

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

AND

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

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In the Matter of Arbitration Between: :
MICHAEL BALLANTINE, LISA BALLANTINE, :
:
Claimants, : PCA Case No.
:
and : 2016-17
:
THE DOMINICAN REPUBLIC, :
:
Respondent. :
:
-----x Volume 1

ORAL HEARING

Monday, September 3, 2018

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

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

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

ALSO PRESENT:

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Secretary to the Tribunal

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P R O C E E D I N G S

1 PRESIDENT RAMÍREZ HERNÁNDEZ: Morning, everyone.

2

3 Here we are. I would like to welcome you to the hearing in

4 the arbitration under the CAFTA of Michael and Lisa

5 Ballantine v. The Dominican Republic, this Case 2016/17.

6 I want to welcome you on this Labor Day. My name

7 is Ricardo Ramírez Hernández, and I'm very pleased and

8 privileged to be accompanied by Marney Cheek and Raúl

9 Vinuesa, who will be my co-arbitrators in this case.

10 First of all, two things. I'm speaking in

11 English, as bad as you can see, but I will switch to

12 Spanish at some point. I want to be fair with both Parties

13 and to be fair with myself, which--to speak Spanish, which

14 is my native language.

15 The hearing will be--is being broadcast live. So

16 I would hope that you make an extra effort to make us look

17 good in internet.

18 Finally, before we start with the Claimant's

19 presentation, I would want to ask whether there is any

20 procedural issue that any party would want to raise.

21 I understand that Parties have agreed on the video

22 conference protocol. But if there's anything else that any

23 party might raise--might want to raise before we start with

24 the Claimant presentation, please do so.

25 MR. BALDWIN: We have nothing to raise from the

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1 Claimant side, Mr. President.

2 PRESIDENT RAMÍREZ HERNÁNDEZ: Thank you.

3 Respondent?

4 MR. Di ROSA: Mr. Chairman, we have just one

5 issue. In the procedural order that was issued by the

6 Tribunal last week, the Tribunal agreed to have the experts

7 make 25-minute presentations.

8 In some proceedings, the--the presentation that is

9 made by the expert directly to the Tribunal is essentially

10 the equivalent of the direct examination, and in fact, is

11 the limit for the examination.

12 And my question was simply, is that, in fact, all

13 the time that is available for the direct, or can the

14 Parties pose additional questions to the expert in addition

15 to the 25-minute presentation?

16 PRESIDENT RAMÍREZ HERNÁNDEZ: I think that what

17 the Tribunal was referring to exactly is that it will be in

18 place of direct. So they will have 25 minutes.

19 May we hear from the Claimant, please.

20 OPENING STATEMENT BY CLAIMANTS

21 MR. ALLISON: Members of the Tribunal, thank you

22 for your time and your effort with respect to this

23 important proceeding.

24 I'd like to introduce our side of the table. This

25 is my partner, Teddy Baldwin. My name is Matthew Allison.

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1 This is Michael, and two down, Lisa Ballantine, the

2 Claimants. Leslie Gil and Larissa Diaz are our assistants.

3 Michael and Lisa Ballantine are U.S. citizens from

4 Chicago, Illinois. The Ballantines invested in the

5 Dominican Republic, and their investments are entitled to

6 the protections afforded by the Central American Free Trade

7 Agreement.

8 This hearing is the culmination of their

9 seven-year effort to seek redress for the damages they have

10 suffered as the result of the Respondent's violations of

11 CAFTA. Those violations have wrongfully prevented the

12 Ballantines from expanding their established successful

13 residential ecotourism development in the mountains of

14 Jarabacoa, Dominican Republic.

15 A picture is worth many words. This is Jamaca de

16 Dios. What was abandoned and largely deforested mountain

17 land is now a thriving residential community. Beautiful

18 vacation homes climb up the mountain. These are just a few

19 of the scores of luxury homes that have been built as the

20 first part of Jamaca de Dios.

21 And this land at the top of this slide, this

22 softly rising land up to the ridgeline is what this

23 proceeding is about. One simple fact brings us here today.

24 One simple fact cuts through all the noise created by the

25 hundreds of pages of justifications now put forward by the

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1 Respondent to explain its actions. One simple fact
2 mandates an award for the Ballantines.

3 That simple fact is that while the Ballantines
4 were repeatedly denied the opportunity to develop every
5 square meter of their valuable Phase 2 land, not a single
6 other mountain residential project in the entire country
7 has been denied the opportunity to develop its land. Not
8 one.

9 The evidence already submitted to the Tribunal is
10 plain and overwhelming. Respondent has discriminated
11 against the Ballantines, and it has illegally expropriated
12 their investments, causing tens of millions of dollars in
13 damage.

14 The Tribunal has seen the evidence of at least a
15 dozen comparator projects in La Vega Province, all within
16 just a few miles of Jamaca de Dios. These are all
17 Dominican-owned developments that, like Jamaca, seek to
18 take advantage of the beauty and the climate of the
19 Dominican Central Mountain Range, and every single one of
20 them has been allowed to proceed, either formally or
21 informally.

22 After first relying on a slope law that it applied
23 only to Jamaca as a basis for its multiple denials,
24 Respondent now struggles to find a belated environmental
25 justification for its dramatically disparate treatment of

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1 the Ballantines, trying to present some legitimate reason
2 why only Jamaca was refused a permit.

3 But its efforts are futile and its arguments are
4 insufficient. Ultimately, Respondent's submission cannot
5 refute several key facts that prove the treaty claims of
6 the Ballantines.

7 First, the Respondent denied the Ballantines the
8 right to develop all of their land because less than
9 15 percent of that land had slopes in excess of 60 percent.
10 By contrast, Respondent has expressly permitted multiple
11 Dominican mountain projects in and around Jarabacoa despite
12 all of these projects having slopes in excess of
13 60 percent, every single one.

14 This ever-increasing list includes Paso Alto,
15 Quintas del Bosque Phase 1 and Phase 2, Jarabacoa Mountain
16 Garden, Mirador del Pino, and La Montaña.

17 Second, Respondent affirmatively communicated and
18 collaborated with these Dominican projects to ensure their
19 receipt of a formal environmental license, but offered no
20 such collaboration with the Ballantines, refusing to even
21 issue terms of reference under Dominican law.

22 The Tribunal, by contrast, has seen the extensive
23 correspondence between the MMA and projects like Jarabacoa
24 Mountain Garden, Mirador, and Quintas, which stand in stark
25 contrast to the curt and repeated rejections that it gave

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1 to the Ballantines.

2 Third, Respondent has turned a blind eye and
3 allowed multiple Dominican landowners to develop their
4 property without a permit. This list includes
5 Rancho Guaraguao, Sierra Fría, Los Aquelles, Monte Bonito,
6 and, of course, Aloma Mountain, a mere stone's throw from
7 Jamaca de Dios.

8 Only now, since the initiation of this
9 arbitration, has Respondent tried to cover some of its
10 tracks, purporting to find most of those projects in a
11 failed effort to lessen the manifestly disparate treatment
12 of the Ballantines.

13 Fourth, Respondent denied the Ballantines the
14 right to develop because their property was located in a
15 national park, while it allowed Dominican-owned properties
16 to develop in national parks and protected areas. Indeed,
17 Rancho Guaraguao has had a massive project for more than a
18 decade at 1900 feet above sea level--meters above sea
19 level, in the middle of the Valle Nuevo National Park, and
20 respondent even paved a road right to its front gate.

21 Moreover, Aloma Mountain, right next to Jamaca,
22 continues its march to create a 115-lot subdivision despite
23 being in the Baiguato National Park. The Tribunal has seen
24 the dramatic evidence of the continued development of
25 Aloma Mountain even since the filing of this arbitration.

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1 This is Aloma in 2015, and this is Aloma in 2017.
2 These pictures entirely refute any claim that a modest fine
3 of Aloma or the punitive denial of its permit has stopped
4 its development.

5 Fifth, Respondent discriminated against the
6 Ballantines by putting them in the park at the same time it
7 excluded Dominican-owned properties from the park, even
8 though those properties more directly impact the
9 Baiguato River and the Baiguato Falls, which is what the
10 park was decreed to protect. And it expropriated their
11 property when it relied on the park as a basis to deny
12 their Phase 2 permit.

13 At the end of the day, it really is as
14 straightforward as it sounds. Trying to avoid any real
15 evaluation of whether JDD, Jamaca de Dios, is
16 environmentally different than any of these projects,
17 Respondent instead fills its submissions with arguments:
18 The Ballantines "ignore the nature and inherent complexity
19 of environmental protection." The Ballantines' claim
20 derived from a "fundamental misunderstanding of the nature
21 of environmental assessments and of the practical
22 limitations inherent in environmental projection."

23 Of course, it remains entirely unclear what those
24 practical limitations are and how they justify denying the
25 Ballantines at the same time it was approving other

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1 projects.

2 At the end of the day, these nonspecific
3 assertions cannot trump the reality of what's happening on
4 the ground in La Vega Province. And despite its
5 after-the-fact efforts, Respondent cannot identify even one
6 environmental characteristic or sensitivity of Jamaca that
7 does not exist in the other projects.

8 There is absolutely nothing unique about the
9 location, the altitudes, the slopes, the soils, the water,
10 or the biodiversity of the Ballantines' expansion property,
11 and, thus, no legitimate reason for the Respondent's
12 repeated and singular denial of Jamaca's expansion request.

13 And so while the Respondent now seeks to divert
14 the Tribunal's attention with long discussions about the
15 difference between permitting and policing, about endemism
16 and about the environment being a "complex system of
17 interconnections," the expansion and the development of the
18 mountains surrounding Jarabacoa continues unabated, and the
19 only investors who have been affirmatively prevented from
20 participating in that expansion are sitting before you
21 today.

22 The Respondent's arbitral justifications are
23 simply that: Environmental concerns generated for the
24 purpose of defending this arbitration.

25 This is especially egregious, given, one, the

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1 complete absence of any contemporary discussion of these
2 concerns in the evaluation and permitting of Phase 1, in
3 Respondent's internal evaluations of Phase 2, or in
4 Respondent's multiple denial letters to the Ballantines.

5 Two, the absence of any of these factors in
6 contemporary Dominican regulations concerning land
7 development. And most importantly, the absence of any
8 legitimate environmental or ecological differences between
9 Phase 2 and the multiple Dominican projects that have been
10 permitted or simply allowed to develop. These projects,
11 all owned by Dominicans, could proceed.

12 This simple chart before you sums it up. It
13 compares Phase 2 to just eight Dominican comparators, and
14 quickly reveals that the project shares similar slopes,
15 altitudes, forests, soils, water, and environmental
16 characteristics, but that only Jamaca de Dios, Phase 2, has
17 been denied the ability to develop its land.

18 Indeed, Claimant's environmental experts make it
19 abundantly clear with evidentiary detail that Jamaca was
20 not ecologically unique in any way as compared to these
21 other projects, and Respondent's experts don't even try to
22 argue that there are significant environmental differences
23 between Jamaca and these projects. Their focus is simply
24 on the notion that Jamaca was worthy of protection.
25 Indeed, they do not even appear to have visited the other

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1 projects.

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

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

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

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

22 In the mid-2000s, the Ballantines began to acquire
23 tracts of mountain property in Jarabacoa, which is about
24 two hours north of Santo Domingo, with the vision of
25 developing an upscale mountain residential and ecotourism

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1 community.

2 This was consistent with the Respondent's own
3 policy. The Dominican Republic was actively seeking
4 investment in Jarabacoa, having passed law 158-01 in
5 October of 2001, declaring Jarabacoa and Constanza, next to
6 each other in the La Vega Province, to be mountain tourism
7 poles and offering tax incentives to investors.

8 The Ballantines, without issue, obtained the
9 necessary permits in December 2007 from the Dominican
10 Ministry of Environment, the MMA, and they developed
11 Phase 1 of Jamaca de Dios.

12 Phase 1 was a luxury gated community with more
13 than 90 home sites, common areas, a fine-dining restaurant,
14 and the highest quality private mountain road in the
15 Dominican Republic.

16 This is a map of Jamaca de Dios' site plan. And,
17 indeed, the Ballantines had purchased land and had always
18 intended to develop a second phase of Jamaca higher up the
19 mountain where the climate and the views are even more
20 spectacular.

21 At no time during Phase 1 permitting did the MMA
22 indicate that the slope of the Ballantines' mountain
23 property was an issue of concern or that any portion of the
24 land in Phase 1 could not be developed because it exceeded
25 the slope limitations set forth in Article 122; this

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1 despite the fact that 17 percent of Phase 1 has slopes in
2 excess of 60 percent.

3 The MMA also expressed no concerns about altitude,
4 endemic species, water flow, cloud forests, road layout.
5 These, of course, are among the excuses that the Respondent
6 has now belatedly tried to put forth as the real reason why
7 the second phase of the Ballantines' development was
8 rejected.

9 The development of Phase 1 of Jamaca required that
10 the Ballantines engage extensively and frequently with the
11 MMA. After its approval of Phase 1 of Jamaca, the MMA
12 conducted frequent inspections of Jamaca to ensure its
13 ongoing environmental compliance, showing a remarkable
14 capacity for policing despite its claims now about the
15 difficulty of such efforts.

16 The MMA reviewed the semi-annual environmental
17 reports, the ICA reports, submitted by Jamaca under
18 Dominican Law. Indeed, those are the reports that the
19 evidence now show only Jamaca was required to provide.

20 And the Parties exchanged communications regarding
21 various topics. These communications are in the record and
22 none specify any concerns about environmental issues that
23 the Respondent now trumpets.

24 The approval of Phase 1 gave the Ballantines a
25 legitimate and reasonable expectation that their efforts to

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1 expand Jamaca de Dios would be subject to the same
2 permitting process and standards and that they would be
3 treated equally to similarly situated Dominican projects.

4 The Ballantines worked to develop the
5 infrastructure necessary to support not just the immediate
6 needs of its Phase 1, but also the anticipated future needs
7 of Phase 2. They created robust networks to supply
8 electricity, high-speed internet, water throughout the
9 property. They hired 24-hour security and maintenance to
10 provide for the safety and comfort of their residents and
11 guests. They created recreational and other common areas
12 to enhance the social life of the property, such as a
13 spring-fed lake, a sports area, fitness center, nature
14 trail grounds, nature trails, and a playground.

15 They built a fine-dining restaurant, Aroma de la
16 Montaña, with stunning views of the valley, which quickly
17 became a popular dining destination not only for residents
18 of Jamaca, but for the wider community of Jarabacoa and for
19 visiting tourists.

20 And most importantly, the Ballantines invested
21 significant amounts to design and build a high-quality,
22 environmentally sound road throughout the project.

23 This is an overhead image of Jamaca de Dios:
24 Phase 1 at the top, Phase 2 at the bottom. You can see in
25 Phase 1 the Ballantines' road. The quality of that road is

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1 a critical factor to this story.

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

8 Unfortunately for the Ballantines, the neighboring
9 development, Aloma Mountain, which you can see directly to
10 the west of--excuse me--to the east of Phase 2, was owned
11 by a politically connected Dominican who wanted the
12 Ballantines' road for access to his property. And thus
13 began the Ballantines' troubles.

14 That owner, Juan José Domínguez, is the former
15 brother-in-law of the then-Dominican president, Leonel
16 Fernández, and the son of the then-mayor of Jarabacoa, and
17 Domínguez wanted to remove competition for his complex.

18 Now, that proved difficult because Jamaca de Dios
19 proved to be a resounding success. The first phase of the
20 development sold out largely to a Dominican clientele.
21 There were more than 100 names on a waiting list for lots
22 further up the mountain.

23 In less than five years, Jamaca had become the
24 most popular mountain development in the Dominican
25 Republic. No Respondent witness disputes this.

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1 Having built a successful ecotourism complex and
2 created a brand associated with that excellence, the
3 Ballantines began work on their plans to expand Jamaca.
4 They intended to divide their land higher up the mountain,
5 this land, into 70 more luxury home sites.

6 The Ballantines intended to make a simple
7 extension of their high-quality road up into Phase 2. The
8 testimony about that is plain. Jamaca had the experience
9 and the equipment necessary to construct the road, and the
10 engineering necessary to build the Phase 2 road would be
11 less intensive than Phase 1.

12 Additionally, given their substantial development
13 and construction experience and the investments that Jamaca
14 had made in equipment and engineering personnel, Jamaca
15 intended to build the luxury homes in Phase 2.

16 The Tribunal has seen the un rebutted testimony of
17 Wesley Proch which details Jamaca's creation of a
18 construction arm in order to undertake the home
19 construction activity that would have been associated with
20 the expansion to Phase 2.

21 But Phase 2 was to be more than just valuable
22 additional lots and the homes that would be built on them.
23 The Ballantines also intended to construct a boutique hotel
24 and spa in Phase 2. There were no mountain hotels in the
25 region and the commercial opportunity was manifest.

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1 The Ballantines invested significant time and
2 effort into the development of this concept. They engaged
3 an architect to design the property. They engaged a Taíno
4 Indian expert to help ensure the hotel's cultural
5 appropriateness.

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

9 They contracted with respected Dominican architect
10 Rafael Selman to design the Mountain Lodge, and the
11 Tribunal has the unrebutted witness testimony of David
12 Almanzar, confirming the significant effort undertaken with
13 respect to the Mountain Lodge. Detailed studies were done
14 and engineering drawings were created.

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

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

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

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

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

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

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

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

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

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

17 The Ballantines' Phase 2 plan for 50 additional
18 lots for the hotel and spa and for a lower development
19 project were all described in the Phase 2 submission by the
20 Ballantines for CONFOTUR approval. Approval was sought in
21 August of 2010 and Respondent promptly granted the
22 Ballantines' provisional tax-exempt status in December of
23 2010.

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

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

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

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

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

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

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1 Phase 2 of Jamaca.

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

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

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

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

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

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

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

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

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

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1 any expansion of JDD.

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

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

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

21 However, contemporaneous with these denials, the
22 MMA was permitting the development of competing mountain
23 projects that were owned by Dominicans despite similar or
24 greater slopes at those projects, and it has continued to
25 permit Dominican-owned projects: Mirador del Pino, Alta

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1 Vista, Jarabacoa Mountain Garden, Quintas del Bosque
2 Phase 2, La Montaña.

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

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

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

19 And that may be true in the Dominican Republic.
20 Indeed, the Tribunal has seen their dismal international
21 ranking with respect to ethics and corruption. The World
22 Economic Forum ranked it 135th out of 137 countries in that
23 regard. But the law applicable here today, the Central
24 American Free Trade Agreement, cannot justify Respondent's
25 arguments.

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1 As the MMA began to realize that its reliance upon
2 slope restrictions would be exposed, its official search
3 for a new pretext to deny the Ballantines' permit request.
4 And so in their last denial letter, in January 2014, two
5 and a half years after its initial denial, the MMA invoked
6 a purported new justification for its permit rejection.

7 For the very first time, MMA asserted that the
8 Ballantines' Phase 2 property, more than 283,000 square
9 meters, was located within the Baiguate National Park, a
10 protected area in which development was purportedly
11 restricted.

12 That designation was made by Presidential decree
13 in August 2009, and this January 2014 letter was the very
14 first time the MMA had relied on the existence of the park
15 as a basis for denying the additional development of
16 Jamaca de Dios, four and a half years later.

17 And while the Ballantines acknowledge the
18 Dominican Republic's right to appropriately create national
19 parks for genuine public purposes, it cannot discriminate
20 against investors in creating this park, which it did here.
21 The park's boundaries were drawn to prevent expansion of
22 Jamaca de Dios. By contrast, comparator Dominican-owned
23 projects were expressly drawn out of any protected areas,
24 allowing those landowners continuing freedom to develop
25 their own mountain resort properties.

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1 Respondent has expropriated the Ballantines'
2 investment and must compensate the Ballantines for its
3 significant commercial value.

4 As the Tribunal has seen, Respondent has now moved
5 away from slopes as the justification for its disparate
6 treatment of Jamaca. Because the evidence is plain. All
7 mountain projects have some steep slopes.

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

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

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

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1 province.

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

6 Briefly, Respondent now claims that the altitude
7 of Phase 2 was a significant concern and was a critical
8 factor in the evaluation of the project. This doesn't ring
9 true.

10 First, during the course of all its inspections
11 and technical committee meetings about Phase 2 and
12 throughout its repeated denial letters, not once did the
13 MMA or its engineers specifically cite altitude as a
14 concern

15 Second, there's absolutely nothing in Dominican
16 law at the time that identified altitude as a consideration
17 in the evaluation of a project's environmental viability.
18 And the altitude restriction that Respondent has now rushed
19 to enact after this arbitration was filed would not be
20 triggered by the highest point of Phase 2.

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

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

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

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

15 The Respondent talks about biodiversity and
16 endemic species at Jamaca, but doesn't even attempt to
17 argue that other projects don't share these same ecologies.

18 Evaluation files produced by Respondents for these
19 projects proves any such contention untenable. And the
20 expert witness statement of Jens Richter and Fernando Potes
21 fully catalog the environmental attributes of Jamaca,
22 evaluating them next to these comparator projects. And
23 their testimony confirms there is nothing unique about the
24 Jamaca ecology that justifies the discriminatory treatment
25 the Ballantines faced.

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1 Indeed, these reports show that the
2 microenvironment surrounding the proposed expansion area of
3 Jamaca had been fragmented due to years of prior
4 agricultural use as compared to the more pristine mountain
5 forest environments of other approved development projects.

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

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

18 Indeed, the first denial letter plainly told the
19 Ballantines that the MMA would consider any additional
20 property that the Ballantines might propose, but that all
21 283,000 square meters of Phase 2 land was good only for
22 growing fruit trees.

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

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1 Mountain Garden, Quintas, and La Montaña. These project
2 were not abruptly denied. The engagement between MMA and
3 these projects is compelling, unavoidable, and in the
4 record before the Tribunal.

5 The Respondent did not wait for the magic words "I
6 promise not to build on slopes" before affirmatively
7 advising these project how to secure their permits and then
8 issuing those permits.

9 Second, the Ballantines desperately did try to
10 engage the MMA, defined a solution to any legitimate
11 environmental concerns. That evidence is in the record as
12 well. Michael Ballantine himself wrote to the Minister of
13 MMA, Bautista Rojas Gómez, making clear that he requested
14 his intervention in the evaluation of the Jamaca de Dios
15 extension project.

