U.S. has been consistent, to their credit, on this issue. They've been consistent in that every time they've talked about it, they've talked about it being a jurisdictional objection. And this, for example, is something in the Apotex case that was recited in the Award that explains why
Then they were--excuse me. Going back to this for a minute. When they say that they have to wait for, you know, the definitions of the protected area, what they're talking about there is the Park Management Plan. This park was created in 2009. It's the Park Management Plan, according to Respondent, that lays out what specifically can and can't be done and establishes different things with regard to the park. The adviser said wait for that. And then the adviser also said in the same set of emails--said "Submit your application to them and see what happens." essentially.

"Submit it and see if you get your terms of reference or whether you're refused." And that's exactly what the Ballantines did. They weren't told they couldn't do it. They just said they had to wait for some information.

Now, the Ministry in charge of defining the use. Well, let's look at that. The park was created in 2009. You can see from this timeline, this Empaca Redes email is from 22nd September, 2010. The denial based on the park was from January 2014. Notice of Arbitration filed in 2014. Amended Statement of Claim, 2017. Magically, right after the Amended Statement of Claim, the Park Management Plan is released. Okay.

Eight years after the creation of the park, the Park Management Plan is released. That's what the Empaca Redes adviser said you had to wait for to see what happened. That was done after the--it was done after the statement--Amended Statement of Claim. And as I mentioned, the adviser said, "Register the project. Go to get your terms of reference and see what happened."

And the Ballantines did that. One, two, three times there was denial. No mention of a park. It was only on the fourth denial in 2014 in which that was even suggested.

So those were the emails. Projects such as yours are okay. Wait for the Park Management Plan. Apply for the permit. Exactly what the Ballantines did. And I want to state one other thing because the Respondent has exhibited the law regarding protected areas several times. This is from their Statement of Defense.

And you'll see in there that they say, "As described in the management plan." They talk about that. They also talk about it being ecotourism. So the fact that it was ecotourism was already out there.

In fact, if anything, that email from Michael when he first--you know, when it caused him to see there was a national park, should have given him a lot of comfort. If I found out that my land was becoming a national park, I would probably, maybe just naturally, think I had a loss. And even if I looked at this law and thought "Am I ecotourism?"

But he was ecotourism. His adviser told him, other projects similar are ecotourism. So there's no doubt that he's ecotourism, and so there was no claim.

Again, just quickly, Lisa Ballantine exists too. These are emails between Michael Ballantine and the environmental adviser. Nothing to do about Lisa Ballantine, when she learned about it, anything like that. That's a separate analysis that has to be made.

Now, if they say, "Well, Lisa should have known because the park decree was out there," well, that goes to Michael Ballantine as well and that goes to the jurisdictional issue. But if they're arguing these emails gave Michael Ballantine notice, that doesn't impept to Lisa Ballantine's. She's not involved in the day-to-day operations or even any oversight with regard to Jamaca de Dios. She's an inventor.

That doesn't mean that she's there, you know, glowing roads. She's doing her--her ceramic filters to bring clean water to people.

Okay. So all the evidence shows--so the question is: Do you have a claim? Do you have a loss? Can you bring it? All the evidence shows that they didn't have a loss. Let's look through it. My colleague, Matt, talked about the CONFOTUR approval and when the Ballantines submitted that application, they said exactly what this project was, 1,200 meters, swimming pool, hotel, spa, 95 lots. They laid out what the project was. So they knew in this CONFOTUR application that this was a substantial project with all these things.

They also--the Ballantines also stated exactly where the project was. They said--so they knew--so the CONFOTUR--people looking at the CONFOTUR approval knew the size and scope of the project as well as--as well as where the project was.

Now, they--this CONFOTUR approval, which is issued in November 2010, came after the Empaca Redes' email exchange. In here, they get granted provisional classification. And as my colleague, Matt, pointed out earlier, this is signed by multiple Dominican officials. Two of those officials are from the Ministry of the Environment, Medio Ambiente. Two of them that signed this are from this.

These were MMA people who looked at this and granted--and didn't say, "Hey, you know what? We looked at this land. He's actually in a national park. He can't do this."

No. They signed off on it. Doesn't that give Michael Ballantine reason to believe that there's not going
So people are building in national parks all over the place. Does anybody think for a minute—imagine that somebody comes into your office as a client and tells you this story and they haven’t been denied yet on the basis of the park and they go, “Do I have a claim? Can I bring it because of the park?” You would tell them no. At least I would tell them no, and I assume most people would tell them no. Some lawyers might not.

Now, the only slide I want to talk about—the national park is well laid out in our papers. I just want to show this one slide because it’s a good visual representation of the issue with the park. And that is, as you can see, there’s two things. There’s indentations in the park where people were excluded. But you can look at the properties in blue on the left. Those are properties—those two properties in blue, particularly the ones that are right next to the red properties, those are properties on slopes that go down into the Baiguate waterfall and the Baiguate River.

This was the purpose of the park, was purportedly to protect Baiguate—one of the purposes—protect the Baiguate River and the Baiguate Waterfall. The properties that were on the mountain and would lead right down to those waterfalls were kept out.

And as we’ve stated in there, these were very powerful people, agricultural titan, one of the wealthiest people in the D.R. and a founding member of the PLD Party, which has been in power for 18 of the last 22 years in the Dominican Republic.
Now, I want to briefly talk about Respondent's arbitration conduct. And I feel like since the Ballantines are from Chicago, my colleague is from Chicago, I thought, you know, we should put up this thing. "Once is happenstance. Twice is coincidence. Three times is enemy action."

So let's look at what these coincidences and these things that have happened in the arbitration case. Respondent has sought to use its sovereign powers on at least 11 separate occasions to try to create a defense in this arbitration to cover up its conduct or gain some advantage.

Let's look at the first one. The Ballantines submit a document request on 8 June 2017. I'm sorry. The Ballantines do that. Respondent creates a law--issues a law in July 2017 that orders that documents from these projects have to be protected. And then, of course, because that was the purpose of making the law, Respondent uses that in this arbitration.

That is an improper use of sovereign authority, to have a sovereign create a law to help you try to shield documents from the other side in an arbitration. Look at the timing of that. After. Now, that's pretty--you have to give them credit for one thing. That's very efficient. Submit document requests in June, and by the beginning of July you have a law that orders all the documents that were requested to be secret. And that law was invoked repeatedly by Respondent in their papers.

The Park Management Plan creation. We talked about this briefly. The Baiguate National Park was created in 2009. The management--we say in the Statement of Claim, "Hey, there's no management plan. What's going on here? That's supposed to tell us the uses."

And then magically in March of 2017, the management plan appears eight years later. Does anyone have any doubt that that Park Management Plan is--was designed to help them in the arbitration? That it was looked at by people, that the arbitration was an overriding factor in that Park Management Plan and not what really mattered?

We have the Aloma Mountain fine. Now, Aloma Mountain was issued a fine in 2013 before this case started. In our Amended Statement of Claim, we made a lot about Aloma Mountain building and building without a permit. Two days--the timeline here doesn't even show it because two days before the Statement of Defense, the Minister of the Environment himself went to Aloma and recorded this in a letter, which is what Respondent submitted.

Went to Aloma and said, "Hey, you know, you really have to pay this fine." Four years later, you know, "You really have to pay this fine." That's what the letter says. That's what the document that the Minister wrote up says. "Hey, I told them you really got to pay this fine."

Done before the arbitration. Submitted two days before the Statement of Defense and included in the Statement of Defense as an exhibit.

Now, think about this logically for a moment. Of course this was coordinated. If the Minister goes out and does a visit and then all of a sudden there's a document written up two days later, submitted in a pleading, which has to be looked over, the exhibits gathered, it has to be written into the text, they knew this. They knew this letter was coming. They were ready for the letter. And the letter was done, sovereign power--being done to try to affect the arbitration.

Aloma Mountain in general. Aloma Mountain was supposedly denied. Aloma Mountain was supposedly denied in 2013. But then after it was denied, there were two instances in 2014 and in 2016 where the Ballantines were able to obtain papers from the Freedom of Information Act where they saw that it wasn't actually denied. It was listed as being under environmental review.

So in the Statement of Claim, we say, "Hey, look, they're building, you know, with impunity. This guy over there is building roads, doing all sorts of things."

Then Respondent issues a second denial of the project in 2017. Again--and, of course, the Statement of Defense emphasizes a second denial. "Look, we've denied them again or we've confirmed the denial." You know, "So, look, we really mean it this time."

But then the MNA website, even after the Statement of Defense, still showed that the project was under consideration. And, of course, we know that he's still doing this.

Los Auquelles. Okay. They built without a permit in the mid-2000s. And March 2016, there was a site inspection. It revealed slopes over 60 percent. No fine was issued. No work was halted. Just a site inspection saying, "Hey, you're building without a permit. You're building on slopes over 60 percent." We, in the Amended Statement of Claim, talk about all these projects developing without permission and then, of course, there's a fine of $6,000. $6,000.

The Ballantines would have loved that deal: to build without a permit, build on slopes in excess of 60 percent, and get a $6,000 fine. And by the way, nothing to show that Los Auquelles ever paid that fine. Nothing. Rancho Guaraguao's fine. Constructed in a
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Realtime Stenographer
Worldwide Reporting, LLP

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.questions in particular related to the jurisdictional

ARBITRATOR CHEEK: Good morning. I just had a few

with Marney.

QUESTIONS FROM THE TRIBUNAL

THE VIDEOGRAPHER: Thank you.

MR. ALLISON: Perfect.

So why don’t we take a break. We will come back

at 11:30, and we will take some questions by my colleagues

and then we will start.

MR. ALLISON: Perfect.

THE VIDEOGRAPHER: Thank you.

(Brief recess.)

QUESTIONS FROM THE TRIBUNAL

PRESIDENT RAMÍREZ HERNÁNDEZ: I think my

colleagues and myself have some questions. We’ll start

with Marney.

ARBITRATOR CHEEK: Good morning. I just had a few

questions in particular related to the jurisdictional

PLD and the top Respondent officials. And Odebrecht even

moved its headquarters to the Dominican Republic. It felt

so comfortable. When it was feeling heat in Brazil—look

at the map up here.

Dominican Republic, a little small place in a big

world. Could have moved it anywhere. They go, “Hey, let’s

move the head of bribes to some place where we know we can

get away with it and where everything is going to happen.”

This is the State that is doing this. Yes.

PRESIDENT RAMÍREZ HERNÁNDEZ: Thank you, Counsel.

I think it’s time that we may need a break. Actually, I

will ask my co-arbitrators whether they will have some

questions, because I will have some questions before we

move to the legal issues.

So why don’t we take a break. We will come back

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and then we will start.

PRESIDENT RAMÍREZ HERNÁNDEZ: Perfect.

THE VIDEOGRAPHER: Thank you.

(Brief recess.)

QUESTIONS FROM THE TRIBUNAL

MR. BALDWIN: Thank you, Ms. Cheek. I’ll answer

the last question first, which is, no, it doesn’t matter,
because at no point were the Ballantines dominant and
effective nationals of the Dominican Republic. They were
always dominant and effective nationals of the
United States.

So we don’t think it matters, and we think the
evidence is very strong. And that’s one of the reasons why
I didn’t spend time talking about it today.

I’ll say that we make in our papers the argument
that the relevant time period is when the investment is
made. That’s on a textual interpretation of CAFTA, when
you look at the definition of “investor” and you look at
that definition and there’s a disjunctive form to it—and

The absence of evidence can be a powerful thing.

They don’t talk about any of the other fines being paid,

but they give the bank name and the person who made the

payment at Vista del Campo. That means that the Tribunal

should determine that none of the other fines were actually

paid because, if so, the Respondent would have told you so.

And they don’t do that for the others.

This is a corrupt state acting corruptly. 135th

out of 137 countries, only ahead of Paraguay and Venezuela.

It’s no surprise that Respondent has used its sovereign

authority to try to provide and corrupt this arbitration

process because—not for the Dominican people, but for the

leaders, the ruling party, the PLD that’s been in charge

for many, many years.  This is what they do.  This is what

they know.

And we know about the Odebrecht scandal.  17

contracts, 92 million in bribes. Zero convictions. This

92 million in the contracts came from money from the

Dominican people that ended up lining the pockets of the

PLD and the top Respondent officials. And Odebrecht even


United States disagrees as well.

The only comment I’ll make, because this is a little bit in relation to the United States submission, is that the— I think that an argument— our position— and we think it’s a good one— is that it should be made when the investment is made.

There’s an argument to be made that it happens when the claim arises. Tribunals have in several instances used the date— they’re in different settings, different scenarios, but Tribunal has used the date of the claim as a basis as well. But— as to when the action arose, when the claim ripened, but not when it was submitted to arbitration.

There’s lots of examples where people could be dominant and effective national of one place when the claim arises and then lose that at some point before they actually submit the claim to arbitration. And when that happens, we would certainly state that that isn’t a right that somebody loses.

And you could look at the Iran Claims Tribunal for that, because the Iran Claims Tribunal said you have to have it when the wrong was done. Then you also have to have had it when the accord was signed in ’80/’81, when— you know, when the actual accord that led to it was signed. That’s what they use as the rules.

ARBITRATOR CHEEK: Thank you. That’s all I have.

And the Malek cases, as we talk about, talks about looking at the entire life. Then the A/18 case goes through and lists the factors, and we think those were a reasonable statement of what one should look at, because those factors do look at the whole part of the life of the Respondent— of the Claimants.

And the key point is that it’s not some fixed point in time. You can’t look at one Facebook comment and go, “Oh, you know, she’s dominantly and effectively Dominican.”

I think “dominant and effective” means where do your sort of—if you could say this— and this is captured in a lot of what’s in there— but where does your kind of center lie, your loyalty lie, some of those issues.

I would defer to the factors that are listed in A/18 and that we’ve put forth here instead of me trying to refer, you know, to dominant nationality.
reinvent them. But those factors are--taken together, paint a good picture of where--of whether someone is dominant and effective of one nationality or another.

ARBITRATOR VINUEZA: Maybe I had to clarify my question. I guess you mean dominant and effective are synonymous or are different sort of ideas or concepts?
Because there's a very particular way CAFTA is drafting or actually writing down whatever dominant and effective nationality will mean.

MR. BALDWIN: I think the first thing I would say is that--I think that dominant and effective are two different things. And here both have to be satisfied. So it can't be the dominant or effective or the effective or dominant. It has to be dominant and effective.

So I think particularly the drafters of CAFTA made known that you had to meet a dominance sort of test. And you could look at some of the factors in A/18. They go to dominance.

You can look at effectiveness, which I do think is a totally separate issue, and you can look at some of the factors at A/18, some of the stuff we put in, which really goes more to the effective side, but I think both have to be met. And I think they are slightly different tests, but I think those tests are roughly captured in the factors in case number A/18.

They spent a lot of time talking to people. And I don't think--I think the Tribunal can conclude they would not have done that if this was somebody who was really a Dominican, but just for some reason or another by, you know, marriage or birth, happened to have a U.S. passport.

ARBITRATOR VINUEZA: Okay. My question was much more simple, but you answered it anyway.

And I have a final question, if I may.

When you were talking about the creation of the park, and you were dealing with emails and so on and so forth, I recall that environment adviser sort of suggested that--you know, when they were talking about conditions within the park, what the property will be able to do or not.

You referred--just in my mind, I recall that the environmental adviser is something like such as yours, in reference to ecotourism, right?

What--I want to know your position if you understand--I mean, in your own way of arguing, if ecotourism could be distinguished from luxury homes, villas, development, and so on and so forth.

MR. BALDWIN: No. And in a--sort of a layman sense, I don't think of a big home as ecotourism. But that's what is--the Ballantines--Michael Ballantine was told that's what the Dominican Republic considers ecotourism. Then you need no other evidence other than to look at Rancho Guaraguao, which is listed, and we've put this in as ecotourism. They brand themselves as ecotourism. They say they're ecotourism. And there's huge homes on there, and you can see them in the exhibits that we've put in. So that's considered ecotourism.

ARBITRATOR VINUEZA: Thank you very much.

MR. ALLISON: If I may just point you to some additional piece of evidence in the record with respect to how the Respondent viewed Jamaca de Dios.

When Respondent did a survey of the Baiguante National Park four years after its creation in 2013 to see how the park was doing, first it identified a series of additional areas that they say should have been included in the park, which include many of the comparators we're talking about today.

