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")

- - - - - - - - - - - - - - - - - - - -x-

In the Matter of Arbitration Between:  
MICHAEL BALLANTINE, LISA BALLANTINE,  
Claimants,                        
and                          
THE DOMINICAN REPUBLIC,                
Respondent.                       

- - - - - - - - - - - - - - - - - - - -x Volume 5

ORAL HEARING
Friday, September 7, 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 12:00 p.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:
MR. EDWARD "TEDDY" BALDWIN  
MR. MATTHEW ALLISON  
MS. LARISSA DIAZ  
MS. SHAILA URMI  
Baker & McKenzie LLP  
815 Connecticut Avenue, N.W.  
Washington, D.C. 20006  
United States of America

Claimant Representatives:
MS. LISA BALLANTINE  
MR. MICHAEL BALLANTINE

APPEARANCES (Continued)
Attending on behalf of the Respondent:
MR. MARCELO SALAZAR  
MS. LEIDYLIN CONTRERAS  
MS. RAQUEL DE LA ROSA  
Dirección de Administración de Acuerdos y Tratados Comerciales Internacionales,  
Ministerio de Industria y Comercio
MS. PATRICIA ABREU  
MR. ENMANUEL ROSARIO  
MS. ROSA OTERO  
MS. JOHANNA MONTERO  
MS. CLAUDIA ADAMES  
Ministerio de Medio Ambiente y Recursos Naturales
MR. PAOLO DI ROSA  
MR. RAÚL R. HERNERA  
MS. MALLORY SILBERMAN  
MS. CLAUDIA TAVERAS  
MS. CRISTINA ARIZMENDI  
MR. KELBY BALLENA  
MS. FAILA HİLLETT  
Arnold & Porter, LLP  
601 Massachusetts Avenue, N.W.  
Washington, D.C. 20001-3743  
United States of America

Of Counsel:
MR. JOSÉ ANTONIA RIVAS CAMPO

ALSO PRESENT:
MR. JULIAN BORDAÇAHAR  
Secretary to the Tribunal

Court Reporters:
MS. MARGIE DAUSTER  
Registered Merit Reporter (RMR)  
Certified Realtime Reporter (CRR)  
B&B Reporters  
529 14th Street, S.E.  
Washington, D.C. 20003  
United States of America

MR. DANTE RINALDI  
MR. DIONISIO RINALDI  
D.R. Esteno  
Colombres 566  
Buenos Aires 11184BE  
Republic of Argentina

Interpreters:
MS. SILVIA COLLA  
MR. DANIEL GIGLIO
Respondent cited that as the very first reason for why it was denying the Ballantines' application to expand its project. Respondent cannot rely on that Article anymore. Why not? Because every mountain project in the area has slopes that exceed 60 percent.

The Tribunal has Demonstrative 15. The slope percentages are uncontested. Jarabacoa Mountain Garden, 43 percent slopes above 60 percent. Quintas del Bosque II, 22 percent. Paso Alto, 17 percent.

None of these projects were rejected because a portion of their land had slopes in excess of 60 percent. We heard Mr. Navarro testify yesterday that Article 122 prohibits building on land that is steeper than 60 percent but does not prohibit building on land with slopes of less than 60 percent.

So, Article 122 cannot be the justification why 86 percent of the Ballantines' Phase 2 development could not be developed.

The Tribunal has seen the slope maps for the Jamaica expansion request. Navarro acknowledged that his calculation was 19 percent and Eric Kay's was 14 percent, but the difference was not material to the denial.

This is the map. We've seen it before. We've seen Phase 1 with the steep slopes in the middle. The Ballantines did not build on those slopes.

We see Phase 2 with slopes primarily concentrated in two sections up at the top. We see the land where the road was begun to cut before Michael was fined and the project was shut down.

Respondent ran that slope argument as long as it could. It still tries to say that, "The Ballantines didn't let us know that we weren't going to build on those slopes." But we've heard the statements from the Ballantines. They didn't intend to develop on that land. And if there was any doubt, the June 13th letter affirmatively states, "Nevertheless, according to the aforementioned, the slopes where our project would be located are under such percentage."

And any doubt should have been further eroded by Respondent's own August 2013 inspection report where the findings were that a tour was made of the site where various slopes in the area could be seen. They go from steep to very steep.

And so GPS points were taken in the area where it is intended to develop the project, and they were viewed with Google Earth. The same Google Earth technology that Respondent questioned Michael Ballantine using in connection with his first reconsideration request was used.

The Tribunal has seen the slope maps for the various slopes in the area could be seen. They go from steep to very steep.

And so GPS points were taken in the area where it is intended to develop the project, and they were viewed with Google Earth. The same Google Earth technology that Respondent questioned Michael Ballantine using in connection with his first reconsideration request was used.
But it rains too much. And Navarro first tried to exception of Mirador del Pino, is in the cloud forest. So, in the Dominican Republic begins as low as 350 meters above sea level. And Mr. Navarro deferred to his former colleague, Professor Martínez, on this point. And Professor Martínez confirms that it's the cloud forest that impacts the soil moisture content.”

And so we come to the environmental fragility. What does that mean? It's not defined anywhere in Dominican law. And so Mr. Navarro insists that it means several things.

The Tribunal has noted that the August 23rd inspection report had some inconsistent findings and made no recommendations. Claimants invite and encourage the Tribunal to review the multiple inspection reports to see if any of the issues that Navarro now identifies are reflected in those reports or to see if there were any studies that were made with those reports that would support any of the claims that Mr. Navarro now makes.
It's also plain that there's nothing in the record less than 2 kilometers away: None observed.

"Bodies of water inside the project area or there's a hydrological basis for the denial. And it remains unclear whether it's still an issue when that Respondent has offered at some point for their denial, "I did not."

"Did you ever see a letter that said exactly "I did not."

"Did you ever see a letter that said exactly specifically, 'Where do you plan to build the road to minimize the earth movement that we're concerned about'?"

"I did not."

Water and biodiversity, these were justifications that Respondent has offered at some point for their denial, and it remains unclear whether it's still an issue when there's a hydrological basis for the denial.

But if we look at the very first inspection team note when they went to visit JDD, they noted there was no active water. "Bodies of water inside the project area or less than 2 kilometers away: None observed."

It's also plain that there's nothing in the record addressed in mountain developments. That's not an issue. All developers have to deal with the possibility that erosion will occur.

But there is no evidence that erosion issues were considered by the MMA at the time the Ballantines' permit was denied.

And evidence of erosion or concern about runoff was expressly mentioned in the consideration of multiple mountain projects in La Vega that were later permitted for development.

The JMG original denial letter. "Movement of the earth would be needed to carry out the project, which could potentially lead to erosion of the soil and, hence, sedimentation in the water basin."

Indeed, Mr. Navarro himself observed landslides and took pictures of them when he went to visit Jarabacoa Mountain Garden before approving its permit.

The actual permit for Alta Vista, in December of 2011, says: "Given the topographical characteristics of the terrain, particularly the phenomena of soil erosion at the project site, plot division work on the land, the design and future construction of the project, while bearing in mind the potential risks of mass landslides and subsidence. Therefore, future houses must have lightweight structures according to the load-bearing capacity of the soil."

La Montaña, it's now permitted. "The soil has developed on metamorphic igneous rock with high elevations exposed to mass erosions due to the high local precipitation of 1600 millimeters on the range."

Sierra Fría, rejected first and then given Terms of Reference. "The construction of the project would cause soil erosion and acidity."

Navarro confirmed.

"Did you ever see a letter to Jamaca that said, 'How do you plan to deal with soil stability at your expansion project'?

"The letter provides an option to them of relocating the project."

"I understand the letter says you can submit some different property. I'm asking with respect to the property they had submitted, did the MMA ever write to them and say 'What is your plan with respect to soil stability'?

"I have no knowledge of a letter of that nature."

But with unstable soil, there can be runoff or landslides. Earth movement is an issue that must be considered by the MMA at the Ballantines' permit.

Phase 1 license when it was granted in 2013, and there was no response to any of the many ICA reports submitted by the homes that were climbing up the hill at Jamaca de Dios.

Mr. Booth, who testified about the ecology at Jamaca de Dios, confirmed that he hadn't visited any other mountain projects in La Vega that were later permitted for development.

And no other mountain project has been rejected or even altered on the basis of its soil issues.

Navarro confirmed at 764 and 765: "Just so the record is clear, you didn't see any communications from the MMA to the Ballantines at any point in which they said, 'How do you plan to deal with soil stability at your expansion project'?

"The letter provides an option to them of relocating the project."

"I understand the letter says you can submit some different property. I'm asking with respect to the property they had submitted, did the MMA ever write to them and say 'What is your plan with respect to soil stability'?

"I have no knowledge of a letter of that nature."

But with unstable soil, there can be runoff or landslides. Earth movement is an issue that must be considered by the MMA at the Ballantines' permit.

Indeed, Mr. Navarro himself observed landslides and took pictures of them when he went to visit Jarabacoa Mountain Garden before approving its permit.

The actual permit for Alta Vista, in December of 2011, says: "Given the topographical characteristics of the terrain, particularly the phenomena of soil erosion at the project site, plot division work on the land, the design and future construction of the project, while bearing in mind the potential risks of mass landslides and subsidence. Therefore, future houses must have lightweight structures according to the load-bearing capacity of the soil."

Mr. Booth, who testified about the ecology at Jamaca de Dios, confirmed that he hadn't visited any other mountain projects in the area.

So, Respondent contends, instead of environmentally, that the houses at Phase 1 were just too nice. They say the homes violated the promises made in the Environmental Impact Study presented by Jamaca de Dios that they would build mountain villas or cabins.

We had some debate about what those terms meant. But, again, Respondent can point to no contemporaneous expression of concern to the Ballantines about the style of the homes that were climbing up the hill at Jamaca de Dios. There's no post-permit inspection complaints about the house. No conditions were placed on the renewal of the Phase 1 license when it was granted in 2013, and there was no response to any of the many ICA reports submitted by the landowners every six months.

Ultimately, Navarro is left to insist that the Ballantines could not build their road to the top of Phase 2. This despite the quality of the Phase 1 road of which the Tribunal has seen the video evidence. This is another new argument, although one rejection letter does mention the road and calls it a path.
But Respondent's expert, Mr. Diening, does not contend that the Phase 2 road was unbuildable. He contends that it would have environmental impact, although his views on that are overstated as he projected a 10-meter wide road and not the 6-meter wide road that the Ballantines planned and had built in Phase 1.

You heard Mr. Kay's testimony that the Phase 1 road could be extended into Phase 2.

Now, the road would have impact. There's no doubt about that. But not any greater impact than any other mountain road. Mr. Navarro himself in his Report states, "In general, mountain projects require a great deal of work to make all the areas accessible."

Mr. Navarro confirms there was no specific plan for the JDD road he was evaluating. But he now says the road must be totally vertical, and by contrast, Mr. Navarro apparently liked what he claimed was the preexisting, non-permitted road at JMG, even though the records reflect that only 25 percent of that road had been built. The Tribunal should review and recall the testimony of Mr. Navarro with respect to the JMG road.

We see the site plan. The shaded gray areas are where the slopes at Jamaca de Dios exceed 60 percent. Excuse me. Mountain Garden. We see the contours and the approved roads, and we see that the roads cross contour lines. Here they are blown up in color for the Tribunal's convenience.

Now, the grade proportions of these roads, which Navarro called "the roads cut by farmers," would have to be astonishing. He says a 7 percent grade is steep, and nothing over 15 percent would be safe. Portions of those roads, simple mathematics in that chart, show that these roads would have grades well above 15 percent.

Despite that, Mr. Navarro now claims that no road can be built in Jamaca Phase 2 because, "The only path to get to the upper portion of the mountain is by breaking the contour line." But it's simple physics. You must break and cross contour lines in order to climb a road up a mountain. The road is another new argument.

So, why are we here? Ultimately, Respondent's defense is built on the notion that Jamaca somehow, despite similar projects within a few miles, was so ecologically unique that only its development needed to be completely halted, completely shut down. Not modified, not conditioned, not restricted, not limitedly halted, while at the same time, every single other mountain development was permitted or allowed to develop without a permit.

That notion defies common sense, and Respondent's experts were clear. They made no analysis of any other projects other than Jamaca and, thus, couldn't provide an opinion as to whether Jamaca was different than any other mountain projects with respect to the road, with respect to the biodiversity, with respect to the ecology recovery analysis. Nothing.

Ultimately, compelling evidence exists in the absence of evidence. The lack of communication and collaboration between the Ballantines and the MMA is stark and unavoidable.

We've seen the evidence of the MMA working cooperatively with other developers to facilitate the issuances of their permits. It did not do so with Michael and Lisa Ballantine.

It did not write letters asking them to submit a redesign of its site plan like it explicitly did for Sierra Fría at A-32, QDB2 at C-116, and Mirador del Pino at R-167. Instead, it told them to buy another site. We heard Mr. Navarro say that several times.

"So, they asked them to move the project. But they didn't say, 'You need to redesign the project within the area you're submitting'; correct?"

"Correct."

The evidence is plain, and I just want to highlight a few documents on this point. La Montaña. After rejection, the developer asked for reconsideration, and it was granted. He has a permit. He states, "I modified the Master Plan pursuant to the guidelines and suggestions of the Ministry," Jarabacoa Mountain Garden. It was rejected. It asked for reconsideration, and it was approved. In that sense, and assuming the execution of the previous suggestions, the commission deems it environmentally viable.

Mirador del Pino, permit approved in 2012. In order to approve the Project Mirador, it is suggested to include the follow dispositions.

This is ultimately where Respondent's efforts to make the Jamaca permit review seem like any other evaluation falls apart. It didn't explain its rejections. It didn't offer suggestions or modifications, and it continues to rely on ambiguous, nontransparent articulations of fragility and risk.

It did not issue Terms of Reference to establish a framework for a dialogue, and yet all the permitted projects, even those that were originally denied, received Terms of Reference.

And so did Sierra Fría, who was rejected for the very same reason as Jamaca. The letter to Sierra Fría: "The project is located in an environmentally fragile area. The project is located on a slope of more than 60 percent.

After this denial letter was sent, it's been issued Terms of Reference, and they're under consideration by the MMA.
We've heard the testimony, unrefuted, of Claimants' witnesses who have said the owner of that project has confirmed that he's going to get his license in 2018.

Now, we received this letter because we asked the Respondent to produce any letter in which they had denied a project for slopes of more than 60 percent. They produced a letter, this letter. It's almost verbatim of the letter that came to the Ballantines the first time.

"Environmentally fragile. Slope of more than 60 percent. Look, we've got a letter that shows they're not alone."

So, why are we here? Here are the projects. Here are the comparators. Let's just talk about a few of them.

I do want to say that it's important to know that we're here to talk about all these projects because Respondent wants the Tribunal to consider this issue in a vacuum. They want you to consider their treatment of the Ballantines as if you only have to look at them. They want to say, as we saw in their opening as they marched through the request, the denial, the inspection, the second request, the denial, inspection, four requests, five inspections, four denials, "Look, we did it by the book."

But you can't look at Jamaca de Dios in a vacuum. That's not why we're here.

---

We're here to see how Jamaca de Dios was treated as opposed to Dominican-owned projects that are comparators. These are all of them. We've heard evidence about all of them. We've seen documents about all of them. We marched through them with Mr. Navarro. We presented them in the opening. They're in our submissions, but I want to highlight just a few.