16 He says explicitly that as with the first page of
17 the project, they would not build on slopes in excess--in a
18 pitch of less than 30 degrees, which was roughly equivalent
19 to 60 percent.

20 Right here. According to the aforementioned, the
21 slopes where our project would be located are under such
22 percentage. Indeed, they expressly promise to work
23 cooperatively with the MMA with respect to the Phase 2
24 development. We are very willing to work with the
25 technicians of the Ministry of Environment to execute

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1 what's necessary to make this project a landmark in
2 ecotourism.

3 The Tribunal has also seen the efforts of the U.S.
4 Embassy in this regard and the efforts of the Dominican
5 Foreign Investment Ministry who specifically asked MMA to
6 work with the Ballantines to find a solution.

7 This is the Office of the Foreign--the Center of
8 Exports and Investments of the Dominican Republic. In this
9 letter, the Minister writes, "The Jamaca de Dios project is
10 willing to accept any recommendations from the Ministry
11 relating to the execution project."

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

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

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

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

14 Paso Alto, located on the same mountain ridge as
15 Jamaca only two miles away on Loma Barrero just across the
16 Baiguete River. Permit received in 2006 to subdivide more
17 than 50 lots. Paso Alto spans the ridge line of Loma
18 Barrero and Respondent Witness Navarro now confirms that
19 17 percent of this project has slopes in excess of
20 60 percent.

21 And indeed in 2007, the MMA allowed Paso Alto to
22 build a shortcut road to its project beginning at
23 850 meters above sea level through this pristine forest.
24 That road contains some 20 narrow switchbacks and proceeds
25 to an altitude of 1160 meters above sea level.

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1 The Tribunal has also seen the unrefuted testimony
2 of Omar Rodriguez and his desire to joint venture with
3 Jamaca given the strength of the brand.

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

12 And Respondent now confirms that 15 percent of the
13 project has slopes in excess of 60 percent. And if we
14 superimpose those slopes over the approved site map for
15 Phase 1, we see several lots approved for development
16 despite slopes in excess of 60 percent.

17 Quintas wanted to expand just as Jamaca did.
18 Quintas' expansion request began in February of 2014, one
19 month after the Respondent's final rejection of the Phase 2
20 request. The owner saw terms of reference to expand his
21 project, and the terms of reference were promptly issued by
22 MMA despite their refusal to issue terms to Jamaca. That
23 then began a long period of collaboration that ultimately
24 resulted in the issuance of an expansion permit for at
25 least 26 additional lots.

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1 Respondent confirms now that at least 22 percent
2 of QDB Phase 2 has slopes in excess of 60 percent. This
3 map reveals the concentration of those slopes. And,
4 indeed, this approval was granted only three weeks after
5 MMA communication with José Roberto Hernández, who will be
6 a witness here, about slopes that exceed 60 percent in the
7 development.

8 This is a letter. They say, "Please submit a
9 revised site map. Please relocate some lots. Permit
10 granted." Entirely different than how the Ballantines were
11 treated.

12 Jarabacoa Mountain Garden, also located 2 miles
13 from Jamaca. This property soars up from the Baiguata
14 River just before the falls through a mature forest to an
15 altitude of almost 1100 meters connecting at the top of its
16 project with the bottom of the Paso Alto project.

17 JMG was granted a license from the MMA in
18 December 2013 to develop 115 residential lots. That permit
19 was granted only one month before the final rejection of
20 the Ballantines despite Navarro now confirming at least
21 43 percent of the project has slopes in excess of
22 60 percent.

23 This cannot be overstated. Respondent admits that
24 nearly half of the entire property is on a slope greater
25 than what is supposedly permitted by Article 122, and yet

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

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

17 Internal MMA documents concerning the approval of
18 JMG show the stark difference between how this project,
19 despite its greater environmental impact, was treated
20 versus how the Ballantines' expansion request was treated.
21 The Tribunal will hear from Mr. Navarro, who was in charge
22 of the MMA evaluation process at the time. He is now
23 forced to try to argue there are differences between the
24 two projects that support the denial of Jamaca at the very
25 same time JMG was approved. One argument he tries is that

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1 the roads of JMG would be less impactful because they
2 wouldn't have to cross contour lines. This map shows
3 that's not true.

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

11 It's unclear how Jarabacoa Mountain Garden would
12 adapt or adjust its slopes to bring them down from
13 60 percent to 30 percent, but they didn't do that. They
14 didn't reduce the number of lots they wanted to develop by
15 80 percent. Instead, they were approved. The Tribunal has
16 seen the documents from MMA's own files and will see them
17 later this week concerning the evaluation and approval of
18 this project. The MMA didn't care about 115 lots directly
19 above the Baiguata River despite acknowledgment that
20 project runoff would impact the river. It didn't care
21 about a site plan that called for these lots to be on
22 slopes exceeding 60 percent.

23 It didn't care that the proposed roads would cut
24 directly across contour lines and have to be dangerously
25 steep. It didn't care about active water on the property

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1 "all year long" and that there were unexplained pipes
2 already built into those waterways.

3 It didn't care about the potential habitat
4 destruction, specifically noted by inspectors. It didn't
5 care about the existing evidence of erosion and the
6 potential for landslides specifically noted by inspectors.
7 It fully approved the project without modification or
8 condition.

9 The differential treatment here is unavoidable and
10 dispositive. JMG has steeper slopes than JDD, and this was
11 not a barrier to approval. The very same environmental
12 contentions that Respondent now puts forth in this
13 proceeding as justification for denial of Jamaca were not a
14 barrier to the approval of Jarabacoa Mountain Garden.

15 Within two months of each other, Navarro and the
16 MMA accepted the Dominican project's appeal of its original
17 denial and issued a permit and rejected the Ballantines'
18 appeal of their original denial and refused a permit.

19 Mirador del Pino, located on a mountain ridge to
20 the north of Jamaca. It was granted permission to
21 subdivide its property into 77 buildable lots in December
22 of 2012 despite the fact that at least 7 percent of the
23 project has slopes in excess of 60 percent. Mirador
24 requested and received terms of reference, and in March of
25 2011 the Respondent did not deny the permit request but

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1 instead advised Mirador that several of its lots were too
2 close to a ravine that was a source for a tributary of the
3 Yaque River.

4 The MMA identified a small portion of the
5 property, about 10 percent of the 84 lots that Mirador
6 sought to develop that needed to be removed, eliminated,
7 seven eliminated lots from the submission. The MMA later
8 identified concerns about the slopes at Mirador del Pino,
9 but this also did not prompt a refusal of the request to
10 develop. Instead, it simply said, "In addition, the lots
11 with slopes equal to or more than 60 percent will be
12 excluded," according to Article 122.

13 Of course, one year earlier in 2011, Respondent
14 did not identify any specific portion of the Jamaca
15 expansion that needed to be removed from its application.
16 It simply rejected the entire application without comment.

17 In April 2012, a field inspection team visited
18 Mirador and made these observations. "We recommend that
19 all the lots which are on the banks of sources of water and
20 have a very steep slope which is over the limits allowed by
21 64-00 are not used for construction."

22 The inspectors did not recommend that the entire
23 project be rejected. Unlike the inspectors at Jamaca, they
24 did not say, "Your project has some slopes over 60.
25 Permission to expand denied. "Rather, they simply

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1 recommended that the steep lots not be used for
2 construction and the permit was granted.

3 La Montana, this project is a few miles southwest
4 of Jamaca and, like so many others, directly abuts the
5 Baiguata Park but conveniently is not included in it.
6 According to the MMA website, it's intended to be the
7 largest mountain project in the country and intended
8 ultimately to be more than three times as large as the
9 proposed expansion of Jamaca. As Respondent's own maps
10 show, the project is entirely forested and has slopes that
11 exceed 60 percent.

12 La Montana received an MMA permit earlier this
13 year despite inspection reports that note serious concerns
14 about its environmental impact. Let's look at that report.

15 It discusses the construction of ecotourism
16 cottages on a total of 60 plots. It notes mass erosion due
17 to the high local precipitation. It notes slopes between
18 36 and 60 percent. It observes a series of streams having
19 clear and constant flow of high and good quality. It notes
20 the impact the project would have. The loss of forested
21 area, changes in the natural condition, loss of
22 biodiversity, loss of species habitat, the possible
23 disappearance of the El Rancho stream and an unidentified
24 stream.

25 And it says, "We are of the opinion that should

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1 the project be implemented, it would considerably and
2 negatively affect the dynamic of the ecosystems that
3 interact for the conservation of the forest, especially the
4 area's flora and fauna."

5 Permit approved. Indeed, the project has now been
6 approved up to at least 1300 meters above sea level showing
7 that Respondent's putative concern about altitude
8 apparently applies only to the Ballantines.

9 Rancho Guaraguao. This project was developed only
10 entirely within the Valle Nuevo Category 2 National Park in
11 Constanza after the park was created in 1996.

12 Constanza, like Jarabacoa, is a mountain tourism
13 pole and the towns are only 12 miles apart. This is owned
14 by Dominican Miguel Jiménez Soto, a major general of the
15 Dominican Armed Forces. It's a development remarkably
16 similar to Jamaca with 52 luxury villas, a restaurant, and
17 common areas. It can be seen from anywhere within the Town
18 of Constanza and by anyone driving past on the main road.

19 However, this project was built entirely without
20 an environmental permit. It was expanded in 2010 without a
21 permit. And it still doesn't have a permit. Indeed, it's
22 continuing to actively develop. It was also developed at
23 an altitude between 1470 and 1890 meters above sea level,
24 dwarfing the proposed altitude of the Jamaca project by
25 more than 600 meters. It promotes itself as an ecotourism

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1 project just as Jamaca did.

2 And tellingly, in 2015 Respondent paved a road
3 from Constanza to the entrance of Rancho Guaraguao. Not
4 surprisingly, the Respondent's Minister of Public Works,
5 Gonzalo Castillo, is a property owner at this unpermitted
6 luxury mountain development.

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

12 Sierra Fría. It appears this project was
13 initially denied by the MMA in November of 2016 after this
14 proceeding was brought. This project continued to market
15 its property and now has been or is about to be permitted.
16 Indeed, the Respondent's Ministry of Tourism website
17 publicly confirms the project received its CONFOTUR
18 approval in July of 2017. That approval was signed by
19 Zoila González, the same MMA manager that signed the
20 original denial of the Sierra Fría permit only eight months
21 earlier.

22 Sierra Fría has confirmed potential buyers and
23 brokers that the development will receive its permit in
24 2018. The testimony to that is in the record and
25 un rebutted. And it is marketing the sale of 133

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1 condominiums. These are its brochures.

2 The Tribunal has seen the unrefuted testimony that
3 Dominican Owner Daniel Espinal was allowed to work directly
4 with the Ministry of the Environment to secure MMA approval
5 for Sierra Fría.

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

16 Los Auquelles. This 35-lot project is located in
17 the Central Mountain Range on the north side of Jarabacoa.
18 14 homes have been built here since the mid-2000s without
19 an environmental permit. 15 homes. The Tribunal has seen
20 the evidence of the MMA's policing of this project.

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

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1 inspection visit was made in May 2017.

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

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

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

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

25 It's appropriate to save Aloma Mountain for last.

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1 Aloma Mountain is owned by Juan José Domínguez and borders
2 Jamaca at the top of the two properties. The Tribunal saw
3 the map earlier. Aloma has divided its property into 115
4 residential lots, internal roads have been built, common
5 areas, a lake, a park, a clubhouse all complete, and
6 electricity and water have been installed.

7 Indeed, Domínguez intends to build a hotel, just
8 as the Ballantines planned in Phase 2. Domínguez is the
9 brother of Leonel Fernández' first wife, and Fernández was
10 the president of the Dominican Republic from '96 to 2000
11 and then again from 2004 to 2012, during which time the
12 Ballantines sought permission to expand Jamaca de Dios.

13 Domínguez was the de facto spokesman and
14 representative of Leonel Fernández in Jarabacoa during all
15 12 years of his presidency. Domínguez was also the son of
16 the mayor of Jarabacoa between 2010 and 2016 while the
17 Ballantines were seeking permission to expand.

18 Domínguez also had close ties to Bautista Rojas
19 Gómez, the Minister of the MMA from 2012 to 2016. Gómez
20 Rojas had been the Minister of Public Health earlier and
21 during that time Domínguez was the Vice Minister of Oral
22 Health directly below Gomez Rojas. These political ties
23 have allowed Domínguez to develop his property without a
24 permit and to improperly use MMA as a barrier to the
25 expansion of Jamaca.

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1 The Tribunal has seen the Nuria report from the
2 respected journalist broadcast across the Dominican
3 Republic, which highlighted the disparate treatment between
4 Jamaca and Aloma Mountain and highlighted the political
5 connections between Gómez--between Domínguez and the MMA
6 which allowed Juan José Domínguez to use MMA personnel to
7 help build his project.

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

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

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

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1 simple as that.

2 Thank you.

3 MR. BALDWIN: Thank you, Members of the Tribunal.
4 It's good to see Respondent here, and I thank everyone for
5 their time and attention to this case because this is an
6 important case. I'm going to talk about a few issues
7 today, and the first is dominant and effective nationality.

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

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

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

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

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

23 With Merge. Merge moved to Italy in 1933 with an
24 Italian husband, resided--never resided in the United
25 States at the point that the claim was brought. So she

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1 never resided in the U.S. after 1933, didn't pay U.S.
2 taxes, only Italian. The Tribunal found her to be an
3 Italian.

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

9 Malek vs. Iran. Now the last two are cases where
10 the people were found to be U.S. If you look at Malek,
11 left Iran in 1958 when he was 17. Relevant claim period
12 was '80-'81. Married an Iranian woman, made frequent trips
13 to Iran, but nevertheless was still deemed to be--and, of
14 course, born in Iran. Nevertheless still deemed to be U.S.

15 And then Saghi was a U.S. national who happened to
16 be born in Iran and lived on and off there and sought
17 citizenship but found to be, in this case, U.S.

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

24 And Respondent throughout its papers lumps them
25 together. You can see this is typical of a lot of these

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1 paragraphs where they say "Oh, they did for travel purposes
2 and financial purposes, business license, signing loan
3 agreements." And then you start to look at the evidence.

4 And the evidence doesn't hold up.

5 And I'm confident the Tribunal will look at that
6 evidence. The evidence doesn't hold up in many places.
7 But also when it talks about some of these issues that are
8 listed, particularly in this paragraph, you go to the
9 citation and all you see is something Michael Ballantine
10 did.

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

14 And, of course, it shouldn't be surprising to the
15 Tribunal that if they're making a--if Michael Ballantine is
16 making a loan agreement in the Dominican Republic, that he
17 would--might use his Dominican nationality or Dominican
18 passport in connection with that. That just makes sense.
19 That doesn't show any connection or attachment to the
20 Dominican Republic.

21 So before we get to the specific evidence, I want
22 to talk about how Respondent views people. And I want to
23 make it clear I'm not talking about the people in this room
24 who are here from Respondent. I'm talking about
25 Respondent's officials who are not here but who have

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

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

14 So let's look at this. C.P. And this is all from
15 Exhibit C. The C.P. is all from Exhibit C-179. C.P. was
16 born in the Dominican Republic. Lisa Ballantine, born in
17 the United States. C.P. lived her whole life in the
18 Dominican Republic. 37 years. Lisa lived her whole life
19 in the United States except for portions of the years in
20 2001 when she was on a mission's trip and then from 2006 to
21 2014, portions of those years.

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

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

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

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

21 Now, this human rights travesty shows that it is a
22 precarious thing to be Dominican. So let's look at what
23 happens here.

24 Pregnant women and young children stripped of
25 their Dominican citizenship. That's important. These

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1 aren't people that weren't. They were stripped of their
2 Dominican citizenship before being pushed across the border
3 into Haiti, forced to leave the country of their birth
4 through abusive, in summary, practices.

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

10 It's not a court decision. There's laws. There's
11 other implementing regulations. This is the executive
12 branch doing this, and you can see this.

13 Immigration officers did not even make a cursory
14 attempt to determine whether they should be deported aside,
15 you know, from checking whether they had work documents.
16 They had been separated from their children for days or
17 weeks after they crossed the border and had no legal
18 recourse or opportunity to challenge that before a judge.

19 Now, I want to make a point. And if you'll
20 indulge me, this point is a little bit personal. But you
21 see, the last part talks about children being separated
22 from their parents. I'd be remiss here if I did not
23 mention that the U.S. officials have done some pretty
24 disgusting things too, in my view, in terms of immigration;
25 separating children, other things that have happened in the

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1 last two years.

2 I mention that because I don't want the Tribunal
3 to have the impression that I think what the U.S. does is
4 okay. I deal with these immigration issues all the time.
5 I just want that to be known.

6 But that doesn't excuse Respondent from doing
7 these same things from summary deportations, from stripping
8 people of their citizenship, and all these other things.

9 Lastly, on this point, again, I'm just going to
10 note that these are Dominicans, but they're Haitian
11 descent. And that's why they were selected and stripped of
12 this citizenship.

13 Now, Dominican citizenship is not permanent for
14 other reasons too. You can see the naturalization law
15 here. And the naturalization law provides that the DR,
16 particularly the president of the Dominican Republic, can
17 revoke citizenship of dual nationals if they commit acts of
18 disloyalty, unfaithfulness, ingratitude or indignity. This
19 isn't a case where once you're a Dominican--if you're not a
20 Dominican, you know, who's a real Dominican, that you can
21 keep that. You can lose it for a lot of reasons.

22 I also want to make it clear that the Ballantines
23 are certainly ungrateful to Respondent. And so they would
24 fit into this category. They are ungrateful to Respondent.
25 And the reason is, is that, you know, there's been no

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1 kindness shown to them by the Republic. By the people of
2 the Dominican Republic, yes, lots of kindness. By the
3 Republic itself, no kindness. So they have a reason in
4 this case to be ungrateful.

5 So let's talk about what we have to look at for
6 dominant and effective nationality. As the Tribunal said
7 in the Malek vs. Iran award, you have to look at the entire
8 life of the Claimant. In this case, each of the Claimants
9 here.

10 This is because attachments and other things are
11 fleeting things. A stray comment someone makes on Facebook
12 is not evidence of whether they have attachment to one
13 place or another. It's one point in time. Somebody in
14 this case making an offhand comment--we'll get to that in a
15 moment--but that doesn't show attachments. It's the
16 lifetime of the Claimant that shows the attachment.

17 These are the factors. We're going to go through
18 some of these. These are the factors for a dominant and
19 effective nationality analysis. So let's look at the first
20 one, habitual residence, time in the Dominican Republic.
21 Now, I gave that visual representation of Michael
22 Ballantine, so I feel I owe Lisa Ballantine the same--the
23 same right here.

24 The Ballantines, both Michael and Lisa Ballantine,
25 have spent almost all of their lives out of the D.R. with

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1 the vast majority of that time in the U.S. Here is a chart
2 which shows the amount of time Lisa Ballantine has spent
3 out of the DR in green and in the DR in red.

4 This chart which was exhibited--or information
5 originally came from Michael Ballantine. The Respondent
6 exhibits this in their information as well. This is a
7 chart for the years 2010 to 2014. And you can see the
8 amount of time that Lisa--this is, again, Lisa
9 Ballantine--the amount of time she spends in the Dominican
10 Republic versus being out of the Dominican Republic.

11 Now, of course, the time out of the Dominican
12 Republic doesn't mean she was in the United States the
13 whole time. Lisa Ballantine, as the Tribunal is aware from
14 the pleadings, ran a non-profit that brought clean water.
15 She was spending a lot of time in other countries at that
16 time too. She was spending time in other countries working
17 on this nonprofit, bringing clean water to people in these
18 countries, bringing these filters to people. So it wasn't
19 all in the U.S. But you can look at what was in the
20 Dominican Republic and out of the Dominican Republic.

21 So what were the Ballantines doing in the
22 Dominican Republic? Were they there to learn the Merengue,
23 which is--which originated and is a very popular dance in
24 the Dominican republic? Is that what attracted them to the
25 Dominican Republic? No.

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1 Michael Ballantine was there for this. As my
2 colleague, Matt, has shown already, Jamaca de Dios, Phase
3 1, Phase 2, working it. He was there. This was his
4 project. This was his--his--this was important to him.
5 And he was there working on the project, not doing the
6 Merengue.

7 And as we discussed, Lisa--and as the testimony
8 shows, Lisa Ballantine was there--while she was there
9 working on this non-profit that she did.

10 Now, why did Lisa Ballantine take Dominican
11 nationality? They've decided not to call her in this case.
12 They decided not to cross-examine her. Her testimony is
13 un rebutted. And she states in her Witness Statement that
14 she became a citizen of the D.R. to protect our investment
15 in case of our demise. "I was concerned that our children
16 could lose the entire investment if we were to die."

17 Now, this is the most basic reason to do
18 something, to take the Dominican nationality to protect
19 your children, not to gain some advantage or anything like
20 that. To protect what you're going to be passing on to
21 your children. Although the Respondent took it away
22 anyway. But that's why she was there, to protect her kids.

23 She certainly would have never thought that she'd
24 be sitting here and Respondent would be arguing that
25 because she did this to protect her children that,

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1 therefore, she doesn't have a right to seek legal redress.

2 Habitual residence. The Ballantines owned or
3 rented residential property in the U.S. This is from
4 Michael Ballantine's Witness Statement. The Ballantine
5 children were in the U.S. for a very short time. The four
6 of them were in for a very short time. Joshua and Rachel
7 left in 2007. And then this was before any of the--no
8 matter what period you think that Respondent wants, this
9 was before that. Joshua and Rachel were back. Josiah and
10 Tobi left to go to school in 2010. So after 2010, all the
11 children were in the U.S. The Ballantines spent a lot of
12 time in the U.S. during that time period.

13 I just want to note that the Respondent makes a
14 point about legal domicile. The Ballantines signed a form
15 that was a Dominican naturalization form that talked about
16 where their domicile was. And they said that their
17 domicile was in the Dominican Republic. But "domicile" is
18 a legal thing having to do with a legal designation. It
19 doesn't show habitual residence, has no relevance to this
20 determination.

21 Now, family ties is the next thing. This to me is
22 another--all of these weigh in favor of the Ballantines.
23 This one particularly weighs in favor of the Ballantines.
24 So let's look at the Ballantines' family ties to the
25 Dominican Republic.