But, additionally, it created a use and coverage map that defined how the Dominican Republic deemed the areas of Baiguante National Park in 2014. And I'm sorry. I mispoke. This survey was in 2016. And they first said: How is the park? How was it used in 2014? And it identified the Jamaca de Dios and the Aloma Mountain properties as ecotourism projects. It's directly in the record. I can point you to the exhibit number. But
that's how the Claimant--the Respondent viewed the Ballantines' project, as an ecotourism project.

PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. Let me pose some questions. And, again, I may sound repetitive, but maybe it's part of, I think, the Tribunal's task to try to address this first-impression issue of what does "dominant and effective" mean.

So, again, I know that Parties have put forward a lot of elements to this test. But my concern is, do you agree that you have to have an objective test?

And I hear you saying before where your loyalty lies or where your heart is. Those kind of introduce elements of subjectiveness.

So at the end, the Tribunal will have to now come up with a test that we need to apply in this case. So could you try to help us discern: What are the objective criteria that we need to look at in order to determine whether it's a dominant and effective nationality?

MR. BALDWIN: I think that certainly I would suggest that--Professor Ramirez, that the Tribunal would need to look at all the factors that are listed in the A/18 case. In conjunction with that, there would have to be looked at in connection with the overall assessment through the rest of their lives.

And most of--and those really--factors in A/18, for example, are really objective factors, habitual residence and some of those things. There are things from both sides--you know, Lisa saying she was proud to vote, and, you know, things from our side that talk--that have an essence of sort of a subjective nature.

I would say to the extent those subjective acts manifest in something which can be objectively discerned, then I think they're relevant. But I don't think--but I think that the test is essentially an objective one that really is sort of structured around the Malek and A/18 case, because those are kind of representative of how they do. But when there is some subjectivity to it, I think that that can be relevant if it's--if it's tied back to the objective side.

PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. During your presentation, you raised this issue about going to the Embassy and being--the letter sent by the Embassy, at extera.

And I think you tried to respond to some of the Respondent's arguments where you said at the end you didn't know whether you know--knew we will ask Mr. Ballantine tomorrow.

But my question is, if we consider that a relevant factor, should we consider also a relevant factor the fact that there was some permit issued by the Dominican

Republic where they portray Mr. Ballantine as a citizen of the Dominican Republic, or contracts where Mr. Ballantine portrays himself as a Dominican Republic citizen? Wouldn't that also be a factor we should take into account?

MR. BALDWIN: Well, the short answer to that question is the Tribunal, I assume, can and will take all of it into account when deciding it. So, certainly, Respondent's arguments on that are part of it.

I would say that when you--what we would suggest is when you look at dominant and effective--and this goes to Professor Vinuesa's question. When you look at dominant and effective, you don't restrict it to somebody's conduct in that particular place.

As I mentioned, I don't think it's surprising that if Michael Ballantine is signing a contract or submitting a permit that he would do it noting that he was Dominican. And I think, in fact, that that is--he testifies to that. And, you know, the Tribunal can ask him about that in terms of why he did it. Because he was trying to minimize the overt discrimination that he was facing, among some other issues.

So, yes, he--you know, the--there were things done with that Dominican thing. Those things were done in the Dominican Republic. International travel, all these other things when they were outside, were done and presented as a U.S. thing.

So certainly it's a factor. But I think it's something someone would entirely expect, that if you're in the Dominican Republic and you're trying to minimize the disruption of your thing, you're trying to minimize the discrimination and the other problems, yeah, you might say that.

I don't think that shows--if you look at the factors in A/18, I don't think that really meets any of the factors, but I do think that the--that the Tribunal should certainly keep all of that in mind.

PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. You mentioned, when you started your presentation, talking about when we issue a ruling, we will have to determine whether also Lisa Ballantine complies with the test of dominant and effective.

But I want to make clear, what are you arguing? Are you arguing that we need to do two separate inquiries? That means we have to determine whether Lisa Ballantine and Michael Ballantine had a dominant and effective nationality? Or do we have to do a holistic of both would be all-or-nothing inquiry on whether both of them are dominant and effective nationals of the U.S. or Dominican Republic?

MR. BALDWIN: Whether or not--how the Tribunal
decides to issue its award I don't have any comment on. I think how --we do the analysis in the best way the Tribunal sees fit, obviously.

In terms of that legal issue, CAFTA provides a definition for investor. Both Michael Ballantine and separately Lisa Ballantine have to meet that definition. So I think that--I think that the analysis cannot just be holistic and group them together. I think that's a flaw. Because--just because they--I mean, would you do that with two companies that might have different circumstances? No.

I mean, the fact that they're a married couple certainly is relevant to their daily life and relevant to their family life and relevant in some respects here. But the--the nature--they're both investors, both of them. And Michael Ballantine is the one whose name you see all over the project documents because he was doing that while Lisa was doing other things. But both of them have--there should be a separate inquiry. How the Tribunal does it is one thing, but there should be a determination of both of them individually as investors, each individual investor under CAFTA.

PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. Finally, just clarification for myself based on some of the things you said.

Am I understand correctly that you are not bringing a legal claim regarding the division of the park, of how the park was divided?

MR. BALDWIN: Yes, but only to the extent that was used as a basis. So when you're looking at the denial, the fourth denial, that included the park. The first three didn't. The fourth one included the park. The way in which the park was created is relevant to that denial.

PRESIDENT RAMÍREZ HERNÁNDEZ: Just to be clear, it's relevant, but it's not--you are not bringing a legal claim regarding how the park was divided. You are bringing a legal claim regarding the denial based on the park. Am I understanding correctly?

MR. BALDWIN: Yes. Yes.

PRESIDENT RAMÍREZ HERNÁNDEZ: I think we exhausted the questions, and you may continue.

MR. BALDWIN: I'll be brief, Members of the Tribunal, and I'm not going to go through and tell you what CAFTA says and what this article says. You know it. You know it as good as the Parties do.

So I'm just going to get into some of the key points of the legal issues and not an overall survey of all the things that are in our papers, in their papers, and I'm sure you've read them.

First thing is national treatment only requires one comparator. We don't have to show that all the comparators or some of the comparators were treated better.

We just have to show that one comparator--just one is needed. And you can see from the Pope and Talbot Tribunal have stated that just one is needed.

Here the Ballantines have an embarrassment of riches, but it's not needed.

Secondly, the comparison that they are entitled is the best treatment. Again, by the Pope and Talbot Tribunal, the right to treatment equivalent to the best treatment accorded to domestic investors. So all the comparators, we are entitled to the best treatment of that.

Not some average treatment or some middle-of-the-road treatment. The best treatment. That's the purpose of the national treatment provision. And as you can see, the best treatment is pretty good. You know, this is one example. There's lots of other examples.

But we talked about Rancho Guaraguao. I won't talk about it again. This is only one of many comparators, but this is pretty good treatment, and the Ballantines would have been happy with that.

The Ballantines' mistake was that, like Rancho Guaraguao did, they didn't sell property to a high-ranking government official. There was a government official that lived in this National Park and said when he was asked about it, "Well, if they give me one, I will take it. I do not have villas. But if they want to give me a gift, I'll gladly receive it." And I have no doubt that that is a correct statement.

Next, I want to talk about the evolution of the minimum standard of treatment, fair and equitable treatment. We've listed these cases here. I'm not going to go over them. They're in the record. This is Slide 80. We'll have this to the Tribunal. You can see those. But the tribunal after tribunal, the vast majority of them have stated that the minimum standard is an evolving standard.

The Railroad Development Corporation award puts the nail in the Neer coffin because they talk about it not being--this is a CAFTA award--talk about it not being static and that it's constantly in the process of development. And I would note even cases like Glamis Gold, which is cited by Respondent, where they use the "shocking and outrageous." The Tribunal uses the "shocking and outrageous" words from Neer.

They also, in that case, cited Respondent as showing that they are using Neer. But they also state in Glamis Gold that what is shocking and outrageous today is different than what was shocking and outrageous in 1923 when Neer was adopted, and I think we can all agree that that's true.

Discrimination is alive and well, both in the
In our Reply, we list these cases where they've done that. CAPTA awards, Railroad Corporation, and TECO v. Guatemala Holdings have acknowledged this discrimination. So discrimination is an element of this, and that's been shown many times.

Discrimination is not limited to national origin. And what Respondent says is, "Well, look. There's already protections against discrimination in the Treaty, so it's not part of the minimum standard of treatment."

The problem with that is national treatment has to do with national origin, has to do with your nationality, whereas discrimination under the FTI can apply to lots of different things: gender, race, religious belief, types of conduct that amount to a deliberate conspiracy to destroy the investment, evidently singling somebody out. They don't have to single you out because of your nationality, like under national treatment. They can single you out for any reason.

In terms of arbitrary, the only thing predictable about Respondent's environmental regulatory regime is that it favors powerful Dominicans and disfavors foreigners. And I would just point you to this Professor Schreau quote from SDF v. Romania where he says what it means to be arbitrary. It's not based on legal standards but on discretion. And you're going to hear this word come up a little bit, "discretion." That's what was here. Prejudice or personal preference, that's arbitrary.

These are in our papers. I'm not going to go through these. But these are the examples of the arbitrary conduct, slope law, you know, passed in 2000, never used against building projects until 2011. Tribunals have found violations under fair and equitable treatment for much less than we have here. TECO v. Guatemala, a case I know a lot about. The Tribunal found that Guatemala breached CAPTA-DR just because they didn't give reasons for departing from a recommendation.

There was a recommendation by a nonbinding committee. The government officials, within their right, want in another direction. And the Tribunal says, "Well, you know, you didn't tell them why you were doing something different than the recommendation, therefore, that's a violation of the minimum standard of treatment."

The minimum standard of treatment is a violation when you just don't explain why you did something different from what was listed in a nonbinding recommendation. And there's other examples too of tribunals finding FET for much less.

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**I just want to lastly talk about expropriation for a minute. This U.S. submission's position summarizes what it means to be an indirect expropriation. And here in our Amended Statement of Claim--you can look at it--we explain with regard to the denial of the licenses based on the park, denial of the licenses based on the slopes, and the refusal to give the no-objection thing. These are indirect expropriations that substantially deprived that.

And the reason I bring this up is there is one place in our Rejoinder where--and it might be--there's a place in our Rejoinder--I'm sorry--in our Reply that Respondent picks up on where we say, "Direct expropriation by the denial of the license based on the park."

That should have read "indirect." And the reason I say it should have read, it was a mistake. It was an error to put it in. We didn't mean to write that in. Is if you look at the analysis that follows where we're explaining why, it's all about substantial deprivation. It's all about an indirect expropriation. And we've explained to why the expropriation was illegal. So now I'd like to turn it over--back again to my colleague, Matt.

**PRESIDENT RAMÍREZ HERNÁNDEZ**: Just one question.

Are you moving away from the legal claims and going to damages, I guess?

**MR. ALLISON**: Yes.
The Parties have spent a lot of time arguing about this issue. We certainly—and we’ve given cases that show this. There doesn’t have to be some uniform—and, in fact, there can’t be. There would never be a comparator if there had to be absolute uniform things. Uniform aspects. If they all had to be uniform in every single aspect.

What matters is—things like the—what matters is the type of business it is. In this case, these developments on mountains. And we have cases that support this. And the other thing that matters is, are they subject to the same legal regime? And here we’re subject to the national park, we’re subjected to the environmental laws, and so are the other people. Now, actually, the other people are actually not subjected to them because they have built in the absence of those.

But I think that what the cases really look at, is they look at what sort of business sector are you in and how—you know, you can—people can debate and tribunals differ on what it means to be in the same business sector.

Maybe construction isn’t enough. Maybe it has to be construction of houses. Maybe that’s not enough. Maybe it has to be construction of houses on mountains. So there’s—those kind of distinctions can be made, but the same business sector.

And then I would say the same—they’re the same

Speaker: From a legal perspective, though, there is flexibility under that standard for the Tribunal to find that there was less favorable treatment among a range of comparators, or do we have to identify who we think is the best and then decide whether Claimants’ treatment was less favorable to that specific comparator?

Mr. Baldwin: No. No. It’s more of a pedantic point than anything that I was making. But, no. You can find that generally they were treated less favorably. You don’t have to go through and say, “This was the best, and they were less than this.”

The point about the best is that it’s not just an average or—you know, the Ballantines weren’t treated better than any Dominican landowner with a project. But let’s say they had. Let’s say there were ten. The Ballantines were treated better than nine, but not as the tenth. That’s not the case here. And because of that, I don’t think the Tribunal needs to engage into trying to determine which one is the best.

And depending on issues. Some are the best for legal regimes, another common way that they look at it. But I’m not even sure what “all relevant aspects” really is intended to say.

Arbitrator Cheek: Okay. Thank you. I did have another question about some of your comments on national treatment and that is with regards to best treatment.

So you mentioned that best treatment is relevant. I guess, does the—you can the Tribunal find for the Claimant—find that there was a national treatment violation if the Ballantines received less favorable treatment, that it falls somewhere shy of best treatment?

I’m trying to understand—or do we need to find that the Ballantines didn’t receive the best treatment?

Mr. Baldwin: No. It’s best in connection with the comparator. So any—you look at the comparators. You find what you might argue is the best one, what somebody thinks is the best treatment. And anything less, as you stated in your formulation—as one of your alternative formulations, anything less than the best treatment is a violation.

So any case in which somebody was treated better. And they don’t have to be treated better in every way. They could be treated better in one way. Maybe they were fined and—but they didn’t pay the fine. You know, anything where they weren’t required to pay the fine. And...
American nationals, or are you saying that the Ballantines were discriminated because they were the Ballantines?

MR. BALDWIN: Both. And we think there's evidence for both. The important part--from our view, the important part on the discrimination is they were singled out and treated differently. Now, we've given lots of reasons as to why we think that Respondent discriminated against them. But that's for--you know, that's Respondent's doing.

And so we don't need to show--we don't have a burden under the discrimination prong to show why they did it, even though I think we give a lot of particular reasons. We just need to show they were singled out and they were singled out for among those different reasons.

PRESIDENT RAMÍREZ HERNÁNDEZ: Could you give me one or two examples of your claim regarding--I know you--I understand throughout your submissions you make a lot of statements saying, well, because they were nationals, you would impose part of the P70 in your presentation. But those were related because they were Americans.

To what you're referring when you're talking about "targeted"? To what are you referring? To what type of different treatment or were they singled out because they were targeted, or what is the evidence you are showing us? Because they were targeted because they were Michael and Lisa Ballantine? Because they had some--there was some

c. lots of government actors. It wasn't just one person that did it. It was a collection of people that at different times took these actions.

They had different motivations. Some might have been animosity towards U.S. nationals. There was certainly the competition and a jealous factor.

Some of it was probably related to the Ballantines themselves, you know, for whatever reason. So we've presented evidence of many of those reasons, but those are some examples.

PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. You can continue now.

MR. ALLISON: Thank you.

I'd just like to spend a few minutes discussing the damages that the Ballantines have suffered as a result of the Respondent's treaty violations. And although this proceeding seeks monetary redress, I'd be remiss if I didn't also mention the deep emotional toll that Respondent's actions have taken on Michael and Lisa Ballantine.

They are not a corporation with thousands of shareholders. They are not an investment trust for some institution or endowment. They are two individuals who poured their sweat and their hearts into developing Jamaca de Dios. We've seen this morning the fruits of that labor.

reason for that aside from the nationality issue.

MR. BALDWIN: You know, I think as we all know--all of us, I think, in here have worked with governments from time to time. We know that governments are not some monolith that do everything the same. Not everyone was standing up marching together going, "We're all going to do this because they're U.S. nationals."

We presented evidence to show that some of what happened was a result of them being U.S. nationals. We submitted other evidence. And the thing that I'll point you particularly to is the next-door neighbor, Aloma Mountain, Juan José Domínguez, who is very politically powerful, connected. He was the nephew of the president, the son of the mayor of Jarabacoa, very politically connected. And we've put in evidence to show that he was a big factor because he was jealous.

You have two competitors on the same mountain. And the Ballantines built this beautiful project. Juan José Dominican couldn't even get a road built up to his project. And he looked at the commercial success of the Ballantines, and I think--and there's evidence in the record of this to show that that was one of the reasons.

So, you know, some of the action that happened was related to that. I think that it's often not so simple to say there's one thing and only one thing because there's

A beautiful complex of gorgeous vacation homes rising in the mountains of Jarabacoa built from scratch and from a vision that Michael and Lisa had as they looked up into those hills more than a decade ago.