La Montaña. Permit was approved for 25 lots earlier this year. Less than four miles from Jamaca with slopes that exceed 60 percent.

We saw how and why the project was originally rejected. Mass erosion due to the rainfall. Slopes between 36 and 60 percent. A series of streams having clear and constant flows.

If the project were to be carried out, it would include construction of an access road running approximately 7 to 8 kilometers from Pinar Quemado to the planned project site, as well as the construction of main roads, internal roads, up to 130 meters above sea level.

Therefore, cutting and removing and moving soil material does not guarantee final disposal according to circumstances and operationality that would affect the drains, depressions and natural and nascent undulations of streams that, when there is runoff and infiltration, may be altered and contaminated.

---

So, we have soil, we have rains, we have slopes, we have water. We have the road. Sounds environmentally fragile.

The impacts: Loss of a forested area, loss of biodiversity, loss of species' habitat, possible disappearance of the El Rancho stream and the unidentified stream. Should the project be implemented, it would considerably and negatively affect the dynamic of the ecosystems that intersect for the conservation of the forest, especially the area's flora and fauna.

The detail contained in the La Montaña inspection report, the identification of the concerns, dwarfs anything we saw with respect to Jamaca de Dios.

We have the minutes of the Technical Committee. Rejected. 23 streams flow from the zone, which are the primary sources of the Jarabacoa aqueduct.

But the developer wasn't phased. He appealed. He wrote a letter. He said, "We have the best intentions of sustainably using the areas of that property and, therefore, contributing to the conservation of the mountains of the La Vega Province and the Jarabacoa Municipality."

"I envision the La Montaña ecotourist project as offering a unique vacation option in Jarabacoa with the lowest density in all the national territory and minimal impact in order to appreciate the beauty of the area."

"The aforementioned project will protect the entire area that borders and forms part of the buffer zone for the Baiguate Park." And his permit was granted.

Rancho Guaraguao. Developed without a permit at the same time as jamaca de Dios. It's in the Valle Hondo National Park. It's located in Constanza, the second tourism pole created by the Dominican Republic, with 52 homes up to almost 1900 meters. It too is an ecotourism project that received a fine earlier this year after it was identified as a comparator by Claimants in this proceeding.

We've seen pictures of the project. We can see the cloud forest in the pictures. We can see construction in the pictures. We can see a development with a basketball court and a tennis court. We see homes on the mountain.

Indeed, the Ministry of Tourism paved a road to the front gate of Rancho Guaraguao, but now the HMA has come out and said, "You must halt construction."

Jarabacoa Mountain Garden. This contemporaneous comparator and the disparate treatment it received compared to Jamaca is stunning. The HMA didn't care about identified environmental concerns that are in the record.

They ignored a change in the pattern of the runoff into the Baiguate River. They ignored property on slopes in excess...
of 60 percent. They ignored the road steepness and direct cuts across contour lines.

They ignored active water on the property. In fact, during the tour, they found ravines with permanent water, and they had pipes in them.

We asked, “What was the objective of the pipes?” But they did not know the explanation. It’s unclear whether anyone did get an explanation.

They ignored the ecological destruction that would occur. Intervention on this land means the destruction of the habitat due to the elimination of the vegetation, the migration of the species of fauna associated with such vegetation, and contamination of the water.

It ignored the visual evidence of erosion and landslide that were photographically attached to the inspection reports.

And indeed, it only looked at 5 percent of the project. “It should be noted that the tour took in 5 percent of the total surface area of said land due to the fact that topography is irregular, which is why we decided to leave. As was said before, the land could be impossible--impassable.”

But apparently the topography is not too irregular to build a series of roads totaling 4.5 kilometers.

The MBA accepted the promise of this developer too to be good. He submitted a descriptive report about his project, and it’s from Santiago Duran. And he says: “Taking advantage of the avenues that already exist, the owners of the land has had a vision of dividing the land into lots and bringing sources of revenue into the area by promoting a lot division tourism--a lot division project with ecotourism characteristics.”

We heard a lot of confusion from Respondent about what this vision mean? It’s apparently the same vision that Jarabacoa Mountain Garden’s owner had and the vision that we heard José Roberto Hernández testify to yesterday.

Respondent is still accepting that--excuse me. He made another promise. He said, “Despite its mountainous characteristics, it has a high percentage, 60 percent, of mild slopes, slopes of less than 15 percent. The steeper slopes are intended to be left as areas of protection and beautification of the surroundings.”

We’ve now seen Mr. Navarro’s slope map that identifies the slope percentages for Jarabacoa Mountain Garden. We discussed it yesterday, and he confirmed 78 percent of the slopes of Jarabacoa Mountain Garden were in excess of 40 percent.

The developer here is saying 60 percent of my slopes are less than 15 percent. And it appears the

Respondent is still accepting that promise today.

In Mr. Navarro’s report he quotes from this letter and cites to it. “The developers of this project agreed to limit development to areas with soft slopes, about 60 percent of the land, and to maintain areas with stronger slopes as protection areas and beautification of the environment.”

Either Mr. Navarro believes that anything less than 60 percent slope is a soft slope, or he was simply parroting the letter that Mr. Canelia Duran wrote.

We have it again here. This is the site plan. All of these lots have slopes in excess of 60 percent, and we learned that that doesn’t matter. We learned if you can find a small area in any of these lots where you can put a house that takes up 5 percent of that lot, you can build there. It doesn’t matter. These slopes don’t matter.

They mattered to the MBA when they denied Michael Ballantine.

Let’s talk a little bit about comparators. These projects are all comparators. Respondent says there’s only one real comparator, it’s Aloma Mountain next door.

But as the promoters’ descriptions of these projects make plain, as we see in the documents that have been submitted, they’re all trying to sell subdivided mountain lots for residences in gated communities for vacationers and tourists.

JMG is a perfect example. That same report we saw yesterday describes the facilities that are going to be offered in the project. Lot sizes, 2000 square meters, electricity, water, guarded entry, 24-hour security, common areas for recreation, common green areas, maintenance of the hillsides and erosion control, individualized property deeds; a description of facilities that sounds almost identical to what was offered at Jamaca de Dios.

Aloma Mountain we can be brief on. We had a lot of testimony about whether there was still a development at Aloma Mountain or whether there wasn’t development or only three houses or structures built in violation of the permit matter.

As to Aloma Mountain, we have this picture. We have the picture of the mountain in December 2015, and we have the picture of the mountain in September 2017. The mountain has been deforested. Aloma Mountain doesn’t have a permit, and it’s developing.

We know why. We saw this email. It’s a political bout now, as laws can always justify an argument depending on the agenda.

So, why are we here? We’re here to look at the comparator projects. Respondent doesn’t want to look at the comparator projects. You didn’t hear much about them
Margie Dauster, RMR-CRR  
info@wwreporting.com

Let’s talk about the Baiguate National Park. It was enacted in 2009 as part of a ~32 protected areas that were created in a one-year span.

Mr. Martínez said it was intended to act as a bridge to connect to other protected areas, although the Baiguate Park connects to no other park.

The decree that establishes the Park is unambiguous. It "Creates the Baiguate National Park, with the aim of preserving the vast carpets of pine trees and beautiful gallery forests, which combine in the middle course of this river, where the walnut tree still appears as a species."

But we know that the Baiguate River, the Baiguate Falls and the beautiful gallery forests that climb up from the river are not protected.

Professor Martínez now insists that the real purpose of the Park is to protect what he’s defined as the Mogote System. That’s his three-mountain system that includes Loma Mogote, Loma Peña, and a third mountain I won’t try to pronounce.

But none of these mountains or the system are mentioned anywhere in the text of that decree. The Mogote System does not appear in the decree, and it does not appear in the 2013 survey of the Park that recommended expanding the Park to actually including the namesake Baiguate River and the Falls.

You can search that entire document. The Mogote System doesn’t appear anywhere in the Baiguate Park management plan.

Respondent produced no field notes, no technical dossiers and no maps about how they defined, articulated, and created the Park.

Indeed, you saw, on redirect, the single document that supports the creation of the Park was an article from the year 2000 about vegetation and flora on the Mogote Mountain.

So, this is the map. We went over it yesterday.

And we see the Baiguate River flowing out of the Park and continuing up to the falls between the Baiguate Park, the Jimenoa monument, and the Ebano Verde Reserve.

But Martínez says he protected the river and the falls with the boundaries he created. He said what’s important to protect is that the source of the river is protected. This despite that the last 3 miles of the river don’t have protection. Martínez admitted runoff from either side of the Baiguate will end up in the river. And

the MMA now admits that the Park should be extended to include the river and the falls.

We saw the recommendation. Extending the Park would actually create the ecological corridor described in the Gap Analysis and create the bridge to the Salto Jimenoa National Monument just across the Baiguate River. But nothing has been done in the five years since the recommendation was made to expand the Park.

Most tellingly, Mr. Martínez could not answer why the Salto Jimenoa Monument boundaries exactly trace the borders of Paso Alto. This despite the fact that the ridgeline of Loma Barrero is above Paso Alto and when so many of the Park borders follow the ridgeline of the mountains, except when they come sometimes to projects.

He did say, "I didn’t work on that map." And it’s true that this map is not his. But the border map is, and the preferential boundaries of Paso Alto are as plain as a

different story. The boundaries of the Park border both La Montaña and QDB. We know that because we’ve seen the communication between those property owners and the MMA about how close they can get to the buffer zone.

And we saw the map. It’s Martínez’ own map, and he described the hydrological umbrella created by the Park’s borders because the borders are on the ridgeline, and a bowl of protection is created.

But when the Park comes to its northern edge near Loma Peña and Jarabacoa and Jamaca de Dios, it drops down from the ridgeline. That’s because we have to protect the Yaque River, the most important river in the country.

We see it in Martínez’ map. The boundary cuts across halfway down the mountain, goes directly through Jarabacoa Mountain Garden. Mr. Martínez says, "I was protecting the Yaque River." But if we look, Quintas del Bosque is almost on the Yaque River, and it was left out of

The at the end of it all, it doesn’t make sense. The borders of the Park don’t match the purported justifications for the Park. Dominican projects are out of the Park, and Jamaca de Dios is in the Park.

And so what does that mean? What does it mean to be in the Park? We still don’t know whether development is or is not permitted in the Park or what development is or
MR. BALDWIN: Good morning, Mr. President, Members of the Tribunal. I'm going to talk briefly about the environmental experts and then talk about jurisdiction, and then Mr. Allison will finish up with the damages discussion.

So, I have here what's pulled up from Page 3149 of the transcript, and this is a question that Mr. Herrera asked yesterday to Mr. Booth. And I found this a very striking exchange. And I think this question, not the answer—we'll get to the answer. But this question perfectly summarizes what Respondent is hoping to do in this case and its strategy.

And it also shows the flaw in the strategy because I think Mr. Herrera only asked Mr. Booth one question, and this was the question: "Is it important to have visited other projects to determine the environmental impact of the expansion project?"

Of course, if you're looking at the environmental impact of one property, why look at the others? However, it's not the answer that's wrong, it's the question that's wrong. Because the question here is not whether or not that the development of the Ballantines' property would have some effect on the environment. Any rational person would say yes, of course it would have some effect on the environment.

The question is whether that effect is similar, the same, less than the other properties. In particular, with regard to whether or not the decision to deny the Ballantines and allow the others amounts to discrimination, arbitrary, any other of the things we've discussed under the minimum standard. Expropriation also has, of course, a discrimination element to it, and, of course national treatment.

So these other properties are key here. And the fact that the Respondent only suggested to these experts to look at that really makes both Mr. Deming and Mr. Booth's reports irrelevant. But just to make sure, we're just going to talk about them for a moment.

I seem to be having some computer problems here, so just give me a moment. I'm going to put this on Mr. Allison's computer. Hold on. Okay. We'll try this and see how it goes.

So Mr. Deming, as we stated, Mr. Deming did not give any other information about other projects. You could tell from his testimony. He admitted that, you know, he's a U.S. guy. He's talking about what you might do when you build such a road in the United States. Nothing about how one gets built in other places, nothing about the Dominican Republic.

If you look at Mr. Deming's Report, he never
viewed possible routes for the road. I mean, that seems to be key. If you're looking at what the road is going to do, why wouldn't you map out some routes to see whether a road is feasible.

He never even saw--he talked about development in slope areas over 60 percent. And we've shown that there's--all these other projects have roads. In Mr. Kay's Report, Appendix A to his Second Report, he shows that all these roads had--all these projects had slopes over 60 where they were building.

But Mr. Deming never bothered to find out whether or not such a road could be built on Jamaica Phase 2. And, in fact, it was Mr. Kay's testimony--and, you know, he wasn't asked about this by Respondent--that you could have avoided slopes over 60 percent in building the Phase 2 road. And I want to explain one thing about that. Because you look, and you can see the map of the project, and you can see there's the black that shows the slopes over 60 percent.

But those slopes are based on contours. So within a certain segment of land, let's say 20 meters, a pretty common contour. If you take that 20 meters from top to bottom, it may have a 60-percent slope. But in that 20 meters, you may have flatter portions that are below 60, and then you may have other portions that are above 60.

didn't spend time with him on this because he didn't have information about other properties. It didn't matter. But if you actually look at the Report, he makes a lot of discussions about development in a wooded area has an effect.

He talks about, "Well, there's loss of bird habitats. There's soil erosion that happens when you cut down trees."

A lot of it had to do with cutting down trees. You know, when you cut down trees, there's a negative effect on the environment. Again, that's true. But, again, that is meaningless in this case unless you look at it compared to the other properties. So, yes, we agree that cutting down trees and developing can have an effect on the environment, which is essentially what Mr. Booth says.

Now, I just pulled this out because this is one example. And Mr. Booth, who I have to admit to having a certain affinity for, he talks a lot about how these projects affect climate change and everything else. Again, all true. But, you know, whether or not it's helpful to the Tribunal is a different question.

But this is one of his opinions where he talks about any forested area creates issues. And he was talking about how chopping down trees affects the bird population.

And he says, "Maintaining these bird populations is important not only for their contributions to the ecosystem, but also because unique bird species bring ecotourism dollars to the neighboring region from bird watchers eager to add species to their lifetime list."

Now, anybody that reads this would have to have my affinity for Mr. Booth. Because what he's essentially saying is, you know, "Maybe you should think about not developing any of your wooded areas so that you can take advantage of the lucrative bird-watching industry tourism."

So--but it's not relevant to this case.

And then just to put here, he does mention of the 20 bird species identified at Jamaica de Dios by Mr. Richter, none, just for what it's worth, were the ones that are actually threatened. So it's not even an issue with the birds.

I took this one picture from Mr. Booth's Report. It's on Page 55. And he has several pictures. But if you look at his description here in Photo 3, he says, "Panorama looking down-slope and generally to the north showing mosaic of highly disturbed areas with no trees to grassy/pasture areas to the forest," et cetera.

What's interesting is he's on Phase 2 taking this picture. But if you look what he's talking about where he says "areas with no trees," you can see in the--sort of
the upper part to the right of there, you can see an area
where there's a lot of trees cut down.

As we've seen from other pictures, that's actually
Aloma Mountain. So when he says here that you can see
"highly disturbed areas with no trees," he's not talking
about Phase 2. He's talking about that area up there,
which is Aloma Mountain, which Mr. Richter reports—or
states in his Report that when he was there in August of
2017, the cutting down of those trees was occurring at that
time.