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1 Zero. None. Now, let's look at the Ballantines'
2 family ties to the U.S. Okay. We have kids, grandkids.
3 We have in-laws. We have parents. We have uncles, aunts,
4 cousins in the United States. That's where their
5 connections are. And, of course, you'll see the Canadian
6 there because they have a Canadian in-law, so I had to
7 throw the Canadian in there. But these are the family ties
8 to the U.S. versus the family ties to the Dominican
9 Republic.

10 Now, I just want to again go back to these cases
11 that we've talked about and look at the family ties in
12 those cases compared to the Ballantines' cases.

13 Nottebohm, German family. Merge, married an
14 Italian and lived in Italy. Ladjevardi, Italian parents
15 and family. Malek, Iranian family, married an Iranian
16 women, yet still was U.S. And Saghi, as I mentioned, U.S.
17 nationals.

18 Participation in public life. Another factor.
19 The Ballantines never obtained Dominican driver's licenses.
20 Now, I thought this was a pretty interesting point and a
21 pretty powerful one to me. Because as somebody who has
22 traveled a lot, has lived in other countries, having a
23 foreign driver's license in another country can be
24 problematic.

25 If you were going to be in that country all the

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1 time, you would tend to get a driver's license from that
2 country. And, in fact, when people come to the United
3 States, even if they're here for a couple of years, they
4 often do that. Never obtained Dominican driver's license.

5 Michael Ballantine was a member of the American
6 Chamber of Commerce in the Dominican Republic. They voted
7 in the Dominican Republic, to be sure, but they also voted
8 in the United States. They never joined any Dominican
9 groups. Lisa Ballantine at one point tried to join the
10 Rotary Club, but she was rejected. And they never--and
11 that was partly--the reason she was joining the Rotary Club
12 is because she was a part of the Rotary Club in the United
13 States. She was involved with that in connection with a
14 non-profit, thought she should join the Rotary Club here,
15 but couldn't. And I think we can all, you know, guess why
16 she was rejected.

17 Now, the Ballantines' evidence of attachment.
18 Their children and grandchildren, which they were in the
19 United States for often, 30 times from 2010 to 2014 in the
20 United States. As they testified, their friends were U.S.
21 nationals. Not just their friends in the Dominican
22 Republic. Their friends in the Dominican Republic were
23 often U.S. nationals, but they kept very close connections
24 to their friends in the United States who were, obviously,
25 you know, U.S. nationals. So they kept that connection

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1 there. Very close to their friends.

2 And, again, we have this un rebutted testimony that
3 Lisa Ballantine didn't want to take Dominican nationality,
4 but she thought--eventually was convinced that she should
5 because she should protect the investment for the sake of
6 her children.

7 Now what about--what about Lisa's evidence of
8 attachment. Let's talk about that. Because we've got to
9 look at both of them. Well, Lisa--what Lisa was doing
10 there, as we talked about, is her nonprofit work to bring
11 clean water to people in various countries.

12 Now, the clean water project is not an attachment
13 to Dominican culture. I don't think contaminated water or
14 trying to get rid of contaminated water is anything
15 specific to the Dominican Republic. It's a problem all
16 over the world. And that was Lisa's attachment to making
17 sure this was done. She distributed 100--the company
18 distributed 100,000 filters and have these three factories
19 worldwide. Their operations were not limited to the
20 Dominican Republic. They had factories in other places and
21 did a lot of work in other places around the world.

22 Now, another thing that tells an important part of
23 this story is, what did the Ballantines do when they
24 realized that they weren't going to be able to do Phase 2
25 and that Respondent had essentially taken away their hard

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

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

15 Now, the U.S. Embassy has a view here too. The
16 U.S. Embassy in the D.R. advocated for Michael Ballantine
17 on many occasions as a U.S. national. They advocated on
18 his behalf all the time. Let's talk about how Respondent
19 viewed the Ballantines because the Respondent certainly
20 viewed them as U.S. nationals. This is from Professor
21 Riphagen's concurrence in Case Number A/18.

22 And he says, "If one state treats a dual national
23 as an alien, that is by arbitrarily discriminating against
24 that person as compared with its own citizens, a claim may
25 by validly brought before an international tribunal on that

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1 basis of the person's nationality."

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

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

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

22 But the other issue is just because he was a
23 Dominican national does not answer the question. That
24 starts the question. It's the dual nationality that begins
25 the inquiry. What matters is the attachments and other

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1 things. And certainly, the people in the CEI-RD and
2 others--this is just one example--viewed Michael Ballantine
3 as a U.S. national. He looks like it, he talks like it,
4 he's hanging out with U.S. nationals. He's a U.S.
5 national. That's how they viewed him.

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

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

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

25 This is just a slide on--we talked about the time

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1 period. It's in our papers. I'm not going to--I'm going
2 to skip over that now given time constraints.

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

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

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

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

24 That's a nice, kind, decent comment made by a
25 nice, kind, decent human being to someone to talk about the

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1 Dominican people feeling at home. "I feel at home when I
2 go to the Dominican Republic because they're very kind and
3 very warm people." But it's twisted and put up here to
4 show, "Oh, look, he has a connection. He's at home in the
5 Phili"--excuse me, in the Philippines; it's on my
6 brain--"he's at home in the Dominican Republic."

7 Okay. That's what this nice comment is made to
8 prove, that he feels at home. This is an attachment.

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

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

20 These are people who treated their employees well.
21 And somebody says, "Hey, they treated me really nice, like
22 family," and that's touted by Respondent as a cultural
23 connection and attachment.

24 This one is especially interesting. So Lisa
25 Ballantine went to the school in the U.S. This was after

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1 the missions trip in 2000 but before they started Jamaca de
2 Dios and before she--especially before she started her
3 non-profit. She went to Northern Illinois University.
4 Now, that's part of the attachment analysis. Where do the
5 people go to school? She went to school in the United
6 States.

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

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

15 So here they say--they highlight that she went
16 back to Northern Illinois University and said, "This
17 indicates mainly a connection to the Dominican Republic."

18 Now, I assume that the connection is not studying
19 ceramic filter manufacturing. But the connection they
20 think is that--it says here "the history of the Dominican
21 Republic." Yeah, she took a class on the history of the
22 Dominican Republic as part of college.

23 I very much doubt that Northern Illinois
24 University has a major on Dominican history. Okay? So it
25 wasn't like she was there taking a major on Dominican

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1 history. She took one class. I deal with a lot of
2 students all the time as part of the Jessup Competition and
3 other things, and I have never heard anyone tell me, "Hey,
4 I'm from Northern Illinois University and I have a Ph.D. in
5 Dominican history." Okay. It's one class.

6 Now, this is something--other things that
7 Respondent has done in connection with this. Okay.
8 They--Lisa Ballantine's Facebook page--I've been on it
9 myself. It's public. Looked through it. Hundreds of
10 pictures. Lots of pictures. She likes to take pictures,
11 and she puts these pictures up on Facebook.

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

15 She says, "We placed our votes today as Dominican
16 citizens."

17 "Ah, look. This shows she's Dominican."

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

23 But this--this is evidence of nothing. But that's
24 not the issue. Because the issue is, if you look through,
25 and as Lisa Ballantine put in her statement, these

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1 facts--if you look through the entire thing, you see her
2 making all kinds of comments that Respondent didn't
3 include. They just selectively picked out a couple.

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

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

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

23 They took a funny comment--this is a funny
24 comment. "What the heck is Chick-fil-A?" Like she
25 couldn't have Googled Chick-fil-A to see what it was, like

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1 she even didn't know what Chick-fil-A was. And then she
2 jokes about being a foreigner.

3 It's a funny comment that she made in 2010. Now,
4 the Tweet is from 2015, but the Tweet is just laughing at
5 the 2010 Facebook comment.

6 Now, what does Respondent say about this?
7 Respondent says that Tobi, for example, "crowd-sourced
8 questions about American pop culture, justifying at least
9 one such question on the basis that she was a foreigner."
10 That's the evidence. 16-year-old girl is being made
11 to--you know, that just got back to the United States.

12 I have to say that if--if we hold 16-year-old
13 girls to what they say on social media, Justin Bieber would
14 be the emperor of the world right now. Okay? So what a
15 16-year-old girl says on social media is certainly no
16 evidence.

17 Now, I wanted to put this up because I wanted to
18 show that Facebook comments are not literal. Six months or
19 so ago, I was in Nepal visiting with government officials.
20 They were very nice to let me take this picture in their TV
21 broadcasting booth. It's been up on my Facebook for some
22 time. Caption, "Delivering my weekly TV address. Power to
23 the people."

24 People say things on social media that don't mean
25 anything, and it's ridiculous, and all of that should be

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

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

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

19 Now, when the U.S. has been asked, the U.S. has
20 been consistent. Respondent has not been consistent. The
21 U.S. has been consistent, to their credit, on this issue.
22 They've been consistent in that every time they've talked
23 about it, they've talked about it being a jurisdictional
24 objection. And this, for example, is something in the
25 Apotex case that was recited in the Award that explains why

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1 it's a jurisdictional objection about the time bar, not an
2 admissibility thing. But as I mentioned, Respondent knows
3 this.

4 In the Corona Materials case--this is from the
5 Award--the Tribunal notes, "The Dominican Republic hereby
6 respectfully requests that this Tribunal declare they lack
7 jurisdiction to hear the dispute based on the three-year
8 time period."

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

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

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

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1 knew about it. So the Ballantines, according to
2 Respondent, were already on notice. This is their
3 Statement of Defense, before this issue arose.

4 The Ballantines were already on notice that there
5 was a park. But they go, "Oh, no, no, this isn't enough
6 because we're talking about the emails. It's the emails
7 that are different."

8 So let's look at the emails. This--in the
9 emails--this is Exhibit R-169--the environmental adviser of
10 the Ballantines says--when they're discussing the
11 park--says, "I remind you that the national category allows
12 low impact economic tourism such as yours, although the
13 matter of some things will be up for discussion."

14 That's it. Just up for discussion. That's all.

15 So "such as yours." "Such as yours." They were
16 told that the park allows ecotourism projects such as
17 yours. Is that a loss? I don't think so.

18 They also say that you have to wait to hear from
19 the Ministry. And they remind them that the Ministry gets
20 to ultimately say yes or no, which is just a matter of
21 fact. Here, the Ministry did it in an extraordinarily
22 arbitrary and discriminatory manner. But, certainly, the
23 Ministry, sovereign power, does get to say yes or no. This
24 is what they were told. And by the way, Lisa was told
25 nothing about this at all.

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1 Then they were--excuse me. Going back to this for
2 a minute. When they say that they have to wait for, you
3 know, the definitions of the protected area, what they're
4 talking about there is the Park Management Plan. This park
5 was created in 2009. It's the Park Management Plan,
6 according to Respondent, that lays out what specifically
7 can and can't be done and establishes different things with
8 regard to the park. The adviser said wait for that. And
9 then the adviser also said in the same set of emails--said
10 "Submit your application to them and see what happens,"
11 essentially.

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

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

25 Eight years after the creation of the park, the

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

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

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

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

21 In fact, if anything, that email from Michael when
22 he first--you know, when it caused him to see there was
23 even a national park, should have given him a lot of
24 comfort. If I found out that my land was becoming a
25 national park, I would probably, maybe just naturally,

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1 think I had a loss. And even if I looked at this law and
2 thought "Am I ecotourism?"

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

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

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

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

22 Okay. So all the evidence shows--so the question
23 is: Do you have a claim? Do you have a loss? Can you
24 bring it? All the evidence shows that they didn't have a
25 loss. Let's look through it. My colleague, Matt, talked

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1 about the CONFOTUR approval and when the Ballantines
2 submitted that application, they said exactly what this
3 project was, 1,200 meters, swimming pool, hotel, spa, 95
4 lots. They laid out what the project was. So they knew in
5 this CONFOTUR application that this was a substantial
6 project with all these things.

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

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

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

24 No. They signed off on it. Doesn't that give
25 Michael Ballantine reason to believe that there's not going

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1 to be an issue in development?

2 Also, Rancho Guaraguao, as my colleague mentioned
3 as well, this is a development in a national park, was
4 built in a national park. Building began around 2004 after
5 the national park was created. Michael Ballantine had been
6 to that project. You can see the project from the road.
7 He had been to that project and even stayed there as a
8 guest. He knew people could build--he's seen people build
9 in national parks.

10 He saw Ocoa Bay, a huge facility, built in a
11 national park. Getting a permit for--he may not have known
12 there was a permit, but he would have known that they were
13 building in a national park. You could see Ocoa Bay
14 building in a national park despite having a Park
15 Management Plan.

16 And then, of course, we have Aloma Mountain, his
17 next-door neighbor. My colleague, Matt, said "a stone's
18 throw away." I don't even think that's true. I think
19 they're right next to each other. So it's a, you know,
20 stone drop away. But it's very close, in any respect.

21 The point is, is that the politically connected
22 Domínguez built and built and built in the same national
23 park. Why would Michael Ballantine feel like he was going
24 to have restrictions based on the national park with
25 building? Therefore, he had no claim.

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1 Now, Respondent--as Winston Churchill might say,
2 Respondent happened to stumble upon the truth here. In
3 their objection to admissibility, they were going through
4 and talking about how it's not Phase 2, it's Project 3.
5 It's Project 3, 4, 5. They were giving an explanation.
6 But in there, they said something important in Footnote 2.
7 They admit that the expropriation claim for the denial of
8 the license was based, among other things, on the creation
9 of the park.

10 The expropriation claim is the denial of license.
11 Now, that denial of license becomes relevant when you talk
12 about the park.

13 Now, in the legal section of the Amended S
14 tatement of Claim, we make that exact thing as the
15 Respondent admits. We make that claim. That the claim for
16 expropriation is a denial based on -- of the license based
17 on the national park. Now, there's certainly places in the
18 pleadings where we talk about the park being created was
19 discriminatory, the park being created was arbitrary, it
20 was wrong.

21 First off, those are factual statements. It was
22 discriminatory. It was arbitrary, and it was wrong. But
23 the claim--and, by the way, let's talk about a point of
24 knowledge. Because those emails that we looked at, none of
25 them say, "Oh, look, people were excluded from the park" or

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1 "Here's the reason why they did the park and that reason
2 doesn't hold up."

3 I mean, it doesn't give Michael Ballantine
4 knowledge about the discrimination aspects of the park or
5 the arbitrary aspects of the park. But at any point, those
6 only become relevant when the license is denied.
7 Otherwise--I don't care if somebody creates in--they can
8 create all the arbitrary discriminatory parks they want.
9 If it doesn't affect my property right, if I can build my
10 project, what does it matter? They can do that all day.
11 There's no wrong there. There may be a wrong, but there's
12 no claim, no loss until that.

13 So does anyone really believe that if they would
14 have in 2010, when they got those Empaca Redes emails, if
15 they would have brought a claim and they later get the
16 CONFOTUR approval, they haven't even applied for a permit
17 at that, told by the advisers that projects such as
18 yours--such as yours--are allowed, denied three times and
19 not for the park, and people are building in the national
20 parks like it's the national pastime, which happens to be
21 baseball.

22 So people are building in national parks all over
23 the place. Does anybody think for a minute--imagine that
24 somebody comes into your office as a client and tells you
25 this story and they haven't been denied yet on the basis of

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1 the park and they go, "Do I have a claim? Can I bring it
2 because of the park?" You would tell them no. At least I
3 would tell them no, and I assume most people would tell
4 them no. Some lawyers might not.

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

16 This was the purpose of the park, was purportedly
17 to protect Baiguata--one of the purposes--protect the
18 Baiguata River and the Baiguata Waterfall. The properties
19 that were on the mountain and would lead right down to
20 those waterfalls were kept out.

21 And as we've stated in there, these were very
22 powerful people, agricultural titan, one of the wealthiest
23 people in the D.R. and a founding member of the PLD Party,
24 which has been in power for 18 of the last 22 years in the
25 Dominican Republic.

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1 Now, I want to briefly talk about Respondent's
2 arbitration conduct. And I feel like since the Ballantines
3 are from Chicago, my colleague is from Chicago, I thought,
4 you know, we should put up this thing. "Once is
5 happenstance. Twice is coincidence. Three times is enemy
6 action."

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

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

20 That is an improper use of sovereign authority, to
21 have a sovereign create a law to help you try to shield
22 documents from the other side in an arbitration. Look at
23 the timing of that. After. Now, that's pretty--you have
24 to give them credit for one thing. That's very efficient.
25 Submit document requests in June, and by the beginning of

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1 July you have a law that orders all the documents that were
2 requested to be secret. And that law was invoked
3 repeatedly by Respondent in their papers.

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

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

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

25 Went to Aloma and said, "Hey, you know, you really

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

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

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

17 Aloma Mountain in general. Aloma Mountain was
18 supposedly denied, and you can see it's in quotes there.
19 Aloma Mountain was supposedly denied in 2013. But then
20 after it was denied, there were two instances in 2014 and
21 in 2016 where the Ballantines were able to obtain papers
22 from the Freedom of Information Act where they saw that it
23 wasn't actually denied. It was listed as being under
24 environmental review.

25 So in the Statement of Claim, we say, "Hey, look,

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1 they're building, you know, with impunity. This guy over
2 there is building roads, doing all sorts of things."

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

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

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

21 The Ballantines would have loved that deal: to
22 build without a permit, build on slopes in excess of
23 60 percent, and get a \$6,000 fine. And by the way, nothing
24 to show that Los Auquelles ever paid that fine. Nothing.

25 Rancho Guaraguao's fine. Constructed in a

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1 national park. We talked about this, all these facts. The
2 fine--when we mentioned in the Reply--now, some of these
3 fines were made after we mentioned a project in the
4 Statement of Defense. Others were done after we mentioned
5 them in the Reply.

6 This was one that was done after we mentioned
7 Rancho Guaraguao in the Reply. Everybody can see it. The
8 government--actually, the Ministry of Tourism in 2015 built
9 a road, paid for by the government, by the taxpayers of the
10 Dominican Republic--paid for a road to this project, which
11 was built in the national park and not permitted. They
12 issued a fine to General Jiménez, the former head of the
13 military, after the Reply.

14 Now, does anybody think that that fine is ever
15 going to be paid? Nothing in the record that it's going to
16 be paid. But I know that if Vladimir and Estragon were
17 sitting there waiting for that fine to be paid, they would
18 be waiting a long, long time because that fine would not be
19 paid.

20 These are other fines. They're in here. All of
21 them you can see done after we submitted a particular
22 thing. Mirador del Pino, another pretty good deal, 5,000.
23 Ocoa Bay, fined. Vista del Campo is a very interesting one
24 because in--when they talk about the Vista del Campo fine,
25 they talk about how the fine was paid. And they say--they

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1 give the bank name. You can look at it. It's in
2 Respondent's Rejoinder at 223. They have a footnote which
3 talks about the bank being paid, talks about all kinds of
4 other things. Okay. And now--but they only do that for
5 that one.

6 The absence of evidence can be a powerful thing.
7 They don't talk about any of the other fines being paid,
8 but they give the bank name and the person who made the
9 payment at Vista del Campo. That means that the Tribunal
10 should determine that none of the other fines were actually
11 paid because, if so, the Respondent would have told you so.
12 And they don't do that for the others.

13 This is a corrupt state acting corruptly. 135th
14 out of 137 countries, only ahead of Paraguay and Venezuela.
15 It's no surprise that Respondent has used its sovereign
16 authority to try to provide and corrupt this arbitration
17 process because--not for the Dominican people, but for the
18 leaders, the ruling party, the PLD that's been in charge
19 for many, many years. This is what they do. This is what
20 they know.

21 And we know about the Odebrecht scandal. 17
22 contracts, 92 million in bribes. Zero convictions. This
23 92 million in the contracts came from money from the
24 Dominican people that ended up lining the pockets of the
25 PLD and the top Respondent officials. And Odebrecht even

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1 moved its headquarters to the Dominican Republic. It felt
2 so comfortable. When it was feeling heat in Brazil--look
3 at the map up here.

4 Dominican Republic, a little small place in a big
5 world. Could have moved it anywhere. They go, "Hey, let's
6 move the head of bribes to some place where we know we can
7 get away with it and where everything is going to happen."

8 This is the State that is doing this. Yes.

9 PRESIDENT RAMÍREZ HERNÁNDEZ: Thank you, Counsel.
10 I think it's time that we may need a break. Actually, I
11 will ask my co-arbitrators whether they will have some
12 questions, because I will have some questions before we
13 move to the legal issues.

14 So why don't we take a break. We will come back
15 at 11:30, and we will take some questions by my colleagues
16 and then we will start.

17 MR. ALLISON: Perfect.

18 THE VIDEOGRAPHER: Thank you.

19 (Brief recess.)

20 QUESTIONS FROM THE TRIBUNAL

21 PRESIDENT RAMÍREZ HERNÁNDEZ: I think my
22 colleagues and myself have some questions. We'll start
23 with Marney.

24 ARBITRATOR CHEEK: Good morning. I just had a few
25 questions in particular related to the jurisdictional

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1 discussion that you just presented.

2 One question to clarify Claimants' position. From
3 a legal perspective, when we're looking at the question of
4 dominant and effective nationality, are we looking at the
5 date that the investment was made and, therefore, came
6 under protection of the Treaty or the FTA, or are we
7 looking at the date upon which a claim was filed and,
8 therefore, the Claimant access dispute settlement?

9 And I guess the second question is, on these
10 particular facts, does it matter?

11 MR. BALDWIN: Thank you, Ms. Cheek. I'll answer
12 the last question first, which is, no, it doesn't matter,
13 because at no point were the Ballantines dominant and
14 effective nationals of the Dominican Republic. They were
15 always dominant and effective nationals of the
16 United States.

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

20 I'll say that we make in our papers the argument
21 that the relevant time period is when the investment is
22 made. That's on a textual interpretation of CAFTA, when
23 you look at the definition of "investor" and you look at
24 that definition and there's a disjunctive form to it--and
25 we go into all this. Respondent disagrees. The

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1 United States disagrees as well.

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

7 There's an argument to be made that it happens
8 when the claim arises. Tribunals have in several instances
9 used the date--they're in different settings, different
10 scenarios, but Tribunal have used the date of the claim as
11 a basis as well. But--as to when the action arose, when
12 the claim ripened, but not when it was submitted to
13 arbitration.