While the first phase of Jarabacoa stands as irrefutable testimony to the entrepreneurial skill and drive of the Ballantines, they owned even more valuable and breathtaking property just beyond the borders of their current complex, and yet Respondent wrongfully refused the Ballantines the right to develop that land, as we've seen, while all other projects were either fully approved or left alone to develop with a wink, a nod, and now a small fine.

It's inequitable, and it's a violation of CAFTA.

The Tribunal has seen the evidence and knows the story. The Ballantines have been driven from the Dominican Republic by Respondent's actions, forced to abandon their brand to significant additional opportunities in and around Jarabacoa.

But the Ballantines are not here seeking to punish the Respondent. They seek an award from Respondent only for what they would have otherwise had had Respondent not wrongfully denied their expansion request. The Ballantines' damages calculations are conservative. They do not seek damages for additional property that they were
It's a straightforward analysis that looks in the increases of the actual sale prices as one moved up the mountain and then projects those into the Ballantines' Phase 2 land all the way to the top of the mountain. Now, we have the historical record that lots near the top of Phase 1 sold between 2012 and 2014 in amounts ranging from $78 per square meter to $107 per square meter. And the elevations of Phase 2 would support even higher prices, especially as one reached the ridgeline of the mountain and its panoramic views to the north and the south.

The addition of the Mountain Lodge and the boutique hotel would have increased valuations as well. All of those sale contracts for Phase 1 are in evidence, and the expert report of Mr. Farrell provides a detailed spreadsheet calculating the Ballantines' earnings for those sale 2 lots. His numbers are conservative. He prices the lowest Phase 2 lots at $65 per square meter, well below the prices that Jamaca had actually received for several of the upper lots of Phase 1. And, indeed, he caps the value of the land at the top of the mountain at no more than $120 per square meter, which is only $12 more—or $13 more than the price paid for one of the lots at the top of Phase 1.

Now, there was a waiting list of buyers interested for the Phase 2 lots, and sales could have begun the very same day Jamaca de Dios received its expansion permit. Respondent's expert, Mr. Hart, does not take much issue with the structure of this model, but he instead argues that the sale price inputs are wrong. Mr. Hart chooses instead to use contracts that don't reflect the actual consideration paid by the buyers to the Ballantines for the land at issue. He knows that. The Respondent knows that.

Mr. Hart uses the sale prices that were reported to the Respondent's tax authority. This is the parallel contract issue. But Respondent knows those parallel contracts don't reflect the economic benefit that was received by the Ballantines. They are tax documents only.

The Ballantines followed the very same tax reporting process that everyone in the country followed with respect to the sale of land. The Expert Report of Mr. Ballouma makes this clear.

The parallel contract issue is a red herring. The Respondents now want to try to tarnish the Ballantines before this Tribunal for reporting taxes just like everybody else did in the Dominican Republic, including all 90 purchasers at Jamaca, mostly Dominicans, including government officials who signed parallel contracts and wanted parallel contracts for their own tax reporting.
The Tribunal has seen the evidence of the mountain lodge. It was to sit directly above the restaurant on two lots the Ballantines had reserved for this project. Its upscale design was popular. Jamaca had taken deposits for several units in this complex. The Tribunal has also seen the plans commissioned for the lower apartment complex which the Ballantines sought to develop on land closer to the entrance of their complex.

These projects were both on land that had already been approved for development by the Respondents, and the Ballantines first sought specific approval for a modification to their Phase 1 permit to build the mountain lodge. But, of course, by this time the Ballantines were no longer welcome in Jarabacoa.

The Tribunal has seen evidence of the administrative void into which this application fell, never to emerge. Any application to build the lower apartment complex would have been futile. The damages associated with these projects are twofold.

One, the Ballantines have lost cash flows associated from the sale of the individual condominium units for both of these properties. That’s detailed in Mr. Farrell’s report and totals 1.3 million for the Phase 2 lots and $5 million. His detailed analysis uses expected construction costs and local comparables and includes appropriate overhead and administrative expenses.

Mr. Hart insists that the Ballantines would have needed financing to complete all these Phase 2 plans. But he’s wrong. Hart tried to emphasize the capital expenditures associated with Phase 2, but the vast majority of the numbers he uses relate to the construction costs for the Phase 2 homes, and those amounts would have been paid by the home purchasers as the homes were built and would not have been fronted by Jamaca.

Mr. Hart also has to inappropriately delay the inflows of cash associated with Phase 2 in order to make his argument seem more credible. Jamaca de Dios had funds from Phase 1 and receivables from Phase 1 and immediately accessible and valuable land in Phase 2 located literally across the street from Phase 1. And it could have sold those if not for the treaty violations of Respondent. Financing was not necessary for the Phase 1 development which was built from scratch, and it wouldn’t have been necessary for Phase 2.

Third, the Ballantines seek losses associated with the inability to develop two additional properties that they sought to build that would have been located in the land of Phase 1. This is the mountain lodge and the lower apartment complex. Success of Phase 1 development revealed the market need for additional forms of upscale accommodation.

The Tribunal has not received any evidence of the mountain lodge. It was to sit directly above the restaurant on two lots the Ballantines had reserved for this project. Its upscale design was popular. Jamaca had taken deposits for purposes.

So instead Mr. Farrell used the real sale prices for his projections, and Mr. Hart used numbers that he knew were not really what was paid for the Phase 1 lots. Mr. Farrell then subtracted the infrastructure cost that the Ballantines would have needed to invest to make those lot sales.

He would have had to--the Ballantines would have had to extend their road and extend their utilities, and those costs are factored into Mr. Farrell’s report. It would have been a simple process and could have been paid for by the sale of these lots.

Mr. Farrell accelerated those costs--those infrastructure costs to the beginning of the damage period to make his report more conservative, even though those amounts would have more likely been paid out over a few years as the lots were sold.

Mr. Hart also contends that no overhead and general expense amounts were included in Mr. Farrell’s analysis, but those amounts are. They’re captured partly in the infrastructure numbers, partly in the administrative expense numbers used in Mr. Farrell’s report for home construction, and partly in the HOA fees that would be paid by residents. And they’re a pitance against the value of the Phase 2 property. The sale of these valuable lots would have earned the Ballantines more than $12.75 million.

Second, the Ballantines would have been the general contractor for the construction of the homes in Phase 2. The testimony as to this is unrebutted, and the sale contracts for Phase 2 lots would have required it. Jamaca had significant construction experience. It had built several of the houses in Phase 1. It had built the administration buildings and the common areas and the Aroma Restaurant, and it had supervised the construction of every Phase 1 home.

It established a construction division, hired a full-time construction manager, a civil engineer, and an administrative staff all to manage the construction of Phase 2 homes.

It had purchased heavy equipment, leased warehouse space, and had relationships with contractors and suppliers throughout La Vega. Mr. Farrell has calculated the net cash flows for constructing the Phase 2 homes at just in excess of $5 million. His detailed analysis uses expected construction costs and local comparables and includes appropriate overhead and administrative expenses.

Mr. Hart insists that the Ballantines would have needed financing to complete all these Phase 2 plans. But he’s wrong. Hart tried to emphasize the capital expenditures associated with Phase 2, but the vast majority of the numbers he uses relate to the construction costs for the Phase 2 homes, and those amounts would have been paid by the home purchasers as the homes were built and would not have been fronted by Jamaca.
discounted present value of the stream of that lost income totals 477,000 for the mountain lodge and 302,000 for the lower apartment complex.

Fourth, the Ballantines seek damages associated from their inability to develop the Paso Alto project. The value of that project is significant. Paso Alto was a fully permitted development just across the Baiguate River, a few miles from Jamaca. The addition of the Jamaca name and the development experience of Jamaca added to the topographical beauty of Paso Alto would have allowed that project to flourish. And Jamaca had a letter of intent to purchase it, and the final terms of that acquisition were close to complete.

Omar Rodriguez confirms he wanted to co-venture with Jamaca de Dios and Michael and Lisa. The acquisition of Paso Alto would have been a perfect complement to Jamaca de Dios just across the Baiguate River. And the testimony of Michael Ballantine has confirmed that one thing and one thing only delayed the consummation of that Paso Alto deal: the receipt of Phase 2's expansion permit. Why?

Michael knew that a denial of the Phase 2 expansion permit would further evidence the increasing hostility of Respondents towards JDD's success and would foreshadow regulatory issues with respect to the development of Paso Alto, even though it was already permitted.

As explained by Mr. Farrell in his report, the Ballantines' future investment opportunities and their brand were adversely impacted as a result of Respondent's treaty violations, and his report calculates the loss associated with that brand diminution at 2.5 million.

The Ballantines seek two other items of damage presented in Mr. Farrell's report. The Tribunal will hear from both experts. Mr. Hart is a professional testifier.

interest only from January 2014, although they were first wrongfully denied their expansion permit in September 2011.

And as tribunals have noted, specifically the Tribunal in Saghi v. Egypt, since 2000 no less than 15 out of 16 tribunals have awarded compound interest on damages in investment disputes. The Ballantines trust the Tribunal will make appropriate determinations on these two calculation points.

Instead, Mr. Hart’s report largely focuses on three contentions. That the Ballantines’ claims are speculative, that the Ballantines have failed to establish causation, and that the Ballantines have failed to mitigate their damages. These are, of course, legal arguments that are beyond the purview of a quantum expert.

As to the repeated and insistent claim, there's no evidence to support any of these damage calculations. It's all speculative. That's simply not true. Mr. Farrell cites the support for his work product. And importantly, there is a track record of sales for Jamaca de Dios, and all those contracts have been submitted in evidence to the Tribunal.

Legally, tribunals recognize that the projection of future cash flows is not an exact science and necessarily involves a degree of informed estimation. In
Margie Dauster, RMR-CRR  info@wwreporting.com

PRESIDENT RAMÍREZ HERNÁNDEZ: I just have one very minor question. And just talking about moral damages. How would you distinguish moral damages as opposed to punitive damages which we are prohibited to award under the CAPTA?

MR. ALLISON: Punitive damages are intended to

PRESIDENT RAMÍREZ HERNÁNDEZ: I just have one very minor question. And just talking about moral damages. How would you distinguish moral damages as opposed to punitive damages which we are prohibited to award under the CAPTA?

MR. ALLISON: Punitive damages are intended to
We also have a few of our experts. Pieter Booth from Ramboll is here today as well as Timothy Hart from Credibility International, and he's with two of his colleagues, Laura Connor and Tyler Smith. Sorry. Oftentimes in these exercises, the Respondent's delegation is quite large. Mr. Chairman and Members of the Tribunal, for as long as humans have been able to communicate, they've been telling stories. The cave dwellers in the Lascaux caves in southern France 20,000 years ago told stories through their paintings and their drawings on the cave walls. The Egyptians told stories through their hieroglyphics. The Greeks and the Romans told myths. The Norse sagas were stories. Practically all of the religious texts, the Bible, the Torah, the Koran, the Upanishads, they all tell stories. We tell stories to our children at night. We dream stories when we sleep. We even pay people to tell us stories. That's what we do when we buy novels, when we pay for movie tickets, when we go to the theater. We even pay to tell stories, as in the case of therapists for example. Gossip consists of stories, rumors are stories, fantasies are stories, hopes are stories. Stories are a big part of how humans think and apprehend the world. And the simpler the stories are, the more we like them. That's why most stories consist of simple binary constructs. One classic example of that is good versus evil. The story of Adam and Eve was good versus evil.

Every war movie, every western movie ever, every spy movie, every action movie, always good versus evil. The good guys versus the bad guys. That's a simple dichotomy that also appears frequently in children's stories.

Another common dichotomy is unhappy versus happy. Right? Romantic novels and romantic movies use that theme a lot. Unhappy at the beginning, happily ever after; right? You find that in a lot of children's stories like Cinderella. Now, why do we love stories so much and why do we like simple ones?

Neuroscientists and psychologists who specialize in human cognition have made great strides in unlocking the mysteries of how the human brain works and how we process information from the external world. And we like stories so much because through them, we can make sense of a world that is too complex and too bewildering and overwhelming for the human brain to process. For all the superiority of the human brain compared to the brains of other species, we still have very limited ability to understand the world. So we reduce everything to bite-size concepts that we can process. As a
result, our natural default is to think about things in simple terms and to assign simple tags to everything. We often do this subconsciously when we make judgments—instant judgments about people, for example. Right?

We instantly make a judgment, this person seems honest, this person seems dishonest. Right? Liberal or conservative. You know, good or bad, whatever it may be. Honest and dishonest is a typical snap judgment that we make about people.

And that’s also why the world of a child is so binary; right? Everything that a child perceives is very black and white; right? Happy or sad. Fun or boring. Safe or unsafe. And as we become adults we start to see more shades of gray in the world, but we still have a limited ability to process the complexities of the world. So we still interpret the world largely in dualistic terms.

That’s why political slogans are so rudimentary and binary; right? Insider or outsider. Patriots or traitors. You’re either with us or against us.

Now, what impact do these binary constructs, these simple—the simple dualism, this reliance on stories, what impact does that have on the way we think? That too has been extensively studied by cognition specialists. And what those phenomena do is they make us connect dots too easily. They make us find cause and effect too easily.

We make about people, for example. We sort of accept news as true even though we know that often it’s very partial or limited. They make us accept passively stories that we hear, and we consider them true, even though we might know that there’s got to be more to the story. This happens all the time with the news, for example. We sort of accept news as true even though we know that often it’s very partial or limited.

In short, the way our brain works gives us a distorted view of the world and the intuitive appeal of stories makes us often believe things that aren’t true.

The problem is that much of the time, we can’t tell the difference between the stories that are true and the stories that are not true.

This phenomenon is known by psychologists as the "narrative fallacy." It’s been analyzed by the Princeton professor, Daniel Kahneman, who is a psychologist who has the unusual distinction of having been granted the Nobel Prize of economics, despite being a psychologist and not an economist.

And I’d like to quote a couple of passages from his seminal book called “Thinking Fast and Slow.” This is in the record as Exhibit RLA’117. And Professor Kahneman says the following quote at Page 195, “Narrative fallacies arise inevitably from our continuous attempt to make sense of the world. The explanatory stories that people find compelling are simple; they are concrete rather than abstract; they assign a larger role to talent, stupidity and intentions than to luck; they focus on a few striking events that happened rather than on countless events that failed to happen. Any recent salient event is a candidate to become the kernel of a causal narrative. We humans constantly fool ourselves by constructing flimsy accounts of the past and believing they are true.”

Then he says, “Good stories provide a simple and coherent account of people’s actions and intentions. You are always ready to interpret behavior as a manifestation of general propensities and personality traits, causes that you can readily match to effects.”

And finally in this paragraph on Page 196, he says, starting with the second sentence, “You cannot help dealing with limited information that you have as if it were all there is to know. You build the best possible story from the information available to you, and if it is a good story, you believe it. Paradoxically, it is easier to construct a coherent story when you know little, when there are fewer pieces to fit into the puzzle. Our comforting conviction that the world makes sense rests on a secure foundation, our almost unlimited ability to ignore our ignorance.”

Now, you may be asking yourself how is any of this relevant? What is this man talking about? It’s highly relevant. It’s highly relevant because the Claimants have told you a story. And not just any story. It’s a very big story, a tale of the highest order. They deployed every conceivable storytelling and narrative trick in the book, every conceivable binary construct. The main construct is good versus evil, which is probably the central binary construct in all of human storytelling. That’s the core story here; right? The good guys versus the bad guys.

Those stories appeal to our instinctive sense of justice, our natural inclination to want to make right what is wrong. In other words, this dichotomy between good and evil is something that we want to resolve in favor of the good.

So it’s not just something that we understand, but something that relates to our inner normative sense, how things ought to be. Right? This is why we really like the good guys to win in the movies and we feel cheated if they lose.

Now, the Ballantines also resort to a number of other binary storytelling constructs. For example, they have the theme of the little guy versus the mighty. Right? The little guy who takes on the State. We love those
Now, we'd like to take a step back and to focus for a moment on methodology and evidence. In legal proceedings, to distinguish fact from fiction, we rely on evidence. More stories don't count as evidence. Stories are sometimes accepted by us as true as a result of this narrative fallacy that Professor Kahneman talks about. But in a legal proceeding, you can't just rely on stories and binary constructs. You need evidence. And in this regard, not only are the Ballantines' submissions deficient, but in fact they completely and incomprehensibly, in many instances, contradict the actual contents1 of contemporaneous documents. My colleague, Ms. Sliberman, will walk you through some of those.