Now, Respondent didn't--did not cross-examine
Mr. Richter or Mr. Potes, both of whom submitted a Report
with a Reply. I'm not going to go into those now. But I
just--I would ask that the Tribunal look at those. Because
both Mr. Richter and Mr. Potes talk about the other
projects. They did have some access to the other projects.
So if the Tribunal actually wants an expert opinion that
both looked at Phase 2 and looked at those other projects,
then I suggest Mr. Richter's. And he makes, you know,
observations about Aloma Mountain, Jarabacoa Mountain
Garden, Quintas del Bosque, and--all of which are--and
Rancho Guaraguao, all of which are highly relevant here.
So let's talk about jurisdiction again. Now, I
didn't spend really any time talking about the--just
briefly talking about when the nationality issue matters.

only place--the only place in CAFTA, in Chapter Ten, where
this dual nationally dominant and effective appears, and it
relates particularly to this definition.

Now, the CAFTA drafters could have put this
definition when they talk about what it means to be a
Claimant. They could have put it when it talks about the
scope section, when they talk about when you actually have
a claim. They could have made it clear in the text that
you have to maintain dominant and effective at particular
points, but they didn't. They put it in one place, and
that's the investor of a Party.

So it's our view that this dual national provision
speaks to the definition of "investor of a Party." When
you meet that description—then other words, when you are
attempting to make an investment, you are making an
investment, or you have made an investment--if at that
time, your dominant and effective locks in to where you
are. So this says to us that that is what it means.

Now--but what Respondent says is--Respondent--I'll
got to the slide in a second. But Respondent does its
nesting dolls, and the U.S. admission does the nesting
dolls too, the Russian nesting dolls, and basically says,
you know, you have to take--you take investor of the Party,
and then every time that word "investor of the Party" is in
another provision of CAFTA--so if "investor of the Party"
is a definition, every time that definition appears
somewhere else, what Respondent is essentially saying is
you have to do the same nationality test every time.

So every time it appears, you do the same
nationality test. Right? Okay.

Now--so I took a look at the CAFTA text, and I
said, "let's take the Respondent's approach of
incorporating the entire definition and doing what the
requirements of that definition are and let's do it to
other portions of Chapter Ten."

So let's look at this. CAFTA's definition of
"investment" is--"investment" means "every asset that an
investor owns or controls directly or indirectly." "Owns
or controls." Okay. So the question is, is--the term
"investment" appears all through Chapter Ten, of course.
Because, in fact, Chapter Ten is the investment chapter.

So if we take this, this means that to be a
Claimant--and as they point out, you only become a Claimant
when you submit the arbitration. To be a Claimant, it
means an investor of a Party that is a Party to an
investment dispute. An investment dispute.

And I think we would all know--I mean, it's sort
of so basic, I'm embarrassed to say it, but I think it does
need to be recalled. In order to bring an investor-State
treaty claim, you have to have an investment. Okay?
Now--but if we take this definition of "investment" to mean something owned or controlled and we read it in and we do our--I'm not going to do the nesting doll thing that the Respondent did when they did theirs. But if we do it, we can say, "Claimant" means "an investor of a Party that is a Party to a dispute over an asset that the investor owns or controls with the other Party." Okay? You can read that in.

Now, what about when the State deprives--what about if you had a case here where you had a Respondent that actually followed expropriation rules and they come in and they take physical title to your property. They take physical dominion, take physical property. As a legal matter, you have no ownership, no control over that investment.

Now, under this nesting doll approach that Respondent and the U.S. has advocated, you couldn't be a Claimant because you don't have an investment dispute. Because at the time you submit the claim to arbitration, you don't have an investment because you don't own or control that asset. Okay?
The same--and you can see the submission of the claim to arbitration. It says, "In the event that a disputing Party considers that an investment dispute cannot be settled." "Investment" appears again.

The scope and coverage. So the idea of--the idea of this chapter applying, the scope and coverage of the entire chapter applying, it applies to covered investments. If the investment is taken away, you don't even have an investment--you may not--I'm going to give an example of this. You may not have an investment even--you may not even have an investment where--at the time that the claim arises.

Now, you say, "Well, how can you not have an investment at the time the claim arises?" Because if the government comes in and they take your property, then when they took the property, the claim arose, and so you have one if the claim arises.

But let me give an expropriation example. Let's say we had a Respondent that respected private property and they come in and they expropriate your property, take title, take possession of that property. Okay? And they give you a judgment that you go--you know, basically go to court, like in the U.S. You know, when property gets expropriated in the U.S., the government will give you their estimation. You can go to the Court and you can get a proper--if you don't agree, you can get a proper expropriation amount.

Now, let's say that happens in the U.S. and your property gets taken away, you lose it. You don't own or control it anymore.

So what happens? You go to the court. You get a judgment of a certain amount of money. Now, let's say that judgment is prompt, adequate, and effective. So you get the money, but now you have a judgment. You get this judgment. But you can't collect on the judgment. The government won't pay. It decides not to pay.

CAPTA states that a court judgment is not an investment. So now you're stuck with a court judgment. The claim arises when the government won't pay this court judgment.

But under this nesting doll thing, you can't even bring--you don't even have a claim. Because at the time the claim arose when the government had it, you don't have an investment. Your investment is gone. You incorporate that definition of "investment" in it.

So what the U.S. is suggesting is, in essence, ways--that there are many examples if you do this nesting doll approach where you're not going to have an investment. And you can see the Russian word for "disaster" over there, "catastrophe," over on the side. That's what you would have if you followed this type of logic.

Now, as we've stated that the--it's--you know, the--in addition to the--you know, we've seen the CAFTA text says one thing. International law also doesn't require that you have to be a--you know, dual nationality, that you have to be dominant and effective at the time that you submit the claim to arbitration.

And just to give an example of that, the U.S. Claims Tribunal--what the U.S. Claims Tribunals looked at was--they said okay. You had to be when the--you had to be dominant and effective when the claim arose, and you had to be dominant and effective on the effective date of the Algiers Accord, which was 19 January 1981.

Now, Parties could bring claims after the Accord. They had until 1982 and sometimes even longer to bring these claims to the U.S. Claims Tribunal. So, if you brought a claim in 1982, that would be okay because they would look back and say, "Were you dominant and effective in 1981?" and not even look at 1982. So it's not as if there's some universal concept of international law that requires this outside the text. Also, this just makes sense.

Okay. Chapter Ten is about investment. The idea is to encourage foreign investment. Okay. And that means that you look at the dominant and effective nationality at the time the investment is made.

Here you have the type of situation where Respondent's formulation and the U.S. formulation would
mean that you could have situations where you have a purely
domestic investment. I invest in the United States, okay,
as a U.S. citizen. Five years later, four years later,
whenever, I move to Canada. I become a dominant and
effective Canadian, which I’ve thought about before, and
then I sue the U.S. And I sue the U.S. over a domestic
investment because that’s what it was when it was made.

Now, let’s then get to the evidence here. Because
I said I don’t think it matters very much. I think the
evidence of dominant U.S. nationality for both Michael and
Lisa is pretty substantial.

So when did they become Dominican citizens? That
matters. The Ballantines were in their 40s when they
became dual nationals. Lisa was 42. Michael was 45. The
first denial—and they became citizens in 2010. Thank you. I
knew that. But in 2010,

Now, the first denial—when you’re aware the claim
arose—happened in 2011. So they spent 45 years in the
United States. Okay. They’re here for a year. Do they
all of a sudden become that? The claim is filed in 2014.
Still, four years after they move—or after they become
Dominican citizens. In those four years, was that 45-year
history and connection and cultural attachment to the U.S.
lost for this? No. You don’t destroy a lifetime of attachment in—

Republic—not government officials—that’s not what this
testimony says—would do it.

He talked about how, you know, “Nobody wants to
buy from a gringo who is not even going to stick around.
We want someone that’s going to be there.”

That’s why he did it. Again, no attachment. And
they haven’t stated any other thing to state there was any
attachment.

Now, why does one take another nationality?
Mr. President on that second day, you know, was asking
Mr. Ballantine a question. And getting a naturalization,
it’s a—it’s, for many people, a big step. It’s like
having another flag. It has a lot of emotional—you know,
it entails an important decision.

Okay. Now, I’m not sure that applies all across
the board. And I’ll just give an example. Again,
Mr. Allison made me promise I wouldn’t bring up Haitians.
But I do want to bring up immigration law. Because in the
U.S., if you’re a permanent resident, you can be a
permanent resident for 30 years. And if you have a drunk
driving accident that ends up hurting somebody, or
sometimes even it doesn’t, or a low-level battery even, you
can be deported for that crime.

Now, does that mean that permanent residents of
the United States that take U.S. nationality all do it

should be four years. It says five. But you don’t destroy
a lifetime of attachment in five years. That’s just silly, as we like to say on our side.

Now, why did Lisa Ballantine take Dominican
nationality? On rebutted testimony, she says, “I became a
citizen of the D.R. to protect our investment. I was
concerned our children could lose it.” Unlike Michael,
Lisa took Dominican citizenship only so that her children
would not lose her investment. That was the reason.

Nothing about “I just felt this—you know, I felt like I
had to be Dominican and didn’t want to associate with the
United States anymore.” She did it for—purely for
economic reasons, protection reasons.

Now, why did Michael Ballantine take Dominican
nationality? This was in his examination. He says, “I
obtained dual nationality because I was concerned about our
family and the investment. And in case of my demise or
Lisa’s, I felt like that would be a better process to leave
with my children in terms of probate.”

And this is where he differs partly from Lisa.

“And I had faced discriminatory treatment prior to that and
some people wouldn’t buy because I was an American, and I
thought that would help for business purposes.”

So it was a commercial thing so that the people he
was dealing with economically in the Dominican

because it’s a big emotional decision? No. They do it
because they say, “Look, I have family here. I don’t want
to risk having some drunk driving issue and then being
forced to never see my family again in the United States or
being forced to leave the United States personally.”

I bring that up just to say there’s lots of
reasons that people take it. And it’s not always—not
always an emotional issue.

As far as personal attachment goes, Michael
Ballantine testifies that they never assimilated
culturally. This is a supplement statement at 4.

“Although we always tried to be respectful of Dominican
culture and its people, we did very little to assimilate in
the Dominican culture. We never felt like we were
Dominicans, never acted like Dominicans, and nobody
persuaded us at Dominicans.”

And there is—I would challenge—you know, say is
there anything in the record to contradict this? Now,
there’s social media posts. There’s exuberant statements
that are made. But this does not mean that they had
assimilated into the culture.

And when Lisa Ballantine says, “I’m a Dominican
now,” that’s not an assimilation statement. That’s a
statement of fact. But actual assimilation evidence, I
don’t see any.
Now, we're going to--we talked about the social media things that are whimsical and everything else. But there are several letters in the record that are important because--excuse me. They're emails. People don't really write letters anymore. There are several emails in the record. And these are emails where Michael Ballantine is writing to his father. Lisa Ballantine is writing to a close friend.

We would suggest that instead of social media posts, it's these letters--these emails--excuse me--that are relevant. Because they're personal things said to close friends that better--contemporaneously that better express the thing.

So here's Lisa in 2003 (sic). "I haven't really made friends here in the D.R. It is a different culture to connect with, and I am an outsider." This isn't done for the arbitration. This is her talking to a friend.

"There's a nice expat community"--so she's dealing with expats--"but they are very transitory. I am pretty lonely. I work a lot, run a lot, knit a lot."

There are other emails to close friends. This one where Michael Ballantine, at C-63, refers to the D.R. as a "foreign country."

In 2002, "Lisa"--"I'm sorry. 2012. Thank you. Lisa Ballantine revealed to a friend that she was dreading her return to the Dominican Republic." That one was in 2013, I think.

And Michael Ballantine, as I mentioned, wrote to his father and told him that he "couldn't wait to get out of this place." And that's in Exhibit C-166. And you see the other exhibit numbers up there.

Now, Mr. Di Rosa asked Mr. Ballantine a couple of questions. And, you know, Mr. Ballantine says, "Oh, we didn't have a Dominican home." Mr. Di Rosa, says, "Well, what do you mean? What's a Dominican home?" You know, I think he probably had a lot of expectation for that question.

Because you go--like you see somebody say, "Dominican home." You're, like, "Oh, they don't--well, there's no Dominican homes. They're just homes."

But this is Mr. Ballantine's answer. "Dominican homes are often designed where there is a separation where there's a maid--separation where there's a maid and servant's area." And I apologize for this transcript. I don't know if Respondent had the same problem. But the final version on the second day was missing this national--this nationality stuff, but I think they're fixing it.

So I had to use the draft. "Ours is a big American open floor plan. We speak English. We made food.

We entertained like Americans. The food we ate. Our home was totally American. And it was an obstacle to sell it because it was constructed differently."

And there's testimony in the record that Lisa Ballantine designed the home. In fact, that testimony is used to show a connection to the Dominican Republic by Respondent in their opening that Lisa Ballantine--in their--in their Rejoinder where, you know, Lisa Ballantine designed that home.

Again, Mr. Ballantine had written in his thing that they didn't act Dominican. We saw that a minute ago.

So Mr. Di Rosa again, "What does it mean to act Dominican? You know, do you"--"I mean, he didn't say this, but you can imagine what--you know, what the thinking was there."

Well, this is what Mr. Ballantine said. "Well, on a lot of levels, there's cultural norms and the way people interact with each other. For instance, conflict, how to enter into a conflict, to avoid it, how to resolve it. There are some cultural things, holidays and the way people relate. It's a high-context culture where what's not said is often more of the message. Just acted like an American. I would confront things head on."

Now, all of us in this room deal with international issues. We deal with different--from people of different cultures and backgrounds.

Of course, people--of course, there's a way that different people act. It doesn't mean everyone acts that way, but there's a way--you know, there's particular ways that, you know, Japanese people tend to act versus the way a Turkish, you know, businessperson might act. So this is just common sense.

Let's look at the center of the Ballantines' economic, social, and family life, and let's look at family first.

The children were born in the United States. The children did live for a few years in the Dominican Republic while Michael Ballantine was developing and selling Phase 1 and preparing for Phase 2.

But they left in 2007 and 2010. So the dates that Respondent thinks are relevant here are--the kids weren't even here. They were all in the United States. And they left to go to school. The testimony is that the children left to go to school.

Now, Rachel Ballantine did come back with her husband Wesley because, as we know, they were prepping and sort of getting the stuff that they needed done for the construction operation because Wesley was going to manage the construction operation. So they were in town in 2013 for a short period of--relatively short period of time.
But besides that, everybody gone.

And I--you know, we've looked at this slide before. But just, again, it's not only the children. It's everyone else. No connection to the D.R. in terms of family at all.

Now, what about economic connections? Well, the economic connections are to the United States, not to the Dominican Republic. The Ballantines always had U.S. credit cards. They never had Dominican credit cards.

Now, again, people that travel know when you use a credit card--when I go and use a U.S. credit card overseas, it's extra, you know, money that's associated with it.

There's transfer issues. You know, it creates an issue. It would be nice to have a credit card from every single place that you go.

Never bothered to get a Dominican credit card. They used their U.S. credit cards. They always had bank accounts in the United States. Always maintained bank accounts in the United States.

Michael Ballantine had an IRA account from 2009 onwards in the U.S. And they had 529 college savings plans, which I would advise to anybody to get if you're in the United States because it allowed their children to leave college debt free which, in this day and age, is quite a miracle.