14 There's lots of examples where people could be
15 dominant and effective national of one place when the claim
16 arises and then lose that at some point before they
17 actually submit the claim to arbitration. And when that
18 happens, we would certainly state that that's not a right
19 that somebody loses.

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

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1 But our position is at the time the investment was
2 made.

3 ARBITRATOR CHEEK: And if I could just ask one
4 other question related to when the Ballantines had notice
5 of the national park, which I think you walked us through
6 some email correspondence where the national park was
7 referred to by a consultant.

8 And if this is a factual question that we should
9 wait for, that's fine. But is there anything in the record
10 where the Government of the Dominican Republic, having
11 formally created a national park, the government itself
12 formally notified those who owned property within the
13 national park?

14 Because I did notice on one of your maps, part of
15 Phase 1 appears to also be in the national park. So it
16 would seem that--you know, that would have arisen,
17 obviously, even before anything related to Phase 2.

18 So I was just wondering if there's somewhere in
19 the record that there's that formal notice.

20 MR. BALDWIN: To my knowledge, Respondent hasn't
21 argued at all that people were given notice. The
22 Ballantines say they never received any notice. There was
23 no notice given. And, in fact, there's one piece of
24 evidence to show there was no notice given.

25 Their witness Mr. Martinez has stated--made the

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1 remarkable claim that they didn't even look to see whether
2 people owned property or not when they made the park. That
3 had no consideration. They just made it without regard to
4 anybody's ownership.

5 And so it would seem to me highly unlikely that
6 they would have notified people since he claims they didn't
7 even look at ownership.

8 MR. ALLISON: One other additional piece of
9 evidence that is in the record with respect specifically to
10 Phase 1, which some of the national park does include, the
11 permit for Phase 1 was renewed after the decree of the
12 national park, and nothing was stated in connection with
13 the renewal of the Phase 1 permit about the existence of
14 the national park.

15 ARBITRATOR CHEEK: Thank you. That's all I have.

16 ARBITRATOR VINUESA: Thank you. Good morning.

17 I have just a few questions. One was already
18 answered in reference to if there were or not critical
19 dates. And you covered that, so I will avoid my own way of
20 doing it.

21 One thing that really needs some clarification to
22 understand your position is that in--all over your
23 writings, and especially in the Claimant's Rejoinder on
24 jurisdiction and admissibility, you all the time are
25 referring, you know, to dominant nationality.

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1 And my question is if you could elaborate on your
2 own understanding on the concept of dominant and effective
3 nationality and CAFTA.

4 MR. BALDWIN: Well, there is nothing specifically
5 in CAFTA except for very minimal things talking about this
6 test to give any instruction on it. And so both Parties
7 have looked to--as you know well--the decisions that have
8 been made by the Iran Claims Tribunal, the ICJ, some other
9 authorities on what makes it.

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

16 And the key point is that it's not some fixed
17 point in time. You can't look at one Facebook comment and
18 go, "Oh, you know, she's dominantly and effectively
19 Dominican."

20 I think "dominant and effective" means where do
21 your sort of--if you could say this--and this is captured
22 in a lot of what's in there--but where does your kind of
23 center lie, your loyalty lie, some of those issues.

24 I would defer to the factors that are listed in
25 A/18 and that we've put forth here instead of me trying to

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1 reinvent them. But those factors are--taken together,
2 paint a good picture of where--of whether someone is
3 dominant and effective of one nationality or another.

4 ARBITRATOR VINUESA: Maybe I had to clarify my
5 question. I guess you mean dominant and effective are
6 synonymous or are different sort of ideas or concepts?

7 Because there's a very particular way CAFTA is
8 drafting or actually writing down whatever dominant and
9 effective nationality will mean.

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

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

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

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1 ARBITRATOR VINUESA: Thank you.

2 I have another question in reference to what
3 you're referring. It's also in writing.

4 You refer to U.S. diplomat assistance in favor of
5 Claimants does prove dominant and effective nationality by
6 itself, that sort of assistance, the Consulate and
7 ambassador--the Embassy assistance in Dominican Republic.

8 MR. BALDWIN: No. I'm certainly not saying that
9 by itself proves anything. That's one piece and probably
10 even a small piece of the overall picture of the dominant
11 and effective nationality.

12 Now, the U.S. will invoke protection for U.S.
13 citizens, but I can ask you to imagine a scenario where a
14 person spends their whole life in the Dominican Republic,
15 obtains U.S. citizenship through some connection, therefore
16 obtaining it very fast, moves back to the Dominican
17 Republic and continues to run their business, and then
18 spends a lot of time at the Embassy going to do that.

19 Now, will the Embassy technically do something for
20 this person? Maybe. But it was the level--as you can see,
21 it was the level of--it was the level of involvement that
22 the U.S.--that one document I showed is one document.
23 There's other testimony about this. It's the level of
24 involvement that really mattered.

25 They really went to bat for Michael Ballantine.

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

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

8 And I have a final question, if I may.

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

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

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

22 MR. BALDWIN: No. And in a--sort of a layman
23 sense, I don't think of a big home as ecotourism. But
24 that's what is--the Ballantines--Michael Ballantine was
25 told that's what the Dominican Republic considers

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1 ecotourism. Then you need no other evidence other than to
2 look at Rancho Guaraguao, which is listed, and we've put
3 this in as ecotourism. They brand themselves as ecotourism.
4 They say they're ecotourism. And there's huge homes on
5 there, and you can see them in the exhibits that we've put
6 in. So that's considered ecotourism.

7 ARBITRATOR VINUESA: Thank you very much.

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

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

17 But, additionally, it created a use and coverage
18 map that defined how the Dominican Republic deemed the
19 areas of Baiguate National Park in 2014.

20 And I'm sorry. I misspoke. This survey was in
21 2016. And they first said: How is the park? How was it
22 used in 2014?

23 And it identified the Jamaca de Dios and the Aloma
24 Mountain properties as ecotourism projects. It's directly
25 in the record. I can point you to the exhibit number. But

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1 that's how the Claimant--the Respondent viewed the
2 Ballantines' project, as an ecotourism project.

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

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

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

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

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

25 And most of--and those really--factors in A/18,

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1 for example, are really objective factors, habitual
2 residence and some of those things. There are things from
3 both sides--you know, Lisa saying she was proud to vote,
4 and, you know, things from our side that talk--that have an
5 essence of sort of a subjective nature.

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

15 PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. During your
16 presentation, you raised this issue about going to the
17 Embassy and being--the letter sent by the Embassy,
18 et cetera.

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

23 But my question is, if we consider that a relevant
24 factor, shouldn't we consider also a relevant factor the
25 fact that there was some permits issued by the Dominican

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

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

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

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

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

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1 U.S. thing.

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

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

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

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

25 MR. BALDWIN: Whether or not--how the Tribunal

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1 decides to issue its award I don't have any comment on. I
2 think how --we do the analysis in the best way the Tribunal
3 sees fit, obviously.

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

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

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

25 Am I understand correctly that you are not

1 bringing a legal claim regarding the division of the park,
2 of how the park was divided?

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

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

13 MR. BALDWIN: Yes. Yes.

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

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

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

24 First thing is national treatment only requires
25 one comparator. We don't have to show that all the

1 comparators or some of the comparators were treated better.
2 We just have to show that one comparator--just one is
3 needed. And you can see from the Pope and Talbot Tribunal
4 have stated that just one is needed.

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

7 Secondly, the comparison that they are entitled is
8 the best treatment. Again, by the Pope and Talbot
9 Tribunal, the right to treatment equivalent to the best
10 treatment accorded to domestic investors. So all the
11 comparators, we are entitled to the best treatment of that.
12 Not some average treatment or some middle-of-the-road
13 treatment. The best treatment. That's the purpose of the
14 national treatment provision. And as you can see, the best
15 treatment is pretty good. You know, this is one example.
16 There's lots of other examples.

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

21 The Ballantines' mistake was that, like Rancho
22 Guaraguao did, they didn't sell property to a high-ranking
23 government official. There was a government official that
24 lived in this National Park and said when he was asked
25 about it, "Well, if they give me one, I will take it. I do

1 not have villas. But if they want to give me a gift, I'll
2 gladly receive it." And I have no doubt that that is a
3 correct statement.

4 Next, I want to talk about the evolution of the
5 minimum standard of treatment, fair and equitable
6 treatment. We've listed these cases here. I'm not going
7 to go over them. They're in the record. This is Slide 80.
8 We'll have this to the Tribunal. You can see those. But
9 tribunal after tribunal, the vast majority of them have
10 stated that the minimum standard is an evolving standard.
11 The Railroad Development Corporation award puts the nail in
12 the Neer coffin because they talk about it not being--this
13 is a CAFTA award--talk about it not being static and that
14 it's constantly in the process of development. And I would
15 note even cases like Glamis Gold, which is cited by
16 Respondent, where they use the "shocking and outrageous."
17 The Tribunal uses the "shocking and outrageous" words from
18 Neer.

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

25 Discrimination is alive and well, both in the

1 Dominican Republic and also as one of the ways in which a
2 State can violate the minimum standard of treatment, fair
3 and equitable treatment through discrimination.

4 In our Reply, we list these cases where they've
5 done that. CAFTA awards, Railroad Corporation, and TECO v.
6 Guatemala Holdings have acknowledged this discrimination.
7 So discrimination is an element of this, and that's been
8 shown many times.

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

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

22 In terms of arbitrary, the only thing predictable
23 about Respondent's environmental regulatory regime is that
24 it favors powerful Dominicans and disfavors foreigners.
25 And I would just point you to this Professor Schreuer quote

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1 from EDF v. Romania where he says what it means to be
2 arbitrary. It's not based on legal standards but on
3 discretion. And you're going to hear this word come up a
4 little bit, "discretion." That's what was here. Prejudice
5 or personal preference, that's arbitrary.

6 These are in our papers. I'm not going to go
7 through these. But these are the examples of the arbitrary
8 conduct, slope law, you know, passed in 2000, never used
9 against building projects until 2011.

10 Tribunals have found violations under fair and
11 equitable treatment for much less than we have here. TECO
12 v. Guatemala, a case I know a lot about. The Tribunal
13 found that Guatemala breached CAFTA-DR just because they
14 didn't give reasons for departing from a recommendation.

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

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

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

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

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

22 PRESIDENT RAMÍREZ HERNÁNDEZ: Just one question.
23 Are you moving away from the legal claims and going to
24 damages, I guess?

25 MR. ALLISON: Yes.

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1 PRESIDENT RAMÍREZ HERNÁNDEZ: So I will pause a
2 little bit and ask my colleagues whether they will have
3 questions. Because I do have some. Please, Marney.

4 ARBITRATOR CHEEK: Let me start with the point you
5 just made. So to confirm, Claimant is asserting an
6 indirect expropriation claim but not a direct expropriation
7 claim. Do I understand that correctly?

8 MR. BALDWIN: Yes.

9 ARBITRATOR CHEEK: I was wondering if you could
10 comment on something in the U.S. government non-disputing
11 party submission. For the record, it's at their
12 Paragraph 14, with regard to national treatment, where they
13 say--and I'll quote from the submission--"When determining
14 whether the Claimant was in like circumstances with alleged
15 comparators, the Parties' investor or investment should be
16 compared to a national investor/investment that is alike in
17 all relevant respects but for nationality of ownership."

18 I was wondering what Claimants', you know, view is
19 on that. Is "like circumstances" being alike in all
20 relevant respects except for nationality of ownership?

21 MR. BALDWIN: With due deference to the U.S.
22 officials, I think that's a pretty empty statement.
23 Because it's the details that get into it and make it done.
24 What does it mean to say "all relevant respects"? You
25 know, the same address? The same location?

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1 The Parties have spent a lot of time arguing about
2 this issue. We certainly--and we've given cases that show
3 this. There doesn't have to be some uniform--and, in fact,
4 there can't be. There would never be a comparator if there
5 had to be absolute uniform things. Uniform aspects. If
6 they all had to be uniform in every single aspect.

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

16 But I think that what the cases really look at, is
17 they look at what sort of business sector are you in and
18 how--you know, you can--people can debate and tribunals
19 differ on what it means to be in the same business sector.
20 Maybe construction isn't enough. Maybe it has to be
21 construction of houses. Maybe that's not enough. Maybe it
22 has to be construction of houses on mountains. So
23 there's--those kind of distinctions can be made, but the
24 same business sector.

25 And then I would say the same--they're the same

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1 legal regimes, another common way that they look at it.
2 But I'm not even sure what "all relevant aspects" really is
3 intended to say.

4 ARBITRATOR CHEEK: Okay. Thank you. I did have
5 another question about some of your comments on national
6 treatment and that is with regards to best treatment.

7 So you mentioned that best treatment is relevant.
8 I guess, does the--can the Tribunal find for the
9 Claimant--find that there was a national treatment
10 violation if the Ballantines received less favorable
11 treatment, that it falls somewhere shy of best treatment?
12 I'm trying to understand--or do we need to find that the
13 Ballantines didn't receive the best treatment?

14 MR. BALDWIN: No. It's best in connection with
15 the comparator. So any--you look at the comparators. You
16 find what you might argue is the best one, what somebody
17 thinks is the best treatment. And anything less, as you
18 stated in your formulation--as one of your alternative
19 formulations, anything less than the best treatment is a
20 violation.

21 So any case in which somebody was treated better.
22 And they don't have to be treated better in every way.
23 They could be treated better in one way. Maybe they were
24 fined and--but they didn't pay the fine. You know,
25 anything where they weren't required to pay the fine. And

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1 the Ballantines were required to pay a fine. All of those
2 things relate to the best. So the best of any of those
3 comparators. Anything less than the way that the best
4 comparator here was treated should result in a violation of
5 national treatment.

6 ARBITRATOR CHEEK: From a legal perspective,
7 though, is there flexibility under that standard for the
8 Tribunal to find that there was less favorable treatment
9 among a range of comparators, or do we have to identify who
10 we think is the best and then decide whether Claimants'
11 treatment was less favorable to that specific comparator?

12 MR. BALDWIN: No. No. It's more of a pedantic
13 point than anything that I was making. But, no. You can
14 find that generally they were treated less favorably. You
15 don't have to go through and say, "This was the best, and
16 they were less than this."

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

25 And depending on issues. Some are the best for

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1 the park issue, building in a park. Some are the best for
2 the slope and environmental issues. So it would vary. But
3 I don't think it has to be so didactic to say that here's
4 the best and the Ballantines don't meet that. I think the
5 Tribunal can find that they received less favorable
6 treatment than these competitors.

7 PRESIDENT RAMÍREZ HERNÁNDEZ: I have two
8 questions, one related--and these may be in the same vein
9 as my colleague regarding this national treatment inquiry.
10 When you're talking about--when you're trying to find
11 whether investors are in like circumstances, how does
12 environmental impact play a role here? Or would that be an
13 important factor to determine whether two investors
14 have--are under the same circumstances?

15 MR. ALLISON: Thank you, Mr. Chairman.

16 Yes, that would be one of the factors to evaluate
17 in considering whether or not comparators are within like
18 circumstances.

19 And I can give you examples here, but the answer
20 to your question is yes.

21 PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. My next
22 question is regarding to your claim of targeted
23 discrimination. And I want to understand, what is your
24 claim here? Which is, are you claiming that the
25 Ballantines were discriminated because they were nationals,

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1 American nationals, or are you saying that the Ballantines
2 were discriminated because they were the Ballantines?

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

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

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

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

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1 reason for that aside from the nationality issue.

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

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

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

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

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

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

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

11 PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. You can
12 continue now.

13 MR. ALLISON: Thank you.

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

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

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

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

14 The Tribunal has seen the evidence and knows the
15 story. The Ballantines have been driven from the Dominican
16 Republic by Respondent's actions, forced to abandon their
17 plans to complete Phase 2, and to expand the Jamaca de Dios
18 brand to significant additional opportunities in and around
19 Jarabacoa.

20 But the Ballantines are not here seeking to punish
21 the Respondent. They seek an award from Respondent only
22 for what they would have otherwise had had Respondent not
23 wrongfully denied their expansion request. The
24 Ballantines' damages calculations are conservative. They
25 do not seek damages for additional property that they were

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1 in the process of buying when the first denial surprised
2 them in late summer 2011.

3 Indeed, the Tribunal has the unrefuted testimony
4 of David Almanzar whose family owned a huge track of land
5 just to the west of Jamaca and who wanted to joint venture
6 with the Jamaca brand.

7 There's testimony in evidence about other
8 developers who wanted to leverage the Jamaca de Dios brand
9 for their developments, including Alta Vista, now expanding
10 just down the road from Jamaca with the blessing of the
11 Respondent. They do not seek lost revenue that the denial
12 cost them at their expanded restaurant, Aroma Mountain.

13 They have removed from their claim losses
14 associated with the depressed value of the Phase 1 property
15 that was the result of the Respondent's actions. And,
16 indeed, they even subtract from their damage request losses
17 that they project to have initially suffered in developing
18 a boutique mountain and hotel and spa.

19 The Ballantines seek only just compensation for
20 the harm they suffered with appropriate interest and with
21 an award of fees and costs incurred to bring these claims
22 this week. The damages outlined in the Ballantines'
23 quantum presentation are available irrespective of how the
24 Tribunal characterizes Respondent's CAFTA violations.

25 They flow equally from the inequitable and

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1 discriminatory treatment of the Ballantines and from the
2 illegal expropriation of the Ballantines' property. The
3 Tribunal knows the damages standard in investor-state
4 disputes.

5 In Metalclad v. Mexico, an award should wipe out
6 the consequences of the illegal act and re-establish the
7 situation which would, in all probability, have existed had
8 the act not been committed. This, of course, includes lost
9 profit. The Ballantines' damage claim presented through
10 the expert report of James Farrell who, the Tribunal will
11 see later this week, has several straightforward elements.

12 First, the Ballantines seek the profit that would
13 have been earned from the sale of the 70 lots that they
14 planned for Phase 2. To be clear, all of these 70 lots
15 across more than 283,000 square meters were owned by the
16 Ballantines prior to the date of the first denial of their
17 license request in September 2011.

18 So how do we know how much that land would have
19 been worth? Well, despite the D.R.'s claims to the
20 contrary, we don't have to speculate. Jamaca de Dios had
21 an established track record of lot sales. Jamaca de Dios
22 sold roughly 90 lots in Phase 1. Took in more than
23 \$7 million. Using those sale prices, Mr. Farrell has
24 presented a conservative analysis of the distributable cash
25 flows associated with the sale of Phase 2 lots.

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1 It's a straightforward analysis that looks in the
2 increase of the actual sale prices as one moved up the
3 mountain and then projects those into the Ballantines'
4 Phase 2 land all the way to the top of the mountain.

5 Now, we have the historical record that lots near
6 the top of Phase 1 sold between 2012 and 2014 in amounts
7 ranging from \$78 per square meter to \$107 per square meter.
8 And the elevations of Phase 2 would support even higher
9 prices, especially as one reached the ridgeline of the
10 mountain and its panoramic views to the north and the
11 south.

12 The addition of the Mountain Lodge and the
13 boutique hotel would have increased valuations as well.
14 All of those sale contracts for Phase 1 are in evidence,
15 and the expert report of Mr. Farrell provides a detailed
16 spreadsheet calculating the Ballantines' earnings for those
17 Sale 2 lots.

18 His numbers are conservative. He prices the
19 lowest Phase 2 lots at \$65 per square meter, well below the
20 prices that Jamaca had actually received for several of the
21 upper lots of Phase 1. And, indeed, he caps the value of
22 the land at the top of the mountain at no more than \$120
23 per square meter, which is only \$12 more--\$13 more than the
24 price paid for one of the lots at the top of Phase 1.

25 Now, there was a waiting list of buyers interested

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1 for the Phase 2 lots, and sales could have begun the very
2 same day Jamaca de Dios received its expansion permit.
3 Respondent's expert, Mr. Hart, does not take much issue
4 with the structure of this model, but he instead argues
5 that the sale price inputs are wrong.

6 Mr. Hart chooses instead to use contracts that
7 don't reflect the actual consideration paid by the buyers
8 to the Ballantines for the land at issue. He knows that.
9 The Respondent knows that.

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

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

19 The parallel contract issue is a red herring. The
20 Respondents now want to try to tarnish the Ballantines
21 before this Tribunal for reporting taxes just like
22 everybody else did in the Dominican Republic, including all
23 90 purchasers at Jamaca, mostly Dominicans, including
24 government officials who signed parallel contracts and
25 wanted parallel contracts for their own tax reporting

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1 purposes.

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

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

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

18 Mr. Hart also contends that no overhead and
19 general expense amounts were included in Mr. Farrell's
20 analysis, but those amounts are. They're captured partly
21 in the infrastructure numbers, partly in the administrative
22 expense numbers used in Mr. Farrell's report for home
23 construction, and partly in the HOA fees that would be paid
24 by residents. And they're a pittance against the value of
25 the Phase 2 property. The sale of these valuable lots

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1 would have earned the Ballantines more than \$12.75 million.

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

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

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

22 Mr. Hart insists that the Ballantines would have
23 needed financing to complete all these Phase 2 plans. But
24 he's wrong. Hart tries to emphasize the capital
25 expenditures associated with Phase 2, but the vast majority

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1 of the numbers he uses relate to the construction costs for
2 the Phase 2 homes, and those amounts would have been paid
3 by the home purchasers as the homes were built and would
4 not have been fronted by Jamaca.

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

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

22 The Tribunal has seen the evidence of the mountain
23 lodge. It was to sit directly above the restaurant on two
24 lots the Ballantines had reserved for this project. Its
25 upscale design was popular. Jamaca had taken deposits for

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1 several units in this complex. The Tribunal has also seen
2 the plans commissioned for the lower apartment complex
3 which the Ballantines sought to develop on land closer to
4 the entrance of their complex.

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

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

16 One, the Ballantines have lost cash flows
17 associated from the sale of the individual condominium
18 units for both of these properties. That's detailed in
19 Mr. Farrell's report and totals 1.3 million for the
20 mountain lodge and 850,000 for the lower apartment complex.

21 And, two, these units would have been part of a
22 rental management program that Jamaca had established. The
23 detailed and conservative calculations from Mr. Farrell
24 with respect to rental rates/occupancy rates are all set
25 forth in his project--excuse me--in his report, and the

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1 discounted present value of the stream of that lost income
2 totals 477,000 for the mountain lodge and 302,000 for the
3 lower apartment complex.