This morning, they said, "Oh, the Respondent, you know, ignores contemporary evidence" and-- but they didn't put up any evidence.2 And if you flip through their PowerPoint from this morning, you'll see that they actually weren't referring to real evidence. They weren't quoting from real documents. I'll come back to this issue.

Now, it's hard to read the Ballantines' pleadings or their Witness Statement without getting pulled into the story and letting it flow like a good novel rather than

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1 English Audio Day 1 at 05:02:14
2 English Audio Day 1 at 05:02:41

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1 They didn't just make it up. The problem is you don't know where to look to actually confirm it or to test it. And, you know, we do encourage the Tribunal to actually flip through, for example, all the long stretches of their briefs on the comparative projects and ask yourself--they're saying a lot of stuff, but what do they actually prove? What are they providing as evidence of what they're saying? And you will find that there's not much to their pleadings other than the narrative storytelling. If you undertake that exercise as we were forced to do, to really test every factual proposition, you'll find that the Claimants don't really have evidence on the matters that--you know, on the matters that really count. On the issues that are important for this arbitration, the issues that are important for this Tribunal to decide on those issues, you will find them severely lacking in documentary evidence. They rely a lot on testimonial evidence. They have a lot of Witness Statements, and, you know, they say a lot of things in their pleadings obviously, so there are a lot of naked assertions from the lawyers as well. But even their testimony is suspect from a purely evidentiary standpoint as it often relies on self-serving statements by the Ballantines themselves or on assertions that have no testimonial value, like the one that we're going to see on
frequently does in its submission, Respondent immediately
of our 796 footnotes. Then the second one they say, "As it
here. The first--in the first quote there, they make fun
about it, that's not evidence. If I hear somebody tell me
about something they heard about some other person that
told them, that's even less of a piece of evidence as such.
And they frequently do this. They will refer to things
that people told to them. They refer to things that they
didn't personally witness or apprehend in some direct way.

Now, aside from that, they have just a general
lack of intellectual and evidentiary rigor in all of their
arguments and pleadings. And you know, that's in sharp
contrast to the Dominican Republic's pleadings which we
think are well supported, not just with testimonial
evidence but also with documentary evidence, and much of it
is contemporaneous documentary evidence. This is precisely
why our briefs have so many footnotes. Footnotes contain
cites, cites refer to exhibits; exhibits are real evidence.

Now, aside from the documentary evidence
deficiencies and because the Ballantines oversimplify

the fact itself that Claimants' explanations and
categorizations of the alleged comparator projects are so
simple should in and of itself give you pause about the
accuracy and reliability of what they say about them. And
not only do the Claimants oversimplify and fail to provide
real evidence, incomprehensively, they actually, in their
pleadings, mock us for our footnotes and our charts.

I'll just give you a few examples on this slide
here. The first--in the first quote there, they make fun
of our 796 footnotes. Then the second one they say, "As it
frequently does in its submission, Respondent immediately

raises the opportunity to insert a chart into its
Rejoinder." Then the final one, "Despite all the charts,
footnotes, and accusations"--as if that's a bad thing. You
know, it's like they're saying, "Look at these silly
Dominicans and their lawyers with their facts and their
evidence." It's like saying, "How quaint, you know, old
school to rely on facts and evidence. Haven't you heard?
These days, it's all about rhetoric and repetition."

Now, that may be a successful tactic in modern-day
politics, but it really is nothing short of perverse in the
context of a legal proceeding such as this one.

Now, aside from methodological and evidentiary
failures, the Claimants' case also fails as a matter of
pure logic. It's somewhat easy to miss that, though, in
part because of the environmental aspects, some of which
are technical and obscure this phenomenon somewhat. But
for this reason, we tried to think of an analogy from
everyday life that illustrates most of the points that are
at issue in this case. And this analogy is somewhat
detailed, so, you know, we'd like to ask the Tribunal to
bear with us while we march through it. But we think it
will help lend some conceptual clarity to many of the
issues that are being discussed in this case, and we think
will expose many of the common sense deficiencies of
Claimants' case from a--from a pure logic standpoint.
So what we'd like to do is to posit a hypothetical scenario in which an American citizen moves to the Dominican Republic. He sees an antique car that he decides he must have, and he goes ahead and he buys it. And he buys it on impulse without checking first with a mechanic whether the car, which is very old, would be likely to pass a vehicle inspection.

The car owner takes the car to the municipal vehicle inspection facility to get it inspected. The inspector conducts a number of tests. And after the test he says to the car owner, "Sir, your car has three significant defects. It has a transmission problem, it has a braking problem and it has an emissions problem. But you won't be able to fix it with this car. The car itself is too old and beyond repair. So inspection permit has to be denied. If you bring us a different car, we'll be happy to inspect it."

The American leaves but instead of getting a different car, he comes back to the inspection facility with the same car. And he says to the inspection facility, "You know what, I measured the emissions myself of my car and I think you guys are mistaken." The inspection facility says, "Okay. Well, we'll do another inspection and we'll have a different team do the inspection." The different team conducts it. You know, they do the relevant tests, but the results are the same.

So the first reconsideration request is denied. American leaves, but then returns with the same car and the same argument. "I measured my emissions and still think you're wrong." So the inspection facility again rejects the reconsideration request because nothing had changed. Incredibly, the American returns a third time with the same car. This time he has the U.S. Embassy official call the inspection facility. Inspection facility patiently conducts the test. And because of the intervention of the U.S. Embassy, the supervisor of the facility personally conducts the tests. But the results are still the same. This time, the facility tells the American, "You still have the same problems that you had before but this time in the tests that we conducted, we have identified an additional problem. Your suspension is also deficient."

So the facility reiterates to the American that the solution will be to bring a different car.

Now, having failed for a fourth time to get his inspection permit, what does the American do? He doesn’t get a different car. Instead, he gets a lawyer and he sues the inspection facility. The American first insists that the facility did in fact make a mistake in measuring the emissions. But he doesn’t say anything about the two other grounds on which the permit was denied, the braking and the transmission.

So the facility responds. They said, "First, there is no mistake with our measurements in our tests. We stand by our earlier conclusions. Secondly, in any event, we denied your permit on three different grounds, so even if you're right about your emissions, your permit would still have been denied."

The American then says, "Wait, I have another argument. A lot of cars owned by Dominicans got their inspection permit approved. I saw them. Here are pictures of them. You discriminated against me because I am an American."

The inspection facility says to the American, "Sir, let me say three things to you in response. First, we did not deny your permit because you are American. We denied your permit because your car is unsafe and bad for the environment. We tested it several times and each time the test results were the same. Second, you complained that there were many Dominicans who got permits and that you saw them. Of course a lot of Dominicans got permits. This is the Dominican Republic. Most car owners here are, in fact, Dominicans. Third and most importantly, sir, the cars that go approved didn't have the same problems that your car did. One Dominican did have a similar problem to yours, but he was denied a permit just like you were. Other Dominicans were denied initially, but they came back after fixing the problem that we had identified, and they passed the inspection, so we granted them the permit."

So the American says, "Wait, I have another argument. There are a lot of cars out on the road that are owned by Dominicans that have emissions problems. Here's a list of 20 of those cars and here's some photos of them. That means you discriminated against me because I am American."

The inspection facility says, "Sir, in response to that argument, let me say the following six things to you. First, some of those cars are driving illegally and never came to inspection at all, so we never approved them. The fact that they're driving out there illegally is a problem, but it's an enforcement issue, it's not an inspection issue. We don't have enough enforcement personnel to chase after every person whose car may have bad emissions. Second, some of those cars did come for inspection, but they were perfectly fine when they came here. That's why we approved them. That means that those cars you saw must have developed their emissions problems after they were inspected. But that too is an enforcement problem, not an inspection problem. Third, some of those cars got their permits before the current emission standards entered into
effect. Fourth, in any event, you said that the cars that you saw had emissions problems, but emissions was not the only problem that your car had. We told you that your car also had a braking problem and a transmission problem. That means you can’t compare those cars to yours even if those cars do have emissions problems. Fifth, how do we even know that the cars that you saw indeed had impermissible levels of emissions? Even if you had managed somehow to measure some or all of these cars emissions yourself, how does the inspection facility know that you conducted the right test or used the right instruments?"

"Sixth, even if you were right about those cars, how would that be discrimination against you? How would it be discrimination for our facility to deny you a permit on the grounds that your car is objectively deficient simply because we are not catching all of the cars that are out on the road driving illegally? Are you saying that we should have approved your car despite its bad emissions just because some cars that are already on the road also have bad emissions? What kind of an argument is that? If we had to grant permits on that basis, we would have to approve all the cars that have bad emissions and if we did that, we would be making a mockery of the applicable regulations. We would be adding to our pollution problem, and we would be doing a disservice to the public."

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circumstances.

How can they file a case about an environmental permit and consider that the environmental issues are not really all that relevant?

Now, we’ve explained in our pleadings why, with the exception of Aloma, which is the property that’s directly adjacent to Jamaica de Dios, on the same mountain, that the other projects are, in fact, not in like circumstances. That’s what this big chart was all about.

And therefore, they’re not legitimate comparators. And my colleague Ms. Silberman will address the Aloma property and some of the other comparator issues in more detail in her portion of the presentation.

Now, aside from the third-party projects, the Claimants create a number of other distortions apparently designed to introduce into their story some additional subplots that maybe they thought would make their story more compelling. A few representative examples of this are the entire issue of the national park, just a massive red herring. They spent an enormous amount of ink and time and effort on this issue. But now that the dust has settled, it has become evident that the issue really is completely irrelevant. It’s almost like they introduced the subject simply as a means to introduce this really juicy conspiracy theory into their story because they conceded that it’s—they’re not claiming about the creation of the park. And they’re saying, “Well, we’re claiming that the national park was one of the reasons that we were denied the permit.” But it was an after-the-fact denial, as my colleague, I think, will walk you through.

The tearing down of the gate. Another irrelevant detail or story. But violence always makes for a good story; right? So they threw that in.

The reference to the Haitians. Completely irrelevant. But allegations of racism always make for a good story.

Now, some of these issues that they raised, the Haitians and Odebrecht, are complex issues and we’re not going to debate them here. They’re completely irrelevant. They, of course, oversimplify the issues, but we were not going to engage them in a debate about these issues that are irrelevant.

The Haitians issue is a very complex issue relating to Article II of the Dominican Constitution and a Supreme Court decision from 2005. It’s a complicated legal issue. As we say, we’re not going to engage with them on that.

And the same with Odebrecht. They said today, “Oh, there’s not been a single conviction in the Dominican
Republic.” But there has been a lot of action on the legal and criminal front.

They had a settlement pursuant to which Odebrecht will pay $184 million to the Dominican government. They have already paid 60 million of that. They’re doing it in installments.

And there’s a massive prosecution ongoing. It hasn’t ended yet, but it is ongoing. They’re prosecuting a bunch of senators, including two presidents of the Senate. They’re prosecuting several members of the Congress. They’re prosecuting a former Minister of Public Works, a former Minister of Industry.

So, you know, it’s, again, another illustration of how they handle facts. You know, they throw out half-truths or details and they lied. Much of the story right? This is what Kahneman was talking about; right? We make decisions on what we see and what we perceive, and disregard information that isn’t presented to us. We rely heavily on that technique.

So, ultimately what we exhort the Tribunal is not to get distracted. We simply ask that you do your best to disregard the noise generated by the Claimants’ plots and subplots and that you focus on what really matters from a legal perspective.

And what really matters for the Tribunal’s purposes is the denial of the permit. Despite all the confusion and the smoke generated by the Claimants and all the plots and subplots, this case is really all about this permit and its denial.

The fact that the permit denial is the essence of the Claimants’ case is illustrated by the fact that this measure, exclusively the denial of the environmental permit, is the basis for all of their damages claims in this arbitration as demonstrated by this quote on the screen from their own damages expert.

Mr. Farrell says: “The damage amounts I have presented appropriately flow from the assumption that the Ballantines’ inability to expand their investment in the Dominican Republic was the result of the Dominican Republic’s inappropriate refusal of their environmental permit.”

So it’s really all about the denial of the environmental permit. So let’s take a quick look at this document. And, of course, you know, my colleague is going to walk you through in great detail, these things, but I did want to emphasize a couple of points about this document since it’s so important.

This is Exhibit C-8. This is the letter pursuant to which the Dominican Republic—you know, the Ministry of the Environment conveyed to the Claimants that the upper mountain project was not viable environmentally. They told them—they said, look, you—you know, the project is not viable because, quote, “it’s located in a mountain area with a slope greater than 60 percent.”

And then further down in the same paragraph, they said: “Likewise, it is deemed an environmentally fragile area and an area of natural risk.”

So there’s three different—three different reasons for which the permit was denied. For some reason—well, we know why. It’s because they can’t deal with the number 2 and number 3 there on the screen, so they just focus their entire narrative on the slope. And they say, you know, it’s steep or not steep. And ours was, you know, not steep or not steep in all the relevant parts of the property, or whatever their argument is, and they just completely read out of this letter these other two reasons.

They also say the—you know, the Dominican Republic worked with other Dominican-owned projects to—you know, to make them happen, but not us. And, you know, you see here, there is an invitation from the Ministry. They said, you know, come back to us should you decide to submit any other place with viable potential.

They just didn’t do that. They—they wanted their project on the mountain that they had, and they wanted way up top of the mountain. And so they kept coming back with these reconsideration requests.

Now, this letter, obviously, is the encapsulation, you know, the kind of culmination of a technical process that lasted quite a while. And for that reason, we have summarized on the next slide the—the key documents relating to the permit denial.

And, you know, if you read their story, they almost make it sound like it was just that one letter, one-liner saying “denied,” you know, and that that was sort of a manifestation of this big conspiracy against them.

But the reality is that the Ministry did a very thorough analysis of this property. In the end, when all was said and done, they conducted five different site visits even though nothing had changed from their initial proposal, but just, you know, out of diligence.

They—every time that the Ballantines requested a reconsideration, the Ministry not only went out again, but they—as a matter of policy, they designated a different technical team to go out and confirm the findings of the previous team. And this is just a completely—the relevant documentation is the list of the different communications.

But really, you know, where the—you know, the evidence of what the Ministry took into account in denying the permit is in those technical reports that you saw on the previous slide. And we encourage you to look at those.
You know, they're--incomprehensibly, the Claimants repeatedly say, "They only mentioned the slopes, and they never mentioned anything else. And now this is all ex post facto."

Can you go to the previous slide.

Look at the dates on this. How can this be ex post facto? They didn't file their claim until 2014. All these documents predate their own claim.

You know, they repeatedly say that in their pleadings that we invented these justifications, these technical environmental justifications, for the denial to suit our needs in the arbitration. And these are all documents that predate their own claim.

And moreover, they said exactly the opposite of what they claim, and they don't show you any documents because they can't. These documents contradict what they say, and Ms. Silberman is going to walk you methodically through each of them.

Ultimately the Tribunal needs to decide whether the Ministry's denial of the upper mountain permit was so outrageous or baseless that it reaches the level of a violation of the minimum standard of treatment.

Now, that should not be a challenging decision in the end when you have reviewed all the evidence, because the Claimants' case ultimately amounts to not much more than storytelling and unsupported allegations. They have produced no credible evidence of any conspiracy or discrimination against them. And in any event, that's not the key legal issue in this case.

The key issue is just the permit denial that we just discussed. And the real evidence, the documentary evidence, shows that the Ministry officials acted diligently and responsibly and reasonably in their handling of the permit application. They were doing their job. They had granted a permit previously to the Ballantines for the project on the lower part of the mountain. But a new project on the upper mountain with a wide and heavy road leading all the way to the top with 70 houses and a hotel and a spa perched up there would have been too dangerous and too damaging to the environment. And it's as simple as that.

That concludes my portion of the presentation, Mr. Chairman and Members of the Tribunal. In the next segment, my colleague, Mallory Silberman, will address the key factual issues relating to jurisdiction and merits, and she will review the documentary evidence as I previewed.

I should note, finally, that we will not be addressing any of the damages issues in this presentation.

We will address those in the closing arguments once the Tribunal has heard from the two damages experts.

With that, and unless the Tribunal has questions for me, I will now turn the microphone over to Ms. Silberman.

Thank you.

MS. SILBERMAN: Good afternoon, Mr. President, Members of the Tribunal.