Social considerations. Let's look here at what Lisa says in her Paragraph 7 here. She says, "Beyond this have those economic connections as a result of his dominant and effective nationality when he's required to not even be a factor. Why should those factor in to a determination. But let's put that to the side and just hypothetically state that it is, her economic connection in this case is to the United States, even if some of that work is done in the--even if, you know, that work is done--part of that work is done in the Dominican Republic.

Economic connections to the Dominican Republic. Michael Ballantine's economic connections to the Dominican Republic--and we're going to get into some of these in a moment--are loan agreements, contracts, bank accounts.

Now, I think we have to think about different types of investors here. You know, if you're an investor that has shares in a company and you're sitting in your, you know, nice cabana in the United States and never really going to the foreign country because you know, you're just a shareholder, it's operated and managed by someone else,

you're probably not going to have any economic ties other than that investment itself with that host state.

But what happens when you're in the host state managing the investment, totally managing it, and it's the type of investment, a housing project with a restaurant, an HOA, and everything else that you have to be there for? Well, you're going to have economic ties to that country.

So, yes, you're doing to do loan agreements. You're going to do contracts. You're even going to have bank accounts because you need bank accounts to be able to do business there. And because you're living there, you need a bank account just for the sake of living there.

Any managing investor, not a passive investor. Any managing investor would have those same--there is no economic connection that I see in anything that Respondent says. Nothing that is different than any managing investor that had to be on-site for their investment would have.

Nothing else besides those things related to this.

So the economic connection with the D.R. should not even be a factor. Why should those factor in to a dominant and effective nationality when he's required to have those economic connections as a result of his investment? Shouldn't be considered.

Social considerations. Let's look here at what Lisa says in her Paragraph 7 here. She says, "Beyond this
their intention--Respondent is going to put up--I'm sure intended to return to the United States. That it was never that money and using that passport when they came in. Now, you can argue about, you know, different coming into the Dominican Republic. That includes the United States, but it also includes the international destination. And the Dominican Republic goes, Michael was connected with the AmCham. Lisa, none. None in the D.R. And yet she was still involved in the rotary group in the U.S. So her connections with clubs or groups was the U.S. Nothing unrebutted testimony--nothing with the Dominican Republic. No clubs. No cultural attachments related to clubs. What about other attachments? Now, the—you know, I didn't want to put them all here and bore the Tribunal with a long, you know—you know, a long reciting of the different places. But, obviously, they're in the Witness Statements. They're in our papers. So I won't go over them again. But here's two big ones, I thought.

One is maintaining U.S. health insurance. Obviously, an expensive venture, maintaining U.S. health insurance the whole time. Also having a gym membership the whole time. If you were moving to a country permanently, not really having any connection to the former country, why would you, you know, want to have a gym membership? They probably use their gym membership more in the U.S. while being in the D.R. than I do my gym membership here in the United States.

Now, let's talk about use of the U.S. passport for travel. And Respondent admits this too. If you look at Respondent's opening slide, they state that the—the Ballantines used the Dominican passport for coming into the Dominican Republic.

So—but, as has been testified to, the U.S. passport was used when traveling anywhere outside of the Dominican Republic. That includes the United States, but it also includes the international destination. And the D.R. passport, as Respondent admits, is only used when coming into the Dominican Republic.

Now, you can argue about, you know, different things. But, you know, every time—they made 30 trips in and out of the United States in those years of 2010 to 2014. $10 each. You can do the math. That probably saved them alone the cost of their citizenship just by saving that money and using that passport when they came in. Now, the Ballantines have stated that they always intended to return to the United States. That it was never their intention--Respondent is going to put up--I'm sure they have it already set to go. They're going to put up a thing where the Ballantines say, "Oh, we're"—not the Ballantines. But there's a report and, you know, other things that are said. And they go, "Oh, we're selling our possessions and going to the Dominican Republic."

What you won't see in that statement—even assuming that the statement—you know, the statements can be interpreted in that manner, what you don't see is another part of that which is "never to return." "I'm selling my possessions and moving to Hong Kong." Does that mean that I am not going to come back to the United States? No. It's a statement of what you're doing. You're moving to the place.

They don't say in there, "And we're never coming back to the United States because we have this strong cultural connection to the Dominican Republic, a place that we know relatively very little about." That's not what they did.

It was an exciting time. We're moving to a different place. We're going to, you know—you know, start a new venture. You know, we're going to start an investment, an enterprise. That's what those statements are meaning.

And, in fact, they did return. Not into the situation they wanted to, but they did actually end up...
They met their neighbors. They met their--I mean, what a, you know, Dominican attachment is that, that you eat your neighbors? They made friends, a lot of American friends, as Lisa Ballantine testified. But they made friends.

This is overwhelming? Respondent thinks this is overwhelming evidence of Dominican connections. They joined a church, an American church, and they enrolled their children in a local school? I don't--I mean, Lisa did homeschool the children for a while, but I don't know, when your children are there, how you do anything other--if you're not going to homeschool them, then enroll them in a school.

And they created a charitable venture designed to help their new community. So, again sort of implying that, well, Dominican people--such a connection to them, that this charitable thing was designed to help the new community. This is the evidence.

We're going to look at a couple of these.

First, the Ballantines built a house. They did, in fact, build a house. That's a picture of it. But--and this is C-180--they also decided to sell their house in 2012. Not 2014, when they left, but they started the process to sell their house in 2012, you know, evidencing a desire to leave and to cut the connection even as of 2012.

They did meet their neighbors. That's, in fact, true. And I give Respondent credit for the truth of this statement. And here's what is said.

The quote--the citation to that on the slide that was used for this was to Michael Ballantine's statement at 13, and he says, "To be good neighbors, we immediately allowed the landowners to our west--members of the Rodriguez family--to use this 2005 Road to access their farms. We let the Rodriguezes use the 2005 Road without issue for six years." This is meeting the neighbors.

They made friends. We've talked about this already. A lot of American friends, a few Dominican friends. They joined a church. It's an "American church," U.S. church, I would say.

Now, the President mentioned this the other day. And that is that the steps that were taken to acquire the dual nationality should have no place in the evaluation of whether there's a dominant and effective nationality.

Because it is that dual nationality that triggers the examination, but it is not the examination.

In other words, in order to acquire the dual nationality, it's already assumed that you're going to have to take the legal steps to acquire this dual nationality. So we're going to look at the sites here that Respondent uses. And I didn't even include them all.
Okay? So they voted. Yes, they voted, but they voted in the D.R. Now, the one where the quote is allowing the whole thing is they do admit that they used the Dominican nationality when they entered the D.R. So if you look at Slide 32, you'll see respondent admitting that when they used the Dominican nationality for passport purposes, it was to enter into the D.R. They used it to bring legal claims in the D.R. There's no evidence that they brought a legal claim in Chicago and used their Dominican nationality for that legal claim. And they used it to apply for a business license in the D.R. And they used it to enter into contracts and loan agreements in the D.R. And these are all Michael—the last three are Michael only. And, again, I think these—these things, or the last three particularly, are not relevant. Because they're what needs to happen for Michael to manage his investment. The investment is assumed in a CAFTA dispute. I'm almost there. So what about the contracts with the daughter? There was a lot of mention about, well, it wasn't only with the local people in town. He made a contract with his daughter that—also where he said he was a Dominican national.

Now, you'll recall that Michael Ballantine testified that one of the reasons he did, so that he wanted the commercial aspects, the people he was dealing with for the project, to see him as a Dominican. It didn't work. We've seen the gringo video. But that's what he wanted. He wanted that to happen.

So, what is this contract with the daughter that is talked about here? Well, it's a power of attorney where Rachel Ballantine is giving Michael Ballantine power of attorney with respect to Aroma de la Montaña. Okay? And it's to acquire things for the company, obtain, receive. Now, we all know what a power of attorney is used for. Is this some private contract that's used between Rachel and Michael that no one else will see? No. This is what Michael Ballantine needs to bring to vendors, to businesses, to everybody else, to be able to show that he has power to deal with the things. He's not bringing these to people in the U.S. He's bringing these to Dominicans, to that. So that's why his Dominican nationality is used in here. This isn't a private contract. Social media postings are not probative. They express whims or satire. And, you know, as the President of—the Prime Minister of Nepal can attest, they are not always entirely serious. And, in any event, Lisa's social media posts show a repeated reference to the U.S. as being her true home. Respondent's evidence of family ties. Children left in 2007 and 2010. No others. Habitual residence is discussed in the things, but at all relevant times, according to Respondent's relevant times, they had residences in both the U.S. and the D.R. And so I will pass it back to my colleague, Mr. Allison, who has a very short presentation on damages, but I can assure you we will be under our time. MR. ALLISON: Mr. Chairman, Members of the Tribunal, we've had four expert reports and two witnesses who have debated damage. So I will endeavor to be brief. I simply wanted to discuss a few issues about quantum. We've seen the standard that Metalclad v. Mexico puts forward in which the award in investor-state arbitration should wipe out the consequences of the illegal act.

And, of course, other Tribunals have said there's, of course, uncertainty in projections of future profits. They're inherent, and it's inevitable, but they need to be based on informed estimation. Those citations, of course, are in our pleadings.

So the first element of the Ballantines' damages is the lost profit from the Phase 2 lot sales. We've seen discussions of this. They were going to put 79 lots over 233,000 square meters, which would leave 25 percent of the land for the road, for green space, and for the hotel they planned. Now, we've heard a lot about whether or not the projections that Mr. Farrell made with respect to the Phase 2 lot sales were accurate. But as the documents in evidence before the Tribunal show, the Ballantines had Phase 1 lot sales in Zone C, which is the higher part of the mountain, between $78 and $107 per square meter between 2012 and 2014. Mr. Farrell, using his altitude analysis, started the Phase 2 lot sales at only $64 per square meter. He then described how he applied an 8 percent altitude adjustment as you went from Zone D to E and Zone E to F, and he had price appreciation over the five years he projected for the sale of those 79 lots. 

Infrastructure costs, cost of sales, subtracted from that, and he discounted the stream of that revenue back to present value at $12.75 million. Now, you heard a lot from Mr. Hart about the tax contracts and the real contracts. And I expect we may hear some more about that as we go on today.

But one of the things Mr. Hart didn't like was that the real contracts were presented to the Tribunal as...
experience is in the record, what they did to create that plan.

Mr. Farrell took those projections, imputed overhead costs, and cited all the inputs that he put into his report using local comparables, discounted that back to present value, $5 million.

Now, Mr. Hart says Jamaca would have needed financing to fund the construction of these homes. And thus, he didn't--Mr. Farrell didn't include any financing in his projections, and thus, they're unreliable and need to be tossed out.

Now, Mr. Hart acknowledges the vast majority of the capital expenditure expenses he uses in his report come--relate to the home construction. And he acknowledges that the buyers would ultimately pay for the construction of these homes, but his analysis inappropriately delays the receipt of those construction cash flows by a year beyond what's already in Mr. Farrell's Report in order to create and magnify the cash flow deficit he projects.

Mr. Farrell's report already delays construction cash flows for 18 months from the date of the lot sale.

Mr. Hart confirms he performed no analysis as to what financing costs may have been, if they were needed. But they weren't needed. The Ballantines had cash from Phase 1 performance. They funded the entirety of Phase 1

report's calculations when he said he heard the testimony that the higher-priced contracts were, indeed, the real contracts that reflected the consideration that was actually exchanged between the buyer and the seller.

All of his analysis relies almost exclusively on the numbers that are in those tax documents and the Jamaca financial statements that reflect them. The financial statements flow throughout his report, but it's undisputed that the financial statements include the lower tax document numbers.

He continues to make statements about the historical performance of Jamaca de Dios based on the tax numbers that he knows are not the actual cash flows that Jamaca received.

"There can only be one actual transaction and only one real contract." And here, there is only one real contract. And Mr. Farrell used the appropriate contract when he did his analysis, and Mr. Hart used the tax contract when he did his analysis.

Lost profits from the Phase 2 home construction. The testimony is unrebutted. We heard about Wesley Proch coming to the Dominican Republic to act as the construction manager. Jamaca de Dios was going to be the general contractor on the Phase 2 homes. The evidence of their

without financing. They had Phase 2 lots ready to be sold across the street from Phase 1, and they had a waiting list of 100 people.

Paso Alto. We heard the testimony of Michael Ballantine about his intention to buy Paso Alto. We also have the unrebutted Witness Statement of Omar Rodriguez in the record, who made clear that he and his partners were looking forward to co-venture with Michael and the Jamaca brand.

This was an already permitted development. We've seen a lot of testimony about Paso Alto, a beautiful property that spans the ridgeline of Loma Barrero. It has lots on both sides of the mountains, beautiful views, and it had 52 lots available for sale.

Now, because it was not as developed as Jamaca de Dios and didn't have the Jamaca de Dios brand associated with it, Mr. Farrell used much more conservative pricing despite the fact that it was at the top of the mountain. He starts his lot sales at Paso Alto at only $30 per square meter and rising to $60 per square meter.

Again, infrastructure costs and the costs of sales associated with those lot sales are subtracted from his report. And the evidence is plain that Jamaca did not move forward with that transaction because their Phase 2 permit was denied.

But Mr. Hart didn't withdraw or change any of his
We heard about two standalone buildings. The Mountain Lodge, we saw the beautiful pictures from the marketing brochure of the Mountain Lodge. Also in the record are the engineering drawings and the architectural plans that were fully developed for that.

David Almanzar described the soil tests. There was a soil test in this case, but it had to do with the soil at the Mountain Lodge and how they were going to ensure that it was appropriate for the condominium building.

They wanted to build it. It was ready to be built. They couldn't get an approval to the modification of their Phase 1 permit. Phase 1 was already permitted. There were two lots the Mountain Lodge was going to be on that were approved for development. But to get the modification to the permit in order to build a different structure, they went to the NHA and they said, "Can we have our permit?". The evidence of the purgatory that that application fell into is in the record.

Two elements of loss related to these projects:

1. Not only the lost sale revenue of the units, but also lost rental revenues from a rental management program that Jamaica had established, had a contract with HMS, and the revenue from that plan discounted back forward.

2.93 million.

build in the Park. We still don't know whether or not they can build in the Park.

The prejudgment interest and the discount rate disputes between the Parties are modest. The quantum summary is attached to the Report of Mr. Farrell. This is from his Reply Report, with the only change being the prejudgment interest that has been updated as to September 1st, 2018, at $8.722 million. The dispute as to prejudgment interest is a slight dispute as to the appropriate rate and as to how it is compounded. This doesn't include the moral damages or the fees and costs.

The evidence here of discrimination, we believe, is overwhelming. Claimants affirm their application for moral damages based on the evidence of the treaty violations they faced and the emotional toll that they endured as individuals here. They were subject to harassment, mob action, death threats, property destruction, and the loss of reputation. That evidence is in the record and in the Witness Statements, and it's before the Tribunal.

The Claimants affirm their request for attorneys' fees and cost, which will be submitted at the instruction of the Tribunal. And the Claimants would like to thank the Tribunal, opposing counsel, the PCA, and all Parties for their effort and participation this week.

Thank you.

PRESIDENT RAMÍREZ HERNÁNDEZ: Thank you, Mr. Allison.

So, let's reconvene at 2:15.

(Brief recess.)

PRESIDENT RAMÍREZ HERNÁNDEZ: So, ready?

MS. SILBERMAN: Thank you, Mr. President.

CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

MS. SILBERMAN: Good afternoon to you and to the Members of the Tribunal.

Over the course of this proceeding, the Dominican Republic has taken the Ballantines’ assertions seriously. It has engaged with their assertions, analyzed their arguments, and it has refuted them carefully, meticulously, and always with evidence.

But no matter what the Dominican Republic establishes, explains, or demonstrates, the Ballantines have refused to adapt their narrative, even when that narrative is demonstrably false.

Just this morning, the Ballantines’ attorneys asserted yet again that “Attitude is not mentioned once in any of the main inspection reports. Not once.” You know this is false. I showed you on Monday. And if you want to see—if you have your slide deck from Monday, just turn to Slide 37—137. There's a reference to their effort and participation this week.

Tribunal, opposing counsel, the PCA, and all Parties for
Now, as Mr. Di Rosa will explain in just a little bit, the Ballantines have no real case. All of the hallmarks of a true legal case are missing. And so today, instead of responding to these inconsistencies or the repeated misstatements, we're going to focus on the questions that the Tribunal has been raising over the course of this past week. We'll begin, though, with a few fundamental tenets that govern this proceeding.

The first is that Chapter Ten tribunals are tribunals of limited jurisdiction, and the Ballantines bear the burden of proof. The third is something that the Ballantines' own counsel said in opening, which is that analysis should be based on truth.

Now, the relevant questions on jurisdiction are:

1. What is the first date of March 11, 2014, which, as we've observed multiple times and the Ballantines have never contested, is the latest possible date on which any event giving rise to a claim could have occurred in accordance with Article 10.16.3 of the treaty.
2. And the second date of March 11, 2014, which, as we've explained multiple times and the Ballantines have never contested, is the latest possible date on which any event giving rise to a claim could have occurred in accordance with Article 10.16.3 of the treaty.
3. Let's turn briefly to the Ballantines' theories on jurisdiction. You heard some of these again today. For example, they asserted yet again that an assessment of dominant nationality is unnecessary. And their theory is the same one that had been advanced in the pleadings, that dominant and effective nationality becomes relevant only if the investor has dual nationality at the time that the investor has made an investment in the territory of a

As stated by the ICJ, "The Court recalls that according to settled jurisprudence, its jurisdiction must be determined at the time of the act instituting proceedings was filed."

Now, these questions ultimately turn, first of all, on dominant nationality as of 11 September 2014, which is the date on which the Ballantines submitted their claims to arbitration. And the second question turns on the Ballantines' dominant nationality between the 12th of September 2011, which was the first alleged treaty violation not barred by the three-year time limitation set forth in Article 10.18.1.

And the second date of March 11, 2014, which, as we've explained multiple times and the Ballantines have never contested, is the latest possible date on which any event giving rise to a claim could have occurred in accordance with Article 10.16.3 of the treaty.

Let's turn briefly to the Ballantines' theories on jurisdiction. You heard some of these again today. For example, they asserted yet again that an assessment of dominant nationality is unnecessary. And their theory is the same one that had been advanced in the pleadings, that dominant and effective nationality becomes relevant only if the investor has dual nationality at the time that the investor has made an investment in the territory of a
that of the United States--this was a case against

What we really want to focus on today is merits

So the issue then is, what does "dominant

soil is not consolidated. Because of the elevation, the

He continued, "The vegetation is typical of the

Rejoinder on Jurisdiction as what the Tribunal needs to
determine is whether the Ballantines were foreign

Next, in analyzing this, the primary question to be
asked is what nationality is indicated by the applicant’s
residence or other voluntary associations.

As mentioned, this comes from the U.S. Digest
of--it comes from the State Department's Digest of U.S.
Practice in International Law.

What we really want to focus on today is merits
issues. First on the questions posed by the Ballantines,
some of which the Tribunal has asked us over the course of
the week, and then questions that must be posed to the
Ballantines. But I’ll start with the former category.

So the first question is: Why was it not possible
for the Ballantines to build a real estate project on their
site? There were several reasons for this.

First of all, there were natural limitations. And
you heard Engineer Navarro explaining some of these during
his testimony this past week. He said, "Jamaica de Dios"
First of all, there was Article 122 of the Environmental Law, which was a law that was promulgated in the year 2000 and predated any investment or any acquisition of ownership or title of this land by the Ballantines.

And it states that "intensive tillage, or any other work which increases soil erosion and sterilization, is prohibited on mountainous soil where slope inclination is equal to, or greater than, 60 percent."

Now, the second principle legal limitation is the existence of the Baiguate National Park, which was created by means of Decree Number 571-09 in August of 2009 and Article 14 of that decree states, "That the Baiguate National Park is created and that this conservation unit of the National System of Protected Areas shall be thoroughly studied in order to develop its potential in the areas of culture, recreation, and biodiversity, with a view toward outfitting its bathing sites, and making use of those places with the best conditions for being earmarked for mountain ecotourism and scientific research in addition to other activities that are compatible with its management category"--it's a Category II park, which means that it protects biodiversity--"and the main vocation of its resources."

Now, just a clarification regarding Article 122 of the Environmental Law, and this was a question that was put to Engineering Navarro. And the question was: So under Article 122, you are not allowed to build whenever this is a slope that exceeds 60 percent. Does that imply that automatically you can build whenever this is no slope that is above 60 percent?

Here's what he said:
"The answer is no. The environment is analyzed based on several variables. If I have a high level of rainfall, clay soil, and slope, and there the determining factor would be gravity, the more slope you have, the more influence gravity will have. But if I have those conditions, I need to analyze that altogether to be able to determine if an area that has less slope has the same risk as an area that has more slope."

The risk can still exist.

Now, another question we've heard come up a lot is why was the Park, Baiguate National Park, not mentioned in certain correspondence to the Ballantines. The answer is that it didn't need to be. There were all of these other problems that rendered the project not viable. And so just as this Tribunal would not need to go into all of the many flaws in the Ballantines merits case, if it ultimately were to determine that it lacked jurisdiction to hear those merits claims, the Ministry is not required to identify every single defect in a project when it communicates its decision to the applicant.

And incidentally, the Ballantines' own witness, Mr. Graviel Peña, explained to you earlier that he wrote the inspection form that was used in the site visit. That was Exhibit R-108. You'll remember and can see on the screen--this is the five-page printed form with handwritten notes by Ministry technicians. It poses 39 separate questions about different environmental issues. And there were some annotations in the Spanish version that may not have registered.

What's interesting about this document is that it goes through in order and it starts with topography of the land. The very first question that it asks is how steep the slopes are. After that, there's a question about how much earth removal will be carried out in the construction phase, the magnitude of the impacts of the construction/facility, and whether the project will contaminate the soil or subsoil.

It's only in Question Numbers 24 and 25 that you get to protected areas. So it seems to be entirely appropriate that the Ministry would consider these issues first before getting to the Park. And, notably, this doesn't say that the Park was not an issue. This just flags it for later, additional consideration.

Now, the fact that the Park wasn't mentioned in certain correspondence doesn't mean that the Park wouldn't be an obstacle to approval. So if Terms of Reference had been issued, the Park still could become an obstacle to getting a final permit during the course of the Environmental Impact Assessment. Because one of the things that needs to be addressed in an Environmental Impact Assessment is whether or not the area falls within any protected area and, if it does, if it complies with the management plan for that protected area. So not mentioning the Park doesn't mean this would have been okay.

Now, why did the Ministry not propose that the Ballantines change the project? Because it's not the Ministry's job. The Ministry's job is to evaluate the projects that come in. And the presumption is that the project is not going to be approved. The onus is on the applicant to overcome that presumption, which is part of the precautionary principle, and it needs to prove to the Ministry that the applicant would like to do is environmentally sound.

Remember, the presumption is that there should be no intervention unless the applicant can prove that it's safe. Now, this is explained both in Mr. Navarro's First Statement that the Ministry's decisions relate to the specific project as submitted, and also in Article 40 of...
the Environmental Law, which focuses on the project, not a specific site.

So it says, "Any project, infrastructure construction, industry or any other activity which, due to its characteristics, might affect the environment and natural resources in one way or another shall obtain the environmental permit or license from the Ministry of the Environment."

Now, when the Ministry receives a first request from an applicant that wishes to pursue a project that may have some sort of environmental impact, the first step in the environment permitting process is to request Terms of Reference. The Ministry then conducts a preliminary analysis to determine the category of project that should be assigned or to determine if the project is unviable and will not continue at all in the permitting process. Two days ago, Zacarias Navarro explained that if there's certainty that a project cannot be approved, it's rejected in the prior analysis phase.

Now, in a way, that benefits the applicant because putting together a lengthy Environmental Impact Assessment--as you saw, the one that the Ballantines submitted was 119 pages and took them more than a year to complete--I guess exactly a year to complete--it costs a lot of money.

If the developer meets then, then the Terms of Reference can be issued."

So it's not a matter of the Ministry coming up with suggestions for what the project should be. The Ministry is either saying there is no way this entire project can go forward, which is what happened with the Ballantines' Project 3, or it can impose restrictions on what the applicant wants to do and say, "We're willing to hear a bit more about this, but you still need to prove to us that the application can be granted."

Now, the real estate project wasn't viable on this particular site, the proposed Project 3 site. And the president of the Tribunal put this question to Mr. Navarro.

He said: "What you're saying is that there was no possibility whatsoever here with this proposal?"

And Mr. Navarro answered: "Yes, with that proposal, there was no possibility for approval."

Now, that doesn't mean that all development possibilities were necessarily out. Ms. Cheek, you asked about this the other day. So on this particular land, there could have been recreational activities, which would include ecotourism or any other activity that can be conducted without endangering biological wealth, the particular type of biological wealth that the park preserves. In addition, there could be activities that do not involve intensive tillage or otherwise increase soil erosion. So that would be the issue with Article 122 of the Environmental Law. But, again, the idea of the Ministry is not to go and tell a person what they can do.

If someone wants to build a skyscraper in the middle of Central Park and that's not environmentally viable for whatever reason, the Dominican Ministry were deciding on that application, it wouldn't go back and say, "You can open up a food truck." That's not the Ministry's job.

Now, what should the Tribunal make of the Ministry's correspondence with other projects? Well, all of the instances of alleged cooperation between developers in the Ministry that the Ballantines have cited have to do with limitations that are placed on the project as they were advancing in the evaluation process.

And as you look at this correspondence--first of all, you should look at it. You should review it in context. Review it chronologically and bear in mind what the correspondence says. Is there a suggestion that's being made from the developer to the Ministry, as there was, for example, in Quintas del Bosque II? Is there a question to which the Ministry responds? What's the date? Is it after the March 2014 deadline that I mentioned earlier?
And then as you review it, ask yourself, have the Ballantines told me enough about this that I can conclude (A) that there was differential treatment of like situated projects and (B) that this differential treatment was unjustified?

As the U.S. stated in its non-disputing party submission, the Ballantines bear the burden of proof in both of these respects.

Now, that brings me to the merits questions for the Ballantines. These are things that haven’t been asked and that the Ballantines can’t really answer.

So, first, why did the Ballantines purchase land before confirming with the Ministry that that land could be used for a real estate project?

You heard from Mr. Hernández yesterday that he had done something like this. He entered into a contingent agreement with the landowner. He said, “I will purchase this land, but I’m going to make this contingent upon receiving a permit from the Ministry. Why spend the money if your project can’t be approved? It only seems prudent.”

Why did the Ballantines wait for the Ministry to mention the Park? As you’ll recall, the Ballantines were informed by their environmental consultants in September of 2010 that the Baiguate National Park could have been an issue.

You heard from Mr. Hernández yesterday that he had done something like this. He entered into a contingent agreement with the landowner. He said, “I will purchase this land, but I’m going to make this contingent upon receiving a permit from the Ministry. Why spend the money if your project can’t be approved? It only seems prudent.”

Why did the Ballantines wait for the Ministry to mention the Park? As you’ll recall, the Ballantines were informed by their environmental consultants in September of 2010 that the Baiguate National Park could have been an issue.

So why not propose an alternate plan? Why insist every single time even after being told about the existence of the Park under the exact same project? Why not ask the Ministry if there was anything that could be approved?

You’ve heard about this Mountain Lodge, for example. But the Ballantines didn’t even ask the Ministry for Terms of Reference.

They’ve stated that they couldn’t because supposedly they hadn’t gotten the no-objection letter from the Municipality. But that didn’t hold them up in connection with Project 2.

For Project 2, they applied to the Ministry first. And as Michael Ballantine explains in his First Witness Statement, it was after that the no-objection letter came in.

So why didn’t they do it? Why did the Ballantines refuse to consider another site? This came up during cross-examination. Mr. Di Rosa put it to Mr. Ballantine that, “You know, you could have bought land somewhere else, right?”

Mr. Ballantine said he was not going to bring the mountain to Mohammed.

But it would seem that he’s the mountain in this scenario, the one who was supposed to move. And that’s just not correct. No one has a right to a governmental permit. Especially an environmental permit. You need to obtain permission and to prove that that permission is warranted. Why did the Ballantines neglect to quote Article 122 of the Environmental Law even once in this proceeding?

It wasn’t in any of their pleadings, not even the Notice of Intent. Didn’t appear in their opening statement. They haven’t quoted it at all. And yet they purported to tell you what it says.

Why did Michael ultimately—only learn of such article when his permit application was rejected? This came out on cross-examination too.

The question was: “At what point did you become seized of Article 122 of the law?”

And he says: “September 12th, 2011.”

Which was the date of the rejection letter. Why didn’t he know about that before then?

Other local developers were familiar with this law. You heard testimony again from José Roberto Hernández.

He says, “In 2007 we delivered the request for the Environmental Impact Assessment.”

And then he was asked by the Ballantines’ counsel, “When you built these houses in 2007, were you familiar of the law—the Environmental Law that governs, let’s say, for...
example, the slopes?"
   "I did. I knew of the law."
   Why did the Ballantines fail to proffer testimony from their Dominican environmental lawyer? This too came out on cross-examination.

   The question was, "Is there a reason that your lawyer, Freddy González, the one who said that the road would have the biggest environmental impact—was there a reason that he didn't provide a witness testimony in this proceeding?"
   "Well, we brought forth 20 witnesses."
   "So you thought the headmaster of the school where your children went was the more relevant witness than your environmental lawyer?"
   Why did the Ballantines fail to proffer testimony from any of their environmental consultants?
   "None of your environmental consultants, either Empaca Redes people or Antilla people, are among the 20 witnesses that you presented!"
   "No."
   Why was there no testimony from any of the Ballantines' engineers?
   "Did you have an engineer involved in the construction of the first road?"
   Well, there was a man named Rafael Peralta, who is supposed a licensed engineer recognized by the Dominican Republic, and an American engineer whose name is Chad Wallace. They were the ones who built the road, according to Mr. Ballantine's testimony.

   That was the first time we had heard about them.
   They weren't mentioned in any Witness statement, and they didn't provide any testimony in this proceeding.

   There was testimony from Mr. Kay. But Mr. Kay, as you'll recall, revealed that he's not an engineer despite the fact that Mr. Ballantine in his statements and the Claimants in their pleadings referred to him repeatedly as "the Ballantines' engineer."
   When asked, "Are you an engineer?" he said, "I am not. I'm a facilitator."
   "What sort of academic training do you have?"
   "Not all that much."
   So have the Ballantines established any of their treaty claims? The answer is no. You need to have evidence to establish treaty claims. You need to have a consistent story. You need to have more than your friends testifying on your behalf creating an echo chamber about any documents or any basis to back it up. And as you consider these issues and try to evaluate what little evidence there is, here's some things that you should bear in mind.
will lead to a marginal improvement, if any, in the condition of the resource. So there's this sense that the high road leads to nowhere and the cumulative results of reasonable individual choices is a collective disaster."