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

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

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

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1 permitted.

2 So Mr. Farrell uses more modest lot sale prices
3 for Paso Alto because it didn't have the infrastructure or
4 the pedigree of Jamaca de Dios despite the fact they're at
5 similar altitudes. And the Ballantines don't seek
6 builder's profit for Paso Alto, even though they intended
7 to build there as well. And they don't seek any loss from
8 a large tract of additional land that Paso Alto owned but
9 had not yet been permitted. Mr. Farrell conservatively
10 calculates the lost cash flows associated with Paso Alto at
11 \$4.23 million.

12 Fifth, Respondent's actions have destroyed the
13 Jamaca de Dios brand. The Ballantines have been driven
14 from the country and forced to engage in this protracted
15 arbitration proceeding. The Tribunal has seen the
16 significant and un rebutted evidence of other opportunities
17 that existed for the Jamaca brand.

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

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

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1 for governments, having been a quantum expert in 18
2 investor-state cases over the last ten years, exclusively
3 for states.

4 His reports attempted and primary reliance on the
5 parallel contracts and the JDD financial statements that
6 reflect those as a predictor of Phase 2's success is
7 inappropriate because those contracts are not the actual
8 sale price received by Jamaca.

9 Now, beyond that, Mr. Hart appears to take little
10 issue with the calculation of damages presented by
11 Mr. Farrell beyond two small debates between them as to the
12 appropriate discount rate to be used and the appropriate
13 prejudgment interest rate that should be awarded to the
14 Ballantines.

15 Mr. Farrell reviewed Mr. Hart's position on the
16 discount rate, agreed with much of it, and adjusted the
17 discount rate in his Reply Report reducing the amount of
18 damages sought by the Ballantines and making any difference
19 now between the two rates largely immaterial.

20 With respect to interest, Respondent does not
21 dispute interest as appropriate but debates what the rate
22 should be and whether it should be simple and compound.
23 The Ballantines here note only that they have used a modest
24 5.5 percent interest rate which ties to the Central Bank of
25 the Dominican Republic's monetary policy rate. They seek

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

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

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

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

22 Legally, tribunals recognize that the projection
23 of future cash flows is not an exact science and
24 necessarily involves a degree of informed estimation. In
25 Flemingo Duty Free, the Tribunal noted approximations in

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1 DCF calculations is inherent and inevitable. The
 2 determination of future expected cash flows is not rocket
 3 science. There will, of course, be some uncertainty in the
 4 calculations presented here. We can't know exactly what
 5 would have happened because Respondent prevented the
 6 Ballantines from proceeding on their Phase 2 endeavors. It
 7 cannot now benefit from its treaty violations to say the
 8 Ballantines' claims are too speculative.

9 As to causation, the Tribunal will determine if
 10 Respondent violated CAFTA and will determine what loss
 11 flows from that violation. Mr. Farrell acts as a quantum
 12 expert should, taking no position on that ultimate legal
 13 issue but simply defining the measure of loss if causation
 14 is assumed.

15 As his report confirms, his calculations document
 16 what the financial state of JDD would have been but for the
 17 treaty violation of Respondent. That's appropriate,
 18 sufficient and what a damage expert should do.

19 As to mitigation, the Tribunal also determine if
 20 the Ballantines acted in any way that caused their damages
 21 to be greater than they otherwise would have been.
 22 Considering that the Ballantines stopped acquiring land
 23 after the very first denial of their permit, it seems
 24 counterintuitive to even make such an argument.

25 Hart primarily appears to question the acquisition

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1 of a small portion of land in Phase 2, after the
 2 Ballantines learned that the Baiguarte Park had been created
 3 in September 2010. But the evidence presented to the
 4 Tribunal comprehensively documents why this modest
 5 additional purchase was appropriate. The project's
 6 CONFOTUR approval in December 2010, it's receipt of a
 7 no-objection letter from the City of Jarabacoa in
 8 December 2010, and the explicit allowance of ecotourism in
 9 the Baiguarte Park in the decree that establishes the
 10 boundaries of that park.

11 Mr. Hart's evaluation and advocacy for the
 12 Respondent on this issue is beyond the purview of a damages
 13 expert and is appropriately argued by legal counsel for
 14 Respondent.

15 Finally, the Ballantines have suffered moral
 16 damages as a result of the Respondent's bad acts. Which,
 17 as summarized, the considerations that make up moral
 18 damages. Personal injury that does not produce the loss of
 19 income. Various forms of emotional harm, such as
 20 indignity, humiliation, shame, defamation, injury to
 21 reputation and feelings. Nonmaterial damage: mental
 22 stress, anguish, anxiety, pain, suffering, stress, nervous
 23 strain, fright, fear, threat, shock.

24 The Respondent's actions inflicted almost every
 25 aspect of these damages on the Ballantines. The

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1 Ballantines lived daily under the threat of continuing
 2 government retribution, and they were subjected to
 3 harassment, angry mobs, death threats, property
 4 destruction, loss of reputation, and emotional harm. The
 5 evidence is in the record to support this.

6 The Ballantines were forced to abandon the efforts
 7 of nearly eight years of hard work in the prime of their
 8 life. Lisa Ballantine was forced to surrender her
 9 internationally recognized water project. They were
 10 ultimately forced to sell their home and to flee the
 11 Dominican Republic in order to escape this harassment, all
 12 because the Respondent chose to enrich local Dominican
 13 interests that had similar projects. As such, the
 14 Ballantines are entitled to moral damages.

15 Additionally, or at the very least, the
 16 Ballantines should be awarded all of the fees and costs
 17 associated with this arbitration, which will be submitted
 18 to the Tribunal at its instruction at the close of this
 19 proceeding.

20 Thank you.

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

25 MR. ALLISON: Punitive damages are intended to

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1 punish the Respondent for their behavior. Moral damages
 2 are intended to compensate the Claimant for harm that he
 3 has legitimately suffered, harm that cannot be defined by
 4 projected cash flows, harm that cannot be defined by the
 5 value of certain property. It's harm that is less
 6 quantifiable. Harm to reputation, harm to emotions, harm
 7 to stress. And the Tribunal needs to look at the behavior
 8 of the government and whether or not those appropriately
 9 inflicted emotional distress and anguish on the Ballantines
 10 and then award the Ballantines the damages they think
 11 appropriately compensate them for those damages.

12 But it's not intended to punish the Dominican
 13 Republic. It's intended to compensate the Ballantines.

14 PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. I think it's
 15 Respondent.

16 MR. Di ROSA: Mr. Chairman, before we take the
 17 break, just a point of order. We had planned to submit,
 18 before our presentation to the Tribunal and to opposing
 19 counsel, a hard copy of our PowerPoint presentation.

20 We notice that the Claimants did not do that. We
 21 didn't wish to interrupt the presentation at the outset,
 22 but it would be helpful if they could email it to us or
 23 give us a hard copy, in fact, preferably right now, and we
 24 still would plan to show our entire presentation to them
 25 before we start the presentation this afternoon.

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1 Thank you.

2 MR. ALLISON: We have no objection. We'll email a
3 copy of our presentation to them as soon as we break here.

4 PRESIDENT RAMÍREZ HERNÁNDEZ: So since we are
5 finishing earlier, could we come back earlier, like
6 2:00 o'clock instead of 2:15? Respondent? I'm looking at
7 Respondent.

8 MR. Di ROSA: It's fine by us, Mr. Chairman.

9 PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. So we will
10 resume at 2:00.

11 (Whereupon, at 12:33 p.m., the Hearing was
12 adjourned until 2:00 p.m. the same day.)

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1 AFTERNOON SESSION

2 PRESIDENT RAMÍREZ HERNÁNDEZ: Good afternoon
3 everyone. Please, may we hear from Respondent.

4 OPENING STATEMENT BY RESPONDENT

5 MR. Di ROSA: Thank you, Mr. Chairman. Let me
6 just introduce the Dominican Republic's delegation for this
7 week's hearing.

8 My name is Paolo Di Rosa. I'm from the law firm
9 of Arnold & Porter. Also here from Arnold & Porter are
10 Raúl Herrera, Mallory Silberman, Claudia Taveras, Cristina
11 Arizmendi, Kelby Ballena, Kaila Millett. José Antonio
12 Rivas is of counsel.

13 Also from the Dominican Republic's government,
14 Marcelo Salazar is the Director of Foreign Trade of the
15 Ministry of Industry and Commerce. Leidylin Contreras is
16 also from the Ministry of Industry and Commerce. Raquel De
17 La Rosa, Patricia Abreu from the--sorry. Raquel De La Rosa
18 also from the Ministry of Industry and Commerce. And from
19 the Ministry of the Environment, Vice Minister Patricia
20 Abreu is here. Also present is Rosa Otero from the
21 Ministry of Environment. From the Ministry of Natural
22 Resources, we have Enmanuel Rosario.

23 Other representatives from the Ministry of the
24 Environment are Johanna Montero and Claudia Adames.

25 We also have a few of our experts. Pieter Booth

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1 from Ramboll is here today as well as Timothy Hart from
2 Credibility International, and he's with two of his
3 colleagues, Laura Connor and Tyler Smith. Sorry.

4 Oftentimes in these exercises, the Respondent's delegation
5 is quite large.

6 Mr. Chairman and Members of the Tribunal, for as
7 long as humans have been able to communicate, they've been
8 telling stories. The cave dwellers in the Lascaux caves in
9 southern France 20,000 years ago told stories through their
10 paintings and their drawings on the cave walls. The
11 Egyptians told stories through their hieroglyphics. The
12 Greeks and the Romans told myths. The Norse sagas were
13 stories. Practically all of the religious texts, the
14 Bible, the Torah, the Koran, the Upanishads, they all tell
15 stories.

16 We tell stories to our children at night. We
17 dream stories when we sleep. We even pay people to tell us
18 stories. That's what we do when we buy novels, when we pay
19 for movie tickets, when we go to the theater. We even pay
20 to tell stories, as in the case of therapists for example.
21 Gossip consists of stories, rumors are stories, fantasies
22 are stories, hopes are stories.

23 Stories are a big part of how humans think and
24 apprehend the world. And the simpler the stories are, the
25 more we like them. That's why most stories consist of

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1 simple binary constructs. One classic example of that is
2 good versus evil. The story of Adam and Eve was good
3 versus evil.

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

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

15 Neuroscientists and psychologists who specialize
16 in human cognition have made great strides in unlocking the
17 mysteries of how the human brain works and how we process
18 information from the external world. And we like stories
19 so much because through them, we can make sense of a world
20 that is too complex and too bewildering and overwhelming
21 for the human brain to process.

22 For all the superiority of the human brain
23 compared to the brains of other species, we still have very
24 limited ability to understand the world. So we reduce
25 everything to bite-size concepts that we can process. As a

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1 result, our natural default is to think about things in
2 simple terms and to assign simple tags to everything. We
3 often do this subconsciously when we make
4 judgments--instant judgments about people, for example.
5 Right?

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

11 And that's also why the world of a child is so
12 binary; right? Everything that a child perceives is very
13 black and white; right? Happy or sad. Fun or boring.
14 Safe or unsafe. And as we become adults we start to see
15 more shades of gray in the world, but we still have a
16 limited ability to process the complexities of the world.
17 So we still interpret the world largely in dualistic terms.
18 That's why political slogans are so rudimentary and binary;
19 right? Insider or outsider. Patriots or traitors. You're
20 either with us or against us.

21 Now, what impact do these binary constructs, these
22 simple--the simple dualism, this reliance on stories, what
23 impact does that have on the way we think? That too has
24 been extensively studied by cognition specialists. And
25 what those phenomena do is they make us connect dots too

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1 easily. They make us find cause and effect too easily.
2 They make us invent stories in our head about almost
3 everything. They make us make snap judgments about things
4 with very incomplete information. They make us accept
5 passively stories that we hear, and we consider them true,
6 even though we might know that there's got to be more to
7 the story. This happens all the time with the news, for
8 example. We sort of accept news as true even though we
9 know that often it's very partial or limited.

10 In short, the way our brain works gives us a
11 distorted view of the world and the intuitive appeal of
12 stories makes us often believe things that aren't true.
13 The problem is that much of the time, we can't tell the
14 difference between the stories that are true and the
15 stories that are not true.

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

22 And I'd like to quote a couple of passages from
23 his seminal book called "Thinking Fast and Slow." This is
24 in the record as Exhibit RLA-117. And Professor Kahneman
25 says the following quote at Page 195, "Narrative fallacies

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1 arise inevitably from our continuous attempt to make sense
2 of the world. The explanatory stories that people find
3 compelling are simple; they are concrete rather than
4 abstract; they assign a larger role to talent, stupidity
5 and intentions than to luck; they focus on a few striking
6 events that happened rather than on countless events that
7 failed to happen. Any recent salient event is a candidate
8 to become the kernel of a causal narrative. We humans
9 constantly fool ourselves by constructing flimsy accounts
10 of the past and believing they are true."

11 Then he says, "Good stories provide a simple and
12 coherent account of people's actions and intentions. You
13 are always ready to interpret behavior as a manifestation
14 of general propensities and personality traits, causes that
15 you can readily match to effects."

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

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1 ignorance."

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

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

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

22 Now, the Ballantines also resort to a number of
23 other binary storytelling constructs. For example, they
24 have the theme of the little guy versus the mighty. Right?
25 The little guy who takes on the State. We love those

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1 stories; right? David and Goliath. This morning, they
2 said, you know, the Ballantines are not a corporation and
3 they're not this and that; right? And we all root for the
4 little guy.

5 They also have the theme of the idealist who
6 pursues a dream against all odds. They had romance in
7 their story; right? The cute married couple that counsel
8 referred to this morning. They even have a few good
9 conspiracy stories in their story, and every story benefits
10 from a juicy conspiracy theory; right? They have the
11 national park. They have the resolution that made
12 information confidential in certain circumstances. They
13 have the fines they all consider part of a massive
14 conspiracy against them specifically.

15 Another theme is the unexpected transformation or
16 revelation. That's always a good theme for a story; right?
17 The people who at the beginning are good and friendly at
18 first, but then they turn out to be mean and evil.

19 The Ballantine story has all the ingredients.
20 It's like a greatest hits of storytelling, themes and
21 techniques. And it works. It's a simple story. It's neat
22 and tidy. It's symmetrical. It's compelling-sounding.
23 It's entertaining. It's intuitively satisfying. It
24 appeals to our emotions and to our sense of justice. It's
25 a great story. It has just one flaw, it's not true.

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1 Now, we'd like to take a step back and to focus
2 for a moment on methodology and evidence. In legal
3 proceedings, to distinguish fact from fiction, we rely on
4 evidence. Mere stories don't count as evidence. Stories
5 are sometimes accepted by us as true as a result of this
6 narrative fallacy that Professor Kahneman talks about. But
7 in a legal proceeding, you can't just rely on stories and
8 binary constructs. You need evidence. And in this regard,
9 not only are the Ballantines' submissions deficient, but in
10 fact they completely and incomprehensibly, in many
11 instances, contradict the actual contents¹ of
12 contemporaneous documents. My colleague, Ms. Silberman,
13 will walk you through some of those.

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

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

¹ English Audio Day 1 at 05:02:24

² English Audio Day 1 at 05:02:41

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1 pausing to really test it, to really evaluate how much of
2 what they are saying is supported by concrete evidence. So
3 we encourage the Tribunal, as they review the Claimants'
4 pleadings and Witness Statements in the coming days and
5 weeks, to focus not only on the Ballantines' narrative, but
6 to really keep an eye out for hard evidence. Every time
7 they make an assertion or an allegation, do they have a
8 footnote? Do they have a citation? Do they have an
9 exhibit? Or is it just them declaring things to be true?

10 Most of their briefs contain long stretches of
11 allegations and statements of fact with zero footnotes and
12 zero evidence. The same applies to their Witness
13 Statements. The same applies to their Expert Reports. Not
14 entirely obviously, but long stretches of statements about
15 technical things or statements about things that happened,
16 and there's no citation.

17 That happened even in their PowerPoint. If you
18 flip through their PowerPoint from this morning, you'll see
19 they say a lot of stuff about facts of various sorts,
20 numbers and this and that, and they characterize the, you
21 know, so-called comparator projects and properties and they
22 had all sorts of details about it, but no citation. So
23 there's no way that anybody--not us, not the Tribunal--can
24 actually test that as--you know. And it's possible they
25 drew it from somewhere; right? You know, one hopes that

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1 they didn't just make it up. The problem is you don't know
2 where to look to actually confirm it or to test it. And,
3 you know, we do encourage the Tribunal to actually flip
4 through, for example, all the long stretches of their
5 briefs on the comparative projects and ask
6 yourself--they're saying a lot of stuff, but what do they
7 actually prove? What are they providing as evidence of
8 what they're saying? And you will find that there's not
9 much to their pleadings other than the narrative
10 storytelling. If you undertake that exercise as we were
11 forced to do, to really test every factual proposition,
12 you'll find that the Claimants don't really have evidence
13 on the matters that--you know, on the matters that really
14 count. On the issues that are important for this
15 arbitration, the issues that are important for this
16 Tribunal to decide on those issues, you will find them
17 severely lacking in documentary evidence. They rely a lot
18 on testimonial evidence. They have a lot of Witness
19 Statements, and, you know, they say a lot of things in
20 their pleadings obviously, so there are a lot of naked
21 assertions from the lawyers as well. But even their
22 testimony is suspect from a purely evidentiary standpoint
23 as it often relies on self-serving statements by the
24 Ballantines themselves or on assertions that have no
25 testimonial value, like the one that we're going to see on

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1 the screen in a moment.

2 This is from the first witness of Michael
3 Ballantine at Paragraph 64. He says, "The next month
4 Victor"--whose last name is Pacheco--"emailed me and
5 advised that Rodriguez had confirmed that Dominguez was
6 'neck deep' in the denial of my permit." Now, in U.S. law,
7 this is what we would call multiple hearsay; right? If I
8 see something, that's evidence. If I hear someone tell me
9 about it, that's not evidence. If I hear somebody tell me
10 about something they heard about some other person that
11 told them, that's even less of a piece of evidence as such.
12 And they frequently do this. They will refer to things
13 that people told to them. They refer to things that they
14 didn't personally witness or apprehend in some direct way.

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

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

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1 everything to the point of caricature, we also felt the
2 need to create a lot of demonstrative exhibits. For
3 example, these comparative charts that we provided that
4 were designed to help the Tribunal understand some of this
5 material, which is quite complex, including some very
6 complicated environmental issues. The most representative
7 example of their oversimplification is their treatment of
8 the so-called comparators. They take a bunch of real
9 estate projects all over the country and they say, "Look at
10 all these Dominican-owned properties that are being
11 developed. Ours is not being developed. Case closed."

12 It's a complete caricature as if every property
13 has the same scale and scope, as if every property has the
14 same soil characteristics, the same altitude, the same
15 flora and fauna, the same degree of biodiversity.

16 They don't have a problem with that. In fact,
17 today, you heard counsel in Slide 21 say, "All these
18 projects had the same biodiversity. They all had the same
19 endemism, the same soil composition, et cetera." And just
20 on its face, that cannot be true. They certainly haven't
21 proven otherwise.

22 The issue of the comparators is just not a simple
23 issue. It doesn't lend itself to the sort of simple binary
24 treatment that the Claimants purport to advance. You know,
25 they purport to reduce it to steep versus not steep; inside

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1 the park, outside the park, you know. All these very
2 clean, very neat constructs that, you know, maybe are
3 somewhat intuitively appealing to people generally. But
4 this is a legal proceeding. There has to be more than
5 that.

6 And these issues are just not simple at all. And
7 just to give you an example, I have here--this is the
8 chart. And I'll show you this chart here. This is Exhibit
9 A to our Rejoinder. It was in an Excel format. But this
10 is--when you print it out, this is what it looks like.
11 This is a comparative chart of the various projects and of
12 their characteristics on all these--on all these variables
13 that have to be analyzed for purposes of determining
14 whether these projects are, in fact, in like circumstances.

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

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

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

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

12 Now, aside from methodological and evidentiary
13 failures, the Claimants' case also fails as a matter of
14 pure logic. It's somewhat easy to miss that, though, in
15 part because of the environmental aspects, some of which
16 are technical and obscure this phenomenon somewhat. But
17 for this reason, we tried to think of an analogy from
18 everyday life that illustrates most of the points that are
19 at issue in this case. And this analogy is somewhat
20 detailed, so, you know, we'd like to ask the Tribunal to
21 bear with us while we march through it. But we think it
22 will help lend some conceptual clarity to many of the
23 issues that are being discussed in this case, and we think
24 will expose many of the common sense deficiencies of
25 Claimants' case from a--from a pure logic standpoint.

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1 So what we'd like to do is to posit a hypothetical
2 scenario in which an American citizen moves to the
3 Dominican Republic. He sees an antique car that he decides
4 he must have, and he goes ahead and he buys it. And he
5 buys it on impulse without checking first with a mechanic
6 whether the car, which is very old, would be likely to pass
7 a vehicle inspection.

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

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

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1 tests, but the results are the same.

2 So that first reconsideration request is denied.
3 American leaves, but then returns with the same
4 car and the same argument. "I measured my emissions and
5 still think you're wrong."

6 So the inspection facility again rejects the
7 reconsideration request because nothing had changed.
8 Incredibly, the American returns a third time with the same
9 car. This time he has the U.S. Embassy official call the
10 inspection facility. Inspection facility patiently
11 conducts the test. And because of the intervention of the
12 U.S. Embassy, the supervisor of the facility personally
13 conducts the tests. But the results are still the same.
14 This time, the facility tells the American, "You still have
15 the same problems that you had before but this time in the
16 tests that we conducted, we have identified an additional
17 problem. Your suspension is also deficient."

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

20 Now, having failed for a fourth time to get his
21 inspection permit, what does the American do? He doesn't
22 get a different car. Instead, he gets a lawyer and he sues
23 the inspection facility. The American first insists that
24 the facility did in fact make a mistake in measuring the
25 emissions. But he doesn't say anything about the two other

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1 grounds on which the permit was denied, the braking and the
2 transmission.