Because of all of the noise that the Ballantines have generated through the various tactics that Mr. Di Rosa has mentioned, it occurred to us that to set the stage for the remainder of this hearing, it might be useful to spend the day today just walking through the evidence without spending too much time on legal standards.

I'd be happy to answer any questions that you may have, and as you will see soon, I will be discussing the issues relating to jurisdiction, and in addition to that, addressing some of the questions that the Tribunal put to the Ballantines earlier today.

But for the most part, I will be basically addressing two chronologies. The first is the nationality chronology. You see that on the screen already.

And the second will be the chronology relating to the Ballantines' three projects—at least the three projects in Jarabacoa for which the Ballantines sought some form of permission from the Ministry of Environment.

So the Ballantines, as you know, were born and raised in the United States. But in the year 2000, the Ballantines and their children spent a year in the Dominican Republic. As Michael Ballantine explains on the Jamaca de Dios website, this year in the Dominican Republic transformed the family, which developed a "deep love and passion for the people and culture of the island."

At the end of the year, the family returned to the United States, but Michael felt unsatisfied. And so, throughout the early 2000s, the Ballantines traveled annually to the Dominican Republic. These were not just quick trips. Rather, as the Ballantines have explained, the family returned to the country for several months each year.

And in 2003, during one of these visits, the Ballantines, as they have put it, had a vision. A friend of theirs showed them a tract of mountain land in the City of Jarabacoa. In 2004, the Ballantines acquired the land with the vision of developing the first upscale mountain residential community in the Dominican Republic.
Now, in 2006 the Ballantines moved to the Dominican Republic with their children. As Michael states, again on the website of Jamaca de Dios, the Ballantines were still “feeling the effect of our experience here.” What does that mean? Well, it means that as the Ballantines’ own Notice of Arbitration states, it was “as a result of their affection for the country and its people that the Ballantines and their children moved to the Dominican Republic.” This move in 2006 was intended to be permanent. Indeed, that’s how the Ballantines themselves have explained it. In their Notice of Intent in this very arbitration, it states that “Michael and Lisa Ballantine, as well as their four children, moved permanently to the Dominican Republic in 2006.”

The Ballantines’ friend and former neighbor said the same thing in Exhibit R-12, calling the move both permanent and a huge commitment. And as the Ballantines’ own witness, Andrés Escarraman, explains, the Ballantines felt attracted to the idea of putting down roots in the Dominican Republic. The Ballantines’ actions are consistent with this testimony. So, for example, before the Ballantines left the United States, Michael decided to sell his business and the family sold and gave away many of their possessions. And course the decision was voluntary,” as if this were something common, as if choosing nationality were something that you see every day.

Most people don’t get to choose their nationality. In the vast majority of cases, nationality is ascribed at birth, irrespective of whether the country applies the principle of jus soli or jus sanguinis. The choice is made for you. Not many people voluntarily choose their nationality. To choose nationality, to naturalize, it’s something rare. It’s a privilege that many immigrants around the world aspire to attain.

And, you know, earlier this morning one of the themes of the Ballantines’ presentation was that the Ballantines said or did something nice about the Dominican Republic. “No good deed goes unpunished,” as if having Dominican nationality were a punishment, which is just offensive. This is a privilege, and it’s a privilege that the Ballantines chose to undertake, and it’s something that they embraced, as I’ll show you.

Now, for the Ballantines, the naturalization process cost thousands of U.S. dollars, and in the end, it took them more than two years to complete. But the Ballantines saw benefits to becoming naturalized Dominican citizens. As they’ve stated, one substantial motivation was that people would view them as “fellow countrymen and women.” And according to their pleadings, the Ballantines also believed that naturalization might present certain commercial and legal advantages.

And so, because the Ballantines believed this, they went through all of the following steps. They consulted an attorney, completed an application form, tracked down and submitted supporting documentation. They made a sworn statement of domicile in Jarabacoa, and identified Dominican citizens to serve as references. Then after that, they proceeded to submit an application under a cover letter stating that “Michael J. Ballantine and Lisa Marie Ballantine identify closely with Dominican sentiment and customs given their longstanding respect for and period living in that country.”

The sentence ended by stating that the Ballantines were “happy to confirm, legally, their Dominican sentiment.”

Now, after this, the Ballantines took and passed an examination of written and oral proficiency in Spanish, and they studied for and passed a Dominican history and culture exam. After that, they appeared at a swearing in ceremony where each of them made a sworn oath “to be faithful to the Dominican Republic and to respect and
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Jarabacoa. Lisa Ballantine has testified that they had 
their lives were in the Dominican Republic. 

Now, Lisa not only stated this point on Facebook, 
and in an international arbitration agreement. 
the Ballantines' other 
daughter spent her college breaks in Jarabacoa. And 
according to an exchange between Mr. Richter and 
Mr. Ballantine, it I would appear that Michael's father has 
a house in Jamaca as well. 

But Michael Ballantine used his Dominican 
nationality in a contract with his own daughter. And in 
another example—so you have that one on the screen. But 
another example is Exhibit R-212. This is a January 10th, 
2013, agreement between Michael Ballantine and Prohotel, 
which is a "Texas corporation." That's on the signature 
page of Exhibit R-212. Section 9.1 of that document has an 
international arbitration agreement. International. The 
Texas corporation.

Now, during this same time period, 2010 to 2014, 
the Ballantines' lives were in the Dominican Republic. And 
that's not a conclusion that I'm making. This is something 
that Lisa Ballantine has stated. This is a quote from her 
Facebook page. And I should correct something that was 
stated this morning, which was the notion that the 
Dominican Republic only submitted a portion—selective 
quotations from Lisa Ballantine's Facebook page. We 
submitted the entire thing as an exhibit. So there was no 
hiding anything from the Tribunal.

Now, Lisa not only stated this point on Facebook, 
she also stated it in a holiday email to friends. She said 
their lives were in the Dominican Republic.

The Ballantines also had friends and family in 
Jarabacoa. Lisa Ballantine has testified that they had 
friends in town with whom they socialized frequently. 

It's apparent from the Ballantines' own documents and 
witnesses that they also had family in Jarabacoa as well. 
Beginning in February 2010, for example, the 
Ballantines' daughter and son-in-law and grandchild lived 
at Jamaca de Dios for long stretches of time. In some 
instances, the stretch was a period of several months. In 
another instance, it was a year. And eventually the 
Ballantines' daughter and her family moved to the Dominican 
Republic in March 2013.

In addition to this, the Ballantines' other 
daughter spent her college breaks in Jarabacoa. And 
according to an exchange between Mr. Richter and 
Mr. Ballantine, it I would appear that Michael's father has 
a house in Jamaca as well.

Now, during this same time period, the Ballantines 
ever came to refer to themselves as Dominican. These are 
the words of Lisa Ballantine herself in an exhibit that the 
Ballantines appended to their Notice of Arbitration and 
Statement of Claim. "We love the Dominican Republic. It 
is our country. I am Dominican now."

Even when this arbitration started to get 
underway, in June 2014, when the Ballantines submitted 
their Notice of Intent to submit a claim, even there they 
asserted that the dedication of the Ballantines to the 
Dominican Republic is well understood and accepted by many
Three months later, on 11 September 2014, the Ballantines submitted their Notice of Arbitration and Statement of Claim. Now, at the time they still lived in the Dominican Republic, but eight months later they were moving back to the United States. And in that context Lisa stated that, "We have been gone for so long that I feel out of touch with American society. I feel such a culture shock coming back."

So as you can see, the Ballantines over a period of many years pursued, embraced, and emphasized their strong connections to the Dominican Republic. They did this on their website. They did this in their applications to the Dominican government, and they did it when no one was watching apart from their family and friends.

And then we arrived at the pleading stage of the present arbitration. And in 2017 to 2018 over the course of those pleadings, the Ballantines began to change their story. So they asserted, for example, that the decision to become Dominican citizens was not motivated by any identification with Dominican culture and that the Ballantines were not connected either culturally or socially to the Dominican Republic.

But as I've just shown you, that version of events stands in direct contradiction to the Ballantines' own past statements, and there is quite the tension between those arguments and the claim for $4 million in moral damages for supposedly being "forced to sell their home and leave their friends and colleagues in the Dominican Republic."

You'll find that claim in Paragraph 322 of the Amended Statement of Claim. And Mr. Allison mentioned it again this morning.

Now, the Ballantines also assert that all of their relatives reside in the United States and have always resided in the United States, but that simply is not true as the Ballantines' own witnesses have testified.

Now, in addition, during this same time period after the pleadings got underway, the Ballantines have ignored and ridiculed evidence even when that evidence consists of their own past statements and actions.

So, for example, just a few short months ago, the Ballantines asserted that the notion that their choice to attain dual nationality was driven by cultural attachment "is both factually unsupported and on its face silly."

But if you look at the cover letter to their naturalization applications, you will see that it states precisely that the Ballantines were seeking naturalization specifically "given that they identify closely with Dominican sentiment and customs."

Was it silly to believe what the Ballantines were saying?

Now, the Ballantines also began inventing distinctions that do not exist, like the notion that they are Dominicans but not cultural Dominicans or that the house that they built and lived in in the Dominican Republic while they were Dominican nationals for some reason is not a Dominican home. And despite the fact that the United States does not have an established religion, the Ballantines have argued repeatedly that they attended an "American church while residing in Jarabacoa." The Ballantines also began grasping for arguments, anything that would seem to suit their purposes.

So in the Rejoinder on Jurisdiction, for example, they asserted that; one, they had a personal connection to the stability of the U.S. currency system; and, two, that the fact that they had sought medical treatment in the United States "demonstrates their strong personal attachment to the United States."

And there also was a series of arguments that the Ballantines wholly invented. So you mentioned this this morning, I believe, Professor Vinuesa. One of the refrains that we keep hearing from the Ballantines is that the U.S. Embassy supposedly wrote the Ministry of Environment on behalf of the Ballantines because they were predominantly U.S. citizens. You see that assertion repeatedly in their pleadings.

But the theory just isn't true. The United States itself has already dispelled it stating in its non-disputing party submission that when U.S. Embassies or Consulates provide facilitative assistance to U.S. nationals abroad, such officials typically do not make a legal determination with respect to dominant and effective nationality in order to provide such assistance. It's not a prerequisite to assisting.

And then on top of all of this, the Ballantines have just omitted details when they're not favorable. For example, the Ballantines emphasize repeatedly that Michael Ballantine became an associate member of the American Chamber of Commerce in the Dominican Republic. That seems to be true with the caveat that Michael Ballantine himself isn't the member; rather, his company is the member.

The important thing to note is that what the Ballantines failed to mention is that an associate member is a legal person or entity established in the Dominican Republic of any nationality. And there is an entirely different type of membership called a U.S.-linked member for legal persons whose share capital is directly or indirectly owned by American physical or legal persons.

Now, this may seem minor, but all of these distortions add up. And ultimately, they add up to the
Now, here’s what Article 10.16.1 says. It says, "A Claimant may submit to arbitration a claim (i) that the Respondent has breached an obligation under Section A of Chapter 10 and (ii) that the Claimant has incurred loss or damage by reason of, or arising out of, that breach."

So on Slide 10 of their jurisdictional presentation, they asserted that you, the Tribunal, need to look at the entire life of the Ballantines. This was the basis for the exercise of the relative size of the passports.

And in support of this assertion, the Ballantines cited exclusively to Malek vs. Iran, which is an Iran-U.S. claims Tribunal case that you can find in the record at CLA-51. It’s not a DR-CAPTA case. And even there, the Tribunal didn’t say that a tribunal is supposed to take a person’s entire life and then tally up the connections to one state over the course of the entire life and tally up the connections over—with the other state over the course of the entire life and then see which number is larger.

There was an important part of the quote that the Ballantines left off the screen. We’ve pointed this out in our pleadings, but they have continued to do it. So I’m just going to read that to you now.

It states in Paragraph 14 of CLA-51 that, "The Tribunal has jurisdiction over claims brought by Iran-U.S. nationals only when the dominant and effective nationality of the Claimant is that of the U.S. during the relevant period from the date the claim arose until 19 January 1981. These two dates are determinative of the jurisdiction of the Tribunal."

Then there’s Paragraph 15 which is the paragraph that the Ballantines quoted, and they started in the middle of the paragraph. One of the sentences they omitted states, "To establish what is the dominant and effective nationality at the date the claim arose is necessary to scrutinize the events of the Claimants’ life preceding this date."

So there are critical dates here, and this is what we’ve been saying all along. Let me show you now what those critical dates are.

To contextualize this, we began with a proposition that’s undisputed between the parties, which is that the Tribunal’s authority is derived from the terms of the Dominican Republic’s consent to arbitration.

And in Article 10.17.1 of DR-CAPTA, the Dominican Republic consented to the submission of a claim to arbitration under Section B of DR-CAPTA Chapter 10. The words “submission of a claim to arbitration” are the title of Article 10.16 of DR-CAPTA. And Article 10.16 poses two questions that ultimately turn on the issue of the Ballantines’ dominant and effective nationality.

Now, here’s what Article 10.16.1 says. It says, "A Claimant may submit to arbitration a claim (i) that the Respondent has breached an obligation under Section A of Chapter 10 and (ii) that the Claimant has incurred loss or damage by reason of, or arising out of, that breach."
dominant nationality? As the United States has explained, "If the natural person had the dominant and effective nationality of the Respondent party at the time of submission of a claim, he or she would not be a Claimant.

Here's why that is. And it may be best to watch this part on the screen.

So pursuant to Article 10.28 of DR-CAFTA, the term "Claimant" means an investor of a Party that is a party to an investment dispute with another Party. The phrase "investor of a Party" is a defined term, and here's what it means.

Investor of a Party means a national of a Party that attempts to make, is making, or has made an investment in the territory of another Party. And "national of a Party" is another defined term. In principle, "national" means a natural person who has the nationality of a Party, according to Annex 2.1 of DR-CAFTA, but there's a caveat. 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.

I know that there's a lot of text on the screen, so I'm going to try to simplify by replacing the definitions for the defined terms. And once you do that, starting with the top, here's what you get.

"You have a national of the state of his or her dominant and effective nationality that attempts to make, is making, or has made an investment in the territory of another party that is a Party to an investment dispute with another Party."

That's what a Claimant is. And that's the standard that the Ballantines needed to meet on September 11th, 2014.

Now, as I mentioned, there were two questions arising out of Article 10.16.1. The first, which we just discussed, is whether or not the Ballantines qualified as Claimants when they submitted their claims to arbitration. The second is whether or not the obligations under Section A of Chapter 10 applied to the Ballantines on the date of the alleged breach or breaches.

This question arises from the fact that for purposes of this case, the only type of claim that is permitted is a claim that the Respondent has breached an obligation under Section A of Chapter 10 of DR-CAFTA. And pursuant to the Articles on State responsibility, an act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

This means that the Ballantines must demonstrate that the obligations that they've invoked, which are the obligations set forth in Articles 10.3, 10.5, and 10.7 of DR-CAFTA, applied to them at the time of the alleged breach.

How does this relate to the issue of nationality? Well, as the United States explained in its non-disputing party submission, if at the time of the purported breach the requisite difference in nationality does not exist, then there can be no breach because there was no obligation under Chapter 10, Section A.

Why is that the case? I'll illustrate again.

The obligations in question, the obligations under Articles 10.3, 10.5, and 10.7 only applied to covered investments and to investors of another party. Both of these are defined terms.

"Covered investment" means with respect to a Party, an investment in its territory of investment of another Party. And we've already discussed the definition of "investor of a Party," which has been referenced to national of a Party, which we likewise have already discussed.

So if we do the same exercise that we did before, replacing the definitions for the defined terms, here are the people to whom obligations apply.

To a national of the State of his or her dominant and effective nationality that attempts to make, is making, or has made an investment in the territory of another party and to the investment of such a person.

Now, finally, before we leave the issue of jurisdiction, I'd like to briefly address some of the Ballantines' recurring arguments. Motives in their narrative, if you will.

Their first recurring argument is that this is not a case of treaty shopping. And that's true. This is not a case of treaty shopping in the traditional sense.

But that doesn't mean that the Ballantines have won. As we've explained in their papers, and there were questions about this earlier, the standard is called dominant and effective nationality. And the phrases "dominant nationality" and "effective nationality" mean two different things.

So "effective nationality" refers to the question of whether there's a genuine connection between the dual national in each of the states of nationality. In that context, treaty shopping plainly would be relevant.

But here there's no question that the Ballantines have a genuine connection to both the United States and the Dominican Republic.