This is why we have environmental regulation. This is why in the Dominican Constitution natural resources are a constitutional right of every Dominican citizen, including the Ballantines. They're a shared resource that the government protects. And the government is there to say, "No environmental impact unless a person can prove that it's going to be safe."

Now, importantly, despite all of the things that you have heard about the various names that the Ballantines threw out, they cannot establish nationality-based discrimination. I showed you this conclusion on Monday in the opening, and the Ballantines haven't said anything to refute it.

The problem with Project 3 was with the proposed site and the project that the Ballantines wanted to conduct on that site. It did not have anything to do with the Ballantines themselves.

The evidence of this is that the Ministry invited the Ballantines on two different occasions to propose an alternate site for the project. And in addition, in parallel, the Ministry renewed the Project 2 permit.

On top of that, the Ministry duly conducted five different site inspections, went out whenever the Ballantines asked, and had three different ministers involved in the approval—sorry—the review of this particular permit request and had 21 technicians go out and review.

If there were a problem with the Ballantines, why waste all of those resources? It just doesn't make sense.

Now, I showed you this chart again on Monday. Nothing has changed. When you compare the treatment that was granted to Jamaca de Dios Project 3 and its only genuine comparator, which was Aloma, you see that it's the same.

So for Project 3, the developers were the Ballantines, were dual nationals of the Dominican Republic and the United States. The location of the proposed project site was in the Cordillera Central Mountain Range, right next to Aloma. The altitude was 820 to 1260 meters above sea level. The slope distribution was that 18.7 percent of the land exceeded 60 percent. The soil type: igneous, volcanic and metaformic. The site was inside the Baiguate National Park. A permit was requested, permit was denied.

For Aloma. Juan José Domínguez, who's a Dominican national, son of the Mayor of Jarabacoa and brother-in-law of a former president, had the land right next door. The altitude was 990 to 1220 meters above sea level. Slopes were slightly lower, only 4.89 percent of the land exceeded 60 percent. The soil type was exactly the same. It too was inside the Baiguate National Park. Permit was requested and permit was denied.

Now, Mr. Domínguez had a reconsideration request. It was denied. The Ballantines had three reconsideration requests that were duly evaluated. And in addition to this, when the Aloma permit was requested, the Ministry went out to conduct its site inspection and found that Mr. Domínguez had opened up a road and fined him for this. Fined him—it was either $6,000 or $7,000, and the Ballantines were fined $1,300 for opening a road without a permit.

Now, just to give you a flavor of some of the issues with the other projects that are related to the Park. The Ballantines have a timing problem. They keep directing your attention toward the map. I showed you the other day that they were directing you toward the flat version of the map. And when you look at the version that shows the ridges of the mountains, you can understand why someone seemingly next door to a different project may have been included, may not have been included. It's because they're on one side of the mountain or the other.
request a permit outside of the National Park. And then
Paso Alto is separated from the Monumento Natural Salto
Baiguate by a road. And that very road is what is
mentioned as a border in the actual text of the decree.
Part of Paso Alto is comprised within the buffer
zone of the Monumento Natural Salto Baiguate. But the
project existed since 2006. So much like the original
Jamaca de Dios project, Project 2, it already received a
permit when the monument was created and it’s partly
included in the monument’s buffer zone.
You’ll find that on Page 15 of the First Martinez
Statement, and there's also a map at Annex B of
Mr. Navarro's statement, and Exhibit R-77 is the decree.
Now, the contention regarding Paso Alto would have
to be that the Dominican Republic not only created the
Parque Nacional Baiguate as part of a conspiracy against
the Ballantines, but also modified the borders of the
Monumento Natural Salto Baiguate to affect Paso Alto.
Now, Mirador del Pino is in a completely different
mountain across the Jarabacoa Valley. It asked for Terms
of Reference in 2010. That’s Exhibit C-45.
But back to Aloma, which is the only genuine
comparator. The Ballantines showed you the same pictures
again that they have shown many times before that we have
disproven with the Google Earth images, and we also have
the principle of expresiones exclusio alterius—sorry, I
can’t do it with Latin—it means that the listing of
certain factors means necessarily the exclusion of others.
So, the identification of a most-favored nation
clause or a most-favored nation obligation and of a
national treatment obligation means that all other types of
discriminatory treatment are excluded from the other
obligations set forth in CAFTA.
Now, to continue analyzing the Ballantines’
claims, I’m going to pass the microphone over to
Mr. Di Rosa who will walk you through the many reasons why
these claims fail.
MR. DI ROSA: Mr. Chairman and Members of the
Tribunal, good afternoon. This morning the Claimants said,
"We expect the Respondent will want to talk mainly about
the Jamaca project, and they will mainly want to talk about
Mr. Ballantine," as if, you know, we’re skirting the issue.
And that’s precisely what I plan to talk about because this
case is about their project. It’s not about everybody
else’s project.
Like a magician whose art is the art of
misdirection, they say, "Don’t look at this—don’t look at
this project," which is the one that matters, "but look at
all these other projects." And that’s something that is
totally designed to mislead the Tribunal.
Realtime Stenographer Worldwide Reporting, LLP
Margie Dauster, RMR-CRR info@wwreporting.com

And you saw Mr. Farrell, their damages expert, who happily conceded that he hadn’t looked at anything that’s relevant. And they all happily conceded they don’t have attachments to their—to their Expert Reports. That’s a truly bizarre thing. They have a bunch of Expert Reports and don’t have a single exhibit or very few. There are some photographs. We’ll come back to that. But they don’t have real support. That’s like writing an entire Ph.D. thesis without putting a footnote in it. How can that qualify as evidence? Ultimately, their evidence consists of their own testimony and of expert testimony that can’t be corroborated or tested.

Today you saw opposing counsel cite to Mr. Farrell in their opening statement. They had quotes from Mr. Farrell on the screen. But Mr. Farrell on cross-examination admitted that he had based his views and his conclusions and his calculations on what Mr. Ballantine had told him. So it’s a completely circle—circular type of evidence, and their documentary evidence consists of photographs and maps.

And the photographs you—you saw Mr. Kay, the so-called engineering expert, also admit happily that he had measured some of these slopes using photographs. And the angle of the shadows is sort of like the Egyptian sundial of clinometry. And you can’t measure things and

So what the testimony this week has exposed is that this is a problem of the Ballantines own making. The case has also exposed that this is really abusive misuse of an investment treaty. Investment treaties simply are not designed to address this type of situation. We’ll come back to this topic, but I’d like to talk a little bit about evidence.

We told you at the beginning of the week that they had a nice story, but they had no evidence. And that became even more evident in the course of this week. They purported to challenge the methodology of the Dominican Republic’s experts, which is nothing short of perverse given that they presented an engineering expert who doesn’t have more than a high school degree. They presented an environmental consulting expert who is a lawyer and who is on their payroll and who offered money to a Ministry official to testify, which she declined to do.

And you heard Mr. Ballantine say that he wanted to put 70 of those houses up on the top of the mountain. And the Ministry decided that simply was not going to be safe for all the reasons that you heard.

what the testimony this week has exposed is that this is a problem of the Ballantines own making. The case has also exposed that this is really abusive misuse of an investment treaty. Investment treaties simply are not designed to address this type of situation. We’ll come back to this topic, but I’d like to talk a little bit about evidence.

We told you at the beginning of the week that they had a nice story, but they had no evidence. And that became even more evident in the course of this week. They purported to challenge the methodology of the Dominican Republic’s experts, which is nothing short of perverse given that they presented an engineering expert who doesn’t have more than a high school degree. They presented an environmental consulting expert who is a lawyer and who is on their payroll and who offered money to a Ministry official to testify, which she declined to do.
There's no real evidence that the Tribunal could actually point to in an award to justify a decision to rule in their favor. The court issue, in our view, is that there was no impropriety in the Ministry's decision to deny the permit. We'll come back to that. But the--there's also absolutely no evidence that they were able to produce concerning this massive conspiracy that they so fancifully alleged throughout the case. They didn't say much. In fact, they didn't say anything at all about it this morning. So we assume that that's been adequately dispelled.

They have not proven any discrimination, much less discrimination based on their U.S. nationality, which is what the treaty requires, as the U.S. Government has also agreed in its non-disputing party submission. They haven't proven that there's been more favorable treatment. There's been different treatment, but not more favorable treatment. And the differences are justified for the reasons that my colleague, Mr. Silberman, mentioned today.

They take several--you know, they cherry-pick several issues and they isolate them. And, you know, when you do that, obviously, you can make it look bad. But when you really dig under the surface, you see that there are critical differences of the sort that Mr. Silberman just showed you. And their whole case seems to be based on that sort of strategy. And same thing on nationality.

They say, like, "Oh, well, you know"--they focused on the bank accounts. And, you know, that can't possibly signal that they're dominant and effective--I mean, that their dominant nationality is Dominican.

And, you know, obviously, if you isolate every single factor that you take into account for that determination, then, you know, you can easily disparage the argumentation.

But the whole point of both the nationality--the dominant nationality analysis and the environmental analysis is that it doesn't lend itself to this simplification, these binary constructs that I mentioned in the opening statement. They simply don't.

And they like to say, "Well, it's convenient for them now to invoke the altitude and so forth." And, you know, we--the documents actually show that none of this is an ex post facto invention as they are alleging. But, you know, they say, "Oh, now they focus on altitude and here's--you know, "There's what they say about altitude."

And nobody ever said that it's about one thing. And that's the point that's been repeated over and over again, is that these environmental determinations are based on a number of factors that interrelate in very complicated ways. And the Claimants simply refuse to accept that. And instead they--they reduce it to a caricature by taking these facile comparisons.

Now, why else do the--are the Ballantines not entitled to award? They have deceived the Dominican authorities in a number of respects. They deceived the environmental authorities. They deceived the immigration authorities. They deceived the tax authorities. And I'll walk through briefly each of those.

The documents show, and Mr. Ballantine confirmed in the cross-examination, that when they applied for the first permit, the lower road--the lower mountain road permit, they had requested permission for a road for purposes of a reforestation project.

They never mentioned that they planned to do a housing lot project, even though Mr. Ballantine knew that from the beginning. In fact, that was his vision from the get-go. So, essentially, they got the initial permit by false pretenses.

Then they--once the road was already built, they applied for the housing lot project. At that point, the road is already built, so the Ministry can't really do much about it. And what do the Ballantines do? They apply for a--you know, a series of mountain cabins that were going to be built of wood and lightweight materials. That's what they told the Ministry consistently, even as late as the Environmental Impact Assessment.

And then they built these three-story McMansions that we showed you that even Mr. Ballantine was forced to concede was not ecotourism in any way, shape, or form. They also deceived--ultimately, they also deceived the immigration authorities because they have insisted here and they've testified under oath that the reason they engaged in--the reason that they acquired the Dominican nationality was purely for commercial reasons and purely for business reasons and so forth.

But we showed you in the opening the oath that they took of allegiance to the Dominican Republic where they emphasized that they were embracing the culture of the Dominican Republic and expressing other forms of affinity to the country that they now simply deny, even though when they did that--when they took that oath, presumably, they were supposed to tell the truth, just like they were here.

They both can't be--you know, they can't both be the truth. So, you know, there's clearly some deception going on there.

And, finally, with the tax authorities. We mentioned this point in our pleadings, and it's been discussed by Mr. Hart as well. We tried to address it on.
doesn't have any support and any genuine evidence. Just documents. I mean, it's just words on a page. “No.” Did you check it against any financial statements, like the--their income tax returns for Jamaica in the Dominican Republic and for Mr. Ballantine in the U.S., they all match the tax contract numbers.

And our issue is twofold. First, that they base--they purport to base their claims--their damages claims on these contracts that they call the real contracts, but that doesn't match anything. If you look at all their documents that presumably are true and faithful to what actually happened, which were the contemporaneous documents which they swore under oath were true, like their financial statements, like the--their income tax returns for Jamaica in the Dominican Republic and for Mr. Ballantine in the U.S., they all match the tax contract numbers.

That's our problem.

We were trying to show you that it's relevant because at the time they submitted those tax returns, they were submitted to what the assessing authority determined the assessed value of the--of the property."

And then what happened? What happened is that he admitted that he had not tested it in any way. But did they actually collect that? They didn't. And when we tested the contract pricing, it's a--you know, it's a house of cards really, because it's not--there's no evidence that that was actually the income they received. They had the contracts, sure. You know, a contract can say anything. But, you know, was the contract actually performed? And, you know, we had slides showing you that the contract prices weren't all actually paid. But they don't have any systematic, you know, presentation of--you know, of calculations or evidence of any sort that show you what the actual income that they earned from those contracts.

So all the contracts add up to a certain figure. And when we tested the contract pricing, it's a--you know, it's a house of cards really, because it's not--there's no evidence that that was actually the income they received. They had the contracts, sure. You know, a contract can say anything. But, you know, was the contract actually performed? And, you know, we had slides showing you that the contract prices weren't all actually paid. But they don't have any systematic, you know, presentation of--you know, of calculations or evidence of any sort that show you what the actual income that they earned from those contracts.

So all the contracts add up to a certain figure. But did they actually collect that? They didn't. And when I tested Mr. Farrell on that, you know, again, he happily admitted that he had not tested it in any way.

You know, "Did you check these contract prices against any bank accounts?"

"No."

"Did you check it against any financial statements?"

"No."

So it's not based on anything. You know, it's just documents. I mean, it's just words on a page. It doesn't have any support and any genuine evidence. But they don't have any systematic, you know, presentation of--you know, of calculations or evidence of any sort that show you what the actual income that they earned from those contracts. So all the contracts add up to a certain figure. And when we tested the contract pricing, it's a--you know, it's a house of cards really, because it's not--there's no evidence that that was actually the income they received. They had the contracts, sure. You know, a contract can say anything. But, you know, was the contract actually performed? And, you know, we had slides showing you that the contract prices weren't all actually paid. But they don't have any systematic, you know, presentation of--you know, of calculations or evidence of any sort that show you what the actual income that they earned from those contracts.

Another issue and another reason that they are not entitled to a favorable award is because they, again, are abusing the system. And in doing so, they have managed to defame a lot of people. They have managed to insult the entire country of the Dominican Republic. They have misrepresented their own motives for acquiring the Dominican nationality. You know, Claimants' counsel made a big deal today of the fact that the Ballantines were in their mid-40s when they acquired the Dominican nationality. That's--you know, if anything, that's evidence that they truly believed in acquiring the Dominican nationality and embracing it. Nobody in the Dominican Republic asked them to do this. There was no Dominican authority that forced them to do this and no Dominican person at all that forced them to do this. They voluntarily, in their mid-40s, decided to fully embrace the Dominican nationality. They moved there. They moved all their money there. They started a project there. They moved their kids there. They acquired permanent residency. They then acquired the nationality. Then they acquired their children's nationality. And they loved the Dominican Republic, and you see that in all their declarations. And they loved the Dominican people.