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

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

14 The inspection facility says to the American,
15 "Sir, let me say three things to you in response. First,
16 we did not deny your permit because you are American. We
17 denied your permit because your car is unsafe and bad for
18 the environment. We tested it several times and each time
19 the test results were the same. Second, you complained
20 that there were many Dominicans who got permits and that
21 you saw them. Of course a lot of Dominicans got permits.
22 This is the Dominican Republic. Most car owners here are,
23 in fact, Dominican. Third and most importantly, sir, the
24 cars that go approved didn't have the same problems that
25 your car did. One Dominican did have a similar problem to

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1 yours, but he was denied a permit just like you were.

2 Other Dominicans were denied initially, but they came back
3 after fixing the problem that we had identified, and they
4 passed the inspection, so we granted them the permit."

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

11 The inspection facility says, "Sir, in response to
12 that argument, let me say the following six things to you.
13 First, some of those cars are driving illegally and never
14 came to inspection at all, so we never approved them. The
15 fact that they're driving out there illegally is a problem,
16 but it's an enforcement issue; it's not an inspection
17 issue. We don't have enough enforcement personnel to chase
18 after every person whose car may have bad emissions.
19 Second, some of those cars did come for inspection, but
20 they were perfectly fine when they came here. That's why
21 we approved them. That means that those cars you saw must
22 have developed their emissions problems after they were
23 inspected. But that too is an enforcement problem, not an
24 inspection problem. Third, some of those cars got their
25 permits before the current emission standards entered into

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1 effect. Fourth, in any event, you said that the cars that
2 you saw had emissions problems, but emissions was not the
3 only problem that your car had. We told you that your car
4 also had a braking problem and a transmission problem.
5 That means you can't compare those cars to yours even if
6 those cars do have emissions problems. Fifth, how do we
7 even know that the cars that you saw indeed had
8 impermissible levels of emissions? Even if you had managed
9 somehow to measure some or all of these cars emissions
10 yourself, how does the inspection facility know that you
11 conducted the right test or used the right instruments?"

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

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1 So that's the end of our analogy. Obviously, you
2 know, there are differences. And of course Claimants are
3 going to come back and they're going to say, "That's
4 ridiculous. How can you compare, you know, vehicle
5 inspection to environment? They're totally different."
6 And we understand that they're different. The point is
7 that there are some conceptual problems with their argument
8 that we think are illustrated by this analogy.

9 Now, in the end, for the same reasons that we just
10 illustrated in the vehicle inspection analogy, the issue of
11 the third party, you know, projects and properties in the
12 end is nothing by a red herring. It's a giant distraction.
13 They want you to focus less on the reasons for the denial
14 of their own environmental permit and more on random other
15 projects that they falsely proclaim as comparators.

16 In fact, Ms. Cheek today quite rightly asked,
17 "What counts as like circumstances?" You know, and the
18 U.S. says, "That means that the projects have to be similar
19 in all relevant respects."

20 Opposing counsel in response to that question
21 said, "Business sector and legal regime." Didn't mention
22 environmental impact. And it was only when the president
23 of the Tribunal asked, "Well, isn't environmental impact
24 also relevant," that counsel conceded that that was, in
25 fact, one of the factors that has to be in like

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1 circumstances.

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

5 Now, we've explained in our pleadings why, with
6 the exception of Aloma, which is the property that's
7 directly adjacent to Jamaca de Dios, on the same mountain,
8 that the other projects are, in fact, not in like
9 circumstances. That's what this big chart was all about.
10 And therefore, they're not legitimate comparators. And my
11 colleague Ms. Silberman will address the Aloma property and
12 some of the other comparator issues in more detail in her
13 portion of the presentation.

14 Now, aside from the third-party projects, the
15 Claimants create a number of other distractions apparently
16 designed to introduce into their story some additional
17 subplots that maybe they thought would make their story
18 more compelling. A few representative examples of this are
19 the entire issue of the national park, just a massive red
20 herring.

21 They spent an enormous amount of ink and time and
22 effort on this issue. But now that the dust has settled,
23 it has become evident that the issue really is completely
24 irrelevant. It's almost like they introduced the subject
25 simply as a means to introduce this really juicy conspiracy

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1 theory into their story because they conceded that
2 it's--they're not claiming about the creation of the park.
3 And they're saying, "Well, we're claiming that the national
4 park was one of the reasons that we were denied the
5 permit." But it was an after-the-fact denial, as my
6 colleague, I think, will walk you through.

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

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

13 Now, some of these issues that they raised, the
14 Haitians and Odebrecht, are complex issues and we're not
15 going to debate them here. They're completely irrelevant.
16 They, of course, oversimplify the issues, but we were not
17 going to engage them on a debate about these issues that
18 are irrelevant.

19 The Haitians issue is a very complex issue
20 relating to Article 11 of the Dominican Constitution and a
21 Supreme Court decision from 2005. It's a complicated legal
22 issue. As we say, we're not going to engage with them on
23 that.

24 And the same with Odebrecht. They said today,
25 "Oh, there's not been a single conviction in the Dominican

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1 Republic." But there has been a lot of action on the legal
2 and criminal front.

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

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

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

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

25 And what really matters for the Tribunal's

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1 purposes is the denial of the permit. Despite all the
2 confusion and the smoke generated by the Claimants and all
3 the plots and subplots, this case is really all about this
4 permit and its denial.

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

11 Mr. Farrell says: "The damage amounts I have
12 presented appropriately flow from the assumption that the
13 Ballantines' inability to expand their investment in the
14 Dominican Republic was the result of the Dominican
15 Republic's inappropriate refusal of their environmental
16 permit."

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

23 This is Exhibit C-8. This is the letter pursuant
24 to which the Dominican Republic--you know, the Ministry of
25 the Environment conveyed to the Claimants that the upper

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1 mountain project was not viable environmentally. They told
2 them--they said, look, you--you know, the project is not
3 viable because, quote, "it's located in a mountain area
4 with a slope greater than 60 percent."

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

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

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

23 They just didn't do that. They--they wanted their
24 project on the mountain that they had, and they wanted way
25 up top of the mountain. And so they kept coming back with

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1 these reconsideration requests.

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

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

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

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

22 But really, you know, where the--you know, the
23 evidence of what the Ministry took into account in denying
24 the permit is in those technical reports that you saw on
25 the previous slide. And we encourage you to look at those.

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1 You know, they're--incomprehensibly, the Claimants
2 repeatedly say, "They only mentioned the slopes, and they
3 never mentioned anything else. And now this is all ex post
4 facto."

5 Can you go to the previous slide.

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

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

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

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

23 Now, that should not be a challenging decision in
24 the end when you have reviewed all the evidence, because
25 the Claimants' case ultimately amounts to not much more

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1 than storytelling and unsupported allegations. They have
2 produced no credible evidence of any conspiracy or
3 discrimination against them. And in any event, that's not
4 the key legal³ issue in this case.

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

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

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

³ English Audio Day 1 at 05:33:34

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

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

6 Thank you.

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

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

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

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

23 And the second will be the chronology relating to

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1 the Ballantines' three projects—at least the three projects⁴
2 in Jarabacoa for which the Ballantines sought some form of
3 permission from the Ministry of Environment.

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

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

18 And in 2003, during one of these visits, the
19 Ballantines, as they have put it, had a vision. A friend
20 of theirs showed them a tract of mountain land in the City
21 of Jarabacoa. In 2004, the Ballantines acquired the land
22 with the vision of developing the first upscale mountain
23 residential community in the Dominican Republic.

⁴ English Audio Day 1 at 05:35:55

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1 Now, in 2006 the Ballantines moved to the
2 Dominican Republic with their children. As Michael states,
3 again on the website of Jamaca de Dios, the Ballantines
4 were still "feeling the effect of our experience here."

5 What does that mean? Well, it means that as the
6 Ballantines' own Notice of Arbitration states, it was "as a
7 result of their affection for the country and its people
8 that the Ballantines and their children moved to the
9 Dominican Republic."

10 This move in 2006 was intended to be permanent.
11 Indeed, that's how the Ballantines themselves have
12 explained it. In their Notice of Intent in this very
13 arbitration, it states that "Michael and Lisa Ballantine,
14 as well as their four children, moved permanently to the
15 Dominican Republic in 2006."

16 The Ballantines' friend and former neighbor said
17 the same thing in Exhibit R-12, calling the move both
18 permanent and a huge commitment.

19 And as the Ballantines' own witness, Andrés
20 Escarraman, explains, the Ballantines felt attracted to the
21 idea of putting down roots in the Dominican Republic. The
22 Ballantines' actions are consistent with this testimony.

23 So, for example, before the Ballantines left the
24 United States, Michael decided to sell his business and the
25 family sold and gave away many of their possessions. And

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1 in addition, as Michael himself stated in a letter to the
2 Dominican Republic he and his wife sold all of their
3 properties in the United States.

4 And then, upon arriving in the Dominican Republic,
5 here's what the Ballantines did. They built a house. They
6 opened bank accounts. They met their neighbors. They made
7 friends, joined a church, enrolled their children in a
8 local school, created a charitable venture designed to help
9 their new community. They obtained the formal status of
10 permanent Dominican residents and they invested all of
11 their savings in building their dream community around
12 them.

13 Now, in 2008, the Ballantines reaffirmed their
14 commitment to living in the Dominican Republic. That year
15 they renewed their permanent residency status, and then
16 Michael asked an attorney about the procedure for getting a
17 Dominican passport. This started the naturalization
18 process.

19 As the Ballantines have explained, the
20 naturalization process was something that they undertook
21 voluntarily and in the hopes that Dominicans would see that
22 the Ballantines were making a commitment to the Dominican
23 Republic. This is a quote from their reply.

24 And let's just pause on this for a moment, because
25 in the Reply in the footnote, the Ballantines assert, "of

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1 course the decision was voluntary," as if this were
2 something common, as if choosing nationality were something
3 that you see every day.

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

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

20 Now, for the Ballantines, the naturalization
21 process cost thousands of U.S. dollars, and in the end, it
22 took them more than two years to complete. But the
23 Ballantines saw benefits to becoming naturalized Dominican
24 citizens.

25 As they've stated, one substantial motivation was

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1 that people would view them as "fellow countrymen and
2 women." And according to their pleadings, the Ballantines
3 also believed that naturalization might present certain
4 commercial and legal advantages.

5 And so, because the Ballantines believed this,
6 they went through all of the following steps. They
7 consulted an attorney, completed an application form,
8 tracked down and submitted supporting documentation. They
9 made a sworn statement of domicile in Jarabacoa, and
10 identified Dominican citizens to serve as references.

11 Then after that, they proceeded to submit an
12 application under a cover letter stating that "Michael J.
13 Ballantine and Lisa Marie Ballantine identify closely with
14 Dominican sentiment and customs given their longstanding
15 respect for and period living in that country."

16 The sentence ended by stating that the Ballantines
17 were "happy to confirm, legally, their Dominican
18 sentiment."

19 Now, after this, the Ballantines took and passed
20 an examination of written and oral proficiency in Spanish,
21 and they studied for and passed a Dominican history and
22 culture exam.

23 After that, they appeared at a swearing in
24 ceremony where each of them made a sworn oath "to be
25 faithful to the Dominican Republic and to respect and

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1 comply with the Constitution and the laws of the Dominican
2 Republic."

3 Now, that's everything that the Ballantines did.
4 Let's talk about what the government did.

5 On the government side, the naturalization process
6 involved review and input from national drug authorities,
7 from the Ministry of Police, from the Office of the
8 Attorney General, from the local branch of INTERPOL, and
9 ultimately from the President of the Republic who passed a
10 decree formally confirming Dominican nationality of the
11 Ballantines.

12 And as all of this confirms, and as the
13 International Court of Justice has stated, naturalization
14 is not a matter to be taken lightly. It's not a matter to
15 be made fun of. To seek and obtain it, as I mentioned, is
16 not something that happens frequently in the life of a
17 human being.

18 So up to this point, the Ballantines' connections
19 to the Dominican Republic have grown stronger every year.
20 After visiting the country for the first time in 2000, the
21 Ballantines returned every year for a period of several
22 months. Then they bought land in and eventually moved to
23 the Dominican Republic. They set about making it their
24 permanent residence, both formally and in practice. After
25 that, they became naturalized Dominican citizens.

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1 And then in 2010, the very same year that they
2 naturalized, they reinforced their commitment to the
3 Dominican Republic. So they obtained nationality for their
4 two teenage children, repeating in this context that they
5 "identify closely with Dominican sentiment and customs
6 giving their longstanding respect for it and period living
7 in this country."

8 And in addition to this, the Ballantines also
9 decided to remain in the Dominican Republic when their
10 teenage children moved back to the United States.

11 And between 2010 and 2014,⁵ which is when the
12 Ballantines initiated this case, the Ballantines availed
13 themselves of the benefits of Dominican citizenship. They
14 used their Dominican nationalities to vote, to enter the
15 Dominican Republic, to bring legal claims, to apply for a
16 business license, to enter into contracts and loan
17 agreements, including a contract with their very own
18 daughter.

19 Now, Mr. Baldwin said this morning, "If Michael
20 Ballantine is making a loan agreement in the Dominican
21 Republic that he would--might use this Dominican
22 nationality or Dominican passport in connection with that,
23 that just makes sense."

⁵ English Audio Day 1 at 05:44:34

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1 But Michael Ballantine used his Dominican
2 nationality in a contract with his own daughter. And in
3 another example--so you have that one on the screen. But
4 another example is Exhibit R-212. This is a January 10th,
5 2013, agreement between Michael Ballantine and Prohotel,
6 which is a "Texas corporation." That's on the signature
7 page of Exhibit R-212. Section 9.1 of that document has an
8 international arbitration agreement. International. The
9 Texas corporation.

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

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

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

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1 it's apparent from the Ballantines' own documents and
2 witnesses that they also had family in Jarabacoa as well.

3 Beginning in February 2010, for example, the
4 Ballantines' daughter and son-in-law and grandchild lived
5 at Jamaca de Dios for long stretches of time. In some
6 instances, the stretch was a period of several months. In
7 another instance, it was a year. And eventually the
8 Ballantines' daughter and her family moved to the Dominican
9 Republic in March 2013.

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

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

21 Even when this arbitration started to get
22 underway, in June 2014, when the Ballantines submitted
23 their Notice of Intent to submit a claim, even there they
24 asserted that the dedication of the Ballantines to the
25 Dominican Republic is well understood and accepted by many

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1 Dominicans.

2 Three months later, on 11 September 2014, the
3 Ballantines submitted their Notice of Arbitration and
4 Statement of Claim. Now, at the time they still lived in
5 the Dominican Republic, but eight months later they were
6 moving back to the United States. And in that context Lisa
7 stated that, "We have been gone for so long that I feel out
8 of touch with American society. I feel such a culture
9 shock coming back."

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

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

24 But as I've just shown you, that version of events
25 stands in direct contradiction to the Ballantines' own past

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1 statements, and there is quite the tension between those
2 arguments and the claim for \$4 million in moral damages for
3 supposedly being "forced to sell their home and leave their
4 friends and colleagues in the Dominican Republic."

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

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

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

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

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

25 Was it silly to believe what the Ballantines were

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1 saying?

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

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

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

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1 pleadings.

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

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

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

24 Now, this may seem minor, but all of these
25 distortions add up. And ultimately, they add up to the

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1 point where at the present day, the Ballantines have
2 utterly failed to establish the conditions for
3 jurisdiction.

4 And I know that this has been explained many times
5 before in the pleadings, but it really bears repeating that
6 the Ballantines are the ones with the burden of proof. The
7 United States has confirmed this in its non-disputing party
8 submission, and even the Ballantines themselves have
9 recognized that they "have the ultimate burden of proof
10 with respect to their claims."

11 And this is important because it means that the
12 onus is on the Ballantines to make a positive case. They
13 can't win the day just by being contrarian. They must
14 prove to you with evidence that their U.S. nationalities
15 were dominant as of certain critical dates.

16 Now, as I mentioned earlier, we're not going to
17 spend a lot of time today discussing legal standards. This
18 is the one exception because I'd like to touch briefly on
19 certain jurisdictional issues because the Ballantines have
20 sewn quite a bit of confusion in this regard.

21 Now, a moment ago I mentioned that the Ballantines
22 must prove that their U.S. nationalities were dominant as
23 of certain critical dates. In a second I'll show you why
24 that is. But, first, let's talk about what the Ballantines
25 said this morning.

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

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

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

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

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

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

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

15 And in Article 10.17.1 of DR-CAFTA, the Dominican
16 Republic consented to the submission of a claim to
17 arbitration under Section B of DR-CAFTA Chapter 10. The
18 words "submission of a claim to arbitration" are the title
19 of Article 10.16 of DR-CAFTA. And Article 10.16 poses two
20 questions that ultimately turn on the issue of the
21 Ballantines' dominant and effective nationality.

22 Now, here's what Article 10.16.1 says. It says,
23 "A Claimant may submit to arbitration a claim (i) that the
24 Respondent has breached an obligation under Section A of
25 Chapter 10 and (ii) that the Claimant has incurred loss or

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1 damage by reason of, or arising out of, that breach."

2 Now, there are two questions that arise out of
3 this. The first is, do the Ballantines qualify as
4 Claimants when they submitted their claims to arbitration?
5 And the second is, did the obligations under Section A
6 apply toward the Ballantines at the time of the alleged
7 breaches.

8 The first question arises out of the⁶ first part of
9 Article 10.16 where the rule is that only a Claimant may
10 submit a claim to arbitration. And if the rule is that
11 only a Claimant may submit a claim to arbitration, it
12 follows that a person must meet the definition of
13 "Claimant" at the time of submitting the claim. What time
14 is that?

15 Article 10.16.4 states, "That a claim shall be
16 deemed submitted to arbitration when the Claimant's Notice
17 of Arbitration and the Statement of Claim are received by
18 the Respondent."

19 So the rule here is that the Ballantines must have
20 qualified as Claimants on the date of their Notice of
21 Arbitration and Statement of Claim, which in this case was
22 on September 11th, 2014.

23 Now, how does all of this relate to the issue of

⁶ English Audio Day 1 at 05:58:04

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1 dominant nationality? As the United States has explained,
2 "If the natural person had the dominant and effective
3 nationality of the Respondent party at the time of
4 submission of a claim, he or she would not be a Claimant."
5 Here's why that is. And it may be best to watch this part
6 on the screen.

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

12 Investor of a Party means a national of a Party
13 that attempts to make, is making, or has made an investment
14 in the territory of another Party. And "national of a
15 Party" is another defined term. In principle, "national"
16 means a natural person who has the nationality of a Party,
17 according to Annex 2.1 of DR-CAFTA, but there's a caveat.
18 A natural person who is a dual national shall be deemed to
19 be exclusively a national of the State of his or her
20 dominant and effective nationality.

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

25 "You have a national of the state of his or her

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1 dominant and effective nationality that attempts to make,
2 is making, or has made an investment in the territory of
3 another party that is a Party to an investment dispute with
4 another Party."

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

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

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

23 This means that the Ballantines must demonstrate
24 that the obligations that they've invoked, which are the
25 obligations set forth in Articles 10.3, 10.5, and 10.7 of

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1 DR-CAFTA, applied to them at the time of the alleged
2 breach.

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

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

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

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

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

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

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1 and to the investment of such a person.

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

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

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

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

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

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

25 So the purpose of the dominant nationality inquiry

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1 is to resolve the conceptual paradox. As you know,
2 Bilateral Investment Treaties and investment chapters of
3 free trade agreements generally draw a line between
4 domestic investors and foreign investors. The treaties
5 offer protection to foreign investors, but nationals of the
6 host State generally aren't protected nor can they assert
7 international claims against their own State.

8 But dual nationals are both foreign and domestic.
9 So the idea behind the dominant aspect, the dominant
10 nationality inquiry, is to ensure that the person is
11 sufficiently foreign to the Respondent's State in order to
12 bring an international claim against it.

13 Now, the Ballantines' second recurring argument is
14 that the relevant inquiry turns on whether the Ballantines
15 made a decision to discard their strong U.S. cultural
16 heritage and renounce their lifeline U.S. citizenship to
17 exclusively and singularly embrace a Dominican citizenship.

18 That cannot be the test. If the Ballantines were
19 to abandon their U.S. nationalities, then they wouldn't be
20 dual nationals. They would only be Dominican nationals.
21 And the dominant and effective nationality standard is only
22 applicable in the case of dual nationals.

23 As I mentioned earlier, the test is simply, is the
24 dual national foreign enough to render international a
25 dispute with the Respondent State? And in their Rejoinder

1 on Jurisdiction, the Ballantines agreed with this asserting
2 that, "What this Tribunal needs to determine is whether or
3 not the Ballantines were foreign investors."

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

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

14 And then after this, the U.S., in its Digested
15 Practice in International Law referred to a U.S. court case
16 called *Sadat vs. Mertes*⁷. It was a U.S. court case that
17 addresses the issue of dominant nationality. And the case
18 involved a plaintiff who was born in Egypt, was an Egyptian
19 national from the time of his birth, and he naturalized in
20 the United States later in life.

21 In exactly the same way, the Ballantines were born
22 in the United States and became naturalized Dominican
23 citizens later in life. And even though the Plaintiff in

⁷ English Audio Day 1 at 06:06:16

1 this case maintains significant contacts with Egypt, and
2 even though he didn't renounce his Egyptian nationality,
3 this U.S. court still found that his U.S. nationality was
4 dominant. This is explained in the Digest.

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

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

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

24 And, further, as we'll discuss in the next portion
25 of my presentation, there's no evidence whatsoever of

1 nationality-based discrimination. But for now, I simply
2 wish to call to your attention the fact that the
3 Ballantines' argument here is circular.

4 So in the jurisdiction context, you'll recall the
5 Ballantines were asserting that they were dominantly
6 American. And their argument here in the jurisdiction
7 context for which the Ballantines have commended you to
8 their merits pleadings is that they were dominantly
9 American because they were supposedly treated differently.
10 But the reason that this is circular is that in the merits
11 context, the Ballantines' argument is that they were
12 treated differently because they were dominantly American.
13 So the Ballantines are saying, "We're American
14 because we're treated differently. We're treated
15 differently because we're American." That's circular
16 logic. It doesn't work.

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

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

24 ARBITRATOR CHEEK: Thank you. So, is there a
25 particular point in time in which the Ballantines'

1 nationality became dominantly Dominican rather than
2 dominantly American?