So the question, therefore, is which nationality is dominant? And the reason for that question doesn't have anything at all to do with the issue of treaty shopping.

So the purpose of the dominant nationality inquiry
on Jurisdiction, the Ballantines agreed with this asserting that, "What this Tribunal needs to determine is whether or not the Ballantines were foreign investors."

The third recurring argument from the Ballantines is that residency is not the test. And, yes, that’s true. We have never said otherwise. What we have said, though, is that residency and a person’s voluntary associations are important considerations in this context. And importantly, the U.S. State Department has said the same in its Digest U.S. Practice in International Law.

It said, "The primary question to be asked is what nationality is indicated by the applicant’s residence or other voluntary associations."

And then after this, the U.S., in its Digested Practice in International Law referred to a U.S. court case called Sadat vs. Mertes. It was a U.S. court case that addresses the issue of dominant nationality. And the case involved a plaintiff who was born in Egypt, was an Egyptian national from the time of his birth, and he naturalized in the United States later in life.

In exactly the same way, the Ballantines were born in the United States and became naturalized Dominicans citizens later in life. And even though the Plaintiff in this case maintains significant contacts with Egypt, and even though he didn’t renounce his Egyptian nationality, this U.S. court still found that his U.S. nationality was dominant. This is explained in the Digest.

In Sadat, it was the Plaintiff’s voluntary associations with the United States, his state of naturalization, that led the Court to find that his dominant nationality was American. He had not sought to terminate or avoid his Egyptian nationality and had, in fact, maintained significant contacts with that country.

Now, the Ballantines’ fourth repeated argument that they make over and over again and advanced again this morning is the assertion that the Dominican Republic never considered them Dominican because it supposedly treated them differently compared to other applicants for environmental permits.

Now, there are a number of problems with this argument, one of which is that the Ballantines essentially are asserting that the Tribunal has jurisdiction because a treaty violation occurred, which is not how this works. Jurisdiction is the prerequisite to the evaluation of an alleged treaty violation, and the merits cannot be used to establish jurisdiction.

And, further, as we’ll discuss in the next portion of my presentation, there’s no evidence whatsoever of nationality-based discrimination. But for now, I simply wish to call to your attention the fact that the Ballantines’ argument here is circular.

So in the jurisdiction context, you’ll recall the Ballantines were asserting that they were dominantly American. And their argument here in the jurisdiction context for which the Ballantines have commended you to their merits pleadings is that they were dominantly American because they were supposedly treated differently. But the reason that this is circular is that in the merits context, the Ballantines’ argument is that they were treated differently because they were dominantly American.

So the Ballantines are saying, “We’re American because we’re treated differently. We’re treated differently because we’re American.” That’s circular logic. It doesn’t work.

Now, I’m planning to turn next to the issue of the Ballantines’ projects, but I’d like to pause here, both to ask if the Tribunal has any questions and to see if it’s time for a break.

PRESIDENT RAMÍREZ HERNÁNDEZ: We will do some questions on this topic, and then we’ll take a break, and then we’ll move to the next one.

ARBITRATOR CHEEK: Thank you. So, is there a particular point in time in which the Ballantines’
And you made a lot of assertions. The fact that they--Ballantines becoming nationals of the Dominican Republic. and now you just mentioned as well, this issue about the trajectory into account. Everything that has come to--for all your pleadings and today you have mentioned, PRESIDENT RAMÍREZ HERNÁNDEZ: Let me come back to--for all your pleadings and today you have mentioned, and now you just mentioned as well, this issue about the Ballantines becoming nationals of the Dominican Republic. And you made a lot of assertions. The fact that they learned Spanish, the fact that they pledge allegiance to the Dominican Republic. There were additional things that the Ballantines did. Afterwards, like getting Dominican citizenship for their children and making all of these statements that you've seen about loving the Dominican Republic and thinking of themselves as Dominican. But once the Ballantines chose to naturalize, they made this commitment, given everything that had happened before, their dominant nationality was Dominican as of that time. ARBITRATOR CHEEK: Thank you. And I guess as a follow-up. To the extent that we should be looking at an arc of their connections to the two countries kind of over the course of their lives, how does that--looking at that arc play into our determination as one of the factors that we're supposed to be considering when we determine what their dominant nationality is? MS. SILBERMAN: So why you're looking at this arc is because people don't just spring fully formed. They have a history. And you need to look--you need to determine dominant nationality as a particular date. And when you are determining dominant and effective nationality as of that date, you can look to everything that's happened in the past. So the fact that the Ballantines have progressively made more and more commitments is relevant because it shows--like you said--this trajectory, this increase in the amount of connections that they have to the Dominican Republic.
They were born exclusively as U.S. citizens, and they chose to go to another country, to move there, to become permanent residents, and ultimately to naturalize. And in many of the cases that you see—for example, in the Iran-U.S. Claims Tribunal context, it’s not someone who always chooses. It’s often someone who has, by virtue of their birth, two different nationalities.

So, yes, of course, there is this commitment to two countries, but it’s not the choice. And the Ballantines made the choice and then reinforced it.

PRESIDENT RAMÍREZ HERNÁNDEZ: Yes but—^The language of the treaty says “double nationality.”

MS. SILBERMAN: Of course.

PRESIDENT RAMÍREZ HERNÁNDEZ: So, how do you distinguish the fact that you acquire nationality—so I see what you’re saying. You’re saying the fact that they went and acquired a nationality gives more credence as opposed to whether you had—you were—you had a mother and a father from different nationalities and somehow you acquire both of them.

But how does the standard or how does the text say that? Not being the case, wouldn’t the test in the CAFTA have said, “Well, if you acquire nationality, then you presume that you have dominant and effective of that country”?

So, how do we get to that conclusion based on what we have in the text?

MS. SILBERMAN: So the text says “dominant.” And dominant means that one of them is stronger. And I think the presumption underlying that is because, for the most part, people don’t have a choice. When someone does actually choose, when someone goes against the grain and does this thing that is so unusual—choosing a nationality, choosing to move to another country and live there, and go through this entire lengthy process and become a citizen of another country—I mean, they didn’t have to do it—that choice is a strong connection. And that’s how that falls into dominance which, as I mentioned, means stronger.

PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. Let’s take a break, if you are fine with it. Let’s come back at 3:45.

(Brief recess.)

MS. SILBERMAN: Thank you, Mr. President.

So, we’ll turn now to the second chronology, which I mentioned, which is the Ballantines’ project chronology. And the story begins with a slide that I showed you earlier. It’s a story that begins in 2003 when the Ballantines were struck by a vision.

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As you’ll recall, and as Michael stated in his First Witness Statement, a friend showed the Ballantines a tract of mountain land in Jarabacoa, and the Ballantines acquired the land in 2004 with the vision of developing a residential community on the mountain.

One quick note, though, is that the Ballantines didn’t purchase all of their land at once. Now, this morning the Ballantines stated at the time of the investment, they were exclusively U.S. nationals. Not so. The Ballantines didn’t buy all of the land as exclusive U.S. nationals, and they also didn’t apply for all of their permits as exclusive U.S. nationals.

As we’ve seen from the Ballantines’ own exhibit, Exhibit C-31, there appear to have been at least 29 different transactions with 20 different people on 23 different dates between July 2004 and August 2012.

Now, in any event, once the Ballantines made their initial purchase, they set their minds to bringing their vision to light. As Michael put it, “Having purchased this beautiful property, I was determined to develop it.”

Now, the vision, as mentioned, was a gated housing development, and the Ballantines agreed that such a development could be very successful if they could build a quality road up the mountain. So this brings us to what we’ve been calling in the pleadings Project 1, the road.

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As Michael stated, he was very conscious that the key to success for Jamaca de Dios was the road. This is one place where the Ballantines’ story has been quite consistent. They have asserted in their pleadings that the importance of the road cannot be overstated and that the road was the complete backbone of development of Jamaca de Dios.

What kind of road was this? Well, according to Michael, it needed to not be more than an 8-degree slope and to be wide enough for two large trucks to pass each other in both directions at all points.

Now, there were several problems with this, the first of which consisted of certain construction challenges. As the Ballantines have explained, mountain roads are difficult to build and maintain. And as far as the Ballantines were aware, the type of mountain road that they were creating, the one that they had in mind, had never been before attempted by a private enterprise in the Dominican Republic.

As best we can discern, the Ballantines are not engineers, and they do not have any experience in construction at all. So these challenges were especially amplified in their case. But the Ballantines were confident in their vision. Michael, specifically, was confident from his years of being a broker that he could
find the talent necessary to make the vision a reality.

The issue, though, is that the talent that he found for purposes of planning the road consisted of a surveyor and himself. As Michael states in his First Witness Statement, he hired a surveyor to survey the entire property, and then he got a pair of oxen to laboriously cut trails for easier walking access, and then he asked the surveyor to create computer models for the road.

The second problem with the road is that it was going to have quite a substantial environmental impact. Michael Ballantine knew about this. He explains in his First Witness Statement that his environmental lawyer advised him that the road would have the biggest environmental impact.

And this was a problem because “environmental impact” means that an environmental permit is required. As the Ballantines themselves stated in their Notice of Intent, “Under Dominican law, all people wishing to initiate, amend, or extend any projects or activities with potential impacts on the environment need to apply for and obtain an environmental permit.”

This rule comes from Article 40 of the Environmental Law, which the Ballantines have been referring to as the “slope law,” which is actually a comprehensive piece of legislation that was promulgated in the year 2000. You can find it at Exhibit R-3 in the record.

Now, because there was going to be environmental impact and the Ballantines needed to get a permit, you would think that they would then go to the Ministry and ask for a permit. That’s not what they did. They didn’t approach the Ministry and immediately ask for permission to build a road up the mountain.

Instead, after many months of planning and preparing the route in the field, the Ballantines’ environmental lawyer guided them to a German foundation named PROCARYN, which at the time was subsidizing farmers to plant trees in the deforested areas of the Jarabacoa region.

Michael Ballantine entered into a joint venture with PROCARYN and then proceeded to offer a Trojan horse to the government. In December 2004, the Ballantines wrote to the Ministry seeking authorization to construct an access road for a reforestation project.

Their letter states, “This farm is being reforested, and in order to carry out this work, it is necessary to build the aforementioned access road.”

A few weeks later, in January of 2005, the government accepted this gift but limited the scope of the project. It stated that “the Commission has no objection...”

If there will be no cutting of trees, but this does not signify an authorization for the extraction and transport of sand or gravel.”

Now, from 2005 to 2007, the Ballantines proceeded to build the road, but they ignored the limits imposed by the government.

Here’s how Michael Ballantine has explained it:

“During the course of road construction, we spent significant sums on heavy equipment, fuel, earth moving, culverts, drainage ditches, and gabion rock walls for engineering support.”

“Earth moving” meaning extraction/transport. Now, in culverts, drainage ditches, and gabion rock walls, those are things that relate to the issue of soil stability. Culverts are tunnels that carry water under a road. And "gabion rock walls," as the Ballantines’ expert, Mr. Peña, has explained, “are used to prevent soil erosion or protect pipelines from moving or slipping.” That’s in Footnote 1 of the First Peña Statement.

And since the Ballantines spent significant sums on all of this: on heavy equipment, on fuel, on earth moving, on culverts, on drainage ditches, on gabion rock walls, it seems like a good point to pause for a quick note on the issue of soil stability.

Soil stability is something that is critical in mountain construction, as even the Ballantines’ own witnesses agreed. So here’s what Mr. Kay has stated, one of the Ballantines’ witnesses. “I first visited the Ballantines’ project in May of 2006, examining the topographical features of the land with particular attention to the terrain, types of soils, and weather conditions.”

Another of the Ballantines’ witnesses, Mr. Almanzar, who worked with the Ballantines on the plans for a mountain lodge, which is a project the Ballantines mentioned in their pleadings and mentioned again this morning but never actually asked the Ministry for a permit to construct. Mr. Almanzar has testified that for this mountain lodge, he needed to do significant geological studies because of the mountain construction.”

And in his Witness Statement in Paragraph 4, he explains that “We measured the permeability of the ground, cohesion, plasticity limits, and, of course, its compressive efforts.” All of these are factors that affect soil stability.

So this is what the Ballantines have to say and their witnesses have to say. Let’s turn to the Environmental Law and see what it has to say. The Environmental Law, as I mentioned, is in the record at Exhibit R-3.
In Article 109 it states, “The State is responsible for guaranteeing that human settlements enjoy a balanced relationship with the natural resources that support and surround them.”

Article 110, “Human settlements shall not be authorized in places where there is a likelihood of landslides occurring.”

Article 122, “Mountainous soil where slope incline is equal to or greater than 60 percent shall not be subject to any activity that may endanger soil stability.”

And then, finally, Article 8, which sets forth the precautionary principle. It states that “The criterion of prevention shall prevail over any other in public and private management of the environment and natural resources.”

By “prevention,” it means prevention of environmental harm. As I noted, this sets forth the precautionary principle, which is a principle that is adopted in many states around the world. And the principle is essentially “Do no harm.”

Now turning back to the project chronology. Once the road was essentially a fait accompli, in February of 2005, the Ballantines requested terms of reference for the Environmental Impact Assessment. And the project that they had in mind was a project for the division into lots of Jamaica de Dios. They didn’t, again, ask for permission to build the road because they had already built the road.

So in April 2006, two Ministry technicians, who were an engineer and an architect, conducted an initial assessment of the proposed site for this Project 2. They wrote a report. And the report states, among other things, that “The topography of the land is irregular with steep slopes that contribute to erosion, that the vegetation is typical of a humid subtropical forest, and that the project access road is under construction.”

In the end, the recommendation of these technicians was that “Terms of reference be provided for the completion of an Environmental Impact Statement. Priority should be given to the following: topographic survey of the access road.”

Four months later, in August 2006, the Ministry accepted this recommendation and issued terms of reference for an Environmental Impact Assessment for the project, dividing into housing lots. It states to the Ballantines, “four project requires you to present a declaration of environmental impact. The following will be considered pertinent: topographical survey of the access road. These terms of reference are valid for one year.”

Now, this last piece is relevant because it reflects an understanding that conditions change.

Technology changes. Environmental protection is increasing over time. So by stating that the terms of reference are valid for one year, the Ministry was ensuring that if for whatever reason the Environmental Impact Assessment wasn’t conducted in a year, the Ballantines would come back and the Ministry would be able to decide anew whether it would even provide terms of reference so that an Environmental Impact Assessment could be undertaken.

A few months after this, November of 2006, the Ballantines retained environmental consultants. Their retainer agreement with those consultants, so that the parties understood that the legal system of the Dominican Republic does not guarantee that an environmental license will be obtained simply because an environmental study has been submitted.

Now, in August 2007, the Ballantines submitted an Environmental Impact Assessment. Notably, the Ballantines did not submit this to the Tribunal nor, for that matter, have they proffered the testimony of the environmental consultants who conducted the assessment. But the Dominican Republic has submitted this exhibit. And you’ll find it at Exhibit R-103.

The original Spanish version is 119 pages. And it explains therein that it was compiled through a combination of literary and field research, uses a survey methodology, which is basically an analysis of samples, to create an inventory of flora and fauna, and it analyzes several factors that the Ballantines have alleged were creation for purposes of this arbitration. For example, environmental impact and altitude.

The Environmental Impact Assessment that the Ballantines submitted states, among other things, that “Construction of the project’s access roads and internal roads involves earth moving, excavation, cutting, filling, and compacting.”

It also states that there is—”The increased risk of erosion caused by cutting on slopes for construction of the internal roads has a permanent and highly significant, high-intensity negative impact.”

In addition, it notes that at the top of the hill, at the top of the mountain at an altitude of 970 meters, the soils have a more clayey consistency with numerous gullies, which are evidence of the natural erosion that is known to have occurred there.

So the Ballantines submit this in August 2007. And then in December of 2007, following a review by the Ministry’s Technical Evaluation Committee, environmental permit is granted. The permit made it clear that it was for the project at Jamaca de Dios with the following specifications.
process that they conducted involved gathering existing data, verifying it in the field, including by doing the same type of survey study that the Ballantines’ own environmental consultants conducted, analyzing the environmental and biodiversity of each site, and mapping out areas to be recommended to a high-level advisory panel for protection.

At the end of this process, on August 7, 2009, the government promulgated Decree Number 571-09. The decree was later published one month later in the Official Gazette, which is—there was a question earlier about the notice that was given in the Dominican Republic. Just as in many civil law countries, there’s publication in the Official Gazette. This is a collection of all the laws, and that gives formal notice of decrees of laws.