And then what happened? What happened is that he couldn't build his--you know, his Disney World on the
And you know, that's--that's something that--you know, it's like a child who all of a sudden isn't allowed to play with a toy anymore. And so he threw the adult equivalent of a tantrum, and he started pressing really hard for his--you know, his pet project to be approved. He didn't want to do it anywhere else. He wanted it exactly where he wanted it because of his vision, and he would not accept--he would not accept no for an answer.

And at that point, he starts to claim that he's not Dominican anymore. But at the relevant times, he had fully embraced the nationality. He voluntarily consciously--you know, his U.S. nationality is something that he inherited at birth. He didn't choose that. And the fact that he chose it late in life, you know, if anything, is more reflective of a true intention to acquire another country's nationality.

The other thing that's incredibly offensive is his assertion that he acquired the Dominican nationality as a souvenir. No country's nationality is a souvenir. I assume Mr. Ballantine knows there are hundreds of people who die every year trying to get into the United States to give their children the U.S. nationality. Nationality is not a joke. It's not a souvenir.

Another reason why the Ballantines are not.

it quite when it did. Again, trying to work with the Ballantines, they did produce a management plan.

They renewed the permit, as Ms. Silberman mentioned. They didn't--you know, this was in 2013. They didn't need to do that. But they did possibly because--precisely because he was American. And, you know, they could have revoked the license at that time, particularly given that they had misrepresented a lot of things. And particularly, as we'll show you, there were serious doubts about--even the lower mountain project in terms of--in terms of safety and such.

Our second conclusion--our second point in conclusion, I should say, is that the Ministry of the Environment is entitled to deference. The Ministry--and let me just show you a quote from the AES v. Hungary Case.

The Tribunal said, "The Tribunal has approached this question on the basis that it is not every process failing or imperfection that will amount to a failure to provide fair and equitable treatment. The standard is not one of perfection."

And that's an important point because environmental regulation by its nature is difficult. It's imperfect. That doesn't mean that it shouldn't be undertaken. And when it does get undertaken, it should not be second-guessed by non-experts and by Tribunals and such.
It always was a big thing. It was a big thing even for them. In their own Environmental Impact Assessment, they warned not just of the impact of erosion but what they themselves called the high impact erosion for the Phase 2 project.

So you see this—they say, “There are six high-significant impacts, of which two are negative. And those two are change in land use and the increased erosion caused by earthmoving and vegetation removal.”

So they themselves flagged erosion as a serious problem.

And then they’re own so-called engineer, Mr. Kay, warned of the erosion risks for Phase 2 as well. And he said, “Miss-directed (sic) water has the potential to cause erosion damage and to over-saturate sensitive slopes.”

That’s exactly what Mr. Navarro was saying. You oversaturate a sensitive slope that has a lot of clay content in the soil and the water gets absorbed, and then it’s susceptible to sliding, and that causes landslides. The higher up you are, the more sensitive it is, and the more dangerous it is if a landslide actually happens. You don’t have to be an environmental science genius to figure that out.

Now, look at this property, you know, sort of perched on the edge of a fairly steep hill. And this one.

It’s hard to imagine that this house here is not just one strong hurricane away from blowing down that mountain.

Again, you don’t have to be—let’s just say it’s not just common sense in a country like the Dominican Republic that has frequent hurricanes and increasingly powerful hurricanes, as we all have seen recently. And there’s also a lot of seismic activity in the Dominican Republic, as Mr. Navarro testified.

So this cannot possibly be a safe structure, even on the lower mountain, which is what this is. And they want to put these type of structures, you know, far higher up, and not just a few of them, but 70 of them.

There’s a few others. This is the Aroma Mountain. It’s also perched on the edge.

And the other thing that was alarming that came out in this testimony this week is that Mr. Ballantine is the one who basically built the road himself. He designed it. Remember I asked him about you know—be decided—he testified in his written testimony that he had decided that 8 percent was the right incline for the road on the mountain.

And then when I asked him how he figured that out, he said that he had researched it. And then when I said, "What, did you Google it?" He said and happily, "That’s exactly what I did."

It says, “Conclusion. Institutional weakness and the voracity of economic interests combine to deliver a heavy blow to nature in the Municipality of Jarabacoa, and currently plans are in place to construct a similar project to the one under construction, without having completed the one for which a permit was granted in an environmentally fragile zone. It is not necessary to be a genius in environmental sciences to see this. This zone of high environmental fragility and of high natural risk should not be inhabited by humans given that it is unstable and highly dangerous.”

So here you have a Ministry official expressing a view several months before the permit denial that they really shouldn’t have even got the lower mountain permit.

And it’s not hard to see why. As this report stated, you don’t have to be a genius in environmental science to see why that’s a problem. And we will show you some photographs to illustrate. But importantly—and they keep saying, like, “Oh, you know, all of a sudden erosion is a big thing. The soil is a big thing.”

---

**English Audio Day 5 at 03:31:43**
call the Project 3.

It just couldn't be done safely. That was the issue, and that's the core issue that the Claimants seem to be eager to avoid a discussion of instead of drawing your attention to the competing projects.

The other important point that I wish to stress before going on to the next point is that the Claimants are the ones who have a burden of proof here. And that's a key issue because they really haven't produced anything. So even if you have some doubt as to whether there's some basis on which to issue an award in their favor, they simply have not carried their burden of proof. And as a result of that, that's another reason why they are not entitled to an award.

And even if the Ministry did make some mistakes, they certainly would not rise to the level of a violation of international law. It was the Ministry doing its job, and perhaps certain mistakes were made. But on the core issues, there's really nothing that you can seriously challenge.

It certainly does not reach the level of impropriety that you would need to find a violation of the minimum standard of treatment, for example. It's a very high threshold for a fair and equitable treatment violation, even under the autonomous standard, let alone under the minimum standard of treatment under customary international law.

Now, a third point. The Tribunal should err on the side of protecting the environment. This is what the Parties to the DR-CAFTA want you to do, expect you to do.

And you see this in a number of provisions of DR-CAFTA. You have DR-CAFTA Article 10.11, which is investment and environment. "Nothing in this chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."

And that's exactly what we're talking about here. It's a measure that the Ministry took to make sure that this investment that Mr. Ballantine wanted to make on the mountain was undertaken in the manner that was sensitive to environmental concerns. That's exactly what the Ministry was doing. And this clause and other clauses in this treaty, like this one from Annex 10--did I skip one? No. Annex 10-C of Paragraph 4(b), it should say at the top. Apologies for that error.

It says, "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."

This is another signal from the treaty negotiators telling you you can't find indirect expropriations unless it's in rare circumstances. In other words, they were signaling the treaty should show a certain measure of deference to governments in their regulation of certain areas including the environment. It's another way that the treaty negotiators were saying to tribunals such as this one, "Look, you know, we really want you to pay attention to these issues and to protect our right to regulate on environmental issues."

Again, the DR-CAFTA Article 17.1, a third provision, levels of protection. "Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and policies, each Party shall ensure that its laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve those laws and policies."

Now, what do these clauses say collectively? At a minimum, these clauses have to mean that this Tribunal has to err on the side of protecting the environment rather than take--adopting a decision that ultimately would have an adverse effect on the environment.

If you were to--if you were to rule in favor of the Claimants in this case, what kind of message would that send to environmental regulators, not only in the Dominican Republic but in all of the DR-CAFTA countries? What kind of chilling effect would it have on their measures?

Why does Mr. Navarro and Mr. Martínez have to be--have to be brought here and raked over the coals for five, six hours in a row? Why should these people's technical decisions be second-guessed. You saw Mr. Navarro. You saw Mr. Martínez and how--how knowledgeable they are about these issues.

They should be deferred to on these technical issues. Just a few words by way of conclusion.

Mr. Chairman and the members of the Tribunal. While we're on the subject of Mr. Navarro and Mr. Martínez, public servants everywhere are generally underpaid, undervalued, underappreciated, but they often make enormous contributions.

Take Mr. Navarro and Mr. Martínez. You saw them testify this week. You saw their Expert Reports and Witness Statement. And you saw how well prepared they are,
subjective. So, I think—and this is confirmed by

or Claimants in this case, is, in part, going to be

things—attachments, I think that the view of the Claimant,

I think in terms of some of the other

objective standard. Here are the facts.

But certainly because this has to do with

whether this is a good opportunity for me to

The business reasons argument doesn’t really make

ARBITRATOR VINUESA: All right. Thank you very much.

Now, I have a question to both Parties. I would like to hear comments from both Parties in reference to applicable rules of international law.

ARBITRATOR VINUESA: I have a second question for counsel for Claimants. And this refers to the applicable law to define the test of dominant and effective nationality.

And the question is: Could you isolate dominant and effective nationality from applying custom international law?

MR. BALDWIN: Can you say a--I got the--all up until the very last part.

ARBITRATOR VINUESA: I'm asking you if you can and effective nationality from applying international law?

MR. BALDWIN: I think the framework--I think that you could maybe, you know--you could maybe make some distinctions between customary international law and other sources of international law.

ARBITRATOR VINUESA: I think that framework--I think that you could maybe, you know--you could maybe make some distinctions between customary international law and other sources of international law.

ARBITRATOR VINUESA: I think that the Parties and the Respondent will correct me if I'm not right about this, but I think the parties have generally agreed that the factors that the Iran Claims Tribunal looked at, which also were sourced essentially from the earlier cases, it wasn't an invention of--it wasn't an invention of the A/18 Tribunal. It came--it was there previously.

I think we agree generally on the framework. But I think that framework--I think that you could maybe, you know--you could maybe make some distinctions between customary international law and other sources of international law.

What is de los suelos in Spanish, from Chapter 1 of the same Title IV, which is named the de la norma comunes? Should I repeat it? Because I wrote it down. It sounds rather tricky. It's tricky, actually.

Is it possible to isolate the application of Article 122 in Chapter 2, de los suelos, from Chapter 1 of the same Title, which is on de la norma comunes? It's like a chapeau from Chapter 2.

And the first part was the general context of Article 122 in applying and interpreting Article 122 on the general objectives of the Environmental Law.

Whoever wants to start. No one?

MR. ALLISON: I'd be happy to start.

ARBITRATOR VINUESA: All right. Fine.

MR. ALLISON: Thank you.

ARBITRATOR VINUESA: Thank you.

MR. ALLISON: The way I believe the Article 122 is both written and has been interpreted by the witness who testified today is that the text of the law does not prohibit development on slopes below 60 percent, but it does prohibit development on slopes in excess of 60 percent.

I also believe the witness testified that simply because there are slopes less than 60 percent, Article 122 does not authorize construction.
But Article 122 is not a barrier to construction.

ARBITRATOR VINUESA: Claimant--sorry. Counsel.

Sorry. What I mean to ask you is how you interpret Article 122 within the context of the whole Environmental Law. This is chapeau previous to Chapter 2, which is Chapter 1 in Title IV. That's what I mean.

MR. ALLISON: Sure. Well, Article 122 is applicable, but it is not to the exclusion of Article 1.

ARBITRATOR VINUESA: Okay. Thank you.

Do you have any comments?

MS. SILBERMAN: Yes. During your question, you also mentioned that the Precautionary Principle wasn't stated expressly in Article 122. It is, however, stated expressly in Article 8 of the law, and Article 8 is in--underneath the chapeau of Title 1, Chapter 1, "Basic Principles."

So, Article 122 would be interpreted in accordance with these basic principles, which would include the Precautionary Principle.

ARBITRATOR VINUESA: All right. Thank you.

I have a very last question. And it's for both.

And I think it's--I would like to hear first Respondent.

But whatever wants to start.

And the question is: Has the creation of the Park diminish and/or destroy an owner's right to their property?
Ballantines that caused the loss.

Now, there's various reasons for that. And I think the first one counsel for Respondent has stated is that the area is used for those properties. And, in addition to the official sanctioned uses for those properties, we've seen, with Rancho Guaraguao and with the development activities going on at Aloma Mountain, that the--that, you know, there's opportunities that are given to others to develop in these National Parks, even without a permit.

So, it becomes--it diminished the value of the Ballantines' land when, in that fourth denial, the National Park was used as a basis to deny that. And that's when the discriminatory and the arbitrary nature of the Park sort of sprung into play.

Because as the Respondent itself admits, ecotourism is allowed in the Park. So--and the Ballantines, as you'll recall, when the Empaca Redes people told them--told Mr. Ballantine about the creation of the Park, it says, you know, ecotourism project "such as yours" are allowed in the Park.

And just one other point to that is that another thing that the Empaca Redes people told them, and Respondent has admitted as well, is that the defined uses of the area in the Park--in other words, ecotourism is allowed in the law.

And they--

ARBITRATOR VINUESA: Sorry. If we can review whatever so it's just--

MR. DI ROSA: My point is simply that they assumed the risk because they were aware of the existence of the Park. They were told by their environmental consultant. You see that at Exhibit R-269 and Exhibit R-270. In September 2010, they were already aware of the Park's creation and of its limitations. So, you know, they can't be heard to complain about it if they subsequently, you know, were inclined to put up a project there.

They also assumed the risk that the permit would be denied.

ARBITRATOR VINUESA: I'm sorry. That's out of what I was asking. So, thank you very much. But we have lots of material. Do you want to comment on that?

MR. ALLISON: No. Other than I disagree with his characterization of the evidence.

ARBITRATOR CHEEK: Thank you.

So, if I could follow up on this line of questioning but perhaps ask, hopefully, a slightly different question, which is that it sounds like both Parties are in agreement that once the Park was created, that the property rights remained and so the property still had value.

Let's assume for the sake of argument that through bona fide environmental regulatory activity, the Dominican Republic decides that no activity can take place on this land.

Once the Dominican Republic decides that no activity can take place on the land, at that point is there a diminution in value? And if so, is there any obligation to compensate for that diminution in value?

MR. BALDWIN: We're happy to answer for the Claimants' side. Oh, you want to wait.

MR. DI ROSA: Ms. Cheek, our position would be, and certainly in this particular case, they would not--they would not be entitled to any compensation under the treaty simply by virtue of the operation of the three-year statute of limitations under Article 10.18 in DR-CAPTA.

Whether they would have a right to compensation under Dominican law is a separate issue on which we would have to get back to you, unfortunately. You know, we're not in a position right now--since neither of the partners on the team here are Dominican lawyers, we can't really opine without consulting.

If you wish, we could consult with the environment lawyers who are here, and we can try to revert to--a little later in the session, if that would be helpful. Thank you.
And perhaps that's Article 122. Perhaps that is something else.

MS. TAVERAS: The main criteria that the environmental agency applies in the application of Law 64-00 is Article 8, which is the Precautionary Principle.

And obviously on the basis of technical considerations, then they would adopt whatever they believe is the appropriate decision. There are also guidelines and regulations. Right now the guidelines in force were adopted in 2014.

ARBITRATOR CHEEK: And are part of those technical requirements, guidelines and regulations, Article 122 also of Law 64-00?

MS. TAVERAS: Of course.

ARBITRATOR CHEEK: And what else?

MS. TAVERAS: Article 110, which prohibits human settlements in areas of risk.

ARBITRATOR CHEEK: So, I don’t want to cut you off, Ms. Taveras. But would one look, then, to the Environmental Law as a whole to be able to identify the requirements?

MS. TAVERAS: Yes.

ARBITRATOR CHEEK: Did Claimant have any comment?

MR. ALLISON: Claimant just notes that the

guidelines referenced by the Respondent were enacted in 2014, and, thus, couldn't have been the technical guidelines used in 2011 at the time when the Ballantines' permit was first denied.