3 MS. SILBERMAN: To answer that question, I would
4 want to go back to look at each specific portion of the
5 chronology. The important factors as the Iran-U.S. Claims
6 Tribunal stated in the A/18 decision that Mr. Baldwin was
7 mentioning this morning and as the U.S. also states in its
8 Digest, the important issues are voluntary association and
9 residence.

10 So because the Ballantines were on this trajectory
11 already by the time that they attained Dominican
12 nationality--at that point they had permanent residency,
13 they were living--once they chose to naturalize in the
14 Dominican Republic--that is a big life-changing event.

15 So at that point, because they had been living in
16 the Dominican Republic for--let's see. So they had been
17 living there for four years. They had sold all of their
18 properties in the United States. The move was supposed to
19 be permanent. Their family was in the Dominican Republic,
20 their business was in the Dominican Republic, all of their
21 money was in the Dominican Republic, and they were building
22 a little community around them. At that point it probably
23 would be fair to say that their dominant nationality was
24 Dominican.

25 There were additional things that the Ballantines

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1 did afterwards, like getting Dominican citizenship for
2 their children and making all of these statements that
3 you've seen about loving the Dominican Republic and
4 thinking of themselves as Dominican. But once the
5 Ballantines chose to naturalize, they made this commitment,
6 given everything that had happened before, their dominant
7 nationality was Dominican as of that time.

8 ARBITRATOR CHEEK: Thank you. And I guess as a
9 follow-up. To the extent that we should be looking at an
10 arc of their connections to the two countries kind of over
11 the course of their lives, how does that--looking at that
12 arc play into our determination as one of the factors that
13 we're supposed to be considering when we determine what
14 their dominant nationality is?

15 MS. SILBERMAN: So the reason why you're looking
16 at this arc is because people don't just spring fully
17 formed. They have a history. And you need to look--you
18 need to determine dominant nationality as a particular
19 date. And when you are determining dominant and effective
20 nationality as of that date, you can look to everything
21 that's happened in the past. So the fact that the
22 Ballantines have progressively made more and more
23 commitments is relevant because it shows--like you
24 said--this trajectory, this increase in the amount of
25 connections that they have to the Dominican Republic.

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1 So by the time they naturalize, they already have
2 this history of living in the Dominican Republic of a
3 financial connection there, of a personal affinity for the
4 country. They bring that with them.

5 And given that and the fact that they--you know,
6 they cut ties with the United States in some respect. They
7 certainly cut exclusive ties up until the time that they
8 became Dominican citizens. The only flag that they were
9 pledging allegiance to was the U.S. flag. So the tie is no
10 longer exclusive at that point. And they also sold all of
11 their properties, their business, gave away the belongings
12 when they left for the Dominican Republic in the first
13 place.

14 So at that point in time, their home is really the
15 Dominican Republic, and that's how you would take the
16 trajectory into account. Everything that has come
17 previously further establishes that their lives are in the
18 Dominican Republic.

19 PRESIDENT RAMÍREZ HERNÁNDEZ: Let me come back
20 to--for all your pleadings and today you have mentioned,
21 and now you just mentioned as well, this issue about the
22 Ballantines becoming nationals of the Dominican Republic.
23 And you made a lot of assertions. The fact that they
24 learned Spanish, the fact that they pledge allegiance to
25 the Dominican Republic.

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1 But how much is that important when we are probing
2 whether you are complying with the dominant and effective
3 standard? Because at the end the standard presupposes that
4 you have double nationality.

5 So at the end the standard says, you have pledge
6 allegiance to two countries, whichever they are. And the
7 fact that you are--you're learning Spanish and you do all
8 of the things that you need to do to become a citizen of
9 one country--a national of one country, which is a big
10 thing, as you have mentioned. But at the end, the standard
11 presupposes that you pledge allegiance to both countries.

12 So, how do we assess or how do we separate? The
13 fact that you are a national of two countries and you have
14 some allegiance to those two countries, vis-à-vis testing,
15 whether you have a dominant and effective nationality of
16 one or the other.

17 MS. SILBERMAN: So it goes back to this choice.
18 Because, remember, nationality can be attributed to you at
19 birth. So there are plenty of people--my mother, for
20 example, was born in Pakistan. I was born in the United
21 States. I'm sure there is some theory under which I would
22 have both Pakistani citizenship and the United States, even
23 though I've never been to the country. I never made a
24 choice to attain two nationalities, but the Ballantines
25 did.

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1 They were born exclusively as U.S. citizens, and
2 they chose to go to another country, to move there, to
3 start a business there, to bring their family there, to
4 become permanent residents, and ultimately to naturalize.
5 And in many of the cases that you see--for example, in the
6 Iran-U.S. Claims Tribunal context, it's not someone who
7 always chooses. It's often someone who has, by virtue of
8 their birth, two different nationalities.

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

12 PRESIDENT RAMÍREZ HERNÁNDEZ: Yes but--⁸ The
13 language of the treaty says "double nationality."

14 MS. SILBERMAN: Of course.

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

22 But how does the standard or how does the text say
23 that? Not being the case, wouldn't the test in the CAFTA

⁸ English Audio Day 1 at 06:15:41

1 have said, "Well, if you acquire nationality, then you
2 presume that you have dominant and effective of that
3 country"?

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

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

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

19 (Brief recess.)

20 MS. SILBERMAN: Thank you, Mr. President.

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

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

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

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

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

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

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

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

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

20 As best we can discern, the Ballantines are not
21 engineers, and they do not have any experience in
22 construction at all. So these challenges were especially
23 amplified in their case. But the Ballantines were
24 confident in their vision. Michael, specifically, was
25 confident from his years of being a broker that he could

1 find the talent necessary to make the vision a reality.

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

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

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

22 This rule comes from Article 40 of the
23 Environmental Law, which the Ballantines have been
24 referring to as the "slope law," which is actually a
25 comprehensive piece of legislation that was promulgated in

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1 the year 2000. You can find it at Exhibit R-3 in the
2 record.

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

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

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

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

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

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1 if there will be no cutting of trees, but this does not
2 signify an authorization for the extraction and transport
3 of sand or gravel."

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

7 Here's how Michael Ballantine has explained it:
8 "During the course of road construction, we spent
9 significant sums on heavy equipment, fuel, earth moving,
10 culverts, drainage ditches, and gabion rock walls for
11 engineering support."

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

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

25 Soil stability is something that is critical in

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1 mountain construction, as even the Ballantines' own
2 witnesses agreed. So here's what Mr. Kay has stated, one
3 of the Ballantines' witnesses. "I first visited the
4 Ballantines' project in May of 2006, examining the
5 topographical features of the land with particular
6 attention to the terrain, types of soils, and weather
7 conditions."

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

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

21 So this is what the Ballantines have to say and
22 their witnesses have to say. Let's turn to the
23 Environmental Law and see what it has to say. The
24 Environmental Law, as I mentioned, is in the record at
25 Exhibit R-3.

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1 In Article 109 it states, "The State is
2 responsible for guaranteeing that human settlements enjoy a
3 balanced relationship with the natural resources that
4 support and surround them."

5 Article 110, "Human settlements shall not be
6 authorized in places where there is a likelihood of
7 landslides occurring."

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

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

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

21 Now turning back to the project chronology. Once
22 the road was essentially a fait accompli, in February of
23 2005, the Ballantines requested terms of reference for the
24 Environmental Impact Assessment. And the project that they
25 had in mind was a project for the division into lots of

1 Jamaca de Dios. They didn't, again, ask for permission to
2 build the road because they had already built the road.

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

11 In the end, the recommendation of these
12 technicians was that "Terms of reference be provided for
13 the completion of an Environmental Impact Statement.
14 Priority should be given to the following: topographic
15 survey of the access road."

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

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

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

9 A few month after this, November of 2006, the
10 Ballantines retained environmental consultants. Their
11 retainer agreement with those consultants, so that the
12 Parties understood that the legal system of the Dominican
13 Republic does not guarantee that an environmental license
14 will be obtained simply because an environmental study has
15 been submitted.

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

23 The original Spanish version is 119 pages. And it
24 explains therein that it was compiled through a combination
25 of literary and field research, uses a survey methodology,

1 which is basically an analysis of samples, to create an
2 inventory of flora and fauna, and it analyzes several
3 factors that the Ballantines have alleged were creations
4 for purposes of this arbitration. For example,
5 environmental impact and altitude.

6 The Environmental Impact Assessment that the
7 Ballantines submitted states, among other things, that
8 "Construction of the project's access roads and internal
9 roads involves earth moving, excavation, cutting, filing,
10 and compacting."

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

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

20 So the Ballantines submit this in August 2007.
21 And then in December of 2007, following a review by the
22 Ministry's Technical Evaluation Committee, environmental
23 permit is granted. The permit made it clear that it was
24 for the project at Jamaca de Dios with the following
25 specifications.

1 Here are the characteristics. "The purpose of the
2 project is the construction of the housing development,
3 which includes the development of lots, sale of plots, and
4 construction of two-floor mountain cabanas."

5 The text also made it clear that the only thing
6 being permitted were those activities in that specific
7 area. Any change of technology, substantive inclusion of
8 new works or expansion must be submitted to the
9 Environmental Impact Assessment process in accordance with
10 the Environmental Law.

11 Now, the Ballantines said earlier this morning
12 that having been approved for this project, which they call
13 Phase 1, "The Ballantines have legitimate expectations that
14 it would be appropriately approved for their expansion
15 request."

16 How could they possibly reach that conclusion on
17 the basis of this document? It states expressly that the
18 permit is exclusively for the specific activities mentioned
19 and that any change in technology, substantive inclusion,
20 or expansion must be submitted for this process, the
21 Environmental Impact Assessment process in accordance with
22 the Environmental Law.

23 And, in fact, Michael Ballantine signed the permit
24 and pledged to abide by its requirements. So he signed it
25 and stated that he had read it and understood its terms.

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1 "Which I've read and understood," signed by Michael
2 Ballantine.

3 So turning now to 2008. When the Government
4 completes a study of gaps in biodiversity protection.
5 You'll find that study at Exhibit R-42. The study is
6 something that was conducted by the Nature Conservancy
7 pursuant to the U.N. Convention on Biological Diversity.

8 There was an action plan agreed to, and the study
9 was conducted pursuant to that action plan. And the
10 objective of the study was to identify the species,
11 ecosystems, and ecological processes that were not being
12 adequately conserved so that this information could then be
13 used to create new protected areas.

14 From August of 2008 to August of 2009, the
15 Ministry evaluated potential new sites for protected areas.
16 The team that conducted this process was led by Professor
17 Eleuterio Martínez, who was then Vice Minister of Protected
18 Areas. Professor Martínez is also the Vice Chairman of the
19 Academy of Science of the Dominican Republic, and he has
20 been involved in the creation of 102 of the 123 protected
21 areas of the Dominican Republic, and he's a witness in this
22 arbitration whom the Ballantines have called to testify, so
23 you'll be hearing from him later this week.

24 Now, the team that was led by Professor Martínez
25 included scientists, technicians, cartographers. And the

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1 process that they conducted involved gathering existing
2 data, verifying it in the field, including by doing the
3 same type of survey study that the Ballantines' own
4 environmental consultants conducted, analyzing the
5 environmental and biodiversity of each site, and mapping
6 out areas to be recommended to a high-level advisory panel
7 for protection.

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

16 So there was a decree published in September of
17 2009. And by virtue of the way that laws are created and
18 informed the public generally, that was the way that notice
19 was given.

20 So this decree establishes 32 new protected areas
21 and corresponding buffer zones. And one of the new
22 protected areas was the Baiguata National Park. I only
23 have two brief comments on the Baiguata Park, one of which
24 is that the Ballantines appear to have abandoned their
25 claims predicated on the creation of the park, which is

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1 something that they confirmed expressly this morning.

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

6 So this is one of the Ballantines' witnesses,
7 Andrés Escarraman. He was Subsecretary of the Environment.
8 And he had a property which was inside the limits of the
9 protected area. The Ballantines' neighbor, Juan José
10 Domínguez.⁹ According to the Ballantines, he's the former
11 brother-in-law of the then-president, and yet his property
12 was within the park to the Ballantines' own admissions.

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

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

23 Now, in the meantime, back at Jamaca, customers

⁹ English Audio Day 1 at 06:50:00

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1 weren't sharing the Ballantines' vision. Michael has
2 testified that he offered a free, less-desirable lot to
3 anyone who was willing to build their home immediately, but
4 he had no takers. And after two years, they only had had a
5 handful of sales.

6 Now, this reference to two years has to be a
7 reference to 2009 because the permit for this project,
8 Project 2, was only granted in December of 2007.

9 So we thought it notable that the Ballantines
10 asserted in their pleadings that in 2009, they initiated
11 the second phase of their investment without any buyers or
12 takers. We're not really sure what they mean by
13 "initiating the second phase of their investment," though,
14 because the Ballantines' internal records expressly state
15 that "there were no investment dollars necessary to begin
16 Phase 2."

17 And the Ballantines apparently didn't commission
18 any studies, assessment, or due diligence reports related
19 to the commercial, financial, legal, or environmental
20 feasibility of the so-called Phase 2. We asked for those
21 documents during document production and none were
22 produced.

23 Now, in 2010, Jamaca de Dios applies to the
24 Tourism Development Council, which is called CONFOTUR, for
25 classification as a tourism project. The application was

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1 submitted on 25 August 2010 and was provisionally granted
2 on December 21st of 2010.

3 In their pleadings and again this morning, the
4 Ballantines have made a lot about this CONFOTUR
5 classification saying that it "appropriately caused the
6 Ballantines to expect timely MMA approval of their formal
7 permit application to be an expansion of their property."
8 You'll find that at Reply Paragraph 96.

9 The Ballantines also assert that once they
10 received conditional classification as a tourism project,
11 "They had no reason to believe there would be any issue
12 with the expansion of their existing project."

13 But this is a tourism council. This isn't the
14 Ministry of Environment. And at the same time, the
15 Ballantines hadn't even--at the time the Ballantines
16 applied, they hadn't yet submitted their application to the
17 Ministry.

18 And the classification that they received from the
19 CONFOTUR says that "the benefits to having the project
20 provisionally classified will be the following," and that
21 was three specific tax exemptions. It doesn't say anything
22 about environmental impact, about obtaining a permit,
23 except for the fact that "the resolution of provisional
24 classification as a tourist project does not authorize the
25 commencement of construction of the Jamaca de Dios

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1 project."

2 Now, in September 2010, the Ballantines--at some
3 point the Ballantines have obtained new environmental
4 consultants. And in September 2010, those environmental
5 consultants flagged the issue of the Baiguat National
6 Park. They write an email stating, "Dear Mr. Ballantine,
7 As agreed, I attached the map of the location of the
8 protected areas in the area surrounding Jamaca de Dios.
9 Lots 67 and 90, as you may observe, are located within the
10 protected area. This protected area is called the Baiguat
11 National Park."

12 Michael Ballantine responds asking questions about
13 the park boundaries. "Okay. This is Baiguat Park. But
14 another question is with regard to the Environmental Law
15 signed by Leonel Fernández. Did the law have coordinates?
16 The same as the Park coordinates or something new?"

17 The environmental consultants respond advising
18 regarding the Baiguat Park boundaries. And this is where
19 the notice comes in. So these environmental consultants
20 were able to find the decree in the Official Gazette and
21 they inform Michael Ballantine, "The boundaries of the park
22 are provided by Decree Number 571-09, signed by Leonel
23 Fernández, dated 7 August, 2009. I attach a copy."

24 In addition to this, the environmental consultants
25 warned that the park's existence affects the Ballantines'

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1 project. Here's the quote. "Good afternoon, everyone. I
2 have followed attentively the queries that you have
3 concerning the declaration of protected area, Baiguat
4 Park, which affects the project."

5 Now, after this, the consultant made
6 recommendations and reminders. The recommendation was "to
7 register the project with the Ministry of Environment, to
8 obtain the terms of reference or a letter of refusal and to
9 wait for the Ministry's remarks about the project submitted
10 by us.

11 In terms of the reminders, here's what the
12 consultants said. "I remind you that the National Park
13 category allows low-impact ecotourism projects such as
14 yours, although the matter of the roads is for discussion."

15 You'll see why this is important soon.

16 "In addition, I remind you that notwithstanding
17 the category of protected area, the Ministry is in charge
18 of defining the use and which types of project yes and
19 which no."

20 "I also remind you that what is most important is
21 that the Ministry of Environment visit the area for the
22 project and that it provide its technical, legal, and
23 viability/non-viability opinion for the project."

24 So that brings us now to Project 3. The
25 Ballantines request terms of reference for a new project up

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1 the mountain on November 30th, 2010, consistent with their
2 vision. As initially described, the project was going to
3 involve the road, which was this issue for discussion. It
4 also states, "Design undergoing land subdivision process,
5 one cabin construction."

6 In January of 2011, the Ballantines purchase
7 additional land before they've heard from the Ministry.
8 They make plans to use excavators to use on that land, and
9 then after that the Ministry stamps their application as
10 received. Ministry technicians the very next month conduct
11 a site visit on February 17th, 2011. And Michael
12 Ballantine received the team with Eric Kay.

13 As he explains, "We showed the technicians the
14 bioengineering we had implemented in Phase 1, which was
15 unique to the country, and Eric Kay explained to them that
16 we would be using excavators more in building the Phase 2
17 road."

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

25 Now, I'd like to show you what was already on the

1 site, what was in the quote/unquote "Phase 1" when
2 the--when the Ministry was conducting its site visit. So
3 we're going to show you a video. This is something that
4 the Ballantines themselves put together of Jamaca de Dios.

5 (Video played.)

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

12 Just get the PowerPoint back up.

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

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

1 First of all, it's a five-page printed form, which
2 means that it wasn't something that the Ministry
3 technicians were coming up with in the fields. They didn't
4 have a printer or computer. It's handwritten notes by the
5 Ministry technicians. It poses 39 specific questions and
6 has spaces for additional observations and conclusions.
7 And the original Spanish version has annotations that might
8 not have registered on the translation.

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

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

18 In terms of what's selected on this form,
19 especially notable is the response to Question 1,
20 topography of the land. It's marked as very steep, greater
21 than 40 percent. And earth removals to be carried out in
22 the construction phase are very large, bigger than
23 500 cubic meters.

24 In addition, the magnitude of the impacts of the
25 construction/facility are marked as high. And to the

1 question, does the project contaminate the soil and
2 subsoil, it says, "Yes, significantly."

3 And then in the additional observation section the
4 Ministry technicians wrote, "We observed in the proposed
5 project area diverse vegetation and a slope exceeding
6 60 percent. These are characteristics to be taken into
7 account when developing a building project in mountainous
8 areas, and apparently cannot be overcome to a large extent
9 in the first stage."

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

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

21 And then they even purport to tell you, without
22 showing you, what Article 122 says. They say, "With regard
23 to slopes, Respondent asserts that there exists a whole
24 manner of considerations regarding whether to approve the
25 project." But that is not what the law on slopes says. It

1 refers only to slope percentage being over 60 percent.
 2 So let's see what Article 122 says in context.
 3 Article 122 is part of the Environmental Law that sits
 4 within a chapter called "De Los Suelos," of the soil or of
 5 the land.
 6 And the text of Article 122 states as follows:
 7 "Intensive tillage, like plowing, removal, or any other
 8 work which increases soil erosion and sterilization, is
 9 prohibited on mountainous soil where slope incline is equal
 10 to or greater than 60 percent. Preference shall be given
 11 to natural production and storage of water and land with a
 12 steep slope referred to in this Article shall not be
 13 subject to any activity that may endanger soil stability or
 14 national infrastructure works."
 15 This isn't just about having slopes. The question
 16 is: Are you on mountainous soil where the slope incline is
 17 equal to or greater than 60 percent? Will there be
 18 intensive tillage, like plowing, removal, or any other work
 19 which increases soil erosion or sterilization or any
 20 activity that may endanger soil stability?
 21 Now, at the February 2011 site visit, the
 22 Ballantines and Ministry technician agreed on a course of
 23 action. Michael Ballantine has explained that course of
 24 action in his First Witness Statement. He says, "Because
 25 we were developing to the top of the mountain and it is

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1 virtually impossible to make the subdivision map without
 2 first cutting the road, we agree that we should obtain
 3 permission for the road, cut the road, and make the
 4 subdivision plan, and submit it accordingly."
 5 This is important. The Ballantines emphasized
 6 again this morning that their, quote/unquote "entire
 7 expansion project" was denied on the basis that a portion
 8 of the land exceeded 60 percent. This is why. The
 9 Ballantines were planning on building a road on land that
 10 exceeded 60 percent, and this would involve significant
 11 earth moving, digging, removal. The mountain was steep,
 12 and they wanted a relatively flat road. To make that
 13 happen, they needed to dig, they needed to remove earth,
 14 they needed to change the face of the mountain.
 15 That is what¹⁰ wasn't permitted under Article 122
 16 of the environmental law. And if there wasn't any road to
 17 get to the houses, there would be no houses.
 18 Now, consistent with this action plan, Michael
 19 Ballantine sent a letter to the Ministry of Environment
 20 seeking permission to build the road, stated that the road
 21 would be 3 kilometers long and 6 meters wide and
 22 underscored the vital importance of the road, his request,
 23 for the continuation of the development of the project.
 24
 25

¹⁰ English Audio Day 1 at 07:06:24

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1 This resulted in another site visit from
 2 technicians from the Ministry. And the technicians created
 3 a report that was submitted as Exhibit R-4. This is a
 4 seven-page single-spaced report, with two additional pages
 5 of photos. And it begins with a detailed explanation of
 6 the different types of soil in the region. And that's
 7 followed by discussion of the geomorphological aspects,
 8 including altitude and climate, altitude being one of the
 9 things that the Ballantines say does not appear anywhere in
 10 the documents, and potential environmental impacts.
 11 Here are some of the things that the report
 12 states.
 13 "Apart from the valley of Jarabacoa, the rest of
 14 the territory in the region is comprised of an abrupt
 15 relief from steep slopes, where more than 70 percent of the
 16 surface has slopes greater than 30 percent. However, on
 17 the lands chosen by the owners of this project, the slope
 18 is greater than 60 percent."
 19 "The entire land is comprised of mountains with a
 20 height of 1100 meters above sea level altitude. And due to
 21 the morphology of the zone, all the land is affected by a
 22 natural phenomenon known as mass wasting. The origin of
 23 this phenomenon is the pull of gravity. The zone has a
 24 tropical rain forest climate and is one of the zones with
 25 the highest rainfall in the country. And eventually

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1 potential environmental impacts that may be caused by the
 2 Jamaca de Dios project are impacts on the geomorphology of
 3 the land, impacts on soils, impacts on the region's flora
 4 and fauna, impacts on watercourses and underground waters.
 5 "Scientists have demonstrated that the origin of
 6 our country is the result of the collision of tectonic
 7 plates, which makes our country highly dangerous for the
 8 lives of all of its inhabitants. One of the solutions to
 9 this problem is to avoid, at all costs, building in
 10 vulnerable places. The owners of the project are building
 11 villas on highly unstable land without taking the necessary
 12 precautions.
 13 "During site visit, no work was observed on the
 14 land for the protection of the access roads or for the
 15 villas in a zone of high natural risk where the layers of
 16 sedimentary rock and volcanic rock that lie on the surface
 17 do not have a high degree of sedimentation and their
 18 resistance to breakage has been diminished by natural
 19 phenomena which alter the region's safety factor. In other
 20 words, the land is prone to landslides.
 21 "The alteration have these natural parameters
 22 causes landslides, resulting in damages and loss of life
 23 and properties. The project owners violated Article 122 of
 24 the Environmental Law."
 25 Now, importantly, in June 2011, so around the same

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1 time, just three short months later, Eric Kay expresses
2 similar concerns about slope stability in an email to
3 Michael Ballantine.