So there was a decree published in September of 2009. And by virtue of the way that laws are created and informed the public generally, that was the way that notice was given.

So this decree establishes 32 new protected areas and corresponding buffer zones. And one of the new protected areas was the Baiguate National Park. I only have two brief comments on the Baiguate Park, one of which is that the Ballantines appear to have abandoned their claims predicated on the creation of the park, which is something that they confirmed expressly this morning.

So I don't need to show you all of the quotes that made that point in their pleadings. Instead, we'll just move to the second quick comment, which is that political connections cannot explain the park’s boundaries.

So this is one of the Baillantine’s’ witnesses, Andrés Escarraman. He was Subsecretary of the Environment, and he had a property which was inside the limits of the protected area. The Ballantines’ neighbor, Juan José Domínguez. According to the Ballantines, he’s the former brother-in-law of the then-president, and yet his property was within the park to the Ballantines’ own admissions.

Now, if you want to understand the park’s boundaries, this is probably the best picture that explains everything. And a lot of the pictures that the Ballantines have shown you were in the diagrams or the maps. You only see something flat.

But here you can see the boundaries tracing along the top of the mountain, and the Baiguate National Park is on one side. That helps to explain why some properties on one side are within the park and others aren't. It has to do with the way the mountain is formed.

Now, in the meantime, back at Jamaica, customers...
warned that the park's existence affects the Ballantines'
In addition to this, the environmental consultants
they inform Michael Ballantine, "The boundaries of the park
regarding the Baiguate Park boundaries.  And this is where
"initiating the second phase of their investment," though,
because the Ballantines' internal records expressly state
that "there were no investment dollars necessary to begin
Phase 2."
And the Ballantines apparently didn't commission
any studies, assessment, or due diligence reports related
to the commercial, financial, legal, or environmental
feasibility of the so-called Phase 2.  We asked for those
documents during document production and none were
produced.
Now, in 2010, Jamaca de Dios applies to the
Tourism Development Council, which is called CONFOTUR, for
classification as a tourism project.  The application was
submitted on 25 August 2010 and was provisionally granted
on December 21st of 2010.
In their pleadings and again this morning, the
Ballantines have made a lot about this CONFOTUR
classification saying that it "appropriately caused the
Ballantines to expect timely MMA approval of their formal
permit application to be an expansion of their property."
You'll find that at Reply Paragraph 96.
The Ballantines also assert that once they
received conditional classification as a tourism project,
"They had no reason to believe there would be any issue
with the expansion of their existing project."
But this is a tourism council.  This isn't the
Ministry of Environment.  And at the same time, the
Ballantines hadn't even—at the time the Ballantines
applied, they hadn't yet submitted their application to the
Ministry.
And the classification that they received from the
CONFOTUR says that "the benefits to having the project
provitionally classified will be the following," and that
was three specific tax exemptions.  It doesn't say anything
about environmental impact, about obtaining a permit,
except for the fact that "the resolution of provisional
classification as a tourist project does not authorize the
commencement of construction of the Jamaca de Dios
project."
Now, in September 2010, the Ballantines—at some
point the Ballantines have obtained new environmental
consultants.  And in September 2010, those environmental
consultants flagged the issue of the Baiguate National
Park.  They write an email stating, "Dear Mr. Ballantine,
As agreed, I attached the map of the location of the
protected areas in the area surrounding Jamaca de Dios.
Lots 67 and 90, as you may observe, are located within the
protected area.  This protected area is called the Baiguate
National Park."
Michael Ballantine responds asking questions about
the park boundaries.  "Okay.  This is Baiguate Park.  But
another question is with regard to the Environmental Law
signed by Leonel Fernández.  Did the law have coordinates?
The same as the Park coordinates or something new?"
The environmental consultants respond advising
regarding the Baiguate Park boundaries.  And this is where
the notice comes in.  So these environmental consultants
were able to find the decree in the Official Gazette and
they inform Michael Ballantine, "The boundaries of the park
are provided by Decree Number 571-09, signed by Leonel
In addition to this, the environmental consultants
warned that the park's existence affects the Ballantines'
project.  Here's the quote.  "Good afternoon, everyone. I
have followed attentively the queries that you have
concerning the declaration of protected area, Baiguate
Park, which affects the project."
Now, after this, the consultant made
recommendations and reminders.  The recommendation was "to
register the project with the Ministry of Environment, to
obtain the terms of reference or a letter of refusal and to
wait for the Ministry's remarks about the project submitted
by us.
In terms of the reminders, here's what the
consultants said.  "I remind you that the National Park
category allows low-impact ecotourism projects such as
yours, although the matter of the roads is for discussion."
You'll see why this is important soon.
"In addition, I remind you that notwithstanding
the category of protected area, the Ministry is in charge
of defining the use and which types of project yes and
which no."
"I also 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."
So that brings us now to Project 3.  The
Ballantines request terms of reference for a new project up.
In January of 2011, the Ballantines purchase additional land before they've heard from the Ministry. They make plans to use excavators to use on that land, and then after that the Ministry stamps their application as received. Ministry technicians the very next month conduct a site visit on February 17th, 2011. And Michael Ballantine received the team with Eric Kay. As he explains, "We showed the technicians the bioengineering we had implemented in Phase 1, which was unique to the country, and Eric Kay explained to them that we would be using excavators more in building the Phase 2 road."

Remember earlier when I showed all of the things that the Ballantines' own environmental consultants said about the impact of the existing road for which the Ballantines never really got approval from the Ministry? That road was going to be impactful, and the Ballantines are using excavators more in building this new road as part of Project 3.

Now, I'd like to show you what was already on thesite, what was in the quote/unquote "Phase 1" when the—when the Ministry was conducting its site visit. So we're going to show you a video. This is something that the Ballantines themselves put together of Jamaca de Dios.

(Vide played.)

The idea here is to give you a sense of what the first phase, Project 2, entailed, and Project 1, the road. I will also show you a few pictures which will come from Exhibit C-28. I believe this is the same document that the Ballantines showed you this morning when they were clicking through various pictures.

Just get the PowerPoint back up.

You'll see pictures of the road, of how the angle—how the angle can change your view, of the houses. Here is something we'll come back to. You can see at the bottom there is what appears to be a sort of retaining wall. We'll come back to that later.

So at the February 2011 site visit, the Ministry technicians who attended the site visit filled out a site visit form. And because the original version of this was in Spanish, I'm not sure if you've seen this document, but because the Ballantines asserted this morning that there was a complete absence of any discussion of certain factors or concern in the contemporaneous documents, I just wanted to draw your attention to certain aspects of this form.

First of all, it's a five-page printed form, which means that it wasn't something that the Ministry technicians were coming up with in the fields. They didn't have a printer or computer. It's handwritten notes by the Ministry technicians. It poses 39 specific questions and has spaces for additional observations and conclusions.

And the original Spanish version has annotations that might not have registered on the translation.

So, for example, there's forceful underlining of the words "sandy clay" on Page 2 in the box for the question about soil texture and permeability. You can see in the middle there where there's the blue underlining. It's underlined at least twice.

And then there's also an asterisk next to the question on Page 3 regarding protected areas. It doesn't say no, that the property is not within a protected area. There's an asterisk.

In terms of what's selected on this form, especially notable is the response to Question 1, topography of the land. It's marked as very steep, greater than 40 percent. And earth removals to be carried out in the construction phase are very large, bigger than 500 cubic meters.

In addition, the magnitude of the impacts to the construction/facility are marked as high. And to the question, does the project contaminate the soil and subsoil, it says, "Yes, significantly."

And then in the additional observation section the Ministry technicians wrote, "We observed in the proposed project area diverse vegetation and a slope exceeding 65 percent. These are characteristics to be taken into account when developing a building project in mountainous areas, and apparently cannot be overcome to a large extent in the first stage."

Now seems like a good time to talk about Article 122 of the Environmental Law which, as I mentioned, the Ballantines have referred to as the slope law, the law on slopes, and the slope limit.

They didn't submit the environmental law, and they have never once quoted Article 122. Never once quoted this article in their pleadings and their entire case is about it. So they just mischaracterize it. They say there's a maximum grade of 60 percent permitted under Article 122 of the Environmental Law, as if a law could restrict land somehow. And they say the issue is having slopes.

And then they even purport to tell you, without showing you, what Article 122 says. They say, "With regard to slopes, Respondent asserts that there exists a whole manner of considerations regarding whether to approve the project." But that is not what the law on slopes says. It...
The highest rainfall in the country. And eventually this phenomenon is the pull of gravity. The zone has a natural phenomenon known as mass wasting. The origin of height of 1100 meters above sea level altitude. And due to is greater than 60 percent.”

Surface has slopes greater than 30 percent. However, on the territory in the region is comprised of an abrupt steep slope referred to in this Article shall not be subject to any activity that may endanger soil stability or national infrastructure works.”

This isn’t just about having slopes. The question is: Are you on mountainous soil where the slope incline is equal to or greater than 60 percent? Will there be intensive tillage, like plowing, removal, or any other work which increases soil erosion or sterilization or any activity that may endanger soil stability?

Now, at the February 2011 site visit, the Ballantines and Ministry technician agreed on a course of action. Michael Ballantine has explained that course of action in his First Witness Statement. He says, “Because we were developing to the top of the mountain and it is virtually impossible to make the subdivision map without first cutting the road, we agree that we should obtain permission for the road, cut the road, and make the subdivision plan, and submit it accordingly.”

This is important. The Ballantines emphasized again this morning that their, quote/unquote “entire expansion project” was denied on the basis that a portion of the land exceeded 60 percent. This is why. The Ballantines were planning on building a road on land that exceeded 60 percent, and this would involve significant earth moving, digging, removal. The mountain was steep, and they wanted a relatively flat road. To make that happen, they needed to dig, they needed to remove earth, they needed to change the face of the mountain.

That is what wasn’t permitted under Article 122 of the environmental law. And if there wasn’t any road to get to the houses, there would be no houses.

Now, consistent with this action plan, Michael Ballantine sent a letter to the Ministry of Environment seeking permission to build the road, stated that the road would be 3 kilometers long and 6 meters wide and underscored the vital importance of the road, his request, for the continuation of the development of the project.

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This resulted in another site visit from technicians from the Ministry. And the technicians created a report that was submitted as Exhibit R-4. This is a seven-page single-spaced report, with two additional pages of photos. And it begins with a detailed explanation of the different types of soil in the region. And that’s followed by discussion of the geomorphological aspects, including altitude and climate, altitude being one of the things that the Ballantines say does not appear anywhere in the documents, and potential environmental impacts.

Here are some of the things that the report states.

“Apart from the valley of Jarabacoa, the rest of the territory in the region is comprised of an abrupt relief from steep slopes, where more than 70 percent of the surface has slopes greater than 30 percent. However, on the lands chosen by the owners of this project, the slope is greater than 60 percent.”

“The entire land is comprised of mountains with a height of 1100 meters above sea level altitude. And due to the morphology of the zone, all the land is affected by a natural phenomenon known as mass wasting. The origin of this phenomenon is the pull of gravity. The zone has a tropical rain forest climate and is one of the zones with the highest rainfall in the country. And eventually potential environmental impacts that may be caused by the Jamaca de Dios project are impacts on the geomorphology of the land, impacts on soils, impacts on the region’s flora and fauna, impacts on watercourses and underground waters.

“Scientists have demonstrated that the origin of our country is the result of the collision of tectonic plates, which makes our country highly dangerous for the lives of all of its inhabitants. One of the solutions to this problem is to avoid, at all costs, building in vulnerable places. The owners of the project are building villas on highly unstable land without taking the necessary precautions.

“During site visit, no work was observed on the land for the protection of the access roads or for the villas in a zone of high natural risk where the layers of sedimentary rock and volcanic rock that lie on the surface do not have a high degree of sedimentation and their resistance to breakage has been diminished by natural phenomena which alter the region’s safety factor. In other words, the land is prone to landslides.

“The alteration have these natural parameters causes landslides, resulting in damages and loss of life and properties. The project owners violated Article 122 of the Environmental law.”

Now, importantly, in June 2011, so around the same
time, just three short months later, Eric Kay expresses similar concerns about slope stability in an email to Michael Ballantine. He states, "There are problem steep slope areas and soft soil conditions" and proposes certain methods for addressing the problem.

Michael Ballantine responds, proposing less expensive alternatives. He writes, "Eric, Thank you for your suggestions. I have a question. Instead of your approach, can we instead consider these other two solutions which would be cheaper?"

And then Eric Kay responds, emphasizing the severity of the issue. He says, "There are no real cheaper solution in this instance. Rear in mind the objective is to prevent water from going over the edge of the road, as water will do big damage anywhere it goes over the edge."

This is Eric Kay's emphasis, not ours. As a note, he explains, "Water running at the outside edge of the road increases soil water saturation, and saturated soils are more unstable."

This is the issue that was raised in Article 122 of the Environmental Law. And, importantly, there were threats to soil stability already. So, for example, "on Lot 47, water in excess came over the slope edge and started a failure further downslope, and then this failure worked back upward. Excess water flow from the road caused the problem," Eric Kay says.

After this, Eric Kay recommends urgent action to control slope stability. He says, "It is strongly recommended to urgently undertake a program of bioengineering for slope stability for all slope areas that are showing signs of soil movement."

Movement of soil, landslides. He explains, "Misdirected water has the potential to cause erosion damage and oversaturate sensitive slopes. These seemingly innocuous and minor events have the capacity to misdirect water to areas of high concern."

"Danger areas" he calls them.

Three months after this, following a Technical Evaluation Committee review, the Ministry rejects the Ballantines' application. Mr. Di Rosa showed you this document earlier, but I'm going to show it to you again.

It says, "The Technical Assessment Committee deems the project not environmentally viable for the following three reasons. First of all, due to Article 122 of the Environmental Law," which is the article that I showed you before. "Likewise, the area is environmentally fragile and an area of natural risk."

Now, in a letter to the Tribunal just a couple of weeks ago, on July 30th, 2018, the Ballantines asserted on
So, for example, in Paragraph 101 of the Amended Statement of Claim, it says, "The Ballantines immediately requested that MMA reconsider its decision confirming the slope of any areas that we designated for home construction in Phase 2 would not exceed the 60 percent threshold."

The issue was with the road. The Ballantines asked the Ministry to evaluate the environmental impact of the road. The Ministry said, "This is not environmentally viable."

But in any event, the Ministry reconsidered the application and did so in good faith. A new site visit was conducted on January 11, 2012, by an entirely new set of technicians from the Ministry's national offices. And as the site visit report explains, "In the field visit using a clinometer, which is a tool that measures incline, we could verify that the slopes in the project area were of various ranges, with slopes between 20 and 37 degrees, which in percentage terms would be 36 percent and 75 percent respectively."

The Ministry also stated, "After carrying out the field visit to the Jamaca de Dios expansion project, we were able to verify that the construction of the road entails a great deal of movement of soil in a fragile area where we could observe landslide in some areas already."

Eventually, the Technical Evaluation Committee was asked to explain to the Ballantines what the problem was. It wasn't having slopes. It was earth removal. It was labor increasing their erosion."

And this emphasis was in the original of the document to explain to the Ballantines what the problem was. It wasn't having slopes. It was earth removal. It was an erosion concern.

There's also a citation to the precautionary principle, Article 8 of the Environmental Law, which says that the prevention criterion will prevail over any other in the public and private management of the environment and natural resources.

At the end of this, the Ministry states that the dossier is closed. Nevertheless, the Ballantines come back with the same old argument, the same old land, in August 2012 request reconsideration of the reconsideration denial. So in support of their request, the Ballantines reiterate their assertion that the incline "esta a solo 32 grados." It's only at 32 degrees, which is higher than 60 percent.

If this figure were expressed as a percentage, as the table in Mr. Navarro's statement explains, it would be more than 60 percent.

The new Minister of Environment, Ernesto Reyna, meets with the Ballantines to discuss the project, but their application is rejected on the same basis as earlier, which makes sense. Nothing had changed, not even the Ballantines' arguments.

In the interim, something happens that's important relating to Project 2, the existing housing lots, which is that the Ministry renews the Project 2 permit. After an inspection of the existing lower mountain project is held in January 2013, the permit is renewed in June of that year confirming that the reason for the rejection of the new permit application had nothing to do with the Ballantines' nationality or the Ballantines themselves. It was a problem with the land.