MS. TAVERAS: May I respond to that?

ARBITRATOR CHEEK: Please.

MS. TAVERAS: At the time of the evaluation of the project, there were guidelines. Then, the version of 2011 would have been in force.

And in addition to that, the law of protected areas would also be applied. Zacarias, in his Report, explains the applicable guidelines. Zacarias⁵ Navarro.

ARBITRATOR CHEEK: Okay. Thank you.

And one final question. Perhaps Claimant can respond—oh, I'm sorry, did you—

MR. ALLISON: No, no, no, that’s—

ARBITRATOR CHEEK: One further question—perhaps Claimant can respond to this first—which is that there’s been a lot of talk about comparators and relevant comparators.

I was wondering if you could speak to how you think we should evaluate the criteria of being on Category 2 National Park land as part of a relevant

⁵ English Audio Day 5 at 04:24:15
Now, the obvious—the more easier one then would be Rancho Guaraguao because in this case, it's ecotourism.

The Ballantines' project is ecotourism. They're both in National Parks. Rancho Guaraguao is in a higher thing, but they're doing the same thing, they're selling houses. And we've seen some of those houses at Rancho Guaraguao as part of an overall development project. So, to those, those would be a competitor.

But I think the process, Ms. Cheek, to answer your question, would be, the relevant legal framework is Category 2, and then you would look at whether the businesses have similarity in the type of activities that they do.

My colleague wants me to mention that projects that aren't in parks are comparators. I think, you know, your question was about the parks. Obviously, we have lots of other comparators that aren't in parks, but I understood your question just to be limited to the parks themselves.

Is that correct?

ARBITRATOR CHEEK: My particular question was about the parks. And I do understand Claimants maintain their position that for like circumstances, we should look at a broader range of comparators, not just those within Category 2 Parks.

MR. BALDWIN: Yes, because one of the denials was also on the basis of Law 122 and the slopes that were mentioned there as well.

So, projects that aren't in national—because the first three denials were on that basis. So projects, you know, Quintas del Bosque and La Montaña and these other ones also are comparators but of a different legal framework.

So, those are comparators, essentially to the legal framework that's established under Article 122. Then when you're under that legal framework, you look at businesses that have similarities, and our comparators are ones that would have those similarities.

ARBITRATOR CHEEK: Thank you.

Did Respondent have any comment?

MS. SILBERMAN: Yes, just to clarify that as Professor Martínez explains in his First Statement in Paragraph 44, the designation of Category 2 comes from the International Standards. The International Union for the Conservation of Nature.

There is an exhibit, Exhibit R-52, which states that the purpose of a Category 2 or National Park is "to protect natural biodiversity, along with its underlying ecological structure and supporting environmental processes and to promote education and recreation."

And it's because of that that the difference between Ocoa Bay, which is not a mountain project and, for example, a project within Baiguate National Park wouldn't necessarily be the right comparators because there are two different areas that are protected for two different reasons and have two different ecological structures behind them.

ARBITRATOR CHEEK: Thank you. That's all the questions I have, Mr. President.

PRESIDENT RAMÍREZ HERNÁNDEZ: Okay, I have three questions. One for Claimants, one for Respondents, and one for both.

So, let me go first to the Claimants, and I will allow Respondent to make a comment, as well as Claimants to the questions I make to Respondent.

Let's assume, for the sake of my hypothetical, that there's a Mexico Dominican Republic free trade agreement which has the same provision about nationality that we are discussing in this case.

I'm about to become 50, so let's say that I have a middle age crisis. And among the many things that I don't know how to do, many things in life, is I don't know how to dance merengue, and I don't know how to play baseball.

So, I decide to go to the Dominican Republic because I want to be like Sammy Sosa or Manny Ramirez, and I want to be like Wilfredo Castro, and so I want to learn how to dance and I want to learn how to play baseball at this time in my life.

So, I go there. I leave everything behind. I go there to live. I want to—let's say that in order to become or take classes in an instruction facility in the Dominican Republic, I need to become—I need to be a national of the Dominican Republic. So, I mail the documents and become a national of the Dominican Republic so that I can play—get this instruction from a very famous Dominican manager in baseball.

And throughout this process, I buy some land in the Dominican Republic that at the end, sometimes—at some point, the Dominican Republic authorities say, "Well, your land is in a National Park and you cannot build."

Now is that different, this hypothetical, to a scenario where I go and I state that, "My only reason is to invest and that I will do it because I will not want to lose the entire investment?"

The point is—and in one of your slides, the Claimants say, "Economical consideration related solely to investment should not be a factor."

So—and you also mention in your presentation, is—the idea of a chapter is to encourage foreign

---

English Audio Day 5 at 04:10:23
investment, not domestic investment. So, how come the fact that you became an investor or became a national to be an investor will not be a very relevant factor in determining whether you have a dominant Dominican Republic nationality?

And I'm talking because we already talked about objective criteria. But wouldn't this be different from the example where I took a nationality because I wanted to learn baseball and learn how to dance, as opposed to I did everything to invest, I did everything related to investment, so how come a chapter related to investment that talks about protection of investment not be relevant, the fact that I acquired nationality because I wanted to invest?

MR. BALDWIN: I think my first response, Mr. President, would be that under your hypothetical scenario, you would definitely not be dominantly and effectively Dominican. So, let me say that, I think there's a very basic reason for this, and it goes precisely to Professor Vinmeas's, I think, first question. And that is the--although the--we look for the analysis of the dominant and effective nationality issue under customary international law and some other sources of law, and that's where we get the factors that arise from that test.

But in CAFTA, dominant and effective nationality arises differently than it does in Nottebohm and other instances where it arises as a matter of diplomatic protection. And this is precisely--precisely because Nottebohm--I'm sorry, not Nottebohm. Because CAFTA--when dominant and effective nationality is put in CAFTA, it's put in the context of an investment regime. It presupposes an investment in CAFTA.

So, when you're looking at CAFTA--and you don't look at CAFTA dominant and effective nationality the same way even though the same factors that are pulled from customary international law are relevant. When you look at how you assess the probative value of those factors, you don't look at that.

And the reason that's our position is, again, if you separate a passive investor who just buys shares, never goes into the company. Let's do that. Every managing investor, every investor that's working some project or investment in that host country will have these economic ties.

So, we're not suggesting that, you know, they shouldn't be discussed. It's fine for Respondent to discuss it. I understand why they're trying to make that seem like some big connection.

I think the point that was made this morning was that the probative value of that are slim. Because it is precisely for the reasons that CAFTA presupposes, which is an investment in the country, as to why those economic things are made.

And the thing I would ask the Tribunal is--and this is where the Tribunal will decide how it views the positions put forward between the Parties. Because if--if the Tribunal views some economic connection as something not necessary for the management of the investment, then I think the Tribunal would be right to consider--I think it would be a very minor consideration, but I think the Tribunal can say, "Look, here's an economic connection, but one that's not tied to the actual presupposition of the CAFTA investment."

Here I think the economic conditions that we--that I talked about earlier and that we've talked about in the papers are things that necessarily arise only from the investment, and that's precisely what CAFTA talks about.

So in the framework of CAFTA, differently than how you might do it in a diplomatic protection thing, this sort of economic connections presuppose, therefore, it makes it, you know, I would say irrelevant.

But even if you don't agree with me, it certainly lessens the relevancy of it when Mr. Ballantine has to open up a bank account to do it. He has to buy--he may not have to buy a house, but he has to live somewhere because he's down there managing the project.

So, these sort of economic connections are a necessity tied to that. So that's the framework that we would put that in.

PRESIDENT RAMÍREZ HERNÁNDEZ: Respondent.

MR. DI ROSA: Mr. Chairman, when an investor such as Mr. Ballantine goes to a different country, and amongst the many things that he does, he decides that he wants to be a Dominican investor, then it seems to us that's highly relevant by definition, right?

He has testified extensively that they acquired the Dominican nationality for business and commercial purposes. That's been their main argument all week long. And certainly that would seem to be one of the factors that has to be taken into account.

Under the DR-CAFTA nationality provisions, you have to be dominant and effective national of the other state at two critical times, when the claim arose, when the claim was filed.

That means that as of 2011, they had to be dominant U.S. nationals, and they weren't. At that time they had--all their--you know, all their lives essentially centered in the Dominican Republic.

They say they traveled a lot to the U.S., and
that's fine. That happens fairly frequently with people who are dual nationals. But they were permanent residents in the Dominican Republic, and there are objective criteria that have to be assessed as of that point in time of the two critical dates.

And as of those two points in time, they had—they had moved all their activities, so to speak. You know, their finances were centered in the Dominican Republic. Their lives were centered in the Dominican Republic, and then they took other steps like acquiring permanent residency, and then, finally, acquiring the nationality voluntarily.

And if their reason was precisely to become Dominican investors, then surely that's relevant.

PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. Now I have a second question, but this goes to the national treatment claim, and I go to Respondent.

Let me go to your Statement of Defense in Paragraph 148. And I think Claimant has—I think both Parties agree—and correct me if I'm not being truthful—agree with what is the standard to be applied on the national treatment.

And the first element is whether the domestic investor is an appropriate comparator. The second element is whether the disputing investor was, in fact, accorded a less favorable treatment than its domestic.

Weren't you required to put evidence on why these projects were not in like circumstances, one; and, second, whether there was—these projects had a legitimate policy reason, which you have reinstated throughout this hearing, which is the environment.

MS. SILBERMAN: So, Mr. Chairman, as the United States stated in its non-disputing party submission,

because a Claimant bears the burden of proving its claims, that includes the burden of proof on national treatment. And I can direct you toward the exact paragraph, if that would be helpful.

PRESIDENT RAMÍREZ HERNÁNDEZ: And I go to that, because I thought that that was going to be your answer.

So you—the Claimant comes forward—and I'm trying to understand how the burden of proof plays here, and that's where the question is going.

The Claimant says, well, the reasons they gave me was the slopes, the environmental fragility, the natural risk. They put forward and say, well, these are the projects that are within some radius. And how can the Claimant know that there were different conditions on the other project? They come forward with evidence, saying, "Well, this is how it plays."

So, in the sense, haven't they discharged the burden by saying, "Well, these are all these projects. The stated reasons are the same. Both of them—all the projects talk about environmental fragility, all of them talk about natural risk."

So the Claimants have said, "Well, all of them are in like circumstances."

So wasn't your burden to say, "Well, they were not," for all the reasons you have stated, which was the environmental conditions in Jamaica were very different from the other ones.

And the other—the only environmental conditions that are similar or that are like are the Aloma. So even to—even to prove that Aloma had the same circumstances, wouldn't you have needed to supply evidence and say, "Well, this is because"—and talk about soil. Wouldn't you need also to have put evidence to say, "Well, the soil is the same"?

So that's why—I mean, you are raising as a difference the comparators on the environmental elements. So wouldn't you be required to prove that all these environment elements are similar here and different in the other projects?

MS. SILBERMAN: So as the United States explains, the Claimant is required to establish that there is unjustified differential treatment between investors who are in like circumstances.

So the burden is not on the Respondent to provide justification. The Claimant has to establish with evidence that there was—that there were two investors in like circumstances that were treated differently, and that the treatment—that the difference in treatment was unjustified.

Now, to the extent that there's a question about
I wasn't told. Mr. Ballantine was told that the--that his

MR. BALDWIN: It was under--certainly under

PRESIDENT RAMÍREZ HERNÁNDEZ: Just to be clear,

are reduced more than 50.

We don't know why it was reduced. We don't know why others

reduced. They were reduced by 50. We don't know why 50.

So the Ballantines requested that the fine be

the fine being reduced, and how much the fine is reduced.

And as far as we know, there are no guidelines at

all for when a fine is reduced, what the factors are for

the fine being reduced, and how much the fine is reduced.

And we understand that to be a purely discretionary thing.

So the Ballantines requested that the fine be

reduced. They were reduced by 50. We don't know why 50.

We don't know why it was reduced. We don't know why others

are reduced more than 50.

So, as far as we can tell, it's a pure
discretionary issue.

PRESIDENT RAMÍREZ HERNÁNDEZ: Just to be clear,
you did not contest the 50. You pay, at the end, that
fine.

MR. BALDWIN: It was under--certainly under
protest, because we were told that the--or Mr. Ballantine.
I wasn't told. Mr. Ballantine was told that the--that his
environmental permit would not be considered unless he paid

the fine. So he paid it under protest, because he wanted
the environmental permit considered.

And we're not aware of another situation where an
environmental permit was held up based on the waiting for
the payment of a fine.

MS. SILBERMAN: Just a couple of comments,

Mr. President.

First of all, the fine was imposed in November of
2009 and was paid, I believe, sometime in 2010, which would
be before the three-year cutoff for purposes of

Article 10.18.1 of DR-CAFTA. So I haven't seen at least
recently any claim by the Ballantines in respect to this
particular fine.

As Ms. Taveras mentioned the other day, the fine
was calculated initially by reference to a statutory
formula that took into account the amount of the investment
that the Ballantines alleged to have made in this
particular project.

The Ballantines have made a big show of alleging
that the Dominican Republic supposedly hasn't collected on
fines. And it can be difficult to collect on fines. I'm
sure people have outstanding parking tickets.

And what the Ministry did in this situation by
saying "If you have an outstanding fine, we won't talk to
you in respect to the permit" is similar to the way you
can't get a driver's license in some places if you haven't paid your parking tickets.

PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. Any other questions?

ARBITRATOR CHEEK: No, nothing further.

ARBITRATOR VINUESA: No.

PRESIDENT RAMÍREZ HERNÁNDEZ: Any other comment by Claimants or Respondent, or anything that they want to raise?

MR. DI ROSA: Just a procedural point, I guess, Mr. Chairman, to confirm that the Dominican Republic has wired the funds, that $150,000 that were required for purposes of this phase of the proceeding.

And I just wanted to thank the Tribunal and everyone present here for what has been a productive session.

Thank you.

PRESIDENT RAMÍREZ HERNÁNDEZ: Claimant.

MR. ALLISON: We join Mr. Di Rosa and his kind words to us back to him and thank the Tribunal as well. And I'd also like to specifically thank our assistants here today, Larissa Diaz, who has worked tirelessly all week, and also Leslie Gil, who is here from the Dominican Republic.

Thank you.

PRESIDENT RAMÍREZ HERNÁNDEZ: I would like to thank everyone for being present here today.

Something else I don't know how to do is to put a PDF file on the screen, and both Parties have shown me how to do it. That's one of the many abilities I do not have.

I would like to thank everyone, the stenographers, the interpreters, and, of course, Julian. He has been very helpful to the Tribunal. And, of course, Marney, Raúl. I would like to thank all of you.

One always learns things in these cases, and oftentimes you learn things that you did not want to know; for example, the difference between percentage and degree of a certain slope.

But I learned two things, and I leave here with those things. Of course, deliberations are going to start tomorrow for the Tribunal, and we're going to make a decision in connection with post-hearing briefs.

At any rate, I want both Parties to be assured that we don't think that we're going to ask for long or lengthy, rather, post-hearing briefs. We're going to discuss this.

So you take two things from these experiences, and I take two things out of this hearing. Michael and Lisa, a very nice couple, hard-working couple. And, also, I did not know that the Dominican Republic had such spectacular forests.

So I would like to thank everyone. And you're going to hear from us soon. I don't know how soon, but you will hear from us.

Thank you very much.

(Whereupon, at 4:46 p.m., the Hearing was concluded.)

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