4 He states, "There are problem steep slope areas
5 and soft soil conditions" and proposes certain methods for
6 addressing the problem.

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

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

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

21 This is the issue that was raised in Article 122
22 of the Environmental Law. And, importantly, there were
23 threats to soil stability already. So, for example, "on
24 Lot 47, water in excess came over the slope edge and
25 started a failure further downslope, and then this failure

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1 worked back upward. Excess water flow from the road caused
2 the problem," Eric Kay says.

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

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

13 "Danger areas" he calls them.

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

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

24 Now, in a letter to the Tribunal just a couple of
25 weeks ago, on July 30th, 2018, the Ballantines asserted on

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1 Page 2 that, "The fact that Respondent waited until the
2 Rejoinder to make its post hoc engineering and
3 environmental impact analysis of the planned project cannot
4 be disputed."

5 This is pure fiction. You can see it on the
6 screen. This is a contemporaneous document the Ballantines
7 have not shown you because they generally do not show you
8 documents referencing environmental impact, natural risk,
9 and Article 122 of the environmental law which talks not
10 just about having slopes but about risk to soil stability
11 caused by excessive tillage, digging, and earth removal.
12 *see slide 148 *

13 Now, another feature of this letter, which
14 responds to Mr. Allison's assertion this morning that the
15 Ministry "didn't invite discussion" is that at the end of
16 the letter the Ministry invited the Ballantines to propose
17 another site.

18 "This Ministry is more than willing to perform the
19 pertinent activities for the assessment should you decide
20 to submit any other places with viable potential, in view
21 of which we request that you inform us thereof in order to
22 send the technical committee for the corresponding
23 assessment." But the Ballantines didn't propose another
24 site. They stuck with their site.

25 In November 2011, they asked for reconsideration.

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1 Asserting that "the Ministry stated that, in accordance
2 with Article 122 of the Environmental Law, development is
3 not permitted in areas where the slope is greater than
4 60 degrees. And this is correct. However, the slope where
5 we were trying to create a simple access road is only
6 34 degrees and it is therefore permitted within the
7 permitted margin."

8 So do you see this? They're saying, they wanted
9 to build a road in a place where the slope exceeds
10 33 degrees--it's 34 degrees on this particular site.
11 That's where they want to build the road.

12 And this is important, because as we've explained
13 in the pleadings, there are two different ways to measure
14 slope incline. One is as a percentage and one is in
15 degrees. When you measure slope as a function of degrees
16 and as a percentage, the figures are quite different.
17 34 degrees is far higher than 60 percent.

18 So the Ballantines, I should also point out, have
19 made a big deal, and they did this again this morning,
20 about saying that they did not intend to build on land
21 where the slope incline exceeds 60 percent.

22 As you see, they were planning to build a road
23 there. When they say this in their pleadings, this not
24 building, they mean not building structures, not building
25 houses.

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1 So, for example, in Paragraph 101 of the Amended
2 Statement of Claim, it says, "The Ballantines immediately
3 requested that MMA reconsider its decision confirming the
4 slope of any areas that we designated for home construction
5 in Phase 2 would not exceed the 60 percent threshold."

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

10 But in any event, the Ministry reconsidered the
11 application and did so in good faith. A new site visit was
12 conducted on January 11, 2012, by an entirely new set of
13 technicians from the Ministry's national offices. And as
14 the site visit report explains, "In the field visit using a
15 clinometer," which is a tool that measures incline, "we
16 could verify that the slopes in the project area were of
17 various ranges, with slopes between 20 and 37 degrees,
18 which in percentage terms would be 36 percent and
19 75 percent respectively."

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

25 Eventually, the Technical Evaluation Committee

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1 discusses the project at a meeting held on February 22,
2 2012. And the notes from the meeting indicate that the
3 access road is the biggest problem with the project. There
4 will be a landslide the moment that the road opens.

5 And so on March 8th, 2012, the Ministry rejects
6 the reconsideration request. It sends a letter to the
7 Ballantines. And this is the Ballantines' own exhibit,
8 their own translation. "The Ministry reiterates its
9 conclusion that the proposed project is not viable in the
10 selected place."

11 Not because of the Ballantines' nationality. Not
12 because of who the Ballantines are. Because the project
13 site has a problem.

14 It explains, "The project is located in
15 lots"--which in original Spanish says "terrenos"--"with
16 slopes between 20 and 37 degrees. In percentage terms,
17 this means 36 percent and 75 percent respectively."

18 These "suelos," soils, grounds, have productive
19 capacity class of V, VI, and VII, suitable for forests,
20 evergreen cultivation and pastures."

21 It continues, "The area where the extension is
22 being proposed in case of intervention--in Spanish, it says
23 "intervenida"--"would modify the natural runoff of the
24 area, which would be problematic because of landslides."
25 It also explains, "The cuts and leveling of the terrenos

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1 required to establish the camino and the constructions
2 would have a great pressure on the ecosystem of the
3 mountain where the project is proposed to be located."

4 Then it continues, "The execution of the project
5 therefore comes into conflict with Article 122 of the
6 Environmental Law, which forbids on mountainous grounds
7 with a slope equal to or greater than 60 percent, the use
8 of intensive labor like plowing, removal, or any other
9 labor increasing their erosion."

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

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

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

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1 60 percent.

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

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

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

19 So going back to this Project 3, the upper
20 mountain project, in July of 2013 the Ballantines request
21 reconsideration for the third time. Again, Ministry
22 officials duly analyze the reconsideration request, they
23 conduct two additional site visits, one on August 28, 2013,
24 and another in late September 2013. Again, the technicians
25 who participated in these site visits were different from

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1 those who had conducted the site visits relating to the
2 original application and first reconsideration request.

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

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

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

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

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

9 "The execution of such project comes into conflict
10 with Article 14 of Decree No. 571-09, which is the
11 provision that establishes the Baiguate National Park, and
12 Article 122 of the Environmental Law," which we've been
13 discussing.

14 Then the Ministry renews its offer to evaluate an
15 alternative site. It states, "In this sense, a new site
16 alternative is hereby requested, otherwise your dossier is
17 closed."

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

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

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1 alternative site for the project. In addition to this, in
2 parallel, the Ministry renewed the Project 2 permit.

3 The second conclusion is that the Ministry was
4 diligent in its assessment of the Ballantines' permit
5 applications.

6 Again, here's the evidence. When the Ballantines
7 alleged that the Ministry had make a mistake, the Ministry
8 dispatched a team to reassess its conclusions. In the end,
9 the Ministry dispatched 21 different people to conduct five
10 different site visits.

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

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

19 First independent experts have confirmed, (1),
20 that the area was environmentally sensitive and faced
21 natural risk, and (2), that the Ballantines' plans were not
22 environmentally viable. Further, the Ballantines' own
23 environmental impact assessment for Project 2 confirms the
24 adverse impact of the road.

25 In addition, a pre-existing law prohibited

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

4 And Michael Ballantine himself stated that "The
5 slope where we are trying to create an access road is
6 34 degrees." This corresponds to an incline of more than
7 65 percent.

8 Further, Mr. Ballantine has testified that during
9 the February 2011 site visit Eric Kay explained to the
10 Ministry inspector that the Ballantines would be using
11 excavators, digging, more when building the Phase 2 road.

12 And six months after the third reconsideration
13 request was rejected, the Ministry received a letter from
14 the Homeowners Association of Jamaca de Dios which
15 expressed concern about "considerable landslides" due to
16 earth movements.

17 Now, just a few comments on some of the
18 Ballantines' recurring assertions.

19 The first one is the one that we've already
20 discussed, that it's somehow notable that the Ministry
21 rejected the entire application because some small portion
22 of the property had a slope incline of higher than
23 60 percent.

24 Here the Ballantines are ignoring their own past
25 statements. I've shown these to you. Michael Ballantine

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1 has stated that they were developing to the top of the
2 mountain, and it's virtually impossible to make the
3 subdivision map without first cutting the road. He also
4 stated that the slope where they were trying to create the
5 road was 34 degrees, greater than 60 percent.

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

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

17
18
19 In addition, the same environmental consultant
20 also warned that the Ministry could deem the road to be
21 incompatible with the park. Although, "I remind you that
22 the National Park category allows low-impact ecotourism
23 projects such as yours, although the matter of roads is for
24 discussion, what is most important is that the Ministry of
25 Environment provide its technical, legal, and viability or

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1 non-viability opinion for the project."

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

5 First, Juan José Domínguez, the Ballantines'
6 neighbor, was denied an environmental permit for a housing
7 development project on the basis that "the proposed
8 location is located within the protected area, Parque
9 Nacional Baiguata."

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

16 The third recurring assertion, and it's one that
17 they made again this morning, is that Jamaca de Dios is the
18 only mountain project that has been denied the ability to
19 proceed. You heard this again this morning on Slide 16.
20 It was cited as a quote/unquote "simple fact" that "not a
21 single other mountain residential project in the entire
22 country has been denied the opportunity to develop its
23 land."

24 Here's another one. "The only investors who have
25 been affirmatively prevented from participating in that

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1 expansion are sitting before you today."

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

8 Can you pause it for a second.

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

16 Okay. Let's pause it there.

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

20 Just wait for the slides to come up.

21 So here's Project 3, one of the two neighbors.
22 The developers are the Ballantines, who are dual nationals
23 of the Dominican Republic and the United States. The
24 proposed project site is in the Cordillera Central Mountain
25 Range abutting the proposed project site for Aloma. Right

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1 next door. The altitude is 820 to 1260 meters above sea
2 level; 18.7 percent of the land exceeds 60 percent; soil
3 type is igneous, volcanic, and metamorphic rock. It's
4 inside the Baiguata National Park. A permit was requested.
5 Permit was denied.

6 Here's Aloma. The developer is Juan José
7 Domínguez, who is a Dominican national only and son of the
8 mayor of Jarabacoa, his project site likewise in the
9 Cordillera Central mountain range abutting the proposed
10 project site for Project 3. The altitude is 990 to 1220
11 meters above sea level. The slope distribution of his land
12 is only 4.89 percent of the land exceeds 60 percent, same
13 exact soil types, inside the Baiguata National Park.
14 Permit requested. Permit denied.

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

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

20 ARBITRATOR CHEEK: Thank you.

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

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

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1 construction.

2 There is some construction in 2006. That's on the
3 top right.

4 And then in 2011, there's more construction.

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

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

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

21 Now, notably, after 2011, there hasn't been more
22 construction. There are no houses apart from
23 Mr. Domínguez's house. We understand that there's a
24 gazebo. But this isn't a neighborhood. It isn't a
25 development project.

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1 And Mr. Domínguez was--his permit was rejected on
2 December 5th, 2013. So while the Ballantines' applications
3 for reconsideration are pending, in exactly the same time
4 period.

5 And it's--you'll find that at Exhibit R-006.

6 Now, we will return to these issues and others
7 over the hearing, but unless you have any questions at this
8 time, I'll just leave you with the following.

9 The Ballantines said this morning that "they do
10 not dispute that environmental protection is important."
11 But there seems to be a caveat to that statement.
12 Environmental is important so long as it doesn't affect
13 them.

14 Now, as we've shown you and as you'll continue to
15 hear throughout the course of the hearing, the Ministry had
16 valid and very serious concerns. They were expressed
17 repeatedly in contemporaneous documents. The Ballantines
18 ignore all those. Self-interest can be a powerful thing.

19 Thank you.

20 QUESTIONS FROM THE TRIBUNAL

21 ARBITRATOR CHEEK: Thank you, Ms. Silberman. I do
22 have a few factual questions, if you can indulge me.

23 One is--so looking at your slide 165, which is the
24 rejection for the third reconsideration request, and the
25 quote is that the execution of the project comes into

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1 conflict with Article 14 of Decree 571-09, creating the
2 Baiguat National Park, and then Article 122 of the
3 environmental law.

4 So just to make sure I understand the facts
5 correctly, is there a prohibition on all development due to
6 the status of Baiguat National Park, or, under some
7 circumstances, can you still build in that national park?

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

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

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

24 So I'd like to come back to you with a precise
25 answer, and I'm going to consult with the team to do that,

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1 with your permission.

2 ARBITRATOR CHEEK: Okay. Thank you. And then the
3 second question is about Article 122. I think we're all in
4 agreement, but let me just confirm my understanding, that
5 while Article 122 says that you can't build where the slope
6 is greater than 60 degrees, to the extent that there is
7 part of your property that doesn't have that type of
8 incline, you can build on the rest of your property even if
9 parts of it have that 60-degree slope.

10 MS. SILBERMAN: A couple of tweaks. One is
11 that--so degrees and percentage are two different things.
12 60 degrees would be a very, very, very high percentage.
13 Under the law, it's the percentage.

14 ARBITRATOR CHEEK: 60 percent.

15 MS. SILBERMAN: Yes.

16 ARBITRATOR CHEEK: My question was about
17 60 percent.

18 MS. SILBERMAN: So with the 60 percent--

19 ARBITRATOR CHEEK: I and Mr. Ballantine make the
20 same error inadvertently.

21 MS. SILBERMAN: The issue isn't so much just
22 building. It is the tillage, the digging, the removal. So
23 if, for example, you could drop a house on top of the slope
24 without doing the intensive tillage or digging or earth
25 removal, just as was done, for example, in the Ballantines'

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1 Project 2, that's not a problem. Or if the slope is lower
2 than 60 percent, then that's not a problem either.

3 The issue, though, is what the Ballantines wanted
4 to do is build a housing development, and people would need
5 a way to get to those houses. And there was just no way to
6 build the road to get to those houses without digging into
7 these slopes that exceeded 60 percent. And that was the
8 issue here.

9 ARBITRATOR CHEEK: Go ahead.

10 PRESIDENT RAMÍREZ HERNÁNDEZ: Where in the record
11 do we find exactly the explanation you are just giving us?

12 MS. SILBERMAN: In Mr. Navarro's statement--I
13 forget if it's the first or second statement, but he's
14 testified to this and, of course, will be appearing and can
15 explain that more specifically.

16 PRESIDENT RAMÍREZ HERNÁNDEZ: Okay. Maybe this is
17 a better question for Mr. Navarro on the interpretation of
18 Article 122, which is--and sorry. I have the Spanish
19 version. Sorry for that.

20 But the way I read 122 is--first of all, it's an
21 absolute provision, right, which says you cannot build on
22 that. And I refer you to Paragraph 2. It's a different
23 provision, because you have two paragraphs, but they don't
24 have a chapeau so you can link them. So I'm trying to work
25 out on the version.

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1 And Paragraph 2 says "soils"--excuse me. I don't
2 have the English version. You can follow me. But it says
3 "Asentamientos Humanos," which is human settlements. And I
4 understand that that is an across-the-board mandatory
5 binding provision, that you cannot build on human--how do
6 you say it?

7 MS. SILBERMAN: Human settlements.

8 PRESIDENT RAMÍREZ HERNÁNDEZ: --human settlements
9 that would exceed this inclination.

10 MS. SILBERMAN: Yes. So the English version, if
11 it's useful, says that "land with a steep slope referred to
12 in this article," which is a reference to the earlier
13 60 percent, "shall not be subject to the provisions of the
14 law on agrarian reform. From the enactment of the present
15 act, said land shall not be subject to human settlement or
16 agricultural activity or any other activity that may
17 endanger soil stability."

18 So, yes, precisely. Human settlement could
19 endanger soil stability.

20 PRESIDENT RAMÍREZ HERNÁNDEZ: The other thing.
21 And let me refer you to Slide 148, where you show--there's
22 one of the quotes--one of the quotes about the termination.

23 And if I'm correct, basically, there was no way,
24 given these reasons, that you could build on that site.
25 Why telling them that you could go for another settlement?

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1 Because at the end, all what they were looking is to build
2 on that part. Why not just tell them from the start,
3 "Look, this is not environmentally viable. You
4 violate--there's a violation of Article 122 of the Law.
5 Because the area is environmentally fragile, there is a
6 natural risk.

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

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

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

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

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

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1 issue. The Ministry could have stopped with "This is
2 problematic because of Article 122¹¹ of the Environmental
3 Law. That enough was a sufficient basis for denying the
4 permit, but there were other reasons as well.

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

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

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

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

¹¹ English Audio Day 1 at 07:41:43

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1 MS. SILBERMAN: Right. But the Ballantines didn't
2 consult with the Ministry before buying this property. In
3 fact, they submitted the application without having even
4 bought all the property.

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

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

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

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

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1 MS. SILBERMAN: Sure. They could have come back
2 to the Ministry with a different plan. Remember, they
3 wrote to the Ministry immediately to ask for permission to
4 build the road because the road was necessary to drop in
5 all of the houses.

6 So they came to the Ministry, asked for permission
7 to build the road. The Ministry said, "This project that
8 you're proposing is not environmentally viable. Come back
9 with another site."

10 The Ballantines could have said, "Well, what if we
11 do something else here?" They never did. They just wanted
12 to do their project on their site even though it wouldn't
13 work.

14 ARBITRATOR CHEEK: And my last question I think
15 relates to these technical--the Technical Evaluation
16 Committee review. We were looking at slide 148, which is
17 the review from the 12th of September, 2011.

18 And then what's the legal status of this Technical
19 Evaluation Committee review? In other words, is--that
20 technical committee is making their own observations. It
21 feeds into a Ministry decision. But my impression was that
22 in terms of why--why a project was rejected that the
23 Ballantines should rely on the actual rejection they
24 received from the Ministry and the reasons stated therein.

25 Is that a fair assumption?

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

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

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

21 And then the Technical Evaluation Committee meets,
22 discusses the project, makes a decision, a letter is sent
23 to the Ballantines. And following that, in all of the
24 reconsideration requests, the responses that are given from
25 the Ministry are several pages long. They go into more

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1 detail for all of the reasons for the rejection, and
2 explain the factual circumstances and the legal bases for
3 those as well.

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

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

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

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

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

22 MS. SILBERMAN: You should look at the actual
23 interactions and the actual correspondence. And I don't
24 think that they were all that different, given what the
25 Ballantines were saying.

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1 So if someone comes back to the Ministry and says,
2 "Well, how about if I change the project in this way or do
3 that," and the Ministry then evaluates that and responds to
4 them with a yes-or-no answer, that's basically the
5 equivalent of what the Ministry did here.

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

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

19 That's exactly what the Ministry has done in other
20 situations, but the allegations of the project developers
21 in those circumstances were different.

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

1 interaction by the Dominican Republic agency was different
2 in the sense that, okay, you repeat what 122 says, but you
3 can do X, Y and Z.

4 So I think that is what my colleague's question
5 was referring to, which is this different treatment in the
6 sense of being more forthcoming as to options to deal with
7 that project as opposed to just telling, "You are blind.
8 You cannot do it."

9 MS. SILBERMAN: So there are two issues. One is
10 it depends on the land on whether you can construct a
11 particular--it depends on the land and the type of project
12 that you are trying to do.

13 So if what you are asking for is not something
14 that involves intensive tillage or digging or building a
15 road through a mountain that would, you know, involve these
16 60 percent slopes, then, yeah, the Ministry would say, "Go
17 ahead. Put these houses down." Which is what the Ministry
18 said in relation to Project 2, when the Ballantines had
19 already constructed the road, and all they were asking for
20 permission to do was to put down houses.

21 So the Ministry did that with the Ballantines.
22 And, you know, other projects have been able to change the
23 project in order to comply with the slope requirements.
24 So, so long as there's no intensive tillage on these
25 slopes, then the project would be fine.

1 Other developers were able to change the project
2 or have proposed changing their project. The Ballantines
3 didn't. They said, "We want to do the exact same project
4 in this exact same place. You got it wrong."

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

9 ARBITRATOR VINUESA: I just have a very,
10 Counsel--not relevant--but just to refresh my memory. In
11 slide 131, it's not the date of the "Ley General de Medio
12 Ambiente y Recursos Naturales"¹². Should I assume that
13 it's--6400 means --

14 MS. SILBERMAN: 2000.

15 ARBITRATOR VINUESA: -- what I think?

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

18 ARBITRATOR VINUESA: Thank you very much.

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

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

¹² English Audio Day 1 at 07:51:30

¹³ English Audio Day 1 at 07:51:41

1 get through witnesses and expert testimony in these next
2 three days, Tuesday, Wednesday and Thursday. But should
3 there be any pending witness that we will need to do on
4 Friday, we will do so. And after that, we will take a
5 break--I don't know how long--and we will go immediately to
6 closing statements.

7 So it is the intention of the Tribunal that if
8 there are one or two witnesses or experts pending, we will
9 do them on Friday, and we will move after that. We will
10 discuss at the break according to how we are on that date,
11 but we will move to closing on Friday.

12 So I give you--just for your organizational
13 purposes. So we adjourn and we see you tomorrow at 9:15.

14 Thank you very much.

15 (Whereupon, at 5:33 p.m., the Hearing was
16 adjourned until 9:15 a.m. the following day.)

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