So going back to this Project 3, the upper mountain project, in July of 2013 the Ballantines request reconsideration for the third time. Again, Ministry officials duly analyze the reconsideration request, they conduct two additional site visits, one on August 28, 2013, and another in late September 2013. Again, the technicians who participated in these site visits were different from...
those who had conducted the site visits relating to the
original application and first reconsideration request.

So the Ministry duly evaluates the reconsideration
request. And importantly, the second of these site visits,
the fifth in total, which was the September 2013 site
visit, was attended by the full Technical Evaluation
Committee. As Mr. Navarro explains in his First Witness
Statement, this is an exceptional thing, but it was done
because the committee itself understood that it should
examine the project proposal as explained by the developers
and evaluate in situ the area proposed for the development.

So here are some pictures that were taken on that
site visit. I mentioned to you earlier that we were going
come back to these retaining walls. Here is an example
of one of them. And here’s a picture that was taken on the
site visit. So in the background you can see one of these
retaining walls. And all of the dirt that you see in the
foreground is rubble from when the retaining wall
collapsed.

So finally, as Mr. Navarro explains, “In the fifth
visit to the project, which took place in late
September 2013, I met with the developers. I explained to
them that in addition to the slope and earth movement
issues,” the issues under Article 122 of the Environmental
Law, “the area that the Ballantines proposed to develop was

alternative site for the project. In addition to this, in
parallel, the Ministry renewed the Project 2 permit.
The second conclusion is that the Ministry was
diligent in its assessment of the Ballantines’ permit
applications.

Again, here’s the evidence. When the Ballantines
alleged that the Ministry had made a mistake, the Ministry
dispatched a team to reassess its conclusions. In the end,
the Ministry dispatched 21 different people to conduct five
different site visits.

And the Ballantines, who had insisted upon all of
these visits, have since asserted in a letter to the
Tribunal that an analysis of the site could be completed in
two to three hours. They sent that letter to you on
March 1st, 2018.

The third conclusion is that the Ministry had
valid reasons for rejecting the application. Again, here
is the evidence.

First independent experts have confirmed, (3),
that the area was environmentally sensitive and faced
natural risks, and (2), that the Ballantines’ plans were not
environmentally viable. Further, the Ballantines’ own
environmental impact assessment for Project 2 confirms the
adverse impact of the road.

In addition, pre-existing law prohibited

within the limits of the Baiguate National Park, an
additional reason why the expansion project could not be
developed as proposed.”

Following this, on January 15, 2014, the Ministry
rejects the third reconsideration request. It states,
“After having reassessed your proposal, the Technical
Evaluation Committee concludes and repeats that this is not
viable in the selected place.”

“The execution of such project comes into conflict
with Article 14 of Decree No. 571-09, which is the
provision that establishes the Baiguate National Park, and
Article 122 of the Environmental Law,” which we’ve been
discussing.

Then the Ministry renews its offer to evaluate an
alternative site. It states, “In this sense, a new site
alternative is hereby requested, otherwise your dossier is
closed.”

Now, at the end of all of this, after having seen
the actual evidence, there are certain conclusions that
follow. The first is something that I’ve already alluded
to, which is that the problem with Project 3 was the
proposed site. It wasn’t the Ballantines themselves. It
wasn’t the Ballantines’ nationality.

And here’s the evidence. The Ministry invited the
Ballantines on two different occasions to propose an

intensive tillage, earth moving, and any other activity
that could increase erosion on mountainous soil where the
slope incline was greater than 60 percent.

And Michael Ballantine himself stated that “The
slope where we are trying to create an access road is
45 degrees.” This corresponds to an incline of more than
65 percent.

Further, Mr. Ballantine has testified that during
the February 2011 site visit Eric Ray explained to the
Ministry inspector that the Ballantines would be using
evacuators, digging, more when building the Phase 2 road.
And six months after the third reconsideration
request was rejected, the Ministry received a letter from
the Homeowners Association of Jamaica de Dios which
expressed concern about “considerable landslides” due to
earth movements.

Now, just a few comments on some of the
Ballantines’ recurring assertions.

The first one is the one that we’ve already
discussed, that it’s somehow notable that the Ministry
rejected the entire application because some small portion
of the property had a slope incline of higher than
60 percent.

Here the Ballantines are ignoring their own past
statements. I’ve shown these to you. Michael Ballantine
has stated that they were developing to the top of the
mountain, and it's virtually impossible to make the
subdivision map without first cutting the road. He also
stated that the slope where they were trying to create the
road was 34 degrees, greater than 60 percent.

Their second recurring assertion is that the
Dominican Republic denied the Ballantines the right to
develop because of the national park. And they say that
this is what gave rise to the Ballantines' claims. But the
Ballantines were advised, even before submitting their
application, that the existence of the park affected their
plans. I showed this to you earlier.

"Good afternoon, everyone. I have followed
attentively the conversations and queries that you have
concerning the declaration of the protected area, Baiguate
Park, which affects the project."

In addition, the same environmental consultant
also warned that the Ministry could deny the road to be
incompatible with the park. Although, "I remind you that
the National Park category allows low-impact ecotourism
projects such as yours, although the matter of roads is for
discussion, what is most important is that the Ministry of
Environment provide its technical, legal, and viability or
non-viability opinion for the project."

And importantly, the Ballantines are not the only
ones to have been denied an environmental permit on the
basis of the Baiguate National Park.

First, Juan José Dominguez, the Ballantines' neighbor, was denied an environmental permit for a housing
development project on the basis that "the proposed
location is located within the protected area, Parque
Nacional Baiguate."

In addition, Andrés Escarraman, the Ballantines'
witness and a former Vice Minister of Environment, has
tested on behalf of the Ballantines that he was denied
permission to plant coffee and macadamia and to reforest
with citrus trees and/or avocados on land within the
Baiguate National Park.

The third recurring assertion, and it's one that
they made again this morning, is that Jamaca de Dios is the
only mountain project that has been denied the ability to
proceed. You heard this again this morning on Slide 16.

It was cited as a quote/unquote "simple fact" that "not a
single other mountain residential project in the entire
country has been denied the opportunity to develop its
land."

Here's another one. "The only investors who have
been affirmatively prevented from participating in that
expansion are sitting before you today."

The issue, though, is that the Ballantines ignore
the similar treatment afforded to the only genuine
comparator, which is Aloma. And just to give you a sense
of how close these projects are, we'd like to show you
another video, which is Exhibit C-129. We'll be starting
at minute 2:15.

Can you pause it for a second.

So what you see on the right, those houses, those
are the end of quote/unquote "Phase 1 of Jamaca de Dios."
Beyond that is a road that the Ballantines constructed
without permission, for which they were fined—we'll talk
about this soon. And what you see on the left is Aloma.
We'll see a little bit of a turn soon, so you can get more
of a sense of what Aloma looks like.

Okay. Let's pause it there.

Now, if we go back to the slides and compare the
case of Project 3 and Aloma, you'll see that they were
afforded similar treatment.

Just wait for the slides to come up.

So here's Project 3, one of the two neighbors.
The developers are the Ballantines, who are dual nationals
of the Dominican Republic and the United States. The
proposed project site is in the Cordillera Central Mountain
Range abutting the proposed project site for Aloma. Right
next door. The altitude is 820 to 1260 meters above sea
level; 18.7 percent of the land exceeds 60 percent; soil
type is igneous, volcanic, and metamorphic rock. It's
inside the Baiguate National Park. A permit was requested.

Permit was denied.

Here's Aloma. The developer is Juan José
Dominguez, who is a Dominican national only and son of the
mayor of Jarabacoa, his project site likewise in the
Cordillera Central mountain range abutting the proposed
project site for Project 3. The altitude is 990 to 1220
meters above sea level. The slope distribution of his land
is only 4.89 percent of the land exceeds 60 percent, same
exact soil types, inside the Baiguate National Park.

Permit requested. Permit denied.

ARBITRATOR CHEEK: Ms. Silberman, I'm sorry to
interrupt. But what was the date, again, if you can remind
me, of the rejection of the permit for Aloma?

MS. SILBERMAN: I believe it was in 2013. I can
have someone look up the specific date for you.

ARBITRATOR CHEEK: Thank you.

MS. SILBERMAN: Now, the Ballantines have asserted
that none of this matters because there's been construction
on Aloma Mountain.

But if you look at the Google satellite imagery,
you'll see that, for example, in 2002 there's no
construction.

There is some construction in 2006. That’s on the top right.

And then in 2011, there’s more construction.

At this point, Aloma is fined because it has applied for an environmental permit. Ministry inspectors come out to do the site inspection to determine whether or not the permit should be approved, find the road, fine Mr. Dominguez. He was fined 7,000 U.S. Dollars.

You’ll find that in Exhibit R-56. And, you know, this morning, Mr. Allison called a $7,000 fine a quote/unquote "slap on the wrist." And Mr. Baldwin mentioned another fine of another project of $6,800 U.S. Dollars, and said, “The Ballantines would have loved that deal, to build without a permit and get a $6,000 fine.”

Well, remember how I showed you in the video that the Ballantines had constructed a road without permission? They were fined $1300 for this. You can find that in Exhibit R-143.

Now, notably, after 2011, there hasn’t been more construction. There are no houses apart from Mr. Dominguez’s house. We understand that there’s a gazebo. But this isn’t a neighborhood. It isn’t a development project.

MS. SILBERMAN:  That’s something that I’d like to consult with the team regarding, and it’s for the following reason. I know that that sounds like a very simple question to answer. The issue, though, is at the time that the Baiguate National Park was created, it was one of 32 different protected areas created.

And they were created following what’s known as a gap analysis, which means that there are all of these different gaps in protection: the Ministry goes out and tries to find ways to fill all of those gaps by protecting different types of biodiversity, ecosystems in every different park.

And it’s for this reason that in certain parks, in certain protected areas and within the buffer zone of those protected areas, certain activities are permitted, but in other parks they’re not permitted.

So I’d like to come back to you with a precise answer, and I’m going to consult with the team to do that.
Because at the end, all what they were looking is to build on that part. Why not just tell them from the start, "look, this is not environmentally viable. You violate--there's a violation of Article 122 of the Law. Because the area is environmentally fragile, there is a natural risk.

Why telling--why keep on the discussion of 1, 2, and 3, based on the fact--and even add to that this issue of the park--when, based on what you are saying, there was no way?

MS. SILBERMAN: So the issue again was the project was not environmentally viable on--in this particular place for three reasons. And the Ministry could have gone with just one reason, but there were several.

So it mentioned those several reasons later on when the Ballantines kept pushing Article 122 of the Environmental Law, and they said that there was an error of calculation. The Ministry went back and said, "Well, let's check. Let's verify."

And so the discussion, for the most part, was on Article 122. There also was some discussion of other issues that the Ministry then explained in its various correspondences.

Eventually it mentioned the issue of the park, mostly because the Ballantines kept pressing the

issue. The Ministry could have stopped with "This is problematic because of Article 122\(^2\) of the Environmental Law. That enough was a sufficient basis for denying the permit, but there were other reasons as well.

And importantly, the Ministry did say at the end of this letter, "Come back to us with a new site. So this project on this site isn't going to work. We are happy to evaluate any other site that you may have." That's what the Ministry was saying from this very first letter.

And then in all of the other letters, it says, "The project is not viable on this land. The project is not viable here. Come back to us with other property." And the Ballantines never did.

PRESIDENT RAMÍREZ HERNÁNDEZ: Sorry. The point I wanted to make is, at the end you say--you do say, "Should you decide to submit any other place." But at the end, the Ballantines wanted to build there because that's where they made the investment.

So at the end, why aren't you telling them, when you told them, well, go to another site, go and buy another property in another month in another place, because there--here you will never be able to buy--to get a permit based on these reasons.

\(^{2}\) English Audio Day 1 at 07:41:43
MS. SILBERMAN: Right. But the Ballantines didn't consult with the Ministry before buying this property. In fact, they submitted the application without having even bought all the property.

They had been advised by their environmental consultants that not even submitting a permit application is a guarantee that they will get approval of the permit. So just going out and buying land cannot, by any means, bind the government into approving a very impactful project on a sensitive mountain.

ARBITRATOR CHEEK: If I could just ask a follow-up legal question, though. And it goes to Mr. Di Rosa's analogy about the car getting an inspection.

Normally, if I take my car to get an inspection and they say it fails, you know, something is wrong with it, you need a new carburetor, I don't usually go out and buy a whole new car. I usually get the carburetor fixed and then I go back to the inspection to see if I can pass with my car.

So legally, am I correct that the Ballantines had an option under Dominican law to come back and say, "We will not build on these 60-degree"—"percent slopes, and we will do it another way"? So they--it's--is it correct that they could have still used this land for some developmental purpose or not?

MS. SILBERMAN: So the way the Technical Evaluation Committee works is, first of all, there is a group of different technicians, and these technicians come from the different vice-ministries of the Ministry of Environment. There is, for example, a vice-ministry of forestry, of water and land, of protected areas, of environmental management. I think there are two that I'm forgetting.

And the Technical Evaluation Committee is composed of representatives—I think vice-ministers—of all of these different vice-ministries. They attend the meetings along with the director of the province where the project would be, and they're the ones who are making the decision on the basis of the analysis that the technicians go out and do when they do these site visits.

There was something unusual that happened here, which was that in addition to having all of the technicians go out and conduct these site visits, the Technical Evaluation Committee itself also went out and conducted a site visit.

And then the Technical Evaluation Committee meets, discusses the project, makes a decision, a letter is sent to the Ballantines. And following that, in all of the reconsideration requests, the responses that are given from the Ministry are several pages long. They go into more detail for all of the reasons for the rejection, and explain the factual circumstances and the legal bases for those as well.

So, yes, the Ballantines could rely on these letters. They had explanation in these letters.

Remember I showed where the Ministry quoted the relevant portion of Article 122, and it put in bold text what the problem was, that it was erosion and soil removal. It wasn't just the problem with the land.

So even if you look at those letters, based on the information that the Ballantines were getting, they still were given ample reason for why the project was rejected. They just have ignored those reasons in explaining this case to you.

ARBITRATOR CHEEK: Thank you. And one final question, Ms. Silberman.

What, if anything, should the Tribunal take away from the fact that the interaction with the Ministry that the Ballantines had appears on the record to be quite different than the interactions that other project owners had with the Ministry?

MS. SILBERMAN: You should look at the actual interactions and the actual correspondence. And I don't think that they were all that different, given what the Ballantines were saying.
So if someone comes back to the Ministry and says, "Well, how about if I change the project in this way or do that," and the Ministry then evaluates that and responds to them with a yes-or-no answer, that's basically the equivalent of what the Ministry did here.

The Ballantines came to the Ministry saying, "This was a problem. You made a mistake in the calculation." And the Ministry said, "Okay. Well, we will come back out, we will send out new technicians, we will evaluate the site." And they verified with instruments their calculations and said, "No. We have reached the same conclusion."

So the Ballantines were given the opportunity to raise their response with the Ministry. The Ministry took that seriously, dispatched technicians to go out and conduct site visits, spent valuable resources doing this, carefully considered the issue, and then came back to them with an answer.

That's exactly what the Ministry has done in other situations, but the allegations of the project developers was different.

PRESIDENT RAMÍREZ HERNÁNDEZ: But don't we have on the record some interactions regarding other projects where, when this problem--when the same problem was faced, which was the slopes--and I will only refer to slopes--the

Other developers were able to change the project or have proposed changing their project. The Ballantines didn't. They said, "No, we want to do the exact same project in this exact same place. You got it wrong."

And that's why the Ministry went back and said, "That's what we're going to analyze." It's because of what the Ballantines were asserting to the Ministry that created the Ministry's response to them.

ARBITRATOR VINUESA: I just have a very, Counsel--not relevant--but just to refresh my memory. In slide 131, it's not the date of the "Ley General de Medio Ambiente y Recursos Naturales"13. Should I assume that it's--6400 means --


ARBITRATOR VINUESA: -- what I think?

MS. SILBERMAN: Yeah, that it was promulgated in the year13 2000.

ARBITRATOR VINUESA: Thank you very much.

PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. I think if there are no more questions, we will now adjourn.

Let me give you a heads-up on the next days. It is the Tribunal's intention that if--we hope that we will

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13 English Audio Day 1 at 07:51:41
14 English Audio Day 1 at 07:51:30

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CERTIFICATE OF REPORTER

I, Margie Dauster, RMR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

MARGIE R. DAUSTER